not possessing a search warrant.[9] Assuming that a wife has the right in this state to admit people to the family home, and that the wife of the defendant permitted the complainant and the deputies to enter,[10] it follows that such entry was not an unreasonable one. Consequently, evidence unfavorable to the defendant which is uncovered upon such entry and search is not obtained through illegal methods, violates no constitutional provision designed for the accused's protection, and should be admitted at the trial. If the circumstances were such that the search was a reasonable one, it would seem to be superfluous to inquire whether the accused himself had consented to the search.

In the everlasting conflict between the interest of the community in effective enforcement of the criminal law and the dislike of individuals for police interference with their activities, there is the question when and to what extent police officers, without a warrant, may search for evidence of crime.[11] Perhaps a workable rule would inquire into the conditions under which the search was made; if someone of authority consented to the search, the constitutional requirement is satisfied.

Landlord and Tenant—Distress for Rent—[Illinois].—The plaintiff leased a store from the defendant and furnished it with barber shop fixtures. He became delinquent in payment of the rent and, upon the defendant's refusal to accept the plaintiff's tender of a substantial portion of the amount due, relinquished possession of the premises by returning his key. Thereupon the defendant entered and undertook the operation of the shop, using the fixtures which the plaintiff had not removed. A distress warrant was issued by the defendant but not levied. In an action to recover the fixtures and damages for their wrongful detention, *held*, for the plaintiff. The distress warrant not having been levied, the defendant-landlord had no right to detain or use the plaintiff's fixtures. *Cottrell v. Gerson.*[1]

The instant case is noteworthy because it contains an excellent discussion of distress in Illinois. A landlord in Illinois has a statutory right to distrain for rent[2] and a statutory lien on crops.[3] These statutes are modifications of and additions to the landlord's right to distrain available at common law.[4] To reach the tenant's personal property for the purpose of holding it as security for the rent due or for the purpose of obtaining payment of the rent from the proceeds of a sale of the property, the landlord is authorized to seize "any personal property of his tenant that may be found in the county where such tenant shall reside."[5] At common law the landlord could seize any personal

[9] The majority of the cases on this point have been decided in favor of the husband-defendant. In Cofer v. United States, 37 F. (2d) 677 (C.C.A. 5th 1930), the court said that "the wife was without authority to bind her absent husband by waiving a legal warrant, or consenting to an unauthorized search." The court in Amos v. United States, 255 U.S. 313 (1921), intimated that were the point before the court it would have been decided adversely to the prosecution. *Contra*, Cass v. State, 124 Tex. Ct. 208, 61 S.W. (2d) 500 (1933).

[10] There is no consent to search where entry is permitted under coercion, actual or implied. Amos v. United States, 255 U.S. 313 (1921); see Cornelius, Search and Seizure § 16 (1926).

[11] An illuminating discussion of this problem is made by Professor Waite, *op. cit. supra* note 7.

[1] 296 Ill. App. 412, 16 N.E. (2d) 529 (1938).

[2] Ill. Rev. Stat. 1937, c. 80, § 16.

[3] *Id.* at § 31.

[4] Hadden v. Knickerbocker, 70 Ill. 677 (1873).

[5] Ill. Rev. Stat. 1937, c. 80, § 16.

property, his tenant's or a stranger's, found on the demised premises.[6] Under the Illinois laws the landlord is limited to property owned by his tenant and not made exempt by statute.[7] On the other hand, he may seize such property wherever it may be found in the tenant's county. When a landlord leases premises in one county to a tenant who lives in another county the question arises whether the statute uses "reside" in a strict sense to mean domicile or, in a broader sense, to mean the location of the leased premises. It seems that to deny the latter interpretation would be seriously to narrow the scope of the protection contemplated by the statute.

The landlord himself issues and levies the distress warrant,[8] without which the seizure is unlawful.[9] In this respect Illinois preserves the notion of self-help, to which the feudal lords were accustomed to resort to harry their tenants into paying their rent.[10] Modern statutes in other states have abandoned this medieval process and provide that a state officer should issue and levy the warrant,[11] thereby giving distress for rent the appearance of attachment proceedings.[12] In Illinois, however, once the warrant is levied by the landlord, the matter is handled as a civil action in the same manner as in the case of attachment.[13] The statute requires the immediate[14] filing of a copy of the distress warrant with a justice of the peace or a clerk of a court of record of competent jurisdiction,[15] after which a summons shall issue against the tenant,[16] and provides, furthermore, that the distress warrant shall stand for the plaintiff's declaration.[17]

[6] 2 Taylor, Landlord and Tenant § 583 (9th ed. 1904); for discussion of distraint on goods of a stranger, 62 A. L. R. 1106 (1929).

[7] See note 41 *infra*.

[8] For a discussion of what constitutes a lawful seizure and levy, see 2 Tiffany, Landlord and Tenant §§ 336, 337 (1910). A valid distress cannot be made after the tenant has tendered unconditionally the amount due. *Id.* at § 329 b.

[9] Arnold v. Phillips, 59 Ill. App. 213 (1894).

[10] 3 Holdsworth, History of the English Law 282 (3d ed. 1923). For statutes employing the Illinois method, see Del. Rev. Code 1935, § 5009; N.J. Rev. Stat. 1937, § 2:58–34; Purdon's Penn. Stat. Ann. 1931, §§ 68–251; S.C. Code 1932, § 1818.

[11] These statutes require that the warrant, issued by a judge or justice of the peace pursuant to the filing by the landlord of an affidavit stating the amount of his claim, be addressed to a constable or sheriff and order him to seize the property of the tenant. See: Ga. Code 1933, §§ 61–402; Carroll's Ky. Stat. Ann. 1936, § 2299; Bagby's Md. Ann. Code 1924, §§ 53–9; Miss. Code Ann. 1930, § 2188; Va. Code Ann. 1936, § 5519; W.Va. Code Ann. 1937, § 3662.

[12] There is observable a general tendency to withdraw control of the distress proceedings from the landlord and to rest it in public officials, thus assimilating distress with the process of attachment, 2 Tiffany, *op. cit. supra* note 8, at § 325 (1910). Indeed one state statute speaks of "attachment or distress" and "distress warrant or attachment writ." Miss. Code Ann. 1930, §§ 2186, 2191.

[13] Ill. Rev. Stat. 1937, c. 80, § 20; for attachment statute see *id.* c. 11.

[14] In Schoenfeld v. Kulwinsky, 197 Ill. App. 472 (1916) the court said that the statute requiring the distrainor to "immediately file" a copy of the warrant meant that he should act promptly and in " 'such convenient time as is reasonably requisite for doing the thing' . . . . Thompson v. Gibson, 8 M. and W. 281."

[15] Ill. Rev. Stat. 1937, c. 80, § 17.

[16] *Id.* at § 18.

[17] *Id.* at § 20. For the tenant's right to release the property distrained upon posting bond, see *id.* § 26. After property distrained is replevied, the distrainor loses his lien and has no remedy except on replevin bond. Speer v. Skinner, 35 Ill. 282 (1864).

After the landlord has prevailed in his action and obtained judgment,[18] he may levy execution on all the personalty of the tenant[19] (except that protected by general exemption statutes[20]). Thus he is not limited to the proceeds of the sale of the property distrained. If service cannot be made on the tenant, however, and if he does not appear, judgment by default may be entered. Such a judgment, however, under section 24 of the Landlord and Tenant Statute, can bind only the property then before the court, and consequently the landlord cannot make the judgment the basis of an execution against other property of the tenant. At common law the landlord could not sell the property distrained; he was limited to holding the property and hoping the inconvenience thus caused would force the tenant to pay the rent that was due.[21] In England this remedy, which was of comparatively little benefit to the landlord,[22] was changed by the Statute of 2 William and Mary, c. 5 (1689), which granted the landlord the power to sell the distrained property without a judgment. A similar power exists today in those jurisdictions which still employ the device of distress for collecting rent. Apparently none of those jurisdictions, except Illinois, makes distress for rent the commencement of civil action;[23] the sale follows as the consequence of the levying of the distress warrant and does not depend upon judgment and execution.

The type of lien the landlord acquires under the Illinois distress statute is the type rendered void by the federal bankruptcy act[24] when the landlord levies his warrant within four months of the filing of a petition in bankruptcy against the tenant, because the lien is procured through "legal proceedings" within the meaning of the act.[25] Where the lease, however, provides the landlord with a lien and authorizes the levying of a distress warrant, it has been held that such a lien is the type of lien the bankruptcy act was not intended to affect,[26] the lien being given in good faith and not in contemplation of bankruptcy.[27] Similarly, a statutory lien enforceable by distress proceedings is of this type and also within the province of section 107d of the bankruptcy act.[28] The lien acquired by common law distress, not being obtained through legal proceedings, is not within section 107f.[29] Under the English bankruptcy laws, the landlord may distrain before or after commencement of bankruptcy proceedings for six months'

[18] "If the plaintiff succeeds in his suit, judgment shall be given in his favor for the amount which shall appear to be due him." *Id.* at § 22.

[19] *Id.* at § 23.

[20] See note 41 *infra.*

[21] 2 Tiffany, *op. cit. supra* note 8, at § 342.

[22] The New Jersey statute expressly states that the power to sell was given because distress was otherwise of little benefit to the distrainor. N.J. Comp. Stat. 1910, p. 1940, § 6.

[23] The Illinois statute making distress a method of starting a civil action seems to be unique. At common law distress was not a lawsuit. 2 Tiffany, *op. cit. supra* note 8, at § 343. The landlord's right to distrain, however, may be a survival from the days when lords kept a court for their tenants, and distrained by the judgment of that court. 3 Holdsworth, *op. cit. supra* note 10, at 281.

[24] 11 U.S.C.A. § 107 f (1938).

[25] *In re* United Motor Chicago Co., 220 Fed. 772 (C.C.A. 7th 1915).

[26] 11 U.S.C.A. § 107 d (1938).

[27] *In re* Robinson & Smith, 154 Fed. 343 (C.C.A. 7th 1907); see also *In re* Mossler, 239 Fed. 262 (C.C.A. 7th 1917).

[28] Henderson v. Moyer, 225 U.S. 631 (1912).

[29] *In re* West Side Co., 162 Fed. 110 (C.C.A. 3d 1938).

accrued rent;[30] thus the landlord's right to distrain is preserved, but the amount for which it can be effectively exercised is limited.

It is important in this connection to consider the rights of the landlord under distress as against other creditors. The Statute of 8 Anne, c. 14 (1709), provided that no goods should be taken in execution unless the party at whose suit the execution was sued out should pay the landlord, before removing the goods from the premises, the rent that was due, not exceeding one year's rent. The instant case, in accord with preceding decisions,[31] recognizes that this statute being of a date later than the fourth year of the reign of James I, is not in force in Illinois. Holding that the landlord and tenant statute, giving the landlord a lien upon crops only by implication excluded the idea of a lien on any other property of the tenant,[32] the Illinois courts conclude that the landlord acquires no interest in the property of his tenant until the distress warrant is levied.[33] Before that time the title and possession can validly be transferred by the tenant.[34] When, for example, personal property has been sold by the tenant in payment of a pre-existing debt, and the purchaser in good faith has removed the property from the demised premises, such property is not liable to distress for rent, although rent was due when the sale was consummated.[35] Once levied, however, the warrant creates a lien in favor of the landlord which is prior to all subsequent claims of other creditors. In Florida, a landlord is given a statutory lien for rent which is enforceable by distress proceedings and which dates from the time the warrant is levied.[36] This statute, it appears, is the same as that of Illinois except for a slight difference in language. Similarly, in Georgia landlords are granted a general lien which attaches from the time of the levy of the warrant.[37] In Virginia, however, although the landlord holds no lien before a distress warrant is levied on the property liable for rent, the lien obtained after the levying relates back to the beginning of the tenancy and takes precedence over any other lien on goods or chattels on the leased premises which is secured after the commencement of the tenancy.[38] General lien statutes, which have

[30] 82 L. J. 347 (1936).

[31] Herron v. Gill, 112 Ill. 247 (1884); First Nat'l Bank v. Adam, 138 Ill. 483, 28 N.E. 955 (1891); Rowland v. Hewitt, 19 Ill. App. 450 (1885); Faubel v. Michigan Blvd. Bldg. Co., 278 Ill. App. 159 (1934).

[32] Herron v. Gill, 112 Ill. 247 (1884); Felton v. Strong, 37 Ill. App. 58 (1890).

[33] Springer v. Lipsis, 209 Ill. 261, 70 N.E. 641 (1904); Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 44 N.E. 411 (1896); Hadden v. Knickerbocker, 70 Ill. 677 (1873); Morgan v. Campbell, 89 U.S. 381 (1874).

[34] Powell v. Daily, 163 Ill. 646, 45 N.E. 414 (1896). If the transaction is fraudulent, however, apparently the landlord might follow the property. 2 Taylor, *op. cit. supra* note 6, at § 576.

[35] Hadden v. Knickerbocker, 70 Ill. 677 (1873), cited in Henon v. Gill, 112 Ill. 247, 252 (1884) where it was held that the lien created upon the levy of the distress warrant was subject to the liens of executions previously levied. A distress warrant issued after an assignment by the tenant for the benefit of creditors and after the assignee had taken possession of the property was held to give the landlord no lien in Friedman v. Kappel, 257 Ill. App. 568 (1930).

[36] *Cf.* Fla. Comp. Gen. L. Ann. 1927, § 5420. This statute also provides for a lien upon crops as well as one upon property "usually kept on the premises."

[37] Ga. Code 1933, § 61–203.

[38] Amer. Exch. Bank v. Goodlee Realty Corp., 135 Va. 204, 116 S.E. 505 (1923). *Cf.* Va. Code Ann. 1936, §§ 5523–5524.

been enacted in a few states,[39] give the landlord a security interest for the payment of the rent from the beginning of the tenancy, whereas it has been noted, the landlord's lien that results from distress proceedings dates from the levying of the distress warrant.

Commonly a statutory lien is given on agricultural products,[40] probably because the common law did not authorize the levying of distress on such property.[41] Thus in Illinois the statutory lien on crops attaches from the time of the commencement of the crop's growth, whether the rent is then due or not;[42] it is a paramount lien[43] and is not defeated by the tenant's sale of the crop to a person who has notice of the tenancy.[44]

Innkeepers were the only type of landlords afforded the protection of a lien at common law.[45] Modern legislation has increased the types of landlords similarly protected. Attention has been drawn to statutes providing for a general landlord's lien on the personal property of his tenant and to those giving a lien on crops to lessors or farm lands.[46] In addition, modern statutes extend the lien to such comparatively recent institutions as the boarding house[47] and the apartment hotel.[48]

The justification for distress for rent as a method of acquiring a lien would appear to be grounded on a historical basis. During the feudal period distress for rent had been regarded as the landlord's ordinary remedy and developed when rent was considered as a thing issuing from the land, being treated much like an estate in land.[49] Today rent is a payment for the use of land and arises from the contractual relations

[39] Ala. Code 1928, § 8814 (landlords of storehouses and other buildings; enforceable by attachment); Ariz. Rev. Code 1928, 1958 (property of tenant, including crops grown on premises; enforced by action to recover possession); Fla. Comp. Gen. L. Ann. 1927, § 5420 (property usually kept on premises; enforced by distress warrant); Ga. Code 1933, § 61–2 (lien arising at time of levy of distress warrant).

[40] Besides the Illinois statute, typical statutes are: Ga. Code 1933, §§ 61–203; N.M. Stat. Ann. 1929, §§ 82–101; Ark. Dig. Stat. 1937, § 8845.

[41] "At common law, on the ground that it could not be returned in the same condition, and also because not susceptible of identification, growing grain and grain in sheaves was exempt from distress." 2 Tiffany, *op. cit. supra* note 8, at § 328d.

[42] Watt v. Schofeld, 76 Ill. 261 (1875); Harvey v. Hampton, 108 Ill. App. 50 (1903). The lien on crops does not grow out of the levy of a distress warrant. Wetsel v. Mayers, 91 Ill. 497 (1879). Distress proceedings may be used to enforce the lien. Bates v. Hallinan, 220 Ill. 21, 77 N.E. 115 (1906). Where it appears that the tenant is about to sell and remove, or permit to be removed, such of the crops as will endanger the lien of the landlord, the latter may institute distress proceedings before the rent is due. Ill. Rev. Stat. 1935, c. 80, § 35.

[43] Lillard v. Noble, 159 Ill. 311, 42 N.E. 844 (1896).

[44] Lawrence v. Elmwood Elevator Co., 25 Ill. App. 101 (1929).

[45] Brown, Personal Property § 114 (1936). Aside from the innkeeper, landlords were given no lien by the common law; but they had the right to distrain. 1 Jones, Liens § 540 (3d ed. 1914); 2 Tiffany, *op. cit., supra* note 8, at § 320.

[46] See notes 31 and 32 *supra.*

[47] Almost every state has a statute giving a lien to boarding-house keepers. For a discussion of the statutes, see 1 Jones, *op. cit., supra* note 45, at § 515.

[48] Cahill's N.Y. Consol. L. 1930, §§ 34–181; Deering's Cal. Civil Code 1937, § 1861-a (furnished apartments or bungalow courts); Ore. Code Ann. 1935 Supp., § 51–1401 (apartment house).

[49] 7 Holdsworth, *op. cit. supra* note 10, at 262 ff.

between the lessor and lessee. Thus distress is in the nature of a hangover, although it may be justified on its own grounds in that it provides an easily workable protection to a particular kind of creditor, and just because it is not available for most creditors is not a complete reason why it should not be available for a particular one.

The rights bestowed upon landlords by distress and lien statutes may appear to work undue hardship on the tenant despite the fact that generally certain property is by statute exempt from distress and execution.[50] The lien of the innkeeper on the personalty which the transient brings upon the premises is justifiable on account of the obligation of the innkeeper to take in any traveller who seeks shelter in his establishment and because of the extraordinary responsibility of the innkeeper for the goods of his guest.[51] These reasons, however, do not adequately explain the existence of such liens as those granted other landlords. Whether the lien be one that arises upon a distress for rent or whether it be one that is given by statute, it may be that the lessor is given extraordinary protection[52] because he is considered a peculiar type of creditor, having permitted the tenant to have the use of part or all of his land, a subject which has always been a favorite of the law, and having provided the tenant with one of the primary essentials of life, whether it be a place for a home or a location for his business.[53] A comparison of the landlord's lien with liens based on possession, such as those given the attorney, the warehouseman, and the ship-owner, suggests that the landlord is in a situation analogous to that of one in possession. That is, the landlord is also entitled to protection because the tenant, by placing his chattels on the leased premises, in effect is putting the landlord in possession of the chattels. Furthermore, it appears that the landlord's lien is almost universal, probably on account of this reason. It is found in the Civil Codes of Germany,[54] Switzerland,[55] and France,[56] as well as in the United States and England.

Practice—Federal Rules of Civil Procedure—Pleading of Contributory Negligence—[Federal].—The plaintiff brought an action in the federal district court of Illinois, for injuries received in an automobile accident. The complaint did not have an allegation negativing contributory negligence. The defendant moved to dismiss the complaint on the ground that the decision in *Erie R. Co. v. Tompkins*[1] made Rule 8(c) of

[50] At common law very little of the tenant's property was exempt from distress for rent. Now, however, in those jurisdictions having statutes, either specific exemptions are set out or the general exemption statutes apply. See 1 Jones, *op. cit. supra* note 45, at § 563 (3d ed. 1914) and 2 Tiffany, *op. cit. supra* note 8, at § 328k. For the Illinois exemption statute, see Ill. Rev. Stat. 1937, c. 52, § 13.

[51] Brown, *op. cit. supra*, note 45, at § 114; 7 Holdsworth, *op. cit. supra* note 10, at 512.

[52] Unless good reasons are proferred for the existence of the landlord's lien, this protection would seem to be an unfair discrimination among creditors in favor of the landlord. 2 Corn. L. Q. 357 (1917).

[53] One authority defends this added protection given the landlord on the grounds that otherwise the poor would be unable to secure credit and to rent property. 1 Jones, *op. cit. supra* note 45, at § 540.

[54] German Civil Code, §§ 559–63.

[55] Swiss Code of Obligations, art. 272–4. [56] French Civil Code, art. 2102, no. 1.

[1] 304 U.S. 64 (1938) holding "there is no federal common law" and expressly overruling Swift v. Tyson, 16 Pet. (U.S.) 1 (1842).