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"PROBABLE CAUSE" IN CONNECTION WITH APPLICATIONS FOR SEARCH WARRANTS.

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In the recent cases of *State v. Hammer*[1] *and State v. Richardson*[2] the Supreme Court of Missouri held that a search warrant was properly issued by a justice of the peace upon an application filed and sworn to by the prosecuting attorney which stated positively and not upon information and belief that intoxicating liquor was being kept on premises therein particularly described *but which did not state any further evidentiary facts.* In so ruling the court followed its own previous decisions[3] and certain cases in the courts of appeal. In the still more

[1] (Mo. Sup. Div. 2, 1927) 292 S. W. 60, l. c. 61.
[2] (Mo. Sup. Div. 2, 1927) 292 S. W. 61, l. c. 62.
[3] State v. Perry, 267 S. W. 828, l. c. 831 (1924); State v. Cobb, 273 S. W. 736, l. c. 738 (1925); State v. Cockrum, 278 S. W. 700, l. c. 702 (1925); State v. Hall, 312 Mo. 425, 279 S. W. 106 (1925); State v. Halbrook, 311 Mo. l. c. 677, 279 S. W. 395 (1925); State v. Gooch, 285 S. W. 474, l. c. 477 (1926); State v. Stevens, 292 S. W. 36 (1927); State v. Richardson, 292 S. W. 61 (1927). All of these cases were in Division No. 2 of the Supreme Court of Missouri. The Stevens case involved an application in the same form made by a deputy sheriff. In this connection it is well to call attention to the language of the statute governing the issuance of search warrants in liquor cases. It is Section 25 of the Prohibition Act of April 3, 1923 (Laws of 1923, p. 244 *et seq.*) and is as follows:

> The attorney general of the state of Missouri, or the prosecuting attorney of any county, or any prohibition enforcement officer, is hereby empowered to file in the circuit court, criminal court, court of criminal correction, or any other court having criminal jurisdiction in the county, or before the judge thereof in vacation, or justice of the peace, an application for a search warrant, which application shall be by petition setting forth substantially the facts upon which the same is based, describing the place to be searched and the thing or things to be seized as nearly as may be, which petition shall be verified by the oath of the officer filing the same. If it shall appear to the satisfaction of the court in which said petition is filed or the judge

recent case of *State v. Catalino*[4] the court reiterated the same doctrine. The rule thus stated has been, however, severely criticized, and a determined effort is being made to induce the tribunal to overrule these cases.[5] Owing to the tremendous importance of the question to law enforcement in the state it is well to examine briefly the grounds on

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thereof in vacation, or justice of the peace before whom said petition shall be filed, either from the facts set forth in said petition or from evidence heard thereon, that there is probable cause to believe that intoxicating liquor is being unlawfully manufactured, sold, stored, or kept . . . within said county . . . it shall be the duty of such court or such officer before which or whom said petition was filed, to issue or cause to be issued a search warrant . . .

The following form of application or petition for a search warrant originally devised by Mr. Benton B. McGowen, then prosecuting attorney of Ralls County, Missouri, is now universally used throughout the state upon recommendation of the attorney general. It is the form attacked in the cases cited and in them held good and it is the form discussed herein.

State of Missouri — Before John Smith, Justice of the
County of ————. — Peace ———— township.

William Jones, Prosecuting Attorney, within and for the said county of ———— in the state of Missouri, upon his oath respectfully states and shows the court that in the hereinafter described buildings and structures and at and upon the hereinafter described premises and place in the said county and state viz.: no. 597 White street in the city of ————, county and state aforesaid being a small frame house on the east side of said street near the intersection of Black street, intoxicating liquor is being unlawfully manufactured, sold, stored, and kept; that thereat and therein also being used and kept a still, doubler, worm, worm tub, mash, mash tubs, fermenting tubs, vessels, fixtures and equipment, and parts thereof, used and fit for use in the manufacture and production of intoxicating liquor. Your petitioner therefore prays that a search warrant be issued as by law provided and delivered to the sheriff of said county, authorizing and commanding said officer, with the necessary assistance to enter said building, structure, premises, and place by force if need be, either in day or by night, and the same diligently to search for said intoxicating liquor, still, etc., and to produce before this court any such articles therein found in possession thereof, and to make return hereof as required by law.

The warrant issued after the filing of this petition after reciting the filing of the petition goes on to state that

from the facts set forth in said verified petition and the showing thereby and thereupon made it is found by me that there is probable cause etc.

The petition is verified by a positive oath in the following form:

"William Jones, Prosecuting Attorney, being duly sworn deposes and states that the facts set forth in the above petition *are true.*"

[4] (Mo. Sup. Div. 2, 1927) 295 S. W. 568.

[5] In the case of State v. Gooch, *supra,* note 3, the court complained that "practically every case that comes here of this character contains an exhaustive review of the law relating to the issues above mentioned." The writer is informed by the attorney general that there are now pending six cases in Division No. 2 of the court in which the same point is being raised. It is reported that in these cases a very determined effort is being made to have the former Missouri cases cited, note 3, *supra,* overruled. It is said that an attempt will be made to have the question passed upon by the court *in banc.*

which the accepted rule of the court rests and the arguments adduced against it.[6]

The courts of a number of jurisdictions have held, in accordance with immemorial custom, that an application for a search warrant which states in general terms the commission of an offense and the presence, on particularly described premises, of contraband goods and which was verified only upon information and belief, was, nevertheless, entirely sufficient to authorize the issuance of the warrant.[7] Following the decision of a Federal District Court[8] in 1921 a few courts began to hold that a verification upon information and belief was insufficient.[9] This position was adopted by Missouri.[10] This state, however, together with a majority of those accepting the federal rule in this particular held that so long as the verification of the application was positive, *i. e.*, not on information and belief, it was sufficient if the affidavit stated in general terms that the contraband property (intoxicating liquor, narcotics, stolen goods, etc.) was being secreted or kept on the described premises, with-

[6] It is not too much to say that a decision in these cases adverse to the state would mean an absolute nullification of the state prohibition act. Absolutely no attempt to enforce that act would thereafter be possible. To argue as to the wisdom or unwisdom of the prohibition law is not within the scope of this paper, We express no opinion thereon. But it is well to remember that this policy, rightly or wrongly, has been written into the federal constitution by a two-thirds vote in the houses of congress and the ratification of three-fourths of the states. For the court by a constitutional decision to set aside a policy so deliberately adopted by the representatives of the people would be to say the least highly unfortunate.

[7] Cochran v. State, 138 N. E. 54 (Oh. 1923); Porter v. State, 100 So. 377 (Miss. 1924); State v. Mallett, 122 Atl. 570 (Me. 1924); State v. Breen, 122 Atl. 571 (Me. 1924); Loeb v. State, 98 So. 449 (Miss. 1924); Bufkin v. State, 98 So. 452 (Miss. 1924); Zimmerman v. Town of Bedford, 115 S. E. 362 (Va. 1923); Foley v. Utterback, 194 N. W. 721 (Ia. 1923). For an analysis of the authorities see Cornelius, SEARCH AND SEIZURE (1926) p. 274 *et seq.* Without intent to criticize unduly the very interesting and helpful work of Mr. Cornelius it should be pointed out that he writes from the viewpoint of a defending lawyer. On all questions he leans away from a broad interpretation of the law and is far more tender of the rights of an accused person than of those of society. This strong bias must be kept in mind constantly in dealing with his work.

[8] United States v. Burnside, 278 Fed. 249 (D. C. Wis. 1921), see the following earlier cases suggesting the same rule. Tippman v. People, 175 Ill. 101, 51 N. E. 872 (1898); State v. Boulter, 5 Wyo. 236, 39 Pac. 883 (1895), warrant for arrest).

[9] Central Consumers Co. v. James, 278 Fed. 249 (D. C. Ky. 1922); United States v. Ray, 275 Fed. 1004 (D. C. Md. 1922); State v. Bird, 205 Pac. 241 (Mont. 1922); People v. Dineen, 192 N. Y. S. 905 (1922); Giles v. U. S., 284 Fed. 208 (C. C. A. 1st Ct. 1923); Cooley v. Commonwealth, 195 Ky. 706 (1923); People v. Effelberg, 109 N. W. 727 (Mich. 1923); Magen v. State, 220 Pac. 666 (Okl. 1924).

[10] State v. Lock, 259 S. W. 116 (Mo. Sup. Div. 2, 1924).

out any statement as to the particular evidentiary facts tending to show that this was true.[11]

The Federal Courts,[12] on the other hand, and those of a few of the states[13] have held that such an application is insufficient and that it is necessary for the affiant to state particular facts which show or tend strongly to show the illegal possession of the contraband property, *e. g.* in a liquor case he must state either that he has himself purchased whiskey on the premises or has been present and seen whiskey sold there.[14] He may not make use of hearsay to support his application and in one case it is even held that his statement that the liquor purchased was whiskey was not sufficient, but that he must either show a chemical analysis or else qualify himself as an expert.[15] It has even been suggested that an applicant may not get a search warrant by stating that he has seen intoxicating liquor sold on given premises since the sense of smell alone is insufficient to identify the liquor as being intoxicating.[16] It is this extreme form of the federal rule which it is sought to have adopted in Missouri.

When the fathers of our state government wrote into our first constitution section XIII of article 13 (now section II of article 2) the fourth amendment to the federal constitution had been in force over thirty years.[17] Identical or highly similar provisions had been adopted after the ratification of the fourth amendment by most of the older states.[18] It is a matter of common learning that the framers of the

[11] See Missouri cases cited, note 3, *supra,* and also People v. Knopha, 220 Mich. 540, 190 N. W. 731 (1923); State v. Czckay, 218 Mich. 660 (1923); Bowen v. Comm., 199 Ky. 400, 251 S. W. 625 (1923); People v. Flaczinski, 223 Mich. 650, 194 N. W. 566 (1923); Caudill v. Commonwealth, 249 S. W. 1005 (Ky. 1923); People v. Kennedy, 303 Ill. 423 (1921); Blackburn v. Com., 202 Ky. 751, 261 S. W. 277 (1924); State v. Quartier, 236 Pac. 746 (Ore. 1925); Com. v. Intoxicating Liquors, 95 Mass. 52 (1866); State v. Smith, 235 Pac. 273 (Okl. Cr. 1925). In 33 C. M. 676 it is said:

> Where an affidavit, upon which a warrant was issued, contains positive averment of facts justifying the issuance of the warrant, its validity is not affected by proof *aliunde* that the facts therein positively stated were in reality stated on information and belief.

[12] Giles v. United States, note 9, *supra.*

[13] Cf. In re Liquors, 197 N. Y. S. 758 (1923).

[14] Even this statement that he has seen liquors sold seems to be considered as insufficient by Mr. Cornelius, *Op. Cit.* p. 285, and by some courts. See Central Consumers Co. v. James, note 9, *supra.*

[15] Central Consumers Co. v. James, *supra,* note 9.

[16] Some unreported cases in Federal District Courts have gone this far but the general rule even in the Federal Courts is *contra.* See cases collected, Cornelius, *Op. Cit.,* sec. 91.

[17] This amendment was ratified Dec. 15, 1791. See Beard, AMERICAN GOVERNMENT AND POLITICS (2 Ed., 1917) p. 65.

[18] For the various state constitutional provisions with the date of their first

constitution of 1821 copied these provisions almost *verbatim* and intended in so doing to adopt the construction theretofore placed upon them by the federal courts and those of the older commonwealths. It is also generally known that in adopting the fourth amendment Congress and the ratifying legislatures had in mind pre-existing rules of the common law regulating search, seizure, and arrest as those rules had been stated by Lord Camdon in the cases growing out of the "Wilkes incident."[19]

Now it is worthy of note that in the cases mentioned,[20] Lord Camdon, while attacking the practice of issuing general warrants, expressly approved the existing practice of justices of the peace in issuing warrants for the search for stolen goods.[21] It is also to be noted that James Otis, in his famous speech on the "general warrants," which has been called the spark which kindled the flame of the American Revolution, admitted the propriety and legality of warrants issued in the common law form by justices of the peace in larceny cases.[22]

It is clear that the general practise in England for many years prior to the Wilkes cases had been for these warrants to issue upon applications which stated only in general terms the commission of a larceny and that *the affiant believed and had good and probable cause to believe that the goods so stolen were concealed upon the premises described.*[23] Hence it follows that both Lord Camdon and Otis believed that such an affidavit, filed with a justice, gave him sufficient grounds for finding that "probable cause" for the issuance of the warrant existed. It therefore is certain that the framers of the constitution did not mean that the provisions of the fourth amendment should require any other and greater amount of proof than this for the establishment of probable cause. This conclusion is strengthened by the fact that applications in this form were universally held valid by American courts under the very constitutional provisions here under discussion until the enactment of the present prohibition laws in the last decade.[24]

In this connection it may be pointed out that *the fourth amendment and also section II of article 2 of our state constitution place the same*

enactment see Fraenkel, CONCERNING SEARCHES AND SEIZURES, (1921) 34 Harvard Law Rev. 361.

[19] See Weeks v. United States, 232 U. S. 392 (1914).

[20] Entick v. Carrington, 19 How. State Trials 1029 (1765); Leach v. The Kings Messengers, 19 How State Trials 1001 (1765); Wilks v. Wood, 19 How. State Trials 1153 (1763); Wilks v. Halifax, 19 How. State Trials 1805 (1765).

[21] See Entick v. Carrington, *supra*, note 20.

[22] Hart, AMERICAN HISTORY AS TOLD BY CONTEMPORARY, Vol. II, p. 375 (1903).

[23] 2 Hale, P. C., 249.

[24] See e. g. Humes v. Tabor, 1 R. I. 464 (1850).

limitations upon warrants for arrest that they do upon warrants for search. The language of the state constitution in this respect is of particular interest:

> That the people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures and no warrant to search any place *or seize any person* or thing, shall issue without describing the place to be searched *or the person* or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing. (Italics ours.)

The words printed in italics clearly show the application of the section to warrants for arrest. What other kind of warrant could issue to seize a person? What is an unreasonable seizure of the person if it be not an arrest? Here, too, we must look to history for an interpretation of the constitutional language. The general warrants which were denounced by Otis and Camdon and which constituted the evil which the constitutional provisions sought to remedy were in many instances not search warrants at all, but warrants for arrest. Some of the great cases in which the legal principles of the amendment were first laid down contained counts for false imprisonment as well as for trespass *q. c. f.* and *de bonis.*[25] In the light of history as well as of the words of the constitution themselves the application of the section to warrants for arrest is obvious. Yet it is a matter of general knowledge that warrants for arrest have been issued from time immemorial on general allegations of the commission of a crime contained in an affidavit which are substantially the same as those used in an indictment or information.[26] If our courts adopt the federal rule and if they are consistent they will require every complaint filed with a justice for the issuance of a state warrant to contain a full account of all the evidentiary facts just as they will come from the lips of the witness on the trial. Then, too, if the court should so hold and should be consistent it must declare unconstitutional the sections of our statutes which permit the issuance of *capias* on the mere filing of a verified information by the prosecuting attorney.[27]

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[25] See cases cited *supra* note 19.

[26] See Lustig v. People, 18 Colo. 217 (1893).

[27] Section 3849 R. S. Mo. 1919, Section 3851 R. S. Mo. 1919, Section 3760, Section 3761 R. S. Mo. 1919. The later sections apply to prosecutions before justices of the peace. Where the prosecuting attorney files the information on his oath of office no complaint of a private prosecutor need be filed to authorize a warrant to issue. The prosecuting attorney may file such an information verified only on information and belief. State v. Ransberger, 106 Mo. 135 (1892). In many cases it has been held that constitutional provisions worded exactly like those in Missouri, here under consideration, apply equally to warrants for search and warrants for arrest. See e. g. Lustig v. People, *supra,* note 26; Thornberry v.

We turn now to the theoretical objections urged against the present Missouri rule. For convenience we will state the argument more fully than the objectors themselves customarily do, expressing premises which they usually prefer to leave inarticulate.[28] The argument fairly states it as follows: (1) The existence of probable cause must be determined by the judicial officer who issues the warrant, for in so doing he is performing a judicial function which could not be delegated to an executive officer such as the prosecuting attorney without violation of the constitutional principle of separation of powers. (2) The issuing officer cannot determine the existence of probable cause from the affidavit of the prosecuting attorney, since he must make his determination from "legal" evidence before him and that affidavit (a) is based on the statements of others and hence is purely hearsay, and (b) states merely a conclusion of the prosecutor and not ultimate facts.

The argument usually adduced in support of the first proposition, namely that the function of determining probable cause is a judicial one and hence must be performed by a judicial officer, is specious rather than sound. The classification of political activities and their division among the three great departments of government may not be accomplished by any process of *a priore* reasoning nor by the application of metaphysical rules.[29] Legislative, executive, and judicial power are terms of an ever varying meaning which must be defined in each new political situation in the light of history[30] and of present practical necessity.[31] Now, historically considered, we cannot say that the determination of probable cause is a judicial function. In England, from an early date, executive officers issued warrants both for arrest and for search of premises. And this power was expressly upheld by the courts.[31a] Moreover our own court, in a well considered opinion, has held that in so far as preliminary hearings in felony cases are concerned, the determination of probable cause is not a judicial function.[32]

It may be contended, however, that the constitution requires that

State, 3 Tex. App. 36 (1877); State v. Boulter, 5 Wyo. 236, 39 Pac. 883 (1895); State v. Shafer, 26 Mont. 11, 66 Pac. 463 (1901).

[28] The proponents of the federal rule (by which we mean the inferior or harsher federal rule announced in Giles v. United States, *supra,* note 19) usually object to a warrant in the form here used on the ground that it is a conclusion or a mere hearsay statement without fully stating the argument.

[29] Garner, INTRODUCTION TO POLITICAL SCIENCE, (1910) Chap. XIII, THE FEDERALIST No. 46; Duguit, DROIT CONSTITUTIONNEL, p. 369; Woodrow Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, p. 56.

[30] James M. Landis, CONSTITUTIONAL LIMITATIONS ON THE CONGRESSIONAL POWER OF INVESTIGATION, (1926), 40 Harvard Law Review 153, l. c. 156.

[31] United States v. Grimaud, 220 U. S. 506 (1910).

[31a] Cases cited, *supra,* note 20.

probable cause be "supported by oath or affirmation" and that this is equivalent to requiring that it must be determined on the basis of a sworn or affirmed statement. That, therefore, the person making the oath or affirmation may not himself determine probable cause since he cannot determine it on the basis of his own oath. The argument seems somewhat strained and scholastic,[33] yet for the purposes of the present discussion we may admit that it is sound, and that we should therefore concede the first proposition on which the attack on the rule under consideration rests.

In conceding, however, that it is the justice of the peace who must determine the presence of probable cause and (*ex hypothosi*) that he so determine from the affidavit of the prosecuting attorney, we have admitted only one of the premises of the argument against the present rule. It remains for the opponents of that rule to establish that the justice may not lawfully determine probable cause from the evidence furnished by that affidavit. In attempting so to do they insist that the justice must make his determination on the basis of "legal" evidence and that the affidavit of the prosecuting attorney is not legal evidence since it is (a) a mere statement of a conclusion[34] and (b) hearsay.[35] Now ordinarily legal evidence would mean evidence permitted by law[36] and to prove that the affidavit of the prosecuting attorney was not legal evidence, they would have to assert that it was not so permitted which is the very proposition they started out to prove. Hence they fall, of necessity, into a vicious *circulus in probandum.* It is evident, however, that they do not mean to use the expression "legal" evidence in this sense, but rather as denoting evidence which is permitted by those artificial legal rules which grew up in the courts of common law in the regulation of jury trials.[37] Such are the rules forbidding the reception of hearsay and conclusions of witnesses. It is absurd to contend that the fathers in adopting the fourth amendment meant to include therein by implication a requirement that in determining probable cause all of the then existing rules of the common law system of evidence should be ob-

[33] State ex rel. v. Nast, 209 Mo. 708, 108 S. W. 563 (1908).

[33] It is to be remembered that the constitution does not require that the evidence on which probable cause is found be sworn or affirmed evidence. It is believed that the requirement of an oath springs from a very different reason. This requirement is met by the oath of the prosecuting attorney no matter whether in point of fact he or the justice determine probable cause.

[34] See e. g. State v. Lock, *supra.*

[35] See the attacks made on the "Missouri rule" in the cases cited *supra,* note 3.

[36] Note, LAW JOURNAL, May 22, 1926.

[37] Wigmore on Evidence, (2 Ed. 1922) Sections 4 and 4a.

served.[38] If such an implied addition is to be found in the fourth amendment, why not similar ones in the fifth and the fourteenth?[39] If they be present there, no legislative act would be valid which changed the common law principles of evidence in the slightest degree; a proposion whose absurdity is at once apparent.[40] The sounder view is that the constitution did not establish any rules of evidence by which "probable cause" must be determined, and hence the rules in that regard may be modified by the legislature in any manner it sees fit, provided its acts bear a reasonable relation to the ends sought to be attained and are not wanton and arbitrary.

We are now prepared to consider the application to our present problem of the particular rules of evidence which are said to be violated by the acceptance of the affidavit in question as the basis for a search warrant. It is said that the affidavit is in reality a mere hearsay statement on the part of the prosecuting attorney. In form, of course, it is not hearsay,[41] since the prosecutor does not state that he has been informed of law violation on the premises, but states directly that intoxicating liquor is being kept there.[42] If, in reality he has no "direct personal knowledge" of this fact, the objection to his statement as evidence lies in its violation of the requirement of "testimonial knowledge" and not of the hearsay rule.[43] But assuming that the hearsay rule were really involved, it is clear that it can have no proper application here. That rule exists for one purpose and one purpose only—to safeguard the right of cross-examination.[44] In Europe, where the right of cross-examination is of very recent recognition, the rule does not exist. In our system of procedure, where the greatest emphasis is placed on cross-examination as a substantial guarantee of the truth of testimony, we reject a hearsay statement of an absent witness because the real witness—the one who in reality saw the facts in controversy, and whose statement about them is being retold by the witness on the stand, is not subject to be cross-examined. But in a search warrant proceeding the

[38] If so it may well be asked what rules of evidence were incorporated into the constitution? If it be the rules existing at the time this amendment was adopted, it may be said that even in jury trials those rules have in the meantime been completely changed.

[39] Particularly since the case of Gitlow v. New York, 268 U. S. 652 (1924).

[40] If such rules of evidence are to be considered as being protected by the constitution then statutes of which we have many, liberalizing the rules of evidence in criminal cases would all be invalid, a conclusion, which on the face of it, is preposterous.

[41] See the attack made on the Missouri rule in the cases cited note 3, *supra.*

[42] Wigmore, *loc. cit.*, note 42. [43] Wigmore, *Op. Cit.*, section 1361.

[44] Wigmore, *Op. Cit.*, sec. 1362.

defendant, *is not, and in the nature of things cannot be,* present either in person or by counsel and hence no right of cross-examiation can exist. Therefore the hearsay rule, which exists only to safeguard cross-examination, ought not to be applied—*cessante ratione cessat ipsa lex.*

It is also said that the procedure, here under consideration, does violence to the opinion rule—that the statement of the prosecuting attorney is a mere conclusion and hence is not "lawful" evidence. Now if the word "conclusion" is used in the sense in which it is applied in the law of pleading, it is obvious that the statement, here under consideration, is not in any sense a conclusion. Every lawsuit, civil or criminal, may be reduced as a logical argument to the form of a syllogism in which the major premise is a statement of a general rule of law in the form of a universal affirmative proposition, which predicates certain legal consequences upon the existence of certain facts; the minor premise is a statement of facts which asserts that the facts mentioned in the legal major premise exists in the instant case; and the conclusion asserts that therefore the legal consequences, embodied in the major premise, follow in the instant case, *e. g.* in a prosecution for the possession of liquor we may state the argument as follows: (1) all cases in which the defendant has in his possession intoxicating liquor are violations of the prohibition act and must be punished as such: (2) this is a case in which the defendant has in his possession intoxicating liquor. (3) Therefore this is a violation of the prohibition law. Now it is the statement of this last proposition of the syllogism which is condemned in the law of pleading as a conclusion. The pleader is required to state facts and this means that he must state the second or minor premise of the argument. Thus an information which states that the defendant has and possesses intoxicating liquor, *viz.,* whiskey, is universally held to be good.[45] It is therefore obvious that in the sense here referred to, the statement of the prosecuting attorney is not a "mere conclusion."

There is another sense in which the term conclusion is sometimes used and we believe it is in this sense that the proponents of the federal rule employ it here. It is used as synonymous with the expression, "opinion of a witness."[45a] And opinions of witnesses are contrasted (not very logically it is believed) with facts which the witness "knows." It is necessary therefore to determine just what we mean by knowledge.[46]

[45] State v. Gooch, *supra,* note 3.

[45a] See Wigmore, *Op. Cit.,* sections 1917 *et seq.* Even in this sense it is doubtful if the statement, here considered, can really be said to be an "opinion" or conclusion for the prosecuting attorney. Rather it is a simple statement of fact.

[46] In State v. Ransberger, 106 Mo. 135 (1891), (a case involving the kind of oath required to verify an information) Thomas, J. speaking for Division 2 of our

All the facts of external nature, which an individual may know at a given time, may be classified into two groups: (a) there are those physical phenomena which have given direct and immediate sensory stimulation to his nervous system—things which he has seen, felt, heard, tasted, or smelled. His conscious images of these things are percepts and we may call his knowledge of them perceptional knowledge. (b) there are many other things he knows by means of logical inferences drawn from facts known perceptually. For example, the writer has never seen Mr. Coolidge in the White House nor observed him while engaged in the duties of his office. Yet he knows that Mr. Coolidge is President of the United States. This fact he knows because he has inferred it from any other facts sensually perceived, *e. g.*, from state ments in newspapers, books and magazines, from references in speeches made by the President, etc.[47]

Now it is sometimes said that a witness may not testify to inferences he has drawn, but only to facts which he has himself sensually perceived. It is these inferences of the witness which are called conclusions. And the opinion rule is said to preclude his stating them. But this statement is not universally true.[48] Lay witnesses are often, and experts

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Supreme Court discussed at length the meaning of the term knowledge. Dean Wigmore, *Op. Cit.*, Sec. 1919 clearly points out that there can be no scientific distinction between "fact" and "opinion." This is not at all the basis of the so-called "opinion" rule in our law of evidence. Clearly from the point of view of epistomology no such supported distinction can be said to exist. All of our knowledge is knowledge of mental states. We never directly know any "fact" of the outer world. With this *datum* as a starting point some philosophers have held that we can never really know the non-self. But even if we do not go that far it is plain that there is no valid difference between knowledge of sensually perceived fact and knowledge of conceptions inferred from such facts. From the point of view of behavioristic psychology, on the other hand, the supposed distinction is equally illusory. When witness A. tells on the stand that he saw B. strike C., he is merely reacting to a certain sensory stimulus in a way determined by certain connections in his nervous system. When he states that in his opinion Blackacre is worth $90 per acre, he is doing exactly the same thing. In the latter case the nerve centers involved are a little higher and the process of reaction is more complex, that is all. Plainly then, no definite line between "fact" and "opinion" can ever be drawn. The terms are *real variables* to which the courts can and do apply, changing meanings in each case which arises. Perhaps they thus serve a good purpose. Perhaps, as has been suggested by Dean Wigmore, *loc. cit.*, they have only brought confusion into the law of evidence.

[47] Modern science furnishes us with many examples which clearly prove that we know many things which are impossible of direct sensory perception. No one has ever seen the hydrogen atom. It is so small that even the most powerful microscope or ultramicroscope cannot enable us to observe it. Yet we clearly and positively know that it is composed of an electron which revolves about a proton. No one has visited the sun or directly seen the various elements of which its surface is composed. Yet we know just what those elements are. Other examples might be multiplied indefinitely.

[48] As a matter of fact in jury trials every day witnesses are permitted to testify

almost always are permitted to state their conclusions. A comparison of the procedure in French, German, or Italian courts or of that of our own administrative bodies with that of a tribunal in which a jury is habitually employed shows that the reason for the rule is the assumed inability of untrained jurors to properly weigh and evaluate the opinions of witnesses and to distinguish opinions from primary evidentiary facts. It is also to be noted that exceptions[49] to the rule are recognized whenever there is a necessity from the circumstances of the case so to do and whenever some special guarantee of the witness' trustworthiness exists.[50]

So closely connected with the hearsay and opinion rules that it is often confused with them is the rule that a witness must possess testimonial knowledge.[51] Ordinarily, in the course of a jury trial, he is not permitted to tell of matters unless he has gained his knowledge of them through direct personal sensual observation. Even when stating a conclusion, under an exception to the opinion rule, he must base his conclusion either upon data gained through his own observation or on data which have been furnished the tribunal in the testimony of witnesses who are themselves observers of the facts concerning which they have testified.[52] Yet this rule like the others mentioned is by no means universal. In many instances witnesses are permitted to state conclusions which rest upon primary evidential facts not in evidence.[53] Here, too, the exceptions rest on the ground of necessity or convenience, and of the existence of a substantial guarantee of trustworthiness.[54]

It is believed that an examination of the practical side of the question now under discussion will demonstrate that in the case of the affidavit of the prosecuting attorney both the necessity and the guarantee of trustworthiness, mentioned above, exist.[55] It is therefore believed that

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to facts which they have inferred from other sensually perceived facts even without stating the data on which their inferences are based, e. g. when a witness states the speed of an automobile, when he says from the taste of liquor that it is whiskey, etc., or when he gives an opinion as to value or sanity.

[49] Experts are generally allowed to state their conclusions. It is submitted that this is because the jury are considered incapable of drawing the correct scientific inferences from the facts and also because there is a substantial guarantee of the trustworthiness of the testimony of the experts.

[50] Wigmore, *Op. Cit.*, Sections 1923, 1924.

[51] Wigmore, *Op. Cit.*, Sec. 650 *et seq.*

[52] Chouteau v. Searcy, 8 Mo. 736 (1844); Cf. Bushel's case, 6 How. State Trials 999, l. c. 1003 (1670); Ann. Y. B. 23 Ass. Pl. 11, and Y. B. 20 H. VI 20; for modern cases see Gunn v. State, 78 Fla. 599, 83 So. 511 (1919); Frederick v. Brainard, 32 Idaho 296, 182 Pac. 351 (1919).

[53] See Wigmore *loc. cit.*

[54] If the various exceptions to the rule, listed by Wigmore, *loc. cit.*, note 53, are noted these two reasons will be seen to apply to all of them.

[55] As will be shown in the later portion of this paper the other evidence, which

none of the three rules of evidence upon which the proponents of the federal rule rely in their attack on the present Missouri rule has any application to our problem. It is submitted that on purely technical grounds the attack on the present rule fails, and that the whole question becomes, as indeed most constitutional questions become in the long run, one of reasonableness—whether or not the ends of legislative action are proper and the means employed are fairly calculated to effectuate those ends without unduly injuring other interests more socially important than those which are sought to be protected.[58]

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might be used as a basis for the issuance of a warrant, is unavailable and the forces of public opinion exerted on the prosecutor form a sufficient guarantee that his actions will be careful and reasonable.

[58] A learned friend has pointed out that this reasoning amounts to an assertion of the old proposition that the end justifies the means. We might well answer his objections by quoting the often repeated language of a great Missouri philosopher "if the end doesn't justify the means it is hard to imagine what can." As a matter of fact in law, and in particular in constitutional law, the end and the end alone must justify each rule. With the exception of a few evolutionary positivists, modern ethical thinkers are agreed that we cannot judge any act to be right or wrong save as it tends towards or away from some ideal end which we call the good. As to the nature of the greatest or highest good they may dispute but as to the fact that it is the end of all action there is no argument. Friederich Paulsen, SYSTEM OF ETHICS, (1898) Bk. II, Chap 1. See the following statement:

> Indeed I do not see how teleological ethics can deny the proposition (that the end justifies the means). But I see no reason why it should wish to deny it. When rightly understood the proposition is harmless and necessary. When misconstrued, of course, it becomes absurd and damnable.

Thilly's American Edition, p. 233.
The state, like all other social organizations and agencies, is merely a means toward an end. In a democracy we conceive of that end as the good of the individual citizens—the members of society. We have learned from the positivistic jurists that law is merely a generalized statement by which we attempt to describe certain past phenomenon of behavior—the actions of judges and other state officers under given circumstances and conditions and upon which we attempt with some degree of probable success to forecast the future action of the same or other state officials under similar circumstances. See Walter Wheeler Cook, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1923). 33 Yale Law Journal 45. SCIENTIFIC METHOD AND THE LAW, American Bar Association Journal, July, 1927. But we know that law is constantly undergoing an evolution. Existing rules of law differ materially from the rules of fifty years ago. Now this legal evolution differs in one remarkable respect from biological evolution. It is self-conscious and self-directed. Rules of law are changed by the conscious volitional activity of men—judges, legislators and the like. But if we consciously control the change and evolution of law—if we will it to be what it is—we can classify existing rules as good or bad. And such a judgment passed upon rules of law means that we evaluate them in accordance with their tendency toward or away from an ideal social good. This is the position which the sociological jurists of today avoidly assume. Rules of law they tell us are merely means with which we seek the ends of social control. The task of the lawyer is one of social engineering. He must weigh the conflicting interests in every legal situation and protect by legal rules those which are most important. See Roscoe Pound, INTRODUCTION TO LEGAL PHILOSOPHY,

Turning therefore from the technical and theoretical to the practical and pragmatic aspects of the question, let us inquire what are the actual results of the federal rule as it is applied in the courts of the national government and what are the actual results of the Missouri rule as applied by our state officers.[57] In a former article in the ST. LOUIS LAW REVIEW,[58] the writer has had occasion to point out the marked difference which must be noted between the enforcement of social and economic regulatory statutes such as the prohibition law, the narcotic law, laws against gambling, pure food and drug laws, anti-trust laws, factory inspection laws, child labor laws, minimum wage laws and the like, on the one hand, and the traditional type of criminal law, as *e. g.*, the law of murder, rape, larceny, robbery, arson, and the like on the other. In the beginning of every system of jurisprudence the law of crimes and the law of torts are scarcely distinguishable.[59] Crimes are injuries to the individual members of the community and are punished by the direct action of the wronged party in accordance with legal restrictions.[60] In

(1922) Chap. II. Such a view of the state and of law are in line with the more progressive trend in constitutional interpretation such as is to be seen in the opinions of Mr. Justice Holmes.

[57] In discussing the practical working of the two rules we have relied upon information furnished by federal and state prosecutors, sheriffs, police officers, justices of the peace, judges, defending lawyers, and others who are in close touch with the administration of criminal justice. A questionnaire, covering certain aspects of the present problem together with others in the general field of search and seizure, was sent to all of the prosecuting attorneys of Missouri. Personal interviews were had with federal and state officers and court records were examined. We have placed some reliance on the data gathered in the course of a similar study and published in an interesting and instructive "Comment" in 36 Yale Law Journal 988 (1927).

[58] Ely, FEDERAL CONSTITUTIONAL LIMITATIONS ON SEARCH BY STATE AUTHORITY, (1927) 12 St. Louis Law Review 159.

[59] In addition to these tort-crimes, which are the real basis of our modern law of crimes, there were offenses against the tribal gods which form an exception to the general rule. These offenses were punished by the action of the tribe as a whole or by the religious cast. But they are apart from the general evolution of the criminal law. There are also certain exceptions in regard to offenses against the king as an individual, such as the game laws in early England. Then there were certain social and economic laws which bear a slight resemblance to our modern legislation in these fields, e. g., the laws governing monopolies in food stuffs. Generally speaking these laws were made for the benefit of a certain small social class as the members of a trade guild or the like and these persons became the prosecutors who could be relied upon to commence and push a prosecution and thus make enforcement possible. None of these exceptions is, however, of any great importance.

[60] The early law of the Hebrew people furnishes a good illustration of this phenomenon. There are traces of the institution of blood vengeance even in their earliest law code, the "Book of the Covenant." See Ex. 21, 12-15 (homocide), Ex. 21, 16 (larceny), Ex. 21, 28-29 (negligent keeping of a vicious beast). In cases of assault this blood vengeance could be avoided by the payment of a sum of money like the Wergild of our Anglo-Saxon ancestors. Ex. 21, 18-19. Even the code of Deuteronomy, adapted as it was to a higher state of civiliza-

our own law this system of private vengeance gradually gave way to one of prosecution in the king's courts but even here the prosecution was initiated by the act of the wronged individual and the case largely under his control.[61] All of the traditional forms of our criminal procedure were developed under such a system and presuppose the existence of a "prosecuting witness" or "prosecutor," who is the person wronged by the defendant's criminal act and who will report the matter to the officers of the law, set in motion the state's machinery,[62] and furnish evidence on which the defendant may be convicted. Out of this situation has come our conception of criminal procedure as a duel between the prosecution (in interest usually identified with some particular prosecuting witness and represented by the prosecuting attorney) and the defendant in which the court acts as a sort of impartial referee who blows the opening whistle, sees that the game is played according to the rules, and penalizes either party who violates them.[63]

Unfortunate as this sporting attitude in regard to criminal jurisprudence is in any case, it had considerable justification in the case of

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tion, did not do away with the private blood vengeance (legal self-help) but only limited it by such institutions as that of the cities of refuge. Deut. 19, 1-14. In our own jurisprudence the law of crimes began as a limitation of the right or practise of blood vengeance. Out of this after the Norman conquest came the trial by battle—later the trial by a petit jury, after an indictment returned by a grand inquest. But even here as has been said the burden of commencing and carrying on the prosecution was on the injured party. See James B. Thayer, THE OLDER MODES OF TRIAL, (1891) 5 Har. Law. Rev. 45.

[61] He (the private prosecutor) can and does manage the whole matter as he might manage any other action at law; he employs a solicitor, who may or may not instruct counsel, and who takes proofs of witness, brings them before the committing magistrate, and the grand jury, instructs counsel at the trial, and, in a word, manages the whole of the proceedings just as he would in a civil cause. . . . Every private person has exactly the same right to institute any criminal prosecution as the Attorney General or anyone else. Sir James F. Stephen, HISTORY OF THE CRIMINAL LAW, (1883) Vol. I, p. 493.

[62] Even our Missouri criminal procedure is based on this idea very largely. See the following statutes. Section 3812 provides for the commencement of felony prosecutions (other than by indictment) by the filing of a "complaint" before a justice or other committing magistrate. From the language of the section this is supposed to be filed by a witness—i. e., a private party who has been injured. As a matter of fact it is now pretty generally filed by the prosecuting attorney or by the police. This change has come as a matter of practice without statutory sanction. Section 3818 provides for a preliminary hearing (under section 3848 this is necessary in every felony case before information can be filed) and further provides that the "complainant" shall be examined by the magistrate. Sections 4174 and 4175 make this complainant liable for costs where the defendant is not bound over or where no information is filed against him. Section 4173, however, exempts a public officer who has filed a complaint from this liability.

[63] See a very interesting article in which this conception of criminal procedure is discussed. Rollin M. Perkin, THE GREAT AMERICAN GAME, (1927) Harper's Magazine, Nov., 1927, p. 750.

the older criminal law.[64] But we have today to deal with an entirely different type of criminal statute. In the society which has arisen since the industrial revolution, with its minute division of labor, its intricate interdependence of each individual upon every other individual in the community,[65] its urbanization of population,[66] and its utilization through scientific research of physical forces of unheard of strength and potency,[67] social and economic relationships which were formerly comparatively simple have become tremendously delicate and complex. It is obvious that if civilization is to continue to exist at all these relationships must be regulated by the power of the state, *e. g.*, in a simple rural society where the milk supply of the family comes from their own cow or one of their near neighbors, no sanitary regulations in regard to the methods of milking etc., are needed.[68] But where

[64] In general our legal procedure in both civil and criminal trials is controversial in its nature. Where the offense is in reality one against a private person such a system works fairly well and appeals to the national psychology. Yet even here it has been carried so far as to make some of our criminal trials farsical. In truth even the old traditional crimes are being committed in new ways. Modern scientific devices used by criminals make it impossible for the wronged party to himself gain evidence sufficient to convict anyone. The criminal who today uses high-powered automobiles, high explosives, firearms of the latest type, acetaline torches for opening safes, disease germs instead of poison, and the like, must be caught by specially trained police officers who themselves made use of the latest scientific discoveries. In other words the detection of crime has become a specialized business for experts as indeed almost every line of work has become in these days of division of labor.

[65] For the economic effect of the industrial revolution generally see Schapiro, MODERN AND CONTEMPORARY EUROPEAN HISTORY, (1918) Chap.3; Hays, POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE, (1917) p. 75 *et seq.*; Mantoux, LA REVOLUTION INDUSTRIELLE AU SIECLE XVII, 1906). For the causes and effects of the division of labor see Veblen, THE THEORY OF BUSINESS ENTERPRISES (1904), p. 4 *et seq.*

[66] The extent of this urbanization in the United States is shown by the following figures as to the percentage of rural population taken from the United States Census:

1880	71.4
1900	60.0
1920	48.6

These figures are taken from Mr. Mark Sullivan's, HISTORY OF OUR TIMES (1927), Vol. II, p. 198.

[67] The effect of these scientific discoveries on crime is pointed out by Judge White in his paper on the "crime wave" read before the October, 1927, meeting of the Missouri Bar Association. See John Turner White, THE CAUSE OF THE CRIME WAVE, (1927) 13 American Bar Association Journal 726.

[68] In a simple community, like the one supposed, the individual purchaser will generally know all about the sanitary conditions existing at the "plant" of the seller. Competition will exist and he can demand of the seller satisfactory sanitary conditions, threatening, if they are not maintained he will go to another seller. But in a complex society, the buyer cannot have any personal knowledge at all of the conditions in the seller's plant. Furthermore a monopoly will probably exist which would prevent the buyer from exerting any effectual economic pressure on the seller.

a single great pasteurization plant takes the milk of a hundred producers and sells it to the thousands of families clustered together in a great city, a minute state regulation of the whole process of production and distribution becomes a pressing necessity. It is out of these conditions of modern industrial and urban society that the new type of criminal law has evolved and the evolution is a necessary one.

Now it must be noted that a violation of this new type of law differs from the older kind of crime in that it is an injury to society as a whole but is generally unattended with any particular injury to a definite person.[69] In other words there is no longer any "prosecuting witness" or prosecutor to commence the action of the state, to furnish evidence, and to see that the law is enforced. The prohibition law, which is at present the most important of such social and economic regulatory legislation, furnishes the best example of this fact. When Smith sells Jones a drink of whiskey, the law has been violated. The violation of the law involves social and economic consequences of the greatest practical consequence, yet no one definite individual has been injured. The only persons who have, ordinarily, any knowledge of the transaction are Smith and Jones themselves. Yet, clearly, neither of them can be expected to start a prosecution themselves or to give information to the state officers which will lead them to start a prosecution. As a matter of fact even were Jones brought before a grand jury and asked about the transaction he would commit perjury rather than testify against Smith whom he considers in the light of a friend and benefactor. It is obvious that the state officers themselves, through their own unaided efforts, must find out who is violating the law and must unearth sufficient evidence to secure convictions. Thus it is seen that the old conception of criminal procedure as a duel between the state and the defendant breaks down and a new conception of that procedure as an impartial investigation on the part of the state to determine the true facts of the case and apply proper remedial action thereto takes its place.[70]

These conditions effecting the new criminal law have certain important consequences in connection with the use of search warrants. In the first place, *the use of search and seizure by government officers as an instrumentality for the enforcement of all social and economic legis-*

[69] Sometimes there is a person who is injured particularly by the violation of the statute, but he is not in an economic position to complain, e. g., where a minimum wage act prescribes a given scale of wages and an employer and employee contract for a lower scale. Economic pressure which is stronger than the law of the state prohibits the wage earner from complaining.

[70] See the address of the writer before the Missouri Bar Association, report of the 1924 meeting, p. 200.

lation is absolutely necessary. Since, as we have seen, the sole initiative in the inception of prosecutions must be that of the state officers unaided by private citizens, they must employ some means of gaining evidence upon which they can proceed. There are only two ways of getting this evidence open to them (a) the use of paid informers or "under-cover" agents and (b) the search of private premises to gain tangible, material evidence of law violations. Even when under-cover agents are used searches are generally necessary to secure evidence corroborative of the testimony of these persons. The conclusions of the writer, based upon his own experience as a prosecutor, are in this respect borne out by the statements of a large number of state and federal prosecuting officers interviewed concerning this question.[71] In the opinion of them all it is absolutely impossible to make any attempt at all to enforce either a prohibition law, an anti-narcotic law, or any other similar statute, unless great freedom of search and seizure is allowed.

In the second place it is clear that *the testimony of private individuals cannot ordinarily be secured as a basis for the issuance of a search warrant.*[72] The same considerations discussed above are here applicable. The only persons who have any knowledge which would enable them to be witnesses are those who are either themselves involved in the crime or consider themselves benefited by its commission. Hence they will not only fail to offer themselves as witnesses, but in those rare instances in which their names can be learned by the prosecuting officer, and they are subpoenaed, they will commit perjury rather than offer evidence for the state. Even persons not directly concerned will universally refuse to give information to the officers of the state unless they are first assured that they will not be required to appear in court and that their names will not be disclosed. It is useless to discuss the ethics of the situation—we are here dealing with a fundamental trait of race psychology. We are merely stating a fact for the truth of which every prosecuting attorney, sheriff, and police officer in the state can vouch.

In addition it must be remembered that if "raids" are to be successful they must be made with the greatest of secrecy and dispatch. To summon into the justice court, in the search warrant proceeding, a number

[71] Out of between two and three hundred liquor cases in Marion County, only some five or six were made on the testimony of private individuals, and out of these only one resulted in a substantial conviction. Similar conditions exist in many other counties according to reports from their prosecuting attorneys.

[72] The testimony of Missouri prosecuting attorneys on this matter is borne out by the experience in New York, see Comment, 36 YALE LAW JOURNAL 988 cited *supra,* and in Michigan, Waite, THE CONTROL OF CRIME, ATLANTIC MONTHLY, February, 1926, p. 214.

of witnesses, many of them hostile, would be to foredoom the whole attempt to failure.

Now it is obvious, as indeed the proponents of the federal rule themselves assert, that the state officers cannot themselves have direct and personal knowledge of the sale of liquor or other similar law violations. What is the result? If so-called "actual personal knowledge" be required as the basis for the issuance of a search warrant, since the ordinary officers cannot in the nature of things have such knowledge and the knowledge which private individuals do have is unavailable, we must make use of persons who, while officers, yet work secretly and by undercover methods to discover the identity of law violators. This conclusion reached by logical inference from the nature of the situation is borne out by observation of the facts. The federal government, which of course operates under the federal rule, never uses a search warrant in a liquor or narcotic case unless it is obtained by an undercover agent who has first made a "buy" from the prospective defendant.[73] The adoption of the federal rule by the state would therefore mean either (a) that the use of search warrants in liquor, gambling, narcotic, pure food and similar cases must be discontinued with a consequent complete cessation of all attempt to enforce these laws; or (b) the creation of a secret police. To the writer the latter contingency seems both impractical and socially undesirable.

Such is the practical working of the federal rule. How is the Missouri rule working? Here again we base our conclusions upon interviews with a large number of prosecutors and peace officers. We take as an example the enforcement of the state prohibition act, considering it as typical of all similar social and economic legislation. Every day many reports of violations of the act in the county are brought to the prosecuting attorney, the sheriff, and the police. The latter refer these reports to the prosecutor. Sometimes the complainants remain anonymous. To such reports little credence is given. In most instances they consent to make known their identity in return for a promise from the prosecutor that their names will not be disclosed in court. Rarely, if ever, is a warrant issued on a single complaint. But the prosecutor takes the total of complaints made against each individual and weighing all the evidence carefully finally determines when it amounts to a proof of probable guilt. When he is satisfied that the prospective defendant is probably violating the law he issues the warrant.[74]

[73] The writer is informed by federal prohibition officials that no warrants are ever issued in liquor cases until "undercover" men have first visited the place and either made a buy or seen liquor served in their presence.

[74] The process to which this evidence is subjected is much like that which the

Now the opponents of the present Missouri rule will immediately say that this is lodging too great a power in the hands of the prosecutor. In answer we may point out that by a law whose wisdom no one disputes the prosecuting attorney has the power to charge any citizen by an information with the commission of any offense from murder or treason down to the most petty misdemeanor.[75] If he can be trusted with the power to place a citizen in jail, awaiting trial, cannot he be trusted with the power to order the citizen's home or place of business searched, an act which can at most occasion the person involved a merely temporary inconvenience,[76] but the real safeguard against abuse of this power lies in the fact that the prosecuting attorney is an elected official.

He realizes that if he exercises his power in a rash, imprudent, or tyrannical manner his hopes of re-election vanish. Furthermore, peace officers hesitate to serve warrants unless they have at least a fair chance of success, since too frequent failures lead to public suspicion that someone has "tipped off" the raids. Thus public opinion acting on the prosecutor directly and through the medium of the peace officers with

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historian uses in dealing with his "sources." All evidence, rumors, hearsay, reports of police officers, the general past reputation of the owner of a place and of the place itself, the character of the persons who frequent it are all considered and when on the basis of all of this testimony it seems probable that liquor is being kept on the premises an application is filed and the warrant issued. Most of the individual items of this evidence violate the rules established for jury trials. But the prosecutor, like the historian in his field, is able to take a mass of such evidence and sifting it thoroughly and letting one fact help out another and one witness offset what others have said to arrive at a working approximation of the facts.

[75] This analogy was stressed by Higbee, C. in his very able opinion in State v. Halbrook, *supra,* note 3, some paragraphs of which deserve quotation:

> Under the constitution and the statute, the prosecuting attorney without having personal knowledge of the facts, may, by information, initiate criminal proceeding against any person, even for a nonbailable offense, subject to the right of the accused to a preliminary examination. . . .
>
> If the unsupported information of the prosecuting attorney is deemed probable cause for the arrest and incarceration of persons accused by him of a felony, it seems unreasonable that, if this public official, charged with the enforcement of the law for the protection of society, should, while acting under his official oath and in the exercise of his discretion, file evidence of unlawful manufacture, possession or transportation of intoxicating liquors, that process should be refused unless and until he should produce further proofs in support of such petition.

In answer to this it is said that no constitutional provision limits the issuance for arrest while there is such a provision in the case of search warrants. But this is not true. See the cases cited note 27, *supra,* and the text in connection therewith. It is also said that the accused in a felony case has the right to a preliminary examination. But even if he is given one and discharged by the justice, the prosecutor may still file his information whereupon a bench warrant must issue for the arrest and imprisonment of the offender. See section 3848, R. S. Mo. 1919.

whom he has to work, forces him to employ the greatest caution in the issuance of applications for warrants.

After all, the final responsibility, in point of fact, for the issuance of warrants must be placed on some one. It may be placed on the justice of the peace or it may be placed on the prosecutor. Or, as in our system, it may rest in a certain degree on both of them but chiefly on the prosecutor. Generally speaking the justices are men untrained in the law and often with but slight general education. In most instances the prosecutors are men of considerable legal education and experience.[77] The prosecutor is generally far more open to the influence of the right kind of public opinion than the justice. Certainly it is as safe to lodge these powers in the hands of the former, as in the latter. At best this is a question of policy for the legislature. The discretion of that body ought not to be hampered by the adoption by the courts of a narrow rule of constitutional interpretation.

The present Missouri rule has, in the opinion of a vast majority of the prosecutors of the state, done much toward bringing about consistence and stability in our criminal procedure.[78] The adoption of the federal rule would not only create the utmost confusion, but would make it practically impossible to enforce the prohibition law, laws against gambling, pure food laws and other similar statutes. It is therefore submitted that both on technical and pragmatic grounds the present rule is the correct one and that it ought not to be disturbed by the courts.

Hannibal, Missouri.

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[76] If the searching officers needlessly injure or destroy the defendant's property he will have his action against them even though their wararnts were legal.

[77] Sometimes this is not true, of course. Missouri Crime Survey, (1926) p. 131, *et seq.* But the remedy for this is not to curtail the powers of the office, but to raise the requirements for election thereto and perhaps the compensation of the incumbents. See Missouri Crime Survey, *loc. cit.*, 78. 75 per cent. of the prosecutors who answered the questionnaire stated that the number of motions to suppress evidence had been greatly diminished since the law was settled on this point. Of the search and seizure which reach the Supreme Court and Courts of Appeal an increasingly large portion are being affirmed each year.

[78] The writer desires to take this opportunity of thanking Mr. Walter G. Stillwell, Assistant Prosecuting Attorney of Marion County, and one of the editors of this Review for his able assistance in the preparation of the questionnaire referred to and for other help rendered in the preparation of this article. Thanks are also due to the prosecutors and others who have furnished information used herein.