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FEDERAL CONSTITUTIONAL LIMITATIONS ON SEARCHES BY STATE AUTHORITY

BY BEN ELY, JR.*

A recent decision of the Federal Supreme Court¹ suggests some interesting problems in the law of search and seizure. The facts of the case were these:² One Byars was tried and convicted in the District Court for the Southern District of Iowa upon an indictment charging him with the felonious possession of certain counterfeit revenue stamps made to imitate those used on bottles of bonded whiskey. His conviction was upheld by the Circuit Court of Appeals for the 8th Circuit. The case was taken to the Supreme Court on certiorari, and in that Court the judgment below was reversed and the defendant discharged.

The following circumstances gave rise to the prosecution: A police officer of the City of Des Moines filed with the municipal court of that city a complaint in which he stated,

that the affiant has good reason to believe and does believe that defendant has in his possession intoxicating liquors.

This complaint accurately described the place where the above mentioned liquors were kept and was verified on oath by the applicant. The Municipal Court thereupon issued a search warrant in proper form directed to any peace officer of Des Moines, Polk County, Iowa. This warrant was placed in the hands of one Densmore, a city policeman. As Densmore and certain other police officers were about to start for

* Prosecuting Attorney of Marion County, Missouri.

¹ *Byars v. United States* (1927) 71 Law. Ed. 331, — U. S. —, — SUP. CT.—, reversing 4 Fed. (2nd) 507.

² The facts of the case as herein stated are taken in part from the opinion of Mr. Justice Sutherland in the Supreme Court and in part from that of Judge Van Valkenburgh in the Circuit Court of Appeals.

defendant's home they met one Adams, a Federal Prohibition Agent, and requested him to accompany them. When they arrived at the residence of defendant, Densmore instructed each member of the party including Adams to take charge of one room in the house and search it. During the course of this search Adams found some twenty of the counterfeit stamps mentioned upon the possession of which the first count in the indictment was bottomed. One of the State police officers found fifty-four similar stamps in another room, and it was with the possession of these stamps that the defendant was charged in the second count. Before the trial defendant filed a motion to suppress the evidence gained by this search because of the alleged invalidity of the warrant which he claimed violated both Federal and State Constitutional provisions. This motion was overruled on the trial, similar objection to this evidence was made *ore tenus* and this was also overruled. Defendant was convicted under both counts of the indictment and in the appellate courts, assigned error upon the admission of the evidence mentioned.

The court speaking through Mr. Justice Sutherland, declared that the warrant was illegal under the Fourth Amendment, if that constitutional provision applied to the case, since the complaint on which it was issued was sworn to on "information and belief" only.³ It further held that the fact that a federal officer was present made the search a federal one and hence it came within the perview of the Fourth Amendment.⁴

It is believed the basic principle necessarily implied in the court decision will, if carried out to its full logical extent, profoundly affect the whole law of search and seizure. It will be profitable therefore to critically examine its precise nature and probable future development. We shall attempt to answer three questions: First, what is the proposition of law upon which in the last analysis the court's decision must be based? Second, what result will the acceptance of that proposition have upon the future development of the law of search and seizure? Third, will these effects prove beneficial or otherwise? Before attempting to answer these questions, however, it will be advisable to restate certain fundamental principles concerning the construction of the 4th Amendment to the Federal Constitution which ought to be tolerably obvious but which of late have been to a certain extent overlooked by the profession and occasionally disregarded by the courts.

(1) *The Fourth Amendment does not in any way apply to the states.* It has reference alone to the Federal Government. The Articles of

³ 71 L. Ed. at p. 331.

⁴ 71 L. Ed. at p. 333.

Confederation of 1777 had granted to the Central Government no power of action against the individual citizen.⁵ The legal relations of the Confederation were with the states alone. All of this was changed by the Constitution of 1789, and while the new Federal Government was given broad powers directly affecting the activities of its citizens, no adequate restraint was provided to prevent the abuse of those powers. Even before the Constitution had been ratified there arose a popular demand for the inclusion in the instrument of certain guarantees of personal rights as against the Federal Government. The states looked on the broad powers of that government with jealousy, and the sympathy of the people was with their local governments rather than with the new central power. In response to this popular demand the first ten Amendments were submitted. The purpose was to guarantee personal rights as against possible aggression on the part of the National Government.⁶

Immediately upon the adoption of these Amendments however counsel began to try to apply them to state legislation. In 1833 the court definitely decided that the Fifth Amendment had no application to the states.⁷ John Marshall, who had been a member of the Virginia Convention which ratified the Constitution, and had taken part in the discussion at the time of the submission of the Amendments, delivered the opinion of the court, using the following language:

But it is universally understood, it is a part of the history of the day, that the great revolution, which established the Constitution, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriotic statesmen who then watched over the interest of our country deemed essential to union and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was ratified, Amendments to guard against the abuse of power were recommended. These Amendments demanded security against the apprehended encroachments of the general government not against those of the local government.

In compliance with a sentiment thus generally expressed to quiet fears, thus extensively entertained, Amendments were proposed by the required majority in Congress and were adopted by the

⁵ See the Articles as printed in BEARD, READINGS IN AMERICAN GOVERNMENT AND POLITICS (1913) 25.

⁶ BEARD, AMERICAN GOVERNMENT AND POLITICS (1917) 63; CURTIS, CONSTITUTIONAL HISTORY OF THE U. S. (1889) Vol. I p. 669 quoting a letter of Thos. Jefferson, Argument of Madison, ANNALS OF CONGRESS Vol. I pp. 440 *et seq.*; Report of Select Committee, GAZETTE OF U. S. Aug. 1, 1789.

⁷ BARRON vs. The Mayor, etc., of Baltimore (1833) 7 Pet. 243, 8 L. Ed. 672.

⁸ 17 ENCYCLOPEDIA BRITANNICA 700.

States. These Amendments contained no expression indicating an intention to apply them to the State Government. This Court can not so apply them.⁹

It was not until 1855 that the question of the applicability of the Fourth Amendment to the States arose. In that year the Court decided the Case of *Smith v. Merrill*,¹⁰ upholding a search and seizure Statute upon the ground that the Fourth Amendment was not applicable to the State Government. The Court said that the Amendment:

restrains the issue of warrants only under the law of the United States and has no application to state process.¹¹

The Court cited with approval Marshall's decision in the case just quoted together with a line of intervening cases under the Fifth Amendment.¹² Although courts have overlooked this principle at times it has been again and again reiterated in well reasoned decisions.¹³

(2) The Fourth Amendment does not forbid all searches made without warrant or legalize all searches made under the authority of a warrant.¹⁴ *It forbids only unreasonable searches (whether made with or without warrant) and it legalizes all reasonable searches.*¹⁵ There are, of course, circumstances under which a search could be called *reasonable* only when made with a search warrant. In these cases if the warrant be invalid, the search will therefore be illegal. There are other cases in which the search is reasonable even if the officer have no warrant.¹⁶ Hence if he has a warrant which is illegal—in the sense that the issuing judicial officer was without power to issue the same or erroneously ex-

⁹ 8 L. Ed. at p. 675.

¹⁰ 15 L. Ed. at p. 270.

¹¹ (1855) 18 How. 71, 15 L. Ed. 269.

¹² *Holmes v. Jennson* (1840) 14 Pet. 540, 10 L. Ed. 579. See in particular the opinion of Thompson, J. 10 L. Ed. at p. 600, 14 Pet. at 582 and that of Barbour, J. 10 L. Ed. 602, 14 Pet. 587; *Morris v. Lessee of Harmer's Heirs* (1833) 7 Pet. 552, 8 L. Ed. 781; *Fox v. Ohio* (1847) 5 How. 1. c. 434, 12 L. Ed. 213.

¹³ See e. g. the decision of the federal Supreme Court in the case of *United States v. Cruikshank*, (1876) 92 U. S. (2 Otto) 542, 23 L. Ed. 588 and cases cited 23 L. Ed. at p. 591 (decision as to the effect of the First Amendment); *United States v. Grosby* (1871), 1 Hughes 448, Fed. Cases No. 14893; *Reed v. Rice* (1829), 25 Ky. (2 J. J. Marsh) 44, 19 Am. Dec. 122; *State v. Atkinson* (1894) 40 S. C. 363, 18 S. E. 1020, 42 Am. St. Rep. 877; *State v. Brennan*, (1891) 2 S. D. 384, 50 N. W. 625. *Crawford v. United States* (1925) 5 Fed. (2d) 672 (C. C. A. 6th Ct.); see also Comments, (1927) 37 YALE LAW JOURNAL 536 at 537.

¹⁴ *Carrol v. United States* (1924), 26 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543.

¹⁵ The text of the Amendment is as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹⁶ *Carrol v. United States supra* note 14; *State v. Hall* (1926) 278 S. W. 1028; *McFadden, THE LAW OF PROHIBITION* (1925) 28; 29 Comments, (1926) 35 YALE LAW JOURNAL 612, Comments (1927) 37 YALE LAW JOURNAL 356 at 541.

exercised his power—the search will, nevertheless, be proper.¹⁷ In yet other cases, where the search is made under a valid warrant, the manner of executing it is unreasonable and the search is therefore illegal. In this connection it is well to remember that this concept of *reasonableness* is one whose content varies with changing social and economic conditions. In adopting constitutional standards we did not place in our fundamental law groups of static and unchangeable principles, but rather general concepts having a meaning derived from history and embodying within themselves “the evolutionary process inherent in their origins.”¹⁸ Thus, circumstances which yesterday would not have warranted an official search of private property without warrant, may today provide ample justification for such action.

(3) The Fourth Amendment contains two distinct parts establishing as law two different propositions. The first provision is contained in the words, “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.” It lays down the general requirement of reasonableness for all searches. A careful analysis of its jural consequences shows that it creates a right-duty relationship¹⁹ between each Federal ministerial officer and each citizen. The citizen has a right as against the officer that the latter shall not unreasonably search or seize his person or property. The officer is under a correlative duty to the citizen.

The second proposition contained in the Amendment is stated in the following language: “And no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The jural consequence of this provision is the creation of an immunity-disability²⁰ relationship between the citizen and the Federal judicial officer. It does not directly affect the rights of the citizen in respect to the seizure of his body or the search of his home. It merely makes it impossible for Congress to grant to the Federal judicial officers the power to issue warrants except under certain specified circumstances viz: the showing of probable cause, the filing of a sworn complaint, the particular

¹⁷ *State v. Graham* (1922) 295 Mo. 695, 247 S. W. 194.

¹⁸ *Borgnis v. Falk Co.* (1911) 147 Wis. 327 at 348, 133 N. W. 209 at 215.

¹⁹ Wherever legal relationships whether right-duty, privilege-right, power-liability, or immunity-disability are referred to herein these terms are used in the sense given them by the late Prof. Wesley N. Hohfeld. See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1923) Chapt. I as to the nature of the rights duty relationship as that term is used herein see in particular HOHFELD *Op. Cit.* p. 36 *et seq* CORBIN, *RIGHTS AND DUTIES* (1924) 33 *YALE LAW JOURNAL* 504.

²⁰ For the term power-liability relationship as used herein see HOHFELD *Op. Cit.* p. 50 *et seq.*

description of the place to be searched and of the person or thing to be seized. In the whole of our future discussion it will be necessary to keep clearly in mind the exact legal relationships created by each clause of the Amendment.

(4) *The Amendment does not itself make evidence obtained by a search which violates its inhibitions inadmissible in a criminal prosecution against the person whose constitutional rights have been violated by the search.*²¹ The privilege that evidence so obtained shall not be used is one created by the courts. It exists because it is the only practical sanction for the provisions of the Amendment. The form of compulsion which society originally offered to enforce the right of freedom from unreasonable search was a damage suit against the officer making the search. But this sanction proved socially undesirable. First, it was unwieldy and difficult to use and therefore gave the citizen insufficient protection. A second and far more important reason for its growing disuse is that it penalizes the active and honest officer who, in his zeal for law enforcement, makes a mistake in deciding when the circumstances warrant a search. Thus, as the old remedy of a damage suit against the officer proved ineffective the courts developed this new rule. Evidence obtained by an illegal search in violation of the Amendment will on proper motion be suppressed.²²

Having thus analyzed the general meaning and legal effect of the Amendment let us apply these principles to the case under review, to

²¹ WIGMORE, EVIDENCE (1923) sections 2183 *et seq.* HARNO, EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE (1925) 19 ILL. LAW REV. 303; CHAFFEE, THE PROGRESS OF THE LAW; EVIDENCE, (1922) 35 HAR. LAW REV. at 695; FRANKEL, CONCERNING SEARCHES AND SEIZURES (1921) 34 HARV. LAW REV. 361; ATKINSON, PROHIBITION AND THE DOCTRINE OF THE WEEKS CASE (1925) 23 MICH. LAW REV. 748, see also the remarks of White J. in

²² Weeks v. United States (1914) 232 U. S. 392. The reasoning of Dean Wigmore to the effect that the unlawful obtention of the evidence does not in any way effect the criminality of the defendant's act and hence ought not to prevent his punishment is unanswerable. The argument of the Supreme Court of Missouri in State v. Owens, to the effect that the defendant had merely committed a petit misdemeanor while the searching officer had violated a constitutional provision cannot stand the test of careful analysis. The "petit" misdemeanor which the defendant had committed consisted of a violation of the 18th Amendment of the Constitution. Why a violation of the 4th Amendment should be more serious than a violation of the 18th we are at a loss to understand. If there is any difference we would consider the last expression of the popular will the more binding. On the other hand we believe that the rule of the Weeks case illogical, as it is justified on the ground suggested in the text. Of course the fact that the unlawfully obtained evidence can be suppressed does not mean that the right of the criminal defendant to sue the officer is taken away. But as a matter of fact if he can have the evidence suppressed and thus avoid criminal punishment he will not ordinarily avail himself of this right and when he does sue he will have little success before a jury. If this remedy of suit against the officer were the only one allowed however it would be used in more cases and with greater success.

determine, if possible, the exact legal proposition which underlies the court's decision as an unexpressed major premise. It is plain that the warrant itself was not invalid. It was issued by a state judge and not a Federal judge. Hence the second clause of the Fourth Amendment could have no effect upon it. The State Constitution, as interpreted by the highest court of the state and the laws made in accordance therewith, gave the judge power to issue the warrant, even though the complaint was sworn to upon "information and belief" alone.²³ The fact that a Federal officer assisted in the search made under the warrant could not in any way affect the power of the judge in issuing the same. The decision of the court therefore comes to this, *that the issuance of a warrant upon such a complaint is so arbitrary, wanton, and tyrannical an abuse of power in and of itself, without the violation of any constitutional guarantee of immunity, that a search made thereunder is necessarily and intrinsically unreasonable.* This being so, the Federal officer who took part in the search violated the right of the defendant that he should not make an unreasonable search of defendant's premises. The secondary sanction rule mentioned therefore came into operation, and created in defendant a privilege that the evidence obtained by the Federal agent's search should not be used against him. Of course this reasoning could not possibly have applied to the search by the state officers.²⁴ The Fourth Amendment did not create any right-duty relationship between them and defendant, and hence the rule of the *Weeks* case could not create in him a privilege against the use of their testimony. Therefore, it is submitted that the decision of the court upon the second

²³ Iowa Code 1924 Title VI, sec. 1968; *Feley v. Utterback* (Ia. 1924) 194 N. W. 721. Article I Section 8 of the Iowa Constitution is identical with Fourth Amendment of the Federal Constitution.

²⁴ *Crawford v. United States* (C. C. A. 6th 1925), 5 Fed. (2d) 672; *Lerskov v. United States* (C. C. A. 8th 1925), 4 Fed. (2d) 540; *Gotterdam v. United States* (C. C. A. 6th 1925), 5 Fed. (2d) 673; *Klein v. United States* (C. C. A. 1st 1926), 14 Fed. (2d) 35; *Brown v. United States* (C. C. A. 9th), 12 Fed. (2d) 926; *CORNELIUS, SEARCH AND SEIZURE* (1926) sec. 15, p. 68; *COMMENTS*, (1927) 36 *Yale Law Journal*, 536, at 538 cf.; *Legman v. United States* (C. C. A. 3rd, 1924), 295 Fed. 474; *United States v. Costanzo* (W. D. N. Y. 1926) 13 Fed. (2d) 259; Suppose that federal officers make a search which is concededly unlawful and unconstitutional. They discover evidence of the violation of a state law. Prosecution is brought in a state court. Can the evidence discovered by the federal officers be used? The Supreme Court of Missouri has answered this question in the negative. *State v. Rebasti* (1924), 306 Mo. 336, 267 S. W. 858; see also *Walters v. Commonwealth* (1923), 199 Ky. 182, 250 S. W. 839. A critical examination of the reasons offered for this decision would carry us beyond the proper limits of this paper. It is submitted, however, that in no event could the rule adopted by the Missouri court effect the situation in the case under review. In the first place the federal court is not bound in a prosecution for a federal offense to turn aside from its purpose to enforce the provisions of a state constitution. But even if it were it must adopt the construction put upon the state constitution by the highest court of the state.

count cannot be supported on any grounds. To contend that the state officers who had, acting independently of any Federal authority, obtained a state search warrant from a local judge, who had themselves planned and conducted the raid, who were engaged in a bona fide attempt to enforce a state law, merely because they asked the assistance of a Federal officer in carrying out the mandate of the state process, became thereby his deputies and hence Federal officers amenable to the inhibitions of the Fourth Amendment, is to strain common language and common sense in a way which puts to shame the most fantastic subtleties of the medieval schoolmen. We are forced to the conclusion that the learned court overlooked the fact that the second count was exclusively bottomed upon the evidence obtained by the state officers. Hence, we believe that this portion of its decision is hardly a controlling precedent for the future. We therefore must take the proposition above stated as to the alleged intrinsic unreasonableness of the search as the true *ratio decidendi* of the case.

Assuming, then, that the case stands for this proposition: what effect will the establishing of that principle as law have upon the future development of the rules governing search and seizure? If its consequences are to be limited to those cases in which, as in the case under review, a Federal officer has aided in the service of a warrant issued by a state court or judge, they will be of comparatively small importance. But can they be so limited? The answer to this last question requires notice of another peculiar recent development of Federal Constitutional law.

Had an informed student of constitutional theory during the last decade of the nineteenth century been asked the question, "Does an admittedly unreasonable search by a state officer, in which a Federal officer has no part whatsoever, violate any provision of the Constitution of the United States?," he would have had little hesitation in answering the question in the negative. He would have relied no doubt upon the decisions which have been cited above and which establish beyond the possibility of argument the fact that the Fourth Amendment does not and cannot place any limitation upon state powers.²⁵

But Marshall's decision in *Barron v. Baltimore* with the cases following it, did not satisfy the bar. If some guarantee as against the states of the rights protected against federal aggression by the first ten amendments could be found in the National Constitution, a wide opportunity would be afforded for attacking state statutes which might

²⁵ Cases cited *supra* notes 7, 10, 12, and 13.

²⁶ (1873) 16 Wall. 36, 21 L. Ed. 394.

prove inconvenient in particular cases. When in 1868 the Fourteenth Amendment was accepted by the states, its sweeping declarations seemed to afford a new basis for this contention. It was at first insisted that the words, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," were to be construed as placing such rights as freedom of speech and the press, trial by jury, and freedom from unreasonable searches, under the aegis of the Federal fundamental law. But in the Slaughter House cases²⁶ the court refused so to construe this clause of the Amendment. Although refusing to define the term *privileges and immunities of citizens of the United States*, the court held that they did not include those rights which "belong to the citizens of the states as such" and that the various guarantees of the Federal Bill of Rights were not extended to the acts of the state governments by the clause of the Fourteenth Amendment quoted.

The next attempt to extend the scope of the Federal Constitution came through the application of the "due process" clause of the same Amendment. This attempt has met with better success than the former ones whose history we have noticed. It does not lie within the scope of the present article to describe the steps by which the court has gradually altered its position. In his excellent article in the Harvard Law Review, Mr. Charles Warren has accurately and exhaustively traced the various stages of this development.²⁷ It is sufficient here to point out the last stage of the evolution. In *Gitlow v. New York*²⁸ the court assumed jurisdiction to decide the question whether or not a New York statute infringed the right of freedom of speech.

Mr. Justice Sanford speaking for the court said,

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states.

Even Mr. Justice Holmes, that inveterate opponent of federal interference with state action, in dissenting from the opinion of the majority, and holding the statute unconstitutional, expressly decided of course that the Fourteenth Amendment protected freedom of speech against state aggression. His language is significant.

²⁶ WARREN, "THE NEW LIBERTY UNDER THE FOURTEENTH AMENDMENT" (1926) 39 HARV. LAW REV. 431.

²⁷ (1924) 268 U. S. 652, 45 Sup. Ct. 461, 69 L. Ed. 1138.

²⁸ (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937.

The general principle of free speech, it seems to me, must be taken to be included in the 14th Amendment, in view of the scope that has been given the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States.

Strange language indeed to come from the author of the dissent in *Lochner v. New York*,²⁹ but clearly indicative of the position which the court has definitely assumed.

Of particular interest in connection with the application of this doctrine to the question of search and seizure, is the decision in *Adams v. New York*.³⁰ The validity of a state statute allowing, under circumstances which defendant contended to be unreasonable, search for and seizure of gambling paraphernalia, was brought in question before the Federal Supreme Court. The Court expressly refused to decide whether an unlawful search by state officers violated the Fourteenth Amendment, but by entertaining jurisdiction of the case at all seemed to indicate a disposition so to apply the constitutional guarantee. In any event, if freedom of speech is a part of the "liberty" of citizens safeguarded by the due process clause, then freedom from unreasonable search must also be.

Assuming that the decision in the *Gilow* case will stand as the law (although we are inclined to agree with Mr. Warren's criticism of that case), what is the effect of the combined action of that rule and the proposition decided in the case under review upon state searches? Under the *Gilow* case the only test of validity which a Federal court could apply to a state search is that of reasonableness.³¹ If state action is arbitrary and wanton, it may be held to violate the Fourteenth Amend-

²⁹ (1904) 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

³¹ Under the rule in the *Gilow* case the right of freedom of speech, freedom from unreasonable search, etc., becomes part of the content of the term "liberty" as used in the due process clause. Hence to deprive one of his freedom of speech or to unreasonably search his premises deprives him of his liberty. But the 14th Amendment does not prohibit all state action which deprives one of his liberty because that would virtually stop all state legislation on every conceivable subject. Holmes J. dissenting in *Adkins v. Children's Hospital* (1922) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 at 801. Only such action on the part of the state as deprives the citizen of his liberty in an arbitrary, wanton, and unreasonable manner or without any justification of furtherance of a public interest is prohibited by the amendment. *Adkins v. Children's Hospital supra*; *Muller v. Oregon* (1908) 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 An. Ca. 957; HAND, "DUE PROCESS OF LAW AND THE EIGHT HOUR DAY," (1908) 21 HARV. LAW REV. 495. Hence if the decision of the *Gilow* case stands, but the instant case be rejected, only those searches which the court holds necessarily arbitrary, wanton, and tyrannical in their invasion of individual right would be held to offend against the Federal Constitution.

ment. But if reasonable men might differ as to the wisdom or necessity of the state action—if in short the court can conceive of any reasonable man supporting the act as proper—it must be upheld. But the present case holds that any search under a warrant issued upon an “information and belief” verification is intrinsically arbitrary, wanton, and unreasonable. Hence, logic requires the court to hold that all state searches made with such warrants are a denial of due process, and hence void. It is not intimated that the court will actually so decide. It is merely asserted that such a rule is the necessary logical result of its present position.

Practically all of the states in the American Union have constitutional provisions identical or almost identical with those of the Fourth Amendment to the fundamental law of the Nation. These provisions were all based upon the common law requirements of a valid search as stated in Lord Camden's decision in *Entick v. Carrington*.³² In the last decade the courts of almost all of the states have been called upon to decide whether a complaint which states in general language, as does the one in the case under review, that the affiant has reason to believe and does believe that contraband property, specifically described, is being kept on named premises, is sufficient to permit the issuance of a search warrant.

In 1921 a Federal District Judge in Wisconsin decided that a warrant issued upon a complaint like that in the case under review was bad.³³ His decision was soon followed in other districts and by some of the Circuit Courts of Appeal. A few of the state courts adopted the rule.³⁴ It was said that the Federal and State Constitutions required warrants to be issued only after probable cause had been shown,

³² (1765) 19 How. State Trials 1029. See also in the same connection Leach v. the King's Messengers (1765) 19 How. STATE TRIALS 1001, 3 Burr. 1692; Wilkes v. Wood (1763), 19 How. STATE TRIALS 1153; Wilkes v. Halifax (1705), 19 How. STATE TRIALS 1805.

³³ United States v. Burnside (D. C. Wis. 1921) 275 Fed. 603, an earlier state case which suggests the same rule is Tippman v. People (1898) 175 Ill. 101, 51 N. E. 872.

³⁴ Central Consumers Co. v. James (D. C. Ky. 1922), 278 Fed. 249; United States v. Ray et al. (D. C. Md. 1922), 275 Fed. 1004; State v. Bird (Mont. 1922), 205 Pac. 241; Peoples v. Dineen (1922), 192 N. Y. S. 905; Giles v. U. S. (C. C. A. 1st Ct. 1923), 284 Fed. 208; Colley v. Com. (1923), 195 Ky. 706, 243 S. W. 913; Price v. Com. (1923), 195 Ky. 711, 243 S. W. 927; People v. Effelberg (Mich. 1923), 109 N. W. 727; Peoples v. Knopha (Mich. 1923), 190 N. W. 731; In re Liquors (1923), 197 N. Y. S. 758; Queck v. Hawker, (D. C. Pa. 1923), 283 Fed. 942; U. S. v. Kaplan (D. C. Ga. 1923), 286 Fed. 953; Carter v. Com. (Ky. 1923), 247 S. W. 3; Keith v. Com. (Ky. 1923), 247 S. W. 42; Craft v. Com. (Ky. 1923), 247 S. W. 722; Mathingly v. Com. (Ky. 1923), 247 S. W. 938; Peoples v. Warner (Mich. 1923), 192 N. W. 566; Food Products Co. v. McClure (D. C. Pa. 1923), 288 Fed. 982; Peoples v. Perrin (Mich. 1923), 193 N. W. 889; Magen v. State (Okla. 1924), 220 Pac. 666; State v. Lock (Mo. Sup. 1924), 259 S. W. 116.

that the determination of probable cause was a judicial act and hence could be performed only by a judge; that the judge could decide that probable cause existed only upon the basis of evidence adduced before him, and that this evidence must be set out and contained in the complaint; that a complaint sworn to on information contained only hearsay evidence, and one sworn to upon belief stated a "conclusion" of the affiant; that hearsay and conclusions were no evidence at all, and hence the court or judge could not therefore determine the existence of probable cause.

Of course, it may be pointed out that the premises of this elaborate argument are not universally true. The determination of probable cause is not necessarily a judicial function. The notion that it is, is based upon the decision in the *Carrington* case and its companion cases. These cases did not so decide. In fact they negative the proposition. Ever since the reign of Elizabeth warrants had been issued by Privy Councilors and Secretaries of State—executive and not judicial officers—and the cases mentioned expressly upheld the practise.³⁵ But even granting that this is so, and that the judicial officer who issues the warrant alone can determine probable cause, it is obvious that in passing on this question he should be able to make use of evidence which violates the technical rules as to hearsay, opinions, etc. These rules have been developed primarily as a control upon the actions of an unskilled and inexperienced jury, and can rightly have no place in determining the action of a judge whose special training and long experience have given him an ability rightly to evaluate evidence which a juror rarely possesses.³⁶

At common law warrants to search for supposedly stolen goods were issued on such complaints.^{36a} Even the sweeping decision in the *Carrington* case and the other English cases immediately following it did not deny validity to these warrants. Most of the American Constitutional provisions mentioned date from the late eighteenth and early nineteenth Centuries.³⁷ Yet after their adoption in practically every state, the statute law provided for the issuance of search warrants in larceny cases upon complaints verified upon information and belief.³⁸

³⁵ *Regina v. Kendal and Roe*, 1 Salk, 347, 12 How. State Trials 1299, Holt 144; *Entick v. Carrington* *supra* note 32.

³⁶ See WIGMORE, EVIDENCE (1923) section 4 a. Cf. the reasoning in *Watson v. State*, (Neb. 1922) 189 N. W. 620 where the court argues that the constitution does not fix any rule as to the sufficiency of an affidavit.

^{36a} 2 HALE, PLEAS OF THE CROWN 149.

³⁷ These constitutional provisions are collected in a note in FRANKELL, *supra* 34 HAR. LAW REV. 361 with the date of the first enactment of each.

³⁸ See e. g. *Humes v. Tabor* (1850), 1 R. I. 464. Missouri statutory provisions of the kind are to be found in section 4115 R. S. Mo. 1919 (larceny and em-

The Fourth Amendment and co-ordinate state provisions apply to warrants for arrest as well as to search warrants. And yet in every jurisdiction such warrants have immemorially been issued, and are still always issued, on complaints verified on information and belief.³⁹ It must be remembered, however, that during all of this period the search warrant was of little practical significance. It was used as a means of recovering stolen goods and in a few isolated cases of different offenses. No one of course was tremendously concerned about the rights of a convicted thief. The law of search and seizure had passed through a stage of great development during Revolutionary days reaching its climax in the adoption of the constitutional provisions mentioned. But for over a hundred years it was to lie dormant. The present Century has witnessed a revival of interest in the subject. The wave of social and economic regulation made necessary by our growingly complex social organization had brought forth scores of state laws against gambling and similar practices, state and Federal pure food and drug laws, the Harrison Anti-narcotic Law and at last the Eighteenth Amendment. To enforce laws of this type it was necessary to make use of searches and seizures by government officers. It is little wonder that conservative judges should be shocked at this enormous extension of governmental invasion of individual privacy. It has been almost universally held that bodies of experts such as the various public service commissions, workmen's compensation commissions and the like are not bound to apply the hearsay or opinion rules to evidence before them. It is therefore submitted that the reasoning on which the decision in the *Burnside* case and cases following it is based is unsound.

But of more importance is the practical difficulty experienced in the application of the rule. Violations of the prohibition law and of other social and economic regulatory statutes differ to a marked degree in one respect from the older traditional type of criminal offences. In the ordinary crime with which our fathers were familiar the offence against

bezzlement), see *Halstead v. Brice* (1850), 13 Mo. 171, Section 3651 R. S. Mo. 1919, (liquor sold by concealed vendor), section 3622 R. S. Mo. 1919 (narcotic drugs).

³⁹ See as an example of such statutes, section 3849 R. S. Mo. 1919 permitting the arrest after the prosecuting attorney has filed an information verified only upon his information and belief. *State v. Gregory* (1903) 178 Mo. 48, 76 S. W. 907 but cf. *State v. Hayward* (1884) 83 Mo. 299 and *State v. Armstrong* (1891) 106 Mo. 395, 16 S. W. 604.

⁴⁰ The writer does not mean to intimate the opinion that the prohibition law is unenforceable. The position taken in this: if the prohibition law is unenforceable it is because our system is not designed to punish offenses which are injuries to society as a whole rather than to an individual. If the system is incapable of development in this regard then all social and economic legislation will prove unenforceable, a result fraught with tremendous consequences to our complex modern civilization.

the state was generally joined with an injury to some private individual. On the other hand a violation of the prohibition law injures society as a whole but does no specific and recognizable harm to any particular individual. In a liquor case there can be no "prosecuting witness" in the traditional sense of that term. Society, organized as the state, through its official agents must take the initiative in detecting the violation of such laws and in setting in motion the machinery of the law for their prosecution and punishment. If this condition existed only in reference to violations of the prohibition law, we might dismiss the whole difficulty by saying that that statute was impossible of enforcement.⁴⁰ But what has been said concerning prohibition is equally true of the anti-narcotic law, the law against gambling, the pure food and drug law, sanitary codes generally, factory inspection acts, hours of labor and minimum wage legislation, and a host of other laws of like character. Under the comparatively simple form of social organization existing prior to the industrial revolution such laws were unnecessary. In the complex society of today civilization cannot exist without them.

But if governmental officers, without the aid of citizens, are, through their own action, to detect violations of these laws, discover sufficient evidence to make convictions possible, and initiate prosecutions, the use of the search warrant is an obvious necessity. Moreover, it is necessary that the warrants shall be issued on the complaint of the officers and not that of private citizens as was the case with warrants in larceny cases. Experience shows that it is impossible to get private citizens to swear to applications for search warrants in these cases.⁴¹ This is but natural since, as we have shown, there is no individual citizen who is specially injured, or at least who considers himself injured by a violation of the law. The officer will rarely have direct personal knowledge of the facts of law violation on premises which he desires to search. Generally, the knowledge of the prosecutor will be derived from a multitude of intangible factors; hearsay complaints coming to him in anonymous letters and telephone calls, suspicious actions of persons inhabiting the premises reported to him by police, the general character of the inmates as known to the officers of the law through their previous experience. These factors, not sufficiently tangible to put down on paper, depending on the unsworn statements of many witnesses who could never be gotten into court or induced to sign an affidavit, are nevertheless of sufficient force to convince him to a moral certainty that the law is being violated in the suspected place. When he swears to the com-

⁴¹ WAITE, "THE CONTROL OF CRIME" 137 ATLANTIC MONTHLY 214, (February, 1926) Prof. Waite's conclusions are fully borne out by the experience of the present writer in the office of prosecuting attorney.

plaint on information and belief he is stating in as definite a form as possible the resultant of all these factors.

In the last analysis the question here presented, like any other legal question, is one of balancing the conflicting interests involved. On the one hand there is the interest of society that its laws should be enforced; on the other there are the interests of the individuals whose homes are searched. In the case of the guilty persons whose homes are searched the individual interest may well be disregarded; for do we not, as a social consequence of their illegal act, place them in jail thus depriving them of an interest immensely more valuable than that of privacy of the home? After all then, it is the interest of the innocent man whose house may through mistake be searched which must be weighed over against the interest of society in efficient law enforcement. The law has long recognized that the social interest in these cases is of more importance than that of the individual. It has seen fit, however, to provide certain safeguards so that the privacy of the home will be interfered with only when it is reasonably necessary. It is believed that the requirement that the complaint shall be sworn to on "information and belief" affords as large a safeguard against unreasonable action as is practically possible to give.

Seeing the logical and pragmatic weakness of the rule in the *Burnside* case many state courts have refused to follow it. In a large number of states it is held that an information and belief warrant is good.⁴² In the majority of jurisdictions where the rule of the *Burnside* case is adopted, however, it has been greatly limited in its scope. Thus, it is generally held that where affiant states positively that defendant has intoxicating liquor (or other contraband articles) on the described premises this is sufficient.⁴³ The Circuit Court of Appeals for the First Circuit, however, in the case of *Giles v. United States*⁴⁴ refused to accept this modification of the rule, and declared that the particular evidential facts leading the affiant to believe that liquor was being kept or sold on the premises must be stated in the complaint. This rule of the *Giles* case has been pretty generally adopted by the Federal Circuit Courts of Appeal. In some courts it is even held that the affiant cannot

⁴² *Cochran v. State* (Oh. 1923), 138 N. E. 54; *Porter v. State* (Miss. 1924), 100 So. 377; *State v. Mallett* (Me. 1924), 122 Atl. 570; *State v. Breen* (Me. 1924), 122 Atl. 571; *Loeb v. State* (Miss. 1924), 98 So. 449; *Buffkin v. State* (Miss. 1924), 98 So. 452; *Zimmerman v. Town of Bedford* (Va. 1923), 115 S. E. 362; *Foley v. Utterback*, *supra* note 23.

⁴³ *Caudill v. Commonwealth* (Ky. 1923), 249 S. W. 1005; *People v. Kennedy* (1921), 303 Ill. 423, 135 N. E. 762; *State v. Cochran* (1926), 278 S. W. 700 (Mo. Sup.).

⁴⁴ (C. C. A. 1st Ct. 1923) 284 Fed. 208. See also *People v. Effelberg* (Mich. 1923), 109 N. W. 727.

state generally that liquor, which he himself has purchased on the premises in question, was intoxicating, but that he must set out the results of a chemical analysis of the liquid or other facts from which they, the court, can judicially determine its intoxicating character.⁴⁵

It is submitted that the present system of allowing each state to solve the problem of what is a permissible form of complaint for search warrant has had a beneficial result. Local courts, familiar with local problems, can work out their own problems of law enforcement in a practically workable manner. But if the *ratio decidendi* of the present case be applied to its full logical extent, all of this will no longer be possible. The rule of the *Giles* and *Burnside* cases has been elevated from the position of an interpretation of the language of the Fourth Amendment to the position of a universally valid rule of reason. Warrants which are issued upon complaints which violate that rule are intrinsically and necessarily unreasonable, and searches made thereunder are arbitrary and wanton abuses of power which violate the Fourteenth Amendment. Thus the extreme Federal rule as stated in the *Giles* case may be forced upon the states as a part of the Federal Constitutional restriction upon their action. It is submitted that such a result is highly undesirable, that it would make state participation in prohibition enforcement difficult if not practically impossible, and would put a stumbling block in the way of an adequate administration of all social and economic regulations by the states.

⁴⁵ *Central Consumers Co. v. James* (D. C. Ky. 1922), 278 Fed. 249; *In re Liquors* (1923), 197 N. Y. S. 758.