
3-1930

Criminal Law-Search and Seizure-Consent

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Recommended Citation

(1930) "Criminal Law-Search and Seizure-Consent," *Indiana Law Journal*: Vol. 5 : Iss. 6 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ilj/vol5/iss6/8>

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CRIMINAL LAW—SEARCH AND SEIZURE—CONSENT—Officers sent to search D.'s home for intoxicating liquor read search warrant to D.'s wife, who said "COME RIGHT IN. You are welcome to search here. You will not find anything." Search warrant invalid. HELD: Such language did not constitute an invitation to search, nor a waiver of D.'s constitutional right against unlawful search and seizure. *State v. Connor*, 167 N. E. 545. Case is in accord with *Meno v. State*, 197 Ind. 16, in holding that one acquiescing to search under a warrant is merely yielding to legal coercion, resistance to which is an offense against the state, and does not thereby consent to the search. Accord: *State v. Owens*, 259 S. W. 100 (Ky.); *State v. Lock*, 259 S. W. 116 (Mo.); *Hampden v. State*, 252 S. W. 1007 (Tenn).

Failure to object to officers' search held not consent in *U. S. v. Olmstead*, 7 Fed. (2nd) 760, and yielding to a show of force is not consent, *Amos v. U. S.*, 255 U. S. 313; but see *Gallendon v. U. S.*, 5 Fed. (2nd) 673, assent under a threat to procure a search warrant held good consent. Owner of property, in reply to a show of a search warrant said "All right. Go ahead. You won't find anything." Held to constitute waiver as a matter of law. *State v. Uotila*, 71 Mont. 351. Accord, *Gray v. Commonwealth*, 749 S. W. 769; *Smith v. McDuffee*, 72 Ore. 286; *State v. Luna*, 266 S. W. 755 (Mo.). Perhaps the best rule is, where there is a conflict of facts as to alleged waiver, to submit the question to the jury under proper instructions. *People v. Forman*, 188 N. W. 375 (Mich.).

Concerning the ability of wife to consent for husband (not decided in the principal case), cases holding squarely that wife cannot consent, *Pollowick v. Commonwealth*, 199 Ky. 843; *Veal v. Commonwealth*, 199 Ky. 643; *Carigano v. Commonwealth*, 238 Pac. 507 (Okla.). An agent was not allowed to consent for his principal in *Tri-State Coal and Coke Co.*, 253 Fed. 605. But a mother can consent for her son in Kentucky, *Gray v. Commonwealth*, *supra*, and consent by wife was upheld in *Smith v. McDuffee*, *supra*, and *State v. Luna*, *supra*. Indiana will probably follow the Kentucky rule if the question is ever presented.

J. S. G.