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Search of Person under Authority to Search Premises

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of searching the record, but it does not solve the problem when the auto has a foreign license or a foreign registration. The most practical solution, and the present trend, is to make the certificate of title an instrument of recording.¹⁷ Thus, there is not only constructive notice when validly recorded, but also actual notice when the certificate is necessary to convey the auto.¹⁸ The present problem is to have a uniform act adopted in all states.¹⁹ Wyoming, which already requires a certificate of title,²⁰ should adopt this convenient and satisfactory method of recording automobile mortgages.²¹

ROBERT BURGESS

SEARCH OF PERSON UNDER AUTHORITY TO SEARCH PREMISES

Reed informed an Office of Price Administration investigator that he was going to purchase some counterfeit gasoline ration coupons from a certain Buttitta. Acting on that information, the investigator and a detective from the Buffalo Police Department followed Buttitta's automobile to the appointed place. The investigator and the detective went over to Buttitta's car and found the informer Reed sitting alone in the rear seat of the car holding two counterfeit gasoline ration coupons in his hand. On being asked where he obtained the coupons, Reed said he obtained them from Buttitta, who was then sitting in the driver's seat of the car. In the seat beside Buttitta sat defendant Di Re. All three men were taken in custody, "frisked" for weapons, and then taken to the police station. About two hours later, Di Re was booked and thoroughly searched, and one hundred counterfeit gasoline ration coupons were found in an envelope concealed between his shirt and underwear. By the use of this evidence, Di Re was convicted on a charge of knowingly possessing counterfeit gasoline coupons. The Circuit Court of Appeals reversed the judgment; and, on the petition of the United States, the Supreme Court granted certiorari. One of the contentions of the government was that incidental to the arrest of Buttitta the officers had the right to search Buttitta and the premises on which he was arrested, therefore that a search of the automobile would have been lawful and since Di Re was in the automobile the search of his person was lawful. Held that a person does not lose the immunities from a search of his person to which he would otherwise be entitled

17. Arizona, California, Delaware, Florida, Michigan, Montana, Nebraska, Nevada, New Jersey (conditional sales only), New Mexico, Ohio, Pennsylvania, Texas, Utah, Virginia and the District of Columbia.

18. The following states require a certificate of title, but do not use it for recording mortgages so that a recording upon the certificate is constructive notice: Colorado, Idaho, Illinois, Indiana, Maryland, Mississippi, Missouri, North Carolina, North Dakota, Washington, West Virginia, Wisconsin and Wyoming.

19. The following states do not require a certificate of title for automobiles: Alabama, Arkansas, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, South Carolina, Tennessee, and Vermont.

20. Wyo. Comp. Stat. 1945 sec. 60-207.

21. For suggestions as to the form of the Statute and a discussion of the problems, see Leary, Horse and Buggy Lien Law and Migratory Automobiles, 96 U. of Pa. L. R. 476-483 (1947).

merely because he is on premises which may lawfully be searched. The judgment of the Circuit Court of Appeals was affirmed. *United States v. Di Re*, 68 Sup. Ct. 222 (1948).

The fourth amendment to the Federal Constitution¹ does not prohibit all searches and seizures made without the authority of a properly issued search warrant, but rather prohibits only unreasonable searches and seizures² by officers and agents of the Federal Government.³ The problem arises, then, of determining what constitutes a reasonable, and therefore lawful, search and seizure.

It is well settled that a search and seizure made as an incident to a lawful arrest is reasonable and therefore lawful,⁴ and such a search may extend to the person of the individual arrested and the immediate premises on which the arrest was made,⁵ or at least so much of the premises as are under the immediate control of the person arrested.⁶ In order for such a search and seizure to be reasonable and lawful, however, the arrest incidental to which it was made must first be lawful.⁷ In the instant case, the arrest of Di Re was not lawful and his search could, therefore, not be justified as incidental to *his* arrest,⁸ but the government contended that Di Re's search was justified as incidental to the arrest of Buttitta. The problem of the reasonableness of a search of a person and seizure of his possessions by virtue of the fact that he was on premises which could lawfully be searched was, therefore, presented to the Supreme Court of the United States.

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1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amend. IV.
 2. *Carroll v. United States*, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925); *Cannon v. United States*, 158 F. (2d) 952 (C. C. A. 5th 1946).
 3. *United States v. Falloco*, 277 Fed. 75 (W. D. Mo. 1922); *United States v. One Ox-5 American Eagle Airplane*, 38 F. (2d) 106 (W. D. Wash. 1930); *Graffe v. United States*, 49 F. (2d) 270 (C. C. A. 10th 1931); *Van Hook v. City of Helena*, 170 Ark. 1083, 282 S. W. 673 (1926).
 4. "It is fundamental that a search may be made without a warrant in connection with a lawful arrest, . . ." 47 Am. Jur. 515; *Carroll v. United States*, 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925); *United States v. Heitner*, 149 F. (2d) 105 (C. C. A. 2d 1945); *Shettle v. United States*, 113 F. (2d) 34 (App. D. C. 1940).
 5. *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925); *Marron v. United States*, 275 U. S. 192, 48 Sup. Ct. 74, 72 L. Ed. 231 (1927); *United States v. Tot*, 131 F. (2d) 261 (C. C. A. 3rd 1942), *rev'd* on other grounds, 319 U. S. 463 (1943); *Beard v. United States*, 82 F. (2d) 837 (App. D. C. 1936).
 6. *United States v. Seltzer*, 5 F. (2d) 364 (Mass. 1925); *United States v. Lindenfeld*, 142 F. (2d) 829 (C. C. A. 2d 1944).
 "To what extent, however, a search may extend beyond the prisoner's person cannot be clearly defined from an abstract point of view, depending as it does, on the court's interpretation of such phrases as 'immediate presence,' 'immediate control,' or 'immediate surroundings' of the person arrested, as applied to the facts of the particular case, although it has been held that the 'place' or 'the immediate place' at which the arrest occurs or the 'immediate surroundings' may be searched." 47 Am. Jur. 515.
 7. *Cline v. United States*, 9 F. (2d) 621 (C. C. A. 9th 1925); *United States v. Hotchkiss*, 60 F. Supp. 405 (Md. 1945); *Goodman v. State*, 158 Miss. 269, 130 So. 285 (1930).
 8. The court said that Di Re had not committed any crime in the presence of the officers and that the officers did not have sufficient reason to believe that Di Re had committed a felony and therefore that Di Re could not lawfully be arrested. *United States v. Di Re*, 68 Sup. Ct. 222 (1948).

Although this question had never been presented to the Supreme Court of the United States before,⁹ it has come up several times in the state courts under the search and seizure provisions which appear in the state constitutions¹⁰ and which are phrased the same or substantially the same as the fourth amendment to the Federal Constitution.¹¹ In these cases it has uniformly been held that the right to search premises does not carry with it the right to search a person who happens to be present on the premises.¹² Although the question in the state courts seems always to have arisen in connection with a search made under a search warrant, the rules there laid down would also be applicable to searches without a warrant incidental to a lawful arrest. Authority to search premises incidental to a lawful arrest can surely be no greater than that conveyed by a search warrant for the same premises.¹³

In *Purkey v. Mabey*,¹⁴ the leading case for the proposition that the authority to search premises does not include the authority to search a person on the premises, the defendant was the sheriff of Bancroft County, Idaho, and had a lawful warrant for the search of a cigar store. When defendant executed the warrant he also searched the plaintiff who was merely a bystander in the store. Plaintiff brought an action in assault against the defendant, and the trial court directed a verdict for the defendant. On appeal, the Supreme Court of Idaho said that a search warrant issued to an officer authorizing him to search a certain place cannot be extended so as to constitute authority to search a person who merely happens to be in the place searched, and that the search of the plaintiff's person was unlawful and an invasion of his constitutional rights. The judgment of the trial court was therefore reversed.

Some cases have gone even further than this toward protecting the right of the individual to be free from unreasonable search and seizure. Cases have held that not only is a third person who merely happens to be present on the premises not included within the authority to search, but that the person in charge of the premises is likewise exempt from search unless the warrant specifically names him and states that his person as well as the premises is to be searched.¹⁵

9. *Ibid* at 224.
10. For a note to the effect that every American state constitution has such provisions, see 10 Va. L. Rev. 124 (1923).
11. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized." Iowa Const. Art. I, sec. 8. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized." Wyo. Const. Art. I, sec. 4.
12. *Purkey v. Mabey*, 33 Idaho 281, 193 Pac. 79 (1920); *State v. Massie*, 95 W. Va. 233, 120 S. E. 514 (1923); *State v. Tatar*, 108 W. Va. 709, 152 S. E. 748 (1930); *State v. Wuest*, 190 Wisc. 251, 208 N. W. 899 (1926); *Robinson v. State*, 143 Miss. 247, 108 So. 903 (1926); *Bates v. State*, 143 Miss. 772, 109 So. 730 (1926); *State v. Jokosh*, 181 Wisc. 160, 193 N. W. 976 (1923); *State v. Nozanich*, 207 Ind. 264, 192 N. E. 431 (1934).
13. *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W. D. N. Y. 1943).
14. *Supra* note 12.
15. Defendant was the manager but not the owner of the premises, and officers who had a warrant to search the premises also searched the defendant. Held, that the search

The search of premises incidental to a lawful arrest is permitted on the theory that the arrested person has control of the immediate premises in which he is arrested and may have hidden the fruits of his crime somewhere on the premises. Under this theory, in order to justify the search of a third person who is present on the premises authorized to be searched as incidental to the arrest it would be necessary that the pockets of the third person be under the control of the person arrested. Unless the third person is an accomplice in the crime, such, of course, is not the situation. A third person's pockets are under his own control and, if his search is to be justified, the justification must come from something more substantial than the arrest of one other than himself. If the third person has committed an offense in the presence of the officers or if the officers have a good reason to believe that he committed a felony, he may himself be arrested¹⁶ and his person searched as incidental to his own arrest; but if he is presumably innocent to such an extent that he is not subject to *arrest*, his search would be unreasonable. The minute possibility that the arrested person may have slipped an important piece of evidence into his pocket is not sufficient to deprive a third person of his immunity from search as guaranteed by the Federal Constitution.

JOE R. WILMETTI

RIGHTS OF LEGATEES TO PRINCIPAL IN LIEU OF ANNUITY

The testatrix bequeathed a sum of \$3,000.00 to the legatee, payable \$1,000.00 in cash and the remaining \$2,000.00 to be invested by the executor for the benefit of the legatee in specified annuities. The executor asked the direction of the court as to whether or not he could pay the entire sum over to the legatee, or be forced to purchase the annuities. The executor stated that he was of the opinion that the legatee had the right to receive the total sum in cash. To this the societies from whom the annuities were to be purchased, filed objections. On appeal to the supreme court: *Held*, that where the testatrix has bequeathed a certain sum and specified that it is to be used for the purchase of a specified annuity, that the intent of the testatrix must be followed and the annuity must be purchased. *In re Johnson's Estate*, 30 N. W. (2d) 164 (Iowa 1947).

This decision is a complete reversal of the rule of law that an annuitant may elect to take the capital sum, where there is a direction in the will to the executor to purchase an annuity for a named beneficiary.¹ This has been the accepted law

was unreasonable and unlawful. *State v. Jokosh*, 181 Wisc. 160, 193 N. W. 976 (1923). Defendant was the owner of the house in which she lived and when she learned that officers with a search warrant were about to search her home for whiskey she took a bottle of whiskey out from under the pillow of her bed and secreted it on her person. Officers took her to headquarters and had her searched. *Held*, that the search was unreasonable and unlawful. *State v. Nozanich*, 207 Ind. 274, 192 N. E. 431 (1934).

16. *Shettel v. United States*, 113 F. (2d) 34, 35 (App. D. C. 1940); *United States v. Sam Chin*, 24 F. Supp. 14, 17 (Md. 1938); *United States v. Biddle*, 39 F. Supp. 203 (E. D. Pa. 1941); *United States v. Strickland*, 62 F. Supp. 468, 471 (W. D. S. Car. 1945).

1. 69 C. J. 945, sec. 2133.