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## Justice and Constables--Civil and Criminal Liability for Unlawful Searches and Seizures

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## STUDENT NOTES AND RECENT CASES

**JUSTICES AND CONSTABLES—CIVIL AND CRIMINAL LIABILITY FOR UNLAWFUL SEARCHES AND SEIZURES.**—The issuing of warrants defective in themselves, or upon insufficient information, or the arrest of supposed offenders of the law without warrants of any description, endangers the constitutional guarantees of the citizen against unreasonable searches and seizures. It is proposed to inquire into the liability, both civil and criminal, of a justice of the peace who issues a defective warrant, or a warrant upon meager information, and of a constable who acts under such warrant, or without any warrant whatever.

It is not strictly within the scope of this inquiry to ascertain precisely what errors of commission or omission will render a warrant invalid. Suffice to say that it must contain a description of the place to be searched,<sup>1</sup> a description of the property to be seized,<sup>2</sup> and of the person to be arrested.<sup>3</sup> Some cases hold that the name of the accused need not be inserted, if he is otherwise sufficiently described.<sup>4</sup> Our statute would seem to require the name, since it commands "the officer forthwith to apprehend the *accused*. . . ."<sup>5</sup> A valid warrant can only be dispensed with for an offense of which a justice has jurisdiction, committed in his presence or the presence of a constable.<sup>6</sup> Where there is neither a valid warrant nor such an offense committed in the presence of the officer, the judgment is illegal and void,<sup>7</sup> and our court has held that all unlawful searches and seizures are "unreasonable" within the meaning of the Constitution.<sup>8</sup>

<sup>1</sup> *Smith v. McDuffee*, 72 Ore. 276, 142 Pac. 558 (1914).

<sup>2</sup> *Bryan v. State*, 99 Ark. 163, 137 S. W. 561 (1911).

<sup>3</sup> *Reed v. Rice*, 2 J. J. Marsh (Ky.) 44, 19 Am. Dec. 122 (1829). See, as to contents of warrant, Code, c. 50 § 223. As to variance between warrant and the information filed before the justice, see *State v. Brown*, 91 W. Va. 709, 114 S. E. 257 (1922).

<sup>4</sup> *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752 (1894).

<sup>5</sup> Code, c. 50 § 223. "The warrant of arrest shall be issued only on the information, under oath, of some credible person. It shall describe the offense alleged to have been committed, as heretofore required in such cases by law, and command the officer forthwith to apprehend the accused and bring him before the justice, to be dealt with according to law."

<sup>6</sup> *State v. Emsweller-Jenkins*, 78 W. Va. 214 at 224, 88 S. E. 787 (1916).

<sup>7</sup> *Idem*.

<sup>8</sup> *State v. Willis*, 91 W. Va. 659, 114 S. E. 261 (1922).

Assuming then, that there has been an unlawful search and seizure of one's property, or arrest of the person, or both, what is the remedy of the injured party? Considering first the civil liability of the justice, trespass lies against him for issuing a search warrant maliciously, with intent to injure, and without probable cause.<sup>9</sup>

However there are cases *contra*, holding that when acting within the scope of their authority, justices are not liable to a private action for the erroneous exercise of the judicial functions with which they are invested by law.<sup>10</sup> This seems to be the recent tendency.<sup>11</sup> Whether the issuance of a defective warrant would amount to a breach of the condition of a justice's bond, has not been decided. The statute setting forth the condition is as follows:<sup>12</sup>

"When a person undertaking any office is required by law to give an official bond, the condition, unless otherwise provided, shall be for a faithful discharge by him of the duties of his office. . . ."

This might be liberally construed to mean that the issuance of warrants in blank, or visibly defective within the knowledge of the justice, are acts not faithfully discharging his duty. There is another civil proceeding for the removal from office of a justice for, among other things, official misconduct, incompetency, or neglect of duty.<sup>13</sup> This proceeding may be prosecuted by citizens and taxpayers.<sup>14</sup> As to the criminal liability of a justice, he is subject to indictment for malfeasance, misfeasance, or neglect of official duty.<sup>15</sup> The Constitution is simply declaratory of the generally accepted view, in this regard.<sup>16</sup>

Turning now to the civil liability of a constable, the rule seems to be that he is liable to action for damages if the process under which he acts is invalid or void on its face.<sup>17</sup> Other cases hold, in regard to this question, that the officer will not be liable to an action of false imprisonment if the warrant is irregular only, and not void.<sup>18</sup> The constable, it is submitted, ought not to be held

<sup>9</sup> *Muse v. Vidal*, 6 Munf. 27 (Va. 1817).

<sup>10</sup> *Truesdell v. Combs*, 33 Ohio St. 186 (1877).

<sup>11</sup> *Broom v. Douglass*, 175 Ala. 268, 57 So. 860, 44 L. R. A. (N. S.) 164 (1912), and an instructive note and further citations.

<sup>12</sup> Code, c. 10 § 6.

<sup>13</sup> Code, c. 7 § 7.

<sup>14</sup> *Dawson v. Phillips*, 78 W. Va. 14, 88 S. E. 456 (1916).

<sup>15</sup> W. VA. CONSTITUTION, ART. IX, § 4. See in connection with this, *McDonald v. Guthrie*, 43 W. Va. 595, 27 S. E. 844 (1897).

<sup>16</sup> 1 BISHOP, CRIMINAL LAW, 8th ed., p. 334.

<sup>17</sup> *Brown v. Hadwin*, 182 Mich. 491, 148 N. W. 693, L. R. A. 1915-B, 505 (1914); *Grumon v. Raymond*, 1 Conn. 40 (1814).

<sup>18</sup> *Welch v. Scott*, 27 N. C. 58 (1844).

liable if he acts *bona fide*, and the warrant is fair and regular upon its face.<sup>19</sup> *A fortiori*, if there is no warrant whatever, the constable is liable to a civil action for damages.<sup>20</sup> Liability on his official bond is much the same question that has been raised with regard to the justice. One state at least, has held that if the writ under which the officer acts, is void, that his acts are only *colore officii*, and that his sureties are not liable.<sup>21</sup> However, in West Virginia, the acts of a deputy sheriff done *colore officii* are a breach of the condition of his bond and render the surety liable.<sup>22</sup> This rule was seemingly somewhat abrogated by a strict construction of the statute, in a recent case, limiting the liability to a case of misfeasance.<sup>23</sup> Even so, the condition of the bond,<sup>24</sup> as suggested above, might well be held to be broken by either a misfeasance or a malfeasance of the constable; and where there is no statute requiring a strict construction of the condition of the bond, as was the case with deputy sheriffs. The constable is liable to the same civil proceeding for removal from office on prosecution by citizens and taxpayers, as is the justice.<sup>25</sup> In addition, if the accused should be killed while resisting an unlawful search, it would seem that the officer would be liable under the "wrongful death" statute.<sup>26</sup> Criminally, the constable is subject to indictment under the constitutional provision governing the justice and other county officials.<sup>27</sup>

The sum total of this inquiry leads to the conclusions that: first, a justice is not liable to a civil action *ex delicto*, unless he acts maliciously, in which case there is still a division of authority; second, a justice may be removed from office by civil proceeding under the statute; and, third, he is subject to criminal indictment. Further, with reference to a constable: first, he is liable to a civil action in tort if the warrant is irregular upon its face; second, he is liable to an action for wrongful death if he kills the accused unlawfully; third, he is subject to removal from office by civil proceeding; and, fourth, he may be indicted criminally. The

<sup>19</sup> *Appling v. State*, 95 Ark. 185, 128 S. W. 866 (1910).

<sup>20</sup> *Sheftall v. Zipperer*, 133 Ga. 488, 66 S. E. 253 (1909).

<sup>21</sup> *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738 (1893). The better view seems to be *contra*; see *Lee v. Charmley*, 20 N. D. 570, 129 N. W. 448 (1910).

<sup>22</sup> *Lucas v. Locke*, 11 W. Va. 81 (1877).

<sup>23</sup> *State ex. rel. Sonner v. Dean et al.*, 126 S. E. 411 (W. Va. 1925); 31 W. Va. L. QUAR. 225.

<sup>24</sup> Code, c. 10 § 6.

<sup>25</sup> Code, c. 103 § 5: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages—although the death shall have been caused under such circumstances as amount in law to murder in the first degree, or manslaughter."

<sup>27</sup> W. VA. CONSTITUTION, ART. IX. § 4.

extent of the liability of both the justice and constable and their sureties upon official bonds is a question as yet undecided in this state, although the statute appears to be capable of a liberal construction, and to allow a recovery for such official acts as do not amount to a faithful discharge of their duties.

No brief is held for adherence to petty legal technicalities, by the aid of which admitted offenders of the law have escaped a just punishment. It is obvious that the points of procedure raised here are not of that character. The irregular, and perhaps over-zealous, methods of public officers menace the security of person and property and strike at the most sacred of constitutional guarantees.<sup>28</sup> Viewed in this aspect, the problem commands the attention not only of the lawyer, but of the average citizen. Too often, apparently, he is ignorant of the rights and remedies available to him.

—R. T. D.

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<sup>28</sup> W. VA. CONSTITUTION, ART. III §§ 6 and 10; AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTS. IV, V, AND VI. Other instructive cases on the topic of search and seizure are, *State v. Andrews*, 91 W. Va. 721, 114 S. E. 257, (1922); *State v. Brown*, 91 W. Va. 709, 114 S. E. 372 (1922); *State v. Snodgrass*, 91 W. Va. 553, 114 S. E. 136 (1922); *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434 (1919); *State v. Kees*, 92 W. Va. 277, 114 S. E. 617 (1922); *State v. Pridmore*, 93 W. Va. 417, 116 S. E. 756 (1923).