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THE SEIZURE OF PROPERTY AS EVIDENCE, ITS UNLAWFUL RETENTION, AND SUGGESTED REMEDIES OF THE OWNER

By Samuel Anderson

Not infrequently, property which has been stolen or otherwise unlawfully obtained from its rightful owner is seized by law enforcement agencies and held as evidence relating to the commission of a subsequent crime. Under such circumstances the rightful owner of the property may be deprived of its use for considerable periods of time with consequent loss to the owner. It will be the purpose of this article to explore the possibilities of what may amount to an "unlawful taking" and to suggest possible remedies available to the owner when his property is subsequently detailed.

Statutes sometimes provide for the forfeiture of such property to the government.[1] There may be statutes which expressly authorize compensation to the property owner for privations of the kind here involved. Neither type of statute is within the scope of this article.

In order to provide a more specific basis for the discussion, let us assume that *D* steals a late model automobile from *V*, then uses the automobile in the commission of a homicide. *D* is arrested and charged with the homicide. The automobile is seized by the arresting officers and is detained by law enforcement authorities for possible use as evidence at *D's* trial on the homicide charge. As soon as *V* learns what has transpired he makes demand upon the authorities for the return of his property, but it is not returned to him until the conclusion of the homicide trial. May *V* recover damages for the depreciation in value and for the deprivation of the use of the automobile during the period of detention?

Validity of the Seizure

The initial point to determine is whether the seizure of the automobile was valid. If it was in fact, unlawful, the vehicle in question may be suppressed as evidence of the crime, and the rightful owner is entitled to its immediate return. The federal and state constitutions uniformly prohibit unreasonable searches and seizure and the issuance of a search warrant without a showing of probable cause supported by an affidavit.[2] But a well recognized exception to the strict application of these constitutional provisions is where the search and seizure is incident to a lawful arrest.[3] In this instance the exception is based on an expediency, i.e., the arresting officer must have the authority to

1. For example, see California Penal Code § 335a, providing for the destruction of gambling devices.
2. U. S. Const. amend. IV; Wyo. Const. art. 1, §4. The federal and Wyoming Constitutional restructions against unreasonable searches and seizures have been held to be substantially identical in meaning. State v. Hiteshew, 42 Wyo. 147, 292 Pac. 2, 4 (1930). The former provides: "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."
3. Moreland, Modern Criminal Procedure, p. 118, (1959).

eliminate his suspect's means of escape and remove the weapons from his possession.[4]

Under what circumstances may a lawful arrest be made without a warrant? In *State v. George*[5] the defendant was suspected of having stolen sheep which had strayed from the complainant's herd. Armed with an invalid search warrant, and in the company of the complainant, a deputy sheriff of the jurisdiction investigated the defendant's herd of sheep on the open range during the night, and satisfied himself that some of them did belong to the complainant. The defendant had no notice of the "search." The following morning the defendant was arrested, apparently without a warrant, and at the same time, 32 sheep, claimed to be owned by the complainant, were seized on the open range.[6] Under these circumstances the arrest and seizure were upheld as valid.[7] As to the validity of the arrest the court said:

> Where a felony has been committed the right of arrest is broader than in cases of misdemeanor; and according to the general rule, which we have no reason to doubt is in force in this state, a peace officer may arrest, without a warrant, one whom he has reasonable or probable grounds to suspect of having committed a felony.[8]

The court further held that there had been no "search" in the constitutional sense, since the officer did not enter upon the defendant's premises when he observed the sheep, nor when he seized them; the sheep were open to observation by everyone.[9]

From the *George* case, then, we derive two principles of law important to the solution to the problem of this article: (1) a lawful arrest on a charge of felony may be made without a warrant, by a law enforcement officer, when a felony has been committed and when the officer has probable cause to believe that the arrestee committed this felony; and (2) No "search" (in the constitutional sense) is made when property open to view, in a place where the officer has a right to be, is seized; in other words, a motion to suppress evidence and to return it to the rightful owner, made on the grounds that it was seized by the arresting officer immediately following the arrest.

The application of these principles to the hypothetical case posed *supra* is evident. Assuming that no "arrest" was made in order to discover the automobile, and assuming that D was validly arrested, the seizure of the automobile by the arresting officer immediately following D's arrest was a valid seizure.

Even if there has been a search, and the property was seized as a result, the search and seizure are lawful if the arrest was lawful and the search and seizure took place immediately following the arrest, in the immediate

4. *Ibid.*
5. 32 Wyo. 508, 281 Pac. 17 (1929).
6. *Id.* at 684.
7. *Id.* at 694.
8. *Id.* at 690.
9. *Id.* at 689.

vicinity of the arrest. In the case of *State v. Young*[10] the defendant and his companion were suspected by two men of stealing their log chain. The description of the suspects and the vehicle they were driving were reported to the sheriff's office by telephone. On the basis of these descriptions two deputy sheriffs began to look for the defendant and his companion. The suspects and their vehicle were soon discovered. Both deputies testified they smelled a strong odor of whiskey as they approached the defendant's car. The officers' request to search the vehicle without a warrant was refused. This resulted in the arrest of the defendant and his companion for illegal transportation of intoxicating liquors, and an immediate search for and seizure of liquor inside the car. The trial court's decision that under such circumstances there was a showing of probable cause to support an arrest without a warrant was upheld, as was the seizure of the liquor as being incident to a lawful arrest.[11] In its opinion the court declared that "Where an offense against the laws of the State are being committed in an officer's presence, he may, indeed it is his duty, to arrest without a warrant."[12]

The above mentioned cases are representative of Wyoming decisions which uphold the validity of an arrest without a warrant, and the subsequent seizure of evidence in the possession of the defendant at the time of arrest.

THE RETENTION

In *Wiggins v. Slater* [13] the court said:

> The law is well settled that an officer has the right to search the party arrested, and take from his person and from his possession property reasonably believed to be connected with the crime, and the fruits, means, or evidence thereof, and he may take and hold them to be disposed of as the court directs.[14]

Title E, Chapter 7 of the *Wyoming Statutes (1957)* provides the statutory warrant procedure for search and seizure—causes for issuance, requisites of warrant, etc. Section 7-152, 7-153 and 7-154 are particularly important in the area now to be considered.[15]

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10. 40 Wyo. 508, 281 Pac. 17 (1929).
11. *Id.* at 19.
12. *Ibid. Accord*, State v. Kelly 38 Wyo. 455, 268 Pac. 571 (1928).
13. 280 Wyo. 480, 206 Pac. 373 (1922).
14. *Id.* at 376.
15. Wyo. Stat. 337-148 through 7-154 (1957). §7-152. "When the warrant is executed by the seizure of the property or things described therein, the same shall be safely kept by the justice to be used as evidnc."
§7-153. "If, upon examination, the justice shall be satisfied that the offense set forth in the complaint in reference to the property or things seized by the officer, has been committed, it shall be his duty either to keep possession of such property or other things, or deliver them to the sheriff of the proper county, there to remain until the case against the offender has been disposed of, or the claimants right has been otherwise ascertained."
§7-154. "Upon conviction of the offender, the property stolen, embezzled or obtained under false pretenses, shall be returned to its owner, and the other things specified shall be burnt or otherwise destroyed, under the direction of the court; but if the alleged offender shall be discharged, either before the magistrate or the court before

These three statutes assume that property has been seized by virtue of a warrant. They should apply equally, however, when a valid arrest, search and seizure have lawfully taken place without a warrant.

Alexander, in his work on *The Law of Arrest*[16] says this regarding the issue raised:

> It is the statutory duty of every arrester . . . to take the property of another which he has seized with or without a search warrant, promptly before the magistrate named in the warrant, or before the nearest accessible magistrate if there is no warrant. Such promptness is measured by the same rules as in the seizure of persons. The purpose is to get before a magistrate any and all property of every kind which may be useful as evidence in a criminal action or proceeding, or whose ownership is in dispute therein . . . Presentation of such property before him is "arraignment" analogous to that of a person; both are "arrested."[17]

In *State v. Jacobs*[18] which was concerned with property seized without warrant but incident to an arrest, the court declared: ". . . surely the rights of the owner of such property are no less where, as here, the property was taken without such warrant."[19]

In the Missouri case of *State v. Baker*[20] the defendant was convicted of the larceny of certain domestic fowl. Prior to his arrest the sheriff of the jurisdiction, upon a reasonable belief that the defendant had stolen the property, was issued a search warrant of the defendant's premises. The property in issue was taken by the sheriff, without resistance of the defendant, and returned to the person claiming ownership. At trial the defendant offered an instruction to the effect that the sheriff may retain such property seized to be used as evidence in the trial.[21] The trial court's refusal of the instruction was upheld since the instruction was not in "consonance with the law."[22] "The duty of the sheriff was to hold the property 'subject to the order of the court or officer authorized to direct disposition thereof.' "[23]

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which he is recognized to appear, th property or other things shall be returned to the person in whose possession they are found."

16. Alexander, he Law of Arrest, §153, 643, 644, 1947).
17. See also Wyo. Stat. §7-12 (1957).
18. 30 N.E. 2d 432 (Ohio 1940).
19. *Ibid* at 439. The court cited §13430-6 of the General Code of Ohio, now found as Ohio Rev. C. §2933-26 (1958) which reads as follows: "When a warrant is executed for the seizure of property or things described therein, such property or things shall be kept by the judge, clerk or magistrate to be used as evidence " §2933.27 further reads: "If, upon examination, the judge or magistrate is satisfied that the offense charged with reference to the things seized under a search warrant has been committed, he shall keep such things or deliver them to the sheriff of the county, to be kept until the accused is tried or the claimant's right is otherwise ascertained." (Note the similarity here with Wyo. Stat. §-153 (1957) supra, note 15).
20. 175 S.W. 64 (Mo. 1915).
21. *Id.* at 66.
22. *Id.* at 68.
23. *Ibid.* The court cited §5325 R.S. 1909 which is now Mo. Rev. Stat. §542.310 (1959) which reads as follows: "When property alleged to have been stolen, purloined or obtained by false shall come into the custody of any sheriff, coroner, constable, marshal, or any person authorized to perform the duties of such officers, he shall hold the same subject to the court or officer authorized to direct disposition thereof."

Under Wyoming's particular statutory provisions regarding control of property seized under warrant,[24] if the "justice"[25] is satisfied that the offense complained of has been committed "in reference to the property or other things seized," i.e., if there is sufficient evidence to sustain the crime charged, and if the property seized is evidence thereof, he shall preserve the same to be used as evidence; otherwise, such property is to be retained until its ownership is determined and then disposed of to the owner. In other words, the things seized must be "arraigned" as Alexander has stated.[26] The statute is very explicit—" . . . it shall be his duty . . ."[27]

It remains to be seen what the result should be where there has been no hearing to determine use as evidence or other disposition of the property seized.

In *Newberry v. Carpenter*[28] a manslaughter case, the defendant, one Thompson, was an engineer in control of boilers in a building owned by Newberry. The boilers exploded because of the alleged criminal negligence of Thompson, and the building was completely wrecked with 37 persons being killed in the process. Ten days after the explosion, and on motion to the district court by the prosecuting attorney, the boilers and surrounding premises were ordered into the custody of the police department to be used as exhibits in the manslaughter trial. On application for mandamus by Newberry against Carpenter (the judge ordering custody) the Supreme Court of Michigan in granting mandamus noted that if an order of the nature of the one in question were allowed to stand, police authorities may seize any means by which a citizen earns a livelihood merely because they believe it was used in the commission of a crime. This example was used:

> If A be arrested, charged with arson in the burning of B's house, and there be some evidence in the house believed to connect A with the crime, the police authorities may seize and hold possession of the house for months, and until the trial, and prevent the owner from rebuilding . . . if an order such as in this case be sustained.[29]

As was previously noted, Alexander considers the haste necessary in arraigning property seized the same as in arraigning the person arrested.[30] In *McNabb v. U.S.*[31] the defendants submitted confessions to officers during an extended period of questioning and were not brought before a magistrate for several days. Professor Moreland[32] concludes that the reversal of conviction was the net result of a failure to promptly take the defendants before a magis-

24. Wyo. Stat. §7-153, *supra* note 15.
25. As defined in Wyo. Stat. §7-58 (1957) ---". . . justice of the peace or police justice or other officer authorized by law to examine into charges in relation to the commission of a crime."
26. Alexander, *op. cit. Supra,* note 16.
27. Wyo. Stat. §7-153, *Supra* note 15.
28. 107 Mich. 567, 65 N.W. 530 (1895).
29. *Id.* at 530.
30. Alexander, *op. cit. Supra* note 16.
31. 318 U.S. 332 (1943).
32. Professor of Law, University of Kentucky, 1959, Author of Modern Criminal Procedure, supra note 3.

trate although the Court stated that confessions so elicited were inadmissible, and the conviction, based primarily on such confessions, could not stand.[33] Professor Waite[34] says that regardless of how the case is rationalized it results in turning known criminals loose upon society as a means of punishing the police.[35] Using Alexander's rationale and applying what has been said to be the result of the *McNabb* case, it seems that property seized without further hearing regarding its disposition or use should be resleased to its owner on demand. It should also be noted that in doing so no "known criminals" will be turned loose on society.

Evidence unlawfully obtained is inadmissible in Wyoming,[36] and, therefore, it need not be "preserved" to be used at trial. So also, evidence unlawfully retained should also be inadmissible; hence no preservation is necessary here either. In *State v. Peterson*[37] the Wyoming Supreme Court noted that:

> . . . It has generally been held by the latest and best reasoned authorities that if a timely application is made for the return ofproperty seized in violation of the constitutional provisions against unreasonable searches and seizures before the trial or the offer of the property as evidence therein, it is the duty of the court to order the return of the property . . . [38]

Certainly such reasoning touching unlawful seizure is just as appropriate in considering an unlawful retention. Such a retention is no less unlawful than if the property had been illegally seized in the first instance.

It has never been even remotely considered that an arrest by an officer is conclusive of the guilt of his suspect. So also, the seizure by the same officer of "evidence" at the time of arrest should never be considered conclusive as to use of such "evidence" as evidence of the crime at trial. The necessity of a hearing regarding the property becomes apparent in such a situation.

REMEDIES OF THE OWNER WHERE RETENTION IS UNLAWFUL

Wyoming law provides that any claim against a county must be presented to the commissioners thereof before any court action may be maintained.[39] If the claim is disallowed and appeal is taken to the district court, notice thereof must be filed with the clerk and chairman of the board of commissioners disallowing such claim.[40] This, then, is a possible remedy.

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33. Moreland, *op. cit. Supra* note 3 at 155.
34. Professor of Law, University of Michigan, 1944.
35. 42 Mich L. R. 679, 681 (1944).
36. State v. George, 32 Wyo. 223, 231 Pac. 683, 684 (1924). (dictum); 13 Wyo. L. J. 173 (1959).
37. 27 Wyo. 185, 194 Pac. 342 (1920).
38. *Id.* at 351.
39. Wyo. Stat. §18-155 (1957).
40. Wyo. Etat. §18-157 (1957).

Consideration should also be given to the possibility of using a "constructive" eminent domain theory of recovery. Although sovereign immunity is always a problem in a suit against the state or its political subdivisions, some courts have held that the condemnation clause in most constitutions which provide for the payment of just compensation constitutes a consent to suit.[41]

Liability of the sheriff individually or on his surety bond[42] is a good possibility.

In some jurisdictions there is a possibility of punitive damages against the sheriff after a consideration of his conduct in the particular circumstances involved.[43]

Considered individually, unlawful retention of property under the circumstances herein discussed may not appear to be of serious consequence. In the aggregate, however, the problem assumes serious proportions. Moreover, if not challenged, such practices can be self-perpetuation and an abusive tool of law enforcement procedure.

46. 6 Nichols, Eminent Domain §30.1, 446-451 (1962).
42. Wyo. Stat. §18-172 (1957).
43. See all Oil v. Barquin, 33 Wyo. 92, 237 Pac. 255 (1925), as to the amount of punitive domages allowable relative to actual damages.