Dated 1945 Sept. 47-45

TRANSCRIPT

No 6

APPEALED FROM

CRIMINAL COURT

AT MARYVILLE, TENNESSEE

SUE K. HICKS JUDGE

WADE EVERETT CLERK

IN THE CASE OF

~~STATE~~ Henry Stinnett

VS.

~~HENRY STINNETT~~ The State

TO THE

SUPREME COURT

KNOXVILLE TENNESSEE

JUDGMENT LOWER COURT

$500.00 fine and all costs

Howard Gothard

ATTORNEYS FOR PLAINTIFF

W. H. Atkins Grant

ATTORNEYS FOR DEFENDANT

FILED 13 DAY OF July 19 45

W. H. Boyd CLERK

DEP. CLERK

Tenn. Office Supply, Knoxville

I N D E X

TRANSCRIPT FOR SUPREME COURT

- - - - - - - -

TRANSCRIPT OF THE RECORD IN THE CASE OF THE STATE OF TENNESSEE VS. HENRY STINNETT, IN THE CRIMINAL COURT FOR BLOUNT COUNTY, MARYVILLE, TENNESSEE. BEING CASE NOS. 9714 & 9715 ON THE RULE DOCKET OF SAID COURT.

- - - - - - - -

February 21, 1911. GENERAL ORDER AS TO MOTION FOR NEW TRIALS entered as follows:

MONDAY FEBRUARY 13, 1911.

STATE OF TENNESSEE.

Be it remembered that at a Circuit Court began and held for the County of Blount at the Court House in Maryville, Tennessee, on the Second Monday, it being the 13th day of February, One Thousand Nine Hundred and Eleven, A. D., present and presiding the Honorable S. C. Brown, Judge, etc. of the Fourth Judicial Circuit, duly elected, commissioned and assigned to hold the Circuit Courts in the State of Tennessee, when the following proceedings were had and entered of record, to-wit:

- - - - - - - -

Thereupon Court adjourned to meet tomorrow morning at eight o'clock.

Sam C. Brown,

Judge

T U E S D A Y F E B R U A R Y 2 1, 1 9 1 1.

Court met pursuant to adjournment, present and presiding the Honorable Sam C. Brown, Judge, as on yesterday. The minutes of yesterday were read and signed, when the following further proceedings were had and entered of record, to-wit:

GENERAL ORDER AS TO MOTIONS FOR NEW TRIAL.

All motions for new trials shall be made in writing and entered of record. The grounds for such motions shall be numbered separately and state the reasons assigned for setting aside the verdict and granting a new trial. It shall be unnecessary to set out in detail in such motions evidence objected to for incompetency or inadmissibility but such evidence shall be referred to in a general way that such objections may be understood by the Court.

No motion for new trial not in accord with this order will be considered by the Court.

The Clerk will copy this order into the transcript of all cases hereafter made out for the Supreme Court or Court of Civil Appeals, as the case may be, without further specific orders of the Court.

All former orders or rules of this Court as to motions for new trial are hereby abrogated.

Thereupon Court adjourned until Court in Course.

Sam C. Brown,

Judge.

July 8, 1947, State Warrent filed, and in the words and figures as follows:

STATE OF TENNESSEE, BLOUNT COUNTY

Personally appeared before me, Harry Edmondson an acting Justice of the Peace of said County, Ben Mays and made oath in due form of law that the offense of storing and possessing whiskey has been committed, and charging Henry Stinnett thereof.

Ben Mays

Sworn to and subscribed before me, this 2 day of July 1947.

Harry Edmondson, J. P.

STATE OF TENNESSEE, BLOUNT COUNTY

TO ANY LAWFUL OFFICER OF SAID COUNTY:

Information on oath having been made me by Ben Mays that the offense of Storning and Possessing Whiskey has been committed, and charging Henry Stinnett thereof: you are commanded, in the name of the State, forthwith to arrest the said Henry Stinnett and bring him before me, or some other Justice of said County, to answer the above charge. July 2, 1947. Harry Edmondson, J. P.

Endorsed on back as follows:

Warrant No. 3850 - STATE WARRANT - Rule Docket No. 9714, The State vs. Henry Stinnett - Possessing & Storing Whiskey, Ben Mays Prosecutor. Issued the 2 day of July 1947 Harry Edmondson, J. P. Came to hand 2 day of July 1947. Executed as commanded by arresting the defendant, Henry Stinnett and bringing him before Harry Edmondson, J. P. for trial on the 2 day of July 1947 at 3 o'clock P. M. James R. Beeler. Also summoned witnesses as commanded

THE STATE VS HENRY STINNETT - JUDGMENT - In this case the defendant having been brought before me for examination and he guilty and waiving his case to the next term of Criminal Court and fix his bond at $250.00, which was made by A. R. Sparks and D. C. Williams. This 2 day of July 1947, Harry Edmondson, J. P.

BILL OF COSTS

Arrest $2.00 Each	2.00
Gurading	2.00
Affidavit and Warrant	1.00
Judgt. & Docketing	1.50
Bond & Mittimus	1.00
	$7.50

I certify the above Bill of Costs is correct. Harry Edmondson, Justice of the Peace. Summon as Witnesses on part of the State, James R. Beeler, Estel Jones, Hugh Graves, Oscar Boling.

July 8, 1947, State Warrant filed and is in the words and figures as follows:

STATE OF TENNESSEE, BLOUNT COUNTY

Personally appeared before me, Harry Edmondson an acting Justice of the Peace of said County, Ben Mays and made oath in due form of law that the offense of Operating a Still and Manufacturing Whiskey has been committed, and charging Henry Stinnett thereof.

Ben Mays.

Sworn to and subscribed before me, this 2 day of July 1947.

Harry Edmondson, J. P.

STATE OF TENNESSEE, BLOUNT COUNTY

TO ANY LAWFUL OFFICER OF SAID COUNTY:

Information on oath having been made me by Ben Mays that the offense of Operating a Still and Manufacturing Whiskey has been committed, and charging Henry Stinnett thereof: you are commanded, in the name of the State, forthwith to arrest the said Henry Stinnett and bring him before me, or some other Justice of said County, to answer the above charge. July 2, 1947. Harry Edmondson, J. P.

Endorsed on back as follows:

Warrant No. 3849 - State Warrant - Docket No. 9715, The State vs. Henry Stinnett, operating a still and manufacturing whiskey, Ben Mays, Prosecutor. Issued the 2 day of July 1947, Harry Edmondson J. P. Came to hand 2 day of July 1947. Executed as commanded by arresting the defendant, Henry Stinnett and bring him before Harry

Edmondson, J. P. for trial on the 2 day of July 1947, at 3 o'clock P. M. Also summoned witnesses as commanded Estel Jones, D. S.

THE STATE VS HENRY STINNETT - Judgment - In this case the defendant having been brought before me for examination and he waiving his case to the next term of Criminal Court fix his bond at $500.00, which was made by A. R. Sparks and D. C. Williams. This 2 day of July 1947, Harry Edmondson, J. P.

BILL OF COSTS	Arrest $2.00 Each	2.00
	Guarding	2.00
	Affidavit and Warrant	1.00
	Judgt. and Docketing	1.50
	Bond and Mittimus	1.00
		$7.50

I certify the above Bill of Costs is correct, Harry Edmondson, Justice of the Peace, Summons as Witnesses on part of the State, Estel Jones, James R. Beeler, Oscar Boling, Hugh Graves.

MINUTES;

CRIMINAL COURT MINUTES, AUGUST TERM, 1947, MONDAY AUGUST 11, 1947.

STATE OF TENNESSEE,
BLOUNT COUNTY.

Be it remembered that a Criminal Court, began and held for the County of Blount, at the Court House in Maryville, Tennessee, on the Second Monday of August, One Thousand Nine Hundred and Forty-seven (1947), A. D. present and presiding the Honorable Sue K. Hicks, Judge of the Criminal Court for the Fourth Judicial Circuit of Tennessee, duly elected and commissioned to hold the Criminal Courts in the State of Tennessee, for Blount County, when the following proceedings were had and entered of record, to-wit:

* * *

Thereupon Court adjourned until tomorrow morning at nine o'clock.

Sue K. Hicks, Judge.

CRIMINAL COURT MINUTES, AUGUST TERM, 1947, TUESDAY AUGUST 12, 1947.

Court met pursuant to adjournment, present and presiding the Honorable Sue K. Hicks, Judge, as on yesterday. The minutes were read and signed when the following proceedings were had and entered of record, to-wit:

Came the Grand Jury into the open Court headed by their Foreman, and returned into open Court indictment against each of the following named defendants endorsed "A TRUE BILL".
STATE VS. HENRY STINNETT - Nos. 9714-9715, Possessing Whiskey Operating Still.

Thereupon Court adjourned until tomorrow morning at Nine o'clock.

Sue K. Hicks, Judge

August 12, 1947, Presentment filed, and is as follows:

STATE OF TENNESSEE — August Term, 1947

BLOUNT COUNTY. — Criminal Court.

The Grand Jury for the State aforesaid, being duly summoned, elected, empaneled, Sworn and charged to enquire in and for the body of the County aforesaid, upon their oaths present: That Henry Stinnett heretofore, to-wit, on the 2 day of July, 1947, in the County aforesaid, unlawfully did possess intoxicating liquors received since March 1st, 1917, contrary to the Statute and against the peace and dignity of the State.

2nd. COUNT; And the Grand Jury aforesaid, upon their oaths aforesaid, do further present: That on the day and year aforesaid, and in the County and State aforesaid, the said Henry Stinnett unlawfully did manufacture and attempt to manufacture intoxicating whiskey and brandy contrary to the Statute and against the peace and dignity of the State.

3rd. COUNT: And the Grand Jury aforesaid, upon their oaths aforesaid, do further present: That on the day and year aforesaid, and in the County and State aforesaid, the said Henry Stinnett

unlawfully did have in his possession and under his control a still, parts of a still, and apparatus for said still, used and intended to be used for the unlawful manufacture of intoxicating whiskey and brandy, contrary to the Statute and against the peace and dignity of the State.

R. BEECHER WITT, Attorney General

Endorsed on back as follows:

A TRUE BILL, Jno. M. Clark, Foreman Grand Jury

Perry E. Garner, R. G. Blevens, Fred McNelly, Andy Cunningham, Leonard Eidson, Geo. Spradling, Floyd Roberts, Howard McNeilly, Thomas Willocks, S. C. Connatser, Hugh Walker, Geo. Painter

PRESENTMENT, No. 9714-9715, Jno. M. Clark, Foreman Grand Jury, CHARGE Possessing Whiskey Operating Still, STATE OF TENNESSEE vs. HENRY STINNETT_____Prosecutor, CLERK SUMMONS FOR THE STATE, James Beeler, Hu Graves, Ben Mays, R. BEECHER WITT, Attorney General. Filed August 12, 1947, Wade Everett, Clerk.

CRIMINAL COURT MINUTES, AUGUST TERM, 1947, FRIDAY AUGUST 15, 1947.

Court met pursuant to adjournment, present and presiding the Honorable Sue K. Hicks, Judge, as on yesterday. The minutes were read and signed, when the following proceedings were had and entered of record, to-wit:

STATE)
VS.) Nos. 9714-9715 - Possessing Whiskey, Operating Still
HENRY STINNETT)

This case is continued by consent until the next term of this court.

Thereupon Court adjourned until Thursday September 18, 1947.

Sue K. Hicks, Judge.

STATE OF TENNESSEE,

BLOUNT COUNTY.

Be it remembered that a Criminal Court, began and held for the County of Blount, at the Court House in Maryville, Tennessee, on the Second Monday of December One Thousand Nine Hundred and Forty-seven (1947), A. D., present and presiding the Honorable Sue K. Hicks, Judge, of the Criminal Court for the Fourth Judicial Circuit of Tennessee, duly elected and commissioned to hold the Criminal Courts in the State of Tennessee, for Blount County, when the following proceedings were had and were had and entered of record, to-wit:

* * *

Thhereupon court adjourned until tomorrow morning at nine o'clock.

Sue K. Hicks, Judge.

F R I D A Y D E C E M B E R 12, 1 9 4 7.

Court met pursuant to adjournment, present and presiding the Honorable Sue K. Hicks, Judge, as on yesterday. The minutes were read and signed when the following proceedings were had and entered of record, to-wit:

STATE	(	
VS.	(	Nos. 9714-9715, Possessing Whiskey and Operating Still
HENRY STINNETT	(	

Came the Attorney General, who prosecutes for the State, and the defendant in person and by attorney, who being arraigned upon the indictment pending against him on the charge of Possessing Whiskey & Operating Still, for plea thereto says he is not guilty and puts himself upon the County for trial, and the Attorney General doth the like.

Thereupon came a jury of good and lawful men, citizens of Blount County, to-wit: Jess Broady, Joe Martin, Enoch Law, Will Whitehead, John Headrick, A. L. Lane, D. T. Fuller, D. D. Gillenwater,

J. R. Bailey, W. C. Mize, H. G. Feezell, G. E. Large, who being duly summoned, elected, empaneled, tried and sworn according to law, and having heard all the evidence, argument of counsel, and received their charge from the Honorable Court, upon their oaths do say they find the defendant guilty of Possessing Liquor under the First Count as charged in the indictment, and fix his fine in the sum of $500.00.

It is therefore considered by the Court that the defendant for said offense pay a fine of $500.00, and all costs of this case, including State and County taxes, a State expense fee of $5.00 a County expense fee of $5.00, and Judges retirement fee of $2.50.

Thereupon came the defendant by his attorney and entered a motion for new trial in this case, which motion is set for hearing Dec. 19, 1947.

This order is entered now for Dec. 9, 1947.

Thereupon Court adjourned until Monday, December 15, 1947.

Sue K. Hicks, Judge.

* * *

F R I D A Y D E C E M B E R 19, 1 9 4 7.

Court met pursuant to adjournment, present and presiding the Honorable Sue K. Hicks, Judge, as on yesterday. The minutes were read and signed when the following proceedings were had and entered of record, to-wit:

STATE OF TENNESSEE	(	NO. 9714 and 9715
VS.	(	IN THE CRIMINAL COURT FOR
HENRY STINNETT	(	BLOUNT COUNTY, TENNESSEE.

MOTION FOR NEW TRIAL

In this case comes the defendant and moves the court to set aside the verdict of the Jury and the judgment of the court based thereon and grant him a new trial for the following reasons:

1. The court erred in failing and refusing to sustain the

motion to quash the indictment made in this case for the reason that the First Count of the indictment is not related to or connected with the charges made in the Second and Third Counts thereof.

2. There is no material evidence to support the verdict of the Jury and the evidence does not show that the defendant was in possession of intoxicating liquor.

3. The evidence preponderates against the verdict of the Jury and in favor of the defendant's innocence.

4. The court erred in admitting the testimony of Ben Mays, James Beeler and Hugh Graves for the reason that their testimony was the result of an illegal and unlawful search of the premises and therefore the evidence was not admissible.

5. The court erred in failing and refusing to sustain the motion of the defendant at the close of the State's evidence to withdraw from the Jury the testimony of the three witnesses introduced by the State and hereinabove named.

6. The court erred in failing and refusing to direct a verdict in favor of the defendant, made at the conclussion of the State's proof.

7. The court erred in failing to define the illegal possession of intoxicating liquor in his charge to the Jury.

8. The court failed to charge the Jury that if the evidence showed that the premises and buildings were not the property of the defendant then there is a presumption of law that the liquor belonged to the owner of the premises.

Wherefore, the defendant prays the judgment of the court that this motion be sustained and that a new trial be granted.

Homer A. Goddard
Attorney for Defendant

Filed Dec. 19, 1947.
Wade Everett, Clerk.

Which motion having been considered by the Court, the Court is of the opinion that the same is not well made and overrules

and disallows said motion. To the action of the Court in overruling his motion for a new trial the defendant excepts and prays an appeal to the next term of the Supreme Court at Knoxville,Tennessee, which appeal is granted and the defendant is allowed thirty days from the date hereof for preparing and filing his bill of exceptions, which when filed the Clerk will certify the entire record to the Supreme Court of Tennessee.

Pending the appeal the defendant will be allowed to make bond for his appearance at the next term of this Court after the Supreme Court has passed upon his appeal. The bond will be in the sum of $750.00.

ENTER:

Sue K. Hicks, Judge

Thereupon Court adjourned until Monday Morining Dec. 22, 1947, at Nine o'clock.

Sue K. Hicks, Judge

December 19, 1947, Appearance Bond filed, and in the words and figures as follows:

STATE OF TENNESSEE, BLOUNT COUNTY

We Henry Stinnett and A. R. Sparks and W. A. Freshour, agree to pay the State of Tennessee Seven hundred fifty Dollars unless the said Henry Stinnett appears at the next term of the next term of the Criminal Court of said County, after the Supreme Court has acted on his case and from term to term until the case is finally disposed of, to answer for the offense of Possessing intoxicating liquor and does not depart the Court without leave.

Witness our hands, this the 19 day of Dec. 1947.

Henry Stinnett

A. R. Sparks

W. A. Freshour

Endorsed:

APPEARANCE BOND - STATE OF TENNESSEE VS. HENRY STINNETT. CHARGE_____. Filed Dec. 19, 1947, Wade Everett, Clerk, By Tressie Everett, D. C.

January 12, 1948, Bill of Exceptions filed and in the words and figures as follows:

IN THE CRIMINAL COURT FOR BLOUNT COUNTY, TENNESSEE

STATE)
VS.) NO. 9714-9715
HENRY STINNETT)

Maryville, Tennessee.
December 9, 1947.

A P P E A R A N C E S:

Hon. Beecher R. Witt, District Attorney General appearing for the State.

Homer Goddard, Esq., Counsel for Defendant.

. . .

BILL OF EXCEPTIONS

This case came on to be heard before the Honorable Sue K. Hicks, Judge, and a Jury, when the following was all of the evidence introduced, and proceedings had, to-wit:

The Jury was thereupon selected and impaneled.

GEN. WITT:

The indictment in this case charges that the defendant on the 2nd day of July did unlawfully manufacture and attempt to manufacture intoxicating whiskey and brandy, contrary to the statutes and against the peace and dignity of the State.

The second count charges he did unlawfully have in his possession and under his control, a still, parts of a still and apparatus for a still, used for the unlawful manufacture of whiskey and brandy, contrary to the statute and against the peace and dignity of the State.

MR. GODDARD:

How many counts are you relying on?

GEN WITT:

All three counts.

MR. GODDARD:

The defendant moves to quash the indictment because it has three counts, one of which is unrelated to the other two counts of the indictment,

This defendant is charged under this indictment in the first count of unlawfully possessing intoxicating whiskey received since March 1, 1917. The second count that he unlawfully did manufacture and attempted to manufacture intoxicating whiskey, and the third count he unlawfully had in his possession apparatus to manufacture whiskey.

The first count is not related to the manufacture and the possession of apparatus. They are separate and distinct offenses, and are not related.

THE COURT:

I am going to overrule the motion. If there is any question about it, I will take care of it later on.

MR. GODDARD:

Defendant excepts to the Court's ruling to quash the indictment.

The Defendant pleads not guilty.

Thereupon the jury was sworn; the witnesses called, sworn and excused under the rule.

Thereupon the following testimony was introduced on behalf of the State:

BEN MAYES having first been duly sworn, testified as follows on

DIRECT EXAMINATION BY GEN WITT:

Q You are Ben Mayes?

A Yes sir.

Q Mr. Mayes, what official position do you hold in Blount County?

A In the Sheriff's office - Sheriff.

Q Were you Sheriff of this county in July 1947?

A Yes, I was.

Q Do you know Henry Stinnett:

A I do.

Q Where does he live?

A Walland Road, between Maryville and Walland, eight or miles out.

Q Is that this county, Blount County?

A Yes sir.

Q Does he have a place of business or just live there?

A He lives there.

Q Were you up there on or about the 2nd day of July?

A Yes sir.

Q Day time or night time?

A Day time.

Q For what purpose did you go there?

A We had a report that there was a still up there.

MR. GODDARD:

Except to that.

THE COURT:

Cant tell what was said.

GEN. WITT:

Q Did you go there?

A Yes sir.

Q Did you find a still?

A Yes sir.

Q Where?

A Found it about - I couldn't estimate how far it was from the road or from his house. It was kinda across in a little ravine, across from his house, about as far as from here to the restaurant over there, or Dr. Burchfield's place. 500 or 600 feet, I will say.

Q Was this still in operation?

A Wasn't operating at the time. It was still warm.

Q Was it set up, and everything?

MR. GODDARD:

Object to because leading.

THE COURT:

Sustained.

GEN. WITT:

Q You say it was warm?

A Yes sir.

Q Describe the still to the jury.

Q It was setting up there in a furnace, furnace was built around it kinda. Set up just like a still would be set up.

Q Had a furnace and the still over the furnace?

A Yes sir.

MR. GODDARD:

Object to because leading.

THE COURT:

It is leading, but go ahead.

GEN. WITT:

Q You say the still was warm?

A Yes sir.

Q Any still slop there?

A Yes sir.

Q Any mash?

A Dont know just exactly how much of that there was. I looked at it, but I left the scene after I looked at it and the other boys tore it down. I went to a different place.

Q Did you see any whiskey there before you left?

A I did.

Q How much?

A If I remember right, it was two half gallon jars. I am pretty positive on that. Two half gallon jars at the still.

Q Was the whiskey warm or cold?

A I didn't examine it.

Q Dont know whether it was moonshine or not?

A It was white.

Q Could you tell from the general appearance how long this still had been there,- how long it had been operating?

A It hadn't been too awfully long.

Q Were there any coals under it?

A There were ashes and coals there, yes.

Q You say it was warm?

A Yes sir.

Q What time of day did you say this was?

A Around three o'clock in the afternoon.

Q Now leading from this still, was there any trail or tracks going anywhere, if so, where did they go?

A There was. Leading from this still going in that direction, across, I will say 20 to 25 feet, a little path went right up straight from it and turned back out the hill, and there was a water line coming into it, went to the little building from the still, I would say just a little further than the length of the court room from the still.

Q Did you see the defendant that day?

A No, I didn't see him.

Q Did you go to his house?

A I did in a little while - or somebody's house on the bank. There are two houses there, and I went to the one where the people were at,- there are two houses. I dont know which one he lives in.

Q Did you talk to him later about it?

A Yes, he came on in to jail that afternoon.

Q What did he say about that still?

A Said he wanted to make bond, didn't want to be locked up. The fact is, he had a man there to make bond when I got there.

Q Was the still mentioned between you and him?

A No, not that I recall.

Q Did any trail go to his house there?

MR. GODDARD:

He said he didn't know which house was his.

GEN WITT:

Q Anything else you know about it?

A Yes. You were asking me about the trail. The trail came out to the little house, and there is a spring there, and you can drive an automobile down the road down there. Two houses there. One sets along there farther, and the other one I would say is a short distance back of that. I dont know which house he lived in. We pulled in there, and the people that lived there -

MR. GODDARD:

Dont tell what somebody told you.

THE WITNESS:

A That is what I seen. I went up there and told them to tell Henry to come on in.

GEN. WITT:

Q Is that all you know about it?

A Yes, except there is a little house out there -

MR. GODDARD:

Except about the house.

GEN. WITT:

Q What about the little house?

A That is where I went when I left the still, - went to the little house that is built out that little trail, and I could see malt corn in there with sprouts on it.

MR. GODDARD:

He didn't have a right to search the house.

THE WITNESS:

A Didn't have to search it. There were cracks in there

you could stick your hand in. I could see the malt corn in there and the grinder and bottles with whiskey in them, - or something in them.

MR. GODDARD:

Object to that.

THE COURT:

Yes.

GEN. WITT:

Q Did you call Mr. Goddard and tell him you saw the malt corn in there?

MR. GODDARD:

We will go into that too. I am excepting to that house.

THE COURT:

This is something else now.

MR. GODDARD:

Object to any testimony about anything in the house.

THE COURT:

Yes.

GEN. WITT:

Q Did you get instructions from a prominent lawyer here in Blount County to look through the crack there and make a search?

THE COURT:

Dont think that is competent. Sustain the objection.

GEN WITT:

Q Did you say you could look through these cracks and see this stuff in there?

MR. GODDARD:

Object.

GEN. WITT:

Q Did you see this malt corn and stuff before you made any search?

MR. GODDARD:

Object.

THE COURT:

Sustained.

GEN WITT:

Q How far was this little house from this still?

A I will say probably a little bit farther than the length of this court room.

THE COURT:

I am going to let it in, if it is shown it was the defendant's house. Going to let it in until it does come out whose the premises were.

MR. GODDARD:

They are alledging in the indictment it was this defendant's liquor. Now then they cant search any building and say it is his liquor without a search warrant.

THE COURT:

If they searched some building that didn't belong to the defendant, it would be in favor of the defendant.

MR. GODDARD:

Except.

GEN. WITT:

Q Did anybody live in this building?

A No sir.

Q How big was it?

A Looked to be about 10 x 16, I will say. One room house.

Q Did this trail go along by it?

A Went right to it.

Q And at the time you were going up to this little house, were you looking to see where this water line went, or where it came from?

A Some one of the boys came by it and said somebody had better guard that little house.

MR. GODDARD:

Object.

THE COURT:

Sustained.

GEN. WITT:

Q You say you dont know where the defendant lived at that time - dont know which house he lived in at that time?

A No sir.

Q What did you see in this little house?

A I saw malt corn.

MR. GODDARD:

Object.

THE COURT:

Overruled.

THE WITNESS:

A Sprouted corn over one side of the house, I will say a space of about 10 feet square, Sprouts on it about that long (indicating), and had a little mill, one of them grinding mills like a sausage grinder, and in the other end of the building was a bunch of bottles, with something in them, couldn't tell what,- and a bunch of cases, and I picked up a little stick and stuck through the crack and shook them, and you could tell they were full. After they tore down the still I went in the house.

Q See any whiskey there?

A Yes sir.

Q How much?

A 61 half gallons.

Q How much malt corn would you say was there?

A Bushel or a bushel and a half.

Q Do they use that sprout corn to make whiskey?

A Suppose so.

MR. GODDARD:

Object to what he supposes.

GEN WITT:

Q You did not, as a matter of fact, ever use malt corn to make whiskey?

A No sir.

Q You say there was a little grinder there?

A Yes sir.

Q This whiskey that was already manufactured, you say there was 61 half gallons?

A 62, including what we got at the still.

Q Was all that moonshine whiskey - white whiskey?

A Yes sir.

CROSS EXAMINATION BY MR. GODDARD:

Q You didn't have any search warrant for this house or premises?

A No sir.

Q And this house and these premises where you went out there were how many feet, miles or yards from the public road?

A Some little distance.

Q About how far?

A I judge it was between a quarter and a half.

Q And you couldn't see in that little house from any public road?

A No.

Q Do you know whose house it is?

A No.

Q Dont know whose land it was you found the still on?

A No.

Q Dont know who had been at the still?

A Yes, I know what -

Q Of your own knowledge.

A I don't say that.

Q You didn't see Henry Stinnett at all?

A No.

Q You left word for him to come in?

A Yes sir.

Q And he did what you told him to?

A Yes.

Q And he didn't admit anything about it being his still?

A No.

Q You say there were two houses there somewhere?

A Yes.

Q And you dont know who lived in either one of them?

A No, - I know they are Stinnetts.

Q And there are paths around there?

A Coming from the house to the spring the path went to the still.

Q You dont know who made the path?

A No.

Q Who was with you?

A Hugh Graves, James Beeler and Estel Jones, and seems like Oscar Bowling was along.

Q You didn't phone any lawyer a bout making that search, did you?

A No sir.

Q And you are not trying to leave the impression you did?

A No. I can tell what happened.

GEN. WITT:

Let him tell.

MR. GODDARD:

Q Who was the fellow that phoned?

A Estel Jones.

Q Did he tell you that lawyer said you had already made an illegal search, might as well get the liquor?

A He didn't say that.

THE COURT:

That isn't competent. Go to something else.

MR. GODDARD:

Q Were there any fences around this property?

A No sir.

Q No fences around the the land?

A Dont know.

Q What kind of land was it?

A Kinda hilly.

Q How many acres of cleared or not cleared,- how much woods were there?

A Dont know. This still was at the edge of the woodland, and there were shrubs and bushes across the hollow below the spring.

Q You say that was 500 or 600 yards from this house?

A Across the hollow. I said feet.

Q You didn't measure that?

A No.

Q You know who else lives around there close?

A Dont know what his name is. It is a Stinnett. His brother I understand lives there.

Q There are other people living in other houses around there?

A Yes.

Q How many houses different from these two houses?

A These two are the only ones I know of. Further up there are some more.

Q How much further up?

A Quite a distance.

Q You dont know who lives in them?

A No.

Witness excused.

The next witness, JAMES BEELER, being first duly sworn,

testified as follows on

DIRECT EXAMINATION BY GEN. WITT:

Q Your name is James Beeler?

A Yes sir.

Q Mr. Beeler, are you an officer of this county?

A Yes sir.

Q And were you a deputy sheriff in July, 1947?

A Yes sir.

Q You know Henry Stinnett, the defendant?

A Yes sir.

Q Were you up there at the time the Sheriff was up there at this still?

A Yes sir.

Q About what time did you get there?

A It was after one o'clock.

Q Were you with the Sheriff when you went up in these words there, or were you with someone else?

A No, we separated when we went into the woods.

Q Did you see the defendant?

A Yes sir.

Q Where did you see him?

A When I first saw him,- as you come out from the still there is a little path sorta uphill and swings back down like that. He was coming up the little hill right from the still. He was within 10 feet of it.

Q And what was he carrying, if anything?

A Little package about that long, and about that square. (Indicating).

Q In a paper poke?

A No, it was wrapped up,- believe it was Norton Hardware paper.

Q What did he do then?

A He came down the path and went to the front of this little sh shack, and I lost sight of him when he went around the house, and the next I seen of him, he was taking off up the hill, and he hadn't seen me. I fell back, and fell down with my rifle, and he come up on Estel and said, "What the God damed hell you people doing on my premises," and another deputy came down from the t op of the hill, and when he said that, Henry turned white. Never pulled his hands out of his pocket,- walked down toward the house, and I hollowed for the Sheriff and Hugh Graves, and said, "Watch that house down there." By that time Estel and Oscar Bowling and myself had found the still, but had lost sight of Henry, and I told Estel -

MR. GODDARD:

Except.

THE COURT:

Dont tell that.

THE WITNESS:

A The next thing I knew I heard this racket -

GEN. WITT:

Q Did you see Henry running?

A Yes sir.

Q Which way did he go?

A Over the hill.

Q Fast or slow?

A Fast.

Q This little package that Henry was carrying when he came away from the still, did you see that package again?

A Yes.

Q Where?

A On the front steps of this little shack.

Q Did you open it?

A Yes sir.

Q What was in it?

A Fruit jar lids.

Q Lids they have on half gallon fruit jars?

A Yes sir.

Q How many were there?

A There was a dozen.

Q You say at the time you first saw him he was in 10 feet of the still, coming away?

A Yes.

Q Did you ever see Henry any more?

A Just a streak as he went by.

Q The next time you saw him was in town?

A Yes, at the jail.

Q Was he ready to make bond?

A Yes sir.

Q Did you look in that little house?

MR. GODDARD:

Object.

THE COURT:

It looks like from the evidence now, it is his property.

GEN WITT:

Let me ask him this.

Q Was there any fence around this place up in the woods?

A No, no fence around it.

Q Grown up with shrubs and woods?

A It was grown up a right smart, yes.

Q Was anybody living in this house at all?

A No sir.

Q You know whether it was an abandoned house,- have any sign of life?

A No sir, none whatever.

THE COURT:

Q You dont know who it belonged to?

A No sir.

GEN. WITT:

The proof shows there were big cracks in it there.

THE COURT:

Go on with the proof, and we will see what develops.

MR. GODDARD:

I want to be heard on it.

THE COURT:

I have already ruled on it, but may have to change it.

MR. GODDARD:

The proof is this defendant said, "What in the hell are you doing on my premises."

GEN.WITT:

Dont matter what the defendant said.

THE COURT:

I instruct the jury not to pay any attention to that evidence. If he can prove who owned the house, I will let it in.

GEN. WITT:

Q Do you know who owned the house?

A No sir.

Q Where did Henry Stinnett live?

A I dont know.

Q Is there another house there?

A Yes, two other houses, - I will say in 100 yards.

Q Did you see any still slop on Henry when he came away from the still?

A No sir.

Q Want to ask you about the liquor you found at the still, two fruit jars. Did they have caps on them?

A Yes sir.

Q New Caps?

A Yes sir.

Q Same kind of caps you found in front of this little house?

A Yes, believe they were Ball caps,- put out by Ball people.

Q How much liquor did you find at the still?

A Two half gallon jars, and a bag of malt corn.

Q And was this still warm at that time?

A Yes, I tore it down.

Q How much mash was there?

A Believe four 60 gallon barrels.

Q Is that what you call still slop?

A Yes sir.

Q How far was this still from this little house you talk about?

A Straight line to it. 25 yards at the most.

Q How far was the little house from these other two houses?

A Well, from the first house I will say it was about 80 yards, and from the other house, it would be about 100 to 110 yards. You have to come down the hill.

Q You say there was no fence enclosing the still and this little house?

A No sir.

Q Did this little trial go up in the woods?

MR. GODDARD:

Object to leading.

THE COURT:

It is leading.

GEN. WITT:

Q Where did this trial go that went by the house,- was there trail by the house?

A Yes, he had his still set up and these 4 barrels embedded in the ground. That was the end of it there. They branched as they come out of there. You could only come out through the path. You could go up a little piece and turn back down a path that run along the side of this house. From the still there was 1/2" pipe from a little spring that went up under the house and come out on the other side, and went about 10 or 12 yards from the edge of the house, and had two sections of hose hooked onto the end of the pipe, and it went to the still. It run water out all the time.

Both ended at this little shack. One big room built out of rough lumber and some places the cracks were 1/2 to 3/4" apart.

Q You say there was no fence, - or did you say there was any fence enclosing the little house with either one of the other houses?

A No sir.

Q Was there any fence at all around there?

A Couple of pieces of fence. Little section of fence, dont know how big, didn't measure it, starts up here and ends down here, doesn't seem like it is connecting anything. Doesn't square up with anything, and doesn't enclose it, and up on top of the hill there is another section of fence that goes up there and ends. doesn't close with anything.

Q Anything else you know about it?

A No sir.

THE COURT:

Q Any indiction whether anybody lived in this house or not?

A Wasn't any indication at all, just whiskey and malt corn.

MR. GODDARD:

Except to that.

THE COURT:

Want to get it all in before I finally have to rule on it.

CROSS EXAMINATION BY MR. GODDARD:

Q You didn't have a search warrant, did you?

A No sir.

Q You couldn't see this still from the public road?

A No sir.

Q Had to go on the property there and make a search to find it, didn't you?

A Yes sir.

Q And you had no search warrant for the still?

A No sir.

MR. GODDARD:

Move the court to withdraw all this testimony from the jury, because they had no search warrant for these premises.

THE COURT:

Going to deny that. Not shown that is the defendant's premises, or shown it is enclosed, and hasn't been shown he had possession of it.

MR. GODDARD:

Q You dont know who had possession of it?

A No sir.

Q But you said the defendant said, "What are you doing on my property?

A That was back up on the side of the mountain.

Q How far was that from the still?

A Good 100 yards.

Q That is the place you saw him?

A Not the first place I saw him.

Q You dont know who operated the still?

A No sir.

Q Dont know who it belonged to?

A No.

Q Dont know who made the path?

A I know he helped make it.

Q How do you know?

A Saw him coming from the still.

Q You saw him one time and that helped make it?

A Yes sir.

Q You walked the path too, didn't you?

A Part of it.

Q Then you helped make the path up there?

A Part of it, yes.

Q You dont know who lived in any of the houses?

A Believe I saw the defendant coming from the first house.

Q You dont know whether he lived there or not?

A One of the kids called him daddy.

Q And you came how close to that house?

A I was down the hill.

Q He lived in one of the houses - do you know which one?

A This was the first house I saw him coming away from, and one of the kids called him daddy,- a cinder block house.

Q The other one was pretty close to it?

A About 40 yards.

Q You say the distance from this house to the still is how far?

A I would say 80 yards to the first one. It is a drop side, old house. 20 yards up the way is a cinder block house.

Q It wasn't 600 feet - the Sheriff was wrong?

A I wouldn't estimate it that far.

Q You didn't measure it or step it?

A No sir.

Q You say there were fences around this property?

A No sir.

Q Some fences there?

A Yes, but they didn't enclose anything.

Q Where were the fences?

A If you left the road and come up a gulley, you could go into the still, and wasn't any fence to cross, and about where the path took a curve down, there was a section of fence there, looked to be about 4 feet high, just went down a little ways and stopped, just about 4 poles.

Q There was some fences around his property?

A No, that was just a section of fence.

Q It fenced in something?

A No sir.

Q It was around the woods or fields or something?

A No, just standing there.

Q All fences stand, dont they?

A It wasn't enclosing anything.

Q Was there a fence on the other side?

A No sir.

Q How far over did you go to see?

A I was all through there.

Q Some houses up above this still, wasn't there?

A No sir.

Q Dont you know up above it -

A Which direction are you going in?

Q Any way around there.

A There was other houses on the same side that Henry's house is.

Q Were they below, above it, or beside it?

A If you run a straight line, they would be above it.

Q There were houses above it?

A According to which side you go in.

Q Of course above would be above?

A There is two ways to go above.

Q North of this still was there any houses?

A I didn't set my directions. On the same side Henry's house is on, up a path there is four shacks, I believe.

Q People living in them?

A Yes sir.

Q And you dont know who they are?

A Believe the last house belongs to Ingle. I went up there and arrested him once.

Q Four families lived up there?

A At that time I believe so.

Q How far were they from the still?

A First house about, I will say, 300 yards.

Q And how close were the others?

A Pretty close until you get to the last one. It will take you about 15 to 20 minutes to get to the last shack.

Q How do people get up to these houses?

A There is a road up to this crib that is built out there from the second house, then you have to leave your car and go on foot the rest of the way.

Q And there are paths going up that way?

A Yes sir.

Q From the still?

A No.

Q Where did the path go above the still?

A Went to these houses.

Q Above the still?

A Yes sir.

Q This house you thought Stinnett lived in was below the still, wasn't it?

A One of them is practically right straight across from it.

Q But there are paths all through that country there?

A No sir.

Q Did you follow any of these paths up to the other houses?

A Followed this little road here.

Q How close was the road to the still?

A About 35 yards.

Q When you start up the hollow, to get up there to the still, dont you have to cross a fence to get there?

A At the road here?

Q Yes.

A Yes sir.

Q And there was a fence there?

A Yes sir.

Q And you went over that fence?

A Went over it?

Q Climbed over it, through it, or under it. You didn't have any search warrant to go over that fence and into that property?

A No sir.

RE EXAMINATION BY GEN. WITT:

Q Did that fence go around the still?

A No sir.

Q You were talking about this place where some child called him daddy - how far was that house from the still?

A That is the one that is about 110 yards from the still.

Q How far from the little house?

A About 130 from that little shack.

Q Was there any enclosure enclosing the house where you heard the child call him daddy with the little house,- was there any fence enclosing them together,- was there a fence there enclosing anything together?

A No sir.

RE CROSS EXAMINATION BY MR. GODDARD:

Q There was a fence you had to cross to get into this property?

A Yes sir.

Q And a fence along the side you testified about?

A A section of fence.

Q You didn't go around every foot of this property to see where other fences were?

A Went over a majority of it.

RE EXAMINATION BY GEN. WITT:

Q This fence you went over, did it go around and circle over the mountain?

A No, that fence is along the highway.

Witness excused.

The next witness, HUGH GRAVES, having first been duly

sworn, testified as follows on

DIRECT EXAMINATION BY GEN. WITT:

Q Mr. Graves, are you a deupty sheriff in this county?

A Yes sir.

Q Back in July of this year, did you go along at the time the officers went to the home of this defendant and up in that section and made a search of a still?

A Yes sir.

Q Did you see the defendant anywhere that day?

A Never saw him until he came back into the jail to make bond.

Q You didn't see him up there at the still or coming away from the still?

A No sir.

Q Were you present when Mr. Beeler found these tops,- fruit jar tops?

A Yes sir.

MR. GODDARD:

Defendant excepts to all this testimony with reference to what was found up there on the ground. The officers entered this property without a search warrant, and a search of these premises was illegal.

THE COURT:

Going to let that in at the present, and if the proof shows later about the ownership of this house I can take care of it then.

MR. GODDARD:

Except.

GEN. WITT:

Q Did you see some fruit jar lids there?

A Yes sir.

Q Where?

A At the still.

Q How many did you see?

A Several of them there, and a gallon of whiskey there.

Q At the still, what all did you see there?

A I just seen the still and the barrels.

Q Was there some whiskey there?

A Yes sir.

Q How much?

A Two jars.

Q Did you see any fruit jar caps there?

A Yes sir.

Q Where were they?

A Some old fruit jar caps at the still, and at that house there was some new ones out there.

Q That was the ones on the steps?

A In that house where that malt and stuff was at.

Q Was this still a complete outfit?

A Yes sir.

MR. GODDARD:

Object to because leading.

THE COURT:

Sustained.

GEN. WITT:

Q Was it or not a complete outfit?

MR. GODDARD:

Still leading.

THE COURT:

Sustained.

GEN. WITT:

Q Mr. Graves, was this still, all of the still there or not, or what about it?

A You mean was it the only still?

Q No, what kind of still was it, was it a complete outfit?

MR. GODDARD:

Object

THE COURT:

Still suggestive.

THE WITNESS:

A Complete outfit, Everything was there.

GEN. WITT:

Q You say you didn't see the defendant there?

A No sir.

Q You know where he lives?

A I know where they said he lives.

MR. GODDARD:

Object.

THE COURT:

Dont tell that.

CROSS EXAMINATION BY MR. GODDARD:

Q Mr. Graves, did you go up there with Mr. James R. Beeler?

A Yes sir.

Q And as you went up there, you had to cross a fence to get into this property?

A Yes sir.

Q And you went over into that property across the fence, or under it, or over it?

A Over it.

Q And you didn't have any search warrant when you went on to these premises, did you?

A No sir.

Q Now you said something about a still. The still wasn't in operation, was it?

A No sir.

Q You dont know whose still it was of course, of your own knowledge?

A No, I dont know whose it was.

Q Dont know whose whiskey was there - who owned the whiskey?

A No sir.

Witness excused.

GEN. WITT:

That is the State's case.

MR. GODDARD:

I want to raise a question with the Court.

THE COURT:

Let the jury go out. Thereupon the jury retired from open court.

MR. GODDARD:

If the Court please, the defendant moves the Court to withdraw all of the evidence of Sheriff Mayes, Mr. Beeler and Mr. Graves. Believe that is all that testified, and if there is any other officer who has testified, move it be withdrawn from the jury, for the reason that it is apparent that these officers entered enclosed premises of the defendant, and made a search for a still and for liquor, without a search warrant, and they had no authority to do that without a search warrant. That is my first motion.

THE COURT:

What is the second? That one is overruled.

MR. GODDARD:

We move to direct a verdict with reference to all three counts of the indictment because there is not sufficient proof in the record to justify a conviction that this was the defendant's still, or that the liquor that was found there was his liquor, and for the further reason that this defendant cannot be tried for operating a still and for possessing apparatus and for possessing liquor in one indictment, and if Your Honor please, further, there is no proof that the still was in operation there at all by this defendant, Move Your Honor to direct a verdict on all three counts.

THE COURT:

During the trial the Court was inclined to exclude the evidence about what was found in the little house, but at the conclusion of the State's evidence it is apparent to the court that this little house was out there, and not in any enclosure; what is called under the law wild land. Fence along one side, or even two sides wouldn't make it enclosed. The proof shows this is woodland, wild land. The Supreme Court has repeatedly held that where it is the type terraine like that, dont have to have a search warrant to search.

Now as to the house where the liquor was found, this being wild land, not enclosed terraine, the officers, upon hearing a description of the house, it was apparent to them this was a rough-built house; witnesses swore there was no enclosure; nobody lived in the house; they could look through cracks and see liquor in there, therefore they had a right to go in there and search without a search warrant. Overruled.

MR. GODDARD:

Except. Defendant rests.

Thereupon, after argument by counsel for the respective parties, the Court charged the jury as follows:

Geneltmen of the Jury, the indictment in this case is in three counts. The first count charges that the defendant Henry Stinnett, heretofore to-wit, on the 2nd day of July, 1947 in Blount County, Tennessee, unlawfully did possess intoxicating liquors received since March 1, 1917, contrary to statute and against the peace and dignity of the State of Tennessee.

The second count charges that the defendant at the same time and place unlawfully did manufacture and attempt to manufacturing intoxicating whiskey and brandy, contrary to statute and against the peace and dignity of the State.

The third count charges that the said defendant at the said time and place in said county unlawfully did have in his

possession and under his control a still, parts of a still, apparatus for said still used and intended to be used for the unlawful manufacture of intoxicating whiskey and brandy, contrary to statute and against the peace and dignity of the State.

To all three counts defendant has pled not guilty, and thus are made up the issues for you gentelemen to decide.

Defendant is presumed to be innocent and of good character, and this presumption stands as a witness in his behalf until overcome by competent and credible proof.

Before the state can convict, you must be satisfied from the proof and beyond reasonable doubt that defendant is guilty of one of these counts charged in the indictment, and that the offense occured in this county twelve months prior to the finding of the indictment in this case.

By reasonable doubt is not meant every slight misgiving that might come to your mind, but is an honest doubt engendered after an honest investigation of all the proof, and such a doubt as reason entertains and sanctions as a substantial doubt.

Absolute certainty is not required, but moral certainty is required, and this certainty is required as to every element necessary to constitute the offense.

The first count of this indictment is based upon Section 11216 of the Code of Tennessee which makes it unlawful for any person to possess intoxicating liquors received since March 1, 1917, and the punishment on that count is a fine,- that is if you find that there is a quart or less of liquor, then the minimum fine is $10.00 and the maximum $500.00. If you find that there was more than a quart of liquor, then the punishment is a minimum of $100.00 and a miximum of $500.00, that is some amount between $100.00 and $500.00, and in addition thereto in both cases there is a jail or workhouse sentence not to exceed six months, but the jail or workhouse sentence is within the discretion of the court, and the jury would have nothing to do with fixing that.

The second count of the indictment is based upon Section 11246 of the Code, which in part reads:

> "It shall be unlawful for any person to manufacture or attempt to manufacutre intoxicating whiskey or brandy, and anyone violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a find for each offense of not less than $250.00 nor more than $1000.00, and imprisonment for a period of not less than 90 days nor more than twelve months, provided this section shall not be construed as to prohibit the manufacture of alcohol of not less than 188 proof for chemical, pharmaceutical, medical, and bacteriological purpose."

Section 11248, following that Section, reads as follows:

> "The offenses described in the two preceeding sections shall be deemed to have been committed by any person who shall attempt to manufacture intoxicating liquor, either by assembling the necessary apparatus for the purpose of manufacturing intoxicating liquor as prohibited by law, or by doing any act preparatory to such manufacture; and any such attempt shall be punished as described in the preceding section."

Now under the third count of the indictment, Section 11249 provides as follows:

> "It shall be unlawful for any person to have in his possession or control any still or other apparatus, or part thereof, used or intended to be used for the purpose of manufacturing intoxicating liquor as prohibited by law; and any person convicted of a violation of this law shall be deemed guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars nor more than five hundred dollars, and by confinement in "the county jail or county workhouse for a period of not more than one year in the discretion of the court."

The theory of the state in this case is that this defendant on the date charged in the indictment in this county, near his home in this county had in his possession a still out in the woods, for the purpose of manufacturing intoxicating liquor, and that he did manufacture intoxicating liquor in said still, and that he had in his possession near by, and at the s till a quantity of liquor which had been received since March 1, 1917, contrary to law.

If you believe this theory is true beyond a reasonable doubt you should convict the defendant of one of these counts in the indictment.

When you retire, of course you will take up the first count, and if you find the d efendant not guilty, take up the second

count. If you find him not guilty of that count, take up the third count. If you find him not guilty of that count, you will report a verdict of not guilty.

If you find him guilty of one count, say which count you find him guilty of, and the punishment you fix for the defendant.

The theory of the defendant is that he did not possess intoxicating liquors as charged; that he did not possess the apparatus for a still as charged, for the purpose of manufacturing liquor, and that he did not manufacture liquor as charged.

The theory of the defendant is that this still found up there and this liquor was not his liquor nor on his premises and not his still, and that he was not operating it, and did not have in his possession the still or liquor.

If you find this theory true, or have a reasonable doubt as to the guilt of the defendant, you should acquit him.

You gentlemen are both judges of the law and the evidence. The Court is a witness to you what the law is. You must take the law as I give it to you. You yourselves are judges of the evidence.

The law presumes all witnesses have sworn the truth, and you should reconcile the testimony so as to make witnesses swear the truth if you can, but if you cannot so reconcile it, you will decide who you believe, and who you wont believe and how much weight you will give to the swearing of each witness.

In forming your opinion as to the credibility of the witnesses, you may look to the manner and demeanor of the witness on the witness stand, interest or want of interest, consistenoy or inconsistency of the statements, probability or improbability of the story the witness tells. Take into consideration all the facts and circumstances in judging and weighing the evidence.

There are several modes of impeaching a witness. One is by cross examination to involve the witness in discrepancies; another is to show the witness has made conflicting statements in court and out of court about material matters, and you decide how far any

witness has been impeached by any of these processes.

Under the law, the defendant has a right to testify or not, as he sees fit, and the fact he did not testify cannot be considered against him in making up your verdict, that is, there is no presumption of guilt against him by reason of his not testifying, and it is for you to take the evidence adduced from the stand, and the law, and determine the case upon that, regardless of the fact he did not give evidence.

I charge you as to circumstantial evidence. Circumstantial evidence is when there is no eye witness to the crime. A case may be proved upon circumstantial evidence alone, or it may be proven upon direct evidence - evidence of somebody that sees the act committed. or may be proven both on direct and circumstantial evidence but before a case can be proved upon circumstantial evidence alone, you must find there is no other reasonable theory other than the guilt of the defendant, - no other hypothesis or theory other than the guilt of the defendant.

Any Special Requests?

None were presented.

I charge you further that the jury doesn't have anything to do with the question of whether there is a right to search. The Court has held in this case the officers had the right to search.

Any further requests? None were presented.

You may retire and report when you have reached a verdict.

There upon the jury retired from open court and after consideration of their verdict, returned into open court, and the following transpired:

THE COURT:

Do you waive the call?

MR. GODDARD:

Yes.

GEN. WITT:

Yes.

THE COURT:

Have you reached an agreement?

FOREMAN:

No sir.

THE COURT:

Is there something you want?

FOREMAN:

Question on taking a vote on it, whether we can vote on the second count or vote on the third count and leave the first.

THE COURT:

I instructed you to take up the first count, and if you find him guilty on that count, you report on that count; if you find him not guilty on the first count, take up the second count, and if you find him not guilty on that count, take up the third count.

You gentlemen may retire.

Thereupon the jury again retired, and after further consideration returned into open Court and reported they found the defendant guilty under the first count, possessing liquor.

THE COURT:

What fine do you fix?

FOREMAN:

$500.00.

THE COURT:

You find the defendant guilty of possessing liquor and fine him $500.00 and costs,- so say you all?

JURORS:

Yes.

MR. GODDARD:

Want to make a motion for a new trial.

THE COURT:

I will fix a date for your motion.

THE FOREGOING WAS ALL OF THE EVIDENCE INTRODUCED AND PROCEEDINGS HAD UPON THE TRIAL OF THE FOREGOING CASE.

Motion of the defendant for a new trial in this case came on for hearing before the Honorable Sue K. Hicks, Judge, on this the___day of _____, 1947, and after argument of counsel upon said motion, the Court is pleased to and doth disallow and overrule the same, and the motion of the defendant to set aside the verdict of the jury and grant him a new trial is accordingly overruled.

To the action of the Court in overruling his motion for a new trial, including each and all of the several grounds thereof, the defendant a t the time excepted, and now excepts, and prayed and is granted an appeal to the next term of the Supreme Court for the State of Tennessee sitting at Knoxville, - and now comes the defendant by his attorney and tenders the foregoing as his Bill of Exceptions to the action of the Court in overruling his motion for a new trial in this case, and pronouncing judgment on the verdict of the jury, hereinabove set for against him, which Bill of Exceptions is signed, sealed, and ordered by the Court to be made a part of the transcript of the record in this case.

This the 2nd day of January 1948.

Sue K. Hicks, Judge

This the ____day of _____, 1947.

_____

Judge

_____

For the State

_____

Counsel for Defendant

STATE		
VS		Nos. 9714 and 9715
HENRY STINNETT		Possessing Whiskey Operating Still

BILL FOR MAKING TRANSCRIPT.

For making Transcript from Criminal Court at Maryville, Blount County, Tennessee, to the Supreme Court at Knoxville, Tennessee.

Forty-five (45) pages at three hundred words (300) per page, total number of words, 13500 at ten (10¢) cents per hundred (100) words----------$13.50

Order of Appeal & Bond---------- .75

Certificate & Seal---------- .50

Postage---------- .50

$15.25

STATE OF TENNESSEE
BLOUNT COUNTY

I, Wade Everett, Clerk of the Criminal Court, in and for the aforesaid County and State, do hereby certify that the foregoing is a true, perfect, and complete transcript of the record and proceedings had in the cause of State vs. ~~Henry~~ Stinnett as will be found of record in my office, Maryville, Tennessee, on this 15 day of June 1948

Wade Everett
Clerk

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

SEPTEMBER TERM, 1948

Dec 11-48

BE IT REMEMBERED, That at a September Term of the Supreme Court for the Eastern Division of Tennessee, held at Knoxville on the Second Monday of September, 1948, the following proceedings were had and entered of record, to-wit:

Henry Stinnett	No. 6 Blount County Criminal
vs.	Possession of intoxicating liquor
THE STATE	Reversed and dismissed

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Blount County; and on consideration thereof the Court is of opinion that there is reversible error on the record, ~~in that~~ as shown in the written opinion of the Court for publication filed and made a part of the record, and for the reasons set forth in said opinion, the judgment of the court below is reversed and the case dismissed, and the plaintiff in error will go hence without day.

It is therefore ordered by the Court that the judgment of the Court below be reversed, the case dismissed and plaintiff in error will go hence without day, verdict of the jury set aside, and the cause remanded to the Court below for a new trial. The County of Blount will pay the costs of this appeal, which will be certified to the proper officer of the county for payment in the manner required by law. The case is remanded to the Criminal Court of Blount County for the collection of cost accrued in said Criminal Court.

Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee:

I, W. H. EAGLE, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court pronounced at its September Term, 1948, in the case of Henry Stinnett vs. THE STATE, as the same appears of record in my office.

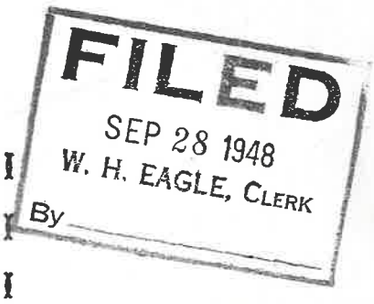
In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Knoxville, Tenn., on this the ..... day of ....., 19.....

.....Clerk

By ..... D. C.

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

SEPTEMBER TERM, 1948



HENRY STINNETT,

Plaintiff in Error

VS.

STATE OF TENNESSEE,

Defendant in Error

No. 6

BLOUNT CRIMINAL

REPLY BRIEF FOR THE STATE

MAY IT PLEASE THE COURT:

This is an appeal from a conviction on a charge of possession of intoxicating liquor, with punishment fixed at a fine of $500.00. The plaintiff in error was acquitted on the counts charging unlawful manufacture of whiskey and possession of a still.

STATEMENT OF THE CASE

The Sheriff and his deputies found a complete still, which was warm and had ashes and coals in the furnace, across a ravine about five or six hundred feet from two houses. A child in one of the houses called the plaintiff in error "Daddy". The officers had been able to drive to the houses. There were several pieces of fence on the premises, but the premises were not surrounded by a fence. The officers crossed one of these fences in going to the still. As they neared the still, the plaintiff in error was seen about ten feet from it. As he ran he passed one of the officers and asked "What the g. d. hell you people doing on my premises?" (Tr. p. 25). He had a package under his arm which he dropped at a little building about twenty-five feet from the still. This package contained about two dozen new fruit jar caps. Without searching the building the officers saw through the cracks that it contained sprouted corn, a grinding mill, bottles and some cases. (Tr. p. 20). This building was on a trail and at the end of a water line from the still. At the still the officers found two half-gallon jars of moonshine whiskey. There were sixty half-gallon jars of moonshine whiskey in the building. (Tr. pp. 20, 21).

The officers did not have a search warrant.

The left instructions at one of the houses for the plaintiff in error to come into the Sheriff's office. He came in promptly and made bond.

BRIEF AND ARGUMENT

The assignments of error are that (1 and 2) the evidence preponderates against the verdict, (3 and 4) the trial Court erred in admitting and in failing to withdraw the testimony of

the officers as to the finding of the still and whiskey, on the ground that the search was illegal and the trial Court erred (5 and 6) in failing to define illegal possession of liquor and in failing to charge that if the evidence showed the premises did not belong to the plaintiff in error there is a presumption that the liquor belonged to the owner of the premises.

Assuming, but not conceding, that the charge should have been broader upon the subjects complained of, the failure of the trial Court to give more liberal instructions cannot be treated as reversible error in the absence of special requests.

Powers v. State, 117 Tenn., 363, 371

The controlling question is whether the search, without a search warrant, was legal.

The Court has expressly held that the provision of Article I, Section 7 of the Constitution "that the people shall be secure in their person, houses, papers and possession from unreasonable searches and seizures" includes the space of ground adjoining the dwelling house and the buildings thereon within the same common fence in daily use in connection with the conduct of family affairs.

Welsh v. State, 154 Tenn., 60

In the course of the opinion the Court said that the word "possessions" as used in the Constitution does not include wild or waste lands that are unoccupied. (p. 63).

That the constitutional prohibition against unreasonable searches is limited to the curtilage is expressly indicated in Allen v. State, in which it is held that the plaintiffs in error were in no position to question the legality of the search since they were not in actual or constructive possession of the enclosed

pastures in which the still was found, the constitutional protection being personal to the owner of the premises or some other person in lawful possession thereof.

Allen v. State, 161 Tenn., 71

As has been indicated, it was unnecessary for the Court, in the cases just referred to, to pas directly upon the exact question here presented. The opinions clearly indicate, however, that the Court will adopt the rule which has been adopted by the Supreme Court of the United States and in Kentucky, Missouri, Oklahoma, Texas, Montana and Washington.

In Hester v. U. S., 265 U. S., 57, 68 L. Ed., 898, the Court said in an opinion by Mr. Justice Holmes:

> ".....the special protection accorded by the fourth amendment in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the houses is as old as the common law".

The cases holding that a search and seizure without a warrant, or a valid warrant, is not unreasonable, where it is made in open fields, woods, etc. are collected in the following annotations.

27 A.L.R., 709, 732 et seq
39 A.L.R., 811, 828 et seq
74 A.L.R. 1418,1454 et seq

If these annotations are exhaustive, as they usually are, Mississippi is the only State holding that the word "possessions" as used in this constitutional provision, extends to all of the property in possession of a citizen and, therefore, that a search in a wooded district without a search warrant is illegal.

Falkner v. State, 134 Miss., 253, 98 So., 691
Helton v. State, 101 So. 701

The Kentucky Court, in the opinions cited in the annotations above referred to, applies the rule of ejusdem generis in construing a similar provision of the Constitution of that State.

> "The rule of interpretation indicated by these words (ejusdem generis) is in substance that, where in a statute general words follow special words which limit the scope of such statute, these general words must be construed as applying to things of the same kind or class as those indicated by the preceding special words."
>
> State v. Wheeler, 127 Tenn., 58, 61

> "It is a sound rule of construction, whether applied to a statute or a Constitution, that it shall be taken and construed as a whole. 'Such instruments, ' says Mr. Cooley,' are adopted as whole, and a clause which, standing by itself, might seem of doubtful import, may be made plain by comparison with other clauses.' He adds:- 'It is, therefore, a rule of construction that the whole is to be examined, with a view to arrive at the true intention of each part. Effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.' Cooley's Const. Lim., ps. 57, 58.
>
> ' One part is not to be made to defeat another, if by any reasonable construction the two can be made to stand together.' Ibid."

If the general word "possessions" as used in Article I, Section 7 of the Constitution were given its broad meaning, the words "houses, papers" as used in that Section would be entirely nugatory.

The historical reasons for the adoption of the constitutional provision here in question so ably discussed in Hughes v. State, 145 Tenn., 544, Craven v. State, 148 Tenn., 517 and numerous other cases, do not apply to open fields and woodlands upon which trespass may be committed and searches made without the slightest interference with the lawful pursuits of the citizens of the State. Such searches do not in any way invade or disturb the privacy of the home.

In addition, exact title to and boundaries of mountain land in Tennessee, upon which the validity of the search warrant might well turn, are so uncertain, as a rule, that, as a practical matter, enforcement of criminal laws would be extremely difficult and uncertain if officers were required to have a valid search warrant to permit them to search mountain land. Frequently only the owner of property and the owners of property adjacent thereto know the true boundaries thereof. That they do not always agree is evidenced by the numerous cases in which the Courts are called upon to decide this question. The tendency to copy descriptions in deeds as titles pass from person to person makes it impossible, in many cases, for officers to go to the Register's office and obtain accurate description of property they desire to search, when that property consists of fields and woods not immediately contiguous to buildings which are relatively easy to describe.

The State respectfully insists that the search in this case would not have been unreasonable even if the woods in which the officers found the still and the whiskey had been enclosed in a fence. In this case, there were only stretches of fencing which did not connect and did not enclose anything. If,

as the State respectfully insists, the search was not unreasonable and the evidence as to the results of the search was not, therefore, inadmissible, there is no merit to the assignments of error which question the sufficiency of the evidence. It is undisputed that the officers found a gallon of corn whiskey at the still. These two fruit jars were covered with new caps like those the plaintiff in error had in his package and left at the shack in which the sprouted corn and some thirty gallons of whiskey were found. In his brief the plaintiff in error recognizes the presumption that the whiskey found belonged to the owner of the premises. The only evidence as to ownership is that the plaintiff in error asked one of the officers what the hell they were doing on his premises.

In addition the jury was entitled to consider his flight as a circumstance tending to indicate his guilt.

Moody v. State, 159 Tenn., 245, 249

The State respectfully insists that the evidence does not preponderate in favor of the innocence of the plaintiff in error.

Christian v. State, 184 Tenn., 163,164

In conclusion, the State respectfully insists that the judgment of the lower Court is without reversible error and should be affirmed.

Respectfully submitted,

J. Malcolm Shull
Assistant Attorney General

JMS:C
9-1-48

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE, TENNESSEE

HENRY STINNETT)
) CRIMINAL CASE NO. 6
VS.) FROM THE CRIMINAL COURT OF
) BLOUNT COUNTY, TENNESSEE.
STATE OF TENNESSEE)

ASSIGNMENTS OF ERROR AND BRIEF IN SUPPORT THEREOF

ON BEHALF OF HENRY STINNETT

I.

STATEMENT OF THE CASE

At the August Term 1947 of the Criminal Court for Blount County, Tennessee the Grand Jury returned an indictment against the Plaintiff-In-Error, Henry Stinnett, which contained three counts, to-wit, the First Count with the unlawful possession of intoxicating liquor, the Second Count with the unlawful manufacture and attempt to manufacture intoxicating whiskey, and the Third Count with unlawfully having in his possession and under his control a still, parts of a still and aparatus used and intended to be used for the unlawful manufacture of intoxicating whiskey and brandy.

Record pages 6 and 7.

The case came on for trial in the Criminal Court for Blount County, Tennessee on December 12, 1947, which resulted in the conviction of the Plaintiff-In-Error, Henry Stinnett, of possessing intoxicating liquor under the First Count of the

indictment and his fine fixed in the sum of Five Hundred ($500.00) Dollars.

Record pages 8 and 9.

The Plaintiff-In-Error was acquitted upon Counts Two and Three of the indictment.

On December 19, 1947 the Plaintiff-In-Error filed his motion for a new trial and assigned as grounds therefor the following:

"1. The court erred in failing and refusing to sustain the motion to quash the indictment made in this case for the reason that the First Count of the indictment is not related to or connected with the charges made in the Second and Third Counts thereof.

"2. There is no material evidence to support the verdict of the Jury and the evidence does not show that the defendant was in possession of intoxicating liquor.

"3. The evidence preponderates against the verdict of the Jury and in favor of the defendant's innocence.

"4. The court erred in admitting the testimony of Ben Mays, James Beeler and Hugh Graves for the reason that their testimony was the result of an illegal and lawful search of the premises and therefore the evidence was not admissible.

"5. The court erred in failing and refusing to sustain the motion of the defendant at the close of the State's evidence to withdraw from the Jury the testimony of the three witnesses introduced by the State and hereinabove named.

"6. The court erred in failing and refusing to direct a verdict in favor of the defendant, made at the conclusion of the State's proof.

"7. The court erred in failing to define the illegal possession of intoxicating liquor in his charge to the Jury.

"8. The court failed to charge the Jury that if the evidence showed that the premises and buildings were not the property of the defendant then there is a presumption of law that the liquor belonged to the owner of the premises."

Record pages 9 and 10.

The Court overruled the motion for a new trial and the Plaintiff-In-Error excepted and prayed an appeal to this Court, and he was granted thirty days within which to prepare and file his Bill of Exceptions.

Record pages 10 and 11.

The Bill of Exceptions was filed on January 12, 1948.

Record page 12.

II.

STATEMENT OF THE FACTS

On July 2, 1947 Ben Mays, Sheriff of Blount County, with Deputies James R. Beeler and Hugh Graves, went to the home of the Plaintiff-In-Error, Henry Stinnett, to make a search for whiskey and a still.

Record pages 13 and 14.

Henry Stinnett lived off of the Walland Highway about eight or ten miles from Maryville.

Record page 14.

The Sheriff and his Deputies searched the premises, and in addition a little house, and they found a still on the premises,

sprouted corn and sixty-one gallons of liquor in the little house.

Record page 20.

The Sheriff and his Deputies made the search and entered the premises without a search warrant.

Record page 21.

The premises of the Plaintiff-In-Error were between one-half and one-quarter of a mile from the public road and could not be seen from the public road.

Record page 21.

To enter the premises of the Plaintiff-In-Error from the public road they had to cross a fence. On this question Officer James R. Beeler testified as follows:

"Q. When you start up the hollow, to get up there to the still, dont you have to cross a fence to get there?

A. At the road here?

Q. Yes.

A. Yes sir.

Q. And there was a fence there?

A. Yes sir.

Q. And you went over that fence?

A. Went over it?

Q. Climbed over it, through it, or under it. You didn't have any search warrant to go over that fence and into that property?

A. No sir."

Record page 33.

On the same question Deputy Sheriff Hugh Graves testified as follows:

"Q. Mr. Graves, did you go up there with Mr. James R. Beeler?

"A. Yes sir.

Q. And as you went up there, you had to cross a fence to get into this property?

A. Yes sir.

Q. And you went over into that property across the fence, or under it, or over it?

A. Over it.

Q. And you didn't have any search warrant when you went on to these premises, did you?

A. No sir."

Record page 37.

When the officers went to the premises James R. Beeler testified that he saw the Plaintiff-In-Error on the premises and that the Plaintiff-In-Error said to one Estel Jones, who was also a Deputy Sheriff, "What the God-damn hell you people doing on my premises".

Record page 25.

The officers testified that there were several houses in and around where the still was and that there were many paths and roads around in this vicinity. They did not know who lived in any of the houses and could not say in which house the Plaintiff-In-Error lived.

III.

ASSIGNMENTS OF ERROR

In this case the Plaintiff-In-Error makes the following assignments of error to the action of the Trial Judge in overruling and disallowing his motion for a new trial.

1. The Court erred in not granting a new trial because there is no material evidence to support the verdict of the Jury. The evidence does not show that the Plaintiff-In-Error was in

possession of intoxicating liquor.

2. The Court erred in not granting a new trial because the evidence preponderates against the verdict returned by the Jury and in favor of the Plaintiff-In-Error's innocence.

3. The Court erred in not granting a new trial for the reason that the Trial Judge erred in admitting the testimony of Ben Mays, James Beeler and Hugh Graves as to what they found on the Plaintiff-In-Error's premises in that what was found was the result of an illegal and unlawful search of the premises, and, therefore, the evidence was not admissible.

4. The Trial Court erred in failing and refusing to sustain the motion of the Plaintiff-In-Error, made at the close of the State's proof, to withdraw from the Jury the testimony of the three witnesses, Ben Mays, James Beeler and Hugh Graves. They were officers of the law, the Sheriff and two Deputies, and they entered the premises of the Plaintiff-In-Error without a search warrant.

5. The Court erred in failing to define the offense of an illegal possession of intoxicating liquor in his charge to the Jury.

6. The Trial Court erred in failing to charge the Jury that if the evidence showed the premises and buildings were not the property of the Plaintiff-In-Error then there is a presumption of law that the liquor belonged to the owner of the premises.

IV.

DISCUSSION OF THE ASSIGNMENTS OF ERROR

We wish to discuss first the assignment of error which deals with the action of the Trial Judge in not granting a new trial for the reason that the Court admitted over the objections of the Plaintiff-In-Error the testimony of Ben Mays, James Beeler and Hugh Graves with reference to the finding of the liquor, for

which the Plaintiff-In-Error was convicted. Under the proof in this case one of two propositions must be true: (1) That the premises searched by the officers was in the custody and control of the Plaintiff-In-Error, or (2) That the premises were not in his custody and possession and he had no control over them.

Under the first proposition if the premises were in the possession and control of the Plaintiff-In-Error, as the evidence in this case clearly indicates, then the officers had no right to search the buildings on these premises without a search warrant. The proof shows conclusively that the officers had to cross a fence to go to the place where the liquor was found and they had to search the building in which the liquor was found to find it. It seems that the State took the position that inasmuch as there was not a fence around the building and that it was a rough building that therefore the officers had a right to search it without using a search warrant. We do not think this a correct proposition of what the law requires. The Sheriff and his Deputies went upon the premises for the express and sole purpose of searching for a still and for liquor. They had to cross a fence from the public road to go to the buildings and they had to go into the building and make a search inside to find the liquor. We respectfully insist that under the Constitution of the State of Tennessee and the decisions of this Court that this search was wholly and totally illegal, unlawful and without authority, and that the testimony of the officers relative to said search should have been excluded by the Trial Judge. The testimony of these officers was duly excepted to by the Plaintiff-In-Error, and at the conclusion of all of the proof introduced the Plaintiff-In-Error moved the Court to exclude this testimony in the following language:

> "We move to direct a verdict with reference to all three counts of the indictment because there is not sufficient proof in the record to justify a conviction that this was the defendant's still,

> or that the liquor that was found there was his liquor, and for the further reason that this defendant cannot be tried for operating a still and for possessing apparatus and for possessing liquor in one indictment, and if Your Honor please, further, there is no proof that the still was in operation there at all by this defendant. Move Your Honor to direct a verdict on all three counts."

Record page 38.

In passing upon the foregoing motion the Trial Judge said:

> "During the trial the Court was inclined to exclude the evidence about what was found in the little house, but at the conclusion of the State's evidence it is apparent to the court that this little house was out there, and not in any enclosure; what is called under the law wild land. Fence along one side, or even two sides wouldn't make it enclosed. The proof shows this is woodland, wild land. The Supreme Court has repeatedly held that where it is the type terraine like that, dont have to have a search warrant to search.
>
> "Now as to the house where the liquor was found, this being wild land, not enclosed terraine, the officers, upon hearing a description of the house, it was apparent to them this was a rough-built house; witnesses swore there was no enclosure; nobody lived in the house; they could look through cracks and see liquor in there, therefore they had a right to go in there and search without a search warrant. Overruled."

Record page 39.

We, therefore, insist that the Trial Court erred in admitting the testimony of these officers over the objection of the Plaintiff-In-Error, and in failing to sustain a motion to exclude the testimony from the Jury on the motion made by the Plaintiff-In-Error at the conclusion of all the proof.

If the liquor that was in the little house that was searched by the officers was the liquor of the Plaintiff-In-Error then it was occupied by him, used by him and in his possession and, therefore, the same could not be searched without authority of law to make the search. We refer the Court to the case of

Welch v. State, 154 Tennessee, page 60 at page 64, wherein the Court defined the word "possession" and applied it to the facts of that case and said:

> "It is obvious that it was intended to protect possessions in actual occupancy from unreasonable searches and seizures, whether real or personal, meaning thereby, as pointed out by Justice Cooley, that when one desires to search the occupied premises of another he must do so in a lawful manner, viz: procure a search warrant in the manner prescribed by statute.
>
> "We cannot believe that the makers of the Constitution intended to license officers to go upon the property of one in actual possession and occupancy and promiscuously search about with the hope or expectation of finding contraband goods, but, on the other hand, they proposed to prohibit such conduct by the provision in question."

The Attorney General for the State took the position in the trial below that the fact that a fence was not around each and every side of this property and the fact that the house where the liquor was found was not occupied and no one lived in it that therefore it was an abandoned house or located on wild land and therefore the officers would not have the right to search it without a search warrant, and then on the other hand he took the position that the liquor being found in the little house that it was therefore in possession of the Plaintiff-In-Error and he was guilty of unlawful possession thereof. This situation does not seem either logical, reasonable nor legal. The evidence in the case indicates that this property was in the possession and control and occupancy of the Plaintiff-In-Error. He asked the officers when they accosted him on the premises what they were doing on his premises or property. We, therefore, respectfully insist that this was an unlawful search and seizure and the testimony illicited should have been excluded by the Trial Judge.

Under the second proposition hereinabove set out, that is, if the premises were not in the possession of the Plaintiff-In-Error, then there is not sufficient proof to convict him of having

illegal possession of the liquor. If the premises were not occupied by him, if he did not have possession thereof, then there is no proof to show it was his liquor except a very slim inference of the fact. There is not sufficient proof to convict him of having possession of the liquor illegally and contrary to the Statute. If it were not his premises, if he did not occupy or use the same, and if the same were not under his control then they must have been under the control, use and occupancy of some other person and the liquor would be presumed to be owned by the person who had control and possession of the premises. We, therefore, insist that under the proof there is not sufficient evidence, in fact there is no material evidence, to support the verdict of the Jury and the judgment of the Court to show beyond a reasonable doubt that the Plaintiff-In-Error was in the unlawful possession of the liquor found by the officers. In this case, while the officers testified that they did not know who had possession of the premises, who owned them, or who had possession of the liquor, they were accusing the Plaintiff-In-Error of having such possession and intimated that the house where he lived was close to the house where the liquor was found and therefore it must be his liquor, and the State took the position below that it was his liquor and that he should be convicted of the unlawful possession thereof. This Court said in the case of Everett v. State, 182 Tennessee, page 22 at page 27 as follows:

> "(6) It is also the State's contention that the officers did not know that the place searched belonged to the defendant as owner or tenant; that if he had no proprietary interest in the place, no constitutional right of his was violated by the search, and the conviction should be affirmed on (1) the finding of the liquor, and (2) defendant's subsequent admission of ownership. We cannot agree with this contention because both officers who made the search, testified that although they did not know positively, they had been informed and had reason to believe that the place searched was "the place of business of the defendant." They knew, therefore, or should have known as officers, that an affidavit and warrant in regular form was necessary for a legal search."

We, therefore, insist that under the proof in this case there is not sufficient evidence to support the verdict of the Jury, that the evidence preponderates against the verdict and in Plaintiff-In-Error's favor should the Court come to the conclusion that the premises were not occupied and used by him and therefore a search warrant was not required for the officers to make the search they did.

We think under the record in this case that the Court should have defined to the Jury the law relative to the illegal possession of intoxicating liquor. That the Trial Judge should have told the Jury that if the liquor was not found on the premises, or under the control of the Plaintiff-In-Error, that they could not convict him of the crime for which he was indicted. The Court should have told the Jury that they must find that this liquor belonged to the Plaintiff-In-Error and that it was in his possession and control before they could convict.

We further insist that the Trial Judge should have charged the Jury that if the evidence showed that the premises and buildings were not the property of the Plaintiff-In-Error and were not in his custody and control, then there is a presumption of law that the liquor belonged to the owner of the premises. The Court failed to give any definition of illegal possession and failed to charge the Jury that they must find beyond a reasonable doubt that this liquor was in the custody and control of the Plaintiff-In-Error.

V.

IN CONCLUSION

We, therefore, respectfully insist that the Trial Judge committed error in not granting a new trial and that this Court should now reverse the action of the Trial Judge and grant a new trial for the following reasons:

1. The evidence of the possession of intoxicating liquor given by the Sheriff and his Deputies was the result of an unlawful, illegal and unreasonable search, and the Trial Judge should have excluded this testimony from the Jury.

2. That there is no material evidence to support the verdict of the Jury when the illegal evidence is excluded from their consideration. In no event is the evidence sufficient to convict the Plaintiff-In-Error of possessing intoxicating liquor illegally under the Statute.

3. That the evidence preponderates against the verdict of the Jury and in favor of the Plaintiff-In-Error's innocence.

4. That the Court erred in not clearly defining to the Jury what constitutes illegal possession of intoxicating liquor.

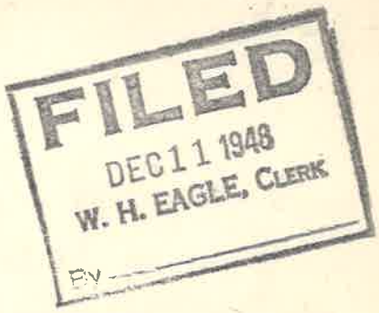
5. That the Court erred in failing to charge the Jury that there is a presumption of law that the intoxicating liquor belonged to the owner of the premises where there was no direct proof that the Plaintiff-In-Error in this case had the custody and control thereof.

We, therefore, respectfully insist that the action of the Trial Judge in passing upon the motion for a new trial should be reversed and the case remanded for a new trial.

Respectfully submitted,

Attorneys for Plaintiff-In-Error
Maryville, Tennessee.

For Publication
Burnett, J.



HENRY STINNETT	)	
	)	
	)	BLOUNT CRIMINAL
V.	)	
	)	HON. SUE HICKS,
	)	
	)	JUDGE
STATE OF TENNESSEE	)	

For Plaintiff-in-Error:

Goddard & Gamble,
Maryville, Tennessee

For The State:

J. Malcolm Shull,
Assistant Attorney General

O P I N I O N

The plaintiff in error was indicted in a three count indictment. He was convicted on the first count only, i.e., the count charging possession of intoxicating liquor. He was acquitted on the counts charging unlawful manufacture of whisky and possession of a still. He appeals from this conviction wherein he was fined $500.00 by the jury. A fair statement of the facts is given by the Attorney General in the State's brief as follows:

"The Sheriff and his deputies found a complete still, which was warm and had ashes and coals in the furnace, across a ravine about five or six hundred feet from two houses. A child in one of the houses called the plaintiff in error "Daddy". The officers had been able to drive to the houses. There were several pieces of fence on the premises, but the premises were not

surrounded by a fence. The officers crossed one of these fences in going to the still. As they neared the still, the plaintiff in error was seen about ten feet from it. As he ran he passed one of the officers and asked, "What the G. D. hell you people doing on my premises?" (Tr. p. 25). He had a package under his arm which he dropped at a little building about twenty-five feet from the still. This package contained about two dozen new fruit jar caps. Without searching the building the officers saw through the cracks that it contained sprouted corn, a grinding mill, bottles and some cases. (Tr. p. 20). This building was on a trail and at the end of a water line from the still. At the still the officers found two half-gallon jars of moonshine whisky. There were sixty half-gallon jars of moonshine whisky in the building. (Tr. pp. 20, 21)."

The evidence narrated was secured without the aid of a search warrant. This being true the obvious determinative question arises, it is very clearly and forcibly raised through various assignments, that is, whether or not the search, without a search warrant, was legal. Apparently this court has never directly decided the question presented under a like state of facts. This court though has indicated in at least two published opinions that a search under such facts would be

legal without a search warrant. See Welsh v. State, 154 Tenn., 60,289 S.W. 510; Allen v. State, 161 Tenn., 71, 29 S.W.(2d) 247.

Specifically the question here is: Does the word "possession" as used in Article I, Section 7 of the Constitution "that the people shall be secure in their person, houses, papers and possession from unreasonable searches and seizures" include the still and small house adjoining it as belonging to and a part of the home of the plaintiff in error?

It is a well recognized construction of this Constitutional language that the space of ground adjoining the dwelling house and the buildings thereon within the same common fence in daily use in connection with the conduct of family affairs are within the "searches and seizures" protection. What we mean, is well illustrated in Welsh v. State, supra, where it was held that the term "possessions" did include a hog lot inclosed with a fence and used by the defendant as a necessary part of his farming operations, although it was not within the curtilage. In other words, when the search is made upon premises so inseperable from and immediately adjacent to one's home as to be a part thereof, the entry is in effect, an invasion of the privacy of the home. In so far as Welsh v. State, supra, meets the test herein applied it is reaffirmed and will be followed in cases similar in their facts.

The Supreme Court of the United States and the courts of last resort of Kentucky, Missouri, Oklahoma, Texas, Montana and Washington hold that a search and seizure without a warrant, or a valid warrant, is not unreasonable, when it is made in open fields, woods, etc. See annotations 27 A.L.R. 709; 39 A.L.R. 811; 74 A.L.R. 1418. In Hester v. U.S., 265 U.S. 57, 68 L.Ed. 898, Mr. Justice Holmes delivering the opinion said in part:

"--- the special protection accorded by the fourth amendment in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the houses is as old as the common law."

In Wolf v. State, 110 Tex. Crim. Rep., 124, 9 S.W.(2d), 350, the Texas Court expresses our idea, as to the correct rule to be applied to a situation presented by this record, in these words:

> "It is apparent from the precedents that the immunity from interference is founded upon the desire to give effect to the idea that "a man's home is his castle"; that an unreasonable search is one which trenches upon the peaceful enjoyment of the house in which he dwells or in which he works and does business, and those things connected therewith, such as gardens, outhouses, and appurtenances necessary for the domestic comfort of the dwelling house or that in which the business is conducted. In its limitations, the immunity intended is analogous to that which applies to the curtilage of which the common law speaks, and does not render unreasonable the search of woods, fields, ravines, or open spaces not so connected with the place of business or dwelling, though owned by the same individual. See State v. Shaw, 31 Me. 523; Cook v. State, 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688; Washington v. State, 82 Ala. 31, 2 So. 356; State v. Hecox, 83 Mo. 531; Cornelius on Search and Seizure, § 25, p. 88."

Apparently the courts of Mississippi are the only ones holding to the contrary. The Mississippi courts hold that the word "possessions" extends to all of the property in possession of a citizen and, therefore, that a search in a district without a search warrant is illegal. Falkner v. State, 134 Miss., 253, 98 So., 691.

The Kentucky court applies the rule of ejusdem generis in construing a similar provision of the Constitution of that State. This rule is that "general words must be construed as applying to things of the same kind or class as those indicated

by the preceding special words". State v. Wheeler, 127 Tenn., 58, 61. It seems to us that this is a reasonable and proper means of construction of a Constitutional provision. See Cooley's Const. Lim; pages 57, 58. We apply this method of construction here. In doing so we find that the words which precede "possession" are "their person, houses, papers". It would therefore appear that this still and little "still house" which are in no way connected with the dwelling house, neither by path nor enclosed fence, are not within the protection of the "searches and seizures" clause of the Constitution.

This construction seems logical and reasonable to us. Especially so if we take the converse of the situation, that is, suppose a search warrant was duly issued for the dwelling house and the whiskey was found where it was. Under such an assumed state of facts clearly the search warrant would not permit a search of the property where the whiskey was found.

A gallon of whiskey was found at the still. This was in two half-gallon fruit jars covered with new caps like those the plaintiff in error had in his package which he left at the little shack just before his flight. The only evidence we have as to the ownership of the whiskey or the premises is a statement of the plaintiff in error, which is not denied, that he asked one of the officers what the hell they were doing on his premises. Then too, the flight of the plaintiff in error is a circumstance to which the jury, might look tending to indicate his guilt. Moody v. State, 159 Tenn., 245, 249.

Certain assignments are directed to the failure of the trial judge to charge more elaborately or broader on certain subjects. No special instructions were asked on the subjects complained about. Even though the instructions complained about were not as broad as they might have been this

does not constitute reversible error in the absence of special requests. Powers v. State, 117 Tenn., 363, 371.

The views above expressed are those of the writer of this opinion. The Chief Justice agrees with this view point but the majority of the Court disagree. Under the facts of this record the majority think a search warrant necessary and there is no reasonable excuse shown why the officers did not obtain one.

The result, therefore, is that the case must be reversed and dismissed.

Hamilton S. Burnett, Associate Justice