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the original divorce proceeding, the husband might induce the court to exercise its discretion, to reinvestigate the facts *ex mero motu*, and to declare the original divorce void by reason of the fraud. Clearly the plaintiff is in need of judicial aid and his "hands are tied."<sup>26</sup>

HENRY M. WHITESIDES

### Search Warrants—Requisites for a Valid Warrant to Search for Unlawfully Possessed Liquor

In a recent decision of the North Carolina Supreme Court, *State v. White*,<sup>1</sup> it was held that a search warrant, obtained from a justice of the peace by a constable upon the latter's oral testimony under oath that he had reason to believe that defendant had intoxicating liquor in her home, and giving a description thereof, was invalid and the evidence obtained under the warrant incompetent because the requisite provisions of G. S. § 15-27<sup>2</sup> had not been complied with. Specifically the court found the warrant defective because the issuing officer had not required the constable to sign an affidavit under oath to support the issuance of the warrant as required by G. S. § 15-27,<sup>3</sup> which provides as follows:

Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or any evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action.

The application of this statute to determine the validity of a warrant authorizing a search for unlawfully possessed liquor conflicts with several earlier decisions of the Supreme Court. In *State v. McLamb*,<sup>4</sup> in dismissing defendant's contention that the trial court erred in admitting

<sup>26</sup> In *Patrick v. Patrick*, 245 N. C. 195, 95 S. E. 2d 585 (1956), which was decided after this case, the court allowed a party not served but who was interested at the time of the divorce to attack the prior divorce. It was clear that the party making the attack was an interested party at the time of the divorce and that the point upon which he based his attack had not been part of the controversy and adjudicated at the previous trial.

<sup>1</sup> 244 N. C. 73 (1956).

<sup>2</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>3</sup> *Ibid.*

<sup>4</sup> 235 N. C. 251, 69 S. E. 2d 537 (1952).

evidence showing him to have been in unlawful possession of liquor and obtained under a search warrant, objected to as invalid under G. S. § 15-27<sup>5</sup> the court said “. . . the provisions of G. S. § 18-13 are applicable rather than G. S. § 15-27.”<sup>6</sup> In *State v. Brady*,<sup>7</sup> which involved the validity of a search warrant issued for the same purpose, the *McLamb* case was cited as authority for holding that G. S. § 18-13<sup>8</sup> rather than G. S. § 15-27<sup>9</sup> governs the issuance of search warrants for intoxicating liquors.

The provisions of G. S. § 18-13<sup>10</sup> pertinent here are as follows:

Search warrants; disposal of liquor seized.—Upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; . . .

This note is an attempt to analyze the conflict between the *White* case and the *McLamb* and *Brady* cases and to consider what result might have been reached in the *White* case had the court considered its prior rulings that G. S. § 18-13<sup>11</sup> controls the legal requisites for the valid issuance of a warrant for the search for unlawful liquor.

Other North Carolina decisions indicate that both statutes apply with equal force to the issuance of such warrants. In *State v. Rhodes*,<sup>12</sup> the court gave no indication that one statute prevails over the other in holding that the presumption of proper issuance of a search warrant arose when the warrant and accompanying affidavit appeared on their faces to comply with the requirements of both statutes. In *State v. Harrison*,<sup>13</sup> and *State v. McMilliam*,<sup>14</sup> the latter being cited by the court in support of its holding in the *White* case, and both involving the legal requirements for valid issuance of warrants for the search for unlaw-

<sup>5</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>6</sup> *State v. McLamb*, 235 N. C. 251, 255, 69 S. E. 2d 537, 540 (1952).

<sup>7</sup> 238 N. C. 404, 78 S. E. 2d 126 (1953). See also *State v. Brady*, 238 N. C. 407, 78 S. E. 2d 129 (1953) which reiterates the rule that the subject of the requirements of the law in the issuance of search warrants for intoxicating liquors is controlled by N. C. GEN. STAT. § 18-13 (1953) rather than by N. C. GEN. STAT. § 15-27 (1953).

<sup>8</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>9</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>10</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>11</sup> *Ibid.*

<sup>12</sup> 233 N. C. 453, 64 S. E. 2d 287 (1951).

<sup>13</sup> 239 N. C. 659, 80 S. E. 2d 481 (1954).

<sup>14</sup> 243 N. C. 771, 92 S. E. 2d 202 (1956).

ful liquor, G. S. § 15-27<sup>15</sup> is cited as to the incompetency of evidence obtained under an illegal warrant; yet G. S. § 18-13<sup>16</sup> is given equal emphasis in each case. *State v. Rainey*<sup>17</sup> is of the same effect holding that a search warrant was valid as the issuance fulfilled "the requirements of the controlling statutes. G. S. § 18-13 and G. S. § 15-27 as amended."<sup>18</sup>

It has been observed that G. S. § 15-27<sup>19</sup> is a restrictive statute, general in nature and applying generally to the issuance of search warrants. On the other hand G. S. § 18-13<sup>20</sup> is a special enabling statute applying only to those warrants authorizing searches for unlawful liquor. It is a general rule of statutory construction that statutes should be read together and harmonized where possible; however if there is any necessary repugnancy between them, the special statute will ordinarily prevail over the general statute, in the absence of a contrary legislative intent.<sup>21</sup> The question then arises: Is there a necessary repugnancy between the two statutes?

The proviso to G. S. § 15-27,<sup>22</sup> which was added to the statute in 1951, brought the evidentiary rule of exclusion into the law of North Carolina. Although G. S. § 18-13<sup>23</sup> contains no such provision and although the exclusion rule is not required by due process under the Fourteenth Amendment to the Constitution of the United States<sup>24</sup> or by the North Carolina Constitution,<sup>25</sup> the court has uniformly applied that rule in cases involving searches for unlawful liquor.<sup>26</sup> Thus, the court has apparently harmonized the two statutes at least to this extent, notwithstanding the *Brady* and *McLamb* decisions, in neither of which was the applicability of the exclusion rule to liquor warrant cases questioned.

The sole possibility of the existence of a repugnancy between the two statutes lies in the fact that while G. S. § 15-27<sup>27</sup> expressly requires ". . . the complainant or other person to sign an affidavit under oath. . .,"<sup>28</sup> G. S. § 18-13<sup>29</sup> is susceptible to an interpretation that a law officer is not so required, due to the uncertain use of the correlative *or* in the opening phrase of its first sentence. If the words *filing of* are not carried over by the correlative to *information furnished under oath by an*

<sup>15</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>16</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>17</sup> 236 N. C. 738, 74 S. E. 2d 39 (1953).

<sup>18</sup> *Id.* at 740, 74 S. E. 2d 39, 40 (1953).

<sup>19</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>20</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>21</sup> 82 C. J. S., *Statutes* § 369 (1953).

<sup>22</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>23</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>24</sup> *Wolf v. Colorado*, 338 U. S. 25 (1949).

<sup>25</sup> N. C. CONST. art. I, § 15.

<sup>26</sup> *State v. Rhodes*, 233 N. C. 453, 64 S. E. 2d 287 (1951), *State v. Harrison*, 239 N. C. 659, 80 S. E. 2d 481 (1954), *State v. McMilliam*, 243 N. C. 771, 92 S. E. 2d 202 (1956).

<sup>27</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>28</sup> *Ibid.*

<sup>29</sup> N. C. GEN. STAT. § 18-13 (1953).

officer charged with execution of the law, then G. S. § 18-13<sup>30</sup> would logically be construed as requiring only oral information of the procuring officer for a valid issuance of a liquor warrant. If this be a proper interpretation of G. S. § 18-13<sup>31</sup> and if that statute be the controlling statute, then the decision in the *White* case would obviously be incorrect; for "(I)n the absence of a constitutional or statutory provision requiring the showing of probable cause to be by affidavit, its existence may be shown either by affidavit or by sworn testimony."<sup>32</sup>

However, the writer has found no case in which it was urged that G. S. § 18-13<sup>33</sup> does not require an affidavit under oath from the procuring officer. Indeed in the state's appellate brief in the *McLamb* case, the Attorney-General construed that statute as reading in effect: "Upon the filing of a complaint under oath by . . . an officer charged with execution of the law. . . ." <sup>34</sup> Further the court, in the *McLamb* case, tested the validity of the affidavit in question, signed under oath by a law officer, by the provisions of G. S. § 18-13,<sup>35</sup> and held that the affidavit met the requirements of that statute.

The general proposition of the *McLamb* and *Brady* cases that G. S. § 18-13<sup>36</sup> only controls the legal requisites for valid issuance of liquor search warrants must be viewed with suspicion. Due to the brevity and generality of the discussion in each case on this question, it is difficult to determine the true bases of those decisions for the purpose of ascertaining their precedent value.

If, as is indicated by North Carolina case law, the 1951 proviso to G. S. § 15-27<sup>37</sup> applies to searches for unlawful liquor, then it is quite probable that the affidavit requirement of that statute would be carried over also into the area of searches for unlawful liquor even if G. S. § 18-13<sup>38</sup> does not of itself require such affidavit. This conclusion would seem to find support in the fact that the *Harrison*, *McMilliam* and *White* cases were all decided subsequent to the *McLamb* and *Brady* decisions.

Notwithstanding that the *White* case is probably in accord with the better reasoning, it is unfortunate that the court in that case failed to comment upon the *McLamb* and *Brady* cases and to explain the relationship between the two statutes compared here.

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> 79 C. J. S., *Searches and Seizures* § 74 (1952). Where the statute provides that issuance can be supported by probable cause based on examination under oath, sworn oral testimony is sufficient; no written affidavit is required. *Bergeman v. State*, 189 Wis. 615, 208 N. W. 470 (1926), *State v. Baltes*, 183 Wis. 545, 198 N. W. 282 (1924).

<sup>33</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>34</sup> Compare with express wording of N. C. GEN. STAT. § 18-13 (1953).

<sup>35</sup> N. C. GEN. STAT. § 18-13 (1953).

<sup>36</sup> *Ibid.*

<sup>37</sup> N. C. GEN. STAT. § 15-27 (1953).

<sup>38</sup> N. C. GEN. STAT. § 18-13 (1953).