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Case No. W2022-00514-COA-R3-CV

IN THE

Court of Appeals of the State of Tennessee

AT JACKSON

TENNESSEE WILDLIFE RESOURCES AGENCY, BOBBY WILSON, ED CARTER, and KEVIN HOOFMAN,
Defendants/Appellants,

v.

TERRY RAINWATERS and HUNTER HOLLINGSWORTH,

Plaintiffs/Appellees.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS®, REALTORS® LAND INSTITUTE, AND TENNESSEE ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLEES

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> *At the very foundation of our state is the right of the people to be secure in their persons, houses, papers, and possessions. Infringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism.*
>
> –Chief Justice Grafton Green[1]

Appellants claim carte blanche authority to trespass on any Tennessean's land without a warrant or probable cause. That is an affront to Article I, Section 7 of the Tennessee Constitution, which guarantees "[t]hat the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures …."

Tennessee courts have, for nearly a century, interpreted the term "possessions" to include real property far beyond the home's curtilage. Appellants claim authority, however, under Tennessee Code Annotated §70-1-305(1) and (7) (the "Statute") to enter any private land, without a warrant, without consent, and without exigent circumstances, to conduct exploratory searches for potential hunting violations, in direct contradiction to the protection afforded by Article I, Section 7 and private property owners' reasonable expectations of privacy. The trial court correctly concluded that the Statute is facially unconstitutional. Tennessee courts should nurture private property owners' right to control who enters their land, and guard that right against Appellants' remarkable claims of authority. This Court should affirm.

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[1] *Cravens v. State*, 256 S.W. 431, 432 (Tenn. 1923).

I. Tennessee has a long history of protecting land beyond the curtilage from warrantless and unreasonable searches.

Longstanding Tennessee precedents recognize that land beyond a home's curtilage is protected from unreasonable and warrantless searches under Article I, Section 7.

A. *Welch v. State* established that private land beyond the curtilage is a "possession" within the meaning of Article I, Section 7.

In *Welch v. State*, the sheriff conducted a search of a one-acre space, enclosed by a fence used for confining livestock, about three-hundred yards from the property owner's home. 289 S.W. 510, 510 (Tenn. 1926). Though the sheriff did not have a warrant, the lower court found the entry constitutional because it was beyond the home's curtilage. *Id.* at 511. The Tennessee Supreme Court, however, rejected that reasoning. *Id.* The term "house" in Article I, Section 7 covers the curtilage, so the framers of the Tennessee Constitution could not have intended the term to be so limited. *Id.* Rather, the term "possessions" refers to "property, real or personal, actually possessed or occupied." *Id.* at 511. The Court explained that the drafters sought to prohibit officers from "go[ing] upon the property of one in actual possession and occupancy and promiscuously search about with the hope or expectation of finding contraband goods." *Id.* at 510-511.

The Court did not clearly define the scope of the term "actually possessed or occupied." In that case, it was sufficient that the subject property was "enclosed with a fence" and "in daily use in connection with and as a necessary part of his farming operations." *Id.* The Court stated

the term "possessions" did not include "wild or waste lands, or other lands that were unoccupied." *Id.*

B. Subsequent cases have affirmed *Welch*'s holding.

Three subsequent Tennessee Supreme Court cases have affirmed that "possessions" includes land far beyond the curtilage of the home, as originally held in *Welch*.

In *Allison v. State*, the Court suppressed evidence found without a warrant, a still and nine gallons of whiskey, when it was beyond the curtilage of a house in a "fenced enclosure used for pasture" about a half-mile from the house. 222 S.W.2d 366, 366 (Tenn. 1949). *Stinnett v. State*, an unreported case,[2] involved a warrantless search held unconstitutional despite the absence of an encircling fence. Slip op. at 1-2 (Tenn. Dec. 11, 1948). There were "pieces of fence" on the property, and the search was "about five or six hundred feet" from the defendant's home, separated by a ravine. *Id.* Finally, in *State v. Lakin*, the Court found a warrantless entry on unfenced land, at least one-quarter mile from the defendant's

[2] The majority apparently wrote no separate opinion. Curiously, the opinion was authored by Justice Burnett in dissent, who after reciting the facts and stating his views, noted that "the majority of the Court disagree. Under the facts of this record, the majority think a search warrant necessary and there is no reasonable excuse shown why the officers did not obtain one." Slip op. at 6. The opinion is attached here as Exhibit 1. Though the opinion apparently did not get published, the first page states "For Publication." The Supreme Court's minute book also references a "written opinion of the Court for publication filed and made part of the record." Attached as Exhibit 2. These resources were provided to the undersigned by the Tennessee State Library and Archives. The opinion and appellate record are also available on the Tennessee State Library and Archives website at https://supreme-court-cases.tennsos.org/search?search=1&search_fields%5B%5D=case_name%2Ccause%2Cnotes&county=all&start_year=&end_year=&search_keywords=%22Henry+Stinnett%22/.

home, was unconstitutional. 588 S.W.2d 544, 546-49 (Tenn. 1979) (noting the land was "[p]robably" beyond the curtilage). The Tennessee Supreme Court has also stated in dicta that "[w]e have expressly held that the word 'possessions,' as used in our Constitution, art. 1, § 7, includes more than the 'curtilage.'" *Peters v. State*, 215 S.W.2d 822, 823 (Tenn. 1948).[3]

The Tennessee Court of Criminal Appeals has also repeatedly found that property beyond the curtilage is protected from unreasonable and warrantless searches under Article I, Section 7. *See State v. Harris*, 919 S.W.2d 619, 624 (Tenn. Crim. App. 1995) ("Tennessee courts have *consistently* held that police entry upon private, occupied, fenced land without a warrant and absent exigent circumstances is unreasonable ….") (emphasis added)). In *State v. Dunham*, the Court of Criminal Appeals found that a warrantless search was unconstitutional when the search occurred on land that was "several hundred feet" outside of the defendant's fenced-in yard and the evidence of occupation consisted of some paths, a "no trespassing" sign, and a mule. No. CCA01C019002CR00041, 1990 WL 165796, at *2 (Tenn. Crim. App. Nov. 1, 1990).[4] In *State v. Casteel*, the intermediate court found that wooded property was not "wild and waste land," and therefore protected from warrantless and unreasonable searches, even though the property was not fenced in, lacked a "fixed dwelling," "was not cultivated for farm use,"

[3] *See also* 9 David Louis Raybin, *Tennessee Practice, Criminal Practice & Procedure* § 18:25 (Westlaw, Dec. 2022 Update); Mark W. Ward, *Tennessee Criminal Trial Practice* § 4:38 (Westlaw, Nov. 2022 Update).

[4] The description of the fences in *Dunham* is unclear. A subsequent case has described the property at issue in *Dunham* as "unfenced." *Harris*, 929 S.W.2d at 624.

and featured a single trail. No. E199900076CCAR3CD, 2001 WL 329538, at *18 (Tenn. Crim. App. Apr. 5, 2001). The defendant in *Casteel* posted "no trespassing" signs, periodically told strangers to leave, and had camped on the property. *Id.* at *2, *18.

These cases establish that land does not have to be enclosed by a fence to be protected, nor is having a home on the property necessary, nor is it necessary for the search area to be used in the daily operations of the premises. In contrast, *State v. Doelman* exemplifies land that constitutes unprotected "wild or waste lands." 620 S.W.2d 96 (Tenn. Crim. App. 1981). In *Doelman*, the court concluded a search was of "wild or waste lands" since the land was "heavily wooded without *any* indicia of private ownership," and it was not "posted," "occupied, enclosed, cultivated, or in actual use by the appellants." *Id.* at 98-99 (emphasis added).

C. Appellee's private properties do not constitute "wild or waste lands" under Tennessee case law, and therefore are protected against warrantless and unreasonable searches under Section I, Article 7.

The land which Appellants entered without a warrant was not unprotected "wild or waste land" and instead featured numerous indicia of private ownership. Like in *Welch*, several of the subject tracts are fully enclosed by a fence and used for farming purposes. The entrances to other tracts were blocked by chained gates, analogous to the partial fences in *Stinnett*. Like in *Dunham* and *Casteel*, Appellees have posted "no trespassing" signs. And like in *Dunham*, there are paths on the land, but these paths are not merely worn into the ground, but are made of gravel.

At least one of the Appellees (Mr. Hollingsworth) also denied one of the Appellants permission onto his land, similar to the defendant in *Casteel*.

In addition, all of the lands at issue here were occupied by Appellees due to their regular use—some tracts for residence and farming, others for hunting, fishing, and camping. Though the Appellants characterize hunting and fishing as "recreational," Brief, at 24, apparently thinking such activities of less significance than agricultural uses, they offer no reason why. Hunting and fishing are activities so important to Tennesseans that our Constitution expressly protects them.[5] Similar to farming, which develops land for human use, hunting and fishing take the natural resource of game and fish for someone's personal use. Perhaps more significantly, these hunting and fishing uses of the land by Appellees were open and known to Appellants—that is what attracted Appellants to search the land in the first place.

Appellants suggest that private property falls outside the protection of Article 1, Section 7 unless it is "used in the daily operation of the premises." Brief, at 24. That is not correct. First, such a requirement is inconsistent with *Stinnett* and *Casteel*, both of which held that land was a protected "possession" despite the absence of such evidence. Second, in support Appellants cite *Chico v. State*, but the issues presented in that case did not implicate the meaning of "possessions" in Article I, Section 7. 394 S.W.2d 648, 651 (Tenn. 1965). The defendant in *Chico* argued that a search was invalid due to issues concerning "the

[5] *See* Tenn. Const. art. XI, § 13.

validity and sufficiency of the warrant," and the Court concluded it could not review his arguments because he had failed to include the search warrant in the bill of exceptions. *Id.* at 651. The *Chico* Court's passing description of what land is protected by Article I, Section 7 was nonbinding dicta, being irrelevant to resolving the questions the defendants had presented. *See, e.g.*, *Shousha v. Matthews Drivurself Serv., Inc.*, 358 S.W.2d 471, 473-74 (Tenn. 1962). Third, adding this requirement would confuse two distinct inquiries. Whether certain land is used in the daily operations of a home is properly a factor when determining if that land falls within a home's curtilage. *See State v. Prier*, 725 S.W.2d 667, 672 (Tenn. 1987).[6] The analysis for what makes land part of the curtilage should not be confused with the analysis for whether land *beyond* the curtilage is nonetheless protected by Article I, Section 7. Indeed, over ten years after *Chico* was decided, the Court in *Lakin* stated that "no compelling reason has been demonstrated" for revisiting the precedents interpreting Article I, Section 7 to protect land beyond the curtilage. *Lakin*, 588 S.W.2d at 549.

II. Historical evidence shows that use of the term "possessions" in Article I, Section 7 includes "real property."

Founding era dictionaries, treatises, precedents and other contextual evidence confirm *Welch*'s core holding that the term "possessions" was understood to include real property. Article I, Section 7 of the Tennessee Constitution reads:

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[6] *Prier* repeated *Chico*'s dicta regarding the scope of land protected by Article I, Section 7. *Prier*'s discussion was also dicta, since the Court held that the property in question was part of the home's curtilage. *Id.* at 672.

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.

The same provision appeared in Article I, Section 7 of the 1834 Constitution, and Article XI, Section 7 of the 1796 Constitution. Thus, the meaning of Article I, Section 7 in our current Constitution, adopted in 1870, should be the same as it was in 1796. Therefore, the inquiry is how the term would have ordinarily been understood in 1796. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 259 (Tenn. 2001) (analyzing how the term "fine" was understood "[a]t the time that the 1796 Constitution was drafted and ratified").[7]

While, unfortunately, there are no extant ratification debates for our 1796 Constitution, and the journal of the proceedings includes very little interpretive information,[8] other sources indicate that the framers' use of "possessions" would have been understood to include all of a person's personal and real property. These sources are relevant, even if

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[7] *See also Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983) ("[T]heir intent should be derived from the language as it is found in the instrument."); *State ex rel. Doyle v. Torrence*, 310 S.W.2d 425, 428 (Tenn. 1958) (adopting interpretation of a term according to its ordinary meaning); *State ex rel. Timothy v. Howse*, 183 S.W. 510, 514 (Tenn. 1916) (explaining that due to the same language, "its meaning as to the nature of the 'right' is to be gathered from that language used in the earliest Constitution"); *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599, 620 (1831) (Kennedy, J.).

[8] *See Journal of the Proceedings of a Convention, Began and Held at Knoxville, January 11, 1796* (reprt. Knoxville, McKennie & Brown 1852).

not necessarily addressing the search and seizure context, since the particular usage of "possessions" in Article I, Section 7 does not appear to have been a term of art.

A. Dictionaries

Samuel Johnson's Dictionary—the most comprehensive and well-respected English dictionary of the 18th century[9]—provides good evidence. The relevant definitions of "possession" are broad: "1. The state of owning or having in one's own hands or power; property. 2. The thing possessed."[10] It is unlikely that Article 1, Section 7 would be much concerned with searches and seizures of abstract property rights, so the best definition of a person's "possessions" is "property," or "the things he or she possesses." Note that these definitions puts no limitation on what "possessions" could include.

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[9] Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 385 (2014).

[10] 2 Samuel Johnson, *A Dictionary of the English Language* 362 (London, J.F. & C. Rivington et al. 6th ed. 1785) (hereafter, "*Johnson's Dictionary*"). (The page numbers are not printed on the page. Pincites are to the electronic page number.) The relevant definitions of "property" are "3. Right of possession. 4. Possession held in one's own right. 5. The thing possessed." 2 *id.* 409. The relevant definition of "possess" is "To have as an owner; to be master of; to enjoy or occupy actually." 2 *id.* 362.

Another dictionary defines "possession" as "the state of occupation, the thing possessed." 2 John Ash, *The New & Complete Dictionary of the English Language* (London, Edward & Charles Dilly et al. 1775); *see also* James Barclay, *A Complete & Universal English Dictionary* (London, J.F. & C. Rivington et al. 1792) ("[T]he state of having in one's hands or power. The thing enjoyed by a person.").

In marked contrast, Johnson defined the term used in the Fourth Amendment, "effects," to mean "goods; moveables."[11] "Goods" are defined as either "moveables in a house" or "personal or moveable estate," with the latter definition's example expressly distinguishing it from land.[12] And "moveables" are defined as "Goods; furniture: distinguished from real or immoveable possessions, as lands or houses."[13] These definitions strongly characterize "effects" as personal property,[14] a distinct subset of "possessions," the latter of which *also* includes land.

Noah Webster's 1828 dictionary, the first of its kind in the New World, included this definition for "possession": "The thing possessed; land, estate or goods owned; as foreign *possessions*."[15] This confirms

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[11] 1 *Johnson's Dictionary* 673.

[12] 1 *Johnson's Dictionary* 892 ("That a writ be su'd against you, To forfeit all your *goods*, lands, tenements, Castles, and whatsoever." (quoting Shakespeare, Henry VIII)).

[13] 2 *id.* 158. The first definition of furniture is "moveables; goods put in a house for use or ornament." 1 *id.* 848.

[14] North Carolina's 1794 statutes, binding in Tennessee, reflect a frequent usage of "effects" coterminous with "goods" or "moveable property." *See* Act of 1794, c.1, §§ 22-23, 59, reported in 1 *Statute Laws of the State of Tennessee* 12-13, 92 (1831) (rev. & digested, J. Haywood & R. Cobbs eds., Knoxville, F.S. Heiskell 1831) (hereafter, "*Statute Laws of Tennessee*"). This interpretation is also consistent with contemporaneous English decisions regarding the word "effects." *See Doe v. Dring* (1814) 105 E.R. 447, 449; 23 M. & Sel. 448 (Ellenborough, C.J.) (explaining that the term "effects" means personal property unless with "general introductory words" like "as to all my worldly substance," or "coupled with the words 'real and personal'"); *Hogan v. Jackson* (1775) 98 E.R. 1096, 1100-01; 1 Cowp. 299 (Mansfield, C.J.); *Ryall v. Rowles* (1749) 1 Ves. Sen. 348, 371 (2d ed. 1773) (Hardwicke, Ch.) (noting "goods and chattels, as used in this act, take in all kind of personal property").

[15] 2 Noah Webster, *An American Dictionary of the English Language* (N.Y., S. Converse 1828).

Johnson's interpretation, and doubles down, expressly covering land, estates, and goods. A recent commentator collected other contemporary dictionary uses of the term "effects." Only one of nine defined "effects" to equate to "possessions."[16] Possibly the English language needed the word "possessions" to encapsulate both real and personal property since, "in the feudal time, title to chattels was often implicated with the title to land."[17]

B. Treatises

Given the heavy reliance on legal treatises by early American lawyers, relevant usages of "possessions" in those treatises warrant special attention.

William Blackstone's foundational[18] *Commentaries on the Laws of England* includes two relevant uses of the term "possessions." In discussion about "inquests of office," by which the King would be entitled to forfeiture Blackstone, explained it applied to chattels as well as to land, and in the next paragraph explained that without such an inquest

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[16] *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 986 n.176 (2016).

[17] 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 149 (2d ed. 1898).

[18] Brian J. Moline, *Early American Legal Education*, 42 Washburn L.J. 775, 791 (2004) ("Blackstone was so ubiquitous and readable that he made it appear easy to learn law. Many nineteenth-century lawyers relied exclusively on the Commentaries ...."); Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. Legal Educ. 185, 211 n.15 (2001) ("After the Revolution Blackstone's *Commentaries* would displace Coke as the most important law book in America.").

the King was not entitled to "enter upon or seise any man's possessions upon bare surmises without the intervention of a jury."[19] Elsewhere, Blackstone described a will as having the power to transmit "one's possessions to posterity," having just discussed how otherwise "*all* property must … cease upon death," and introducing the topic by reference to "[p]roperty, both in land and moveables."[20]

William Hawkins' influential[21] *Pleas of the Crown*, wrote that "neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty or possessions, from any person whatever, without a proper remedy from this court."[22] This usage is quite notable, using the term "possessions" in a context highly suggestive of it being equal to "property" of all types. Though the popularity of Hawkins' treatise in the former colonies is enough to render this passage significant, it should also be noted that a 1794 New Jersey case quoted

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[19] 3 William Blackstone, *Commentaries on the Laws of England* 259 (Worcester, Isiah Thomas 1st Worcester ed. 1790) (hereafter, *Blackstone's Commentaries*) (noting this rule was "part of the liberties of England, and greatly for the safety of the subject").

[20] 2 *id.* 9-10.

[21] Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 469 n.109 (2007) (noting Hawkins was "influential" and "widely consulted by framing-era Americans").

[22] 3 William Hawkins, *A Treatise of the Pleas of the Crown* 10 (Thomas Leach ed., London, G.G. et al. 7th ed. 1795).

this exact passage. *State v. Justs. of Middlesex Cnty.*, 1 N.J.L. 244, 250 (1794), rev'd (Jan. 7, 1795).

Joseph Chitty's well-regarded[23] 1816 criminal law treatise, discussing the results of "attainder," notes "[h]e is not only deprived of all his possessions, but is rendered incapable of acquiring any other by inheritance."[24] Following Chitty's citations leads to Blackstone's *Commentaries*[25] and to Matthew Bacon's seven-volume "abridgment" of the law,[26] both of which make clear Chitty's reference to "possessions" meant property both real and personal.

C. Precedent.

The first clear relevant usage of "possessions" in a reported Tennessee case comes in 1848. The Court in *Brown v. Crawford*, a will-interpretation case, interpreted the phrase "the whole of my possessions" to cover all property whether real or personal. 28 Tenn. (9 Hum.) 164, 165 (1848). (Some earlier Tennessee cases used the term in a way that

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[23] James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 193 (1995) ("Chitty's treatise seems to have been especially influential in the American state courts.").

[24] 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 740 (London, A.J. Valpy 1816); *see also id.* at 464 ("[W]hen once a felon is attainted he is dead in law, his whole possessions are forfeited ….").

[25] 4 *Blackstone's Commentaries* 381 ("*Forfeiture* is twofold; of real, and personal estates.").

[26] 3 Matthew Bacon, *A New Abridgment of the Law* 264-68 (Henry Gwillim ed., London, A. Strahan 5th ed. 1798).

might solely be in reference to land, but might also be interpreted as applying to all "possessions" whether real or personal.[27])

A few early American cases use the term "possessions" in the relevant sense. One South Carolina case referenced a man's "whole possessions" in connection with the "estate real and personal" he had acquired by marriage. *Ex parte Beresford*, 1 S.C. Eq. (Des. Eq.) 263, 264, 268–69 (S.C. Ch. 1792) (per curiam). And at least one early American case referred to interests in land using the term "landed possessions."[28] That usage makes quite unambiguous that "possessions" can include land, but the further inference is that the term "possessions" could have been interpreted by a contemporary as being broader than interests in land, to include personal property as well, unless qualified by a term like "landed."

A few contemporary English cases used the term "possessions" to convey items of both real and personal property. In *Sergison v. Sealy*, Lord Chancellor Hardwicke described a son as being "entitled to the possessions of his father," meaning "both real and personal." (1742) 88 E.R. 513, 515; 9 Modern 390. And in *Weaver v. Bush*, a 1798 case, at issue

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[27] *See Garner v. State*, 13 Tenn. (5 Yer.) 160, 179 (1833) (Whyte, J.) (noting that the rich are "surrounded with their wealthy possessions and consequent friends"); *In re Darby*, 3 Wheel. Cr. Cas. 1 (Tenn. 1824) (Haywood & Peck, JJ.).

[28] *Peaceable v. Nicholls*, 1 Yeates 293 (Pa. 1793) (Yeates, J.). In *Herndon v. Carr*, 1 Jeff. 132, 135 (Va. Gen. Ct. 1772), Pendleton, who later took the Virginia bench, argued as a solicitor about a testator's "landed possessions." James Madison also used the term. *See* Speech of James Madison (July 26, 1787), in 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 371 (2d ed., Jonathan Elliot ed., 1836) (hereafter, "*Elliot's Debates*").

was a man's right to use force to defend his land. (1798) 101 E.R. 1276, 1277; 8 Term Rep. 78. Counsel for the defendant argued that the law permitted force "for the preservation of his possession of lands or goods." *Id.* Judge Lawrence's opinion agreed that "the law allows him, either in defence of his person or possessions, to lay his hand on the plaintiff," *id.* at 1278,[29] thus using the single term "possessions" to cover both the "lands or goods" adverted to by the defense counsel.

D. Other notable sources.

Though the debates leading to the ratification of the federal constitution include no helpful analysis of the search and seizure provision in the Fourth Amendment,[30] there were uses of "possessions" which indicate the term was understood across the former colonies to include real and personal property.

In 1781, a congressional committee (which included Alexander Hamilton and James Madison) authored a report in support of a proposed tax. It expressly equated "possessions" with all things, whether land or moveable goods:

> [T]axes on possessions, and the articles of our own growth or manufacture, whether in the form of a land tax, excise, or any other, are more hurtful to trade than impost duties….

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[29] Indeed, popular treatises equated the degree of force permitted to protect real property as to protect personal property. *See* 1 William Selwyn, *An Abridgment of the Law of Nisi Prius* 38-40 (Albany, E.F. Backus 1811).

[30] *See* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning: 602-1791*, 713 (2009).

> A judicious distribution to all kinds of taxable property is a first principle in taxation. The tendency of these observations is only to show that taxes on possessions, on articles of our own growth and manufacture, are more prejudicial to trade than duties on imports.[31]

The debates in Massachusetts over the federal constitution include several probative uses of the term "possessions." Theophilus Parsons, an influential jurist, said that the Massachusetts search-and-seizure provision "includes all the possessions of the people, and divests them of everything."[32] Another speaker at the Massachusetts convention equated "all property" with "all [of a man's] possessions."[33] "Agrippa," writing in the *Massachusetts Gazette*, also used the term "possessions" to cover personal and real property, asserting "the object of every just government is to render the people happy, by securing their persons and possessions from wrong."[34] In his later writings, John Adams apparently used "possessions" to describe all of a person's accumulated assets.[35]

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[31] Reply to the Rhode Island Objections, Touching Import Duties (Dec. 16, 1782), in 1 *Elliot's Debates* 105.

[32] Speech of Theophilus Parsons (Jan. 22, 1788), in 2 *Elliot's Debates* 89.

[33] Speech of Thomas Thacher (Feb. 4, 1788), in 2 *Elliot's Debates* 145.

[34] Letters of Agrippa (XII), Mass. Gazette, Jan. 11, 1788, in 5 *Documentary History of the Ratification of the Constitution Digital Edition* *694, *694 (J. Kaminski et al. eds, 2009 (hereafter, "*Documentary History*"); *see also* Letters of Agrippa (XII), Mass. Gazette, Jan. 15, 1788, reprinted in 5 *Documentary History* *720, *720 (asking, "[W]hat is the kind of government best adapted to the object of securing our persons and possessions from violence?").

[35] John Adams, *Discourses on Davila* (1812), in 6 *The Works of John Adams* 237-38 (Boston, Little & Brown 1851).

The Pennsylvania debates include relevant usage as well. Samuel Bryan, an Anti-Federalist, equated "possessions" with "property" writ large. He said that the Pennsylvania Constitution protected the right "to hold yourselves, houses, papers and possessions free from search and seizure," meaning there was protection against someone to "search your houses or seize your persons or property …."[36] Thomas Hartley, speaking at the Pennsylvania debates, noted that the existing Confederation failed to protect "[t]he lives, the liberties, and the property of the citizens … so that necessity compels us to seek beneath another system, some safety for our most invaluable rights and possessions."[37]

How John Locke used the term "possessions" is notable, given his significance to the founders' philosophy of liberty and property. While sometimes he used the term to reference land ownership,[38] he also used the term to refer to "possessions" of all types whether real or personal.[39]

The above evidence shows that using "possessions" to refer to both real and personal property was well known in 1796. But two other related meanings should be recognized. First, it was extremely common to refer

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[36] Centinel I, Independent Gazetteer (Oct 5, 1787), in 13 *Documentary History* *326, *329; *see also* Centinel II, Phila. Freeman's J. (Oct. 24, 1787), in 13 *Documentary History* *457, *466-67.

[37] Speech of Thomas Hartley (Nov. 30, 1787), in 2 *Documentary History* *425, *429.

[38] *See, e.g.*, John Locke, *Second Treatise on Government* §§ 48, 108, 116-17 (1689), in 4 *The Works of John Locke* (London, C. & J. Rivington et al. 12th ed. 1824).

[39] *See id.* § 171, at 441 (discussing how man in a state of nature uses his best means to preserve "his own property," and then saying the goal of political power is to "preserve the members of that society in their lives, liberties, and possessions").

to a person as having "possession" of land.[40] This usage is even reflected several times in the 1796 Constitution.[41] Second, many early Tennessee cases used the term "possessions" to describe a possessory interest in land.[42] And one need not get beyond the first volume of the Tennessee reports to find four cases referring to an interest in land as a "possession."[43] That usage was common elsewhere in America as well.[44]

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[40] *See, e.g.*, *Gould v. Hoyle*, 4 Tenn. (3 Hayw.) 100, 102-03 (1816) (per curiam) ("[O]ccupancy respected lands already identified by possession and residence upon them ….").

[41] Article I, Section 7 required representatives in the General Assembly to "possess in his own right, in the County which he represents, not less than two hundred acres of land …." Article II, Section 3 required the Governor to "possess a freehold Estate of five hundred acres of land …." Finally, Article III, Section 1 permitted men "possessing a freehold" to vote.

[42] *See, e.g.*, *Brown v. Massey*, 22 Tenn. (3 Hum.) 470, 470-71 (1842) (argument of Complainants' counsel, asserting, "Our reports are full of cases adjudicating upon occupant claims and possessions").

[43] *See Park's Lessee v. Larkin*, 1 Tenn. (1 Overt.) 101, 103-04 (1805) (Overton, J.) ("[T]his statute annexed the possession in legal understanding …."); *Napier's Lessee v. Simpson*, 1 Tenn. (1 Overt.) 448, 452-53 (1809) (Overton, J.); *Perryman's Lessee v. Callison*, 1 Tenn. (1 Overt.) 515, 516–17 (1812) (Overton, J.), overruled by *Garner's Lessee v. Johnston*, 7 Tenn. (Peck) 24 (1822). These usages by Justice Overton were echoed soon after by other Tennessee jurists. *See Douling v. Hickman*, 5 Tenn. (4 Hayw.) 170, 172-73 (1817) (Whyte & Roane, JJ.); *Darby's Lessee v. Russel*, 6 Tenn. (5 Hayw.) 139, 149-50 (1818) (Haywood, J.); *Gray v. Darby's Lessee*, 8 Tenn. (Mart. & Yer.) 396, 418 (1825) (Catron, J.).

[44] *See, e.g.*, *Anonymous*, 2 N.C. (1 Hayw.) 466, 468–69 (1797) (per curiam); *Andrews v. Mulford*, 2 N.C. (1 Hayw.) 311, 320, 322 (1796) (per curiam); *Ingram v. Hall*, 2 N.C. (1 Hayw.) 193, 196–97 (1795) (Haywood, J.) (discussing "landed contracts" as securing "possessions," and later discussing "other contracts, that concerned only personal estate"); *Plumsted v. Rudebagh*, 1 Yeates 502, 504 (Pa. 1795) (per curiam); *Lilly v. Kitzmiller*, 1 Yeates 28, 33 (Pa. 1791); *Drane v. Hodges*, 1 H. & McH. 262, 272 (Md. Prov. 1768) (Dulany, J.), rev'd (1772); *Legan Lessee of R'd Bernard v. Washington Parish*, 2 Va. Colonial Dec. B272, B277-78, 1738 WL 3 (Va. Gen. Ct. 1738); *Denn v. Smith*, 1 Va. Colonial Dec. R50, R52, at 1731 WL 3, at *1-2 (Va. Gen. Ct. 1731).

E. The reference to "possessions" in Article I, Section 7 protects personal and real property.

In sum, dictionaries, precedents, and other sources provide confident evidence that when the people ratified the 1796 Constitution, the term "possessions" would have been understood to include personal *and* real property. *Welch*'s core holding, that real property beyond the curtilage is protected against unreasonable searches and seizures, stands on firm ground.

The evidence above suggests that *Welch* may actually fail to protect all of a person's "possessions." The undersigned has found no contemporary usage of the term "possessions," in the relevant sense, that suggests the term "possessions" would not extend to "wild and waste lands" that a person owns. In fact, Tennessee[45] and other American[46] courts made it *easier* to claim trespass in connection with wild lands,

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[45] *West v. Lanier*, 28 Tenn. (9 Hum.) 762, 771-72 (1849) ("[I]n this country a different rule has prevailed; and now it is well settled that the party who has the legal title to land which is adversely occupied by no one has a constructive possession thereof that will enable him to maintain trespass for an injury to the freehold."); *Polk v. Henderson*, 17 Tenn. (9 Yer.) 310, 311-12 (1836) ("In England there is but little, if any, real estate which is not in the actual possession of some one, but in the United States large bodies of land are lying uncultivated and unoccupied, and, unless the owners can be allowed to have the constructive possession thereof, and upon that possession to maintain trespass against wrong-doers who have not taken possession adversely, all unoccupied lands are exposed to the ravages of every person who thinks more of his own welfare than of his neighbor's rights, as there is no other remedy for casual trespasses."); *see also Gillespie v. Worford*, 42 Tenn. (2 Cold.) 632, 640 (1866); *Guion v. Anderson*, 27 Tenn. (8 Hum.) 298, 323-24 (1847) (Green, J.); *McCorry v. King's Heirs*, 22 Tenn. (3 Hum.) 267, 273-74 (1842) (Reese, J.). There was dicta suggesting the contrary in *Waggoner v. Corlew*, 3 Tenn. (Cooke) 246, 246-47 (1812).

[46] *See Cannon v. Hatcher*, 19 S.C.L. (1 Hill) 260, 261-62 (S.C. App. L. & Eq. 1834) (Johnson, J.); *Van Brunt v. Schenck*, 11 Johns. 377, 385 (N.Y. 1814) (Spencer, J.).

suggesting such property is not second-class. Of course, this Court is not at liberty to revise *Welch*, nor does it appear that this case would even present a need to do so, since the land at issue here is not "wild and waste land," as explained above.

III. Article I, Section 7 of the Tennessee Constitution offers broader protections than the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution establishes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures …." Federal courts have limited the Fourth Amendment's protections of land to the home and its curtilage, a construction known as the "open fields" doctrine. *See Oliver v. United States*, 466 U.S. 170, 176-80 (1984); *Hester v. United States*, 265 U.S. 57, 59 (1924). The Supreme Court reasoned in *Oliver* that because the term "effects" is less inclusive than "property," the protections of the Fourth Amendment were not intended to extend to privately-owned open fields. *Oliver*, 466 U.S. at 176-77. But the Tennessee Constitution protects "persons, houses, papers, and *possessions*," and as shown above, Tennessee courts have correctly found term "possessions" to encompass private property beyond the curtilage. *See, e.g.*, *Welch v. State*, 289 S.W. 510, 510 (Tenn. 1926); *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979) (finding that "no compelling reason has been demonstrated in this case for modifying or overruling" *Welch* and its progeny). Notably, other state courts have similarly rejected the open fields doctrine based on their state constitutions, reflecting a broader

desire to use the protections afforded by state constitutions to limit the overreaching federal powers under the open fields doctrine.[47]

IV. The Appellants' warrantless activity on Appellees' private properties was unreasonable.

Here, Appellants' searches were not reasonable. Appellants entered Appellees' land, installed surveillance cameras, and surreptitiously took hundreds of photos, without probable cause that any violations of Tennessee hunting regulations were occurring. Property ownership grants the owner "the right of possession, enjoyment and use." *See State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 96 (Tenn. Ct. App. 1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). Yet few Tennesseans would likely enjoy the possession and use of their land knowing the government may be recording any activity on their property without their knowledge.

Indeed, our Constitution protects against Appellants' intrusive searches on Appellants' land. What actions constitute a search or seizure

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[47] *Okhuysen v. City of Starkville*, 333 So. 3d 573, 580 (Miss. Ct. App. 2022) (noting how Mississippi courts have interpreted the corresponding provision in their state constitution, which protects "possessions," to cover *all* of a person's land); *State v. Kirchoff*, 587 A.2d 988, 994 (Vt. 1991) (explaining that Vermont constitution, which protects "possessions," extends to any land "where indicia would lead a reasonable person to conclude that the area is private"); *see also People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1992) (holding that state constitution's search-and-seizure protection applies to any land "posted with 'No Trespassing' signs" or otherwise indicate entry not permitted); *State v. Dixson*, 766 P.2d 1015, 1024 (Or. 1988) (same); *State v. Johnson*, 879 P.2d 984, 992 (Wash. Ct. App. 1994) (noting state constitution's privacy protections extends beyond the curtilage).

is rooted in common law trespass. *United States v. Jones*, 565 U.S. 400, 405-06 (2012).[48] When a government agent trespasses onto protected land, without a warrant or exigent circumstances, it is categorically "unreasonable." *See, e.g.*, *State v. Harris*, 919 S.W.2d 619, 624 (Tenn. Crim. App. 1995); *Okhuysen*, 333 So. 3d at 581 (holding that entry onto property owner's land constituted a trespass even though it was beyond the curtilage, and therefore in violation of state constitution). Here, TWRA officers physically entered Appellees' land without a warrant, permission, or exigent circumstances. That is a trespass.[49] They also attached things (trail cameras) to Appellees' land. That is also a trespass.[50] Those trespasses on Appellees' possessions therefore violated their rights under Article I, Section 7.

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[48] *Jones* rooted this statement in *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275 (Camden, J.), the seminal English case which invalided a governmental search using trespass as the lens of inquiry. The Tennessee Supreme Court has similarly affirmed that *Entick* underpins our Constitution's search-and-seizure protection. *See Cravens v. State*, 256 S.W. 431, 432 (Tenn. 1923) ("[*Entick*] is everywhere alluded to as one of the landmarks of Anglo–Saxon liberty.").

[49] 87 C.J.S. *Trespass* § 108 ("Every trespass gives a right to at least nominal damages, even though a trespasser has not damaged the property or its possessor …." (footnote omitted)); 1 Joseph Chitty, *A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading* 180 (John A. Dunlap ed., Phila., Carey & Lea 4th Am. ed. 1825) ("[Trespass] lies, however unintentional the trespass, and though the *locus in quo* were unenclosed …." (footnote omitted)).

[50] *See, e.g.*, Restatement (Second) of Torts § 158 cmt. a ("The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it."); *see also Jones*, 565 U.S. at 410-11 (holding that warrantless attachment of a GPS device on a vehicle amounted to a trespass, and therefore an unreasonable search under the Fourth Amendment); *Hawkins v. Wallis* (1763) 95 Eng. Rep. 750; 2 Wils. K.B. 173 (3d ed. 1799) (holding that defendant's attachment of "trees" to the greenhouse on the plaintiff's land was a trespass).

CONCLUSION

A landowner's longstanding right to exclude others from their property is a core pillar upon which private property rights stand. The Statute at issue here asserts an unconstitutional authority for Appellants to enter, trespass, and monitor private property and its owners without a warrant. This directly contradicts the express language of Article I, Section 7, and upends the expectations of private property owners across Tennessee. This Court should affirm the trial court's finding that the Statute is unconstitutional.

Respectfully submitted this 1st day of February, 2023.

CHAMBLISS, BAHNER & STOPHEL, P.C.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Section 3, Rule 3.02 of Supreme Court Rule 46 and contains 6,643 words.

/s/ Nathan L. Kinard
Nathan L. Kinard

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the forgoing **Brief of *Amici Curiae* National Association of REALTORS®, REALTORS® Land Institute, and Tennessee Association of REALTORS® in Support of Appellees** has been served upon all interested parties by U.S. Mail, postage prepaid.

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This 2nd day of February, 2023.

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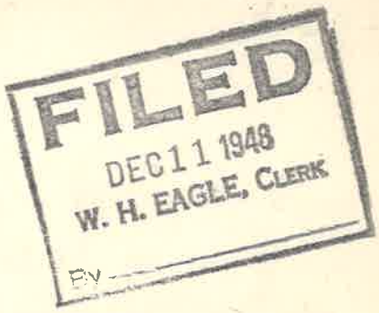
EXHIBIT 1

For Publication
Burnett, J.



HENRY STINNETT	)	
	)	
	)	BLOUNT CRIMINAL
V.	)	
	)	HON. SUE HICKS,
	)	
	)	JUDGE
STATE OF TENNESSEE	)	

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J. Malcolm Shull,
Assistant Attorney General

O P I N I O N

The plaintiff in error was indicted in a three count indictment. He was convicted on the first count only, i.e., the count charging possession of intoxicating liquor. He was acquitted on the counts charging unlawful manufacture of whisky and possession of a still. He appeals from this conviction wherein he was fined $500.00 by the jury. A fair statement of the facts is given by the Attorney General in the State's brief as follows:

"The Sheriff and his deputies found a complete still, which was warm and had ashes and coals in the furnace, across a ravine about five or six hundred feet from two houses. A child in one of the houses called the plaintiff in error "Daddy". The officers had been able to drive to the houses. There were several pieces of fence on the premises, but the premises were not

surrounded by a fence. The officers crossed one of these fences in going to the still. As they neared the still, the plaintiff in error was seen about ten feet from it. As he ran he passed one of the officers and asked, "What the G. D. hell you people doing on my premises?" (Tr. p. 25). He had a package under his arm which he dropped at a little building about twenty-five feet from the still. This package contained about two dozen new fruit jar caps. Without searching the building the officers saw through the cracks that it contained sprouted corn, a grinding mill, bottles and some cases. (Tr. p. 20). This building was on a trail and at the end of a water line from the still. At the still the officers found two half-gallon jars of moonshine whisky. There were sixty half-gallon jars of moonshine whisky in the building. (Tr. pp. 20, 21)."

The evidence narrated was secured without the aid of a search warrant. This being true the obvious determinative question arises, it is very clearly and forcibly raised through various assignments, that is, whether or not the search, without a search warrant, was legal. Apparently this court has never directly decided the question presented under a like state of facts. This court though has indicated in at least two published opinions that a search under such facts would be

legal without a search warrant. See Welsh v. State, 154 Tenn., 60,289 S.W. 510; Allen v. State, 161 Tenn., 71, 29 S.W.(2d) 247.

Specifically the question here is: Does the word "possession" as used in Article I, Section 7 of the Constitution "that the people shall be secure in their person, houses, papers and possession from unreasonable searches and seizures" include the still and small house adjoining it as belonging to and a part of the home of the plaintiff in error?

It is a well recognized construction of this Constitutional language that the space of ground adjoining the dwelling house and the buildings thereon within the same common fence in daily use in connection with the conduct of family affairs are within the "searches and seizures" protection. What we mean, is well illustrated in Welsh v. State, supra, where it was held that the term "possessions" did include a hog lot inclosed with a fence and used by the defendant as a necessary part of his farming operations, although it was not within the curtilage. In other words, when the search is made upon premises so inseperable from and immediately adjacent to one's home as to be a part thereof, the entry is in effect, an invasion of the privacy of the home. In so far as Welsh v. State, supra, meets the test herein applied it is reaffirmed and will be followed in cases similar in their facts.

The Supreme Court of the United States and the courts of last resort of Kentucky, Missouri, Oklahoma, Texas, Montana and Washington hold that a search and seizure without a warrant, or a valid warrant, is not unreasonable, when it is made in open fields, woods, etc. See annotations 27 A.L.R. 709; 39 A.L.R. 811; 74 A.L.R. 1418. In Hester v. U.S., 265 U.S. 57, 68 L.Ed. 898, Mr. Justice Holmes delivering the opinion said in part:

"--- the special protection accorded by the fourth amendment in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the houses is as old as the common law."

In Wolf v. State, 110 Tex. Crim. Rep., 124, 9 S.W.(2d), 350, the Texas Court expresses our idea, as to the correct rule to be applied to a situation presented by this record, in these words:

> "It is apparent from the precedents that the immunity from interference is founded upon the desire to give effect to the idea that "a man's home is his castle"; that an unreasonable search is one which trenches upon the peaceful enjoyment of the house in which he dwells or in which he works and does business, and those things connected therewith, such as gardens, outhouses, and appurtenances necessary for the domestic comfort of the dwelling house or that in which the business is conducted. In its limitations, the immunity intended is analogous to that which applies to the curtilage of which the common law speaks, and does not render unreasonable the search of woods, fields, ravines, or open spaces not so connected with the place of business or dwelling, though owned by the same individual. See State v. Shaw, 31 Me. 523; Cook v. State, 83 Ala. 62, 3 So. 849, 3 Am. St. Rep. 688; Washington v. State, 82 Ala. 31, 2 So. 356; State v. Hecox, 83 Mo. 531; Cornelius on Search and Seizure, § 25, p. 88."

Apparently the courts of Mississippi are the only ones holding to the contrary. The Mississippi courts hold that the word "possessions" extends to all of the property in possession of a citizen and, therefore, that a search in a district without a search warrant is illegal. Falkner v. State, 134 Miss., 253, 98 So., 691.

The Kentucky court applies the rule of ejusdem generis in construing a similar provision of the Constitution of that State. This rule is that "general words must be construed as applying to things of the same kind or class as those indicated

by the preceding special words". State v. Wheeler, 127 Tenn., 58, 61. It seems to us that this is a reasonable and proper means of construction of a Constitutional provision. See Cooley's Const. Lim; pages 57, 58. We apply this method of construction here. In doing so we find that the words which precede "possession" are "their person, houses, papers". It would therefore appear that this still and little "still house" which are in no way connected with the dwelling house, neither by path nor enclosed fence, are not within the protection of the "searches and seizures" clause of the Constitution.

This construction seems logical and reasonable to us. Especially so if we take the converse of the situation, that is, suppose a search warrant was duly issued for the dwelling house and the whiskey was found where it was. Under such an assumed state of facts clearly the search warrant would not permit a search of the property where the whiskey was found.

A gallon of whiskey was found at the still. This was in two half-gallon fruit jars covered with new caps like those the plaintiff in error had in his package which he left at the little shack just before his flight. The only evidence we have as to the ownership of the whiskey or the premises is a statement of the plaintiff in error, which is not denied, that he asked one of the officers what the hell they were doing on his premises. Then too, the flight of the plaintiff in error is a circumstance to which the jury, might look tending to indicate his guilt. Moody v. State, 159 Tenn., 245, 249.

Certain assignments are directed to the failure of the trial judge to charge more elaborately or broader on certain subjects. No special instructions were asked on the subjects complained about. Even though the instructions complained about were not as broad as they might have been this

does not constitute reversible error in the absence of special requests. Powers v. State, 117 Tenn., 363, 371.

The views above expressed are those of the writer of this opinion. The Chief Justice agrees with this view point but the majority of the Court disagree. Under the facts of this record the majority think a search warrant necessary and there is no reasonable excuse shown why the officers did not obtain one.

The result, therefore, is that the case must be reversed and dismissed.

Hamilton S. Burnett, Associate Justice

EXHIBIT 2

MINUTES

1947-48

SUPREME COURT

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Spring Jimmy " " 68-77 282-

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Standard Coosa Thatcher Co. et al 60- 151-16[illegible]
vs. Chas. F. Beard

Smith Bessie & Jim vs. 163-19[illegible]

[illegible]

Filed Jan. 18, 1949
W. H. Eagle, Clerk

Henry Stinnett :
: No. 6 Blount County Criminal
: Possession of intoxicating liquor
vs. :
: Reversed and dismissed
The State :

Remanded Jan. 19, 1949

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Coury of Blount County; and on consideration thereof the Court is of opinion that there is reversible error on therecord, as shown in the written opinion of the Court for publication filed and made a part of the record, and for the reasons set forth in said opinion, the judgment of the Court below is reversed and the case dismissed, and the plaintiff in error will go hence without day.

It is therefore ordered by the Court that the judgment of the Court below be reversed, the verdict of the jury set aside and the case dismissed and plaintiff in error will go hence without day. The County of Blount will pay the costs of this appeal, which will be certified to the proper officer of the county for payment in the manner required by law. The case is remanded to the Criminal Court of Blount County for the collection of cost accrued in said Criminal Court.

(signed) A. B. Neil
Alan M. Prewitt
Hamilton S. Burnett

Filed Jan. 18, 1949
W. H. Eagle, Clerk

Cecil McClellan :
: No. 6 Hawkins County Criminal
vs. : Assault and Battery
: Reversed and Dismissed
The State :

Remanded Jan. 18, 1949

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Circuit Court of Hawkins County; and on consideration thereof the Court is of opinion that there is reversible error on the record, as shown in the opinion of the Court filed and made a part of the record in this case, and for the reasons set forth in said opinion, the judgment of the Court below is reversed and the cause dismissed.

It is therefore ordered by the Court that the judgment of the Court below be reversed, the verdict of the jury set aside and the case is dismissed and the plaintiff in error go hence without day. The County of Hawkins will pay the costs of this appeal, which will be certified to the proper officer of the County for payment in the manner required by law. The case is remanded to the Circuit Court of Hawkins County for the