

1940

SEARCHES AND SEIZURES - CONSTITUTIONALITY OF STATUTE PROVIDING FOR ISSUANCE OF SEARCH WARRANT ON AFFIDAVIT ON INFORMATION AND BELIEF

William C. Wetherbee
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Procedure Commons](#), [Evidence Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

William C. Wetherbee, *SEARCHES AND SEIZURES - CONSTITUTIONALITY OF STATUTE PROVIDING FOR ISSUANCE OF SEARCH WARRANT ON AFFIDAVIT ON INFORMATION AND BELIEF*, 39 MICH. L. REV. 342 (1940).

Available at: <https://repository.law.umich.edu/mlr/vol39/iss2/25>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SEARCHES AND SEIZURES — CONSTITUTIONALITY OF STATUTE PROVIDING FOR ISSUANCE OF SEARCH WARRANT ON AFFIDAVIT ON INFORMATION AND BELIEF — Plaintiff demanded a writ of prohibition against the defendant, a justice of the peace, to prevent his proceeding to determine ownership of trademarked milk bottles seized from plaintiff's milk truck under a search warrant. A statute required the issuance of a search warrant when any person made affidavit that he had reason to believe and did believe that trademarked receptacles were being wrongfully held.¹ *Held*, writ of prohibition granted since the statute was unconstitutional in requiring the issuance of a search warrant without a showing of facts constituting probable cause, and in allowing the affiant instead of the judicial officer to determine probable cause.² *Allen v. Lindbeck*, 97 Utah 471, 93 P. (2d) 920 (1939).

Probable cause is defined by the courts and legal writers to be such an apparent state of facts that a discreet and prudent man would be led to the belief that the accused, at the time of the application for the warrant, was in possession of the property.³ Thus, the court in the principal case was in full accord with the weight of authority in holding that probable cause is not shown by an affidavit on information and belief that does not state the facts upon which the belief is based.⁴ This same view holds that the determination of probable cause upon facts presented is a purely judicial function to be exercised by a judicial officer.⁵ Therefore, a statute which requires issuance of a search warrant upon mere affidavit on information and belief, based upon secret facts of which the affiant may have knowledge, is invalid since it rests upon the conclusion of the applicant as to whether probable cause exists. The reasoning of the majority of courts is based upon the sound theory of giving protection against the invasion of property through the use of a search warrant until there is actual evidence produced which would justify its issuance. On the other hand, the minority of courts uphold the issuance of a search warrant on information and belief.⁶ However, their position has been weakened by important decisions in two states. In Indiana, *Rose v. State*,⁷ which was a leading case upholding the right to issue a search warrant upon information and belief, was overruled by *Wallace v.*

¹ Utah Rev. Stat. (1933), § 95-2-10.

² Utah Const., art. 1, § 14: "and no warrant shall issue but upon probable cause supported by oath or affirmation. . . ."

³ CORNELIUS, SEARCH AND SEIZURE, § 83 (1926).

⁴ 41 A. L. R. 1539 (1926); 74 A. L. R. 1418 at 1490 (1931).

⁵ 56 C. J. 1222 (1932); CORNELIUS, SEARCH AND SEIZURE, § 83 (1926).

⁶ *Lowrey v. Gridley*, 30 Conn. 450 (1862); *Loeb v. State*, 133 Miss. 883, 98 So. 449 (1923); *State v. Mallett*, 123 Me. 220, 122 A. 570 (1923); *Watson v. State*, 109 Neb. 43, 189 N. W. 620 (1922).

⁷ 171 Ind. 662, 87 N. E. 103 (1909).

State.⁸ And in Texas, the court, after reserving the consideration of this question in *Dupree v. State*,⁹ later decided in *Standard v. State*¹⁰ that a mere affidavit on information and belief failed to constitute probable cause. The courts adhering to the minority rule evidently seem willing to concede that the legislature, in defining probable cause as an affidavit on information and belief with the resulting diminution in the judicial function of the justice, has not exceeded its power under the constitution. This interpretation would seem open to the criticism that it tends to subject property to search and seizure at the instance of any person who has convinced himself that he has reason to believe and does believe the property is wrongfully held. The constitutional requirement of probable cause certainly affords a more complete protection from the unreasonable issuance of search warrants where its existence is determined by an impartial judicial officer upon consideration of actual facts.

William C. Wetherbee

⁸ 199 Ind. 317, 157 N. E. 657 (1927).

⁹ 102 Tex. 455, 119 S. W. 301 (1909).

¹⁰ 113 Tex. Cr. 600, 21 S. W. (2d) 1066 (1929).