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Criminal Law -- Search Warrants -- Extension of the Law in North Carolina

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matively extended this doctrine to the area of everyday business competition where a contracting party's competitor has attempted to appropriate the plaintiff's contract rights for himself.[40]

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Criminal Law—Search Warrants—Extension of the Law in North Carolina

In North Carolina, search warrants are authorized by statute to issue for the seizure of the following objects: (1) stolen property; (2) false or counterfeit coins, notes, bills, or bonds, and instruments used for counterfeiting them; (3) any personal property, tickets, books, papers, and documents used in connection with and in the operation of lotteries, gaming, and gambling;[1] (4) liquor illegally possessed for the purpose of sale;[2] (5) deserting seamen;[3] (6) game taken in violation of the game laws;[4] and (7) re-used bottles.[5] A search warrant may not issue for any object not covered by statute,[6] and its availability may not be extended by construction to any case not clearly covered by statute.[7]

At common law, facts discovered by illegal searches and seizures could be used in evidence.[8] In 1913, *State* v. *Wallace*[9] recognized that

[40] A party is liable for any intentional, unprivileged interference with contractual relations of others. Jasperson v. Dominion Tobacco Co., (1923) A. C. 709, L. R. 92 P. C. 190. See also Philadelphia Record Co. v. Leopold, 40 F. Supp. 346, 348 (S. D. N. Y. 1941) (principle applicable to inducement to "tender spurious performance," where professional puzzle solvers sold contestants answers to plaintiff's puzzle series, where the contestants were under no contractual obligation to perform).

For a detailed study of the whole subject of liability for procuring breach of contract see Annotation, 84 A. L. R. 43; Annotation, 26 A. L. R. 2d 1227; Carpenter, *Interference with Contractual Relations,* 41 HARV. L. REV. 728 (1928); Sayre, *Inducing Breach of Contract,* 36 HARV. L. REV. 663 (1923).

[1] N. C. GEN. STAT. § 15-25 (1953). [2] N. C. GEN. STAT. § 18-13 (1953).
[3] N. C. GEN. STAT. § 14-351 (1953). [4] N. C. GEN. STAT. § 113-91(d) (1952).
[5] N. C. GEN. STAT. § 80-28 (1950).

[6] "Ordinarily even the strong arm of the law may not reach across the threshold of one's dwelling and invade the sacred precinct of his home except under authority of a search warrant issued in accord with pertinent statutory provisions." *In re* Walters, 229 N. C. 111, 113, 47 S. E. 2d 709, 710 (1948); People *ex rel.* Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); State v. Mann, 27 N. C. 45 (1844); MACHEN, THE LAW OF SEARCH AND SEIZURE § 2(1950); *cf.* Ltr. of Atty. Gen. of N. C. to Mr. J. K. Morris, 22 July 1952 ("It is seriously doubted if a search warrant would be the proper method of searching a tourist camp which is suspected of operating for immoral purposes.").

[7] Rose v. St. Clair, 28 F. 2d 189 (D. C. 1928); State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A. 2d 863 (1940); State *ex rel.* Wilson v. Quigg, 154 Fla. 348, 17 So. 2d 697 (1944); Powell v. State, 65 Okla. Cr. 221, 84 P. 2d 442 (1938); 47 AM. JUR. *Searches and Seizures* § 14 (1938).

[8] State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).

[9] 162 N. C. 623, 631, 78 S. E. 1, 4 (1913). The court approved the following statement of the rule: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

rule as existing in North Carolina. Under that doctrine, evidence seized by officers either under an invalid search warrant or without any search warrant could be admitted in evidence at trial, and the defendant would then be left to his right of civil action against the trespassing officer.[10] Furthermore, under this doctrine it followed that evidence for which the statute did not authorize a warrant to issue (*e.g.*, burglar tools or murder weapons) could be used in evidence when seized by means of an illegal search. An act of the General Assembly of 1937[11] altered this rule by providing that no facts discovered by means of an "illegal" search warrant could be used as evidence in the trial of any action. The statutory context of the word "illegal" indicates that it connotes a procedural defect in the warrant, such as the failure of the investigating officer to sign an affidavit under oath, or the failure of the magistrate to examine him in regard thereto before issuing the warrant.[12] Thus if a search warrant were issued upon affidavit under oath and examination to authorize a search for narcotics, although there is no statutory authority for the issuance of such a warrant, *quære* as to whether any evidence discovered under such a warrant would not be admissible under the common law in spite of the 1937 amendment. In 1938, the Supreme Court in *State* v. *McGee*[13] pointed out the ineffectiveness of the 1937 amendment in changing the common law rule admitting evidence obtained by illegal search and seizure. This decision held that since the 1937 amendment made no mention of articles seized in an unlawful search conducted without any warrant at all, evidence so obtained was still admissible. Then in 1951, the search warrant law was further amended by adding the following proviso:

> Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action.[14]

As for objects set out in the statutes for which search warrants are authorized to issue, it is clear that they may not be presented in evidence where they are discovered under an "illegal" search warrant or without

[10] Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917); Cohoon v. Speed, 47 N. C. 133 (1885).

[11] N. C. Pub. Laws 1937, c. 339, § 1½ (now N. C. GEN. STAT. § 15-27 [1953]).

[12] "Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of such illegal warrant shall be competent as evidence in the trial of any action. . . ." N. C. GEN. STAT. § 15-27 (1953); *see* State v. Rhodes, 233 N. C. 453, 455, 64 S. E. 2d 287, 289 (1951).

[13] 214 N. C. 184, 198 S. E. 616 (1938) (held, that the amendment constituted a modification and not an abrogation of the common law rule).

[14] N. C. Sess. Laws 1951, c. 644, § 1 (now N. C. GEN. STAT. § 15-27 [1953]).

any search warrant "where one is required." *Quære* as to the admissibility of evidence obtained by a search made with or without a search warrant in a case where no search warrant is authorized by statute; *e.g.*, a search for instruments used in the commission of a felony, or for narcotics.[15] The wording of the provision might be construed to mean that the statute contemplates only those situations where a warrant *may* issue, and not those situations where there is no provision for the issuance of a search warrant.[16]

Under the North Carolina law therefore, search warrants may not issue for property used in the commission of general felonies not covered by the existing statutes, or for illegal narcotics. Thus if an officer were to take it upon himself to search a suspect's home without a search warrant, for instruments used in the commission of a murder and found the murder weapon, it is possible that the court would follow either of two courses of action in ruling on the admissibility of the evidence. The court might consider that the evidence was the result of an illegal search where a search warrant is required and was therefore inadmissible; or, on the other hand, the court might apply the common law doctrine to such a case and admit the evidence, leaving the defendant to his civil remedy. Since the passage of the 1951 amendment, the court has not been called upon to decide whether the common law doctrine admitting evidence obtained by illegal searches and seizures has been completely abrogated in North Carolina. In either of the above two instances, it would seem that the effective detection and prevention of crime is hampered in this State by the fact that our search warrant law does not make provision for issuance of search warrants to search for property used in the commission of a felony or for narcotics.

A survey of the search warrant laws of the several states reveals that fifteen states[17] provide for the issuance of search warrants to search for

[15] Also, *quære* as to the admissibility of evidence obtained by an *unreasonable search* under a *legal* search warrant.

[16] "The courts determine the competency of evidence irrespective of the method by which it was procured. An objection to an offer of proof made on the trial of a cause raises no other question than that of its competency, relevancy and materiality. On such objection the court cannot enter on the trial of a collateral issue as to the source from which the evidence was obtained, unless expressly required so to do by statute." State v. McGee, 214 N. C. 184, 186, 198 S. E. 616, 617 (1938).

[17] ALA. CODE tit. 15, § 101 (1940); ARIZ. CODE ANN. § 44-3501 (1939); CAL. PEN. CODE § 1524 (1949); IDAHO CODE ANN. § 19-4402 (1947); IOWA CODE ANN. c. 36, § 751.3 (1950); LA. REV. STAT. § 15:43 (1950); MD. ANN. CODE GEN. LAWS art. 27, § 328 (1951); MONT. REV. CODES ANN. § 301-2 (1947); NEV. REV. STAT. § 29-801 (1943); N. Y. CRIMINAL CODE AND PENAL LAW § 792 (1945); N. D. REV. CODE § 29-2902 (1943); OKLA. STAT. ANN. tit. 22, § 1222 (1947); ORE COMP. LAWS ANN. § 26-1702 (1940); TENN. CODE ANN. § 11898 (Williams 1934); UTAH CODE ANN. § 77-54-2 (1953) (A search warrant may be issued for property "(2) When it was used as the means of committing a felony; in which case it may be taken on the warrant from any place in which it is concealed, from any person in whose possession it may be.").

property used in the commission of a felony. Five states[18] authorize the issuance of a warrant to search for property used in the commission of a misdemeanor or a felony. Federal Rules[19] authorize the issuance of a search warrant for property "designed or intended for use or which is or has been used as the means of committing a criminal offense." Ten of the fifteen states allowing the issuance of a search warrant for property used in the commission of a felony have an additional provision providing that search warrants may issue for property:

> when it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered, in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possession of the person to whom he may have delivered it.[20]

The Uniform Narcotics Act of North Carolina[21] makes adequate provision for the punishment of violations of the Act and for seizure of the contraband and vehicles used in its transportation. It seems that an important means of enforcement is being withheld from the law enforcement officers of the state, however, in that there is no provision made for the issuance of a search warrant to search places where it is suspected that illegal traffic in narcotics is being carried on. A search of the pertinent statutes of the states reveals that thirteen states[22] have specific

[18] FLA. STAT. ANN. § 993.02(2)(a) (1941); OHIO GEN. CODE ANN. § 13430-1 (Supp. 1952); VT. REV. STAT. § 2447 (1947); WIS. STAT. § 363.02 (1951); WYO. COMP. STAT. ANN. § 10-201 (1945).

[19] Fed. R. Crim. P. 41(b)(2) (1951).

[20] ARIZ. CODE ANN. § 44-3501(3) (1939); CAL. PEN. CODE § 1524(3) (1949); IDAHO CODE ANN. § 19-4402(3) (1947); IOWA CODE ANN. c. 36, § 7513(3) (1950); MONT. REV. CODES ANN. § 301-2(3) (1947); N. Y. CRIMINAL CODE AND PENAL LAW § 792(3) (1945); N. D. REV. CODE § 2902(3) (1943); OKLA. STAT. tit. 22, § 1222(3) (1947); ORE. COMP. LAWS ANN. § 26-1702(3) (1940); UTAH CODE ANN. § 77-54-2(3) (1953).

[21] N. C. GEN. STAT. § 90-86 *et seq.* (1950).

[22] FLA. STAT. ANN. § 933.02(3) (1941); LA. REV. STAT. § 15:43 (1950); MASS. ANN. LAWS c. 94, § 214 (1946); MICH. STAT. ANN. § 1053 (1937); MINN. STAT. § 618.12 (1945); MISS. CODE ANN. § 6837 (1952); N. H. REV. LAWS c. 424, § 1 (1942); N. M. STAT. ANN. § 721 (VIII) (1941); TEX. CODE CRIM. PROC. ANN. art. 725b(16) (1925); UTAH CODE ANN. § 58-13-29 (1953); W. VA. CODE ANN. § 1385(19) (1949); WIS. STAT. § 363.02(7) (1951); WYO. COMP. STAT. ANN. § 46-214 (1945) ("It shall be lawful for any Justice of the Peace to issue search warrants to search any building, house, premises, place, automobile, conveyance, or person, for any of the drugs mentioned in this act [§§ 46-201 to 46-224]. Provided, however, that no warrant for such search shall be issued except upon probable cause and when there shall have been filed with the Justice a complaint in writing under oath, particularly describing the building, house, premises, place, automobile, conveyance, thing or person to be searched, the person to be seized, and alleging substantially the offense in relation thereto, and that the complainant verily believes that drugs mentioned in this Act are kept in violation of law, or so concealed on such person, or in or about the place or thing to be searched. . . ." *Ibid.*

statutes authorizing search warrants relative to the enforcement of their narcotics law. It is also possible, of course, that search warrants may be issued in other states to search for narcotics, if the state has a statute authorizing the issuance of warrants to search for property "used in the commission of a felony."

In order to help remove the doubt concerning the admissibility of evidence obtained without a search warrant in cases where no warrant may issue, and further, to aid the law enforcement officers of our State more effectively to enforce our laws in a legal manner, it is submitted that the search warrant statute, G. S. § 15-25,[23] should be amended to allow the issuance of search warrants for property used in the commission of a felony;[24] and that the Uniform Narcotics Act, G. S. § 90-110,[25] should be amended to allow the issuance of search warrants to search for narcotics being held or possessed in violation of the narcotics law of North Carolina.[26]

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Federal Tort Claims Act—Discretionary Functions Exception

On June 8, 1953, the Supreme Court of the United States, in *Dalehite* v. *United States*,[1] affirmed the judgment of the Court of Appeals for the 5th Circuit in the Texas City disaster cases.[2] The District Court for the Southern District of Texas had found for the plaintiffs, and that judgment had been reversed and rendered for the United States by the court of appeals. Leave to file a petition for rehearing was denied on November 9, 1953.[3]

[23] N. C. GEN. STAT. § 15-25 (1953).

[24] The Federal cases distinguish between evidence of the offense being carried on and the instruments or fruits of the crime. Thus searches of one's house, office, papers, or effects merely to get evidence to convict him of crime is considered a violation of the self-incrimination prohibition; but searches for and seizure of stolen property, counterfeit coins, burglar's tools, illicit liquor and gambling apparatus is considered proper under the Federal law. U. S. v. Lefkowitz, 285 U. S. 452 (1932).

[25] N. C. GEN. STAT. § 90-110 (1950).

[26] "The use of the search warrant to prevent and detect crime is a valid exercise of the police power of the state. The constitutional provisions have no application to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals, and welfare." 47 AM. JUR. *Searches and Seizures* § 13 (1938).

[1] 73 S. Ct. 956 (1953). Mr. Justice Reed delivered the prevailing opinion. Mr. Justice Clark and Mr. Justice Roberts took no part in the case. Mr. Justice Jackson submitted a dissenting opinion in which Mr. Justice Black and Mr. Justice Frankfurter concurred.

[2] *In re* Texas City Disaster Litigation, 197 F. 2nd 771 (5th Cir. 1952). Three of the six judges, while agreeing with the decision to reverse the judgment of the district court, dissented from the decision to render judgment for the United States, being of opinion that the facts alleged in the complaint set up grounds for relief and that the cause should have been remanded for a new trial.

[3] The litigants now, of course, attempt to secure remedy through special Congressional legislation.