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SEARCHES AND SEIZURES - SEARCH AS INCIDENT OF UNLAWFUL SEIZURE - SEARCH WITHOUT WARRANT

SEARCHES AND SEIZURES — SEARCH AS INCIDENT OF UNLAWFUL SEIZURE — SEARCH WITHOUT WARRANT — Where a sheriff took possession of an unattended car parked on the streets, in the belief that the automobile was stolen and without knowledge that it contained liquor, and two hours later searched it and seized liquor in the car, acting on information received subsequent to the seizure of the car but prior to the search for the liquor, *held* that the taking of the car by the sheriff was an unlawful act and the search was an incident thereof; that the search without a warrant was an unreasonable one under the South Dakota Constitution prohibiting unreasonable searches and seizures, since the information as a justification for the search must have existed at the time of the taking possession of the automobile. *State v. Jackson*, (S. D. 1933) 250 N. W. 55.

The court's decision in the instant case presents two distinct problems; whether the search and seizure of the liquor can be justified as reasonable as an incident to the taking possession of the car by the sheriff, and whether the search can be justified as reasonable although based on information received by the sheriff subsequent to the taking of the car but prior to the search for the liquor. Disregarding for the moment the second problem, it will be noted that the court

assumes that the original taking of the car by the sheriff was unlawful. If this assumption be correct, the search for and seizure of the liquor was unreasonable as an incident of an unlawful act.[1] Nor could such a search be justified by the fact that evidence of the crime was discovered.[2] However, it is submitted that there is no ground for the court's assumption. There seems to be no valid reason why this sheriff, believing the automobile to be stolen, should not have the right of taking it into his custody. If this be correct, it would be difficult to deny the reasonableness of the search and the seizure of the liquor as an incident thereof.[3] In considering the second of the above problems, it would seem that the court's conclusion as to the necessity of the existence of probable cause prior to the original taking of the car as a justification for the search and seizure of the liquor is unsound, even though the validity of the assumption that the taking of the car was unlawful be admitted. Although the court does not discuss the nature of the information, it is a fair inference, from the absence of denial, that it was of such character as to give rise to a reasonable belief in the sheriff's mind that an offense was being committed which, under the doctrine of *United States v. Carroll*,[4] would give the sheriff the right of search without warrant.[5] Since information received in such manner has been held sufficient, as a basis of probable cause, to justify a search without a warrant,[6] and since the information received in the principal case existed independently of the original acquisition of the automobile, so that had it been standing alone it would have served as a justifi-

[1] Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652, L. R. A. 1915B 834, Ann. Cases 1915C 1177 (1914); Lewis v. Commonwealth, 197 Ky. 449, 247 S. W. 749 (1923).

[2] CORNELIUS, SEARCH AND SEIZURE, sec. 20 (1926); United States v. Slusser, (D. C. S. D. Ohio 1921) 270 Fed. 818; Byars v. United States, 273 U. S. 28, 47 Sup. Ct. 248 (1927); United States v. Kaplan, (D. C. S. D. Ga. 1923) 286 Fed. 963; Burnett v. State, 199 Ind. 49, 155 N. E. 209 (1927); People v. Scaramuzzo, 352 Ill. 248, 185 N. E. 578 (1933); United States v. Wisniewksi, (C. C. A. 6th, 1931) 47 F. (2d) 825. But see State v. Williams, (Mo. 1929) 14 S. W. (2d) 434.

[3] CORNELIUS, SEARCH AND SEIZURE, secs. 36, 38, and 49 (1926); Bohlen, "Arrest With and Without a Warrant," 75 UNIV. PA. L. REV. 485 (1927); United States v. Rembert, (D. C. S. D. Tex. 1922) 284 Fed. 996; State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923); Altshuler v. United States, (C. C. A. 3d, 1925) 3 F. (2d) 791. Some courts have extended the right of search and seizure to anything possessed by the person used in connection with another offense. State v. Dietz, 136 Wash. 228, 239 Pac. 386 (1925); French v. State, 94 Ala. 93, 10 So. 553 (1892); Jameson v. State, 196 Ind. 483, 149 N. E. 51 (1925); Marsh v. United States, (C. C. A. 2d, 1928) 29 F. (2d) 172; Johnson v. Commonwealth, 240 Ky. 123, 41 S. W. (2d) 913 (1931); State v. Hatfield, 112 W. Va. 424, 164 S. E. 518 (1932). See State v. Zupan, 155 Wash. 80, 283 Pac. 671 (1927). *Cf.* Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261 (1921).

[4] 267 U. S. 132, 45 Sup. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790 (1925).

[5] See Black, "Critique of the Carroll Case," 29 COL. L. REV. 1068 (1929); Bohlen, "Arrest With and Without a Warrant," 75 UNIV. PA. L. REV. 485 (1927); and notes in 13 COL. L. REV. 352 (1913), 23 MICH. L. REV. 891 (1925). See annotation on the right to search automobile without warrant in 27 A. L. R. 709 at 733 (1923).

[6] CORNELIUS, SEARCH AND SEIZURE, sec. 31, p. 129 (1926); Budreau v. State, 197 Ind. 8, 149 N. E. 442 (1925); Houck v. State, 106 Ohio St. 195, 140 N. E. 112 (1922); Lambert v. United States, (C. C. A. 9th, 1922) 282 Fed. 413.

cation for the search, it would seem that the court was wrong in its conclusion that such information, to serve as a justification for the search and seizure of the liquor, must have existed prior to the original seizure of the automobile.[7]

H. F. B.

[7] Safarik v. United States, (C. C. A. 8th, 1933) 62 F. (2d) 892.