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Syllabus.

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this instruction, as modified, if soda water, sarsaparilla, or any other cooling or refreshing drink, not spirituous, were sold, the vendor could not escape conviction. He would be equally liable to punishment with the vendor of whiskey or other spirituous beverages. Such is not the law.

To constitute a tippling house, it is necessary that intoxicating drinks should be sold therein.

The judgment must be reversed and the cause remanded.

*Judgment reversed.*

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HENRY CLARK

v.

JOHN CUMINS.

1. ARRESTING DESERTER—*seizure of private property.* The authority to arrest a person in the military service of the government, as a deserter, does not imply the authority to seize and carry away the private property of the person arrested; and if the person making the arrest does seize and carry away the property of the person so arrested, he must respond to him in an appropriate action therefor.

APPEAL from the Circuit Court of Crawford county; the Hon. HIRAM B. DECIUS, Judge, presiding.

The opinion states the case.

Mr. E. CALLAHAN, for the appellant.

Mr. J. C. ALLEN, for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court :

## Syllabus.

In this case, it appears that Clark, not being in the military service of the government, but acting under the authority of the provost marshal, arrested Cumins as a deserter, and, at the same time, took and carried away from the house of Cumins, a gun which was the private property of the latter. Cumins has demanded the return of the gun, but it has not been restored, Clark swearing he turned it over to the provost marshal. The plaintiff below obtained judgment for the value of the gun.

The judgment was clearly right. Whatever may have been the authority of the defendant to arrest the plaintiff as a deserter, he clearly had no right or authority to seize and carry away his private property. He does not claim to have been directed by the provost marshal to seize that, and no facts appear upon the record showing a state of affairs which would justify the provost marshal in assuming such authority, even if he had undertaken to assume it.

The judgment must be affirmed.

*Judgment affirmed.*

CAROLINE EIMER

v.

GEORGE J. EIMER *et al.*

1. ATTORNEY'S FEES—*not taxable as costs.* In a suit for partition and the assignment of dower, on the motion of solicitors for the complainant, on the coming in of the master's report, for an order on the master to pay them out of the proceeds of the sale, their fees in the case, and the court so ordered, it was

47	373
42a	660
47	373
53a	673
47	373
168	187

47	373
94a	297

47	373
99a	422

47	373
215	507
215	508