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Criminal Law-Search and Seizure-Implied Consent

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motive power machinery within the prison for the manufacture of goods. *Bronk v. Riley*, 2 N. Y. S. 266; *Kemp v. Francies*, 238 Pa. 320, 86 Atl. 190; and occasionally the legislature in broad language provides that the products of prison labor must not be brought into competition with the products of free labor. *Manthey v. Vincent*, 145 Mich. 327, 108 N. W. 667; *McDonald v. State*, 6 Ga. App. 339, 64 S. E. 1108. In the McDonald case, however, the court showed an inclination to aid the cause of prison labor when it held that work on a turpentine farm was not a "mechanical pursuit" within the meaning of the Penal Code (1895) which provided the convicts could not be employed in such mechanical pursuits as would bring the products of their labor into competition with the products of free labor. The attitude of the Federal government toward the problem is sympathetic but not altogether helpful. Congress prohibited the importation of foreign-made convict goods, a most necessary prohibition, Act of June 17, 1930, c. 497, tit. III, sec. 307, 46 Stat. 689, but rather complicated the internal situation by enacting the Hawes-Cooper bill, Act January 19, 1929, c. 79, 45 Stat. 1084, 49 U. S. C. A., sec. 65 (supp. 1930), which provides that on the "arrival or delivery" of convict goods in a state they shall be subject to its laws in the same manner as if they had been produced there. This law is to go into effect January 19, 1934. It has met with criticism (20 *Journal of Criminal Law and Criminology* 485) (1930), on the ground that it will make it impossible for prison administrators to supply work for many prisoners; and there has been some doubt raised as to its constitutionality, *Davis, The Hawes-Cooper Act Unconstitutional* (1930), 23 *Lawyer and Banker* 296, 316. In the end, however, this Act may, by forcing the adopting of what is a variation of the state-use system, lead the way to a practical solution of the whole problem. Under this new plan, by agreement between states, certain industries, which have a ready and stable market among public institutions, would be allocated to the various states and the sale of products of convict labor would be limited to such institutions. *Frayne, Prison Labor and Society* (address at Biennial Convention General Federation of Women's Clubs, June, 1922). If the states could be induced to buy certain prison products from each other for states' use, "concentration, or allocation of production can thus be secured, it is thought, and the state-use market can be developed sufficiently to keep the reorganized prison industries going." *Robinson, Recent Legislation Concerning Crime*, supra. But as the court in the principal case said: "The extent to which prison labor shall be used, and the disposition of the products of such labor, is an administrative question over which the legislature and not the judicial department has control." The policy of the legislature, as laid down in the statutes, was correctly applied by the court in holding that the "surplus" contemplated by sec. 12444 was to be only incidental to the sale of prison goods on state account. If this policy is wrong the legislature must bear the criticism.

**J. W. S.**

**Criminal Law—Search and Seizure—Implied Consent**—Defendants were convicted of fornication on the testimony of police officers, as to what they saw and heard after their entrance into the hotel room occupied by defendants. The officers had knocked on the door, and after a delay of four or five minutes, defendant Warner opened the door, and stepped back,
and the officers then entered. There was no command on the part of the officers, nor any protest to their entrance by the defendants. The error relied on by the defendant was the admission of the testimony of the officers, on the ground that the search and seizure was illegal. Held, affirmed. The court stated that defendants waived their right to invoke immunity when defendant opened the door and stepped back, making no protest, since the officers had a right to assume that they were invited to enter. Warner v. State. Appellate Court of Indiana. December 9, 1930, 173 N. E. 599.

The practical result of this case is that a duty is placed on a private person to make a protest if he wishes to invoke the immunity from unlawful search and seizure guaranteed him by the constitution. If silence is to be construed as an invitation to enter and search, then to be strictly logical, an express assent or consent to search under a void search warrant should be given the same construction. Such construction, however, is contrary to the rule announced in the other Indiana cases. See Meno v. State, 148 N. E. 420, 197 Ind. 16. In that line of cases express consent gained under pretense of a warrant or under a void warrant, is not an invitation to search that will constitute a waiver of the constitutional immunity.

This case does not construe the constitutional guaranty liberally in favor of a private person, and in this particular does not follow the principle announced in Flum v. State, 141 N. E. 353 (Ind.). It is well settled that this constitutional immunity may be waived. Hurst v. State, 219 Pac. 151; State v. Motilla, 71 Mont. 351, 229 Pac. 724. But the submission to search must be voluntary, and if there is any coercion or duress, the search is illegal, and there is strong authority that lack of protest or acquiescence does not render it legal. Smith v. State, 133 Miss. 730, 98 So. 344. In that case the court said that the officer is supposed to know that the private citizen is silently objecting to an unauthorized search, and that unless his permission is obtained the search is illegal. People v. Sakira, 193 N. Y. S. 306, acknowledges this principle and holds that mere non-resistance does not waive the right as it is merely a submission to a show of lawful authority. State v. Wakefield, 184 Wis. 56, 198 N. W. 854, points out that not only would resistance be impotent, but that it would also be a breach of the peace. State v. Owens, 302 Mo. 308, 259 S. W. 100, holds that yielding to the demand of an officer for search is not a waiver since it is done under constraint of his legal capacity. It must be clearly established that the submission was voluntary. United States v. Lydecker, 275 Fed. 976; United States v. Rembert, 284 Fed. 996; United States v. Durser, 270 Fed. 818.

In the principal case it did not appear that the officers disclosed their identity or their purpose, or that they were in uniform so that defendant might have ascertained the same. The mere answering of the door would not constitute a waiver of the immunity, nor on the authorities cited, would mere silence do so. The basis, therefore for the waiver, and implied invitation to enter, must have been the act of stepping back from the door after opening it, either solely or in conjunction with the silence of the defendant. To have averted the subsequent search, defendant would have been forced to protest or forcibly resist any further attempt to enter after his protest. It does not seem good policy to place such a duty on a person in order to
preserve his constitutional rights. This case, however, goes farther than
to merely advance the doctrine of implied invitation, since the case was
based on the right of the officers to assume that they were invited to enter,
which is, to say the least, not construing the constitutional guaranty liber-
ally in favor of private persons. Flum v. State, supra.

As a question of justice in the particular case, there could be no doubt
of the guilt of the defendants, but as a matter of law it seems that the
court has made new law in regard to searches and seizures that has not
yet received the sanction of the courts of other jurisdictions. For other
case notes on the same general subject, see 5 Ind. L. J. 457, 642.

Municipal Corporations—Constitutional Law—Suit in equity to re-
strain the issuance of $250,000 worth of municipal bonds to defray expenses
of establishing a park in the city of Fort Wayne as authorized by Sec.
10678 et seq., Burns Ann. St. 1926. This money was found to be necessary
for the improvements. The requirements of the statute had been carried
out and the bonds were sold. The demurrers to each paragraph were sus-
tained. Appeal was made on the grounds that the act violated several parts
of the Constitution of Indiana, including Article 13, Sec. 1, placing a limi-
tation upon municipal indebtedness. Held, affirmed, no violation of the
Constitution. Johnson v. Board of Park Com’rs of Fort Wayne. Supreme
Court of Indiana, December 17, 1930, 174 N. E. 91.

The problem of the debt limitation has become a very serious one for
the courts. New corporations taking in the same territorial limits of
existing corporations have been upheld on the basis of some new and addi-
tional powers and a new name. West Chicago Park Com’rs v. City of
Chicago, 152 Ill. 392, 38 N. E. 695. The original purpose of Constitutional
debt limits seems quite obviously to protect the taxpayer by restricting
borrowing power, but in a majority of cases the courts seemingly have been
overcome by the form used and have allowed new debts to be incurred.
The one principle upon which the courts are consistent is that there can
only be one corporation having the same powers over a particular district.
Taylor v. City of Fort Wayne, 47 Ind. 274, 281; Strosser v. City of Fort
Wayne, 100 Ind. 443.

Along some lines the courts of Indiana have interpreted the provisions
strictly. There have been cases that have laid down the rule that if the
Constitutional limit is reached, there may not be liabilities for even current
146 Ind. 466.

In some states the distinction is made between voluntary and involun-
tary obligations and those states apply the debt limit to the former only. Ranch v. Chapman, 16 Wash. 568, 48 Pac. 253; Barnard v. Knox Co., 37
Fed. 563. Indiana adopts the rather stringent rule of making no difference
between the obligations. Sackett v. New Albany, 188 Ind. 473; Brashear v.
Madison, 142 Ind. 685. In the principal case, contrary to the general rules
of the other decisions, an agency of the city was allowed to issue bonds with
no effect upon the debt limit of the city. The general rule is that the in-
debtedness must be included in that of the corporation where only a depart-