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Prohibition Searches by New York State Police [Gambino v. United States, 48 Sup Ct. 137]

James Parker Hall

recognize the decree of annulment as invalidating the marriage ab initio as between the parties, saving merely the rights of third persons which (assuming the marriage to have been valid) arose prior to the acquisition by the parties of a domicile in the state decreeing annulment.

The decision of the House of Lords in *Salvesen or Von Lorang* v. *Administrator of Austrian Property*[10] makes it clear that an annulment decree rendered in a state in which the parties acquired a domicile subsequent to their alleged marriage, based on a finding that the marriage was invalid in the state of celebration, will be given retroactive effect in England as a decree in rem, at least to some extent. A decree of annulment made by a court of Wiesbaden in which the parties were domiciled was held to defeat the claim of the British administrator of Austrian property to the property of the supposed wife who, if married, would have been an Austrian subject. Since the parties, who had married in France, had become domiciled in Wiesbaden long prior to the outbreak of the World War and hence long prior to the time when the administrator's claim arose, the question whether the decree affected retroactively supposed rights of third persons accruing before the parties acquired a Wiebaden domicile was not before the court and was not discussed.

The case does not hold or intimate that the state of the domicile alone has jurisdiction to grant annulment and the English courts have themselves annulled English marriages without regard to the domicile of the parties.[11] It remains to be seen what, if any, effect the decision will have in this country. Such American cases as exist are in hopeless conflict and in most jurisdictions authority on the point is altogether lacking. Under these circumstances the decision of the House of Lords is likely to have considerable influence, although this influence may be lessened by the fact that a different view of jurisdiction for annulment has been adopted in the Restatement by the American Law Institute.[12]

E. MERRICK DODD, JR.

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—ADMISSIBILITY OF EVIDENCE ILLEGALLY ACQUIRED BY STATE OFFICERS ACTING TO ASSIST UNITED STATES.—[United States]* Another interesting point has just been decided by the federal Supreme Court regarding the use of evidence obtained by illegal searches and seizures. In *Gambino* v. *United States*[1] the facts were that some New York state troopers, without probable cause and without a search warrant, arrested Gambino in New York near the Canadian border, illegally

10. Supra, note 1.
11. *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Linke* v. *Van Aerde* (1894) 10 T. L. R. 426.
12. See note 8.

*This note was found among the papers of Dean Hall. While evidently prepared for publication it had not yet been finally revised by him.—[Ed.]
1. (1927) 48 Sup. Ct. Rep. 137.

searched his car, and seized some liquor being transported therein in violation of the National Prohibition Act. Gambino and the liquor were at once turned over to the federal officers by the state troopers, and, upon the evidence thus obtained, Gambino was convicted in the federal courts over his objection to the use there of the illegally obtained evidence. An affirmance of this by the circuit court of appeals[2] was reversed in the principal case.

Before this seizure was made the New York state prohibition enforcement act had been repealed so that what Gambino did was no offense against state law, but there was a general belief among state officials that the existing state law required state peace officers to aid federal officers in enforcing the federal prohibition law. The court said:

"No federal official was present at the search and seizure, and the defendants made no attempt to establish that the particular search and seizure was made in co-operation with federal officials. But the facts of which we take judicial notice (compare *Tempel* v. *United States* 248 U. S. 121, 130), make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act, and that they made this arrest, search and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the federal prosecution. . . .

"We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search, and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the direction of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of the federal officials. Compare *Silverthorne* v. *United States* 251 U. S. 385, 392. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States. Whether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to inquire.

"The conclusion here reached is not in conflict with any of the earlier decisions of this court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes. For in none of these cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws."[3]

It will be observed that this course of reasoning, if valid, cannot well be confined to cases like the present one of a supposed attempt to discharge an official duty to aid federal enforcement. It would seem equally to include improper searches and seizures by private persons, if really done to assist the federal government. Private raids to obtain evidence for federal use, some-

2. (1927) 16 Fed. (2nd) 1016.
3. 48 Sup. Ct. Rep., at 138-39.

times advocated by those disatisfied with ineffective official enforcement, would not only be tortious, but would fail to secure evidence that could be used by the federal courts. Whether such a result is really required by the supposed policy back of the Fourth and Fifth Amendments, or whether such policy should be deemed to be satisfied by civil and criminal prosecutions against the wrongful actors in illegal seizures, is a difficult question to answer. No doubt the latter, as effective remedies or deterrents, would be often illusory; on the other hand, there is a wide-spread belief that, under modern conditions, some of our constitutional provisions on behalf of persons accused of crime unfairly handicap the state. There is a good deal to be said for the view that a *correct,* even though *illegal,* guess that a crime is being committed should not be penalized by its collateral effect upon the evidence thus obtained. See the very well-considered observations upon this by Cardozo, J., in *People* v. *Defore,*[4] which are followed by about two-thirds of the state courts, *contra* to the *Weeks*[5] and *Silverthorne*[6] cases in the federal courts. See the cases collected in 11 A.L.R. 681; 13 A.L.R. 1,168; 24 A.L.R. 1,408; 32 A.L.R. 408; 41 A.L.R. 1,145.

JAMES PARKER HALL.

MORTGAGES BY DEED OF ABSOLUTE CONVEYANCE—NATURE OF—PAROL RELEASE OF EQUITY OF REDEMPTION.—[Illinois] In the case of *Illinois Trust Co.* v. *Bibo,*[1] the court states that where a mortgage is created by a deed of absolute conveyance, accompanied by a separate contemporaneous sealed instrument of defeasance or reconveyance, the two instruments together constitute a legal, as distinguished from an equitable, mortgage; that where the instrument of defeasance is not under seal, the deed and instrument of defeasance constitute merely an equitable mortgage. The case of *Fitch* v. *Miller*[2] is cited in support of this distinction. This case does, indeed, hold that the instrument of defeasance being unsealed, the deed of conveyance in connection therewith constituted an equitable mortgage. In the later elaborately reasoned case of *Williams* v. *Williams*[3] the court held that a mortgage created by absolute deed accompanied by a separate contemporaneous bond to reconvey, did not "when taken together constitute a common law mortgage, nor does the legal title remain in the grantor in the deed."[4] The court accordingly held that the interest or estate of the mortgagor, being purely equitable, could be validly transferred, by way of gift, by a mere unsealed assignment written on the bond itself, and a delivery of the bond so assigned; and that the formalities essential for the transfer by gift of the ordinary equity of redemption were not,

4. (1926) 242 N. Y. 13.
5. *Weeks* v. *United States* (1914) 232 U. S. 383.
6. *Silverthorne* v. *United States* (1920) 251 U. S. 385.

1. (1928) 328 Ill. 252, 257.
2. (1902) 200 Ill. 170, 65 N. E. 650.
3. (1903) 270 Ill. 552, 68 N. E. 449.
4. At p. 256.