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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 594

JULIUS A. WOLF, PETITIONER,

VS.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

OPPOSITION BRIEF.

STATEMENT RE JURISDICTION.

While it is contended by petitioner that jurisdiction exists by virtue of Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925 (Chapter 229, 43 Stat. 936), the respondent respectfully suggests that such jurisdiction does not here exist because the final judgment of the Supreme Court of Colorado did not include in its opinion an interpretation of any federal statute, nor did it attempt to interpret any title, right, privilege, or im-

munity claimed by the petitioner under the Constitution of the United States, nor, indeed, was any title, right, privilege, or immunity claimed by the petitioner under the Constitution of the United States presented for the proper consideration of the Colorado courts.

It will be observed from the brief filed by petitioner that he was convicted in two separate cases, as follows:

Julius A. Wolf and A. H. Montgomery v. The People of the State of Colorado. No. 15666.

Julius A. Wolf, Charles H. Fulton and Betty Fulton v. The People of the State of Colorado. No. 15670.

In this court, the petitioner has filed two separate abstracts, purporting to cover the record in each case above referred to, but only one brief. Here, the abstracts of record, designated as "Transcript of Record", are numbered as follows:

No. 593—Julius A. Wolf, Petitioner, v. The People of the State of Colorado, Respondent.
(This being the Wolf-Montgomery case, *supra* No. 15666.)

No. 594—Julius A. Wolf, Petitioner v. The People of the State of Colorado, Respondent.
(This being the Wolf-Fulton case, *supra,* No. 15670.)

In the Petition for Certiorari (p. 2), counsel assert that page references in their brief "are to the Wolf-Montgomery record" while "folio references are to the record in the Wolf-Fulton case." We have found it difficult to refer to the page numbers and folio numbers thus mentioned in petitioner's brief, and will, in our reference to the filed Transcripts of Record, identify the transcript to which we refer, and the page thereof to which we desire to call attention.

It is conceded by the petitioner that "the Fourth Amendment, like all other amendments which constitute the federal Bill of Rights, has no application to the state governments" (p. 7, Petitioner's Brief). Counsel contend, how-

ever, that the Fourteenth Amendment drew within its scope such earlier amendments as were "implicit in the concept of ordered liberty", and, from this premise, argue that the rights of the Petitioner under the Fourteenth Amendment were violated by the Colorado court.

It is fundamental, of course, that only such matters as are properly presented for review will be considered in an appellate court. Here, the petitioner did not claim, either in his motion for new trial, filed with the trial court, nor in his Assignments of Error filed with the Supreme Court of the State of Colorado, any violation of his rights under the Fourteenth Amendment, nor, in the trial did he specially set up or claim any right, privilege, or immunity under the Fourteenth Amendment. No such question was presented for the consideration of the Supreme Court of Colorado, and the Court did not err in refusing to pass thereon.

only to the "4th Amendment to the Constitution of the United States" (pp. 67, 68), and his Assignments of Error likewise refer only to the same (Fourth) Amendment, (pp. 73, 74).

Likewise, in the Wolf-Fulton case (No. 594), the transcript discloses that petitioner's Motion for New Trial referred only to "the 4th Amendment of the Constitution of the United States", (p. 47, 48), and his Assignments of Error mentioned only the same (Fourth) Amendment (p. 56).

The Colorado courts, both the District Court of the City and County of Denver (the trial court), and the Supreme Court of Colorado, correctly interpreted the issues, i. e., the alleged violation of the rights, privileges or immunities of the petitioner under the Fourth Amendment, as unavailing to him in a prosecution in a state court for violation of a state statute.

It was not until all briefs had been filed in the appellate court, and both cases had been set for oral argument, that petitioner, for the first time, attempted to file a Supplemental Assignment of Error, in violation of the es-

tablished practice and procedure in Colorado, whereby, for the first time he attempted to assert a "violation of the rights of the defendant (petitioner) under the due process clause of the Fourteenth Amendment of the Constitution of the United States" (Wolf-Montgomery Transcript, No. 593, p. 83) (Wolf-Fulton Transcript, No. 594, p. 66). The Colorado Supreme Court properly denied petitioner's motion to file such supplemental assignment of error (No. 593, p. 83) (No. 594, p. 67), the same coming much too late to be considered by the appellate court.

The record thus conclusively shows that the petitioner, in the proceedings had against him in Colorado, at no proper time specially set up or claimed any title, right, privilege or immunity under the Constitution of the United States, applicable to the state government, as required by Section 237(a), Chapter 229 (43 Stat. 936), and hence has failed to establish the necessary grounds giving this court jurisdiction of the instant cause.

STATEMENT OF THE CASE.

The transcripts filed in this court on behalf of the petitioner omit many vital references to testimony given at the trial, and we therefore shall take the liberty of repeating a partial review of the evidence as the same appears in our original answer brief filed with the Supreme Court of the State of Colorado in the case of Wolf-Montgomery v. The People of the State of Colorado. We select this case because the Transcript filed in Case No. 593 in this court corresponds thereto and carried the identical folio numbers of the original record. The court will observe the omission in petitioner's instant transcript of numerous folios referred to in our statement of facts.

We shall confine our statement solely to the facts pertaining to the alleged unlawful search of petitioner's office and the alleged unlawful seizure of evidence.

It appears that on or about April 25, 1944, the office of the district attorney received an anonymous telephone call to the effect that "there was a woman suffering from an abortion in room 602 in the Cosmopolitan Hotel" (fol.

211). Responding to this call, one Ray Humphries, chief investigator, and his assistant, Louis Malach, proceeded to the hotel, where, in room 602, they found a young woman by the name of Gertrude Martin. Miss Martin was ill, and, upon being questioned, she told the officers that "she had been aborted by Dr. Montgomery and had been to see Dr. Wolf before and after the abortion, etc." (fol. 122). She was immediately removed to the office of the district attorney and thence to the Denver General Hospital for hospitalization (fol. 123). The information given Mr. Humphries by Miss Martin was, we gather, almost the same story related by Mrs. Cairo concerning her experiences in freeing herself, with the aid of these defendants, of the burden of an unwanted child.

Armed with this information, Mr. Malach, who, in addition to being an investigator for the district attorney, was also a deputy sheriff (fol. 174), and Mr. Thayer and Mr. Rice, both deputy district attorneys, proceeded, on April 27, 1944, to the office of Dr. Wolf for the purpose of placing him under arrest (fol. 126). As an incident to the arrest, the officers attempted to take any record "that might show the name of * * * Gertrude Martin" (fol. 138). It certainly does not appear that a "search" of the doctor's office was made, in any sense of the word. Mr. Thayer says that he saw Ex. "A" on a table in Dr. Wolf's office (fol. 145), and that he simply picked it up and brought it with him when he returned to the offices of the prosecuting attorney (fol. 146). Although we find no direct evidence pertaining to the acquisition by the people of People's Ex. "C" (the doctor's day book for 1943), Mr. Humphries indicates that "one other book", which, we presume was the day book for 1943, was taken at the same time People's Ex. "A" was acquired (fol. 136).

It is an admitted fact that the officers had no warrant for the arrest of Dr. Wolf and no search warrant authorizing them to search his office at the time hereinabove referred to. It is equally clear that the district attorney had strong and, we might say, conclusive evidence of the commission of a felony, i. e., procuring an unlawful abortion, by Dr. Wolf, and that the arrest was made upon such in-

formation. The two day books were taken incident to the arrest. It is also worthy of note that, so far as we can ascertain from the record, Dr. Wolf made no objection to the arrest, but, on the contrary, he apparently peaceably accompanied the officers to the office of the district attorney for questioning and investigation.

Having acquired these books, Mr. Humphries, as chief investigator, examined them and from such examination he became suspicious in several instances, particularly where the records disclosed rather large payments received by Dr. Wolf (fol. 209). In such case, representatives of the district attorney contacted the persons whose names appeared in the day book and questioned them concerning their activities (fol. 208). There is no intimation that any of the persons so contacted were forced to disclose any facts against their will. On the contrary, it appears that these patients frankly told of their relations with Dr. Wolf and whatever other doctor may have assisted in procuring an abortion in their particular case (fol. 210—see also fols. 218, et seq.).

These facts being shown out of the presence of the jury, the defendants next made an oral motion to quash the information on the ground that it was based upon evidence obtained by the district attorney in violation of the constitutional rights of the accused (fol. 243, et seq.) After considerable argument, the court finally denied this motion (fol. 267), first because the motion to quash was not made in writing, as required by the statutes (fol. 263), and, second, because counsel, having participated in the taking of the deposition of Miss Martin, were thereupon put upon notice, but nevertheless, failed to move to quash the information, and thereafter the defendants, with knowledge of these facts, entered their pleas of "not guilty" (fol. 266).

From the transcripts filed here, the court will note that the motion of petitioner, in the Wolf-Montgomery case, to return the defendant's books and records, asserts only that the alleged unlawful search and seizure constituted a violation of certain sections of the Constitution of Colorado, and no reference was made to an alleged violation of peti-

tioner's rights under the Constitution of the United States (Wolf-Montgomery Transcript, No. 593, p. 8).

In the Wolf-Fulton case, petitioner alleged, in his motion to suppress and return evidence, violation of certain portions of the Constitution of Colorado, and Amendments Four and Five of the Constitution of the United States (Wolf-Fulton Transcript, No. 594, p. 6), these two amendments having no application to state court proceedings, and in neither of said motions did he refer to the Fourteenth Amendment, or claim a violation of his rights thereunder.

We believe that we have sufficiently reviewed the facts pertinent to the issue presently before the court.

ARGUMENT.

Counsel for the petitioner state that "the sole question presented is whether the Fourth and Fourteenth Amendments of the Constitution of the United States protect a person from an unreasonable search and seizure by state officials" (p. 7, Brief of Petitioner). This, of course, assumes that the respondents concede that an unreasonable search and seizure occurred in the case at bar, a fact we most emphatically deny, and an issue not decided by the Supreme Court of Colorado.

The People of the State of Colorado are as greatly concerned with the preservation of freedom and liberty as are the people of any other state of this great union. The courts of Colorado jealously guard the rights and privileges of those persons accused of crime and brought to trial before the bar of justice. The Constitution of Colorado provides, in part.

> "The People shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures * * *." Sec. 7, Art. II, Constitution of Colorado.

It is a conceded fact that no warrant for the arrest of Dr. Wolf had been issued when the officers took him in custody on April 27, 1944.

It is likewise an undisputed fact that, at such time, the arresting officer, Louis Malach, a deputy sheriff, knew all of the facts related by Gertrude Martin from which it conclusively appeared that Drs. Wolf and Montgomery had cooperated to procure an abortion upon her. These facts, we submit, were ample to justify a reasonable belief that Wolf and Montgomery were guilty of the commission of a felony.

It therefore follows, as a matter of law, that, having reasonable grounds to believe that Dr. Wolf had committed a felony, the arresting officer had power, and was fully justified in making the arrest without warrant. In support of this position, we refer to but a few of the adjudicated cases, decided within the past two or three years. We quote from a case which we think the court will find most informative on the issue now under discussion and also on other points pertinent to this case.

> "Initially, there can be no doubt that defendant was lawfully arrested, *even though the agents possessed no warrant. The law is clear that any person, law enforcement officer or private citizen, can make an arrest where a felony has in fact been committed, and the person making the arrest has probable cause for so believing.*" (Italics supplied.)
>
> United States v. Lindenfeld, 142 Fed. (2d) 829, 831.

Continuing, the court said:

> "Conceding the lawfulness of the arrest, therefore, the crucial issue arises as to whether the agents could legally have sought and seized the cards as an incident thereto. The mass of seemingly conflicting decisions on the point, which can serve only as a general guide, since each case must be decided on its own facts, Go-Bart Importing Co. v. United States, supra, 282 U. S. at page 357, 51 S. Ct. at page 158, 75 L. Ed. 374, and through which, as we said in Matthews v. Correa, 2 Cir., 135 F. 2nd 534, 536, we must proceed 'gingerly' and 'with due circumspection, so far as lies in our power, for the constitutional rights of the petitioner and the need that government officials be not unduly hampered in tracking down crime,' have

> evolved certain general principles. Surely when there is a lawful arrest, the premises may be searched; the cases are not in accord merely as to how broad an area the search can cover and as to what can be the objects of the search. The better view as to area is that the search can cover that part of the premises over which the offender's control and unlawful activities likely extended, Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915 C, 1177; Bouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Sayers v. United States, 9 Cir., 2 F. 2d 146, 147; United States v. Wilson, C. C. S. D. N. Y., 163 F. 338; or, as it was phrased in Marron v. United States, 275 U. S. 192, 199, 48 S. Ct. 74, 72 L. Ed. 231, the search can include 'all parts of the premises used for the unlawful purpose.' A refinement of this doctrine is that the objects sought must be in the 'immediate possession and control' of the accused. Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231; Go-Bart Importing Co. v. United States, supra; United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A. L. R. 775. Within this area, there is agreement that fair game for the searchers consists of 'things used to carry on the criminal enterprise,' Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231, or the fruits of the crime and the means by which it was committed.'' (Id., page 832).

In the case just cited, the items ''seized'' by the arresting officers were simple office cards upon which the defendant, a physician, kept his records. They were, as the court pointed out, ''one of the cornerstones of the government's case'', and from them ''the government was able to secure several additional witnesses, beyond the informers, to testify against defendant.'' The court approved the seizure of the records as ''an incident to a lawful arrest'' and held there was no error in permitting the reception of the evidence so obtained. We respectfully submit that this case correctly states the rules of law applicable to the case at bar.

The case just cited was decided in 1944. We turn now to a yet later case where the items seized by the officers, arresting without warrant, and later admitted in evidence, were a sport shirt, a pair of trousers, a partly filled bottle of whiskey, and a newspaper. The court said:

> "Appellant properly conceded that an officer making a lawful arrest on a criminal charge may take such articles as may reasonably be used as evidence; * * *."
>
> Morton v. United States, 147 Fed. (2d) 28, 30.

Another case from the federal courts contains the following comment:

> "A police officer may arrest without warrant persons believed by the officer upon reasonable cause to have been guilty of a felony. * * * Contemporaneous with the arrest and as an incident thereto, they had the right to seize the things used in connection with the commission of the crime."
>
> United States v. Stein, 53 Fed. Supp. 911, 913.

In the case last cited, the defendant sought, by motion, to obtain an order "directing the return to the defendants of all memoranda, including slips, receipts and papers taken from the defendants by customs agents, secret service agents and city detectives and all other evidence which was taken from the persons of said defendants at the time of their arrest and for an order directing the United States Attorney to destroy all evidence which cannot be returned and for an order suppressing the use of the same upon the trial." (Id., page 911). The motion was "denied in all respects."

This rule, then, is so well established that the citation of cumulative authorities would serve no good purpose. We respectfully submit that it cannot be successfully denied that the officers, with reasonable cause to believe a felony had been committed by the defendant Wolf, had the right to arrest him, even though no warrant for arrest had been issued. Incident to such arrest, they had the further right to seize such material evidence as they found in the immediate vicinity of the place of arrest. Neither such arrest nor seizure we submit were in violation of the constitutional rights of the accused.

At the trial, the district attorney took the position that, even if there had been an unlawful seizure, the evidence was, nevertheless, admissible under the rule of law adopted in Colorado and announced in Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. However that may be, we are thorougly convinced that the rule need not be here invoked, for the very obvious reason that here there was no unlawful arrest or unreasonable search or seizure such as is prohibited either by the state or federal constitutions.

The defendants, as we read their briefs, rely primarily upon three cases. These authorities are:

United States v. Lefkowitz, 52 S. Ct. 420, 285 U. S. 452.
People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997.
People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933.

While other authorities are cited, these are the principal decisions which, it is contended, sustain the position of the defendants. Let us examine them more closely.

First, we direct our attention to United States v. Lefkowitz, supra. The Supreme Court of the United States there affirmed an order of the United States Circuit Court of Appeals, and it is to the report of the Circuit Court that we now turn for a more complete statement of the factual situation that existed in that case. It appears that the two petitioners were arrested by a deputy United States marshal in execution of a John Doe warrant. The arrests were treated as having been made lawfully. Continuing, the court said:

> "Contemporaneously with the arrests, both rooms were thoroughly searched. Two desks were opened, ransacked, and papers they contained seized; a towel cabinet was searched and papers in it seized; waste paper baskets were emptied and scraps of paper taken from them and later pasted together. All that was seized after this search was delivered to the United States attorney, who now has possession of so much thereof as he has not seen fit to return."
>
> Lefkowitz v. U. S. etc., 52 Fed. (2d) 52, 53.

In addition to the evidence so seized, the officers took certain items from the person of Lefkowitz himself. Said the court:

> "Without confusing a search for and seizure of contraband of which the government is entitled to take possession because of what in law is said to be the inherent guilt of the res itself and the search for and seizure of books, papers, documents and the like which are not, at least as yet, considered guilty themselves, but are only wanted to prove the guilt of persons or property, it is needless to emphasize that searches and seizures of both kinds must always be reasonable to be lawful. Whenever evidence is searched for and seized, it must be in connection with something else which gives to the public a paramount interest in it. * * * Consequently, when a seizure of contraband is defended as an incident of a lawful arrest, as in United States v. 1013 Crates, etc., supra, or a seizure of evidence is defended on the same ground, as in this case, the reasonableness of the search which resulted in the seizure is the test of legality in each instance.
>
> "The application of this principle to the present case results at once in dividing the property seized into two classes—that which was taken from the person of petitioner Lefkowitz when he was arrested and searched; and that which was seized when the office and its furniture were explored for evidence.
>
> "The things that were found on Lefkowitz were lawfully seized and may be used against him. Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231; United States v. Kirschenblatt, (C. C. A.) 16 F. (2d) 202, 51 A. L. R. 416. The law on this subject has long been so well settled that it is useless to do more than state it whenever occasion arises. It is difficult to conceive how the facts in one case can make it differ from others in this respect, and such a search properly

conducted is reasonable as a matter of law." (Id., pages 52, 53, 54.)

The court then directed its attention to the evidence seized when the offices were *searched,* a procedure the court held to be unlawful, particularly noting, however, that

> "Such a search and seizure as these officers indulged themselves in is not like that in Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made." (Id., page 54.)

Applying these principles to the case at bar, there is nothing whatever in the instant record to indicate a search of any kind. It is our position, as previously stated, that the defendant was lawfully arrested without warrant by the officers who had reasonable grounds to believe him guilty of a felony. His offices were not searched. But the day books, lying on the table in open sight, were certainly so directly under his control that it was permissible for the officers, making a lawful arrest, to take them as an incident of the arrest.

The U. S. Supreme Court, commenting on its earlier decision in the Marron case, supra, said:

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the Marron case. * * * The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense."
>
> U. S. v. Lefkowitz, 52 S. Ct. 420, 423.

This case, then, not only fails to offer any solace to these defendants, but, on the contrary, it conclusively establishes the validity of the action of the arresting officer, and those assisting him, in picking up and retaining, as an incident of the arrest, the day books in plain view at the time of the arrest. This, we submit, was not an unreasonable search and seizure, nor, indeed, was it a search in any sense of the word.

In People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997, the officers arrested the defendant Martin on February 7, 1941, and "in making the arrest the records and envelopes identified in evidence were *discovered* and turned over to the office of the States Attorney" (Id. 999). This, we submit, clearly indicates a search and seizure unlawful in itself, and obviously quite different from the action of the deputy district attorney in the case at bar, who, we again repeat, merely picked up a day book in plain view, without indulging in a *search* of any kind.

In People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933, the defendant gave the officers permission to look at a particular record in his files. Thereafter, without his permission, and while the defendant was held in custody, having been previously arrested, the officers, without a search warrant, searched his offices and seized all of his records. This, we agree with the Illinois court, was unlawful and unconstitutional. The case, however, is no authority here because the facts of the case at bar are so essentially different from those in any of the cases cited by the defendant, that the instant case comes under the rule of law, universally recognized, permitting an arrest without warrant if the arresting officer has reasonable grounds to believe the accused guilty of a felony, and the seizure of items of evidence on his person or under his immediate control as an incident of the arrest. This case does not come under the rule of law announced by the cases cited in support of the contention of these defendants. This we submit as a fact to be determined by the court.

Likewise, as we have heretofore pointed out, it is not a mere seizure, or even a search and seizure of evidence that is prohibited by the state and federal constitutions. These venerable documents forbid only *unreasonable* searches and seizures.

> "Neither the Federal Constitution nor the State Constitution forbids a search and seizure without a warrant. Those instruments forbid unreasonable searches and seizures. The question is not whether the officer had a search warrant; it is whether the

search and seizure were unreasonable. United States v. McBride, D. C., 287 F. 214, 216."

Hubin v. State, (Md. 1942), 23 Atl. (2d) 706, 710.

Summing up our position at this point, then, we reiterate that the defendant Wolf was lawfully arrested without warrant because the officers had reasonable grounds to believe that he had committed a felony. This belief was based upon the fact of their actual knowledge of the physical condition of Gertrude Martin, the discovery of this young woman in the same hotel where the doctor maintained his residence, the same not being the residence of the girl, and her uncontradicted statement that the defendant had performed an abortion upon her. Armed with this knowledge, the officers made a lawful arrest, and a lawful seizure of evidence in plain sight at the time. There was no *search,* and certainly no *unreasonable* search and seizure such as is prohibited by the constitution.

If, however, for the sake of argument, we now concede that the evidence in question was illegally seized, still the defendant cannot be heard to complain. It is true that there is apparently an irreconcilable conflict among the decisions of the courts of last resort of the several states pertaining to the admission of evidence illegally obtained. Colorado, by the decisions of its highest court, is committed to the doctrine that the manner in which evidence is obtained, whether legal or illegal, does not affect its admissibility. This rule was established in the now famous case of Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. The rule was affirmed in the later case of Roberts v. People, 78 Colo. 555, 243 Pac. 544. There, at page 559, the court said:

"4. Since the supersedeas was granted in the instant case we have established, as the rule in this jurisdiction, that the admissibility of evidence is not affected by the fact that it has been unlawfully seized. Massantonio v. People, 77 Colo. 392, 236 Pac. 1019."

"That conclusion was reached after a thorough examination of all the available authorities and a

careful consideration of the alleged reasons supporting each. We reaffirm it. It is now urged, however, that one of the reasons there given must fail in this jurisdiction because section 3726, C. L. 1921, exempts an officer from liability for any unlawful act committed while engaged, in good faith, in the enforcement of the prohibition law. The validity of that act, when urged in defense of one who invades the sanctity of another's domicile in violation of the Constitution, must be determined when properly before us. It is not so here. If, under such circumstances, the act would be a complete defense, it must be because the legislature was empowered to adopt it, and if so its existence would affect in no way the rule laid down in the Massantonio case nor the reasons supporting it. There is ample authority, as therein set forth, for that decision, but it does not rest primarily upon authority, but upon reason. If the application of the rule were divorced from popular prejudice concerning the manufacture and sale of intoxicating liquor, and violations of law by corporations, proof of which depends upon records unlawfully seized, we think the unanimous verdict of lawyer and layman would support the rule of admissibility. Let it be announced, for instance, that one unquestionably guilty of an atrocious murder had been turned loose because it developed that the weapon with which the crime was committed and the blood soaked clothes of the victim, offered in evidence, and without which conviction could not be obtained, had been excluded because some rule of law had not been complied with in their seizure, and a shudder would run through the commonwealth, and its citizens, with one voice, would condemn the helplessness of its court against the depredations of outlaws.

"The argument that the rule announced in the Massantonio case leaves the citizens unprotected against one who unlawfully and violently enters his dwelling if the wrongdoer is unable to respond in damages, should be addressed to the legislature not

> the courts, and apparently overlooks the fact that such an entry was a criminal trespass and indictable at common law (19 Cyc. 1113, 1117), and that the common law has been adopted in Colorado."

Colorado is not alone in thus interpreting the law. Following earlier decisions of the state appellate court, the Court of General Sessions of New York County in 1939 approved the rule that

> "The court will not take notice of how they (papers or other articles of personal property) were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question."
>
> People v. Kuhn, 15 N. Y. S. (2d) 1005, 1007.

In Maryland, although now governed by specific statutory provisions, the like of which we do not have in Colorado, the Court of Appeals announced the law, in a well worded decision, as follows:

> "Prior to the enactment of the Bouse Act in 1929, Maryland followed the ancient rule of the common law that evidence is not rendered inadmissible by the fact that it was procured by unlawful search and seizure. Meisinger v. State, 155 Md. 195, 141 A. 536, 142 A. 190. The Supreme Court of California explained the reason for the rule in the following language: 'From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.' People v. Mayen, 188 Cal. 237, 205 P. 435, 440, 24 A. L. R. 1383. * * * Unquestionably it is within the established power of the State to prescribe the evidence which may be received in the courts of its own government."
>
> Hubin v. State, (Md.) 23 Atl. (2d) 706, 708.

In 1938, the Supreme Court of North Carolina said:

> "Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The Courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the Courts of North Carolina. State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; State v. Mallett, 125 N. C. 718, 725, 34 S. E. 651 (affirmed by the United States Supreme Court on writ of error in Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015); State v. Thompson, 161 N. C. 238, 76 S. E. 249; State v. Wallace, 162 N. C. 622, 623, 78 S. E. 1, Ann. Cas. 1915B, 423; State v. Neville, 175 N. C. 731, 95 S. E. 55; State v. Godette, 188 N. C. 497, 125 S. E. 24; State v. Hickey, 198 N. C. 45, 150 S. E. 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.' "
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> State v. McGee, 214 N. C. 184, 198 S. E. 616, 617.

This decision was further approved by the same court in 1940 in the case of State v. Shermer. 216 N. C. 719, 6 S. E. (2d) 529, 530.

A well worded decision further recognizing the right of each state to fix the rules of evidence within its jurisdiction is as follows:

> "* * * appellant insists that there must be removed from the evidence above discussed all testimony given by the two officers, for the reason that

they entered the apartment without a search warrant. Continuing his theory at this juncture, appellant complains that such actions on the part of those officers amounted to and were an infringement of his constitutional rights. More particularly, it is his claim that the trial court's reception of the evidence thus obtained violates the Fourth and Fourteenth Amendments to the United States Constitution, and sections 8 and 9, art. 1, of the Iowa Constitution. Further appellant urges that the federal prohibitory law does not permit the use of evidence obtained by a search and seizure without a valid search warrant, and cites Peru v. United States (C. C. A.) 4 F. (2d) 880.

"But the indictment in the case at bar is not based upon the laws of the United States. Said instrument was founded upon the state laws against trafficking in intoxicating liquors. So the state rule, as distinguished from the federal doctrine, must govern. Previously this court was required, at different times, to pass upon the question relating to the admissibility of evidence obtained in the manner and way here employed. Upon those occasions it was held that such evidence could be properly received. State v. Lambertti, 204 Iowa 670, 215 N. W. 752; State v. Gorman, 196 Iowa 237, 194 N. W. 225; Joyner v. Utterback, 196 Iowa 1040, 195 N. W. 594; State v. Rowley, 197 Iowa 977, 195 N. W. 881; Lucia v. Utterback, 197 Iowa 1181, 198 N. W. 628; State v. Parenti, 200 Iowa 333, 202 N. W. 77; State v. Wenks, 200 Iowa 669, 202 N. W. 753. Apt language in the Lambertti case is:

"'Prior to the time of the trial, the defendant filed a motion to suppress all of the evidence obtained by the search of the defendant's premises under the search warrant, on the ground that said search warrant was illegally issued, in that the same was in violation of section 8, article 1, of the Constitution of the state of Iowa, * * * and in violation of the Fourth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Con-

stitution of the United States. This motion was by the court overruled.

" 'Objections were made to all of the foregoing evidence at the time of the trial, for the reasons urged in the "motion to suppress," and the objections were by the court overruled. These rulings by the court are assigned as error. In State v. Tonn, 195 Iowa 94 (191 N. W. 530), we held that evidence which is pertinent and relevant is admissible against the defendant in a prosecution for crime, even though the same was secured by an unlawful search of defendant's premises, and have universally so held in the subsequent cases. * * *'

"Reluctantly, there was no error permitting the introduction of such testimony."

State v. Bamsey, (Iowa) 223 N. W. 873, 874.

In a very recent decision by the Federal Circuit Court of Appeals (Tenth Circuit), the court said:

"When the officers got to his room, they took possession of two suitcases belonging to him. They opened them and examined their contents. These contents were offered and received in evidence over the objections of appellant. This evidence was of such a nature that it no doubt was considered by the jury and tended to influence its verdict. Admittedly the officers had no search warrant at the time they seized these suitcases and took possession of these exhibits.

"Even if we assume that the search was illegal, the evidence was nevertheless admissible. It is well settled that evidence obtained by State officers through an unreasonable or illegal search may nevertheless be used by the Federal government in a criminal case instituted in the Federal courts. Under this well settled principle, this evidence was clearly admissible."

Ruhl v. United States, (1945) 148 Fed. (2d) 173, 174.

We also call attention to the following pronouncement, made in 1944, qouting from an earlier California case:

> " 'There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained.' "

People v. Onofrio, (Cal.) 151 Pac. (2d) 158, 160. Continuing, the court said:

> "This reason in the Mayen case found approval in the recent case of People v. Gonzales, 1942, 20 Cal. (2d) 165, 124 P. (2d) 44, 47, where it is cited with other cases and where the court also passed adversely upon the same contention that is made in the instant case, namely, that 'the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law.' The court points out that 'A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial,' and 'The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Cases cited.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.' A writ of certiorari was denied by the Supreme Court of the United States in the Gonzales case, 317 U. S. 657, 63 S. Ct. 55, 87 L. Ed. 528." (Id. 160.)

The ruling was affirmed in People v. Peak, (Cal.) 153 Pac. (2d) 464, where at page 469 the court, recognizing "that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence", concludes that,

in that state, it is necessary to "turn to California decisions which must be accepted as the guide post directing the rule to follow."

So, in Colorado, the trial courts would indeed be subject to just criticism if they failed to look to the previous announcements of the Supreme Court of the state "as guide posts directing the rule to follow" in this jusrisdiction. That rule is unmistakingly set forth in Massantonio v. People, supra, and Roberts v. People, supra. So surely is this true that we deem it unnecessary to comment further on the point.

The situation, then, is plain that there does exist a so-called "federal rule" of evidence applicable in federal courts, which rule has been followed by some state courts. Other states, including Colorado, have followed the common law rule, as certainly we are bound to do until such time as the legislature of the state enacts an appropriate statute or statutes abrogating or modifying the common law.

Summing up our argument on this point, it is our sincere contention that there was no illegal search and seizure in the instant case, because the arrest, even though made without warrant, was nevertheless based upon a reasonable belief by the officers that the accused was guilty of a felony and was, therefore, lawful. No *search* of any kind was made, but evidence, in plain sight of the arresting officers, was taken and subsequently utilized. This was not an *unreasonable search and seizure* such as is prohibited by our organic law. Furthermore, if there was an illegal search and seizure of evidence, competent in itself, such evidence was admissible under the decisions of the Supreme Court of Colorado, and the trial judge was bound to follow the rules of law so announced for this jurisdiction. Such announcement was, and is, based upon an unquestioned interpretation of the common law, which, until modified by appropriate legislative action, remains the law in this jurisdiction.

CONCLUSION.

The first, and indeed the only question seriously argued by counsel, is that the evidence of the People was obtained in violation of the constitutional privileges of the defendants, and hence should have been suppressed. We have

demonstrated that their position is not well taken, and that the People did not obtain the evidence by illegal means. Even, however, if such had been the case, the evidence, otherwise competent, was admissible for the purpose of proving the commission of the crime, and this has, for long years, been the established law in Colorado. That a different rule may obtain in other states, offers no solace to these defendants who selected Colorado as the situs of their crime, and who therefore must abide by the rules of law announced by the Colorado Supreme Court for this jurisdiction.

We respectfully submit that the application for certiorari should be forthwith denied.

Respectfully submitted,

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