Intoxicating Liquor—Sheriff—Automobiles — Search—Search Warrant.

A Sheriff may search an automobile when he has reason to believe that the same is being used for the unlawful transportation of intoxicating liquors without having a search warrant.

B. R. McCabe, Esq.,
County Attorney,
Chester, Montana.

My dear Mr. McCabe:

You have requested my opinion as to whether a Sheriff, without a search warrant, may stop and search an automobile, or other vehicle, for intoxicating liquor, if he has reason to believe that such automobile or vehicle is being used for the unlawful transportation of such intoxicating liquor.

Since the enactment of state and federal prohibition laws this question has been before the courts a number of times, most frequently before the federal courts, although in a number of cases before the state courts.

It is usually contended that the searching of an automobile and the seizure of the same with intoxicating liquors being transported thereby, without a search warrant being in the hands of the officers making the search and seizure, violates the Fourth and Fifth Amendments to the Constitution of the United States, and usually some provision of the State Constitution, which in Montana is Article III, Section 7, which is as follows:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing."

The Supreme Court of Michigan, in sustaining the right to search an automobile for intoxicating liquor without a search warrant, said:

> "The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in batallions, until the slower animal drawn vehicles, with their easily noted individuality, are rare. Constructed as covered vehicles to a standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious question far deeper and broader than their use in so-called 'bootlegging' or 'rum running,' which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from

search and seizure without process. The baffling extent to which they are successfully utilized to facilitate commission of crime of all degrees, from those against morality, chastity and decency to robbery, rape, burglary and murder, is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without search warrant is unreasonable is in its final analysis to be determined as a judicial question in view of all the circumstances under which it is made." People v. Case (Mich.), 190 N. W. 289.

This question was before Judge Bourquin in the United States District Court for this district, and he sustained a search and seizure without a warrant, and in the course of his decision said:

"An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle an offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whiskey by virtue of the National Prohibition Act (41 Stat. 305) were forfeited, and thereby transferred to the United States the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have.

"Silverthorne's Case, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, and cases therein cited, apply to search and seizure of the offender's papers and property and use thereof in evidence, and not to those of others, of which the offender has unlawful possession. The first violates both amendments; the second, neither, so far as return of the seized articles and their exclusion as evidence are concerned." U. S. v. Fenton, 268 Fed. 221.

In the case of United States v. Bateman (D. C.), 278 Fed. 231, the right to search and seize was sustained by the court in the following language:

"There is now and has been ever since this amendment went into effect almost a continuous stream of automobiles from, at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a warrant, the country, of

course, would be flooded with intoxicating liquor, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case, or satchel, to search for intoxicating liquors, on the ground that it would be a violation of the fourth and fifth amendments to the Constitution. If a suit case or a satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such affidavit cannot be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

"Under those circumstances the eighteenth amendment would have been stillborn. The act of more than two-thirds of the House of Representatives, more than two-thirds of the United States Senate in passing such eighteenth amendment, and all the states of the Union with the exception of the two smallest, in approving the eighteenth amendment, would have been utterly futile, and would have brought about only chaos and confusion. At the time Congress passed the last act above referred to, automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search warrant. Therefore if Congress had been of the opinion that it was contrary to the fourth and fifth amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such search and seizures, instead of leaving it to the courts to decide. I think the failure of Congress to act in this matter is a tacit approval of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched.

"It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, the finding of such liquor justifies the search."

In the case of Lambert v. United States (C. C. A. 9th Circuit) 282 Fed. 413, the officers, after following the automobile until it reached the city, arrested the driver and took the automobile into their possession and on searching the same found a large quantity of intoxicating liquor. The defendant contended that he was convicted upon evidence improperly admitted against him because of it

having been obtained by search and seizure without a warrant. Disposing of this contention Judge Ross, after quoting from a number of opinions, said:

> "What is prohibited by the fourth amendment of the Constitution, as will be seen from the foregoing, is the unreasonable search or seizure of the person, home, papers, or effects of any of the people of this country without a warrant issued upon reasonable cause, supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized. It is not claimed that either of the officers who made the search and seizure here involved acted by virtue of any search warrant, or that they made any attempt to procure a warrant upon the information conveyed to them by Edison. Under the circumstances of the case was this essential?
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> "The prohibition of the fourth amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lamber was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

In the case of United States v. Rembert (D. C.), 284 Fed. 996, the court discussed the whole subject exhaustively, and in the course of the opinion said:

> "Since, however, this is not a case of a search of a private residence, but is a case of an arrest and search of an automobile, and of the defendant who was driving it, it remains to inquire what is the legal aspect of the procedure adopted in this case, and whether it was authorized either by statute or by the course of common law. If this were the case of an arrest of a person, where it appeared to the arresting officer that he was carrying liquor, it is fundamental that no warrant would have been necessary, and a search of his person for evidence of the crime would have been sanctioned. .

"An automobile, like a person, can be guilty of offenses, and the uniform course of the federal statutes shows that, where it is apprehended in the handling of prohibited goods, it is subject to arrest and forfeiture.

"Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term 'discovery,' as used in this act, is to be construed in the light of the principles of American and English common law, defining when arrests can be made without warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officers actually see, before apprehension is made, the liquor the subject of the apprehension."

Section 11073, Revised Codes 1921, (Sec. 26, Chap. 9 Ex. Sess. 1921) is very similar to the section of the Volstead Act referred to in the case of U. S. v. Rembert, supra, and in the case of State v. Mullen, 63 Mont. 50, 207 Pac. 634, where a jug containing intoxicating liquor was in a hand bag carried by Mullen, Mr. Justice Holloway, who rendered the opinion of the court, held that a search warrant was not necessary in order to authorize the officer to arrest the defendant and search the hand bag, saying:

"Having determined that the circumstances would have justified the Sheriff in making complaint against Mullen and in securing a warrant for his arrest, it follows from what has been said that he would have been justified in arresting the defendant without a warrant, and since his authority to seize the articles without process was coextensive with his authority to arrest without a warrant, the seizure was not unlawful, and the motion to quash was properly overruled."

It is, therefore, my opinion that while a Sheriff may not indiscriminately and arbitrarily stop and search automobiles for intoxicating liquors, without search warrants, a Sheriff may, whenever he has a sincere belief based on reasonable grounds that an automobile is being used for the unlawful transportation of intoxicating liquor, stop and search such automobile without having a search warrant, and if he finds intoxicating liquor being transported thereby he may arrest the driver and seize the automobile and liquor and then proceed in the manner prescribed by Section 11703, Revised Codes of 1921.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.