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Gunman and His Gun, The

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THE GUNMAN AND HIS GUN[1]

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The cases of *People* v. *Macklin, People* v. *Murray Humphreys* and *People* v. *William Scott* which recenly arose in the Criminal Court of Cook County, Illinois, present matters of paramount importance. They involve the difficult but ever present problem of the suppression of the practice of carrying concealed firearms, and perhaps the prosecutions were brought, and the trial judge, who tried the cases without a jury, rendered his findings of guilty, in the hope that either the Supreme Court of Illinois would overrule or modify its prior holdings in regard to the admissibility of evidence which has been illegally obtained, or would overrule, or further explain, modify or qualify its prior announcements in regard to the right to arrest without a warrant; perhaps he hoped that in the Macklin case it would be ready to make applicable the rule of the "night prowler," and that even in the cases where a night prowler was not concerned, in the face of the present menace of the gunman and the added fact that at the very moment of their search and examination the defendants were committing the crime of carrying concealed weapons and that the very discovery of the gun furnished conclusive evidence of the reasonableness and of the necessity for the arrest, it would feel compelled to sustain the conviction and to make the law of today responsive to and adequate to the needs of today.

In the *Macklin* case the evidence disclosed that on July 6, 1933, at 10:40 o'clock at night, three Chicago policemen, while riding in a squad car, saw the defendant walk away from a gas station and join another man. They testified that, on account of numerous recent robberies of such stations, their suspicions were aroused and they according stopped the men, although they had no direct evidence of either of them having committed or being about to commit a crime. One of the officers then, and with no previous knowledge or evidence that the defendant carried a weapon, put his arms around him, no doubt to satisfy himself in regard to the matter, and the man then made a movement to get into his hands, and thus revealed

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the existence of, a revolver which was concealed on the front of his person.

The man was arrested for the crime of carrying concealed weapons. On the trial, which was before the court after the waiver of a jury, a motion was made to suppress the evidence and for a return of the weapon. This motion was denied, the defendant was found guilty and an appeal was taken.[4]

In both the Humphreys and the Scott cases the arrests were made in the day time and were the results of a police raid on a supposed Al Capone gang headquarters. When the police entered the room, nothing very suspicious was discovered but while they were there Humphreys entered. He had long been suspected by the police but on this occasion they had no evidence against him nor any warrant of any kind. They, however, searched him and found a revolver concealed upon his person. On the trial for carrying concealed weapons, and on the police testifying that, though they had no warrant against anyone, they suspected him of a murder which had recently been committed but for which no warrant had been issued, he was convicted of the crime of carrying concealed weapons and was sentenced to a term in the House of Correction. Strangely enough no appeal was taken.

In the Scott case a search of the person was made without any warrant, in the day time and without even the excuse that the defendant was suspected of having committed any kind of a crime. This case, however, we understand is being continued from time to time and its difficulties have no doubt been avoided by recently bringing the defendant for trial and obtaining his conviction on an old charge which everyone had heretofore believed had been abandoned. This charge grew out of the arrest of the defendant William Scott on July 16, 1930, while he lay in a drunken stupor in an automobile and the finding of two revolvers in the machine. The conviction no doubt was the result of the theory that the arrest for drunkenness was lawful and that therefore the guns were admissible in evidence on a subsequent charge of carrying concealed weapons.

In considering these cases we must bear in mind that in Illinois the carrying of concealed weapons is only a misdemeanor,[5] and that, as far the statutes are concerned, the right of search is limited to cases where the person has been charged with a felony and, seem-

[4]Reversed in *People* v. *Macklin*, (Ill.) 186 N. E. 531.

[5]Smith-Hurd's Statutes (1929), secs. 155, 156.

ingly, has been arrested therefor, and then only under the direction of the judge or justice of the peace and in his presence.[6]

Three questions are presented:

(1) Should evidence wrongfully obtained be admitted in a case where the gist of the action is the carrying of concealed weapons and the weapon itself is conclusive evidence of guilt?

(2) In the Macklin case, was the evidence in fact illegally obtained? Has not an officer a right to arrest or detain for interrogation a man whom he finds at 10:40 at night in a place which creates suspicion and, if so, and in spite of the statute above referred to, does not such right of interrogation involve the right to search the person, and, though the attention of the officer was first called to the person on account of a suspicion of robbery or attempted robbery alone, to use a weapon which has been thus discovered as evidence in a prosecution for carrying concealed weapons?

(3) Is there a distinction between the procedure which is or should be adopted in a case where human life is involved and one in which a sumptuary law merely is sought to be enforced or evidence obtained which may help in a prosecution for its violation? Is there a clear distinction between the discovery of a pistol on a man, the only use of which is to kill and the concealment of which in itself constitutes a crime, and the discovery of liquors or documents or even of narcotic drugs which may or may not be unlawfully used, and which at the most are only evidence of a possible or contemplated crime. Is not the concealed revolver in itself a nuisance which should be summarily abated? In the case of the liquor or the documents or the drugs is there not a search merely for evidence which may or may not be indicative of guilt? In the case of the concealed gun is there not a direct attempt to suppress a nuisance and does not the thing suppressed constitute conclusive evidence of the commission of a crime and of a crime which when once discovered the defendant is committing in the presence of the officer? While they may concede that drugs or liquor or papers may or may not be unlawfully used or possessed, should not the courts be allowed to take judicial notice of the fact that the primary use of the revolver is to take human life? Is not the menace of the gunman too great a

[6]Smith-Hurd's Statutes (1929), Sec. 699. The section reads as follows: "When a person charged with a felony is suspected by the judge or justice of the peace before whom he is brought to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the judge or justice may direct him to be searched in his presence, and such weapon or other thing to be retained, subject to the order of the court in which the defendant may be tried."

menace to be trifled with? Should not society be allowed some measure of self-protection?

The problem of the gunman is, and for a long time will continue to be, an ever present problem in America. Perhaps the logical solution would be the total prohibition of the sale of arms to unlicensed persons, but even this would not put a stop to the evil, since not only is there a large supply of weapons already in circulation and the smuggling in of arms is an easy thing, but among the crooks and the gangsters and in the underworld generally there is so much mechanical skill that the manufacture can always be engaged in. Perhaps, indeed, a wide-spread prohibition of the carriage and sale of arms would merely result in the underworld being armed while the law-abiding citizenry would be without weapons.[7] In any event, we must face the problem of the carrier of concealed weapons and the dilemma which is presented by the rule of law which has been adopted by the Supreme Court of the United States, and by many of the state courts, including that of Illinois, that if an arrest is made illegally in the first instance, that is to say, either without a sufficient warrant or without probable cause for believing that the defendant has committed or is committing a crime, a pistol or other incriminating article, even though discovered on the person of the man arrested, is not competent evidence against him in a subsequent prosecution. We must also be prepared to meet the limitations which are placed on the right to arrest without a warrant and the limitations, if any, which are imposed by the Illinois statute, to which we have before referred and which says nothing of misdemeanors or of the police or arresting officers and merely provides that when one is charged with a felony and is suspected by the judge before whom he is brought to have on his person a dangerous weapon such judge may direct him to be searched in his presence.

The leading cases on the subject in the state of Illinois are those of *People* v. *McGurn,*[8] and *People* v. *DeLuca,*[9] *People* v. *Scalisi,*[10] and *People* v. *Kissane.*[11] In the case of *People* v. *McGurn* it was

[7]This at any rate was the position which was taken by many at the Anti-firearms Convention which was held in the city of Chicago under the auspices of the National Crime Commission. Among the Anglo-Saxons, and prior to and at the time of Edward the Confessor when the general absence of trade and commerce resulted in a large number of unemployed wanderers, all free persons were required to go armed. Sharon Turner, History of Anglo Saxons, Vol. III, 130.

[8]341 Ill. 632, 173 N. E. 754 (1930).

[9]343 Ill. 269.

[10]60 Ill. 361.

[11]261 Ill. App. 621. Affirmed in *People* v. *Kissane,* 347 Ill. 385. See also *People* v. *Roberts* (Ill.) 185 N E. 283. See post note.

held that, although a revolver was found upon the person of the defendant and the carrying of concealed weapons was made by statute an offense, since the arrest was made without a warrant and at the time of the arrest there was nothing which would lead a reasonable and prudent person to believe that the person who was arrested was implicated in any crime which had in fact been committed, and specifically the crime of carrying concealed weapons, the arrest was unlawful and that when the defendant was afterwards indicted and tried for the crime of carrying concealed weapons it was error on the part of the trial court to deny a petition for the suppression of the evidence and to admit the pistol in evidence, and this even although when being searched by the officer the defendant himself disclosed the existence and whereabouts of the weapon by saying, "Don't get excited! Don't get excited! You will find it on the right side." In answer to the contention that, even though the arrest and search and seizure were illegal and the evidence obtained thereby was not competent, yet the defendant should be convicted because he was in fact guilty of the crime of carrying concealed weapons, the Supreme Court quoted with approval from the case of *Hoyer* v. *State,*[12] in which the Wisconsin Court had said:

"Sec. 11, art. I, Wis. Const. *supra,* is a pledge of the faith of the State government that the people of the state, all alike (with no express or possible mental reservation that it is for the good and innocent only), shall be *secure* in their persons, houses, papers and effects against unreasonable search and seizure. This security has vanished. and the pledge is violated by the state that guarantees it when officers of state, acting under color of state-given authority, search and seize unlawfully. The pledge of this provision and of sec. 8 are each violated when use is made of such evidence in one of its own courts by other of its officers. That a proper result—that is, a conviction of one really guilty of an offense—may be thus reached is neither an excuse for nor a condonation of the use by the state of that which is so the result of its own violation of its own fundamental charter. Such a cynical indifference to the state's ob-

[12]180 Wis. 407, 417, 193 N. W. 89, 93, 27 A. L. R. 673, 680 (1923). See to the same effect *Hughes* v. *State,* 2 Ga. App. 29, 58 S. E. 390; *Lewis* v. *Commonwealth,* 197 Ky. 449, 247 S. W. 749; *Helton* v. *Commonwealth,* 195 Ky. 678, 243 S. W. 918; *Robertson* v. *State,* 43 Fla. 156, 29 So. 535; *Tillman* v. *State,* 81 Fla. 558, 88 So. 377; *Pickett* v. *State,* 99 Ga. 12, 25 S. E. 608, 59 Am. St. 226; *State* v. *Lutz,* 85 W. Va. 330, 101 S. E. 434; *Snead* v. *Bonnvil,* 166 N. Y. 325, 59 N. E. 899; *People* v. *Kinney,* 185 N. Y. S. 645; *People* v. *Jakira,* 193 N. Y. S. 306. See also *Ballard* v. *State,* 43 Ohio State 340, 1 N. E. 76; *Rasey* v. *Cicolino,* 1 Ohio App. 194. But see contra *People* v. *Didonna,* 210 N. Y. S. 135.

ligations should not be judicial policy. Such constitutional provisions here invoked are not grants of rights of action for trespass against official or individual violators of such guaranteed rights, for other provisions of the constitution give such remedies. To say, then, that when the state itself has thus violated its own pledges it may use the results thereby obtained for its own purpose, become a party to the trespass by ratification, trace its title through wrongful acts of its officers, remain itself immune, in its sovereignty, from legal liability, and then relegate the individual whose rights are thus swept away and made valueless in and by a court of justice to his bootless and fruitless action of trespass against such trespassing state officials as individuals, is to gibe and to jeer."

The Illinois Court also said:

"In *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426, the Supreme Court of the United States upon this question said: 'The government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had. The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, 34 S. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.' "

In the case of *People* v. *De Luca* we find an even more extreme holding, and although it does not pertain to a gunman its authority cannot be ignored. In it the evidence showed that certain game wardens had heard rumors of game law violations and while the defendant was riding in a railroad train saw some feathers sticking out of his pocket and on searching him for evidence of his guilt found four hen pheasants on his person. Thereupon they arrested him and instituted a criminal prosecution for the violation of the game laws. In spite, however, of the conclusive evidence of guilt furnished by the pheasants and the certainly reasonable ground for an arrest or at any rate for a search which was furnished by the projecting feathers the Supreme Court held that, since the arrest was subsequent to the search, the evidence was obtained in pursuance of an unlawful search and was therefore inadmissible. It is to be noted, however, that to this holding there was filed a dissenting opinion by Justices Stone and De Young who held that the evidence disclosed that an offense had been committed in the presence of the officers, that the protruding feathers furnished reasonable grounds for the arrest and that the search and the arrest were but part of one transaction.[13]

[13]*People* v. *De Luca,* 343 Ill. App. 369. In the opinion of the majority of the court we find the following:

"Evidently, if the hen pheasants had not been found by a search of the person of the defendant he would not have been arrested. In such case there would have been no probable cause for his arrest. There would have been nothing to indicate that the feathers were those of hen pheasants and not of cock pheasants or of some other birds. The evidence was obtained by the unlawful search.

"Undoubtedly the law is that where an arrest is made by an officer who has reasonable ground for believing that the person arrested is implicated in the commission of a crime, such officer has a right to arrest without a warrant and to search the arrested person without a search warrant (*People* v. *Caruso,* 339 Ill. 258, and cases cited), but where there is no probable cause and the person is searched without a search warrant in an effort to discover evidence, and an arrest is afterwards made solely on the strength of the discovery, the evidence thus obtained is violative of his constitutional right and should be suppressed, on motion duly made for that purpose. *People* v. *Brocamp,* 307 Ill. 448; *People* v. *Castree,* 311 id. 392; *Agnello* v. *United States,* 269 U. S. 20, 70 L. ed. 145; *People* v. *McGurn,* 341 Ill. 638.

"The inherent right of all citizens to immunity from unreasonable search and seizure is guaranteed by both State and Federal constitutions. This right was violated by an unlawful search of the defendant without a warrant and before his arrest. The criminal court erred in denying the appeal upon the strength of such evidence." See *United States* v. *Shultz,* 3 Fed. Supp. 273.

"In their dissenting opinion Justices Stone and De Young, among other things, say:

"We do not concur in the foregoing decision. An arrest is defined as a legal restraint of the person; custody. (Webster's International Dict.) It is evident from the record that the search and arrest in this case were but one act. The evidence shows that the officers making the search and arrest

In the case of *People* v. *Scalisi,* also, the Illinois court has seemingly placed rigid restrictions upon the right to arrest for the purpose of questioning. In it it said:

"That the police squad were attempting to arrest the persons in the Cadillac car at the time in question is shown conclusively by the evidence of Conway, the leader of the squad. They were attempting to make what the assistant state's attorney, in his oral argument before this court, called an "arrest for questioning.' Under the common law in England sheriffs, constables, and watchmen were authorized to arrest felons, and persons reasonably suspected of being felons, without a warrant, and as conservators of the peace they also had authority to make arrests without warrants in cases of misdemeanors which involved breaches of the peace committed in the presence of the officers making the arrests, and could not be stopped or redressed except by immediate arrest. 2 R. C. L. 446; *North* v. *People,* 139 Ill. 81; 28 N. E. 966; *Kindred* v. *Stitt,* 51 Ill. 401. Policemen were unknown to the common law, but they are generally considered as having the same powers as watchmen and constables. *Shanley* v. *Wells,* 71 Ill. 78. At common law watchmen and beadles had authority to arrest and detain in prison for examination any suspicious nightwalker. *Lawrence* v. *Hedger,* 3 Taunt. 14; 2 Hawk's P. C. c. 13, sec. 6, Id. c. 12, sec. 20; *Miles* v. *Weston,* 60 Ill. 361. By paragraph 681 of the Criminal Code (Cahill's Rev. Stat. 1925, c. 38), in this state an arrest may be made by an officer or by a private person without warrant for a criminal offense committed or attempted in his presence, and by an officer when a crim-

had been informed that the law protecting game birds had been violated. They saw feathers, which were those of a hen pheasant, protruding from the coat pocket of the plaintiff in error. They had therefore reasonable ground for believing that he was implicated in the violation of the statute prohibiting the possession of hen pheasants. This belief was reasonably based on what they saw in his possession before searching and arresting him. The search and seizure against which the citizen is protected by constitutional guaranty is unreasonable search and seizure and does not extend to immunity from search on arrest. (*People* v. *Hord,* 329 Ill. 117.) The guaranty of the constitution has no application to arrests for offenses consisting wholly or in part in having particular property in possession. In such cases the right of seizure is incidental to the right to arrest. (*North* v. *People,* 139 Ill. 81.) The search under the circumstances of this case cannot be said to be unreasonable.

"It is the rule in this State, and generally, that when an officer has reasonable ground for believing that a person is implicated in the commission of a crime he may arrest such person without a warrant and search him without a search warrant. *People* v. *Caruso,* 339 Ill. 258; *People* v. *Swift,* 319 id. 359; *Lynn* v. *People,* 170 id. 527; *North* v. *People,* supra; *Gindrat* v. *People,* 138 Ill. 103; 5 Corpus Juris, 434.

"The opinion adopted is contrary to the rule long adhered to in this State, as the cases above cited show, and puts an unwarranted restraint upon officers of the law in the discharge of their duty."

inal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. When such arrest is made without a warrant, either by an officer or a private person, the person arrested shall without unnecessary delay be taken before the nearest magistrate in the county, who shall hear the case for examination, and the prisoner shall be examined and dealt with in cases of arrest upon warrant. Crim. Code, par. 684. As in this State a criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence, and may be either a misdemeanor or a felony, the term 'criminal offense' in paragraph 681 must be held to include misdemeanors as well as felonies, and thereby the right of officers to make arrests is much greater than at common law. It is the rule in this State that an officer has the right to arrest without a warrant where he has reasonable ground for believing that the person to be arrested is implicated in a crime. *People* v. *Swift,* 319 Ill. 359, 150 N. E. 263. Whether or not in a given case there are reasonable grounds to warrant an arrest is a mixed question of law and fact. To justify the officer in making an arrest without a warrant, his ground for belief that the person to be arrested is guilty of a crime must be such as would influence the conduct of a prudent and cautious man under the circumstances. *Kindred* v. *Stitt, supra.*"

In summing up, the Illinois Court said:

"When the police squad sought to infringe upon the liberty of plaintiffs in error, and arrest and detain them for questioning, they had no reasonable ground to suspect that either plaintiff in error had been guilty of any crime, and *plaintiffs in error were not night-walkers or vagrants, and hence the attempt to arrest and detain them was unlawful.* The court, in the instructions to the jury, did not differentiate as to the effect of the two kinds of malice, but by its instructions authorized a verdict of guilty of murder, if Olson was unlawfully killed with malice, either express or implied, even if at the time of his death he was attempting to unlawfully restrain plaintiffs in error of their liberty. The peculiar facts in this case required that the jury be instructed as to the right of police officers to make arrests, their right to use deadly weapons in attempting to arrest for misdemeanors, the right of a citizen to resist an unlawful arrest, the distinction between murder and manslaughter, and as to the form of verdict for manslaughter."[14]

[14]Italics added.

The fourth of these cases is that of *People* v. *Kissane,* and, although it was rendered in the Appellate Court for the First Judicial District and not in the Supreme Court, should be given much consideration both on account of the more satisfactory rule that it appears to announce but on account of the high judicial standing of the members of the tribunal and on account of the fact that living as they all do in the city of Chicago where the problem of the gunman is especially acute, its judges had, perhaps, a closer view of the menace and a more complete realization of the needs of the situation. In this case no warrant had been issued but the police testified that the Lake View Trust and Savings Bank had been robbed by a man two days before the arrest of the defendant; that all of the members of the police department were furnished with a description of this person and that the description furnished was that of a man between five feet eleven inches and six feet tall, sallow complexion, slender build and a kind of pointed nose; that immediately after the police received the description the arresting officer and his police partner talked the matter over and decided that the description fitted Kissane; that, though no warrant was issued they arrested Kissane because "his general appearance tallied with a man who held up the Lake View Trust and Savings Bank a few days before; that the arresting officer knew the defendant well; that the latter was well known to the police as a gangster; that he had been charged with murder, robbery and racketeering; that the officer himself had arrested him for some other offense prior to the time of the arrest in question and that in the present case, and after his arrest, he searched him and found a gun upon his person."

No satisfactory proof evidently being forthcoming as to the bank robbery the man was charged with and convicted of the crime or misdemeanor of carrying concealed weapons and on this trial the pistol was permitted to be used in evidence and the defendant was convicted. This judgment was sustained by the Appellate Court, all of its judges holding that no error had been committed in the denial of a motion to suppress the evidence. In its opinion[15] the court said:

"Defendant did not offer any evidence in rebuttal of this testimony and the trial court thereupon denied the motion to suppress the evidence. The jury was then recalled and the trial proceeded. 'Undoubtedly the law is that where an arrest is made by an officer

[15]See *People* v. *Kissane,* 261 Ill. App. 621, 626. Affirmed in *People* v. *Kissane,* 347 Ill. 385. See notes post. See also *People* v. *Roberts* (Ill.) 185 N. E. 283.

who has reasonable ground for believing that the person arrested is implicated in the commission of a crime, such officer has a right to arrest without a warrant and to search the arrested person without a search warrant. (*People* v. *Caruso,* 339 Ill. 258, and cases cited.)' (*People* v. *De Luca,* 343 Ill. 269, 271. See also *People* v. *Swift,* 319 Ill. 359.) 'To justify an officer in making the arrest without a warrant his ground for belief that the person to be arrested is guilty of a crime must be such as would influence the conduct of a prudent and cautious man under the circumstances. (*Kindred* v. *Stitt, supra.*)' (*People* v. *McGurn,* 341 Ill. 632, 636.) In *People* v. *De Luca, supra,* the judgment of conviction was reversed because it appeared that the defendant was searched without a search warrant in an effort to discover evidence and an arrest was afterwards made solely on the strength of the discovery, and it was held that the evidence thus obtained was violative of the constitutional rights of the defendant and should have been suppressed on his motion duly made. In *People* v. *McGurn, supra,* the judgment was reversed for the same reason. In the instant case the People and defendant agree that the arrest was made before the search. The arresting officer testified that as he approached defendant he touched him on the shoulder and told him that he was under arrest, at the same time showing him his police star. Defendant testified that when the officer approached him he 'stuck his gun' in the back of defendant and at the same time said to him, 'You are going to the can.' There was no rebuttal evidence offered by defendant, and we are of the opinion that the People made out a prima facie showing that the officer had reasonable grounds for believing that defendant was the man who robbed the Lake View bank. Defendant does not contend to the contrary. His position is that 'the action of the Court in refusing to hear and determine the legality of the search before the trial, was reversible error,' and that the hearing had during the trial did not cure the error, regardless of what the proof then showed. We are unable to agree with this contention."

This case (*People* v. *Kissane*) was recently affirmed by the Supreme Court of Illinois (*People* v. *Kissane,* 347 Ill. 385) in a per curiam endorsement of an opinion written by Commissioner Edmunds. The court in this opinion said: "Section 4 of division 6 of the Criminal Code provides that an arrest may be made without a warrant by an officer when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it. (Cahill's Stat. 1931, chap. 38, par. 681.)

Where an arrest is made under such circumstances the officer has a right to search the arrested person without a search warrant. (*People* v. *Caruso,* 339 Ill. 258; *People* v. *DeLuca,* 343 id. 269.) Whether or not the officer had reasonable ground for believing that plaintiff in error had committed the bank robbery is a mixed question of law and fact, the circumstances to show it reasonable being the fact and their sufficiency when shown being a question of law. No general rule applicable to every case has been, or probably can be, announced as to what facts will constitute justification, in law, for an arrest without a warrant, other than that such grounds of suspicion exist as should influence the conduct of a prudent and cautious man under the circumstances. Each case must be considered upon its own facts. (*People* v. *Doody,* 343 Ill. 194; *Carroll* v. *United States,* 267 U. S. 132.) Counsel contend that there is, in effect, no evidence which this court can consider as justifying the arrest, asserting that the testimony of the police officer is "unworthy of belief." They characterize this testimony as an "obviously false story" and a "preposterous story," basing such statements, apparently, on the contention that it appears that plaintiff in error was released from jail about five hours after his arrest and that it does not appear that he was ever formally charged with the bank robbery. We cannot accede to the argument that we must reject the officer's testimony as a falsehood, and our opinion is that the arrest and search were proper."

Since that time, also, and in *People* v. *Roberts* (Illinois, April 7, 1933) 185 N. E. 253, we find another case which goes far in the matter of admitting evidence which has been obtained on a questionable arrest and in sustaining an arrest without the preliminary of a warrant. From this case, however, both Justices Dunne and De Young dissent. The evidence shows that four or more police officers entered a building in Chicago Heights about ten o'clock on the night of September 30, 1930, and arrested two girls whom, the officers said, admitted to them that they were living there and were practicing prostitution. The officer also arrested the man who was pointed out by the girls as the owner of, and in charge of, the hotel and then inquired of the girls if anyone else was connected with the place. The girls replied that there were a couple of sluggers, who were their men, in the storeroom on the ground floor of the same building. The officers went downstairs to this room, which was fitted up as and supposed to be a gymnasium, but was apparently operated in connection with the house of ill fame. Upon entering the storeroom, the officers saw three men sitting at a table, and asked them

to stand up. The men remained seated, and were told by the police. 'We are police officers; stand up.' The men did not stand up as requested, and officers Sherping and Levine seized them and then searched each of them. Pistols were found on plaintiff in error and Montascato, and they were taken into custody by the police. The officers then searched the entire building, examined the safe, and found men's wearing apparel in one of the upstairs bedrooms. The policemen had no warrant for the arrest of any person residing or being in the building, and had no search warrant authorizing the search of the building or any person in it. There is no evidence that there was any loud noise, disorder, breach of the peace, or unusual cause for the officers entering the building and making the arrests and search, though one of the officers testified that when they started out from Chicago he had information that the place was a house of prostitution and the other officer stated that they were out raiding the place. Officer Levine also stated that he was positive there was prostitution practiced there, and that the officers had reasonable ground to believe Roberta and Montascato, who the girls said were their men, had some connection with the conduct and operation of the place.

The court said:

"By section 657 of the Criminal Code (Smith-Hurd Rev. St. 1929, p. 1056, f. 38) in this state an arrest may be made by an officer or by a private person without a warrant for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. The term 'criminal offense,' used in the statute, has been construed to include misdemeanors as well as felonies. *People* v. *Scalisi,* 324 Ill. 131, 154 N. E. 715. Where a criminal offense has, in fact, been committed, an officer has a right to arrest without a warrant where he has reasonable ground for believing that the person to be arrested is implicated in the crime, and such officer has a right to search the arrested person without a search warrant. *People* v. *Caruso.* 339 Ill. 258, 171 N. E. 128; *People* v. *Kissane,* 347 Ill. 385, 179 N. E. 850. The right of such search and seizure is incidental to the right of arrest. *People* v. *McGurn,* 341 Ill. 632, 173 N. E. 754. Whether or not in a given case there are reasonable grounds to warrant an arrest is a mixed question of law and fact. No general rule applicable to every case has been or probably can be announced as to what facts will constitute justification, in law, for an arrest by an officer with-

out a warrant, other than that such ground of suspicion or belief exists as should influence the conduct of a prudent and cautious man under the circumstances. Each case must be considered upon its own facts. *People* v. *Kissane, supra; People* v. *Scalisi, supra.*

"Sections 162 and 163 of the Criminal Code (Smith-Hurd Rev. St. 1929, p. 987, c. 38) provide for the punishment of any person having any connection with a house of prostitution or ill fame, whether in the capacity of owner, keeper, patron, or inmate. When the officers, one of whom said he had previous information that the place was a house of prostitution, entered the second floor of the building, where the girls were, the latter admitted that they were carrying on prostitution there, and told the officers that Roberta and Montascato were their men and were sluggers for the place and were downstairs in the gymnasium storeroom, where the officers later arrested them. Before their arrest, no information was obtained from the two men, or through any property belonging to them, that they had an interests in or connection with the place. However, from the information which the police received from the girl inmates, it was reasonable for the officers to believe that the place was being conducted as a house of prostitution, and that these men had some connection therewith, which was a violation of the law. Under such circumstances, we think the seizing of the men by the officers, which we take it was then considered by them as an arrest, and their being taken into custody, was justified. The search of the arrested parties without a search warrant was incidental to the lawful arrest, and the taking of the guns, and the introduction thereof on the trial as evidence against the men on the charge of carrying concealed weapons, was proper. Plaintiff in error's motion to suppress evidence was properly denied.

"There being no reversible error in the record, the judgment of the Appellate Court will be affirmed."

This case goes a long way. The officers had no search or other warrant and their only excuse for entering the building was that they were informed that it was a house of prostitution. What the nature of that information was they did not disclose and if it had been actual evidence they could certainly have made it the basis of a search warrant. They then arrested the girls and upon the information which the girls gave to them they seized the two men defendants who were afterwards prosecuted for carrying concealed weapons. All that the girls, however, said was that they were sluggers and, certainly, the girls furnished no evidence that they were actually

connected with the carrying on of the House. Perhaps it was perfectly reasonable for the officers to presume that these men had some connection with the business, but unless the original entry was lawful the courts that adhere to strict rules would hardly say that information subsequently obtained could be lawfully used. The real fact of the case was that guns were found upon the men and that the guns furnished the evidence of the reasonableness of the arrest. Why did not the courts say so?

So far this is the nature and the import of the Illinois decisions and though we cannot but approve of the conclusions which are reached and the law which announced by both the Appellate Court of the First Judicial District and the Supreme Court in the cases of *People* v. *Kissane* to which we have just referred, we cannot help but realize that in many respects these opinions differ from and are antagonistic to the former holdings of the Illinois Supreme Court. It appears to us that to a much wider extent they justify arrest and upon suspicion alone and to us they appear to have been motivated, and we believe rightly, by the realization of and the desire to combat the fact that a man with a gun is a public menace and that the very finding of the gun upon him in itself proves the reasonableness of the arrest. Unless indeed the Supreme Court will be willing to reverse or to modify its prior holdings we see no way of ultimately sustaining the convictions of such men as Humphreys and Scott both of whom were arrested in the day time and without warrants and in the absence, according to the decisions of the Supreme Court, of any offense which had been committed in the presence of the officers or made known to them except by the means of the arrest and of the search.

When, however, we come to the case of the defendant Macklin, who was arrested at 10:40 at night, we find a different situation and so far the decisions decidely stop short of holding that an arrest and search, such as was made of this gunman, and the subsequent introduction in evidence of the revolver which was found upon his person, will or should be held improper by the Supreme Court of Illinois. The clause in the *Scalisi* case[16]—"and plaintiffs in error were not nightwalkers or vagrants and hence the attempt to arrest and detain them was unlawful"—and the prior admission that "at common law watchmen and beadles had authority to arrest and detain in prison for examination any suspicious nightwalker" should be full of meaning. Though, indeed, in the case of *People* v. *Mc-*

[16]*Supra* note 11; 60 Ill. 361.

Gurn[17] the arrest was made at 11:30 and in that of *People* v. *Scalisi*[18] at 9:30 in the morning, and in neither of these cases were night prowlers involved, in the case of *People* v. *Macklin,* which we are principally considering, the arrest was made at 10:40 o'clock at night, and was the result of the suspicion which was aroused by the men being seen loitering in the neighborhood of a filling station.

In spite of this background in the law and in the authorities, however, the Supreme Court of Illinois reversed the Macklin case, and seems to have announced practically the same rule in regard to the nightwalker as in regard to the wanderer by day. "An arrest," they said, "was not justifiable unless the person had committed some disorderly or suspicious act. . . . An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it. To justify an arrest by an officer without a warrant his ground for belief that the person arrested is guilty of an offense must be such as would influence the conduct of a prudent and cautious man under the circumstances. The evidence discloses that the plaintiff in error was committing the offense of carrying a concealed weapon at the time the police officers approached him. When, however, the plaintiff in error was arrested the officers had neither knowledge nor information that he had committed any offense whatever. The acts which aroused the suspicions of the officers were that, late at night the plaintiff in error had called at a gasoline service station, and that after leaving it, he and another man walked together along a public street. It is not charged that either loitered about the premises of another person in a suspicious or disorderly manner. The plaintiff in error did nothing before his arrest to indicate that he was about to commit an offense of any character. It was only after one of the officers placed his hands upon him that he manifested any attempt at resistance. This act was subsequent to and hence not the cause of the arrest. No overt act of a criminal tendency had been committed and nothing the men did led the officers to suspect either of them of the specific offense of carrying concealed weapons."

All this may be true, but what the officers did suspect was that, in view of the numerous recent gas station robberies, the man was not in the station for any lawful purpose. They, too, saw the other man

[17] *Supra* note 5; 341 Ill. 632.
[18] 360 Ill. 361.

waiting in the neighborhood. Men as a rule do not visit gas stations at night on foot and whether a man is a suspicious character or not depends much upon his appearance.

The rule of law announced certainly gives to the public, and to the police themselves who are constantly being shot by these miscreants, but an inadequate protection. Must the criminal, we ask, always be allowed to fire the first shot?

In this case, indeed, we had hoped that the Supreme Court might have been able to see a distinction, to apply the doctrine of the night prowler and to affirm the judgment of the court below and unless the Illinois statute in relation to the examination of persons arrested for felonies, and which we will later consider, is held to present an insurmountable obstacle.[19]

In the case of *Miles* v. *Weston,*[20] in an action of trespass and false imprisonment, it appeared that "on the night of the arrest two men had been walking the street in front of defendant's house, apparently taking observations, and, when anyone approached they would separate and come together again and thus kept lurking around for about an hour and a half and until late in the evening when the defendant became alarmed at their suspicious conduct, went after and brought two policemen to the place and there found the plaintiff, and the plaintiff giving no account of himself and admitting his presence there for two hours, one of the policemen arrested him and he was taken to the station."

A suit was brought against the defendant, a private citizens, for trespass and false imprisonment. A judgment was rendered for the plaintiff but was reversed on appeal on the ground that the instructions were not sufficiently favorable to the plaintiff and from what we can learn from the opinion we are almost satisfied that the court thought that a verdict should have been directed for him. In its opinion the court said:

"In *Lawrence* v. *Hedger,* 3 Taunt. 14, it was held that watchmen and beadles have authority, at common law, to arrest, and detain in prison for examination, persons walking the streets at night when there is reasonable ground to suspect felony, although there is no proof of a felony having been committed. And it has been said by Hawkins and others, that every private person may, by common law, arrest any suspicious nightwalker and detain him until he give a good account of himself. 2 Hawkins' Pleas of the Crown,

[19]Smith-Hurd's Stat. (1929) Sec. 699. See note 3 *supra.*

[20]60 Ill. 361.

c. 13, sec. 6, c. 12, sec. 20. And it has been held that a person may be indicted for being a common nightwalker, as for a misdemeanor. 2 Hawk. P. C., c. 12, sec. 20.

"Where a person is taken up in the night as a nightwalker and disorderly person, though by a lawful officer, it has been considered that the arrest would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. Tooley's Case, 2 Lord Raym. 1296.

"The reason why night-walking and lurking about the premises of peaceable inhabitants in the night time is disorderly conduct, is because such conduct cannot, in general, be for any but a bad purpose, and it tends to the annoyance and discomfort of peaceable citizens, who have a just right to be exempt from such disturbance. What family, in a large city like Chicago, so frequently infested with burglars and other desperate criminals, could retire to their beds and enjoy the quiet and repose due to them, when they were conscious that suspiciously acting persons were lurking about their premises? And will it be said that the law gives no right to have such persons arrested and removed, until a burglary is actually committed or attempted? The right of arrest in such cases, by the proper officer, is supported by the same reasons and necessity today, that it was in the earlier history of the common law, and its existence we maintain without hesitation. We do not say that the plaintiff below was guilty of such disorderly conduct; it is not our province to do so; but we do say that, in the facts disclosed by the evidence, lay the materials for a plea of justification."

If it is not now considered permissible to search a night prowler we have no doubt that by statute it can be made so. A night prowler is per se enough of an object of suspicion to arrest and detain him for examination. Though the Supreme Court of the United States in construing and enforcing the liquor laws in the case of *Carroll* v. *United States,*[21] did not go to the length of holding that all automobiles were subject to suspicion and liable to search, it nonetheless held that the Fourth Amendment only denounces such searches and seizures as are unreasonable and it justified a distinction in the Federal statutes in regard to the liability of officers who searched without a warrant and which limited that liability generally only to private dwellings and held that in the case of "other buildings or property should only exist where the search was made *maliciously* and without probable cause."

[21]267 U. S. 132, 45 Sup. Ct. Rep. 280.

The right to arrest a night prowler on suspicion and for examination being conceded, there can be no doubt of the right to search for the gun and of the admissibility of the weapon later in evidence. There are many cases, indeed, to the effect that any person who is lawfully arrested or detained may be searched for a possible weapon if for no other purpose than for making sure that he has no means with which to effect an escape.[22]

It is also well settled that a person who is legally arrested and who on being searched discloses evidence which constitutes proof of the commission of another crime or offense than that for which he has been arrested cannot object to the introduction of that evidence on a prosecution for that other offense.[23]

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[22]*Gaines* v. *State,* 230 Pac. 946 (Washington, 1924).

[23]In *Gaines* v. *State,* 230 Pac. 946 (Washington, 1924) the defendant was convicted of the illegal possession of narcotic drugs. The judgment was affirmed, the court held that one illegally arrested may be searched for property connected with the offense which may be used as evidence against or for weapons or things which might facilitate his escape. In *State* v. *Hayes* (Oregon, 1926) 249 Pac 637, the defendant was arrested for a crime committed in the presence of the officer, namely, that of an assault on the officer. The defendant's subsequent conviction for the unlawful possession of intoxicating liquors was upheld on the theory that the officer had the right to arrest the defendant and after the arrest the right to search his person as an incident thereto and on which search intoxicating liquor was found. In *People* v. *Kissane* (Illinois, 1932) 347 Ill. 385, the defendant was arrested without a warrant on the belief of the officer that he had robbed a bank. After he was arrested and his person searched a gun was found. The defendant was convicted of carrying a concealed weapon. Judgment was affirmed. In *Moore* v. *State* (Oklahoma, 1931) 1 Pac. (2) 813, the defendant was driving down a highway, weaving from one side of the road to the other. The officers chased him for committing a misdemeanor. They had no warrant. Upon searching the car, liquor was found and defendant was convicted for transporting liquor. The conviction was affirmed and the evidence held admissible since the search was made after an arrest for a misdemeanor committed in the officers' presence. In *State* v. *Korth* (Iowa, 1927) 215 N. W. 706, the defendant was arrested in a store being suspected of having stolen articles. The defendant was taken to the jail and there being searched morphine was found on her and she was tried and convicted of the crime of the illegal possession of narcotic drugs. The judgment was affirmed. The evidence was held admissible. In *Milam* v. *United States,* 296 Fed. 629, the officers arrested defendant for possession of narcotics and a search of the house disclosed liquor. It was held that the latter evidence could be used against him. In *State* v. *McKindel* (*Washington,* 1928) 268 Pac. 593, where the defendant was convicted of receiving and concealing stolen property a search warrant had been issued for the search of liquor and for liquor alone. While on the premises the officers recognized the stolen goods and arrested the defendant and the prosecution for receiving stolen goods. A motion to suppress the motion was denied. The court held that being lawfully on the premises it was the duty of the officers immediately on learning that defendant has stolen goods in his possession to make the arrest and to seize them. In *United States* v. *Murphy,* 264 Fed. 842, *Vouled* v. *United States,* 264 Fed. 839, *Weeks* v. *United States,* 232 U. S. 383 and *Welsh* v. *United States,* 267 Fed. 819, it was held that when a person was arrested for

But it is not with night prowlers alone that we are concerned. Although, perhaps, the majority of our gunmen ply their trade at night there are many who do not hesitate to operate in the light of day. Of course, if in these cases as well as in those of night prowlers, the Federal court and the Supreme Court of Illinois would repudiate their later holdings in the cases of *People* v. *McGurn*[24] and *Silverthorne Lumber Company* v. *United States*[25] and *Weeks* v. *United States*[26] and return once more to that of *Adams* v. *New York*[27] and hold that evidence, though wrongfully obtained, if in itself probative, can be introduced in a subsequent criminal prosecution, leaving the parties merely to their action for damages, the problem would be largely solved. In these later cases, however, these courts adopt a strict rule. "The courts," they say, "were instituted as a part of the Constitution and therefore they should not ignore the rights of the individual. If evidence is allowed to be obtained without a warrant, the Fourth Amendment is reduced to a mere form of words and might as well be stricken from the Constitution."[28] As far as their own jurisdictions are concerned they seem inclined to limit the right

intoxication whatever was found on his person could be later used as evidence against him.

In *Pitts* v. *State*, 14 Ga. App. 283, 80 S. E. 510 (1914), the defendant was convicted for carrying a concealed weapon and the conviction was affirmed. The arrest was made for an offense other than that of carrying concealed weapons. The court said: "The obtaining of self-incriminating evidence by illegal search and seizure the defendant's person must be regarded as compelling him to furnish testimony against himself and evidence thus obtained is without probative value against him, but when evidence of one's guilt of carrying a deadly weapon is obtained by a search of his person while he is in the legal custody of an officer under an arrest for a different offense and the search is necessary in order to disarm the prisoner for the safety of the officer the evidence is not illegal. See also *Dozier* v. *State*, 107 Ga. 708, 33 S. E. 418. To the same effect see *Sewell* v. *State* (Alabama) 13 So. 555 (1893).

In *French* v. *State* (Alabama) 10 So. 553, the defendant was arrested for violation of a municipal ordinance which was committed in the officer's presence. He was later searched and a pistol was found upon him. He was then prosecuted and convicted and the conviction was sustained.

There are a number of cases where such evidence is held not admissible in cases of search warrants, that is to say, where the warrant was issued for the recovery of stolen property and intoxicating liquors were found. There is a wide distinction, however, between evidence obtained as the result of a lawful arrest and a search afterwards and evidence obtained merely on a fishing expedition under the form of a search warrant. See *People* v. *Preuss*, 195 N. W. 684 (Mich., 1923); *State* v. *Jarvey* (Wash., 1930) 288 Pac. 923.

[24]*People* v. *McGurn*, 341 Ill. 632; also *People* v. *Brocamp*, 307 Ill. 448; *People* v. *Castree*, 311 Ill. 392.

[25]251 U. S. 385.

[26]232 U. S. 383. See *United States* v. *Shultz*, 3 Fed. Supp. 273.

[27]192 U. S. 585.

[28]*Silverthorne* v. *United States*, 251 U. S. 285; *Weeks* v. *United States*, 232 U. S. 383.

to arrest without warrant and, above all, to hold that evidence which has been illegally obtained by Federal officers cannot later on be used by such officers in a criminal prosecution, that is to say, if a prior demand for its return has been made.[29] All of the Federal cases, however, are supported by references to the Fourth Amendment and none of them have intimated that the Fourth Amendment is incorporated in and a part of the Fourteenth, but on the other hand to hold that when it comes to the admissibility of evidence which has been obtained under lawful arrest or the question of the extent to which the state may arrest without warrant, the matter is one for the determination of the state courts when state offenses alone are involved.[30] Though, indeed, Illinois has so far chosen to follow the Federal leadership[31] and to announce a doctrine similar to that which was stated in the *Weeks and Silverthorne* cases, there is nothing to prevent it from making a change of front. Already, indeed, a large and growing number of State courts have adopted the more liberal rule which prevailed in the case of *Adams* v. *New York* and which is strenuously contended for by both Professors John H. Wigmore and Simon Greenleaf and to the effect that after all the matter is one of evidence, that the evidence of the gun or other object is as evidence of the best, no matter how obtained, and that the Constitution is sufficiently adhered to if a suit for civil damages be allowed for any wrong committed in the obtaining.[32] As we

[29]*Crawford* v. *United States*, 5 Fed. (2d) 672; *Weeks* v. *United States*, 232 U. S. 383; *Rowan* v. *United States*, 281 Fed. 137; *Gordon* v. *United States*, 18 Fed. (2d) 531.

[30]See *Weeks* v. *United States, supra* note 9; *Silverthorne Lumber Co.* v. *United States, supra* note 9.

[31]*People* v. *McGurn*, 341 Ill. 632; *People* v. *Brocamp*, 307 Ill. 448; *People* v. *Castree*, 311 Ill. 392; *People* v. *Scaramuzzo*, (Ill.) 185 N. W. 578. See note by James T. Hatcher in 20 Kentucky L. J. 358.

[32]See Wigmore on Evidence (2d ed.) Vol. 4, sec. 2183 *et seq.*; Greenleaf on Evidence, Vol. I, sec. 254A. See numerous cases cited in Wigmore on Evidence (2d ed.) Vol. 4, sec. 2183. See also *State* v. *Kanellos*, 115 S. E. 636; *Mata* v. *State* (Indiana), 179 N. E. 916; *State* v. *Dillon* (New Mexico) 218 Pac. 474; *Hall* v. *Commonwealth* (Virginia) 130 S. E. 416, 143 Va. 554; *Meisinger* v. *State*, 155 Md. 195, 141 Atl. 536, 142 Atl. 190; *Nolan* v. *State* (Maryland), 146 Atl. 268; *State* v. *Fahn*, 53 N. D. 203, 205 N. W. 67; *Commonwealth* v. *Dabbierio* (Pennsylvania), 290 Pa. 174, 138 Atl. 679; *Commonwealth* v. *Connolly*, 290 Pa. 181, 138 Atl. 682; *State* v. *Lyones* (New Jersey), 99 N. J. L. 301, 122 Atl. 758; *State* v. *Chuchola* (Delaware), 120 Atl. 212; *State* v. *Reynolds* (Connecticut) 125 Atl. 636; *State* v. *Lacy* (North Dakota) 212 N. W. 442; *Roberts* v. *People* (Colorado), 243 Pac. 545; *Hall* v. *Commonwealth* (Virginia), 138 Va. 727, 121 S. E. 154; *State* v. *Maes* (South Carolina), 127 S. C. 397, 120 S. E. 576, 114 S. E. 317; *State* v. *Rollinger* (Iowa), 225 N. W. 841; *Morgan* v. *State* (Indiana), 151 N. E. 98; *People* v. *Defore* (New York), 242 N. Y. 13, 150 N. E. 585; *State* v. *Chin Gim* (Nevada), 224 Pac. 798; *Cians* v. *State* (Ohio), 105 Ohio 229, 137 N. E. 11; *State* v. *Pauley* (North

before stated, the case of *Weeks* v. *United States*[33] fairly overrules the prior and equally considered opinion in the case of *Adams* v. *New York*[34] and although it is true that in the *Weeks* case[35] and in some of the Illinois decisions[36] an attempt is made to distinguish the former holdings on the ground that in them no demand was made for return of the property or the evidence before the trial was entered upon, and that in these prior holdings the courts had merely denied the right to try collateral issues, the distinction is hardly convincing, that is to say, if a substantial constitutional right is really involved. Certainly it is not recognized in the case of involuntary confessions.[37]

Why, we ask, on account of the present exigency and of the widespread use of firearms by the criminal classes, should not the

Dakota), 192 N. W. 91; *Commonwealth* v. *Wilkins* (Massachusetts), 138 N. E. 11; *State* v. *Hempley* (South Carolina), 120 S. C. 339, 113 S. E. 123; *State* v. *Aime* (Utah), 222 Pac. 704; *Billings* v. *State* (Nebraska), 191 N. W. 721; *State* v. *Tonn* (Iowa), 195 Ia. 94, 191 N. W. 530; *People* v. *Case* (Michigan), 220 Mich. 379, 190 N. W. 289; *People* v. *De Cesare* (Michigan), 190 N. W. 302; *People* v. *Woodward* (Michigan), 190 N. W. 721; (Liquor seized on entering a home to arrest on a frame.) *People* v. *Saltis* (Illinois), 160 N. E. 86; *Welcheck* v. *State* (Texas) 247 S. W. 524; *Yohner* v. *State* (Texas), 247 S. W. 533; *McNeil* v. *State* (Texas), 247 S. W. 536; *Brown* v. *State*, 92 Tex. Cr. 147, 242 S. W. 218; (Liquor seized during an arrest for an offense in an officer's presence); *Cumpton* v. *Muskogee* (Oklahoma), 225 Pac. 562; (Liquor seized without warrant during arrest for an offense committed in an officer's presence); *State* v. *Fleckinger* (Louisiana), 152 La. 337, 93 S. 115; *Ware* v. *State* (Wisconsin), 230 N. W. 80. See also Greenleaf on Evidence, Vol. I, sec. 2548; *Adams* v. *New York*, 192 U. S. 585; *Commonwealth* v. *Dana*, 2 Met. (Massachusetts) 329; *Leggatt* v. *Tallervey*, 14 East. 302; *Jordan* v. *Lewis*, 14 East. 306; *Commonwealth* v. *Tibbetts*, 157 Mass. 519; *Commonwealth* v. *Acton*, 165 Mass. 11; *Commonwealth* v. *Smith*, 166 Mass. 370; *Chastand* v. *State*, 83 Ala. 29; *State* v. *Flynn*, 36 N. H. 64; *State* v. *Edwards*, 51 W. Va. 220; *Shields* v. *State*, 100 Ga. 511; *State* v. *Pomeroy*, 130 Mo. 489.

Compare also *Ker* v. *Illinois*, 119 U. S. 436 and *Mahon* v. *Justice*, 127 U. S. 700, where forcible induction into the state having the jurisdiction was held not to prevent the trial.

[33]232 U. S. 383. In *Boyd* v. *United States*, 116 U. S. 616, which was decided in 1885, the Court held that the Fourth Amendment to the Federal Constitution prohibiting unreasonable search and seizure was so related to the Fifth Amendment prohibiting compulsory self-incrimination that the Fifth Amendment could be invoked by an accused to withhold from surrender documents sought by even a lawful official search; and that documents obtained by unlawful official search could be excluded from evidence as a consequence of the Fourth Amendment. See Wigmore on Evidence (4th ed.) Vol. 4, secs. 2183, 2264.

[34]192 U. S. 585, 24 Sup. Ct. 372 (1904). The Illinois cases of *People* v. *McGurn*, 341 Ill. 632, *People* v. *Pratt*, 314 Ill. 518, and *People* v. *Brocamp*, 307 Ill. 448, which announce the doctrine of inadmissibility to all intents and purposes overrule those of *Grundrat* v. *People*, 138 Ill. 103; *Trask* v. *People*, 151 Ill. 523 and *People* v. *Paisley*, 208 Ill. 310.

[35]232 U. S. 383.

[36]*People* v. *McGurn*, 341 Ill. 632; *People* v. *Brocamp*, 307 Ill. 448; *People* v. *Wynn*, 324 Ill. 428.

[37]Grigsby's Criminal Law 232; *Brown* v. *People*, 91 Ill. 506.

Supreme Court of Illinois once more reverse itself, adopt the rule argued for by Professor Wigmore and upheld by the majority of the State Supreme Courts and return once more to the holding of the case of *Adams* v. *New York*.[38]

As has so well been pointed out by Professor John Barker Waite in a very recent article[39] the Supreme Court of the United States itself appears to be willing to admit that after all it is merely a question of judicial preference and of a judicial conception of public policy. Which is better, to suppress the nuisance, to make it possible to convict the guilty and to secure some measure of protection to the outraged and long suffering public, or to suppress the evidence lest "the Government should play an ignoble part?"[40] Which is the more important, the protection of the many individuals who annually are killed or robbed by the use of the revolver, or the protection of the somewhat fanciful individual and supposedly constitutional rights of the far lesser number of persons who prey upon them and who seek the aid and the protection of a law and of a government with which they are at war and which they despise? Mr. Justice Holmes, who perhaps is the principal proponent of the present United States rule, says that it is a question of the weighing of the relative importance of two objects of desire, one that the guilty may be convicted and the public be protected and the other that the dignity of the law and of the Government shall be preserved; and that at no time shall the officers of the law be allowed to profit by doing an illegal thing and at no time shall the Government "play an ignoble part."[41] He contends that no matter what happens, the dignity and privacy and independence of the individual must be preserved. He holds, in

[38]192 U. S. 585.

[39]Public Policy and the Arrest of Felons, 31 Mich. Law Rev. 749.

[40]In *Olmstead* v. *United States*, 277 U. S. 438.

[41]In *Olmstead* v. *United States*, 277 U. S. 438, Mr. Justice Holmes says: "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

In *People* v. *Defore*, 242 N. Y. 13 (150 N. E. 555) Judge Cardozo took a contrary position and said that under the rule announced by Justice Holmes:

"The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. . . . Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice."

short, that the admission of the evidence would be totally destructive to our American individualism and would reduce the Fourth Amendment to a mere form of words, and would make the Constitution the subject of a gibe and a jeer.[42] But after all, apart from the American citizenship the Federal government is but an intangible thing, and though the Federal officers should not be allowed to seek protection from or to profit by their own wrongs, the profit and the protection that would be afforded by the more liberal rule would not be so much to the officers as to the law abiding people as a whole.

Is it not fair to assume, and would it not be fitting for both the Illinois and the United States Supreme Courts themselves to admit, that the adoption of their present stringent rule and the reversal of their prior decisions took place without a full consideration of the real menace of the gunman and was, in part at least, due to the protest against and the unrest which arose from the numerous and often unwarranted searches which were made in liquor cases and in the enforcement of an unpopular law, and that the danger of such unreasonable and exasperating arrests is now over? Would it not be proper for them to admit that the carrying of concealed weapons is becoming an alarming public menace which the very safety of society demands shall be summarily abated? Is it not time for them to admit that in handing down their later decisions and in reversing their former rules in regard to admissibility of evidence, the exigency of the firearm was not sufficiently called to their attention and that in every field of law the firearm has occasioned the reversal of prior rules and of prior decisions? Since the advent of the firearm, no longer is one required to retreat to the wall.[43] Since the advent of the firearm no longer is an overt act necessary before a person can shoot or kill in defense nor is the actual ability of the assailant to

[42]See *Yoyne* v. *State*, 180 Wis. 407; *People* v. *McGurn*, 341 Ill. 632.

[43]The change in this old doctrine was brought about by the firearm, because it presented difficulties not seen at the time when the doctrine was originally established. See Inbau, Firearms and Legal Doctrine, 7 Tulane Law Review 529. And at least two appellate courts have frankly admitted the reason for their change. In *State* v. *Gardner*, 96 Minn. 318, 327, 104 N. W. 971, 975, a L. R. A. (N. S.) 49, 63 (1909), the court said: "The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms." A federal court was bold enough to hold likewise. In *Laney* v. *United States*, 294 Fed. 412 (D. C., 1923), this language is found in the court's opinion: "The common law rule, which required the assailed to retreat to the wall, had its origin before the general introduction of firearms. If a person is threatened with death or great bodily harm by an assailant, armed with a modern rifle, in open space, away from safety, it would be ridiculous to require him to retreat. Indeed, to retreat would be to invite almost certain death." See note by Clarence Rothenburg in 20 Kentucky L. J. 362.

commit harm a matter of importance.[44] If only one reaches his hand to his hip pocket it is generally held that as far as the person assailed is concerned an intention to draw a pistol and to shoot him may be presumed.[45] This is the case even when the pistol in the pocket, is not loaded.[46] It is even the case where there is no pistol in the pocket at all.[47] These changes in the law have arisen on account of the exigencies of the cases and the very nature of our new weapons. At a time when fists and clubs or swords were practically the only weapons the rule of retreating to the wall and the overt act might have been proper. But changed circumstances and changed exigencies make new rules. Where the reason for the law faileth that law also fails.[48]

Time and time again the courts have sanctioned violations of seemingly well established personal rights on the ground that otherwise a basic law or police ordinance could not be enforced and the public evil or the public nuisance be abated. They have held saloonkeepers liable for selling to minors even though the sales were made against their express prohibitions and instructions. They have held persons liable for unlawful sales to minors and habitual drunkards even though they had no knowledge of the infancy or habitual tendency and had been assured by the purchaser that he was of full age. In the same way they have held employers liable for the unlawful employment of minors even though they had no knowledge of the minority and had, in fact, been told by the child and its parents

[44]See *Goodall* v. *State*, 1 Ore. 334 (1861), where the court said that there would be no such thing as self-defense if this rule were applied in situations involving firearms.

A similar change resulted in cases where one person sued another for civil assault, and it was proved that the gun so used was unloaded. Under the established doctrine, to recover for an assault it was necessary that the party threatening an injury have the present ability. But the courts soon realized that it was in the interest of public safety and welfare not to permit such conduct to continue with impunity—in such an instance where a person was threatened with a firearm which, for all he knew, had the apparent ability to send a bullet through his body. So, in *Beach* v. *Hancock*, 27 N. H. 223, 59 Am. Dec. 373 (1853), *apparent* ability was held to suffice. The same development is found in criminal cases. The criminal law once required "present ability" before a prosecution could be had for an assault. But the courts realized that "a breach of the peace" or a "tragedy" was as likely to occur whether a gun was loaded or not. The rule was changed to meet the new problem presented by the firearm. See *State* v. *Smith*, 21 Tenn. 457 (1841); *State* v. *Archer*, 8 Kan. App. 737, 54 Pac. 927 (1898); *Price* v. *United States*, 156 Fed. 950, 15 L. R. A. (N. S.) 1272, 13 Ann. Cas. 483 (1907). For a discussion of this judicial evolution see Inbau, Firearms and Legal Doctrine, 7 Tulane Law Rev. 529.

[45]*Keep* v. *Quallman*, 68 Wis. 451; *People* v. *Motuzas*, 185 N. E. 615.

[46]*Beach* v. *Hancock* (1853) 27 N. H. 223.

[47]*Phillips* v. *Commonwealth*, 63 Ky. 328; *People* v. *Motuzas*, 185 N. E. 615.

[48]See Inbau, Firearms and Legal Doctrine, 7 Tulane Law Rev. 529.

that he was beyond the age below which such employment was prohibited.[49]

Even if these decisions are not reversed is there any reason why we should not extend the right to detain for investigation not only nightwalkers but suspicious characters generally and especially men with prior criminal records even though we have no specific evidence against them. Such men may be innocent and their individual freedom may be interferred with. Yet individual liberty is not always recognized and in order that justice may be administered and that the laws may be interfered with. Yet individual liberty is not always recogwhich require witnesses to furnish bail and to be held to testify.[50] Is there not indeed much of suggestion in the insistence by former Chief Justice Taft in the case of *Carroll* v. *United States*[51] that after all it is only unreasonable searches and seizures that are prohibited and that what is reasonable and what is probable cause depends largely upon the circumstances which surround the particular case or the particular public exigencies. Is there not much ground for thought in his analysis of the case of *Boyd* v. *United States*[52] and his approval of that part of the decision therein in which the Supreme Court denies the applicability of the search and seizure clauses of the Constitution to searches for stolen or forfeited goods, or goods liable to duties and which are concealed to avoid the payment thereof and to "the supervision authorized to be exercised by the officers of the revenue over the manufacture or custody of excisable articles" or " for the search and seizure of articles and things which it *is unlawful for a person to have in his possession* for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, and implements of gaming, etc."?[53] Does not a concealed revolver come within these classes. The search, indeed, is made not for the purpose of convicting the defendant but for the protection of the public and the suppression of a public nuisance and an object of public danger. Although the courts of a number of the states[54] have insisted in such cases and even although on a search of the person a concealed weapon has been discovered, that no offense has been committed in the pres-

[49]*People* v. *Falk* (Ill.) 141 N. E. 719; *State* v. *Cloughly* (Ia.) 35 N. W. 652; *Shear* v. *Green*, 73 Ia. 688, 36 N. W. 642; *State* v. *Donovan*, 10 N. Dak. 203.

[50]22 Enc. of P. & P. 1343.

[51]See *Carroll* v. *United States*, 267 U. S. 132. Consta. Amend. 4.

[52]116 U. S. 616.

[53]See opinion in *Carroll* v. *United States*, 267 U. S. 132, 149. See dissenting opinion of Justices Stone and De Young, in *People* v. *De Luca*, 343 Ill. 269, 272.

[54]See note 9 *ante*.

ence of the officer and that therefore there is no reasonable cause for the arrest and consequently the gun is inadmissible in evidence, much more salutary, we believe, is the doctrine of the Court of Special Sessions of the City of New York in *People* v. *Didonna*,[55] which sees in the very finding of a gun on the person convincing proof of that reasonable cause. Is there not much of wisdom in the suggestion of the court in that case, that "to require a search warrant before it (the gun) may be discovered is providing a means for putting the weapon out of the reach of the search warrant"? Is it not also a fact of some interest that in the states where this rule is chiefly applied and arrests for the inspection of gunmen is most frowned upon by the courts the homicide rate is excessively high? While, indeed, the homicide rate is 12 per 100,000 population in Spokane, Washington, and Terre Haute, Indiana; 13 in Cleveland, Ohio, and Trenton, New Jersey; it is 53 in Lexington, Kentucky, 52 in Jacksonville, Florida, 54 in Memphis, Tennessee, 44 in Little Rock, Arkansas, 43 in Charleston, South Carolina, 40 in Birmingham, Alabama, 39 in Atlanta, Georgia, 35 in Miami, Florida, 36 in Savannah, Georgia, 33 in Macon, Georgia, 29 in Dallas, Texas, and 22 even in Washington, D. C.[56]

It is true that in many of these states an attempt is made to attribute the high homicide rate to the existence of a large negro population, but the fact still remains that by far the greater proportion of the murders committed by the negro are committed by the use of firearms. Though, indeed, a recent study of the city of Memphis, Tennessee, has disclosed the fact that though perhaps 85 per cent of the murders can be attributed to the negroes who only constitute one-half of the population, it also has disclosed the fact that at least 78 per cent of these murders were accomplished by the use of firearms.[57] Perhaps it might be well if the courts of the states who strenuously object to the examination of the gunman would pay some heed to these figures.

Even where the detention or arrest for examination is made in the day time, but where the commission of an actual crime of

[55]210 N. Y. S. 135 (1925). In *State* v. *Grant*, 79 Ino. 113 (1883), the court also suggested that the guilt of the arrested person ought at least to be taken into consideration in determining whether or not the officer had real reason for believing him guilty. See also *State* v. *Whitley* (Ino. 1916) 183 S. W. Rep. 317.

[56]See last report of Actuary Frederick L. Hoffman to Prudential Life Insurance Company, published in the press under date of March 30, 1933.

[57]Bruce and Fitzgerald, A Study of Crime in the City of Memphis, Tennessee, 29 Journal of Criminal Law and Criminology No. 2, part 2 (August, 1928).

carrying concealed weapons is disclosed or conclusively proved by the discovery of the gun itself, we see no reason why there should be any hesitancy in allowing the proof in the criminal courts. Of course we cannot afford to expose everyone to unlimited and uncontrolled police interference and of course one who is unlawfully and unreasonable detained or searched should have his remedy in a suit for damages. We must, however, be willing to concede some measure of judgment and discretion to exist among our police and at any rate we should select officers who possess it. Surely one who by such an examination and under such circumstances as were present in the *Macklin* case, and even in that of Murray Humphreys, is disclosed to be a law breaker, that is to say, a carrier of concealed weapons, should not be allowed to complain of an inspection which his past habits and those of his companions makes necessary.[58] The very finding of the gun disclosed the necessity.[59] The gist of the offense of carrying concealed weapons is the concealment and a rule of law is clearly absurd which makes that concealment possible of detection and punishment only if the guilty person commits some other and distinct crime either in the presence of the officer or for which a warrant has been obtained for which he can be arrested or has so lifted the veil of secrecy and of concealment that someone knows of the fact and can swear out a warrant. Our most dangerous gunmen do not work that way. They have to be caught on the run. Surely the present emergency needs some kind of relief.

When it comes to the right of examination and interrogation we are not without analogy. Even at the time of the sainted Edward the Confessor in which the supposed "law of the land" or "due process of law" of the Magna Charta and of the American Fifth and Fourteenth Amendments was supposed to have had its origin, men were compelled, when demanded by the authorities, to prove title to the chattels which they carried with them and wandering boys and men were required to make oath that they would "neither be thieves nor the companions of thieves."[60] Persons may be arrested and even

[58]William Scott, for instance, was well known as a labor racketeer and went under the euphoneous name of Three-Fingered Jack. For some time he had been associated with the Al Capone band of outlaws. In 1919 he was sent to the Joliet Penitentiary for robbery and served four years before he was paroled. Prior to that time he had been twice convicted of murder, though the convictions were reversed by the Supreme Court.

[59]*People* v. *Didona*, 210 N. Y. S. 135.

[60]Purchasers also even of personal property had to be witnessed and the unemployed and unattached were required to furnish sureties, Sharon Turner, The History of the Anglo Saxons, Vol. III, 130-132. In *Ex parte* Smith, 135 Mo. 223 and *City of St. Louis* v. *Roche*, 128 Mo. 541, it was held that

punished as vagrants if they are found loitering and have no means of support, and nightprowlers may be arrested on the mere suspicion which arises from their environment.[61] Why should the lack of the means of a livelihood or the fact of the night environment be of more significance as far, as search and an examination is concerned, that known association with known criminals and often with known gunmen?

Is there not a clear distinction between the discovery of a pistol on a man the only use of which is to kill and the carrying and concealment of which in itself constitutes a crime and the discovery of liquor or papers or even of dope which may or may not be unlawfully used and which at the most are only evidence of a possible or contemplated crime?

Nor do we believe that any difficulty is presented by the Illinois statute which provides that: "When a person charged with a felony is suspected by the judge or justice of the peace before whom he is brought to have upon his person a dangerous weapon or anything that may be used as evidence of the commission of the offense, the judge or justice may direct him to be searched in his presence and such weapon or other thing to be retained, subject to the order of the court in which the offender may be tried."[62]

Though of course it may be claimed that this statute negatives by exclusion the prior right of the police to make such an examination when the defendant is first arrested we cannot believe and there is no suggestion in the decisions that such is its purpose. Rather we believe it was an attempt on the part of the Legislature to make assurance doubly sure and to make it certain that though the courts had before sustained the power of the police to conduct such examinations as a part of the arrest the Illinois judges still retained their common law powers in such matters and could do that and order that to be done which the police might have carelessly neglected to do. Certain it is that so far in no Illinois case has the statute ever been referred to and the doctrine has been frequently asserted that "the guarantee of the Constitution is not against all search and seizure but against unreasonable search and seizure and does not extend to an immunity from search and seizure on lawful arrest. Where a crime in fact has been committed and the arrest is made by an

a mere association and companionship with criminals could not be made a criminal offense.

[61]*Lawrence* v. *Hedger,* 3 Taunt. 14; 2 Hawkins' Pleas of the Crown, c. 13, sec. 6, c. 12, sec. 20; 2 Hawk. P. C., c. 12, sec. 20; *Miles* v. *Weston,* 60 Ill. 361; *People* v. *Craig,* 152 Cal. 42.

[62]Smith-Hurd's Statutes (1929) Sec. 699.

officer who has reasonable ground for believing the person arrested is implicated in the crime, such officer has a right to search the person arrested without a search warrant, and in such case the right of search and seizure is incidental to the right of arrest."[63]

There is a wide distinction between the revolver which is unlawfully carried and the procedure which is or should be adopted in a case where human life is involved and one in which a mere sumptuary law is sought to be enforced or evidence obtained which may help in a prosecution for its violation. There is a clear distinction between the discovery of a pistol on a man the only use of which is to kill and the concealment of which in itself constitutes a crime and the discovery of liquors or documents or even of dope which may or may not be lawfully used, and which, at the most, are only evidence of a possible or contemplated crime. In itself the revolver is a nuisance which should be summarily abated. In the case of the liquor or the documents there is a search merely for evidence which may or may not be indicative of guilt. In the case of the concealed gun there is a direct attempt to suppress a nuisance and the thing suppressed constitutes conclusive evidence of the commission of a crime and of a crime which when once discovered the defendant is committing in the presence of an officer. Liquor or papers may or may not be unlawfully used. The courts on the other hand should be allowed to take judicial notice of the fact that the primary use of revolvers is to take human life. The menace of the gunman is too great a menace to be trifled with. Society should be allowed some measure of self-protection.

Is there not, indeed, much ground for consideration in the holding and language of the Supreme Court of Missouri[64] when in the case of a prosecution for the murder of a policeman while attempting to make an arrest, the court said:

"Touching the other conclusion which we reach, and which bottoms justification of this arrest on the proven fact that defendant had but recently committed a felony, it would, we repeat, be a strict and narrow view to hold that, although defendant *ought to have been arrested, and in fact was arrested,* such arrest was not warranted, because the officer did not know of the specific felony theretofore committed by defendant. In such case the fact of guilt of the recent felony should be held to deprive the defendant of his right to resist. Conversely, the lack of scienter in the officer should make such an

[63] *People* v. *Reid,* 336 Ill. 421; *North* v. *People,* 139 Ill. 81; *People* v. *Hord,* 329 Ill. 117; *People* v. *Preston,* 341 Ill. 408; *People* v. *McGurn,* 341 Ill. 632.

[64] *State* v. *Whitley* (Mo. 1916) 183 S. W. Rep. 317.

arrest to depend for its justification wholly upon the truth of defendant's guilt of the antecedent felony. The duty which such an officer, as a policeman in a large city, owes to society to protect it from criminals, weighed against the duty such officer owes to the law-abiding man not unlawfully, or arbitrarily, or with brutal officiousness, to deprive him of liberty, requires thus far a modification of the rule which grants absolute protection to the officer, when we hold lawful the arrest of one guilty of an antecedent felony which is unknown to the arresting officer. In short, applying the general rule to the concrete case, if defendant had not been guilty of recently robbing Ladinsky, then deceased had no right (under this phase of the case) to arrest defendant, and the latter's right to resist such arrest would have been fully guaranteed to him. But being guilty, and knowing his guilt thereof (as the inference is from the jury's verdict), the duty was by law incumbent on him to submit to this arrest, under penalty, if he refused, of taking away his defense when tried for any act done by him while resisting arrest."

Can anyone also deny the fact that the recent cases of *People* v. *Kissane* and *People* v. *Roberts* to which we have before referred[65] evidence a radical departure from the strict and formal attitude of the old decisions. Under similar circumstances the old decisions there would hardly have found reasonable grounds for the arrests and for the lack of the search warrants. Yet guns were found on the persons of the defendants and we are quite certain that the finding of the guns did much to induce both the Appellate and Supreme Court to overlook any informality or deficiency in the matter of the arrest or the lack of the search warrant and to ignore the fact that the arrests were made upon suspicion and upon suspicion alone. Why, indeed, did they not say so? Why did they not clearly announce the doctrine that the time has now come for the courts to hold that a gun may now speak for itself, and that the finding upon a person of a concealed weapon estops the carrier from questioning the legality of his arrest? Why, indeed, should one be allowed to appeal to the law for the protection of his rights to personal privacy when at the very moment and during his arrest (for the weapon is still being concealed) he is committing a crime and is defying the very government whose protection he seeks?

[65]See ante.