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WRIT OF CERTIORARI.

Filed May 1, 1931.

New Jersey Supreme Court

State of New Jersey, George S. Hobart, Assistant Attorney General, *Prosecutor,* *vs.* The Court of First Criminal Judicial District of the County of Bergen, *Respondent.*	*On Certiorari to the Court of First Criminal Judicial District of the County of Bergen.*

New Jersey, ss.

State of New Jersey to the Court of First Criminal Judicial District of
(SEAL) the County of Bergen, Greeting:

We being willing, for certain reasons, to be certified of a certain order made by you on the thirty-first day of March, 1931, suppressing certain evidence and returning certain articles to the defendant, Herman Becker, in a certain cause entitled, "State of New Jersey vs. Herman Becker," as is said, do command you that you send under the hand of the Judge of said court, and the seal thereof, to the Justices of the Supreme Court of Judicature of the State of New Jersey, at Trenton, on the fifth day of May, next, all and singular, the said Order with all things touching and concerning the same, including a certain search warrant dated January 24, 1931, and the affidavit of

Earl W. Sparks, verified January 24, 1931, upon which said search warrant was issued, the inventory subscribed by Walter L. Simpson and verified the 28th day of January, 1931, constituting the return to said search warrant and any and all records and proceedings had in the said cause, together with this, our writ, that we may further cause to be done what of right and according to the laws of this state should be done.

Witness, Charles W. Parker, Esquire, Justice of our said Supreme Court, at Hackensack, this seventh day of April, in the year of our Lord one thousand nine hundred and thirty-one.

FRED L. BLOODGOOD,
Clerk.

GEORGE S. HOBART,
Attorney for Prosecutor.

Endorsement and Allocatur.

Filed May 1, 1931.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General, *vs.* The Court of First Criminal Judicial District of the County of Bergen, *Respondent,* Charles J. McCarthy, Judge (Retired), Abram Lebson, Judge, J. Wallace Leyden, Acting Judge, and William K. Conley, Clerk, and Herman Becker, *Defendant.*	*Writ of Certiorari.*

Issued April 7th, 1931.

Returnable May 5th, 1931.

GEORGE S. HOBART,
Assistant Attorney General,
Attorney for the Prosecutor,
Hackensack, N. J.

This Writ is allowed. Let it be sealed this 7th day of April, 1931.

CHARLES W. PARKER,
Justice of the Supreme Court.

RETURN TO WRIT OF CERTIORARI.

Filed May 1, 1931.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General, *Prosecutor,* *vs.* The Court of First Criminal Judicial District of the County of Bergen, *Respondent,* Herman Becker, *Defendant.*	*On Certiorari.* *Return by the Court of First Criminal Judicial District of the County of Bergen.*

To the Honorable, the Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of this Writ directed to The Court of First Criminal Judicial District of the County of Bergen, and HERMAN BECKER, defendant, I hereby certify and send, under the Seal of the said The Court of First Criminal Judicial District of the County of Bergen, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the Order made March 31st, 1931, suppressing said evidence; the Search Warrant dated January 24th, 1931; the Affidavit of Earl W. Sparks, verified January 24th, 1931; the Inventory subscribed by Walter L. Simpson and verified the 28th day of January, 1931, and proceedings in said The Court of First Criminal Judicial District of the

County of Bergen, in a certain action, plaint or proceeding brought against HERMAN BECKER, by the State of New Jersey, together with all papers touching and appertaining to the same, as fully and entirely as before said The Court of First Criminal Judicial District of the County of Bergen they remain, as is commanded.

In testimony whereof, I, ABRAM A. LEBSON, Judge of the Court of First Criminal Judicial District of the County of Bergen, have hereunto set my hand as Judge of The Court of First Criminal Judicial District of the County of Bergen, and caused the Seal of The Court of First Criminal Judicial District of the County of Bergen to be affixed and attested by the Clerk of said The Court of First Criminal Judicial District of the County of Bergen, this 23rd day of April, one thousand nine hundred and thirty-one.

ABRAM A. LEBSON,
Judge of The Court of First Criminal Judicial District of the County of Bergen.

Attest:

W. K. CONLEY,
Clerk.

Return—Search Warrant.

Search Warrant.

STATE OF NEW JERSEY, }
BERGEN COUNTY. } ss.:

The State of New Jersey to Walter L. Simpson. Greeting:

Whereas, it appearing to me, J. Wallace Leyden, Acting Judge of the First Criminal Judicial District Court of Bergen County, N. J. on oath of Earl W. Sparks, that he, the said Earl W. Sparks has personal knowledge that John Doe, Herman Becker of the Borough of Little Ferry, County of Bergen and State of New Jersey, did, on or about the 21st day of January, 1931, at the Borough of Little Ferry, in said County, in violation of sections ten and fifteen of the Prohibition Enforcement Act, an Act of the State of New Jersey, passed March 17, 1922, unlawfully, knowingly and wilfully sell, barter, deliver, manufacture, furnish and possess intoxicating liquor used and to be used for beverage purposes, and fit for use for beverage purposes, containing more than one-half of one per centum of alcohol by volume, upon the premises located at No. 210 Washington avenue in the Borough of Little Ferry, County of Bergen, State of New Jersey (which said building bears on the side of the entrance door the number 120), and having in the rear thereof several outbuildings, and that he verily believes that intoxicating liquors are still so unlawfully sold, bartered, delivered, furnished, manufactured and possessed by said John Doe upon said premises; and I having examined the said complainant, Earl W. Sparks, on oath, and being satisfied that there is probable cause to believe that intoxicating liquor is

unlawfully sold and possessed on said premises (the particular grounds being the purchase of intoxicating liquor by the complainant from said Joe Doe, for which the said compainant, Earl W. Sparks, paid for the same the sum of fifty cents for one drink of whiskey), contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of New Jersey;

And it further appearing on oath of said complainant, Earl W. Sparks, that the said John Doe has whiskey and intoxicating liquor in his possession, which are kept for the purpose of unlawfully selling same, and that the affidavit is positive that whiskey and intoxicating liquor is unlawfully possessed in the premises aforesaid;

Now, therefore, you are hereby commanded, in the name of the State of New Jersey, to enter in the day time the said premises situated at Little Ferry, with the necessary and proper assistance, within ten days from the date hereof, and there diligently to investigate and search for, seize and safely keep whiskey and other intoxicating liquor, and if any such be found or intended to be used in the illegal sale and possession of intoxicating liquor, give a copy of this warrant, together with a receipt for the liquor and any property taken (specifying it in detail), to the person from whom it is taken by you, or in whose possession it is found, or, in the absence of any person, to leave a copy of this warrant with the receipt, as aforesaid, in the place where said liquor is found, and make return forthwith to me, and deliver to me a written inventory of the property taken, made publicly or in the presence of the person from whom it was taken and in your presence, verified by your affidavit before me:

Return—Search Warrant.

And also to take the body of the persons in whose possession such liquor and chattels may be found, and bring such persons so found forthwith before me to be dealt with according to law.

Given under my hand and seal this 24th day of January, 1931.

J. WALLACE LEYDEN,
Acting Judge of the First Criminal Judicial District Court of Bergen County, N. J.

Return—Affidavit of Earl W. Sparks.

Affidavit.

Before J. Wallace Leyden, Magistrate.

State of New Jersey, *vs.* John Doe.	*Affidavit.* *Prohibition Enforcement Act.*

STATE OF NEW JERSEY,
BERGEN COUNTY. } SS.:

EARL W. SPARKS, of full age, being duly sworn according to law, on his oath says, that he is a citizen of the United States; that on the 21st day of January, 1931, one JOHN DOE, at the premises hereinafter mentioned, contrary to, and in violation of sections 10 and 15 and the several sections of the Prohibition Enforcement Act, an Act of the State of New Jersey, passed March 17, 1922, did unlawfully, knowingly and wilfully sell, barter, deliver, furnish, manufacture and possess intoxicating liquor used and to be used for beverage purposes, and fit for use for beverage purposes, containing more than one-half of one per centum of alcohol by volume, to wit: Whiskey.

2. That deponent on said date bought said intoxicating liquor from said John Doe of the Borough of Little Ferry, County of Bergen and State of New Jersey, and paid for the same the sum of fifty cents for one drink of whiskey.

3. That the premises upon which said sale was made are located at No. 210 Washington avenue in the Borough of Little Ferry, County

of Bergen, State of New Jersey, which said building bears on the side of the entrance door the number 120, said building adjoining police headquarters or borough hall, and consist of a two-story frame building and having in the rear thereof several out-buildings, one of which being a brick two-story building and several other smaller buildings; being the premises owned and occupied by Carl Becker as a hotel and otherwise; and that said sale was made in that part of the building used as a bar room and that as to the rest of the premises and the said house in the rear thereof, deponent has personal knowledge that the same are used for the storage and sale of liquor.

Deponent further says that because of said sale, and the fact that bottles and containers are in the place, and which contain intoxicating liquor, and also equipment designed for the purpose of dispensing intoxicating liquor, he has reason to believe, and does verily believe that intoxicating liquors are being unlawfully sold, bartered, manufactured, delivered, furnished and possessed upon the premises aforementioned, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of New Jersey.

EARL W. SPARKS.

Subscribed and sworn before me
this 24th day of January, 1931.

J. WALLACE LEYDEN,
Acting Judge, First District
Court, Bergen County.

Inventory and Affidavit.

The following is a written inventory of the liquor, chattels and other property seized in the execution of the warrant to which this is annexed:

2½ gal. wine.
4 qts. Golden Wedding Whiskey.
2 pts. Golden Wedding Whiskey.
1 Journal book.
35 Bbls. Beer.
4 Bottles Gordon Dry Gin.
1½ Bottles Golden Wedding Whiskey.
3 Bottles Cognac.
1 Bottle Chartreuse.
1 Bottle Creme De Cacao.
1 Bottle Irish Sloe Gin.
1 Bottle Benedictine.
2 Bottles Dry Gin, ¾ full.
1 Bottle Satin Gin, ½ full.
6 Bottles Erdener Treppchen.
5 Bottles Scotch Whiskey.
2 pts. Golden Wedding Whiskey.
2 Bottles Scotch (Partly full).

Pre-War Stock

3 Bottles Apricot Brandy.
1 Bottle Apricot Brandy (Partly full).
2 Bottles Vermouth (Partly full).
1 Bottle Bitters.
2 Bottles Cognac.
1 Bottle Curacao.
1 Bottle Hulslkamp (Partly full).
1 Bottle Rock & Rye.
2 Bottles Creme de Menthe.
1 Bottle Brandy.
1 Bottle Jamaica Rum (Partly full).
1 Bottle Jamaica Rum.

Return—Inventory and Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } SS.:

I, Walter L. Simpson, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true statement of all liquor, chattels or other property seized by me in executing the annexed warrant.

W. L. SIMPSON.

Subscribed and sworn to before me
this 28th day of January, 1931.

JULIUS PRUEFER,
A Notary Public of N. J.

Return—Complaint.

Complaint.

Trial date, Jan. 28, 9:30 A. M.
Bail, 1500, Surety Co.

COURT OF THE FIRST CRIMINAL JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

State *vs.* Herman Becker.	*Complaint for Possession of Liquor.*

STATE OF NEW JERSEY, COUNTY OF BERGEN. } ss.:

Before me, CHARLES J. McCARTHY, ESQUIRE, Judge of the Court of the First Criminal Judicial District, in the County and State aforesaid,

Personally appeared Sgt. Walter Simpson, State Trooper, who, being duly sworn according to law, on information and belief, deposeth and saith, that on the 24th day of Jan. A. D. one thousand nine hundred and thirty-one at the Boro of Little Ferry in the County aforesaid that one, Herman Becker, now residing at Washington avenue, Boro of Little Ferry, did then and there possess liquor fit for beverage purposes, all of which is contrary to and in violation of the statutes made and provided for.

Therefore, this complainant prays that the said Herman Becker may be apprehended and

Return—Complaint.

held to answer said complaint, and dealt with as law and justice may require.

W. L. SIMPSON,
Complainant.

Sworn and subscribed to before me this 24th day of Jan., A. D. 1931.

FRED U. HILLERS,
Acting Clerk of the Court of the First Criminal Judicial District of the County of Bergen.

Notice of Motion.

FIRST CRIMINAL JUDICIAL DISTRICT COURT FOR THE COUNTY OF BERGEN.

The State of New Jersey, *Plaintiff,* *vs.* Herman Becker, *Defendant.*	*Notice of Motion.*

TO GEORGE S. HOBART, Special Assistant Attorney General.

Take notice that on Thursday, the 5th day of February, 1931, I shall apply to the First Criminal Judicial District Court of Bergen County, New Jersey, at the Court House, Hackensack, New Jersey, at 7:30 P. M. or as soon thereafter as counsel may be heard for leave to controvert the grounds on which the search warrant dated the 24th day of January, 1931, was issued in the above entitled matter and for an Order to suppress certain evidence in said cause, to wit, those certain articles and things unlawfully seized by one purporting to act under color of said illegal search warrant, which said articles and things are more particularly described in the inventory to be filed with the return to said illegal search warrant, and further for an Order to return the said property, articles and things to the person from whom they were taken.

And my reasons for making such application and motion are as follows:

Return—Notice of Motion.

1. Said search warrant is defective and illegal in form and therefore void.

2. Said search warrant is directed against the premises of no certain person.

3. Said search warrant does not describe or cover the premises owned by the defendant and which were searched by virtue of it.

4. The property, articles and things taken under and by virtue of said search warrant are not the same as those described in the warrant.

5. There was no probable cause for believing the existence of the grounds on which the warrant was issued.

6. The affidavit on which said search warrant was issued fails to disclose sufficient probable cause for believing the existence of the grounds on which it was issued.

7. The affidavit on which said search warrant was issued is improper in form, illegal and therefore void.

8. Said warrant purports to authorize the arrest of a person or persons without describing them or without charging them with any crime.

9. Said property, articles and things seized under said search warrant were taken in violation of the Fourth and Fifth Amendments to the Constitution of the United States and in violation of the Constitution and Statutes of the State of New Jersey.

10. The person purporting to execute said search warrant possessed no legal right or authority to enter upon or in the premises where such illegal search and seizure was made.

Return—Notice of Motion.

11. Said search warrant was void for the reason that the Magistrate who issued the same was without legal authority to do so.

12. Said search warrant is void and the search and seizure thereunder illegal for the reason that the warrant was not issued within a reasonable time after the alleged occurrence of the acts claimed to constitute probable cause for the issuance of the same.

13. There was taken in said illegal search and seizure certain property, articles and things lawfully in the possession of the defendant which the agents and employees of the State of New Jersey were not justified and were without legal authority to take and seize even under a valid and legal search warrant.

HERMAN BECKER,
By Chandless, Weller & Selser,
Attorneys.

TESTIMONY.

FIRST DISTRICT JUDICIAL CRIMINAL COURT OF THE COUNTY OF BERGEN.

The State of New Jersey,

vs.

Herman Becker,

Defendant.

Before:

Hon. Charles J. McCarthy, J.

Hackensack, N. J., March 4, 1931.

Appearances:

Charles Schmidt, Esq., assistant prosecutor, for the State.

John E. Selser, Esq., for the defendant.

HERMAN BECKER, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. Selser.

Q Mr. Becker, you are the defendant in this matter? A Yes, sir.

Q Where do you live? A 120 Washington avenue.

Q Where? A Little Ferry.

Q In Little Ferry? A Yes, sir.

Q Do you recall a raid being made at your home?

Mr. Schmidt: You live there?

The Witness: Well, I have my business there, and I live there.

Q You have your business and live there as well? Do you recall a raid being made at your place on the 28th of January, 1931—was that the date? A 24th, I think.

Q 24th? What day of the week was the raid conducted? A On Saturday.

Q On a Saturday? So, it was the 24th of January. Were you present at the time the raiding officers gained admittance? A Yes, sir.

Q Will you describe to the Court the circumstances under which admittance was gained? A Why, there was a rush through the front door, and I believe that they also rushed in the back door.

Q In other words, the party was divided? A Yes, sir, all divided.

Q A portion of them came in one way and a portion the other way? A Yes, sir.

Q And then what happened? A And I was somewhat pushed behind the bar, and in the meantime other men scattered all over the place, and I demanded a search warrant.

Q Whom did you address yourself to? A To Sergeant Simpson, I believe. And in the meantime I had just cashed a check for a man, and I had left some money on a safe in my living rooms, and I demanded to go in there, and he said, "Stand still." In the meantime his men were scattered all over the place.

Q And did Sergeant Simpson show you any search warrant? A Yes, sir. Then, after he allowed me to go in there, he showed me the search warrant.

Q Did he give you a copy of the search warrant? A Yes, sir.

Q Is this the copy he gave to you (handing paper to witness)? A I wouldn't be sure about that.

Q Well, it was one of that appearance? A One of that appearance.

Q Did he have in his hand at the time the search warrant under which he claimed to have authority to enter? A I think he had.

Q And do you recall whether or not it was this (handing paper to witness)? A I can't be sure.

Q Well, it was of that appearance? A Of that appearance; yes, sir.

Mr. Selser: There is no doubt about the fact that this is the warrant.

Q Now, you said your property is number—what is the number?—120 Washington avenue? A 120.

Q Just describe the premises. You spoke of the place of business. It is on the ground floor? A Yes, sir.

Q With a bar-room in it? A Yes, sir.

Q And what other rooms are on the first floor? A There is a kitchen there and a living room and a dining room, and then a big room on the other side of the house.

Q And upstairs is what? A Living rooms.

Q Living rooms, your private living rooms? A Yes, sir.

Q Where did the searching officers obtain the articles described in the inventory? A In the dining room.

Q Which floor? A On the first floor.

Q Did they obtain anything at all in the barroom? A Not to my knowledge.

Q Was your place ever known as 210, or was it at the time of the raid known as 210 Washington avenue? A Never.

Q Never known as 210 Washington avenue? A No, never.

Q Is your name Herman? A That is right.

Q In an affidavit made by Earl W. Sparks, it is charged that on the 21st day of January, 1931, he purchased at 210 Washington avenue, in the borough of Little Ferry, a drink of whiskey from you, and that he paid 50 cents for the drink. Do you know Earl W. Sparks? Have you seen him around here? A I have seen him on the day of the raid; I never saw him before that.

Q Did you ever sell to Earl W. Sparks, a drink of whiskey for 50 cents? A No, sir.

Q Was Earl W. Sparks ever in your place of business prior to the day of the raid? A No, sir.

Q At the time the raid was conducted? A No, sir; that's the only time.

Q Did the raiding officers make any statement to you as to what their authority for entering was? In other words, did they say they entered by reason of the search warrant, a copy of which they gave to you? A Yes, sir, that's it.

Mr. Selser: I will ask that the warrant and affidavit in this proceeding be marked in evidence.

Mr. Schmidt: They are part of the record.

Mr. Selser: For the reason that this is a matter addressed to your Honor as a mag-

istrate under the Prohibition Act, there probably would be no official record.

The Court: It will become part of the record.

Mr. Schmidt: I object to the matters going into the record, by reason of the fact that they are already part of the proceedings upon which the case is based.

Mr. Selser: Then, it won't do any harm. Mark all of them in evidence.

(Papers referred to received in evidence and marked Defendant's Exhibits A-1, A-2 and A-3.)

Cross examination by Mr. Schmidt.

Q You are not at the Little Ferry address every day in the week, are you? A Most every day.

Q Most every day? I asked you whether you are at the place every day in the week? A Yes, sir.

Q Every day? A Yes, sir.

Q And every hour of the day? A No, sir, not every hour.

Q All right. Why did you say that Sparks was never in your place before this raid? A I never saw him.

Q In answer to a question propounded by Mr. Selser, you said that Sparks was never in your place of business before the day of the raid. Do you want to withdraw that statement? A I never saw him.

Q Will you answer the question, please?

Mr. Schmidt: I ask the Court to direct an answer to the question.

The Court: Answer the question directly, if you can.

Q Do you want to withdraw that statement to the effect that Sparks was never in your place of business before the day of the raid?

The Witness: I am answering my sort of the question that he put.

Q On the 21st of January, 1931, you were at the Little Ferry address, were you not? A Yes, sir.

Q No question about it? A Yes, sir.

Q You state Sparks was not there that day? A No, sir.

Q How do you know he was not there? A Not during my presence.

Q You were not there the entire day, of course? A No, sir.

Q All right. Now, of course, you do quite a business down there at Little Ferry? A Sometimes.

Q You were doing it on that day, weren't you? A I don't remember that.

Q You don't remember? You sell a lot of beer down there, don't you? A Yes, sir.

Q As a matter of fact, you had about 35 barrels of beer there on that day, that a large number of people enter and leave your place?

Mr. Selser: I object to counsel's characterization.

The Court: I will sustain the objection, excepting as to January 21.

Q On the 21st day of January, you had done quite a business? A I can't say that I did.

Q You can't say that you did not, can you? A I can't say that I did not.

Q You don't know January 21 from any other day, do you? A No, sir.

Q And you don't live in Little Ferry? A I lived there for 25 years.

Q Do you live at Little Ferry now? A No, I have my home in Teaneck.

Q And your wife and children live in Teaneck, don't they? A Yes, sir.

Q Then, it is true that you don't live in Little Ferry? A I certainly do. I have my room there.

Q You have a room there? A Yes, sir.

Q Do you sleep in Little Ferry? A Yes, sir.

Q Separated from your wife? A No, sir.

Q But your home is in Teaneck? A Yes, sir.

Q And you live at Teaneck? A I live at Little Ferry as well.

Q You vote in Teaneck? A No, sir.

Q You vote in Little Ferry? A Yes, sir.

Q You don't vote in Teaneck at all? A No, sir.

Q You stay in Little Ferry every day? A Yes, sir.

Q Every night? A Not every night.

Q How often do you stay there? A Three nights a week.

Q Who else lives there at that address? A A brother.

Q What is his name? A Carl Becker.

Q You have a telephone at the Washington avenue address? A Yes, sir.

Q In the telephone book it is listed as No. 210 Washington avenue, is it not? A I don't know.

Herman Becker, for Defendant, Cross.

Q Did you ever see it? A Yes, sir, I think I have seen it.

Q Would you say the address is not listed as No. 210 (handing telephone directory to witness)? A I say that it is not.

Q It is not? A Not.

By the Court.

Q Is there any number on the door? A Yes, sir.

Q Can you see it distinctly? A Absolutely.

By Mr. Schmidt.

Q What is the number on the door? A 120.

Q Will you describe the lower portion of the building again? A It is an old building.

Q Where you enter from the street on Washington avenue— A It sets back off the street, and the entrance is on the level of the street, the sidewalk line.

Q And when you enter, what sort of room do you come into? A I have two entrances; one leads to the living room and the other leads into what we call the bar-room.

Q What do you mean by living room? A There is two entrances. It is like an end building.

Q What do you mean by living room? A Well, where a family would reside.

Q Does any family reside there?

The Court: He said where a family would reside.

Q Does a family reside there? A No, sir.

Re-direct examination by Mr. Selser.

Q In the inventory which is filed, Mr. Becker, there is no mention made of books and documents and other things—other property other than that of an intoxicating nature. Were there any things taken from your premises other than intoxicating liquors, by the raiding officers? A Yes, sir.

Q What? A A ledger.

Q What else? A Well, I missed a fountain pen.

Q Yes. But particularly, they took your ledgers? A Yes, sir.

Q Books of account? A Yes, sir, and also a key to the back door.

Q Was your waiter at the place, who takes care of the premises when you are not present? A I have two men.

Q Who are they? A You mean names?

Q Yes. A I have an uncle, name similar to mine and I have a man named Seeger.

Q Are both of them in court? A No, sir; one is in court.

Q Is Seeger in court? A Yes, sir.

Q What does the man look like? A Absolutely, about the same.

Q The same as you? A The same age.

Q Who was in the place on the 21st of January? Was your uncle there that day? A Well, if you would tell me what time, I might be able to tell you.

The Court: The time of the raid.

Q No; the time of the alleged sale. Well, what time of day would he be on? A Well, he is on until noontime.

Q From early morning until noon? A And the other man is on in the afternoon.

Q Well, Seeger is on in the afternoon? A Yes.

Re-cross examination by Mr. Schmidt.

Q The telephone is listed under the name of Carl Becker, isn't it? A Yes, sir.

Q I have underlined it; you see it in the book (handing to witness)? A That is right.

Q What does it say there?

Mr. Selser: I object to that.

Q 210 Washington avenue?

Mr. Selser: I object to it. If the telephone company makes a mistake, it is no justification for your doing so.

Mr. Schmidt: There is no evidence that the telephone company—

The Court: I think if the defendant will withdraw that objection, it might show that the nearest anybody got to the premises was the telephone address. Will you withdraw the objection?

Mr. Selser: I withdraw the objection.

Q It is true that your telephone is listed as No. 210 Washington avenue, isn't it? A As I see it in the book, yes.

Q You say that there was not contained in the inventory a record of the books, and so forth, that were taken from the place? A I said there was a ledger taken. That is in the inventory.

Q That is in the inventory? A I said that, yes, sir.

Q Sure everything is in there?

Mr. Selser: Where is the ledger?

The Witness: On the top.

By Mr. Selser.

Q That is right away over here in the side, after some whiskey, one journal, it is described—that was the ledger? A Yes, sir.

Mr. Schmidt: That is all.

Mr. Selser: That is all, Mr. Becker.

HERMAN BECKER.

LOUIS SEEGER, called as a witness for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Selser.

Q You are the Mr. Seeger who was referred to by Mr. Becker? A Yes, sir.

Q In his testimony. A Yes, sir.

Q What time were you on duty the 21st day of January, which was a Wednesday, this year? A It is a quarter to two in the afternoon.

Q And how long did you stay on duty? A Half-past ten.

Q Half-past ten at night? A Yes, sir.

Q Have you seen Earl W. Sparks, one of the prohibition agents, around there—

Louis Seeger, for Defendant, Cross.

Mr. Selser: Will you stand up, Mr. Sparks?

(Mr. Sparks stood up.)

Q Do you see him now? A Yes, sir.

Q Did you ever sell a glass of whiskey to Mr. Sparks and charge him for it, on the 21st of January? A No, sir.

Q You know the property which Mr. Becker maintains in Little Ferry? A Yes, sir.

Q What is the street number of that? A 120.

Q Washington avenue? A Washington avenue.

Q Were you present at the time of the raid? A Yes, sir.

Cross examination by Mr. Schmidt.

Q You say you never saw Sparks before? A No, sir.

Q Did not sell him any whiskey? A No, sir.

Q You did not sell him any whiskey on the 21st day of January, 1931? A No, sir.

Q Is that right? A No, sir.

Q You mean that you don't remember having sold him whiskey on that day? That is what you mean, isn't it? A I didn't sell him any. I didn't see him.

Q You didn't see him? A On that day; no.

Q You don't know how many people you had there on the 21st of January, do you? A No, not exactly.

LOUIS W. SEEGER.

James Nally, for Defdt., Direct, Cross, Re-direct.

JAMES NALLY, called as a witness for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Selser.

Q Mr. Nally, are you tax collector of the Borough of Little Ferry? A Yes, sir.

Q How long have you been tax collector of Little Ferry? A 32 years.

Q And as tax collector, you are familiar with properties in your borough, particularly with street numbers, upon Washington avenue? A Yes, some of them.

Q Do you know the property owned and maintained by Mr. Becker, on Washington avenue? A It is 120 Washington avenue.

Q 120? A Yes, sir.

Q You know that of your own knowledge? A Yes, sir.

Q That appears— A Upon the house.

Q Is there such a number upon the records of your borough? A Yes, sir.

Cross examination by Mr. Schmidt.

Q Who owns the property at 130? A Carl Becker.

Q Who owns it at 140? A 140? Well, I couldn't exactly tell you that, 140. I can't keep track of them all.

Re-direct examination by Mr. Selser.

Q You checked up on this particular one, however, didn't you, at my request? A Yes, sir.

Earl W. Sparks, for the State, Direct.

By the Court.

Q You are sure of this one, Mr. Nally? A Yes.

Mr. Selser: That is our case, if your Honor please.

Mr. Schmidt: Do you rest, Mr. Selser?

Mr. Selser: Yes, I rest, Mr. Schmidt.

JAMES NALLY.

EARL W. SPARKS, called as a witness for the State, having been first duly sworn, testified as follows:

Direct examination by Mr. Schmidt.

Q Mr. Sparks, you saw the two witnesses, Seeger and Becker, on the stand? A Yes, sir.

Q Did you ever buy any whiskey from them? A I bought a drink of whiskey on the 21st of January from Mr. Seeger.

Q And how much did you pay for it? A 50 cents.

Q Where was this whiskey delivered to you? A It was delivered to me at the bar, but it was brought up from a room in the rear.

Q And where was that room in the rear located? A Why, I couldn't say. Later, on the day of the raid, I could tell you the exact location of the room. The room is located just to the left rear of the bar-room.

Q Is that the room where this liquor was found? A The same room.

Q You saw Seeger bring it from that room to the bar-room? A I seen him coming from that direction.

Q And at what entrance did you come in on the 21st day of January? A Front door.

Q Front door? A Leading into the bar-room.

Q And that is from Washington avenue? A From Washington avenue.

Q Besides the bar-room, are there any other rooms on the first floor? A Why, yes, there is quite a number of rooms besides the bar-room. There is a large kitchen there; there is this room that I have just mentioned; there is a very large dining room, and bar-room.

Q That is all on the first floor? A Yes, sir; and then another room on the front corner of the building, which is fittted up more as a living room.

Q Did you go into that room and take any liquor from them? A No.

Q On the day of the raid, were any of these rooms barred from your access? A No; they were all open.

Q Did you have any trouble in getting in and from these rooms? A No.

Q Did you make this inventory? A No, sir.

Q Sergeant Simpson did that? A I believe it was Sergeant Simpson made that.

Q Where was the beer found? A If I am not mistaken, 35 barrels of beer were found in the ice-box, and the balance of it in an out-building.

Q Where is the ice-box? A Just off the bar-room.

Q Now, did Mr. Becker at any time sell you any whiskey? A No, sir, never.

Earl W. Sparks, for the State, Cross.

Q Never did? A Never.
Q Was he there on the 21st day of January? A I didn't see him.
Q You didn't see him? A No, sir.

By the Court.

Q What is the number on the plates? A There is a number on the right-hand side of the door, number 120, and I believe it states that in the warrant.

Mr. Schmidt: It is all covered in the warrant and all in the affidavit. That is all.

Cross examination by Mr. Selser.

Q When Sergeant Simpson accompanied you on this raid, was he in uniform at that time or not? A I don't recollect whether he was or not.
Q He is a sergeant of the State Police? A Yes, sir.
Q And acting as a sergeant of the State Police at the time? A Yes, as far as I knew, he is a sergeant; I don't know about the acting part of it.
Q He was the one who executed the warrant? A Yes.
Q And of course, when you say you had no trouble in getting in, when the warrant was served by State Police, Mr. Becker did not make any attempt to throw the State Police out? A I don't believe I was asked that question. I think the question that was asked of me pertained to the 21st, if I recall.
Q The day of the raid? A The day of the raid, we had no trouble. Mr. Becker showed us

right through the place after he saw we had a warrant, and he made no resistance in any way, shape or form.

Q So that, your entry was had by virtue of the fact that you had a warrant, which you claimed gave you the authority to make the search? A I believe we were in the place before the warrant was shown to Mr. Becker. I was not present at the time the warrant was shown to Mr. Becker.

Q You were making the search under authority of the warrant? That is the point? A Yes.

Q Now, Mr. Sparks, in the affidavit you filed, you state you made the purchase of a drink from John Doe. You did not know the name of the person, I suppose? A I didn't know the man's name as Seeger until after the raid.

Q But you saw the man from whom you made the purchase? A Yes.

Q And I suppose there was no particular reason why he shouldn't be described, was there? A Isn't there a description in there? I gave them a description at the time that the warrant was made out.

Q You have alleged here that you made a purchase from John Doe, without stating that the name John Doe was fictitious (handing paper to witness). And you have given no description whatsoever. A It is no slip-up of mine. I gave them the description.

Q You say it is not your slip-up; it is someone else's? A I gave them the description of him.

Walter L. Simpson, for the State, Direct.

WALTER L. SIMPSON, called as a witness for the State, having been first duly sworn, testified as follows:

Direct examination by Mr. Schmidt.

Q Sergeant, you conducted the raid on Becker's place in Little Ferry on the 24th day of January last? A Yes, sir.

Q Will you describe the premises as you entered, and describe the entire first floor. A The building occupies a corner lot on an angle running down to the right; has the two front entrances, one to the bar, and the other seemingly to a private part of the building. We went in the bar and directly in back of the bar there is another room, which I thought might be a storeroom—used for a storeroom at the present time—a lot of stuff in there, and the icebox stood in that storeroom. Out of that storeroom a door led out to the back, another door into a dining room, which was used as a dining room and also an office, as a desk and safe were both in that room also, and the front hall—door leading into the front hall, which led into another room, which was a parlor, and off the dining room was a kitchen in back. We found beer on tap in the bar, and before going on the job we were told that we would probably find liquor stored in this dining room, where the table and desk and safe was, in a closet there. As we went in I asked the defendant if he was Mr. Becker, and he said, "Yes," and I started to read the search warrant; I told the other man to search the building as I was reading the warrant. Mr. Becker said that he wanted to go into the other room right away, as he had some money lying

out there, and I thought best for all concerned that we would go out there and let him take care of his money, so that there would be no question of anything being mislaid.

Q Did he go out there? A We went out there with him, and after he had taken his money and put it in his safe and locked the inner compartment of the safe, then we sat down to the dining table, and I resumed reading the warrant, as the men hauled the liquor out of the cupboard in the dining room.

Q The liquor was found in the dining room? A A quantity of liquor was found in the dining room and in the hallways leading off this storeroom and upstairs, the hallway leading upstairs and into this front parlor.

Q All right, now. How many barrels of beer were on tap? A There were two on tap, and I found three barrels in the ice-box. There is a large ice-box inside of the building—inside of that room.

Q And did you confiscate the beer on tap? A It was knocked off, yes, and destroyed.

Q Did you confiscate the other beer? A Thirty-seven barrels of beer were found in that next building across the alley. Entrance was gained to that barn by a key given us by Mr. Becker.

Q He gave you the key? A Yes, sir.

Cross examination by Mr. Selser.

Q Now, sergeant, the key was given to you by Mr. Becker; I presume you demanded the key from him? A I told him if he didn't give us the key, we would break his lock for him; and he gave us the key in order to save us that trouble.

Q And under those conditions he gave you the key? A Yes, sir.

Q The raid, of course, was conducted by you by reason of the authority which you thought was given to you in the search warrant; is that right? A That's right, sir.

Q And, of course, you were armed with a warrant at the time? A The warrant and the copy.

Q And the warrant is the one which is marked as an exhibit in this case, which I now hand you (handing to witness)? A That's my signature.

Q You have endorsed it on the back, "Returned on the 24th day of January, 1931, with defendant in custody?" A Yes, sir.

Q "Sergeant W. L. Simpson," I suppose you are the Walter L. Simpson who is named in warrant? A That's my name, sir.

Mr. Schmidt: I will rest.

Mr. Selser: If your Honor please, I respectfully urge that the search warrant and the search and seizure had thereunder are illegal, in violation of the Constitutional rights of the defendant in this case, in violation of the provisions of the Hobart Act of this State, and in violation of the common law, and as that common law is established by the decisions of this and sister States and of the United States, on the matter of search and seizure. Our courts, in the case of State against Willett, have said that "A warrant for the search of property differs from the warrant for arrest of an individual in no respect, except that it gives authority to police officers of the State to make entry

into prospective premises, taking possession therein of property which is used in the commission of crime, instead of, of course, taking possession of the individual who is charged with the commission of crime."

These warrants carry both authorities, not only the right to enter property, but also the right to take into custody persons found in possession.

This particular warrant is addressed to John Doe, and the affidavit upon which that warrant was issued alleges a purchase of liquor from John Doe. Obviously, no liquor was purchased from John Doe in Mr. Becker's place of business, because Mr. Sparks says that he intended the name "John Doe" to be fictitious, and that somebody made an error. If the warrant was directed to an unknown person, the law is well established, in order that it be legally effective, that it be so stated upon the face of the warrant, and that the person be described with sufficient particularity that his identity may be determined.

Now, we have not any such warrant, sir. We have a John Doe, a person whose name is alleged to be John Doe—not a fictitious name. We have no description of the person who it is claimed has violated the law on the premises which were subsequently searched by virtue of the authority supposedly given in the warrant, and that being so, certainly there was no justification for the issuance of the warrant and certainly there was no justification for the search and seizure.

A warrant can issue certainly only where there is probable cause for believing that a crime is being committed in the described property. Obviously, crime cannot be committed in the described property unless some person is committing it, and that person must be sufficiently identified. He is not sufficiently identified, and it seems to me, aside from the identification, the fact of whether or not crime was committed in the property has been sufficiently controverted by the testimony of the witnesses.

Now, the property described in the search warrant is No. 210 Washington avenue, which said building bears on the side of the entrance door the number 120. The description of the building is 210 Washington avenue—obviously a number which was taken from a telephone book, which is incorrect. The property is legally known as 120, as testified before your Honor by the tax collector, who is familiar with the records of the borough, and by the two individuals who are familiar with the very property. So that, I say, there is not sufficient identity either in the place to be searched or of the person who it is alleged is committing crime upon the property, using the property for that purpose. Their search and seizure, therefore, was not justified under the warrant; and as the raid was made under the authority given by the warrant, and not because of any crime committed in the presence of the peace officers at the time, and they in hot pursuit made entry of the premises and apprehended the offender. That is not the situation at all, because the officers themselves say that,

so far as the bar-room is concerned, the public portion of the place, no crime was committed at that time in their presence. It was not justification that one of the parties in the raid, at some earlier time, saw an offense committed, because that was the reason he got his warrant. In other words, the point I make is that the raid, search and seizure may be had in two classes of cases: Either under a proper warrant properly issued pursuant to the usual provisions of our State Constitution, and if the warrant be proper and the proceeding under which it was had is proper, then, of course, the raid is justified; or if a crime is committed in the presence of officers at a place where they are invited to be, in other words, a public place, they immediately make an arrest of the individual who commits the crime, they are justified in searching the public place for the instrumentality by which the crime was committed or for the fruits of the crime itself; but beyond those limits, they cannot go, and if they do go beyond them, they violate the constitutional guarantee of the sixth section of the first article of our Constitution; and of course they themselves are guilty of a violation of the law, the paramount law, the backbone of our government, and the State, of course, is not in a position to take advantage of their illegally acquired evidence. This was said by Judge Moscowitz recently in the Eastern District of New York: "It is true that we expect our fellow citizen to obey the law, but it is of greater importance that those who are paid by government to enforce the

law should themselves obey it, and if they do not obey it, the government, least of all, should take advantage of the illegal act, by which they hoped to secure conviction of the offender." Now, for all of those reasons, I say to you that the search warrant should be quashed, and that the search and seizure should be declared illegal, and that the property seized was illegally seized, and should therefore be returned to the defendant.

The Court: I will take this case under advisement.

Mr. Schmidt: I would like to submit a memorandum to the Court, because I believe that this is a case—

The Court: There are points of merit deserving of consideration. Will you submit a memorandum?

Mr. Selser: I should like to, as well.

The Court: I will hold the decision in the matter, and give both sides an opportunity of submitting a short memorandum.

Return—Decision.

Decision.

FIRST CRIMINAL JUDICIAL DISTRICT COURT OF THE COUNTY OF BERGEN.

State,		*Violation Prohibition Enforcement Act.*
	vs.	
Herman Becker.		

For the State: Hon. Charles Schmidt, Assistant Prosecutor.

For the Defendant: Chandless, Weller & Selser, Esqs.

On Motion, &c.

This matter having been heard by the Court upon due notice of motion it appears that the rule of law as outlined in State vs. Enoch Carlson applies with equal force in this instance.

The motion to suppress is, therefore, granted and the defendant may prepare an order directing the return of the goods referred to.

Dated: March 30, 1931.

CHARLES J. McCARTHY,
Judge, First Criminal Judicial District Court of the County of Bergen.

Order Under Review.

FIRST CRIMINAL JUDICIAL DISTRICT COURT FOR THE COUNTY OF BERGEN.

The State of New Jersey, *vs.* Herman Becker, *Defendant.*	*On Motion to Suppress and Return Evidence.* *Order.*

This matter coming on to be heard on the application of the defendant for the suppression of the evidence and return of the articles and things taken by officers and agents of the State of New Jersey on the ground that the search and seizure was made without authority of any properly issued search warrant in violation of the legal rights of the defendant; and due notice of said motion having been given to the Assistant Attorney General of the State of New Jersey in charge of criminal prosecutions in Bergen County, and Charles Schmidt, Esq., an Assistant Prosecutor for the County of Bergen, appearing on behalf of the State, and Chandless, Weller & Selser, by John E. Selser, Esq., appearing on behalf of the defendant; and the testimony in relation thereto having been duly taken and transcribed, whereby and wherein it appears that there was no probable cause for believing that crime was being committed in the premises described in the search warrant under and by virtue of which the officers and agents of the State of New Jersey claimed the right to make such search and seizure, and it further appear-

ing from the said testimony that the premises from which said articles, property and things were taken were not those described in the said search warrant, and that no crime was being committed upon or in the premises wherein the said search and seizure was made in the presence of the officers and agents of the State of New Jersey, who forcibly made entry into the said premises occupied by the defendant and without his consent; and it further appearing that criminal proceedings have been instituted against the defendant herein on a complaint made in this Court, and that it is intended and proposed to use said articles, things and property seized as aforesaid as evidence against the defendant in said criminal proceedings and that said articles, things and property are now in the custody of officers of this Court; and it further appearing that the defendant is the person from whom said articles, things and property were taken, in and by virtue of said illegal search and seizure,

It is on this 31st day of March, 1931, on motion of John E. Selser, of counsel with the defendant, ORDERED, that George S. Hobart, Assistant Attorney General in charge of criminal prosecutions for the County of Bergen, and any and all officers of this Court, forthwith return to the said defendant, each, all and every of the chattels, articles, things and property taken and seized in an unlawful search and seizure of the premises known as No. 120 Washington avenue, Little Ferry, Bergen County, New Jersey,

And it is further Ordered, that the said chattels, articles, things and property, and all evidence seized, taken or obtained by virtue of said illegal search and seizure and its use thereof in

any criminal proceeding against the defendant Herman Becker, be and the same hereby are suppressed.

CHARLES J. McCARTHY,
Judge, First Criminal Judicial District Court for the County of Bergen.

REASONS.

Filed May 1, 1931.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General, *Prosecutor,* *vs.* The Court of the First Criminal Judicial District of the County of Bergen, *Respondent.*	*On Certiorari.* *Reasons.* (*State of New Jersey* v. *Becker.*)

George S. Hobart, Assistant Attorney General, the prosecutor in the above entitled proceedings relies upon the following reasons in his application to have set aside and for nothing holden the Order made by Charles J. McCarthy, Esq., Judge of the Court of the First Criminal Judicial District of the County of Bergen on the 31st day of March, 1931, in the matter of the State of New Jersey vs. Herman Becker:

1. The search warrant, dated January 24th, 1931, in a proceeding entitled, "State of New Jersey vs. Herman Becker," was issued by Hon. J. Wallace Leyden, acting Judge of the Court of the First Criminal Judicial District of the County of Bergen under Chapter 255 of the Laws of 1922, and all proceedings with respect to said warrant should, therefore, have been had before said Hon. J. Wallace Leyden and not before any other magistrate.

Reasons.

2. There was no evidence adduced or presented to the magistrate or court at any time which showed or tended to show that the search warrant or the proceedings thereunder were invalid.

3. Under the said statute the motion, if any such as was herein made, be entertainable, should have been made at the time when the return to the search warrant was made.

4. There is no authority in this State for a motion to suppress evidence.

5. There is no evidence that the said Herman Becker was or is the owner of the property sought to be returned nor that he had or has any right to the possession thereof.

6. The said Herman Becker is not, "the person from whom the property was taken" within the meaning of said statute.

GEORGE S. HOBART,
Attorney for Prosecutor.

Dated: April 29th, 1931.

RULE TO TAKE DEPOSITIONS FOR ARGUMENT OF CERTIORARI.

Filed April 17, 1931.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General,
Prosecutor,
vs.
The Court of First Criminal Judicial District of the County of Bergen,
Respondent.

Rule to Take Depositions for Argument of Certiorari.

Application being made for leave to take depositions, to be used in the argument of the above stated cause:

It is, on this seventh day of April, one thousand nine hundred and thirty-one, ordered that the said prosecutor and respondents have leave to take depositions, to be used in the said argument.

On motion of George S. Hobart, Assistant Attorney General, Attorney for Prosecutor.

Let the above rule be entered on the minutes.

CHARLES W. PARKER,
Justice.

ORDER FOR JUDGMENT.

Filed July 20, 1932.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General, *Prosecutor.* *vs.* The Court of First Criminal Judicial District of the County of Bergen, *Defendant.*	*On Certiorari.* *No. 261 May Term, 1931.* *(Re: Herman Becker.)* *Order for Judgment.*

This matter coming on to be heard on the Return to the Writ of Certiorari herein, and the Court having inspected the same, and having duly considered the Reasons filed for reversal of the order under review, and the argument of counsel thereon;

ORDERED that that part of the order under review of the First Criminal Judicial District Court of the County of Bergen, which orders that the chattels and property therein mentioned and all evidence seized, taken or obtained, by virtue of the alleged illegal search and seizure and its use thereof in any criminal proceeding against Herman Becker be suppressed, be and the same is hereby set aside.

FURTHER ORDERED that that part of the order under review which orders that George S. Hobart, Assistant Attorney General in charge of criminal prosecutions for the County of Ber-

gen, and any and all officers of said First Criminal Judicial District Court of the County of Bergen, return to the said Herman Becker the chattels and property therein mentioned as taken and seized in an alleged unlawful search and seizure of the premises therein described, be and the same is hereby set aside, except as to a certain chattel described in the inventory of the property seized as a Journal Book.

FURTHER ORDERED that that part of the order under review which directs the return to Herman Becker of the said chattel described as a Journal Book be, and the same is hereby affirmed.

This order is made without costs to either party as against the other.

Rule entered this 20th day of July, 1932.

On motion of

GEORGE F. LOSCHE,
Attorney of Prosecutor.

A True Copy,

FRED L. BLOODGOOD,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

Filed July 27, 1932.

NEW JERSEY SUPREME COURT.

State of New Jersey, George S. Hobart, Assistant Attorney General, *Prosecutor-Appellant,*	*On Certiorari.*
vs.	*No. 261 May Term, 1931.*
The Court of First Criminal Judicial District of the County of Bergen, *Defendant-Respondent.*	*(Re: Herman Becker.)*
	Notice and Grounds of Appeal.

To Messrs. Chandless, Weller & Selser, Attorneys of Defendant-Respondent.

TAKE NOTICE that the prosecutor appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as orders and adjudges that that part of the order under review which directs the return to Herman Becker of a certain chattel described as a Journal Book, be affirmed, on the following grounds:

The Supreme Court should have set aside that part of the order under review which directs the return to Herman Becker of a certain chattel described as a Journal Book, for one or more of the Reasons filed by the prosecutor in support of the writ of certiorari herein.

GEORGE F. LOSCHE,
Attorney of Prosecutor-Appellant.

Served on Chandless, Weller & Selser, Attorneys of Herman Becker on July 25, 1932.

NEW JERSEY

Court of Errors and Appeals

STATE OF NEW JERSEY, GEORGE S. HOBART, Assistant Attorney General, Prosecutor-Appellant, vs. THE COURT OF THE FIRST CRIMINAL JUDICIAL DISTRICT OF THE COUNTY OF BERGEN, Defendant-Respondent.	On Appeal from Supreme Court.

BRIEF ON BEHALF OF HERMAN BECKER.

Statement of Case.

This appeal brings before the Court that portion of the order made in the Supreme Court dated July 20, 1932, as follows:

> "FURTHER ORDERED that that part of the order under review which directs the return to Herman Becker of the said chattel described as a journal book be and the same is hereby affirmed."

This order was made by the Supreme Court in a proceeding instituted by writ of certiorari sued out by George S. Hobart, then Assistant Attorney General and Acting Prosecutor of the County of Bergen, to review an order made by the Honorable Charles

J. McCarthy, Judge of the First Criminal Judicial District Court of the County of Bergen, in which Judge McCarthy found that a certain search and seizure made in the property of Herman Becker, pursuant to a search warrant theretofore issued, was illegal and void and the property taken in such search and seizure was directed to be returned to the said Becker, the one from whom it was taken, and the use thereof as evidenced in any criminal proceeding was suppressed. Judge McCarthy's order was made in a proceeding instituted by notice of motion served by the said Becker, the purpose of which was to quash the search warrant and to vacate all proceedings taken thereunder on the ground that the search and seizure was had without probable cause on a faulty affidavit, and further, that articles and things not described in the warrant were seized by the officer executing the warrant and returned to the Court by such officer with the warrant.

The Supreme Court on its review of the order pursuant to the writ of certiorari determined that the order, in so far as it related to the return of so-called intoxicating liquors, was invalid, and that in so far as the order related to the return of the book of accounts described as a journal book, it was proper, and, therefore, that part of the order was affirmed.

The appellant in his grounds of appeal asserts that the portion of the order above set forth is erroneous "for one or more of the reasons filed by the Prosecutor in support of the writ of certiorari." Reference to the reasons filed in support of the writ of certiorari discloses that six grounds for a claim of illegality in the order of the Court below are there set forth, the first being an assertion that the motion should have been made

before some judge other than the one who made the order; the second being addressed to the evidence on a claim of insufficiency thereof; the third being directed toward the time at which the injured citizen might have claimed his right; the fifth and sixth attempting to question the title of the citizen to the property seized, and the fourth being a mere allegation that a citizen at no time has any right to complain when his property has been taken in violation of the guarantees of the Constitution.

The appellant in his brief argues under five heads; the first two attacking the power and authority of the Court below out of which the original order issued; the third attacking the time at which the original application for return was made, and the fourth and fifth dealing with the meritorious questions presented to the District Criminal Court under the evidence and the construction of the law under which the application was made.

We, in this brief, shall deal with all of the argument raised by the appellant in one point as follows:

The Prohibition Enforcement Act of the State of New Jersey directs the return of property taken pursuant to a search warrant if such property is not that authorized to be taken by the warrant itself and the Supreme Court, therefore, rightfully sustained the portion of the order under review.

In order that the picture may be practically set before this Court, we herein set forth a chronological statement of the events as they occurred leading up to the order originally brought for review by the writ of certiorari.

"On January 24th, 1931, Earl W. Sparks appeared before the Honorable J. Wallace Leyden, who was then acting as Judge of the First District Court, Bergen County (undoubtedly intended to be Acting Judge of the First Criminal Judicial District Court of Bergen County), and under oath testified that John Doe (and this name was not alleged as being fictitious but intended to be the Christian name of an existing person) was on January 21st, 1931, to the knowledge of the said Sparks, violating the provisions of the Prohibition Enforcement Act of the State of New Jersey, at premises No. 210 Washington Avenue in the Borough of Little Ferry, Bergen County.

Thereupon, on the same date, J. Wallace Leyden, acting as Judge of the First Criminal Judicial District Court of Bergen County, being satisfied by the evidence of Mr. Sparks that reasonable grounds for the issuance of the warrant existed, did issue to Walter L. Simpson, whose official character was not disclosed in the warrant, a warrant to search the premises referred to by Mr. Sparks and to seize therein any whisky or other intoxicating liquor, and further, to take into custody the body of any person in whose possession such liquor may be found.

On the same date, Sergeant Simpson appeared before the First Criminal Judicial District Court of the County of Bergen, and made complaint against Herman Becker, charging possession of intoxicating liquor in violation of the law.

On January 28th, Sergeant Simpson appeared before Julius Pruefer, a Notary Public, and made return to the said Notary Public of the said search warrant and property seized.

Thereafter, the defendant, Herman Becker, served notice upon George S. Hobart, then Special Assistant Attorney General of the

> State of New Jersey and Acting Prosecutor of the Pleas of the County of Bergen, that on February 5th, 1931, the said Becker would apply to the First Criminal Judicial District Court of the County of Bergen, for an order declaring illegal the proceedings taken under the said search warrant, and to require that the property seized be returned to the said Becker, who was the person from whom the goods and chattels were taken, and the Special Assistant Attorney General and Acting Prosecutor, in response to the said notice, appeared before the said Court and attended at the taking of testimony which showed conclusively that the property taken was not the property described in the warrant.
>
> The Court before whom the matter was heard, directed the return of the property in question to the person from whom it was taken."

The Prohibition Enforcement Act of the State of New Jersey (commonly referred to as the "Hobart Act"), P. L. 1922, Chapter 255, provides in Section 18 thereof that a search warrant may be issued by any magistrate, but only upon probable cause supported by affidavit naming or describing the person and particularly describing the place to be searched.

Section 19 of that Act provides that when the magistrate is satisfied of the grounds of the application and of the existence of probable cause "he must issue a search warrant, signed by him, *with his name of office,* to any officer, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof and commanding him forthwith to search the person or place named, *for the property specified, and to bring it before the magistrate.*"

Section 23 provides that the search warrant must be executed and returned to the magistrate who issues the same within ten days after its date.

Section 25 provides that the officer who executes a search warrant must "forthwith return the same to the magistrate and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, *verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate,* to the following effect: 'I, , the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.' "

Three sections of the statute then immediately follow, these sections being most important in our consideration of the problem now before this Court. We quote them in full as follows:

> "26. If the ground on which the warrants were issued be controverted, the magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced in writing and subscribed by him.
>
> 27. If, on the return of any search warrant, it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause the property to be returned to the person from whom it was taken; but if it appears that the property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of the grounds on which the war-

rant was issued, then the magistrate shall order the same to be retained in the custody of the person seizing it, or to be otherwise disposed of according to law.

28. The magistrate must annexed the affidavit, search warrant, return, inventory and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued, he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire."

In a consideration of the problem it is important also that the Court bear in mind the provisions of Section 9 of the statute which attempts to define the word "magistrate" for the purposes of the statute, and we, therefore, set forth so much of that section as relates to this case:

"For the purposes of this act, the word 'magistrate' shall be taken to mean and include a justice of the Supreme Court, a judge of the Court of Common Pleas in and for any county, a Supreme Court Commissioner, a judge of a city criminal court, a police justice or recorder of any municipality of this State; *provided, however,* that nothing in this act contained shall be construed in anywise to confer jurisdiction upon a justice of the peace. Every Supreme Court Commissioner of this State shall have and possess under this act all the powers of a committing magistrate, in the same manner and with like effect as a judge of the Court of Quarter Sessions when acting as a committing magistrate. The 'magistrate' shall be the official charged with the taking of any complaint, the issuing of any warrant or search warrant hereunder, the hearing upon the return of any warrant or search warrant so as aforesaid issued, the admission to bail,

> the commitment of a person so charged in default of bail, the detention, return or disposal of any property seized by virtue of any search warrant issued hereunder or the performing of any judicial act prior to the indictment of a violator hereof."

As we understand the argument of the appellant, he, under Point I, claims that no person other than Judge Leyden could, by any construction of the law, make the order which was originally brought before the Supreme Court for review, and in Point II, he argues that not even Judge Leyden would have the authority to direct the return of the property in question. The first problem, therefore, is:

A.

By whom was the search warrant in question issued?

There is no question that the Honorable J. Wallace Leyden was Judge of the Second Criminal Judicial District Court of Bergen County, and that the Honorable Charles J. McCarthy was the Judge of the First Criminal Judicial District Court of Bergen County. The search warrant printed on pages 6, 7 and 8 of the state of case shows that Earl W. Sparks, the informant, appeared before "J. Wallace Leyden, Acting Judge of the First Criminal Judicial District Court of Bergen County, N. J." (R. p. 6, lines 10-14; this is not borne out by the affidavit, R. p. 10, lines 34-40), and on oath alleged personal knowledge of a violation of the Hobart Act, and the search warrant itself was signed January 24, 1931, "J. Wallace Leyden, Acting Judge of the First Criminal Judicial District Court of Bergen County, N. J." (R. p. 8, lines 8-15).

The affidavit of Earl W. Sparks, printed in the record at pages 9 and 10, shows that the deposition was taken before "J. Wallace Leyden, Acting Judge, First District Court, Bergen County" (R. p. 10, lines 34-40).

The inventory and affidavit printed in the record at pages 11 and 12, shows that the officer who executed the warrant made the statutory oath before "Julius Pruefer, a Notary Public of N. J." (R. p. 12, lines 1-20).

The complaint charging the violation of the law printed in the record at pages 13 and 14, was made before the Honorable Charles J. McCarthy, Judge of the Court of the First Criminal Judicial District (R. p. 13, lines 20-25), and sworn to before Fred U. Hillers, Acting Clerk of the Court of the First Criminal Judicial District of the County of Bergen (R. p. 14, lines 10-18).

We feel that it is not a violation of the rules of brevity to again call attention to Section 19 of the statute which requires the magistrate, upon being satisfied of the existence of probable cause, to issue a search warrant *"signed by him with his name of office,"* and to the provisions of Section 9, which define the word "magistrate" to be the official charged with the duty of taking a complaint, the issuance of a search warrant, the hearing upon the return of the search warrant, the commitment in default of bail, or the performing of any judicial act prior to the indictment of a violator of the law. We think it necessary, also, to again call attention to Section 25, which requires the officer who executes the warrant to forthwith return the same to the magistrate (not mentioning whether or not the magistrate is the one who issued the warrant or other officer who comes within the definition as given in Section 9), and before such magistrate at the foot

of the inventory, make affidavit prescribed by the statute, which affidavit must be "taken before the magistrate."

This record demonstrates such a great number of irregularities as to make it impossible for anyone to say that any respect whatsoever was paid to the provisions of the law required to be performed by those who conducted the raid and the seizure. The only thing which can be certain is that on the day the raid was conducted a complaint was sworn out against the defendant, Becker, in the First Criminal Judicial District Court of the County of Bergen, charging illegal possession of the property which was seized in the raid on a claim that such possession violated the provisions of the Prohibition Enforcement Act, and, presumably, the property which was so seized was, in accordance with the provisions of Section 28 of the statute, delivered to the Clerk of the Court having power to inquire into the offense in respect to which the warrant was issued, and it was before that Court that the motion for return of the property so seized was brought on for argument and actually argued.

We then come to the second question as follows:

B.

Does the Prohibition Enforcement Act of New Jersey set forth machinery for the return of property taken in a raid conducted pursuant to a search warrant if the property seized is not that described in the warrant?

In answering this problem we again refer to Sections 26, 27 and 28 of the statute, and incidentally thereto, to Section 9.

It will be noted that in Sections 26, 27 and 28, reference is made to "the magistrate," but nowhere is there any limitation whatsoever set forth in these sections as to what magistrate was given the power and duties set forth in such sections. That being so, it seems reasonable that reference should be had to the definition of the word "magistrate" as set forth in Section 9, and when we do so, we find that for the purposes of the statute the word "magistrate" shall be:

(1) The official charged with the taking of any complaint.

(2) The official charged with the issuing of any warrant.

(3) The official charged with the issuing of any search warrant.

(4) The official charged with the hearing upon the return of any warrant or search warrant.

(5) The official charged with the admission to bail.

(6) The official charged with the commitment of a person in default of bail.

(7) The official charged with the detention, return or disposal of any property seized by virtue of any search warrant.

(8) The official charged with the performing of any judicial act prior to the indictment of a violator.

With the provisions of Section 9 defining the word "magistrate," we examine Section 26 of the Act which gives the right to the citizen to attempt to controvert the grounds on which the warrant

was issued, before 'the magistrate" who must proceed to take testimony in relation thereto, which testimony shall be reduced to writing and subscribed by the witness. There is no limitation as to the time when this machinery may be put in motion, nor is there anything about the section which indicates that it shall be had before a magistrate other than the one who then has jurisdiction of the subject-matter. When we read this section with Section 28, it seems reasonable to suppose that the Legislature intended the application to be made before the magistrate who then had jurisdiction of the offense, because in Section 28, it is provided that the affidavit, search warrant, return, inventory, *and the evidence itself,* must at once be filed with the Clerk of the Court having power to inquire into the offense.

The appellant argues that Section 27 places a limitation upon the citizen's right, his construction of the statute being that the evidence to controvert the grounds on which the warrant was issued must be taken at the very instant the officer, executing the warrant, makes his return thereon, and we suppose if, as here, the return was never made to the magistrate who issued the warrant, then there never is a time when the injured citizen is given the right to complain of his injury.

As we read that section, it provides that if at the time of or after return of the search warrant is made (and obviously it could mean nothing else because the very requirements of the search warrant itself are that the return be made forthwith, R. p. 7, line 36), it shall appear that the magistrate, who then has jurisdiction of the subject-matter, that there is no probable cause for believing the existence of the grounds on which the warrant was issued, or, that the property taken is not

that authorized to be taken by the search warrant, then the property taken must be returned to the person from whom it was taken, but if it appears that there was probable cause and that the property is the same as that described in the warrant, then the magistrate may order that the same be retained in the custody of the person seizing it, or otherwise disposed of according to law.

It will be noticed that an affirmative act is required of the magistrate if he finds that there was reasonable grounds for the issuance of the warrant and if the property be the same as that described in the warrant, i. e., an order directing some disposition of the property so seized. This was never done, unless we assume, as we think must be assumed, that the warrant issued out of the First Criminal Judicial District Court and all proceedings were had therein, and the officer executing the warrant returned the property seized to the Court having jurisdiction of the offense, and the Judge of such Court was a magistrate within the meaning of the provisions of Sections 26, 27 and 28. It was before such Judge that the application was made and by whom the order in question was entered.

Again referring to Section 27 and calling attention to the last clause of that section as follows: *"If it appears that the property taken is the same as that described in the warrant and* (not 'or') *that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the magistrate shall order the same to be retained in the custody of the person seizing it, or to be otherwise disposed of according to law."*

The only property described in the search warrant is "whiskey and other intoxicating liquor" (R. p. 7, line 26). The property ordered to be returned by the Supreme Court, and that is all

that is now before this Court for a decision, is a "Journal Book." This is certainly not "whiskey or other intoxicating liquor" and, therefore, no conclusion can be reached other than that the officer executing the warrant did take property other than that described in the warrant, and, therefore, under the provisions of Section 27 of the Act, such property must be returned to the person from whom it was taken.

The late Mr. Justice Bergen, sitting in the Middlesex Oyer and Terminer, in the *Matter of State* v. *Condon,* 40 N. J. L. J. 293, said:

> "If the defendant's dwelling house, his papers and effects, were subjected to an unreasonable search and seizure, and a Constitutional right reserved to him thereby violated, there can be no doubt of his right to have returned to him such papers and effects."

At page 294 of that opinion this distinguished Justice again said:

> "If a defendant whose private papers and effects have been unreasonably seized, cannot have them returned by an order of the Court, in the possession of whose officers they are, then the Constitutional protection against unlawful searches and seizures is entirely destroyed, because the rule is well settled that on the trial of the defendant the Court will not stop to ascertain the legality of the possession of the defendant's private papers and effects when offered in evidence (Adams v. New York, 192 U. S. 585, 176 N. Y. 351; Weeks v. United States, 232 U. S. 383). In view of the settled law regarding the admissibility of private papers, although unlawfully obtained, the refusal of a proper

> application for the return of private papers, would deprive the defendant of a sacred and Constitutional privilege.
>
> We are, therefore, of opinion that, in a proper case, the Court not only has the power, but it is its duty to order restored to an accused person his private papers and effects, when obtained by means of an unreasonable search and seizure."

We believe we have discussed the entire problem which is now before this Court, but we have made so far no comment whatsoever about the argument of the appellant as to the question of whether or not there was before the Court evidence sufficient to show probable cause for the issuance of the search warrant, and that the seizure of the journal book was not unreasonable. This argument, it seems to us, is entirely beyond the question here for decision, but as the appellant has gone into that subject, we wish now to call the Court's attention to the fact that there has been no expression on the subject by this Court whatsoever.

In the case of *State* v. *MacQueen,* 69 N. J. L. 522, the Court was dealing with an exception taken at the trial of the offense to the offer in evidence of a newspaper article found upon the person of the defendant at the time of his arrest.

In *State* v. *Mausert,* 88 N. J. L. 286, the question before the Court was the seizure of a book openly displayed in the reception room of the hotel, which hotel was being maintained by the defendant as a disorderly house, and the seizure was had at the time of the arrest. In this situation there was no question of a violation of any constitutional right and we quite agree with the law as therein set forth.

In *State* v. *King,* 4 N. J. Misc. 218, the matter was before the Court on writ of error to review a conviction on a charge of maintaining a disorderly house and the particular assignment of error related to a question asked by the prosecutor of a State's witness as to whether liquor was found in the premises. There was no question before the Appellate Court as to whether a right of return of the property seized would have existed in spite of the fact that there was some suggestion of a motion having been made before the trial. The Court in dealing with the question said as follows:

> "We do not think the question can be raised in this manner. The entire proceedings relative to the motion mentioned as having been made prior to the trial, should be a part of the record in order for us to properly pass upon this question. Assuming, however, liquor was taken in the raid and the raid was made without a search warrant, *these facts do not warrant a trial judge in refusing to admit in evidence the liquor taken.*"

Obviously, the question now under consideration was not passed upon by the Appellate Court because there was nothing in the record from which it could find what proceedings were had for the return of the property seized in the raid, the only question passed upon being that of the admission in evidence of an observation made by a State's witness of illegal acts performed in the presence of that witness.

In *State* v. *Cortese,* 4 N. J. Misc. 683, the assignment of error dealt with the admission in evidence of a revolver taken from the defendant's home. There was no motion for the return of the property illegally taken, nor was any application made

to suppress as evidence the use of that property, the only question raised by the assignment of error being a question on the admission of evidence at the time of the trial for the offense.

In *State* v. *Mellini,* 4 N. J. Misc. 1047, there was no motion for suppression or for the return of the property illegally taken, and so, too, in *State* v. *Merra,* 103 N. J. L. 361; *State* v. *Gillette,* 103 N. J. L. 523, and *State* v. *Haines,* 103 N. J. L. 534.

The fault in those cases was that a seasonable application for the return of the property illegally seized was not made, the defendant never having taken advantage of a right guaranteed to him in the Constitution, and not being entitled to the benefits of the machinery set forth in Sections 26 and 27 of the Prohibition Enforcement Act of the State of New Jersey, therefore, the rule set forth in those cases has no application to the present problem.

Conclusion.

We respectfully submit that the Prohibition Enforcement Act of the State of New Jersey clearly and unmistakably requires that any and every Magistrate having jurisdiction of the subject matter of the offense and necessarily being in possession of the evidence seized under a search warrant issued pursuant to the provisions of the Act must direct the return of property so seized, if that property be not the property described in the warrant and authorized by the warrant to be taken whether reasonable grounds for the issuance of the warrant did or did not exist either before or after the raid was made, and as the statute in Section 30 makes the officer executing the warrant, who exceeds the

authority given by the warrant, guilty of a misdemeanor for such act (the last clause of Sec 30, P. L., 1922, p. 622), it cannot reasonably be said that the Legislature never intended that the citizen whose property was taken without express authority of a search warrant should not be protected. It may be true, as is said by the appellant on page 6 of his brief, "that the State should be favored in the disposition of legal questions," even so the laws of the State, as expressed by the Legislature, should be construed as giving effect to the Constitutional guaranty of the security of the home, even when the citizen, whose rights have been violated, has been found to have been in possession of intoxicating liquor.

This appeal should, therefore, be dismissed with costs.

CHANDLESS, WELLER & SELSER,
Attorneys for Defendant-Respondent,
Herman Becker.

JOHN E. SELSER,
of Counsel.

OPINION OF SUPREME COURT.

STATE OF NEW JERSEY, GEORGE S. HOBART, ASSISTANT ATTORNEY-GENERAL, PROSECUTOR, v. THE COURT OF THE FIRST CRIMINAL JUDICIAL DISTRICT OF THE COUNTY OF BERGEN, DEFENDANT.

Submitted May 15, 1931—Decided May 18, 1932.

Under Pamph L. 1922, p. 615, if the property seized is the same as described in the warrant and if there is probable cause for believing the existence of the grounds on which the warrant was issued, it must remain in the custody of the seizor.

On writ of *certiorari.*

Before Justices TRENCHARD and DONGES.

For the prosecutor, *George S. Hobart.*

For the defendant, *Chandless, Weller & Selser.*

PER CURIAM.

This writ of *certiorari* brings up for review an order of Judge McCarthy, judge of the court of the First Criminal Judicial District of the county of Bergen, directing the return of certain liquors seized under a search warrant issued by one J. Wallace Leyden, acting judge of said court, and ordering the suppression of all evidence obtained in said search, and the use thereof in any proceeding against the defendant below, Herman Becker.

We do not deem it necessary to pass upon the question of the authority of Judge McCarthy to hear the matter upon the return of the warrant issued by Judge Leyden.

Sections 26 and 27 of the act under which these proceedings are taken (*Pamph. L.* 1922, *p.* 615)

provides that testimony must be taken if the ground on which the warrant was issued is controverted, and if it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause the property to be returned to the person from whom it was taken; but if it appears that the property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the magistrate shall order the same to be retained in the custody of the person seizing it.

The owner, Becker, gave notice of a motion for the return of the property and to suppress the evidence.

Our examination of the record satisfies us that the testimony before the court below established that the property described in the warrant is the same as that taken, with the exception of a journal book, the taking of which was not authorized by the warrant, and that it was established that there was probable cause for believing the existence of the grounds on which the warrant was issued.

Further, we conclude that there is no authority for that portion of the order directing suppression of the evidence and the use of any evidence obtained under the search warrant. Our courts have uniformly held to the contrary. See *State* v. *Lyons,* 99 N. J. L. 301; 122 Atl. Rep. 758; *State* v. *Gillette,* 103 N. J. L. 523; 138 Atl. Rep. 523; *State* v. *Haines,* 103 N. J. L. 534; 138 Atl. Rep. 203.

We conclude that so much of the order under review as directs the return of the journal book is affirmed, and that the balance of the order is set aside, without costs to either party.

STATE OF NEW JERSEY, GEORGE S. HOBART, Assistant Attorney General, Prosecutor-Appellant, vs. THE COURT OF THE FIRST CRIMINAL JUDICIAL DISTRICT OF THE COUNTY OF BERGEN, Defendant-Respondent.	On Appeal from Supreme Court. October Term No. 248.

Submitted by leave of the Court.

The Court of the Second Criminal Judicial District of the County of Bergen

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STATE OF NEW JERSEY,

Plaintiff,

v.

WILLIAM BLOOM, *et als.*,

Defendants.

MEMORANDUM FOR THE STATE

GEORGE S. HOBART,
Assistant Attorney General and Acting Prosecutor for the County of Bergen.

GEORGE F. LOSCHE,
of Counsel.

The Court of the Second Criminal Judicial District of the County of Bergen

STATE OF NEW JERSEY, *Plaintiff,* v. WILLIAM BLOOM, *et als.*, *Defendants.*	Memorandum for the State

This is a motion, as stated by defendants' counsel, "to suppress evidence and for the return of articles illegally seized by certain regular and special officers associated with the Prosecutor's Office of the County of Bergen". The State will treat of its objections to the motion under the various points hereinafter noticed.

POINT I.

The Federal Constitutional Amendment Has No Relevancy to this Motion.

In

SPIES v. *ILLINOIS,* 123 U. S. 131,

the Supreme Court of the United States said:

> "That the first ten Articles of Amendment (to the United States Constitution) were not intended to limit the powers of the state government in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

In

STATE v. *MacQUEEN,* 69 N. J. L. 522 (at p. 527), the court said:

> "This exception has been discussed by counsel for the plaintiffs in error as if it raised some question of a violation of rights secured by the fourth and fifth amendments to the federal constitution; the former of which prohibits 'unreasonable searches and seizures', and the latter declares, among other things, that no person 'shall be compelled, in any criminal case, to be a witness against himself.' The case of Boyd v. United States, 116 U. S. 616, is cited as an authority. It is, however, established that the first ten amendments of the constitution of the United States are limited to the sphere of the federal government, its courts and officers, and constitute no prohibition upon the states."

In

STATE v. *KING,* 4 N. J. Misc. Rep. 218 (at p. 220), the Supreme Court said:

> "The provisions of the federal constitution regarding unreasonable searches and seizures are not limitations upon state powers."

And in

STATE v. *GIBERSON,* 99 N. J. L. 85 (at p. 87), it is said:

> "The contention on behalf of the defendant

is that all of the personal property mentioned in the petition should have been returned to her, because taken from her by unreasonable search and seizure in violation of the constitution of the United States and of this state. The answer is, that the provisions of the constitution of the United States in this regard are limitations upon federal, but not upon state powers."

See also

STATE v. *BLACK*, 5 N. J. Misc. Rep. 48 (at p. 50).

It, therefore, follows that the decisions of the federal courts in cases involving the federal constitution are not binding upon the state courts. Ordinarily the pronouncements of the Supreme Court of the United States are entitled to and receive the approval of the state courts, but on the question involved here the Supreme Court of the United States has seemingly gone so far astray that only fourteen states have followed it, thirty-one adhering to the old and well-established rule.

POINT II.

The Inhibition of the New Jersey Constitution Is Not Against Every Search and Seizure but Only Against Unreasonable Searches and Seizures.

In

STATE v. *KING*, 4 N. J. Misc. Rep. 218 (at p. 220), it is said:

> "Section 6 of article 1 of the New Jersey state constitution protects persons and property only against unreasonable searches and seizures."

And in

STATE v. *MAUSERT*, 88 N. J. L. 286 (at p. 290), it is said:

> "The right which the constitution protects is freedom from unreasonable searches and seizures."

In

STATE v. *GIBERSON*, 99 N. J. L. 85 (at p. 87), Chancellor Walker, speaking for the Court of Errors and Appeals, said:

> "And our constitution (article 1, section 6) secures persons and property against unreasonable searches and seizures."

POINT III.

To Invoke Constitutional Protection Defendants Must Show Invasion of Their Rights.

The New Jersey Constitution states 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". It will be noted that the pronoun is the possessive, "their", indicating beyond peradventure that the only person who would be heard to complain of the violation of this provision is the person whose person or property was violated. One may search in vain throughout the testimony or the notice of motion for any claim, or intimation of a claim, that the property searched and seized belonged to any of the defendants.

In making the application for the return of the property the defendants must show that they are the owners or at least entitled to possession.

In *CHICCO* v. *U. S.*, 284 Fed. 434 (at p. 436), the Court said:

> "There was no allegation in either petition that the property which the court was thus asked to return was the property of either of petitioners, nor was it alleged in what respect its possession by the government affected the interests of the defendants; nor was anything alleged tending to show that its continued possession by the government, or the manner in which it was obtained, violated the constitutional rights of either defendant."

> "It is difficult, therefore, to understand upon what possible theory it can be said that their possession and use by the government, under the circumstances, was an invasion of his constitutional rights."

There is in the case, sub judice, no suggestion of either ownership or possession; nor is there even a suggestion that the property was taken from any of the defendants. Likewise, it might here be observed in passing that section 27 of the Hobart Act may not be invoked to enable the court to return the property to anyone but "the person from whom it was taken".

The cases supporting this contention are legion. It seems unnecessary to refer to more than one or two of such authorities.

In

TONGUT v. *STATE,* 151 N. E. 427,

the Supreme Court of Indiana said (at p. 429):

> "Immunity from unreasonable search is a personal privilege, and a party cannot successfully object to a search of the premises of another so long as it does not unlawfully invade his own privacy. Keith v. Commonwealth, 247 S. W. 42, 197 Ky. 362; Weber v. Commonwealth, 260 S. W. 1, 202 Ky. 449; Snedegar v. State (Ind. Sup.) 146 N. E. 849, and authorities cited; note, 24 A. L. R. 1425."

Even in the federal courts, where the rule is

most favorable to the suppression of evidence illegally seized, it is said by A. N. Hand, C. J., in

U. S. v. *MESSINA,* 36 F. (2nd) 699 (at p. 700):

> "A motion to suppress the evidence offered could not prevail by one with no interest in the premises searched or the property seized."

This case incidentally, like the instant case, was one in which a still was found in the "custody" or "control" of defendant (p. 701).

The absence of any interest of the defendants in the place or property seized renders this application on their part ineffective. The motion should be denied on this score alone.

POINT IV.

Motion Should Be Denied Because It Is an Effort to Adjust Property Rights Between Wrongdoers.

A further reason for the denial of this motion is that courts do not concern themselves with adjusting property rights between wrongdoers. The principle is well stated by Rugg, C. J., speaking for the Supreme Judicial Court of Massachusetts, in

COMMONWEALTH v. *KOZLOWSKI,* 138 N. E. 11 (at p. 14):

> "The motion in the case at bar involved the question whether the liquor was contraband or

was lawfully in the possession of the defendant. Courts commonly do not concern themselves with the adjustment of property rights between wrongdoers contending as to possession of that which the law does not recognize as innocent and innocuous. The law leaves the parties where they put themselves. Duane v. Merchants' Legal Stamp Co., 231 Mass. 113, 120 N. E. 370. The defendant by his motion did not assert the lawfulness of his purpose and right in the seized liquor. He asked for its return simply because seized unlawfully.

"See discussion with ample citation and review of decided cases in other jurisdictions by Professor Wigmore in the American Bar Association Journal for August, 1922, vol. 8, pp. 479, 484."

The situation is not altered by section 27 of the Hobart Act because certainly that act was not intended to over-rule a principle so firmly imbedded in our system of law as that just enunciated.

POINT V.

Defendants' Remedy Is Not by Motion to Suppress or for the Return of the Property.

A.

Apart from the Hobart Act, it seems definitely established that a motion to suppress evidence is not the proper remedy even though the moving party be the owner.

In

STATE v. *BLACK,* 5 N. J. Misc. Rep. 48,

Flannagan, J., after a most enlightening discussion says (at p. 56):

> "I conclude that if the books were seized by unreasonable search and seizure this does not constitute a reason to suppress them. They are, notwithstanding, admissible in evidence. In so far as the motion asks for the recovery of their possession, a remedy is invoked which does not exist by motion in the courts of this state. The motion will therefore be denied."

This conclusion was very apparently reached by the learned judge because of the very definite trend of the decisions in this state which clearly and unmistakably support the view that no matter how evidence is obtained it is admissible.

See

STATE v. *MacQUEEN,* 69 N. J. L. 522 (at p. 528).

STATE v. *MAUSERT,* 88 N. J. L. 286 (at p. 290).

STATE v. *KING,* 4 N. J. Misc. Rep., 218 (at p. 220).

STATE v. *CORTESE,* 4 N. J. Misc. Rep. 683 (at p. 684).

STATE v. *MELLINI,* 4 N. J. Misc. Rep. 1047 (at p. 1049).

STATE v. *MERRA,* 103 N. J. L. 361 (at p. 365).

STATE v. *GILLETTE,* 103 N. J. L. 523 (at p. 524).

STATE v. *HAINES,* 103 N. J. L. 534 (at p. 535).

Aside from the fact that the decision in the *BLACK* case is the logical result of the trend in this state, it is supported by reason.

It seems to be recognized generally, even in the Federal courts, that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.

STATE v. *MacQUEEN,* 69 N. J. L. 522, wherein the court said (at p. 528):

> "As to the mode in which the document now in question was obtained, it is very generally held that papers unlawfully procured, even by means of an unjustifiable search or seizure, are nevertheless admissible if evidential per se. 1 Greenl. Evid., section 254a, citing Legatt v. Tollervey, 14 East 302; Jordon v. Lewis, Id. 305 (note); Commonwealth v. Dana, 2 Metc. 329, 337. See, also, Gindrat v. People, 138 Ill. 103; Siebert v. People, 143 Id. 571; Trask v. People, 151 Id. 523; Bacon v. United States, 97 Fed. Rep. 35, 40."

This rule has been followed as late as

STATE v. *HAINES,* 103 N. J. L. 534 (at p. 535):

"If, as may be surmised, defendant's contention is that certain undisclosed testimony of certain unnamed witnesses was objectionable by reason of the alleged illegality of a search warrant said to have been issued by a magistrate prior to the indictment, it may be well to point out that we have said, with the approval of the Court of Errors and Appeals, that 'it has been settled in this state in the case of State v. MacQueen, 69 N. J. L. 522, that papers unlawfully procured by an unjustifiable search and seizure are admissible in evidence if evidential per se'."

In

RE: DOOLEY, et al., 42 Fed. Rep. (2nd Series), 562 (at p. 563), it is said:

"At the time of the adoption of the Fourth Amendment, illegality in the mode of procuring evidence was no ground for the exclusion thereof. Wigmore on Evidence (2d Ed.) Sections 2183, 2184. The Fourth Amendment was not intended to effect any change in the law of evidence."

It seems also to be quite generally recognized that a court in the course of a trial should not concern itself with how evidence may have been obtained for the reasons that, first, to do so constitutes the trial of a violation of law without due complaint and process; second, interruption, delay and confusion of the investigation in hand, for the sake of a matter which is not a part of it, results; and, third, the rules of evidence are used as an indirect method of punishment. This latter is especially wrong because it enlarges the penalties of the law,

to wit: fines and imprisonment, by adding thereto the loss of a right by depriving a party of his means of proving it. See

4 *WIGMORE,* (*2nd Ed.*), Sec. 2183, page 626.

In

STEVISON v. *EARNEST,* 80 Ill. 513,

Schofield, J., said at page 518:

> "It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of (illegally) obtaining them does not change that which is written in them . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If he could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?"

It is sought, however, to enforce the added penalty of using the rules of evidence to punish by requiring as a condition precedent to the exclusion of evidence that a motion before trial be made to suppress, in recognition of the well-established rule that a collateral issue will not be raised to ascertain the source from which evidence competent in a criminal case comes.

WEEKS v. *U. S.*, 232 U. S. 383.

Professor Wigmore points out the illogical basis for this view:

"(a) The opinion in Weeks v. United States seeks to distinguish the above established principle as merely requiring 'that a *collateral issue* will not be raised to ascertain the source from which testimony competent in a criminal case comes,' while in the Weeks case the defendant made a formal motion before trial for the return of the seized documents. But this is an unsound use of the term 'collateral.' That term signifies 'not relating to the main issue,' and is applied to a class of facts. Now a defendant cannot turn a collateral fact into a material fact by merely making a formal motion before trial, instead of waiting till the offer of evidence. Suppose, in this lottery charge, he has made a motion that (say) the results of the last municipal lottery in Naples be sent for, to be laid before the jury; that would not turn the obviously collateral fact into a material fact. The point is that the fact of illegality of method in obtaining evidential materials *is* a collateral fact to the main issue; and all the motions in the world will not make it anything else.

"(b) Looking still deeper, the mainstay of the special doctrine of Weeks v. United States is that the party whose documents were obtained by illegal search *has a right to obtain their return* by motion before trial. But no such consequence is implied in the Fourth Amendment. The object of the amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials. It ex-

pressly forbids such official misconduct, and it implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials. But it implies nothing at all as to the nature of the documents or chattels possessed by the citizen; and they may be treasonable, criminal, wicked, harmless, or meritorious, so far as the Amendment's tenor is concerned. And when the citizen sets up a right to a remedial process for their return, certainly the merits of the articles themselves must come into issue. If the officials, illegally searching, came across an infernal machine, planned for the city's destruction, and impounded it, shall we say that the diabolical owner of it may appear in court, brazenly demand process for its return, and be supinely accorded by the Court a writ of restitution, with perhaps an apology for the 'outrage'? Such is the logical consequence of the doctrine of Weeks v. U.S., unless the right to return be dependent on the merits of the document or chattel as being instruments of crime or not. Yet no such issue is permitted by the doctrine of Weeks v. United States. The truth is that the doctrine in question is illogical, and that the citizen has no right to claim a return of the articles taken unless their criminal or innocent nature be first determined; but as that is part of the very issue in the main charge, it cannot be determined in advance; so that the doctrine leads to impracticable results.

"3. But the essential fallacy of Weeks v. United States and its successors is that it virtually creates a novel exception, where the Fourth Amendment is involved, to the fundamental principle (*ante,* Sec. 2183) that *an illegality in the*

mode of procuring evidence is no ground for excluding it. The doctrine of such an exception rests on a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way."

4 *WIGMORE,* (2nd Ed.) pp. 635 and 636.

Dean Harno discusses the proposition most effectively in *19 Ill. Law Rev.* 303 (at p. 312):

"This demand-before-trial rule draws our attention, particularly in its elusiveness. Do the courts which hold that the admissibility of evidence is affected when procured by unreasonable search and seizure base their conclusion on the language of the Constitution? If we should assume the Constitution makes the evidence inadmissible, must we also assume that the Constitution makes it inadmissible only if demand is made before trial? If we had some ham, we would have some ham and eggs, if we had some eggs. If the Constitution had made this evidence inadmissible, it would have been inadmissible if demand had been made before trial, if the Constitution had provided that it should be inadmissible if demand were made before trial."

The futility of the Federal view is further pointed out by Cardozo, J., in

PEOPLE v. *DEFORE,* 150 N. E. 585 (at p. 587):

"Weeks v. United States, 34 S. Ct. 341, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, held that articles wrongfully

seized by agents of the federal government should have been returned to the defendant or excluded as evidence, if a timely motion to compel return had been made before the trial. Silverthorne Lumber Co. v. United States, 40 S. Ct. 182, 251 U. S. 385, 64 L. Ed. 319, held that copies of the things so seized, in that case books and papers, must share the fate of the originals. Gouled v. United States, 41 S. Ct. 261, 255 U. S. 298, 65 L. Ed. 647, and Amos v. United States, 41 S. Ct. 266, 255 U. S. 313, 65 L. Ed. 654, held that a motion before trial was unnecessary if the defendant had no knowledge until the trial that an illegal seizure had been made. Burdeau v. McDowell, 41 S. Ct. 574, 256 U. S. 465, 65 L. Ed. 1048, 13 A. L. R. 1159, held that a federal prosecutor might make such use as he pleased of documents or other information acquired from a trespasser, if persons other than federal officers were guilty of the trespass. Hester v. United States, 44 S. Ct. 445, 265 U. S. 57, 68 L. Ed. 898, and Carroll v. United States, 45 S. Ct. 280, 267 U. S. 132, 69 L. Ed. 543, 39 A. L. R. 790, drew a distinction between search and seizure in a house and search and seizure in the fields or in automobiles or other vehicles. Finally Agnello v. United States, 46 S. Ct. 4, 70 L. Ed.——, held that the evidence must be excluded, though the things seized were contraband, and though there had been no motion before trial if the facts were undisputed. This means that the Supreme Court has overruled its own judgment in Adams v. People of State of New York, for the facts were undisputed there. *The procedural condition of a preliminary motion has been substantially abandoned, or, if now enforced at all, is an exceptional requirement.* There has been no blinking the

consequences. The criminal is to go free because the constable has blundered."

The Supreme Court of Appeals of Virginia in *HALL* v. *COMMONWEALTH,* 121 S. E. 154, clearly points out the deficiency of the Federal view.

The court said at page 160:

"The Supreme Court of the United States and the state courts, in holding that evidence procured in an unlawful search is inadmissible, have, in our view, failed to give due weight to certain pertinent and material considerations:

"(a) The Fourth Amendment to the Federal Constitution does not prohibit searches and seizures without a warrant under all circumstances.

"It prohibits *unreasonable searches and seizures,* and the *issuance* of warrants, except upon probable cause shown, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. It prohibits the issuance of *general* search warrants, as had been the custom in England for many years prior to the American Revolution. United States v. Snyder (D. C.) 278 Fed. 650.

"(b) The provision of the Fourth Amendment, inhibiting search and seizure by officers without a search warrant *does not prohibit the introduction against the accused of the evidence procured in the course of the unlawful search.* The unlawful search is in itself a completed offense against the constitutional rights of the

accused, of which the introduction of the evidence forms no part. Its introduction is the act of the court and *not* the act of the offending party.

"(c) An officer making a search without a warrant, or under an illegal warrant, is a trespasser, and not the representative of the government. Nor is the introduction of the evidence illegally obtained by him a ratification of his illegal acts. Such evidence is of the same class as evidence illegally obtained by a private citizen, which is held to be admissible. Burdeau v. McDowell, supra.

"(d) The language used by the framers of the state and federal Constitutions clearly indicates that they intended to protect persons, houses, and effects against illegal searches and seizures, by inflicting direct penalties upon the offending parties, and not by depriving the state or federal government of its right to use evidence, otherwise competent and pertinent, against those who have violated its penal laws.

"(e) The law provides ample protection for the sanctity of the home by inflicting a proper penalty, as in other cases, upon the offending party in a direct proceeding instituted for that purpose.

"(f) The Fifth Amendment, so far as it provides that no person shall be a *witness* against himself, has reference to and was intended to prevent a practice then prevailing in continental Europe, and to some extent in England and Scotland, by which an alleged criminal was compelled to make answer to questions by which he would incriminate himself."

Aside from the lack of logic in the idea that a preliminary motion should be made and allowed in order that the rights guaranteed by the Constitution may be upheld, the Federal view emphasizes the suppression of relevant evidence over the punishment of those who violate the Constitution as the means of enforcing the Constitution. No memorandum would be complete without quoting Professor Wigmore's illustration in this connection:

"The natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, i. e., by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But the proposed indirect and unnatural method is as follows:

" 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavious to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'

"Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At

present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice."

4 WIGMORE, (2nd Ed.) p. 639.

The Federal Courts and their adherents seem also to lose sight of another fundamental idea which is so well expressed by Lumpkin, P. J., in Williams v. State, 100 Ga. 511:

"As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitutions of the United States and of this and other states merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the Courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility, and of their own volition, surely none of the three divisions of government is responsible. If an

official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct . . . Whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination."

It is urged, however, that to relegate a defendant to his remedy against the trespasser is to deny him any practicable relief. It unfortunately is true that the administration of justice cannot always, by force of circumstances, enforce every available remedy in one proceeding. The innocent party is often a favored suitor. Individual rights sometimes must give way to those of the public.

The Supreme Court of Errors of Connecticut, in discussing this phase of the subject said, in

STATE v. *REYNOLDS,* 125 Atl. Rep. 636 (at p. 639):

"Sound public policy forbids the exclusion of evidence, otherwise admissible, though illegally obtained. When evidence tending to prove

guilt is before a court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these constitutional guaranties are above the right of the community to protection from crime. The complexities and conveniences of modern life make increasingly difficult the detection of crime. The burden ought not to be added to by giving to our constitutional guaranties a construction at variance with that which has prevailed for over a century at least. The cases in which in recent years some of the courts have either excluded this class of evidence or ordered articles taken from the accused returned to him have been in prosecutions for violations of the laws against policy, gambling, fraud, and intoxicating liquors. The next case may be one of murder, and the prosecutor be compelled by the ruling of the court to return to the accused the certain evidence of his guilt and the accused go free—his constitutional rights against search protected above the right of society against his crime."

The impracticable effect of the Federal view cannot be summed up better than did Cardozo, J., in

PEOPLE v. *DEFORE*, supra:

"There has been no blinking the consequences. The criminal is to go free because the constable has blundered."

Judge Flannagan's conclusion is, therefore, not only in accord with the accepted view in New Jersey, but is recognized by reason and logic as the only practicable solution.

B.

It might very properly be said that the *BLACK* case, supra, does not pass upon the situation, sub judice, because here there is a statute governing the matter. However, the attitude of the Courts of this State is so firmly established with respect to the admission of illegally obtained evidence and the conclusion reached in the *BLACK* case, supra, so definitely and securely sustained by that opinion, that it is proper to say that the common law rule is as stated by Flannagan, J.

Subsequent legislation, therefore, in derogation of that rule should be strictly construed.

In

CARLEY v. *LIBERTY HAT MANUFACTURING CO.*, 79 N. J. L. 316 (at p. 319),

the court said:

> "Being in derogation of the common law the statute is to be strictly construed and is not to be presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires. Coles v. Celluloid Manufacturing Co., 10 Vroom 326; affirmed, 11 Id. 381; State v. Lash, 1 Harr. 380; Tinsman v. Belvidere Delaware Railroad Co., 2 Dutcher 148."

This rule that legislation in derogation of the common law must be strictly construed is so well

established that further authorities need not be cited therefor.

It will be noted that Justice Parker, accordingly, in

STATE v. *LOWENTHAL,* 2 N. J. Misc. Rep. 18, so strictly construed the Hobart Act in its relation to searches and seizures that he held that only the magistrate who issued the search warrant might consider subsequent action with respect thereto.

Furthermore, the Hobart Act, itself, says in Section 10:

> ". . . all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented; . . ."

The effect of this provision is concisely stated in *STATE* v. *MEDINKOWITZ,* 5 N. J. Misc. Rep. 844 (at p. 846).

Bearing in mind, therefore, that the act is in derogation of the common law and, therefore, should be strictly construed and, bearing in mind that it must be liberally construed for the purpose of enforcing prohibition, it follows that in construing the act any change in the established rules of evidence must, of necessity, be unmistakably clear. This is especially so in view of the rule of practice in criminal cases that the State should be favored in the disposition of legal questions.

Accordingly, one may search in vain throughout the Hobart Act for any departure from the common law rule enunciated in the *BLACK* case. Nowhere is there any express authority (and only express authority would be adequate) for any such motion as is here made.

Nevertheless, it is conceded that the magistrate may act *ex mero motu,* but then only at the time and under the express conditions specified in section 27, which are hreinafter noticed.

It will be noted that Section 25 states:

> "The officer who executes a search warrant must forthwith return the same to the magistrate . . ."

Then, immediately following in Section 26, it says:

> "If the ground on which the warrants were issued be controverted, the magistrate must proceed to take testimony in relation thereto, . . ."

The only conclusion that can be reached from a reading of these two consecutive sections is that the magistrate must, upon the return mentioned in Section 25, and then only, take such testimony, because, in Section 27, it says:

> "If, on the return of any search warrant, it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued,

the magistrate must cause the property to be returned to the person from whom it was taken; . . ."

Obviously, from the position of section 26 between 25 and 27, the intention of the legislators was that "the magistrate must proceed to take testimony" "on the return of any search warrant".

It will also be noted that the only time when the magistrate has authority to return any property is "on the return of any search warrant". No other time is specified. No other time is available. This is not a too strained construction, for, if the statute must be so strictly limited as to allow only the magistrate issuing the warrant to return the property, then it must also be so strictly limited as to the time when the property may be returned.

POINT VI.

Return of Property Only Permitted if Conditions Specified in Section 27 Are Present.

Still bearing in mind that Section 27 is in derogation of the common law rule and that, therefore, it must be strictly construed, it is apparent that the magistrate may order the return of the property only if the express conditions specified in Section 27 are present.

It must not be overlooked that we are not here concerned with what the constitutional guaranty is. Nor are we here concerned with whether an over-zealous officer may have violated that guaranty. That guaranty if violated was violated when the trespass occurred, not thereafter.

In

PEOPLE v. *MAYEN* (Cal.), 205 Pac. 435,

the Court said:

"Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to be secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant. The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other. . . No authority, so far as we have been able to discover, has suggested that the subsequent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned. . .

"Upon what theory can it be held that such proceeding (for the return of the articles) is an incident of the trial, in such a sense that the

ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the State or its agents.

". . . The fallacy of the doctrine contended for by appellant is in assuming that the constitutional rights of the defendant are violated by using his private papers as evidence against him, whereas it was the invasion of his premises and the taking of his goods that constituted the offense irrespective of what was taken or what use was made of it; and the law having declared that the articles taken are competent and admissible evidence, notwithstanding the unlawful search and seizure, how can the circumstance that the court erred in an independent proceeding for the return of the property on defendant's demand add anything to or detract from the violation of defendant's constitutional rights in the unlawful search and seizure?

"The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dis-

simulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possesssion of goods wrongfully taken."

See also

STATE v. *REYNOLDS,* supra (at p. 639).

We are only concerned with the conditions upon which the property seized (illegally if you will) shall be returned "to the person from whom it was taken". It is not a violation of the Constitution to use evidence illegally obtained,

STATE v. *MacQUEEN,* 69 N. J. L. 522 (at p. 528), although the act of obtaining it may have been. Therefore, the refusal to return property illegally obtained is not unconstitutional.

The legislature, therefore, in limiting the conditions upon which such property may be returned, is not acting unconstitutionally. It is, in fact, granting concessions not required of it.

There can be no mistaking the conditions. First, that "the property is not the same as that described

in the warrant". Second, that "there *is* no probable cause for believing the existence of the grounds on which the warrant was issued". It will be noted that the present tense is used, namely, "*is*", which obviously refers to the time when the return to the search warrant is made and not to the time when the search warrant was issued. If probable cause exists at that time, then the mandate is that the property may not be returned. This situation must not be confused. Our Courts do not require that property although illegally seized by the State shall be returned. The Hobart Act makes certain concessions unknown to the common law. Therefore, the legislature strictly limited the conditions upon which return shall be made.

The reluctance to depart from the common law rule hereinbefore adverted to even when legislative urge is involved is evident throughout the cases. In speaking of a statute essentially similar to that sub judice the New York Court of Appeals said in

PEOPLE v. *DEFORE,* 150 N. E. 585 (at p. 588):

> "The truth, indeed, is that the statute says nothing about consequences. It does no more than deny a privilege. Denying this, it stops. Intrusion without privilege has certain liabilities and penalties. The statute does not assume to alter or increase them. No scrutiny of its text can ever evoke additional consequences by a mere process of construction. We must attach them, if at all, because some public policy, adequately revealed, would otherwise be thwarted.

But adequate revelation of such a policy it is surely hard to see. This would have been true in the beginning before the courts had spoken. It is more plainly true today. In this state the immunity is the creature, not of Constitution, but of statute. Civil Rights Law, Sec. 8. The Legislature, which created it, has acquiesced in the ruling of this Court that the prohibition of the search did not anathematize the evidence yielded through the search. If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right."

The Legislature did not say that:

"If, upon the return of any search warrant, it appears . . . that there *was* no probable cause for believing the existence of the grounds on which the warrant was issued. . ."

It said, and it obviously intended to say, that whether or not probable cause existed at any time prior to the return of the search warrant was immaterial insofar as Section 27 is concerned. If there is probable cause upon the return, that suffices and that probable cause is frequently supplied by the results of the search and seizure.

STATE v. *BEST*, 8 N. J. Misc. Rep. 271 (at p. 278).

Quite evidently the legislature had in mind the rule so common on the issuance of rules to show cause that the affidavits are spent upon the grant-

ing of the rules, requiring that testimony be thereafter taken.

PEER v. *BLOXHAM,* 82 N. J. L. 288.

Witness the requirement to take testimony in Section 26. The mandate that the probable cause *is* to be then ascertained constitutes a logical procedure.

It should be noted that the legislature has not made one of the conditions upon which the property shall be returned that the place searched may have been improperly described although it specifically provides for the return if the property seized is not the same as that described in the warrant. Nor has it made such a condition the fact that the affidavit may have been legally insufficient; that the officer to whom the search warrant was directed should have been named; that the property may have been seized in the night-time although the warrant may have specified the day-time, nor a hundred and one other conditions which might be conceived. Why did it only specify two conditions? Obviously because it intended that upon the happening of one or both of those two, and only one or both of those two, should the property be returned.

It is said that if this interpretation of the act be correct that then the Constitution means nothing. On the contrary, the constitutional right still exists and the remedy is also still available, viz.: to punish him who violated that right.

It may be said further that this construction loses sight of Section 18 which prescribed the conditions under which a search warrant may issue. Not so. The remedy which the injured party may have because of the violation of his constitutional guaranty is not affected in any way by the construction hereinbefore placed upon Section 27. The injured party may still have his remedy as to him who violated the sanctity of his home or other private place. Section 30 of the Hobart Act recognizes this fact and provides a special penalty for any person be he judge, clerk, or constable, who improperly issues or executes a search warrant. This is proper. The well-established rule that evidence, no matter how obtained, shall be admissible, should not be confused with the penalties to which a malfeasor should be subjected.

Furthermore, the Courts may not legislate in this respect and take it into their own hands to subject society to the dangers that will result from the extension of the conditions upon which contraband should be returned. The matter is well treated of in

PEOPLE v. *DEFORE,* supra,

where the Court said (at p. 588 and p. 589):

> "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon

an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied. *We may not subject society to these dangers until the Legislature has spoken with a clearer voice.* In so holding, we are not unmindful of the argument that, unless the evidence is excluded, the statute becomes a form and its protection an illusion. This has a strange sound when the immunity is viewed in the light of its origin and history. . . "

"No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. *On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office.* There are dangers in any choice." (Italics are ours).

In

HALL v. *COMMONWEALTH,* 121 S. E. 154, the Supreme Court of Appeals of Virginia said (at p. 156):

"Had the Legislature deemed further penalties necessary for the protection of the citizens against illegal searches and seizures, it would doubtless have prescribed them. Having failed to do so, the duty does not rest upon the courts to inflict additional penalties, and one accused of crime in this jurisdiction cannot be heard to contend that property seized under an illegal search warrant cannot be used as evidence against him."

POINT VII.

There Is No Warrant in Section 27 for the Suppression of Evidence.

Under Section 27 of the Hobart Act the utmost required of the magistrate is to order the "return" of the property.

"If, on the return of any search warrant, it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause the property to be returned to the person from whom it was taken; . . ."

It is entirely consistent under this section that property, under certain circumstances, may be returned and that the evidence thereof be unsuppressed. An officer may have uncovered in an illegal manner a still of vast proportions. The magistrate may have ordered the return of such still although such an order in this State seems, at

least, highly improbable. The officer would, nevertheless, still retain the mental picture of the still, the place where it was uncovered, the circumstances and manner of its operation, those operating it and other attendant conditions. He might also very well retain a very clear recollection of the olfactory sensation experienced.

STATE v. *MILLER,* 71 N. J. L. 527 (at p. 533).

Upon this officer's testimony alone the State might very well prove its case without the production of the actual still. Were the production of the still a necessary element of the State's case, its return by the magistrate would not be dispositive of the matter. The still might by proper process be re-taken from the defendant and produced upon the trial, it being presumed, of course, that the defendant would carefully preserve it since it would be so important an item in the proper and truthful presentation of the matter in court.

If it be urged that the required production of such evidence upon the trial would be to infringe upon the defendant's constitutional right that he be not compelled in a criminal case to be a witness against himself, the answer is that there is no such constitutional right in this State, although there is a similar right which is part of the existing law.

STATE v. *ZDANOWICZ,* 69 N. J. L. 619 (at p. 622).

If it be argued that to require the production of such evidence would violate that right, the answer is that it is not merely any and every compulsion that is the kernel of that right or privilege but only testimonial compulsion.

PEOPLE v. *GARDNER,* 144 N. Y. 119; 38 N. E. 1003.

It is recognized that if the defendant, himself, were required to produce the evidence and by his testimony to identify or authenticate the evidence that then he would be privileged therefrom, but when the identity and authenticity of the evidence is accounted for by other than the defendant, there is no testimonial compulsion and, therefore, no invasion of his right or privilege. Baker, J., in

HAYWOOD v. *U. S.,* 268 Fed. 795 (at p. 802), said:

> " 'From the thirteenth to the middle of the seventeenth century the Ecclesiastical Courts of England and during the later part of the period the Courts of Star Chamber and of High Commission compelled defendants to testify respecting criminal charges against them. During the last century of our colonial period the principle that no person shall be compelled in a criminal case to be a witness against himself had become a fixed part of our inheritance. And it was that fixed and definite meaning that in clearest terms was incorporated in our federal Bill of Rights. 'Witness' is the key word. Constitutional safeguards should be applied as broadly as the word-

ing, in the historical light of the evil that was aimed at, will permit; and so a defendant is protected not merely from being placed on the witness stand and compelled to testify to his version of the matters set forth in the indictment; he is protected from authenticating by his oath any documents that are sought to be used against him; he is protected from producing his documents in response to a subpoena 'duces tecum,' for his production of them in court would be his voucher of their genuineness; he is protected from an act of Congress declaring that the government's statement of the contents of his documents, if he fail to produce them on notice, shall be taken as confessed. But unless the origin and purpose of the command be disregarded and the key word be turned into an unintended, if not impossible, meaning, no compulsion is forbidden by the Fifth Amendment except *testimonial* compulsion. At the trial of this case no defendant was compelled in any way to become a witness against himself or against any of his alleged co-conspirators. Letters, pamphlets and other documents, identified by other witnesses, were competent evidence; and the trial judge, correctly finding them competent, was not required to stop, and would not have been justified in stopping, the trial to pursue a collateral inquiry into how they came to the hands of government attorneys. Consequently there was no violation of defendants' rights under the Fifth Amendment."

Furthermore, it should not be overlooked that there is a specific provision of the Hobart Act relating to this subject matter, to wit, Section 34, which reads as follows:

"No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying or producing books, papers, documents and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this act, but no answer made by any witness to any such question shall be used or admitted in evidence in any proceeding against such witness, except in a prosecution for perjury in respect to any such answer."

POINT VIII.

Regularity in the Issuance and Execution of Search Warrants Is Presumed.

In considering the various applications which have been made, it should be borne in mind that a search warrant is presumed to be prima facie valid and to be issued in conformity to law,

BURTZH v. *ZEUCH* (Iowa Supreme Court), 202 N. W. 542, and, of course, that the officer (judicial or otherwise), who executed the warrant did so in conformity to law must also be presumed because of the general rule that sworn public officers in the performance of their duties are presumed to have acted legally.

Of course, the burden of establishing irregularities sufficient to justify the granting of the relief sought is upon the movent.

STATE v. *GARDNER* (Montana Supreme Court), 249 Pac. 574.

CONCLUSION

It is respectfully submitted, therefore, that the motion be denied.

GEORGE S. HOBART,
Assistant Attorney General and Acting Prosecutor for the County of Bergen.

GEORGE F. LOSCHE,
of Counsel.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, GEORGE S. HOBART, Assistant Attorney General, *Prosecutor-Appellant,* *vs.* THE COURT OF FIRST CRIMINAL JUDICIAL DISTRICT OF THE COUNTY OF BERGEN, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

BRIEF ON BEHALF OF PROSECUTOR-APPELLANT.

Statement.

This is an appeal from so much of an order for judgment of the Supreme Court (Trenchard and Donges, *J. J.*) dated July 20th, 1932 (Case, pp. 49 and 50) as orders and adjudges that that part of the order there under review (Case pp. 43, 44 and 45) which directed the return to Herman Becker of a certain chattel described as a Journal Book, be affirmed.

The Supreme Court's opinion is found in *State of New Jersey, George S. Hobart, Assistant Attorney General, Prosecutor,* v. *The Court of the First Criminal Judicial District of the County of Bergen, Defendant,* 10 N. J. Misc. 725.

A search warrant was issued on January 24, 1931, by Hon. J. Wallace Leyden, Acting Judge of the Court of the First Criminal Judicial District of the County of Bergen (Case pp. 6, 7 and 8). The search warrant was executed by Sergeant Walter L. Simpson and the alleged intoxicating

liquor and property including the Journal Book seized on January 28, 1931. Thereafter a complaint was filed against Herman Becker, for possessing intoxicating liquor in violation of Chapter 255 of the Laws of 1922 (Case p. 13). Thereafter the defendant, Herman Becker, by his attorneys, Chandless, Weller and Selser, served a notice of motion upon the State, the express purpose of which was to secure an order to require the return of said alleged intoxicating liquor, articles and things and the suppression of the evidence thereof (Case pp. 15, 16 and 17). The matter came on for hearing before Hon. Charles J. McCarthy, Judge of the First Criminal Judicial District Court of the County of Bergen, who made an order requiring the return to Becker of each, all and every of the chattels, articles and things and property taken and the suppression of the evidence thereof (Case pp. 43, 44 and 45). Return to the Writ of Certiorari was made on April 23, 1931 (Case pp. 4 and 5).

The Supreme Court in said order of July 20th, 1931 set aside the order there under review except insofar as it related to the said Journal Book and as to that affirmed the order under review.

The sole question presented on this appeal is whether or not said Journal Book should be returned to Becker.

Error Alleged.

The Supreme Court erred in affirming so much of the order under review (Case pp. 43, 44 and 45) as required the State to return the Journal Book to Becker.

The alleged error may be found on page 50 of the record.

ARGUMENT.

I.

The Order under review was entirely illegal because not made by the Magistrate who issued the Search Warrant.

Judge Leyden issued the search warrant (Case pp. 6, 7 and 8). Judge McCarthy made the order under review (Case pp. 43, 44 and 45).

That Judge McCarthy had no authority to make such an order is amply demonstrated by Justice Parker in *State* v. *Lowenthal*, 2 N. J. Misc. 18, wherein he concludes at page 21:

> "We are clear that investigation into the propriety of this seizure must be held, at least in the first instance, by the magistrate that issued the warrant."

II.

The Order under review was entirely illegal because no Magistrate was authorized to make it.

A.

AT COMMON LAW.

Apart from the Hobart Act (Laws 1922, Chap. 255), it seems definitely established that a motion for the return of property is not the proper remedy even though the moving party be the owner.

In *State* v. *Black*, 5 N. J. Misc. Rep. 48, Flannagan, *J.*, after a most enlightening discussion says (at p. 56):

> "I conclude that if the books were seized by unreasonable search and seizure this does not constitute a reason to suppress them. They are, notwithstanding, admissible in evi-

dence. In so far as the motion asks for the recovery of their possession, a remedy is invoked which does not exist by motion in the courts of this state. The motion will therefore be denied."

This conclusion was very apparently reached by the learned judge because of the very definite trend of the decisions in this state which clearly and unmistakably support the view that no matter how evidence is obtained it is admissible.

See

State v. *MacQueen,* 69 N. J. L. 522 (at p. 528);

State v. *Mausert,* 88 N. J. L. 286 (at p. 290);

State v. *King,* 4 N. J. Misc. Rep. 218 (at p. 220);

State v. *Cortese,* 4. N. J. Misc. Rep. 683 (at p. 684);

State v. *Mellini,* 4 N. J. Misc. Rep. 1047 (at p. 1049);

State v. *Merra,* 103 N. J. L. 361 (at p. 365);

State v. *Gillette,* 103 N. J. L. 523 (at p. 524);

State v. *Haines,* 103 N. J. L. 534 (at p. 535).

Aside from the fact that the decision in the BLACK case is the logical result of the trend in this state, it is supported by reason.

B.

UNDER THE HOBART ACT.

It might very properly be said that the BLACK case, *supra,* does not pass upon the situation, *sub judice,* because here there is a statute governing the matter. However, the attitude of

the Courts of this State is so firmly established with respect to the question *sub judice* and the conclusion reached in the BLACK case, *supra,* so definitely and securely sustained by that opinion, that it is proper to say that the common law rule is as stated by Flannagan, *J.*

Subsequent legislation, therefore, in derogation of that rule should be strictly construed.

In *Carley* v. *Liberty Hat Manufacturing Co.,* 79 N. J. L. 316 (at p. 319), the Court said:

> "Being in derogation of the common law the statute is to be strictly construed and is not to be presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires. Coles *v.* Celluloid Manufacturing Co., 10 Vroom 326; affirmed, 11 *Id.* 381; State *v.* Lash, 1 Harr. 380; Tinsman *v.* Belvidere Delaware Railroad Co., 2 Dutcher 148."

This rule that legislation in derogation of the common law must be strictly construed is so well established that further authorities need not be cited therefor.

It will be noted that Justice Parker, accordingly, in *State* v. *Lowenthal,* 2 N. J. Misc. Rep. 18, so strictly construed the Hobart Act in its relation to searches and seizures that he held that only the magistrate who issued the search warrant might consider subsequent action with respect thereto.

Furthermore, the Hobart Act, itself, says in Section 10:

> ". . . all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented; . . ."

The effect of this provision is concisely stated in *State* v. *Medinkowitz,* 5 N. J. Misc. Rep. 844 (at p. 846).

Bearing in mind, therefore, that the act is in derogation of the common law and, therefore, should be strictly construed and, bearing in mind that it must be liberally construed for the purpose of enforcing prohibition, it follows that in construing the act any change in the established rules of evidence must, of necessity, be unmistakably clear. This is especially so in view of the rule of practice in criminal cases that the State should be favored in the disposition of legal questions.

Accordingly, one may search in vain throughout the Hobart Act for any departure from the common law rule enunciated in the BLACK case. Nowhere is there any express authority (and only express authority would be adequate) for any such motion as is made at the time and under the circumstances of this case.

III.

Even if there were authority for such an Order as that under review the time for making it in the instant case had passed.

It will be noted that Section 25 of the Hobart Act states:

> "The officer who executes a search warrant must forthwith return the same to the magistrate . . ."

Then, immediately following in section 26, it says:

> "If the ground on which the warrants were issued be controverted, the magistrate must proceed to take testimony in relation thereto, . . ."

The only conclusion that can be reached from a reading of these two consecutive sections is that the magistrate must, upon the return mentioned in Section 25, and then only, take such testimony, because, in Section 27, it says:

> "If, on the return of any search warrant, it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause the property to be returned to the person from whom it was taken; . . ."

Obviously, from the position of Section 26 between 25 and 27, the intention of the legislators was that "the magistrate must proceed to take testimony" "on the return of any search warrant."

It will also be noted that the only time when the magistrate has authority to return any property is "on the return of any search warrant." No other time is specified. No other time is available. This is not a too strained construction, for, if the statute must be so strictly limited as to allow only the magistrate issuing the warrant to return the property, then it must also be so strictly limited as to the time when the property may be returned.

The return to the search warrant was made on January 24th, 1931 (Case p. 37, l. 16). The motion was noticed to be made by Becker's attorneys on February 5, 1931 (Case p. 15, l. 20) and was actually made on March 4, 1931 (Case p. 18, l. 20) and the order requiring the return of the property was not made until March 31, 1931 (Case p. 44, l. 26).

IV.

Even if there were authority for such an Order as that under review the conditions under which it might have been made were absent.

Still bearing in mind that Section 27 is in derogation of the common law rule and that, therefore, it must be strictly construed, it is apparent that the magistrate may order the return of the property only if the express conditions specified in Section 27 are present.

It must not be overlooked that we are not here concerned with what the constitutional guaranty is. Nor are we here concerned with whether an over-zealous officer may have violated that guaranty. That guaranty if violated was violated when the trespass occurred, not thereafter.

State v. *Reynolds, supra* (at p. 639).

We are only concerned with the conditions upon which the property seized (illegally if you will) shall be returned "to the person from whom it was taken."

There can be no mistaking the conditions. First, that "the property is not the same as that described in the warrant." Second, that "there *is* no probable cause for believing the existence of the grounds on which the warrant was issued." It will be noted that the present tense is used, namely, "*is,*" which obviously refers to the time when the return to the search warrant is made and not to the time when the search warrant was issued. If probable cause exists at that time, then the mandate is that the property may not be returned. This situation must not be confused. Our Courts do not require that property although illegally seized by the State

shall be returned. The Hobart Act includes certain concessions unknown to the common law, which must be strictly limited.

The reluctance to depart from the common law rule hereinbefore adverted to even when legislative urge is involved is evident throughout the cases. In speaking of a statute essentially similar to that *sub judice* the New York Court of Appeals said in *People* v. *Defore,* 150 N. E. 585 (at p. 588):

> "The truth, indeed, is that the statute says nothing about consequences. It does no more than deny a privilege. Denying this, it stops. Intrusion without privilege has certain liabilities and penalties. The statute does not assume to alter or increase them. No scrutiny of its text can ever evoke additional consequences by a mere process of construction. We must attach them, if at all, because some public policy, adequately revealed, would otherwise be thwarted. But adequate revelation of such a policy it is surely hard to see. This would have been true in the beginning before the courts had spoken. It is more plainly true today. In this state the immunity is the creature, not of Constitution, but of statute. Civil Rights Law, Sec. 8. The Legislature, which created it, has acquiesced in the ruling of this Court that the prohibition of the search did not anathematize the evidence yielded through the search. If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right."

The Legislature did not say that:

> "If, upon the return of any search warrant it appears . . . that there *was* no probable cause for believing the existence

of the grounds on which the warrant was issued . . ."

It said, and it obviously intended to say, that whether or not probable cause existed at any time prior to the return of the search warrant was immaterial insofar as Section 27 is concerned. If there is probable cause upon the return, that suffices and such probable cause is frequently supplied by the results of the search and seizure.

State v. *Best*, 8 N. J. Misc. Rep. 271 (at p. 278).

Quite evidently the legislature had in mind the rule so common on the issuance of rules to show cause that the affidavits are spent upon the granting of the rules, requiring that testimony be thereafter taken.

Peer v. *Bloxham*, 82 N. J. L. 288.

Witness the requirement to take testimony in Section 26. The mandate that the probable cause *is* to be then ascertained constitutes a logical procedure.

It should be noted that the legislature has not made one of the conditions upon which the property shall be returned that the place searched may have been improperly described although it specifically provides for the return if the property seized is not the same as that described in the warrant. Nor has it made such a condition the fact that the affidavit may have been legally insufficient; that the officer to whom the search warrant was directed should have been named; that the property may have been seized in the night-time although the warrant may have specified the day-time, nor a hundred and one other conditions which might be conceived. Why did it only specify two conditions? Obviously because

it intended that upon the happening of one or both of those two, and only one or both of those two, should the property be returned.

It is said that if this interpretation of the act be correct that then the Constitution means nothing. On the contrary, the constitutional right still exists and the remedy is also still available, viz.: to punish him who violated that right.

It may be said further that this construction loses sight of Section 18 which prescribed the conditions under which a search warrant may issue. Not so. The remedy which the injured party may have because of the violation of his constitutional guaranty is not affected in any way by the construction hereinbefore placed upon Section 27. The injured party may still have his remedy as to him who violated the sanctity of his home or other private place. Section 30 of the Hobart Act recognizes this fact and provides a special penalty for any person be he judge, clerk, or constable, who improperly issues or executes a search warrant. This is proper. The well-established rule that evidence, no matter how obtained, shall be admissible, should not be confused with the penalties to which a malfeasor should be subjected.

Furthermore, the Courts may not legislate in this respect and take it into their own hands to subject society to the dangers that will result from the extension of the conditions upon which contraband should be returned.

V.

The Return to the Writ of Certiorari does not show that the seizure of said Journal Book was unreasonable.

In *State* v. *King,* 4 N. J. Misc. Rep. 218 (at p. 220), it is said:

> "Section 6 of Article 1 of the New Jersey State Constitution protects persons and property only against unreasonable searches and seizures."

And in *State* v. *Mausert,* 88 N. J. L. 286 (at p. 290), it is said:

> "The right which the constitution protects is freedom from unreasonable searches and seizures."

In *State* v. *Giberson,* 99 N. J. L. 85 (at p. 87), Chancellor Walker, speaking for the Court of Errors and Appeals, said:

> "And our constitution (Article 1, Section 6) secures persons and property against unreasonable searches and seizures."

It is plain that the Journal Book which was seized was used in connection with the business which the defendant maintained, namely, a barroom (Case p. 19, l. 6; p. 20, l. 29; p. 21, l. 3; p. 26, ll. 6-19; p. 28, ll. 12-14), or establishment where intoxicating liquor was sold (Case, p. 23, l. 29; p. 31, l. 30; p. 35, l. 30; p. 36, l. 16) in violation of the Prohibition Enforcement Act.

In *Weeks* v. *U. S.,* 232 U. S. 383, Mr. Justice Day in part of his opinion stated as follows:

> "It is not an assertion of the right on the part of the government to search the person of the accused, when legally arrested, to discover or seize the fruits or evidence of the crime. . . . Nor is it the case of burglar's

tools or other proofs of guilt found upon his arrest within the control of the accused. It will be observed that the court eliminated 'proofs of guilt' found upon his arrest within the control of the accused from the prohibition against unreasonable search and seizure. The right which the constitution protects is freedom from unreasonable searches and seizures.''

In *State* v. *Mausert,* 88 N. J. L. 286, the defendant maintained a hotel which was a disorderly house. The establishment was raided and in the course of the raid, the hotel register was taken by the officers making the raid from the hotel office. Justice Bergen speaking for the Supreme Court stated as follows:

''In the present case the trial court found that the books were in the office of the hotel, the premises which were alleged to be disorderly, and were under the control of the accused. They were convenient instruments used in perpetrating the crime of keeping a disorderly house of the nature alleged, and were, apparently, open to the inspection of anyone in the public office of the hotel, the very room in which the defendant was when arrested, and in our opinion the trial court rightly held that these books were 'proofs of guilt found upon his arrest within the control of the accused' as much so as if they were burglar's tools placed there by the defendant, and under the ruling in the case of United States *v.* Weeks, *supra,* they were not within the privilege established by the paragraph of our constitution above mentioned. These books were in actual use as a means of carrying on the unlawful business, and were as much in defendant's possession and under his control when arrested as if he had them under his arm and dropped

> them to the floor. It is not a case where papers were secreted and intended to be kept private, nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful element. There was no unreasonable search and seizure of incriminating evidence within the constitutional prohibition."

So also in the case *sub judice,* the Journal Book was a convenient instrument used in perpetrating the crime of maintaining a saloon or establishment where intoxicating liquor was sold and is "proof of guilt found upon his arrest within his control as much as if they were burglar tools."

Wherefore, it is respectfully submitted that the Supreme Court erred in affirming so much of the order under review as required the return by the State of the Journal Book.

GEORGE F. LOSCHE,
Attorney for Prosecutor-Appellant.

George F. Losche
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