

CHAPTER 363.

SEARCH WARRANTS.

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363.01 Warrant to issue, when. When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that personal property has been stolen or embezzled or obtained by false tokens or pretenses and that the complainant believes that it is concealed in any particular house or place, the magistrate, if he be satisfied that there is cause for such belief, shall issue his warrant to search for such property.

Note: Warrants authorized by 351.36, relating to houses of ill fame (and by 348.17 as to gambling houses), are in reality search warrants and governed by 363.01 to 363.04. Hence a search warrant in a proceeding against such a house issued on "good reason and belief" and not on probable cause shown was void. *Bach v. State*, 206 W 143, 238 NW 816.

What constitutes a valid basis for a search warrant is discussed at length in this case. *State v. Brockman*, 231 W 634, 283 NW 338.

Testimony of a police officer that he saw known "policy" players resort to certain

premises, and that as they entered they dropped slips bearing "policy" numbers, showed a state of facts sufficient to arouse in the mind of any prudent man a strong belief that the premises were resorted to for the purpose of gambling and constituted a sufficient showing of probable cause to justify the issuance of a search warrant covering such premises. *Mannery v. State*, 236 W 575, 295 NW 683.

For issuance of search warrant there must be sufficient proof before magistrate from which he can reasonably determine probable cause. 26 Atty. Gen. 461.

363.02 In what cases. Any such magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue such warrants in the following cases, to wit:

(1) To search for and seize any counterfeit or spurious coin, forged bank notes and other forged instruments, or tools, machines or materials prepared or provided for making either of them.

(2) To search for and seize any books, pamphlets, ballads, printed papers or other things containing obscene language, or obscene prints, pictures, figures or descriptions, manifestly tending to corrupt the morals of the youth and intended to be sold, loaned, circulated or to be distributed or introduced into any family, school or place of education.

(3) To search for and seize lottery tickets or materials for a lottery made, provided or procured for the purpose of drawing a lottery.

(4) To search for and seize any gaming apparatus or implements used or kept and to be used in unlawful gaming in any gaming house or in any building, apartments or place resorted to for the purpose of unlawful gaming.

(5) To search for and seize any animal, bird, implement or other article used or employed or about to be used or employed in violation of any of the provisions of law relating to baiting or fighting animals or birds.

(7) To search for and seize any opium or coca leaves, or narcotic drugs as described in section 161.01; or any smoking preparations of hemp or loco weed (commonly known as hashish), or any pipe, or usual attachment thereto or other contrivance, used for smoking opium.

(8) To search for and seize any books, records or papers used or kept or to be used in the sale of securities contrary to the provisions of chapter 189.

(9) To search for and seize any intoxicating liquor, fermented malt beverages, or alcohol, possessed for the purpose of evading any law of this state, or property designed for the unlawful manufacture of intoxicating liquor, fermented malt beverages or alcohol. Any property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

(10) To search for and seize any instrument or other article which has been used in the commission of, or may constitute evidence of, a crime. [1933 c. 158 s. 3; 1935 c. 40, 306; 1943 c. 318]

Note: The duties of a magistrate in issuing a search warrant and the quantity of evidence necessary for a warrant, and the procedure generally, and the cases which deal with the subject are reviewed in considerable length in this case. *Kraus v. State*, 226 W 383, 276 NW 303.

The term "reasonable cause" in this sec-

tion is synonymous with the words "probable cause." Evidence of a police officer applying for a search warrant that, while engaged two days previously in a concededly legal search of the premises for gambling devices, he had there discovered by sight, smell and taste a quantity of whiskey and alcohol in unstamped containers, was suf-

cient to support the magistrate's finding of probable cause justifying the issuance of the search warrant, and the search was not unreasonable, and the illicit unstamped alcoholic liquor obtained on the search was competent evidence in a prosecution for the unlawful possession of unstamped intoxicating liquor contrary to 133.03 (8). State v. Hunter, 235 W 188, 292 NW 609.

363.03 To whom directed; what to contain. (1) All such warrants shall be directed to the sheriff of the county or his deputy or to any constable of the county or to any peace officer as defined in the statutes, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property or things to be searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found before the magistrate who issued the warrant or before some other magistrate or court having cognizance of the case.

(2) When any officer takes possession of any property under the fifth subsection of section 363.02 he shall state to the person in charge thereof, at the time of such taking, his name and residence and the time and place at which the application hereinafter provided for will be made, and shall make and file with the magistrate who issued the warrant an affidavit stating the name of the offender charged in the complaint therefor, the time and place of the seizure and a description of the property taken pursuant to the warrant, the name of the person who claims to own the same, if known, and that he has reason to believe and does believe, stating the grounds of his belief, that the same was, or was about to be, used or employed in violation of the law relating to baiting or fighting animals or birds; he shall also deliver the property seized to the magistrate, who shall thereupon, by an order in writing, place such property in the custody of some officer or other person named in such order, who shall keep the same until the trial or final discharge of the accused; the officer who makes such affidavit shall send a copy of such order, without delay, to the proper district attorney.

(3) The person named in such order shall immediately assume the custody of such property and retain the same for the purpose of using the same as evidence upon the trial of the accused, subject to the order of the court before which he may be required to appear, until his final discharge or conviction, in which last event the property shall be adjudged forfeited, and in the event of his acquittal or discharge without conviction the property shall, on his demand, be delivered to the owner thereof. [1935 c. 40]

Note: Estoppel by record prevents a party from litigating what might have been litigated in a former action. A plaintiff may join in the same complaint causes of action for recovery on the ground of both gross and ordinary negligence, and pleading ordinary negligence alone in effect pleads that gross negligence did not exist. *Kuchenreuther v. Chicago, M., St. P. & P. R. Co.*, 225 W 613, 275 NW 457.

363.04 Disposition of property. When any officer, in the execution of a search warrant, shall find any stolen or embezzled property or shall seize any other thing for which a search is allowed by this chapter all the property and things so seized shall be safely kept by the direction of the court or magistrate so long as shall be necessary for the purpose of being produced as evidence on any trial, and as soon as may be afterward all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall, except as is otherwise provided in section 363.03, be destroyed under the direction of the court or magistrate.