

433.

SEARCH WARRANT—NOT NECESSARY TO LEAVE COPY OF SEARCH WARRANT IF OWNER IS ABSENT WHEN SEARCH IS MADE—SECTION 6178 G. C. DOES NOT APPLY.

SYLLABUS:

Section 6178, General Code, does not apply to present liquor laws but same are governed by sections 13482 to 13488 and section 6212-16, 6212-18 and 6212-27, and posting or leaving a copy of the search warrant, if owner is absent when search is made, is unnecessary.

COLUMBUS, OHIO, June 11, 1923.

HON. J. KENNETH WILLIAMSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of May 28th, in which you make the following statement and inquiry:

“There has just been raised in this County a question on the proper service of a search warrant when the owner of the property is absent from his home. I realize that under section 6178 it provides that the search warrant must be tacked up in a conspicuous place if the owner is absent from his home, but I do not consider that that applies to search warrants issued under section 6212-16, which specifically refers to sections 13482-13488 G. C., and seems to incorporate the latter named sections therein.

“Under these last named sections I find nothing that would seem to compel the officers to even leave a copy of the search warrant, much less to tack same up in a conspicuous place. I would like to have your opinion on this matter, as it is a question that will no doubt be raised frequently in this county from now on.”

Section 6178, General Code, reads as follows:

“If no person is found in possession of the premises where such liquors are found, the officer taking such liquors shall post in a conspicuous place on such building or premises a copy of his warrant, take possession of such liquors and vessels containing them and hold them subject to the order of the court or magistrate issuing the warrant and make return of his proceedings thereon. Thereupon such magistrate shall fix a time for hearing and determine the purpose for which such liquors are kept and issue notice thereof to such officer who shall post a copy thereof on such building or premises. If at the time fixed for such hearing, or within thirty days thereafter, no persons appear to claim such liquors and implements for their sale or distribution, such magistrate or court shall order them destroyed.”

and is under the search and seizure section of the old *local option laws*, section 6169 of which provided for the warrant mentioned. These local option laws are now superseded by the Amended Constitution of Ohio, section 9, Article XV, the Crabbe Act and Miller bill, so-called.

So that the search and seizure law as applied to the enforcement of the prohibition amendment is found in section 4, Crabbe Act, 6212-16 G. C., section 6212-18 G. C. as amended in the Gordon law, and section 6212-27 G. C., which, so far as they apply to search and seizure, are as follows.

Section 6212-16, General Code:

"It shall be unlawful to have or possess any liquor, or property designed for the manufacture of liquor, intended for use in violation of law or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue, and proceedings had thereunder, as provided in sections 13482 to 13488 inclusive of the General Code, so far as the same may apply, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor or property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall order it to be disposed of as provided in public act 66 federal statutes. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as store, shop, saloon, restaurant, hotel or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

Section 6212-18, General Code:

"Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act, when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided. And in any such cases where imprisonment is not a part of the penalty, the defendant cannot waive examination nor can said mayor, justice of the peace, or judge recognize such defendant to the grand jury; nor shall it be necessary that any information be filed by the prosecuting attorney or any indictment be found by the grand jury. The officers named herein shall have authority to issue search warrants as provided for in section 6212-16 of the General Code, and the jurisdiction granted herein shall be coextensive with the county, whether or not within the county there is a municipality having a municipal court."

Section 6212-27, General Code, provides, in part, as follows:

"Provided that nothing in this act shall be construed to permit any person to enter or search, with or without a warrant, a bona fide private

residence as herein defined; nor shall a search warrant issue to search any other premises not a bona fide private residence, except in accordance with the provisions of law, as found in sections 13482 to 13488, inclusive, of the General Code so far as the same may apply."

Sections 13482-13488, General Code, so far as applicable, are as follows:

Section 13482:

"A justice of the peace, mayor or police judge may issue warrants to search a house or place:

1. For property stolen, taken by robbers, embezzled, or obtained under false pretense;

2. For forged or counterfeit coins, stamps, imprints, labels, trademarks, bank bills or other instruments of writing, and dies, plates, stamps or brands for making them;

3. For books, pamphlets, ballads or printed papers, containing obscene language, prints, pictures or descriptions manifestly tending to corrupt the morals of youth, and for obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and for instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self-pollution;

4. For a gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property and for money or property won by unlawful gaming."

Section 13483:

"A warrant for search shall not be issued until there is filed with the magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, and the things to be searched for, and alleging substantially the offense in relation thereto, and that affiant believes, and has good cause to believe, that such things are there concealed."

Section 13484:

"The warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the thing to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall command the officer to search such house or place for the property or other things, and, if found, to bring them, together with the person to be seized, before the magistrate or another magistrate of the county having cognizance thereof. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night, in which case a search in the night may be ordered."

Section 13485:

"A warrant for search substantially in the form following shall be sufficient:

The State of Ohio, _____County, ss.:
To any Constable of said County, greeting:

Whereas, there has been filed with me an affidavit, of which the following is a copy (here copy the affidavit).

These are, therefore, to command you, in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day-time (or in the night-time), into (here describe the house or place as in the affidavit) of the said E. F., of the township of _____, in the county aforesaid, and there diligently search for the said goods and chattels, to-wit: (here describe the articles as in the affidavit), and that you bring the same, or any part thereof, found on such search, and also the body of E. F., forthwith before me, or some other magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this _____day of _____,

A. B., Justice of the Peace.

(R. S. Sec. 7123.)"

Section 13486:

"When the warrant is executed by the seizure of the property or things described therein, such property or things shall be kept by the magistrate to be used as evidence."

The only provision in these search and seizure statutes, as far as the service of the warrant is concerned, provides that the officer to whom the warrant is issued shall "search such house or place for the property or other things, and if found, to bring them * * * before the magistrate or another magistrate of the county having cognizance thereof."

Section 6212-16, General Code, provides that the liquor, etc., shall be subject to the order of the court, and that the court shall order same to be destroyed or disposed of under section 66 Federal Statutes.

The courts have held that where the liquors, etc., are found, they can be used in evidence, regardless of whether the search warrant, or its issuance and service, was proper or not, and there is no provision in the laws of Ohio for a motion for return of the liquors found before trial.

Ciano v. State, No. 17194, Supreme Court of Ohio, decided May 31, 1922; Ohio v. Szilogya, Court of Appeals, Montgomery County, Ohio, rendered January 31, 1923; Mascari v. State, Court of Appeals, Franklin County, Ohio, No. 1021; State v. Tell, Common Pleas, Montgomery County, Ohio, decision May 4, 1921; Rosanski, et al., v. State, Supreme Court of Ohio, No. 17530 to 17547.

If illegal liquor or still is found it makes no difference whether a search warrant was issued or not. A warrant is only used on a search of a bona fide private residence and when illegal liquors are found therein it ceases to be a bona fide residence and warrant is not necessary.

Ohio v. Mascari, Franklin Common Pleas, No. 52; State v. Krajnyak, Municipal Court, Lorain, Ohio; State v. Ciano, Ohio Supreme Court, 105 O. S. 225.

It is my opinion, therefore, that section 6178, General Code, does not apply to the present liquor laws but same are governed by sections 13482 to 13488, General Code, and section 6212-16-18-27, and therefore it is not necessary to post a warrant or leave a copy when owner is not at home at time of search.

Respectfully,

C. C. CRABBE,

Attorney General.

434.

APPROVAL, BONDS OF GREENFIELD TOWNSHIP RURAL SCHOOL DISTRICT, GALLIA COUNTY, \$10,500.00, TO PURCHASE SITE AND ERECT AND EQUIP SCHOOL BUILDING.

COLUMBUS, OHIO, June 11, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

435.

APPROVAL, BONDS OF FAIRFIELD TOWNSHIP RURAL SCHOOL DISTRICT, COLUMBIANA COUNTY, \$22,500.00, REFUNDING BONDS.

COLUMBUS, OHIO, June 11, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

436.

APPROVAL, BONDS OF ELIZABETHTOWN RURAL SCHOOL DISTRICT, HAMILTON COUNTY, \$10,000.00, TO FINISH AND EQUIP FIREPROOF SCHOOL BUILDING.

COLUMBUS, OHIO, June 11, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.