

House Judiciary Committee Meeting
Tuesday, March 5, 1963

The House Judiciary Committee met Tuesday, March 5, 1963, in Room 523 at 8:50 A.M. with Chairman Clyde Hill presiding. Thirteen members were present. Members Arthur, Davis, Euler, Fatzer, Gardner, Van Cleave and Williams were absent. Present for a hearing concerning House Bill No. 350 were William M. Ferguson, Attorney General and Keith Sanborn, County Attorney for Sedgwick County. Harold Schroeder was present to speak concerning House Bill No. 141.

Chairman Hill called the meeting to order.

William M. Ferguson, Attorney General, introduced Keith Sanborn. Mr. Sanborn is the immediate past president of the County Attorneys' Association and is county attorney for Sedgwick County. Mr. Ferguson stated that he was particularly concerned that sections 8 and 9 had been taken out of the proposed bill concerning search and seizure. He went on to state that if the committee does not think the proposal for a search warrant being issued for execution in any county of this state other than the county where issued is a good proposal then it is completely up to the committee and they have no quarrel concerning this matter.

Mr. Sanborn stated that he feels very strongly about the pretrial concept of this bill. He said he has a FBI manual on search and seizure which is 265 pages full of cases that have risen in the United States' courts since 1914 covering matters of what evidence should be excluded. He presented examples of cases which supported his feelings concerning the importance of having this pretrial procedure. He stated that in the suggested bill it was privilege with the county attorney, but if it is more palatable to this committee, make it mandatory upon the state to do so. He pointed out that the members of the committee represent the people of Kansas. He stated that since the Mapp case, the defendant has every advantage any way. He pointed out that if the mass of the bill is taken out, there are a number of sections which will have to be put back in. He presented these sections to Chairman Hill. He strongly urged the members of the committee to reinstate these sections.

Mr. Skoog started to ask a question, but Mr. Ferguson pointed out that his question pertains to the other bill which was proposed relating to appeals by the state in criminal cases. He stated that this is the only way it could be done constitutionally. Mr. Skoog questioned whether this could be done constitutionally. Mr. Ferguson pointed out that New York and Illinois do it in this manner. Mr. Skoog asked how long these states have had these statutes and how many times has someone gone to the supreme court concerning this. Mr. Ferguson stated that he didn't know off hand.

Mr. Sanborn stated that if anyone has any question concerning the constitutionality of this; they will be glad to prepare a brief. He went on to present a detailed background of search and seizure and its relation to the Fourth Amendment to the Constitution. He stated he wanted to impress upon the members of the committee the seriousness of this. He said he didn't relish the thought of his state being picked out as the best shelter place for syndicated crime. He went on to point out the inadequacies of the proposed Law, House Bill No. 350, an act relating to criminal procedure, providing for the issuance of search warrants, and pertaining to the affidavit or testimony on which issued; making certain acts unlawful and prescribing penalties, and repealing sections 21-944, 21-946, 21-947, 21-2603, 21-2604, 21-2605, 41-1005, 41-1006, 41-1007, 41-1008, 41-1009, 62-1802, 62-1804, 62-1805, 62-1807, 62-1808, 62-1809, 62-1810, 62-1811, 62-1812, and 62-1813 of the General Statutes of 1949, and repealing section 62-1803 of the General Statutes Supplement of 1961, and pointed out the problems this would create. He stated that the originally proposed law which was presented was based on the Fourth Amendment. He pointed out that the states of California and New York have general search warrant laws. He presented the members of the committee with copies of these laws. He stated that the idea that they would leave out something this important, sections 8 and 9, just because they might get a case out of it. Mr. Sanborn was interrupted at this point by Mr. Crossan who objected to this remark. Mr. Sanborn apologized for any offense and went on to explain the search and seizure bill in detail and stress its importance.

Chairman Hill asked for any questions.

Mr. Crossan asked if Mr. Sanborn would prefer the law the way it was proposed rather than the way it is. Mr. Sanborn stated that the pretrial matters are very important. Mr. Crossan went on to ask if Mr. Sanborn didn't like the addition of including the crimes of this state, or any other state. Mr. Sanborn said he has no objection to this addition. Mr. Crossan then asked how the evidence is going to get any better if it is illegally obtained. Mr. Sanborn stated that if it is illegally obtained, then it isn't going to be any better. Mr. Sanborn went on to say that if it is a serious enough matter, then an appeal could be obtained. Mr. Crossan asked what would happen if the appeal statute doesn't go through. Mr. Sanborn then explained just how things could be handled in the probability of this situation. Mr. Crossan stated that he meant if you follow the procedure and the court suppresses the evidence and the appeal statute doesn't go through. He wanted to know just what remedy you would have then.

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Mr. Hill clarified the question. Mr. Ferguson explained just what would happen in this situation.

Mr. Crossan questioned whether it is mandatory to furnish the evidence. Mr. Ferguson stated that they prefer this be left up to the choice of the county attorney, but they will take it mandatory. There was some discussion concerning this matter by the members of the committee.

Mr. Skoog stated that Mr. Sanborn indicated that without the wording concerning evidence, the people would be particularly injured. Mr. Sanborn again gave reference to the Fourth Amendment. Mr. Skoog said you don't issue search warrants upon the Fourth Amendment. Mr. Sanborn stated that he believes you do. Mr. Skoog questioned what they do in the federal jurisdiction now. Mr. Sanborn stated that there is no federal rule, but there are some federal cases which indicate this. He then gave an example of a case concerning this.

Mr. Ferguson stated that the federal law provides for the fruits and instrumentalities of crime. Mr. Skoog said that is what he understood, but asked what the interpretation has been. Mr. Ferguson presented this information.

Mr. Liebert stated that the words of the original draft of the proposed bill are considerably broader. He stated that this is a law farther than anything he has ever heard of.

Chairman Hill questioned Mr. Ferguson concerning the broadness of section 2. Mr. Ferguson stated that he will furnish the members of the committee with a copy of the federal statute and then these technical questions could be answered.

Mr. Crossan stated that in regard to the charge that the committee hopes to get a criminal case some day, the county attorney and judge in Montgomery County are even more violently in objection to this than he is. Chairman Hill asked what their objections are. Mr. Crossan stated that they said it puts the state in a straight jacket.

Mr. Ferguson stated that as a result of the Mapp case, we are going to have to change our procedure and there is no answer to it. It is just a fact of life that we have to live with.

Mr. Crossan stated that his county attorney doesn't want to disclose anything at the preliminary.

Mr. Skoog stated that it isn't so much right as it is battle.

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Chairman Hill stated that if there were no further questions or comments concerning this proposed bill, the committee will probably consider the matter further tomorrow. He stated that if possible, he would like the gentlemen appearing available tomorrow. He then thanked the gentlemen for appearing before the committee.

Harold Schroeder presented references and information concerning House Bill No. 141, an act relating to taxation; to provide for the apportionment of certain taxes imposed upon estates of decedents and taxes imposed as death duties or inheritance taxes; and to enact the uniform estate tax apportionment act. He was questioned by members Hill, Krug and Skoog and the dangers of this bill were pointed out. Mr. Schroeder pointed out that line 13, section 5(c), should read "country" instead of "county".

Chairman Hill thanked Mr. Schroeder for appearing before the committee and for the work which Mr. Schroeder and his partner did in preparing references concerning this matter.

The meeting adjourned at 10:00 A.M. to meet in Room 523 at 8:30 A.M. Wednesday, March 6, 1963.

Respectfully submitted,
Clyde Hill, Chairman

Minutes approved:

§ 789-a. Justices of the peace to act as coroners in certain cases.—

CASE NOTES

¶ 2. A justice of the peace may receive no fee from the county for acting as coroner. 1953 Ops Atty Gen June 8 (Informal).

TITLE II

OF SEARCH WARRANTS

[New sections added in this supplement]

§ 792. Property subject to seizure under a search warrant.

§ 797. Form of search warrant.

§ 797-a. Form of affidavit for search warrant.

§ 801. When warrant may be executed.

§ 810. Transfer of warrant and accompanying papers to other courts.

§ 791. Search warrant, defined.—A search warrant is an order in writing in the name of the people, signed by a judge, justice or magistrate of a court of criminal jurisdiction, directed to a peace officer, commanding him to search for personal property, and bring it before the judge, justice or magistrate.

HISTORY: Amd. L 1962, ch 542, eff July 1, 1962.
The 1962 act deleted at fig 1 a comma.

§ 792. Property subject to seizure under a search warrant.—The following property may be ordered seized under a search warrant:

1. stolen or embezzled property;
2. property, the possession of which is unlawful;
3. property used or possessed with intent to be used as the means of committing a crime or offense or concealed to prevent a crime or offense from being discovered;
4. property constituting evidence of crime or tending to show that a particular person committed a crime.

The property described in this section, or any part thereof, may be seized from any place where such property may be located or from the person or possession or control of any person who shall be found to have such property in his possession or under his control.

HISTORY: Add. L 1962, ch 542, eff July 1, 1962.
Former § 792, repealed, L 1962, ch 542, eff July 1, 1962.

NOTE: [1962] Sections seven hundred ninety-two, seven hundred ninety-seven, eight hundred one and eight hundred ten of the code of criminal procedure, repealed by this act, have been re-enacted as new sections with the same numbers. Section seven hundred ninety-two relates to property that may be seized under a search warrant; section seven hundred ninety-seven sets forth a recommended form of search warrant; section eight hundred one relates to execution of search warrants in the nighttime; section eight hundred ten provides for transfer of search warrants and accompanying papers to trial courts.

[13 CLS Supp]

ANNOTATIONS: Promises temporarily unoccupied as dwelling within provision forbidding unreasonable search of dwellings 33 ALR2d 1430.

CASE NOTES

¶ 35. There is no provision for a proceeding to vacate a search warrant or for an appeal from an order denying the application to vacate. Re Police Benev. Assn. of New York State Police, Inc. 9 AD2d 929, 195 S2d 169 (1959), aff'd 9 NY2d 803, 215 S2d 513, 175 NE2d 170 (1961).

§ 793. It cannot be issued but upon probable cause, supported by affidavit.—

CASE NOTES

¶ 7. Search warrants were vacated where supporting affidavit, based on police reports that there was probable cause to believe that defendant possessed records showing the mode of printing, selling, etc., obscene literature, was insufficient. People v. Roth, 207 M 875, 144 S2d 122 (1955).

§ 794. Examination of person seeking warrant and witnesses.—The person seeking the warrant shall appear personally before the judge, justice or magistrate who may, before issuing the warrant, examine, on oath, the person seeking the warrant and any witnesses he may produce, and must take the affidavit or deposition of the person seeking the warrant. Any such affidavit shall be substantially in the form prescribed by section seven hundred ninety-seven-a of this code and shall contain the statements and information upon which such person relies to establish sufficient grounds for the issuance of the warrant. Such judge, justice or magistrate may in his discretion require in any case, that any witness upon whom the person seeking a search warrant relies for information appear personally and be examined concerning such information.

HISTORY: Amd. L 1962, ch 542, eff July 1, 1962.
The 1962 act deleted at fig 1 "must", at fig 2 "complainant" and at fig 3 "their depositions in writing, and cause them to be subscribed by the parties making them."
Section heading, amd. L 1962, ch 542, eff July 1, 1962.
The 1962 act deleted the former heading and added an entirely new one.

§ 795. Affidavits or depositions, what to contain.—The affidavits or depositions must set forth the facts, information and circumstances tending to establish sufficient grounds for granting the application, and probable cause for believing that such grounds exist.

HISTORY: Amd. L 1962, ch 542, eff July 1, 1962.
The 1962 act deleted at fig 1 "the", at fig 2 "of", at fig 3 "or" and at fig 4 "they".
Section heading, amd. L 1962, ch 542, eff July 1, 1962.
The 1962 act deleted at fig 1 "Depositions" and added matter between figs 1 and 2.

CASE NOTES

¶ 1. Search warrants were vacated where supporting affidavit, based on police reports that there was probable cause to believe that defendant possessed records showing the mode of printing, selling, etc., obscene literature, was insufficient. People v. Roth, 207 M 875, 144 S2d 122 (1955).

1. When the property was stolen or embezzled.
2. When the property or things were used as the means of committing a felony.
3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.
4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be.

LEGISLATIVE HISTORY

1. Enacted 1872, which read: "It may be issued upon either of the following grounds:

"1. When the property was stolen or embezzled; in which case it may be taken on the warrant, from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be;

"2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be;

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

(a) Criminal Practice Act § 643 (Stats 1851 ch 29 § 643 p 284), which read: "It may be issued whenever property has been stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be."

(b) Stats 1859 ch 119 § 692 p 327.

(c) NY Code Crim Proc § 792.

2. Amended by Stats 1899 ch 72 § 1 p 87, amending the section to read: "It may be issued upon either of the following grounds:

"1. When the property was stolen or embezzled; in which case it may be taken on the warrant from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.