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The Scope of the Constitutional Immunity against Searches and Seizures

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THE SCOPE OF THE CONSTITUTIONAL IMMUNITY AGAINST SEARCHES AND SEIZURES*

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> "Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."[1]

These picturesque words of Lord Chatham, spoken at a time when popular indignation against sovereign oppression ran high, expressed rather indefinitely what the mass of individualistic Englishmen earnestly hoped and believed to be the law. For years, almost for centuries, they had heard the familiar maxim quoted approvingly, and had seen the King's messengers go about their business in open disregard of it. And now their courts had definitely lined up on the side of the people in resisting encroachment on the ancient rights declared by the common law, and their Parliament, not to be outdone, had echoed the doctrine that

* The James F. Brown Prize Thesis, 1926-27. In 1919 the late James F. Brown, of the class of 1873, gave $5,000.00 to the University to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by our constitutions. Any senior or any graduate of any college of the University, within one year after receiving his bachelor's degree, may compete for this prize.

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[1] Chatham's address in Parliament, 1766, quoted in COOLEY, CONSTITUTIONAL LIMITATIONS, p. 425, n. 1.

so far as searches and seizures were concerned, a man's house was indeed his castle. Small wonder that the people rejoiced, and found great comfort in the extravagant statement of Lord Chatham.

Of all his Majesty's subjects, none were more interested in these momentous events than were the American colonists. On the frontier of the world, these pioneers in individual liberty and security felt perhaps more keenly than anyone else the evils of governmental interference. They found themselves too far away from Westminster Hall to benefit from the unwritten Constitution. The infringement of what they considered their indefeasible rights rankled. It was therefore to be expected that when the time should come when they would have the power to make their own Constitution they would embody in it positive guarantees against the oppression they had formerly felt. The Bill of Rights of the American Constitution is generally considered to contain a re-enactment of the old maxim that every man's house is his castle.[2] It might be supposed that in this age, when sovereigns have become more moderate and the people have found that many items of individual liberty must be surrendered in the interest of the general welfare, the emphasis on these old safeguards would be diminished. That, however, has not been the case. As a corollary of the idea that the individual must be subjected to the welfare of society, has come the doctrine that a paternal government can and must regulate the life of its citizens to an extent hitherto unknown. Such regulation necessarily involves, to a certain extent, the surrender of absolute privacy. But the American people cannot so soon forget the heritage from those who earned the right of privacy at such expense. Today, instead of admitting that for the better conservation of the public health, safety and morals, a man's house is not so completely a castle as it once was, the people are insisting on the retention of the old doctrine to its full extent; and they go further. They seek to extend the sanctity of the home to offices, vehicles, open fields, in short, to any place where they might wish to hide the machinery of their crime. So the constitutional protections against unlawful searches and seizures, instead of fall-

[2] Boyd *v.* United States, 116 U. S. 616 (1886); COOLEY, *op. cit.*, p. 424 ff.

ing into disuse, have risen to occupy a position of greatest importance in our administration of justice. The courts are flooded with litigation involving questions of search and seizure. One enterprising writer has ascertained from the American Digest system that since January 16, 1920, American courts have been forced to decide more than 700 cases involving the question of the admissibility of evidence obtained by wrongful search and seizure.[3] In all these cases, the courts must endeavor to strike a balance between the ancient rights of the people and the necessities of a social age. The problem thus presented is one of fundamental importance. To approach it properly requires a careful study of the meaning of our constitutional provisions relating to searches and seizures. And this study must begin, not with the adoption of the Constitution, but with the very beginning of the common law on the subject.

The use of search warrants can be traced into English history to about the beginning of the seventeenth century. In the early part of that century they were declared illegal by Lord Coke.[4] Within a short time, however, they came to be considered as proper devices for one purpose, the search for stolen goods.[5] Their use grew up apparently without the aid of statute, simply by "imperceptible practice" of the common law courts.[6] The Crown saw in these new devices a most effective means of ferreting out seditious matter and of bringing the offenders to justice. Hence arose the practice of issuing warrants whereby the King's messengers were ordered to search out disloyal writings. It is difficult to determine at what period this use of warrants arose, but it apparently came shortly after their first invention for any purpose. In 1634, just six years after he had written that all search warrants were unlawful, Lord Coke, then on his death bed, was visited by the Secretary of State armed with a warrant to search for seditious papers. Every room in the house, save that in which the former Chief Justice lay, was ransacked and papers of every description seized. Among those taken were the original manuscripts from which had been printed the Commentary

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[3] 36 YALE L. J. 536.
[4] 4 INST. 176.
[5] HALE, P. C., vol. I, p. 150.
[6] Entick *v.* Carrington, 2 Wils. K. B. 274, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765).

on Littleton and his second, third and fourth Institutes, his will, and many other valuable documents. The will was wholly lost, and the legal manuscripts were only returned by order of the Long Parliament.[7] Such outrageous practices apparently were continued without opposition, and, indeed, within a few years received legislative recognition. Shortly after the restoration of Charles II, an act was passed to regulate the publication of books in the hope of stamping out all utterances of a disloyal nature. This Act authorized the issuance of warrants under the sign manual or by the Secretaries of State directing the messengers to search in any place where they knew or had reason to suspect that books were being printed to ascertain if the books were properly licensed and contained lawful matter.[8] This statute expired in 1694, but the issuance of similar warrants was continued. It will be noted that the chief difference between the search warrants which the common law writers recognized to be lawful and these writs for the suppression of sedition were that the former were used solely to discover stolen goods, the latter for the seizure of any sorts of documents which the messengers saw fit to pounce upon, and that in the one there was definite direction as to places of search, while the other was an unrestrained "roving commission."[9]

The use of these general warrants proved very burdensome to the people, and there were sporadic outbursts of popular indignation against them. One of the grounds urged for the impeachment of Chief Justice Scroggs in 1680 was that he had in an arbitrary manner "granted divers general warrants for attaching the persons and seizing the goods of his Majesty's subjects, not named or described particularly in said warrants."[10] The opposition to these warrants, however, lacked the spirit and determination to require from the courts a definite pronouncement as to their legality. For over a century the people awaited one with enough temerity to attack the system in an open and direct manner. Such an antagonist finally appeared in the person of John Wilkes, "a profane and profligate man of

[7] CAMPBELL, LIVES OF THE CHIEF JUSTICES, vol. I, p. 246.
[8] 13 & 14 Car. II, c. 33 (1662).
[9] MAY, CONST'L HISTORY OF ENGLAND, vol. II, p. 246.
[10] 7 How. St. Tr. 487.

fashion who, because of his wit, his audacity, and his skill in meeting the ill-advised attempts of the government to suppress him, became the darling of the populace."[11] Wilkes, a member of Parliament, was the publisher of a pamphlet known as "The North Briton Review," a journal devoted to attacking the government. In 1763 the famous "No. 45" was published, a remarkably inoffensive sheet measured by present day standards, but one which aroused the ire of the ministry. Lord Halifax, principal Secretary of State, determined to stamp out this seditious publication. He issued a warrant to four of the King's messengers, the principal clause of which was as follows:

> "These are in his Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, intitled, THE NORTH BRITON, NUMBER XLV, APRIL 23, 1763, printed for G. Kearsley in Ludgate Street, London, and them, or any of them, having found, to apprehend and seize, together with their papers, and to bring in safe custody before me to be examined concerning the premises, and further dealt with according to law * *."[12]

With this warrant for their guidance, the officers set out on their mission. Not knowing whom to arrest or where to search, they were forced to resort to the testimony of men in the street, following the vaguest hints and most uncertain guesses. And a most thorough job they did. Within three days they had arrested no less than forty-nine persons on suspicion.[13] From some source they learned of Wilkes' connection with the publication, and he was forthwith arrested and imprisoned in the Tower. The messengers then returned to his home and ransacked it. Rifling every chest and drawer, they filled great sacks with papers and carried them away to be scrutinized by the offended ministers.[14] The news of this raid produced a popular excitement amounting almost to hysteria. When Wilkes' attorneys applied for a writ of habeas corpus, the room was crowded to such a degree as the reporter "never before saw it," and when the writ was granted on the ground of parliamentary

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[11] CROSS, SHORTER HISTORY OF ENGLAND, p. 510.
[12] Rex *v.* Wilkes, *infra*, n. 15.
[13] MAY, *op. cit.*, vol. II, p. 246.
[14] Wilkes *v.* Wood, Lofft. 1, 19 How. St. Tr. 1154, 98 Eng. Rep. 489 (1763).

privilege, "there was a loud huzza in Westminster Hall."[15] Proceedings were instituted in Parliament for the expulsion of Wilkes, and the debate arose to such heat as to lead to a duel between Wilkes and another member, in which the former almost lost his life.[16] It was ordered that "The North Briton, No. 45" be publicly burned by the hangman, but at the appointed time there arose the greatest mob that Sheriff Blunt had known for forty years to frustrate the ceremony.[17] Sometime later, after Wilkes had been reincarcerated, a similar mob stormed the Tower and bore him on their shoulders into the hall where Parliament was sitting.[18] May estimates that the prosecutions arising from these disorders cost the government a hundred thousand pounds in court costs.[18a] There was in addition a flood of private litigation, for the most part actions for damages brought by persons wronged by the messengers in the execution of their warrant. Fully fifteen verdicts were recovered against them, calling for exemplary damages.[19] Wilkes recovered four thousand pounds from Lord Halifax himself.[20]

The most important of these cases, however, were *Wilkes* v. *Wood*,[21] *Money* v. *Leach*,[22] and *Huckle* v. *Money*.[23] In each of them, the judges inveighed strongly against the use of such general warrants. It has been said that the cases cannot be taken as holding them illegal because they went off on procedural points,[24] but the language of the judges was so strong as to leave no doubt of their opinion.[25] In *Huckle* v. *Money*, the illegality was placed on the ground of

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[15] Rex *v.* Wilkes, 2 Wils. K. B. 151, 19 How. St. Tr. 982, 95 Eng. Rep. 737 (1768).
[16] Letter, Horace Walpole to Sir Horace Mann, Nov. 17, 1763, reprinted in CHEYNEY, READINGS IN ENGLISH HISTORY, p. 619.
[17] Letter, Horace Walpole to the Earl of Hertford, Dec. 9, 1878, reprinted in CHEYNEY, *op. cit.*, p. 620.
[18] Letter, Horace Walpole to Sir Horace Mann, May 12, 1768, reprinted in CHEYNEY, *op. cit.*, p. 621.
[18a] MAY, CONST'L HISTORY OF ENGLAND, vol. II, p. 247.
[19] Opinion of Bathurst, J., Huckle *v.* Money, 2 Wils. K. B. 205, 95 Eng. Rep. 769 (1763).
[20] Wilkes *v.* Earl of Halifax, 2 Wils. K. B. 256, 95 Eng. Rep. 797 (1765).
[21] Lofft. 1, 19 How. St. Tr. 1154, 98 Eng. Rep. 489 (1763).
[22] 3 Burr. 1741, 19 How. St. Tr. 1002, 97 Eng. Rep. 1075 (1765).
[23] 2 Wils. K. B. 205, 95 Eng. Rep. 769 (1763).
[24] Hargrave's Note, 19 How. St. Tr. 1027.
[25] In Wilkes *v.* Wood, *supra*, n. 14, Pratt, L. C. J. said, "The defendant claimed a right under precedents to force persons' houses, break open escritoires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."

violation of the thirty-ninth section of Magna Charta.[26]

Halifax, however, was slow to learn, and he soon furnished the court another opportunity to consider general warrants. The offending publication this time was "The Monitor, or British Freeholder." The warrant differed from that used against Wilkes in that it named the person whose effects were to be seized, but it put no restrictions upon the officers as to the scope of their search. As a consequence, it was about as thorough-going as was the search of Wilkes' residence. John Entick, the victim of their zeal, brought an action for damages against the messengers who conducted the raid. The jury found a special verdict, stating the facts of the raid, and setting up that such warrants had been in common use since the revolution.[27] Lord Camden's judgment on this verdict definitely disposed of the question of their legality. Holding that no amount of usage could sanction such oppressive practice, he concluded,

> "We can safely say that there is no law in this country to justify the defendants in what they have done; if there was it would destroy all the comforts of society; for papers are often the dearest property a man can have."[28]

The judgment in *Entick* v. *Carrington,* "considered one of the landmarks of English liberty"[28a] was soon followed by a resolution of the House of Commons that general warrants were universally illegal, except in cases provided for by act of Parliament.[29] Thus the curtain fell upon one of the most dramatic episodes in English history.

On the European continent meanwhile a somewhat similar scene was being played. For better securing the safety of the monarchy, the King of France issued *lettres de cachet,* containing an expression of the royal will. There was no limitation on what could be done by means of these lettres.

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[26] That passage from Magna Charta reads, "No freeman shall be taken or imprisoned or dispossessed, or outlawed or banished or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."

[27] Philip Carteret Webb, solicitor to the Treasury under Lord Halifax, later demonstrated the antiquity of such general warrants by publishing a collection of them issued on various occasions in nearly every reign for the preceding century. CANADIAN FREEHOLDER, DIALOGUE II, p. 242.

[28] Entick *v.* Carrington, *supra,* n. 6.

[28a] Bradley, J., in Boyd *v.* U. S., *supra,* n. 2.

[29] JOURN. COM., April 22, 1766; Hargrave's Note, 19 How. St. Tr. 1074.

They could take the form of orders of arrest, banishment, or search and seizure warrants. These instruments of French tyranny ran much the same course as their English counter-part. The storm of protest against them was at its highest in 1788 when the Parlement of Paris remonstrated vigorously against them, although they were not finally exterminated until 1814.[30]

The third scene in the pre-Constitutional history of search and seizure is laid in the American colonies themselves. The same session of Parliament which enacted the Licensing Act, under which general warrants for the hounding of sedition were authorized, had passed equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the Writ of Assistance. This was a blanket permit, issuable to anyone, authorizing him to prowl about at random and search any suspected place for goods on which duties had not been paid. The only limitation was that the search must be in the daytime.[31] Proceedings under this statute appear not to have aroused much opposition in England; but in the Colonies, where taxation was none too popular irrespective of methods of collection, the writs of assistance became particularly obnoxious. Determined opposition first arose in Massachusetts in 1761. In that year the legality of such writs was questioned in Paxton's Case.[32] James Otis was at that time Advocate-general to the Crown, and it became his duty to represent the government in attempting to sustain their validity. Instead he resigned his office, saying that in such case he despised a fee, and took the other side of the case. In a masterful address he denounced the writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book." The judges, almost convinced, sent to England for advice; but later, in obedience to orders from the ministry, recognized the writs.[33] Although the case was lost, the cause was not

[30] HONORE MIRABEAU, "LES LETTRES DE CACHET ET DES PRISONS D'ETAT (Hamburg, 1782); ANDRE CHASSAIGNE, LES LETTRES DE CACHET SOUS L'ANCIEN REGIME" (Paris, 1903).

[31] 13 & 14 Car. II, c. 11, §5 (1662).

[32] Quincy (Mass.) 51 (1761).

[33] In an appendix to Quincy's Reports, Mr. Justice Gray reviews at some length the history of writs of assistance.

lost. The effect on the people has been thus expressed by John Adams,

> "Every man of an immense crowded audience appeared to me to go away as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[34]

The opposition thus kindled spread rapidly. Nearly all the colonies in their Bills of Rights inserted clauses declaring these general search permits unlawful.[35] In 1773 the committee of 21 chosen to state the grievances of the colonists complained that their homes were open to unlimited inspection at the hands of "wretches whom no prudent man would venture to employ even as menial servants, whenever they are pleased to say they suspect there are in the house wares for which the duties have not been paid."[36] The Continental Congress, in its Memorial of the Inhabitants of the British Colonies, remonstrated against the practice of unbridled search and seizure.[37] The effectiveness of these various assertions of right is well known, as well as the great struggle into which the colonists threw themselves when peaceable measures proved futile.

Freedom won, the American people set about the task of raising a government for themselves. The memory of past oppressions was yet keen, and this was to be a government so hedged about with restrictions as to make impossible the repetition of the abuses to which they had been subject. One of the chief objections to the Constitution in the form in which it was presented to the States was that it contained no Bill of Rights. In the Virginia Convention of 1788, Patrick Henry warned the people that without such safeguards "excise men may come in multitudes. * * * * go into your cellars and rooms, and ransack, and measure, everything you eat, drink and wear."[38] To allay these fears, the First Congress proposed for ratification a Bill of Rights, asserting certain fundamental rights of the people which the newly

[34] Letter, John Adams to William Tudor, Mar. 29, 1817, reprinted in OLD SOUTH LEAFLETS, vol. VIII, p. 60. See however, MARSHALL, LIFE OF WASHINGTON, vol. I, p. 360, where the learned author minimizes the estrangement with Great Britain produced by these events.

[35] Quincy, 495, 509, 535; ELLIOT, DEBATES, vol. IV, p. 244.

[36] Quincy, 467.

[37] JOURNAL OF CONGRESS, vol. I, p. 36.

[38] BEVERIDGE, LIFE OF MARSHALL, vol. I, p. 440.

formed government should never be able to infringe. It cannot be doubted that the States had in mind writs of assistance, *lettres de cachet*, and general warrants,[39] when they ratified the Fourth Amendment to the Constitution, providing that,

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

Not content with this check on the powers of the federal government, each of the States has enacted into its fundamental law a similar provision.[40] Seventeen of the States, including West Virginia, copied the Fourth Amendment verbatim, and in the others the provisions are so substantially similar as to parallel the federal law. There can be no doubt that all these enactments were intended, each in its appropriate sphere, to achieve the same result. There is therefore little justification for varying interpretations in the different jurisdictions, except as peculiar local conditions may affect the application of the laws.[41] Slight variances in phraseology should not be allowed to becloud the obvious purpose of these provisions. The observations made herein in terms of the Fourth Amendment ought therefore to be applicable to any of the similar state consti-

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[39] Boyd *v.* United States, *supra*, n. 2.

[40] Alabama: I, 9 (1819), I, 5 (1909); Arizona: 8 (1911); Arkanasas: II, 9 (1836), II, 15 (1874); California: I, 19 (1849); I, 19 (1879); Colorado: II, 7 (1876); Connecticut: I, 8 (1818); Delaware: I, 6 (1792), I, 6 (1897); Florida: I, 7 (1838), Decl. of Rights, 22 (1885); Georgia: I, 18 (1865), I, I, XVI (1877); Idaho: I, 17 (1889); Illinois: VIII, 7 (1818), II, 6 (1870); Indiana: I, 8 (1816), I, 2 (1851); Iowa: I, 8 (1364), I, 8 (1857); Kansas: I, 14 (1855), Bill of Rights, 15 (1859); Kentucky: XII, 9 (1792), Bill of Rights, 10 (1890); Louisiana: VII, 108 (1864), Bill of Rights, 7 (1398); Maine: I, 5 (1819); Maryland: Decl. of Rights, XXIII (1776), Decl. of Rights, 26 (1867); Massachusetts: I, XIV (1780); Michigan: I, 8 (1835), VI, 26 (1850); Minnesota: I, 10 (1857); Mississippi: I, 9 (1817), 3, 23 (1890); Missouri: XIII, 13 (1320), II, ii (1875); Montana: III, 7 (1889); Nebraska: I, ii (1886-87), I, 7 (1875); Nevada: I, 18 (1864); New Hampshire: I, XIX (1784), Bill of Rights, 19 (1902); New Jersey: I, 6 (1844); New Mexico: II, 10 (1910); New York: Civil Rights Law, 8 (1828), Rev. Stat., pt. 1, c. 3, §11; North Carolina: Decl. of Rights, XI (1776), I, 15 (1876); North Dakota: I, 18 (1889); Ohio: VIII, 5 (1802), I, 14 (1851); Oklahoma: II, 30 (1907); Oregon: I, 9 (1857); Pennsylvania: Decl. of Rights, X (1776), I, 8 (1873); Rhode Island: I, 6 (1842); South Carolina: I, 22 (1868), I, 16 (1895); South Dakota: VI, ii (1899); Tennessee: XI, 7 (1796), I, 7 (1870); Texas: I, 7 (1845); I, 7 (1867); Utah: I, 14 (1895); Vermont: I, XI (1777), I, ii (1793); Virginia: Bill of Rights, 10 (1776), I, 10 (1902); Washington: I, 7 (1889); West Virginia: II, 3 (1861-63); III, 6 (1872); Wisconsin: I, ii (1848); Wyoming: I, 4 (1889). These citations are taken from an article in 34 HARV. L. REV. 361. The first reference in each instance is to the earliest Constitution in which a like provision appears. It should be noted that the New York provision is not in the Constitution, but in the Civil Rights Law.

[41] State *v.* Andrews, 91 W. Va. 720, 114 S. E. 257 (1922).

tutional immunities, except in rare instances.

In one important respect, however, a distinction must be made between the federal and state provisions on the subject. The Bill of Rights in the United States Constitution of course directs its prohibitions only at the federal government.[42] Various attempts have been made to extend the protection of the federal Constitution to cover violations of the similar state amendments. It has been contended, for instance, that the right to be free from unreasonable searches and seizures is one of the privileges and immunities of citizens of the United States, and therefore cannot be abridged by the States. This contention failed because it could not be shown that the right accrued to the individual as an incident of United States citizenship.[43] A more plausible position was that the Fourteenth Amendment re-enacted the Bill of Rights against the States, and that a violation of these rights constituted a denial of due process. That argument did not prevail, however.[44] The result is that the federal and state laws on the subject have not run together.

This delimitation of the sphere of application of the various constitutional provisions is important because they are all directed at governmental action. For private trespasses the law afforded adequate redress; for governmental intrusion it did not. The people were therefore more afraid of the government than they were of themselves. For this reason, a search and seizure, however unreasonable, by a private person has no bearing on the constitutions.[45] In our system of dual sovereignty, an officer of the one is a private person as to the other. A search and seizure by a state officer therefore does not violate the Fourth Amendment, and a search and seizure by federal officials does not violate the State Constitution.[46] This official relationship to the sovereignty whose constitution is

[42] Smith *v.* Maryland, 18 Howard 71 (1855); Lloyd *v.* Dollison, 194 U. S. 445 (1904); Safe Deposit Co. *v.* Illinois, 232 U. S. 58 (1913).

[43] Minor *v.* Happersett, 21 Wallace 171 (1875); Twining *v.* N. J., 211 U. S. 78 (1908); United States *v.* Crosby, Fed. Cas. No. 14,893 (1871).

[44] People *v.* Defore, 242 N. Y. 13, 150 N. E. 585 (1926), certiorari denied by the United States Supreme Court, 46 Sup. Ct. 353 (1926).

[45] Burdeau *v.* McDowell, 256 U. S. 465 (1921); Kendall *v.* Commonwealth, 202 Ky. 169, 259 S. W. 71 (1924); Hughes *v.* State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639 (1922).

[46] United States *v.* O'Dowd, 273 Fed. 600 (D. C. Ohio, 1921); Robinson *v.* United States, 292 Fed. 683 (C. C. A. 9th, 1923); Walters *v.* Commonwealth, 199 Ky. 182, 250 S. W. 839 (1924); State *v.* Rebasti, 306 Mo. 336, 267 S. W. 858 (1924).

invoked may exist *de facto*. So where state officers are acting with a tacit understanding that federal officers are to receive the fruits of the search, the transaction bears the necessary official relationship to the federal government.[47] The mere presence of federal officers at the scene of a search by state agencies does not make it a federal search;[48] but if the federal men are present in their official capacity, it is sufficient to link them with it.[49] It has also been suggested that if the federal government seeks to benefit from the results of a search by state officers, it ratifies or adopts their methods.[50] There cannot be a technical ratification of course unless the officials purported to act for the federal government,[51] but the doctrine that one sovereignty cannot appropriate the results of a search and seizure and at the same time disclaim its methods is commendable and ought not to be limited by strict rules of agency.

Because these constitutional provisions are directed solely at governments, they cannot be invoked in protest against intrusions at the suit of private individuals. Even though the actual invasion of privacy is made by governmental officials, they are regarded as acting, not for the government, but for the person complainant.[52] On principle, it seems that when the search and seizure is made for the benefit of the government the provisions in its Constitution ought to apply whether the particular action is civil or criminal. For historical reasons, however, it has been held that they have application only in criminal proceedings.[53] It is of course not necessary that the criminal case be actually pending; it is sufficient if the search and seizure is in aid of a prosecution, either as a means of preparation for its institution, or as a step in its later progress.[54] Nor is it necessary that the proceeding be technically criminal in its nature. A suit of the government which will expose the defendant to a penalty or forfeiture is at least quasi-criminal and its prosecution must be within the con-

[47] United States *v.* Falloco, 277 Fed. 275 (D. C. Mo.). See however United States *v.* One Ford Coupe, 3 F. (2d) 64 (D. C. La. 1924).
[48] Crawford *v.* United States, 5 F. (2d) 672 (C. C. A. 6th, 1925).
[49] Byars *v.* United States, U. S. Adv. Ops, Jan. 17, 1927.
[50] Essgee Co. *v.* United States, 262 U. S. 151 (1923); United States *v.* Welsh, 247 Fed. 239 (D. C. N. Y., 1917).
[51] MECHEM, AGENCY, vol. I, §386.
[52] Murray *v.* Hoboken Land Co., 18 Howard 274 (1855).
[53] People *v.* Kempner, 208 N. Y. 16, 101 N. E. 794 (1913).
[54] People *v.* Kempner, *supra*, n. 53.

stitutional prohibitions against unreasonable searches and seizures.[55] This principle has not been extended to proceedings looking to the deportation of aliens.[56]

The protection of the Fourth Amendment and the similar state enactments does not depend upon citizenship. It extends to all residents alike, alien or citizen.[57] It also may be invoked by a corporate person. In *Hale* v. *Henkel*, Mr. Justice Harlan, in a dissenting opinion argued that a corporation ought not to be accorded the immunity from unreasonable search and seizure because the government would thereby lose an effective means of enforcing its laws. The majority of the court very clearly held, however, that a corporation was one of "the people" of the Fourth Amendment.[58]

In ascertaining just what it is that the Fourth Amendment prohibits, the first inquiry necessarily is as to the meaning of the phrase "searches and seizures." The words are simple enough, but they have often been mis-applied. A thorough understanding of their import will save the Amendment from much over-work. Webster defines *search* as a "careful scrutiny or examination; investigation," and *seizure* as "sudden and forcible grasp or clutch; a taking into possession." The framers of the Constitution were not, however, dealing in dictionary definitions; they had in mind concepts formed largely by recent events in English, French, and Colonial history. To them a search and seizure was what had happened to Wilkes and Entick; it was the sort of indignity which had been perpetrated in the colonies by over-zealous customs officers. What then was the essence of those offenses? Was it that the victims had been laid open to incrimination? An examination of the great English cases arising out of those raids shows that although this was the result, it was not considered as the gist

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[55] Boyd *v.* United States, *supra*, n. 2; Silverthorne Lumber Co. *v.* United States, 251 U. S. 385 (1920).

[56] Fong *v.* United States, 149 U. S. 698 (1893).

[57] United States *v.* Wong, 94 Fed. 832 (D. C. Vt. 1899); *Ex parte* Jackson, 263 Fed. 110 (D. C. Mont. 1920); Colyer *v.* Skeffington, 265 Fed. 17 (D. C. Mass. 1920).

[58] Hale *v.* Henkel, 201 U. S. 43 (1906); Silverthorne Lumber Co. *v.* United States, *supra*, n. 55. The Act of Congress defining the powers of the Federal Trade Commission, 38 STAT. AT LARGE 719, apparently undertakes to make a distinction in this connection between natural persons and corporations. To secure information from persons, it must employ a subpoena *duces tecum*, but it may, without process, demand for its agents access to the files of any corporation. It has been suggested that such a distinction is probably unconstitutional. 8 Calif. L. R. 241. The question was raised but not decided in United States *v.* Basic Products Co., 260 Fed. 472 (D. C. Pa. 1919).

of the wrong done. In 1783 it was well settled in England that an accused could not be compelled to incriminate himself,[59] and yet the learned counsel for Wilkes did not object to the prosecution arising from the raid on that ground,[60] nor was that consideration urged in the actions for damages against the messengers.[61] The offenses consisted in something other than its tendency to incriminate the victim. Was it then that valuable property had been taken? In the trial of the cases against the messengers, no effort was made to prove the value of the property taken. The damages assessed were not for property lost, but for security violated. True, Lord Camden did refer to papers as often being "man's dearest possessions," but later in the same opinion he stated as his conception of the true gravamen of the offense:

> "It is not so much the breaking of his door nor the rummaging of his drawers that constitutes the essence of the offense, but it is the invasion of his indefeasible rights of personal liberty."[62]

The court apparently was of opinion that every man was in his home entitled to be free from the prying of officers, and that this right of privacy should not be violated. The wrong was done, not when valuable property was taken away or when incriminating evidence was turned up, but when the sanctity of the home was invaded in an unreasonable intrusion upon its privacy. An act which commits this wrong is a search and seizure; and nothing else can properly be so considered.

In *Boyd* v. *United States*,[63] the first great American case construing the Fourth Amendment, the court was called upon to determine whether or not a compulsory production of books and papers at the suit of the government constituted an unreasonable search and seizure. Mr. Justice Bradley, speaking for the Court, conceded that the aggravating incidents of a search and seizure were wanting when

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[59] Regina *v.* Mead, 2 Ld. Raym. 927, 92 Eng. Rep. 119 (1704); Rex. *v.* Cornelius, 2 Strange 1210, 93 Eng. Rep. 1133 (1743); Rex *v.* Purnell, 1 Wils. K. B. 239, 95 Eng. Rep. 595 (1748).

[60] Rex *v.* Wilkes, *supra*, n. 15.

[61] Wilkes *v.* Wood, *supra*, n. 14; Huckle *v.* Money, 2 Wils. K. B. 205, 95 Eng. Rep. 709 (1763); Money *v.* Leach, 3 Burr. 1741, 19 How. St. Tr. 1002, 97 Eng. Rep. 1075 (1765).

[62] Entick *v.* Carrington, *supra*, n. 6.

[63] 116 U. S. 616 (1886).

production was compelled upon a subpoena *duces tecum*. He pointed out, however, that often the chief purpose of a search and seizure is to secure incriminating evidence, and that the production by order of court obtained the same result. His conclusion was stated thus:

> "It is our opinion therefore that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."

This decision was based largely upon the proposition that the Fourth Amendment and that part of the Fifth which provides that none shall be compelled to be a witness against himself in a criminal proceeding ran together. The Court said in substance that anything which violated that part of the Fifth Amendment also violated the Fourth. Such confusion in purpose should not be attributed to the makers of the Constitution merely because the same official misconduct may constitute a violation of both prohibitions. Dean Wigmore in his work on Evidence has traced the history of the privilege against self-incrimination from the early days of the ecclesiastical courts, and has demonstrated that the historical bases of the two Amendments are quite distinct.[64] If, as has been asserted above, the Fourth Amendment was aimed, not at incriminating results, but at objectionable methods, it seems that the subject matter of the two Amendments is also quite distinct. In view of these distinctions, the later cases have recognized that the two Amendments have separate missions to fulfill and have treated them apart from each other.[65]

The real basis for the decision in the Boyd Case having been abandoned, it might be expected that it would no longer be followed in so far as it held that a compulsory production of books and papers violated the Fourth Amendment. For a time the Court apparently did break away

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[64] WIGMORE, EVIDENCE, vol. IV, §2250 *et seq.*, and §2184. Also 5 HARV. L. REV. 71.
[65] Adams *v.* New York, 192 U. S. 585 (1904); Interstate Commerce Com'n *v.* Baird, 194 U. S. 25 (1904); Hale *v.* Henkel, *supra*, n. 58. See however Agnello *v.* United States, 269 U. S. 20 (1925).

from that doctrine.[66] The reasoning of Mr. Justice McKenna in the leading case of this class[67] shows clearly his conception of the true definition of "search and seizure":

> "It is said, 'a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner'. Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant * * * . The quest of an officer acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and aboveboard . There is no element of trespass or force in it."

Such wholesome doctrine as that deserved to live; but it has been somewhat weakened by subsequent cases. In *Silverthorne Lumber Co.* v. *United States*,[68] the government sought production of certain papers by means of a subpoena. The knowledge on which the subpoena was based had been obtained by an unlawful search. The Court held that such production could not be required. Its decision went not so much on the ground that the production constituted a search and seizure as that the government was seeking to make indirect use of information which it could not have used directly. The Court apparently treats that case, however, as reverting to the doctrine of the Boyd Case to a certain extent. The present rule is thus summed up in a later case:

> "A corporation can only be compelled to produce its records against itself by the demand of the government expressed in lawful process, confining its requirements within limits which reason imposes in the circumstances of the case. In the case before us the demand was suitably made by duly constituted authority. In the Silverthorne Case, it was not."

The willingness of the Court to take this backward step in cases where corporations are involved may be explained by the fact that a corporation is not entitled to the immunities granted by the Fifth Amendment, whereas it is entitled to those of the Fourth.[69]

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[66] Hale *v.* Henkel, *supra*, n. 58; American Tobacco Co. *v.* Werkmeister, 207 U. S. 284 (1907); Rendering Co. *v.* Vermont, 207 U. S. 541 (1907); Wilson *v.* United States, 221 U. S. 361 (1910); Am. Lithographing Co. *v.* Werkmeister, 221 U. S. 603 (1911); *Ex parte* Fuller, 262 U. S. 91 (1922); Dier *v.* Banton, 262 U. S. 147 (1922).

[67] Hale *v.* Henkel, *supra*, n. 58.

[68] 251 U. S. 385 (1920).

[69] Essgee Co. *v.* U. S., *supra*, n. 50.

Another field into which the protection of the Fourth Amendment has been sought to be extended is that of examinations and inspections under the police power. Thus it has been argued that it constituted an unlawful search and seizure to require pawnbrokers to keep books for inspection by public officers,[70] or to require dealers in food to furnish samples for inspection.[71] The contention failed in each of those cases, because the courts saw a clear distinction between such regulation and a search and seizure. That distinction is stated by Freund as follows:

> "The power of inspection is distinguished from the power of search; the latter is exercised to look for property which is concealed, the former to look at property which is exposed to public view if offered for sale, and in nearly all cases accessible without violation of privacy."[72]

These illustrations of what a search and seizure is may not aid in an understanding of what it is. There is no true search and seizure unless there is some actual, present intrusion upon one's privacy. This intrusion has been said to exist only in a show of force, actual or constructive.[73] In application of this idea, one court has held that a mere inspection through the windows of an automobile does not constitute a search.[74] This is giving a too great emphasis to the idea of force. The force necessary to a search and seizure is rather activity than physical violence. The better view therefore is that scrutiny through windows is a search because it is an active invasion of privacy.[75] It was at one time thought that an inspection effected through stealth lacked the element of force.[76] The Supreme Court has definitely decided against that proposition, however.[77]

The next problem is, what of these searches and seizures are prohibited by the constitutional provisions? The common opinion is that the Fourth Amendment was simply a re-statement of the common law on the subject, not creating

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[70] Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560 (1891).
[71] State *v.* Dupaquies, 46 La. Ann. 577, 15 So. 502 (1894).
[72] FREUND, POLICE POWER, 42. See criticizing this view an article in 18 GREEN BAG, 273.
[73] State *v.* Turner, 302 Mo. 660, 259 S. W. 427 (1924).
[74] State *v.* Quinn, 111 S. C. 174, 97 S. E. 62 (1918).
[75] Mattingly *v.* Commonwealth, 197 Ky. 533, 247 S. W. 938 (1923).
[76] United States *v.* Maresca, 266 Fed. 713 (D. C. N. Y. 1920).
[77] Gouled *v.* United States, 255 U. S. 298 (1920).

any new immunities, but guaranteeing those which already existed.[78] It is therefore important to know just how the common law stood at that time. That law may be summed up briefly thus: There could be no search and seizure without a warrant,[79] except as incidental to a valid arrest.[80] Search warrants could be issued only for the search for stolen goods,[81] or to seek out goods hid from taxation;[82] but it was recognized that the use of search warrants could be extended to other fields by legislation.[83] Search warrants could issue only for the search of places, not of persons.[84]

Because the common law thus hedged about the practice of search and seizure, and because the two clauses of the Fourth Amendment are placed so close together, almost in one breath as it were, it has sometimes been contended that there can be no constitutional search and seizure without a warrant. Thus an early work on constitutional law said,

> "The term 'unreasonable' is used to indicate that the sanction of a legal warrant is to be obtained before searches or seizures are made."[85]

Such a construction, however, ascribes to the authors a circumlocution, and makes a part of the Amendment meaningless. Had it been intended that there be no search and seizure without a warrant, what would have been easier than to have said so? As has been said by Chief Justice Marshall,

> "The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[86]

The first clause of the Amendment cannot be given its natural sense if the word "unreasonable" is construed to mean "without a search warrant." It is interesting to note that the same Congress which drafted the Bill of Rights also enacted statutes providing for search and seizure without

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[78] COOLEY, CONST'L LIMS., p. 424 *et seq.*
[79] *In re* Swan, 150 U. S. 737 (1893); Kennedy *v.* Favor, 14 Gray 200 (1859).
[80] Weeks *v.* United States, 245 U. S. 618 (1918).
[81] HALE, P. C. vol. II, p. 150.
[82] Baker *v.* Wise, 16 Gratt. (Va.) 139 (1869).
[83] HALSBURY, LAWS OF ENGLAND, vol. IX, p. 310.
[84] Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173 (1885).
[85] RAWLE, CONST'L LAW, p. 124.
[86] Gibbons *v.* Ogden, 9 Wheaton 1, 188 (1824).

warrant.[87] That is a most convincing fact. For these reasons, it has become well settled that,

> "Each (clause) is clear, independent and complete by itself. The first recognizes search and seizure regardless of process, but restricted by a comprehensive master adjective compelling in performance exercise of moderation and good judgment to the exclusion of prejudice, temper and passion. The second deals with warrants where time and circumstances permit or in reason require them * * * * *."*[88]

In this view of the Amendment, the first clause becomes the more important, because it states the broad general prohibition; the second is merely a particularization of the necessary elements of reasonableness in a certain class of cases. In this view, the word "unreasonable" becomes the very keystone of the whole law on the subject; it is indeed the master adjective.

Reasonableness is of course a well-known legal standard. It embraces much more than law, however. It is primarily a fact conception. Its application involves the setting up of an objective man, the average of the consciences of the judges, and comparing the facts of the particular case with what that man would have done. In such a process, each case is unique. For this reason, it is impossible, or at least unwise, to reduce the law to detailed rules. The flexibility of the Constitution is best preserved without them. One or two illustrations of the results of rules in the law of search and seizure will suffice. As will be pointed out later, the Supreme Court has apparently adopted the rule that there can be no reasonable search of a private residence without a warrant. An officer may, however, enter and even break his way into a residence, without a warrant, in order to arrest a felon.[89] Thus the legality of the entrance is made to depend upon the purpose of the officer: if he enters to search, he is acting wrongfully, if he enters to arrest, he enters rightfully. The situation is further complicated by the application of another rather definite rule which has been adopted as to searches and seizures. It is generally said that a search incidental to arrest is reason-

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[87] 1 STAT. AT LARGE, 29, 43.
[88] People *v.* Case, 220 Mich. 379, 190 N. W. 289 (1922).
[89] Cases collected in note, 5 A. L. R. 263.

able without a warrant.[90] Suppose then that the officer enters for the purpose of making a search. He is intruding unlawfully. If he makes an arrest, however, the search becomes rightful; if he fails to make an arrest, but merely seizes goods, he has violated the Constitution.

These unfortunate results of defining the standard of reasonableness have led one court to express itself in no uncertain terms on the rule as to searches incidental to arrest. Its language may as well be applied to any attempt to reduce reasonableness to a rule.

> "To say that a man may be searched after arrest, though not before, or that a place or house may be searched when a crime is there seen to be committed, and not otherwise, is to introduce false standards; the fundamental question always remains: was the search or seizure unreasonable? The arrest is no more than some evidence that suspicion came near enough to certainty to make both arrest and search reasonable."[91]

In one important instance, the Supreme Court has repudiated rules. Because search and seizure is so closely akin to arrest, it has often been urged that the right to search without a warrant should be on the same basis as the right to arrest without a warrant.[92] Arrests, however, are governed by rather technical rules, based on careful distinctions between felonies and misdemeanors. Nowadays when that distinction is not so important, continued emphasis upon it is not a means of arriving at "reasonableness." In *Carroll* v. *United States*[93] the Court definitely decided that the lawfulness of a search and seizure is not to be measured by the analogous rules as to arrest.

The most that can be done by way of systematizing the law of search and seizure is to undertake to formulate certain principles governing in a general way the exercise of such a power. The first thing to be determined is the relation between a search with a warrant and one without such warrant. As has been shown, the early law knew no such thing as search and seizure without a warrant. There

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[90] Cases collected in note, 27 A. L. R. 716.

[91] Hough, Jr., in a separate opinion concurring in result but dissenting in reasoning in Agnello *v.* United States, 290 Fed. 671 (C. C. A. 2d, 1923), reversed in Agnello *v.* United States, *supra*, n. 65.

[92] Elrod *v.* Moss, 278 Fed. 123 (C. C. A. 4th, 1921); Hughes *v.* State, 145 Tenn. 544, 238 S. W. 588 (1922).

[93] 267 U. S. 132 (1924).

is no doubt today that there may be a reasonable search and seizure without a warrant, in certain instances;[94] but it must be recognized that such action without a warrant is but a substitute for the more orderly method. It may be premised, therefore, that if a search and seizure would not be authorized with a warrant, it would be unreasonable without one. In what cases then may there be a lawful search and seizure under a search warrant? The answer depends upon three factors: (1) The purpose of the search, (2) the nature of the property seized, and (3) the pertinent statutory provisions.

Search and seizure is a drastic measure. It involves an interference with interests which are considered almost sacred. Because it is an heroic remedy, its use should be restricted to cases where there is a high purpose whose importance will outweigh the considerations of private convenience. The vindication of a private right is not considered of sufficient importance to justify the employment of the weapon of search and seizure.[95] It is true that the earliest instance of a search warrant was at the behest of a private person for the recovery of his property which had been stolen. The recapture of stolen goods, however, is of importance to the public, not so much that the goods may be restored to the owner as that the public offense may be brought to light and punished. The early authorities emphasized the fact that the purpose of search warrants was the prevention of crime and the detection of criminals.[96] This conception of the purpose of search and seizure prevails largely today. It is a means available only to the state for the better enforcement of its public laws. So it has been held that a statute which authorized brewers to employ search warrants to secure the return of bottles retained by their customers was unconstitutional, because it allowed search and seizure for the vindication of a mere private right.[97] In this connection, it is interesting to compare a West Virginia statute which empowers the owner

[94] The illustrative cases upon this point are cited below. See also United States *v.* Snyder, 278 Fed. 650 (D. C. W. Va. 1922).

[95] Williams *v.* State, 100 Ga. 511, 28 S. E. 624 (1897); People *v.* Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); State *v.* Schmuch, 77 Oh. St. 438, 83 N. E. 797 (1908); Cohn *v.* State, 120 Tenn. 61, 109 S. W. 1149 (1908).

[96] BROOM & HADLEY, COMMENTARIES (Waite's Ed., 1875), vol. II, p. 549; Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455 (1901).

[97] Lippman *v.* People, 175 Ill. 101, 51 N. E. 873 (1898). See also State *v.* Schmuck, *supra*, n. 95.

of bottle trade-marks to obtain a warrant for the search for and seizure of bottles retained by another in violation of the trade-mark rights.[98] On its face, this statute seems designed merely to aid in the protection of a private right, and so would be unconstitutional. It should be noted, however, that the same chapter of the Code makes the infringement of such trade-marks a misdemeanor,[99] and it can be said that the purpose of the search and seizure authorized is the proper enforcement of this penal provision. Under such a construction, it would fall into the same category as search for stolen goods. The question apparently has not been raised.

The validity of search warrants, and of statutes authorizing them, depends further upon the nature of the property to be seized. Search and seizure has come to have some of the aspects of a proceeding in rem. It acts on the property itself. It follows that before the property can be subjected to the seizure, it must be property which itself has offended. Some cases have carried this doctrine too far, and have said that if property is contraband it is subject to seizure and its taking will necessarily be reasonable.[100] This misconception is based upon a quotation from the judgment in *Boyd* v. *United States*, which reads as follows:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not."[101]

The fact that the government is entitled to the possession of property only means that it may proceed in an orderly manner to acquire that possession. So the remarks quoted above must be taken to refer rather to the sorts of property which may be seized under a search warrant as distinguished from those which cannot be thus taken. In addi-

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[98] W. VA. CODE, c. 62E, §22.
[99] W. VA. CODE, c. 62E, §21.
[100] United States *v.* O'Dowd, 273 Fed. 600 (D. C. Ohio, 1921); United States *v.* Fenton, 268 Fed. 221 (D. C. Mont., 1920).
[101] Bradley, J. in Boyd *v.* United States, *supra*, n. 2.

tion to the kinds of property referred to, the right of search and seizure was early extended to gambling devices.[102] Here the property is clearly contraband. Another field into which the search warrant has been put is that of the abatement of nuisances by seizing the offending property.[103] When the possession of intoxicating liquor first came to be regarded as unlawful in certain instances, it was for a time doubted whether the beverage itself was a proper subject of search and seizure.[104] As the prohibition laws developed, however, and liquor became contraband, it became well settled that it could properly be taken under a search warrant.[105]

It is sometimes indicated that books and papers are never a proper subject of search and seizure.[106] That assumption is too broad. Books and papers which are valuable to the government only as evidence cannot be taken under a search warrant,[107] just as any other property of a purely evidentiary nature cannot be taken.[108] It is not its character as a book or paper which saves it, but it is the fact that it is not contraband property. In cases where the papers themselves may offend, they are as much subject to search and seizure as is any other property. The true principle as to what property may be taken has been stated recently by the Supreme Court:

> "They (search warrants) may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but * * * they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. There is no

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[102] Commonwealth *v.* Dana, 2 Metcalf (Mass.) 329 (1841).
[103] Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908); Orlando *v.* Pragg, 31 Fla. 111, 12 So. 368 (1893); Nelson *v.* Minneapolis, 112 Minn. 16, 127 N. W. 445 (1910); State *v.* Marshall, 100 Miss. 626, 56 So. 792 (1911); St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611 (1905).
[104] State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675 (1903); Lincoln *v.* Smith, 27 Vt. 340 (1855).
[105] Cases collected in note, 27 A. L. R. 709.
[106] Boyd *v.* United States, *supra*, n. 2.
[107] United States *v.* Kirschenblatt, 16 F. (2d) 202 (C. C. A. 2d, 1926); People *v.* Defore, *supra*, n. 44.
[108] Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530 (1895).

> special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized."[109]

One writer has suggested that the latter case goes too far: that there should be power by statute to extend search and seizure beyond property which itself offends to that which is merely evidentiary.[110] Such an extension would conflict with the historical basis of search and seizure. Notwithstanding that fact, it might be considered reasonable if the proper administration of justice demanded it. In view of the language used in the Gouled Case, however, such necessity would have to be presented rather strongly before such statutory extension could be recognized as valid.

The third general requisite of a valid search warrant is that it must conform to the statutory provisions relating to its issuance. A search warrant is generally considered as a creature of statute, with the one common-law exception: the search for stolen goods.[111] The various Constitutions and statutes give rather detailed directions as to its issuance, and these provisions limit strictly its scope. Even though the statutes might constitutionally go further, if they do not, the warrant must conform to them.[112] It is therefore probably worth while to make a brief summary of the statutes of the United States and of West Virginia relating to search warrants, and the construction put upon them by the Courts.

A search warrant is defined as "an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate."[113] In Eng-

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[109] Gouled *v.* United States, 255 U. S. 298 (1921). The idea that the papers themselves may offend is further illustrated in Schenk *v.* United States, 249 U. S. 41 (1919); Commonwealth *v.* Dana, *supra*, n. 102.

[110] 31 YALE L. J. 522.

[111] *In re* Swan, 150 U. S. 637 (1893); United States *v.* Vallos, 17 F. (2d) 390 (D. C. Wyo., 1926); HALSBURY'S LAWS OF ENGLAND, vol. IX, p. 310.

[112] The effect of this rule has recently been forcibly illustrated in West Virginia. In 1919 the legislature enacted c. 32A, §37 of the Code, which provided that §9 of the same chapter should apply to the offense of possessing intoxicating liquor. §9 authorized the issuance of search warrants. In 1923, the legislature undertook to amend and re-enact §37, and in doing so omitted to make §9 apply. (ACTS, 1923, c. 29, §37.) The result was that there was no authority to issue search warrants for liquor merely possessed contrary to law. At least one circuit judge has been required to set aside convictions on this ground. The present session of the legislature has before it measures to remedy this defect. (House Bill No. 318, Senate Bill No. 195).

[113] People *v.* Kempner, *supra*, n. 95.

land, they are issued by justices of the peace.[114] Under federal statutes, they may be issued by the judge of a federal District Court, by the judge of a state or territorial court of record, or by a United States commissioner for the district wherein the search is to occur.[115] In West Virginia, the power to issue them is in general lodged in justices of the peace,[116] and for the search for intoxicating liquors, it is extended to the judges of circuit and intermediate courts.[117] The power to issue search warrants is limited strictly to those designated by statute, and cannot be delegated.[118]

The warrant may be directed, in federal practice, to any civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President.[119] It was for a time doubted whether a prohibition agent appointed by the Internal Revenue department was a civil officer within the meaning of this statute,[120] but it is now generally held that he is.[121] Warrants under West Virginia law must be directed to the sheriff or a constable of the county in which the search is to be made.[122]

The federal statutes allow the issuance of warrants for the search for stolen or embezzled goods, property used as a means of committing a felony, or property or papers used in violation of the espionage laws.[123] They may issue under West Virginia law to search for the following classes of property: stolen or embezzled goods,[124] counterfeit money, counterfeiting tools, etc., obscene books and pictures, lottery tickets, gaming devices,[125] fish and game taken contrary to law,[126] gaming tables, faro banks, etc.,[127] intoxicating liquors,[128] moonshine stills,[129] and milk bottles used in vio-

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[114] HALSBURY'S LAWS OF ENGLAND, vol. IX, p. 310.
[115] Espionage Act, Tit. XI, §1, 40 STAT. AT LARGE 228.
[116] W. VA. CODE, c. 155, §§1 and 2.
[117] W. VA. CODE, c. 32A, §9. By House Bill No. 318 and Senate Bill No. 195, now pending in the legislature, this power would be extended to mayors of municipalities.
[118] Nevin *v.* Blair, 17 F. (2d) 151 (D. C. Pa. 1927).
[119] Tit. XI, §6, 40 STAT. AT LARGE 229.
[120] United States *v.* Musgrave, 293 Fed. 203 (D. C. Neb. 1925).
[121] Steele *v.* United States, 267 U. S. 505 (1925).
[122] W. VA. CODE, c. 155, §3.
[123] Tit. XI, §2, 40 STAT. AT LARGE 228.
[124] W. VA. CODE, c. 155, §1.
[125] *Idem*, c. 155, §2.
[126] *Idem*, c. 62, §2b.
[127] *Idem*, c. 151, §1.
[128] *Idem*, c. 32A, §9.
[129] *Idem*, c. 32A, §37.

lation of trade mark rights.[130]

The mode of issuance, under federal law, is as follows: The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant signed by him with his name of office, stating the particular grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof.[131] The statutes of West Virginia do not make such detailed provisions for the issuance of warrants. In general, the justice may issue them "if satisfied that there is reasonable cause for such relief."[132] A warrant to search for intoxicating liquors may issue merely an oath that some person is violating the prohibition laws, or that affiant has cause to believe and does believe that liquors are being kept in any place.[133] It will be observed that the latter statute does not require that the magistrate examine into the facts, or that the complainant state them. For that reason it has been urged that the statute is unconstitutional.[134] The contention was that the issuance of a search warrant is a judicial act and that the magistrate cannot be relieved of the duty of ascertaining whether there is in fact probable cause for its issuance. The Court held, however, that the statute is not unconstitutional. Its judgment was based upon the proposition that its requirements were fully as rigid as those of the common law. An examination of the principal authority upon which the Court relied shows that this is not the case. Hale lays down the rule as follows:

> "They are not to be granted without oath made before the justice of a felony committed, and that the party

[130] *Idem*, c. 62E, §22.
[131] Tit. XI, §6, 40 STAT. AT LARGE 229.
[132] W. VA. CODE, c. 155, §1.
[133] *Idem*, c. 32A, §9.
[134] State *v.* Kees, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681 (1922). Followed

> complaining hath probable cause to suspect they are in such a house or place, and doth shew his reasons of such suspicions, * * * * * for these warrants are judicial acts, and must be granted upon the examination of the fact."[135]

The most of the authorities have taken the position that while the legislature may define the standard of probable cause, it may not reduce that standard below its level as it was at the common law, and have accordingly held that such a statute as that under consideration is unconstitutional.[136] The West Virginia court recognized this proposition, but felt that the standard had not been reduced. Even though the decision be unsound on that point, it may yet be justified. The fact that in 1789 it was unreasonable to issue a search warrant on the mere oath of a complainant that he had probable cause to believe certain facts does not necessarily mean that it is unreasonable today. A standard so flexible cannot be bound forever by old conceptions of reasonableness. It might well be argued that such an oath as required in our statute is quite sufficient, not because it was sufficient when the Constitution was adopted, but because it is reasonable today. Apparently no court has taken this position however.

The statutes add nothing to the constitutional requirements as to the description of the place to be searched and the property to be seized. They merely provide that the officer must be commanded to search in a named place for specified goods.[137] Under these and similar provisions the decisions have varied considerably as to the degree of certainty of description required. As to the place to be searched, some courts require that it be described with the same exactness used in a conveyance of land.[138] Such a prohibitive requirement subverts the purpose of obtaining a description. The evil sought to be avoided was that of a roving search. Any description which limits the officer to an ascertained place ought therefore to be sufficient. The

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in State *v.* Horner, 92 W. Va. 285, 114 S. E. 620 (1922).

[135] HALE, P. C., vol. II, p. 150. See also HENING'S JUSTICE, p. 621; Espinasse, Nisi Prius, vol. I, p. 381.

[136] *Ex parte* Burford, 3 Cranch 447 (1808); Byars *v.* United States, U. S. Adv. Ops. Jan. 15, 1927; State *v.* Peterson, 27 Wyo. 185, 194 Pac. 342 (1920); 6 MINN. L. REV. 602. *Contra*, Koch *v.* District Court, 150 Ia. 151, 129 N. W. 740 (1911); Dupree *v.* State, 102 Tex. 455, 119 S. W. 301 (1909).

[137] Tit. XI, §6, 40 STAT. AT LARGE 229; W. VA. CODE, c. 155, §3.

[138] State *v.* Brann, 109 Me. 559, 84 Atl. 266 (1912). Other cases collected in 17 Ann. Cas. 232 and 101 Am. St. Rep. 331.

better view accordingly is that,

> "A description of a place to be searched is sufficient if the officer with the warrant can, with reasonable effort, ascertain and identify the place intended."[139]

The West Virginia court is one which follows the more liberal tendency.[140] The description of the property to be seized must vary in certainty with the occasion. If the purpose is to recover specific property, the description ought to be sufficiently definite to preclude the possibility of taking any other; but if the purpose is to take all property of a certain character, a description of that character is sufficient.[141] So in a search for stolen goods more particularity is required than in a search for intoxicating liquor.[142] Here again some courts have imposed stringent requirements as to definiteness,[143] but the tendency is toward requiring only such a description as will keep the scope of the search within reasonable bounds.[144]

Under the statutes of the United States, a search warrant may be executed only by the officer to whom directed and such persons as he may call to render aid.[145] The officer may break his way into the place to be searched if after notice of his authority and purpose he is refused admittance.[146] The time of execution must be limited by the warrant to the daytime, unless the affidavits are positive that the property is in the place to be searched.[147] A warrant becomes void if not executed within ten days from its issuance.[148] When the officer takes property, he must give a copy of the warrant, together with a detailed inventory of the property to the person from whom it is taken.[149] A

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[139] Steele *v.* U. S., *supra*, n. 121. More than one place may be described in a single warrant, Gray *v.* Davis, 27 Conn. 447 (1858); *Contra*, State *v.* Dunne, 100 Me. 447, 62 Atl. 80 (1905).

The description in the warrant cannot be aided by that in the complaint, State *v.* District Court, 70 Mont. 191, 224 Pac. 862 (1924), unless incorporated therein by reference, Commonwealth *v.* Certain Liquors, 122 Mass. 36 (1877).

[140] State *v.* Brown, 91 W. Va. 709, 114 S. E. 372 (1922); State *v.* Montgomery, 94 W. Va. 153, 117 S. E. 870 (1923); State *v.* Noble, 96 W. Va. 432, 123 S. E. 237 (1924); State *v.* McKeen, 100 W. Va. 476, 130 S. E. 806 (1925); State *v.* Whitecotten, 101 W. Va. 492, 133 S. E. 106 (1926); State *v.* Jankowski, 134 S. E. 919 (1926); State *v.* Johns, 136 S. E. 842 (1927). The description was held insufficient in State *v.* Emsweller, 78 W. Va. 214, 88 S. E. 787(1916).

[141] State *v.* Nejin, 140 La. 793, 74 So. 103 (1917).

[142] Elrod *v.* Moss, 278 Fed. 123 (C. C. A. 4th, 1921).

[143] Dupree *v.* State, *supra*, n. 136.

[144] Steele *v.* U. S., *supra*, n. 121; United States *v.* Kaplan, 16 F. (2d) 802 (D. C. Mass. 1926).

[145] Tit. XI, §7, 40 STAT. AT LARGE 229.

[146] Tit. XI, §§8, 9, 40 STAT. AT LARGE 229.

[147] Tit. XI, §10, 40 STAT. AT LARGE 229.

[148] Tit. XI, §11, 40 STAT. AT LARGE 229.

[149] Tit. XI, §12, 40 STAT. AT LARGE 229.

copy of this inventory, under the oath of the officer, must then be returned with the warrant to the magistrate who issued it.[150] The only provision in the West Virginia statutes as to the mode of execution of search warrants is that they may be executed either in the day or night.[151]

In general, property seized by a federal officer must be taken before the magistrate who issued the warrant. If it appears that it is the property described in the warrant, he shall order it retained in the custody of the officer seizing it, or to be otherwise disposed of according to law.[152] The West Virginia statutes provide that the property shall be kept for use as evidence, and that the property be restored to the rightful owner, if stolen goods, and burned if contraband.[153] The prohibition statutes require that the liquor be destroyed on conviction.[154] The latter statutes do not in terms require that the goods be brought before a magistrate to be further dealt with according to law. Such a requirement has been held indispensable to the constitutionality of a statute.[155] The practical effect of our statutes leads to the same result, however, and so the question apparently has not been raised.

These are the standards which the legislatures have set, within which search warrants must be kept in order to satisfy the constitutional requirement of reasonableness. In so far as these legislative standards are not lower than judicial standards of reasonableness, they define what is a lawful search warrant.[156] There remains yet unsolved the great question, when may an officer omit the formalities ordained in the statutes, and proceed at once to the search and seizure? As has been said, this action without process is but a substitute for the more orderly method. It is therefore axiomatic that a search and seizure without a warrant must be of the sort which would be lawful if a warrant were obtained; there can be no higher power without a warrant than there could be with one.

(Continued in next issue)

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[150] Tit. XI, §13, 40 STAT. AT LARGE 229.
[151] W. VA. CODE, c. 155, §3.
[152] Tit. XI, §16, 40 STAT. AT LARGE 229.
[153] W. VA. CODE, c. 155, §4.
[154] *Idem*, c. 32A, §11.
[155] COOLEY, CONST'L LIMS. p. 430.
[156] State *v.* Kees, *supra*, n. 134.