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EVIDENCE — SEARCH AND SEIZURE WITHOUT WARRANT.—[South Dakota] Defendant was legally arrested just outside his room. The arresting officer returned half an hour later and searched defendant's room without a warrant. On the evidence thus secured defendant was tried and convicted of the crime of having burglary tools in his possession. On appeal, reversed. *Held:* The evidence was illegally obtained and therefore inadmissible. *State* v. *McClendon,* 266 N. W. 762 (S. D. 1936).

While it has always been assumed that "one's house cannot lawfully be searched without a search warrant except as incident to a lawful arrest therein" (*Agnello* v. *United States,* 296 U. S. 20 (1935)), was the search in the present case incident to the arrest? In *Papani* v. *United States,* 84 F. (2d) 160 (C. C. A. 9th, 1936), it was said that a search is not incidental to the arrest unless made contemporaneously at the place of arrest. This seems to be the prevalent federal view with which the instant case is in accord. Other federal cases simply assume, without discussing the time element, that search and seizure of evidence is not only permissible but also the duty of an officer when serving an arrest warrant. *United States* v. *Mills,* 185 Fed. 318 (S. D. N. Y. 1910); *United States* v. *Wilson,* 163 Fed. 338 (S. D. N. Y. 1908); *United States* v. *Snyder,* 278 Fed. 650 (D. C. W. Va. 1922); *Rocchia* v. *United States,* 78 F. (2d) 966 (C. C. A. 9th, 1935); *Bruce* v. *United States,* 73 F. (2d) 972 (C. C. A. 8th, 1935). The circumstances of the instant case are almost identical with those of *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585 (1926), and *Poulos* v. *United States,* 8 F. (2d) 120 (C. C. A. 6th, 1925). In the former case the search was made some time after an illegal arrest. The New York Court of Appeals inferred that if the arrest had been legal the search also would have been legal. In the *Poulos* case the several searches subsequent to the arrest were held unreasonable. The fact that they might have been incident to the arrest was not discussed. The constitution prohibits only unreasonable searches and seizures, and the fact that the search is not precisely contemporaneous with the arrest should not necessarily make it unreasonable. See generally, Fraenkel, *Concerning Search and Seizures* (1921) 34 Harv. L. Rev. 361; Comment (1926) 35 Yale L. J. 612. The issue in the instant case should

be the reasonableness of the time interval between the arrest and the search.

Once a court has determined that the evidence has been obtained illegally, it is further confronted with the issue of the admissibility of such evidence. The common law rule, which thirty-three states follow, is that the "admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored." 4 WIGMORE, EVIDENCE (2d ed. 1923) §2183. There are two exceptions: matters of official record, and self incriminating documents or other evidence the use of which in criminal cases would violate the Fifth Amendment. See WIGMORE, *loc cit. supra.*

The court in the instant case adheres to the professed federal rule that evidence obtained by illegal search and seizure cannot be used as evidence on trial. In *Weeks* v. *United States,* 232 U. S. 383 (1914), the Supreme Court held that evidence obtained by illegal search and seizure is inadmissible. *Accord: Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920). See Note (1931) 22 J. Crim. L. 589. Prior to the *Weeks* case the Court had held that evidence which is pertinent to the issue is admissible although it may have been procured illegally. *Adams* v. *New York,* 192 U. S. 585 (1904). But since the later case, evidence has been held inadmissible where the search is made as an incident to an illegal arrest (*Lefkowitz* v. *United States,* 285 U. S. 452 (1931) noted (1932) 23 J. Crim. L. 111; *Byars* v. *United States,* 273 U. S. 28 (1927)), or is purely exploratory (*Go-Bart* v. *United States,* 282 U. S. 344 (1931); *Ganci* v. *United States,* 255 U. S. 313 (1921)), or is for goods lawfully in the possession of the defendant (*Amos* v. *United States,* 255 U. S. 313 (1921); *Boyd* v. *United States,* 116 U. S. 616 (1886).

The Supreme Court has narrowed the scope of the general rule, expressed in the *Weeks* case, however, by holding evidence admissible under the following circumstances: (1) where the objects are in the immediate possession of the defendant (*Marron* v. *United* States, 275 U. S. 192 (1927)); (2) where the issue of admissibility is raised too late (*Segurola* v. *United States,* 275 U. S. 107 (1927)); (3) where there is no physical seizure (*Olmstead* v. *United States,* 277 U. S. 438 (1927)); (4) where the seizuse is not from the home or office of the defendant (*Carroll* v. *United States,* 267 U. S. 132 (1925)); (5) where the search and seizure are not conducted by federal officers (*Gambino* v. *United States,* 275 U. S. 310 (1927); *Burdeau* v. *McDowell,* 256 U. S. 465 (1920)); and (6) where the goods taken are contraband in any sense. (*Carroll* v. *United States; Fenton* v. *United States,* 268 Fed. 221 (D. C. Mont. 1920). Judge Hand, in summarizing the federal rule, makes this distinction: "Private books and papers cannot be seized and used as incriminating evidence. The *corpus delicti* itself has not, I think, been held incapable of detention and production to establish the crime." *United States* v. *Welsh,* 247 Fed. 239 (S. D. N. Y. 1917). See Comment (1927) 36 Yale L. J. 536, where the status of the federal rule is discussed. If this distinction is sound, the burglary tools in the instant case were the *corpus delicti*

of the crime of possession and should, therefore, have been admitted in evidence.

The South Dakota decisions appear to be in a state of confusion on this point. In the following cases objects which were the *corpus delicti* of the crime and incidentally also contraband were held admissible: *City of Sioux Falls* v. *Walser,* 45 S. D. 417, 187 N. W. 821 (1922) (illegal liquor seized); *State* v. *Kieffer,* 47 S. D. 180, 196 N. W. 967 (1924) (illegal liquor seized); *State* v. *Newharth,* 59 S. D. 272, 209 N. W. 542 (1926) (containers for illegal liquor seized). But such cases are to be contrasted with the following in which illegally seized evidence was held inadmissible: *Gamble* v. *Keyes,* 49 S. D. 39, 153 N. W. 888 (1925) (illegal liquor seized); *State* v. *Tanner,* 58 S. D. 146, 235 N. W. 502 (1931); *State* v. *Gooder,* 57 S. D. 619, 234 N. W. 610 (1931) (illegal liquor seized).

These cases permitting contraband illegally seized to be used in evidence strike a balance between the common law rule and that of the *Weeks* case, *supra.* Since the defendant has no property rights in the contraband, the constitutional provision against illegal searches and seizures is not violated by its use in evidence; and since the goods are not obtained by the use of process against him as a witness, he is not forced to give incriminating testimony against himself. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure* (1922) 8. A. B. A. J. 479.

LOIS GOLDSTEIN.

HABEAS CORPUS—DENIAL OF RIGHT TO COUNSEL.—[Federal] Petitioners, who were indigent, uneducated and without friends, were indicted for possessing and uttering counterfeit money. They were not informed of the fact until brought into court for trial. At that time they pleaded not guilty and the trial judge asked them if they had counsel. When they responded in the negative, he did not inquire whether they wished counsel appointed, but proceeded with the trial, which resulted in a conviction. Petitioners did not ask for a new trial or inform the court that they wished to appeal. After they had spent several months in prison they filed application for appeal. When these were denied because filed too late, petitioners sought writs of *habeas corpus,* alleging that their constitutional right to counsel had been violated. The petitions were denied. *Held:* The rights of petitioners under both the Fifth and Sixth Amendments of the Constitution were violated, but this could not be attacked on *habeas corpus* proceedings. *Bridwell* v. *Aderhold, Warden,* 13 F. Supp. 253 (N. D. Ga. 1935).

The court agreed that the failure of the trial judge to appoint counsel deprived petitioners of their constitutional rights, but refused to lend its aid on the ground that since the court had jurisdiction, mere errors of law could be corrected only on appeal or writ of error. The general rule followed by the federal courts is that *habeas corpus* can be used only to attack the jurisdiction of the court. *Ex Parte Crouch,* 112 U. S. 178 (1884); *In re Schneider,* 148 U. S. 162 (1893); *Riddle* v. *Dyche,* 262 U. S. 333 (1923); *Knewel* v. *Egan,* 268 U. S. 442 (1925); see Dobie, *Habeas Corpus in the Federal Courts* (1927) 13 Va. L. Rev. 433, 435.

This rule is generally followed in the state courts. *People ex rel. Morris* v. *Hazard,* 356 Ill. 448, 191 N. E. 54 (1934); *People* v. *Harris,* 266 Mich. 317, 253 N. W. 312 (1934). (The distinction between those facts which are mere error and those which vitiate jurisdiction is drawn by Williams, *Federal Habeas Corpus* (1924) 9 St. Louis L. Rev. 250, 260.)

But the scope of review on *habeas corpus* in the federal courts is not always restricted to questions of jurisdiction alone. In *Henry* v. *Henkel,* 235 U. S. 219 (1914), the Court stated that no hard and fast rule had been formulated as to how far it would go in passing upon questions raised on *habeas corpus* proceedings. This statement, though *dicta,* clearly indicates that the Supreme Court recognizes that there may be certain instances in which it will look beyond the question of jurisdiction. In *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13 (1925), it was said that the Court has power to issue a writ of *habeas corpus* to inquire into the cause of the detention of any person asserting that he is being held in violation of the Constitution, laws or treaties of the United States. The power to make these determinations surely constitutes an enlargement of the basic rule that only jurisdictional matters may be considered. See note to *Capone* v. *Aderhold, Warden,* 71 F. (2d) 160 (C. C. A. 5th, 1934), in (1935) 3 Geo. Wash. L. Rev. 253. In the *Capone* case, however, the court refused the writ where it appeared the indictment was returned after the three-year limitations had run. (For a contrary result, see *People* v. *McGee,* 1 Cal. (2d) 611, 36 P. (2d) 378 (1934) noted (1935) 8 S. Calif. L. Rev. 155.)

In *Moore* v. *Dempsey,* 261 U. S. 86 (1923), *habeas corpus* was granted, not on the ground that the trial court lacked jurisdiction, but that the conviction in the Arkansas court, dominated by mob violence, was a denial of due process of law. (For an interesting discussion of the details of this case, see Waterman and Overton, *The Aftermath of Moore* v. *Dempsey* (1933) 18 St. Louis L. Rev. 117, and *Federal Habeas Corpus* and *Moore* v. *Dempsey* (1933) 1 U. of Chi. L. Rev. 307.) Where the conviction is had in a federal court the Supreme Court would probably be more willing to consider non-jurisdictional questions than it would in state cases. See *Ashe* v. *United States ex rel. Valetta,* 270 U. S. 424, 426 (1926); Nutting, *The Supreme Court, the Fourteenth Amendment and Criminal Cases* (1936) 3 U. of Chi. L. Rev. 244; Notes (1933) 23 J. Crim. L. 841, (1935) 25 J. Crim. L. 943.

It is clear that deprivation of the right to counsel in the present case was a violation of constitutional rights. *Powell* v. *Alabama,* 287 U. S. 45 (1932) noted (1933) 23 J. Crim. L. 841; FERRIS, EXTRAORDINARY LEGAL REMEDIES (1926) 124; Comment (1933) 31 Mich. L. Rev. 245, 252. That being so, the writ should be granted when the constitutional right is violated. See Comment (1935) 35 Col. L. Rev. 404, 411-12. Though the doctrine of *Moore* v. *Dempsey, supra,* would limit granting the writ to "exceptional circumstances" (*Cf. Gotto* v. *Lane,* 265 U. S. 393 (1924); *Ex Parte Lang,* 85 U. S. 163 (1873)), it is believed that the exigencies of the instant case were such as would

warrant the use of the writ of *habeas corpus* to effect the release of the petitioners.

CHARLES B. ROBISON.

VERDICT PROCURED BY FRAUD—BASTARDY PROCEEDINGS.—[Pennsylvania] Defendant was tried and convicted on a charge of fornication and bastardy. He obtained a new trial, at which time the prosecutrix agreed to drop the charges and a verdict of acquittal was entered after defendant refused to accept a *nolle prosequi*. Two years later it was discovered his attorneys had coerced the prosecutrix to consent to the verdict. On motion of the Commonwealth, the trial court set aside the verdict. On appeal, reversed. *Held:* Proceedings in fornication and bastardy being criminal in nature, a verdict of acquittal cannot be set aside, even though obtained by fraud. *Commonwealth* v. *Kroekel,* 183 Atl. 749 (Pa. Super. Ct. 1936).

There are three distinct views in the United States as to the nature of proceedings in bastardy. Pennsylvania, with Georgia and Maryland, follows the English holding—that it is essentially criminal. No doubt the basis for this rule is, as indicated in the principal case, the fact that bastardy proceedings depend on the criminal adultery statute in these states. See for example: PA. STAT. (Purdon, 1930) tit. 18, §711. A few more have held that while the origin depends upon criminal statutes the purpose is not punishment, but the support of the child, and thus the offense is deemed quasi-criminal or quasi-civil. In this group are Alabama, Delaware, Florida, Kansas, Michigan, New York, South Dakota and Wisconsin. See 2 WHARTON, CRIMINAL LAW (12th ed. 1932) §2103. The third group, representing a majority of the states, treats bastardy proceedings as civil in nature. In such jurisdictions the verdict may be reached upon no more than a *preponderance* of the evidence, instead of the usual "beyond a reasonable doubt" formula (*Vail* v. *State,* 1 Penn. (Del.) 8, 39 Atl. 451 (1897); *People* v. *Christman,* 66 Ill. 162 (1872); *State* v. *Nichols,* 29 Minn. 357, 13 N. W. 153 (1882); *State* v. *Haslebacher,* 125 Ore. 389, 266 Pac. 900 (1928)); the defendant may be forced to testify against himself (*State* v. *McKay,* 54 N. D. 801, 211 N. W. 435 (1926); *State* v. *Stilwell,* 45 S. D. 606, 189 N. W. 697 (1927) (a jurisdiction holding such proceedings to be quasi-criminal)); a statute imposing additional liability for support is retroactive (*State* v. *Davis,* 178 Ark. 692, 11 S. W. (2d) 479 (1928)); a statute allowing a five-sixths verdict in civil cases can be invoked (*State* v. *Cummins,* 56 S. D. 439, 229 N. W. 302 (1930)); the prosecution may appeal (*Morris* v. *State,* 115 Ind. 282 (1888)); and it may also obtain change of venue, or a new trial (*Saint* v. *State,* 68 Ind. 128 (1879)). Since the purpose of bastardy proceedings is support of the child, the mother being the real party in interest (*Libby* v. *State,* 42 Okla. 603, 142 Pac. 406 (1914)), and the process includes many elements of civil suits, the better view would be to consider such proceedings civil in nature.

But recognizing that Pennsylvania has held that proceedings of this kind are criminal, setting aside a verdict of acquittal procured by fraud should not be regarded as subjecting the defendant to a sec-

ond trial. This question is raised by the plea of *autrefois acquit*, which is but the application to criminal law of the broader doctrine of *res judicata*, that any controversy once adjudicated between the parties shall not again be questioned. The innocence of the accused is the controverted point, and in order to make a valid plea of former acquittal, the defendant must show a verdict on the merits. *People* v. *Fishman*, 119 N. Y. S. 89 (1909); see 2 HALE, PLEAS OF THE CROWN (1778) 246; *Cf. Conwill* v. *State*, 124 Miss. 716, 86 So. 876 (1921). If, however, he procures his own acquittal or conviction, it will not be a bar to subsequent prosecutions, whether in the same or another court. *State* v. *Ketchum*, 113 Ark. 68, 167 S. W. 73 (1914) (discharged); *DeBord* v. *People*, 27 Colo. 377, 61 Pac. 599 (1900) (conviction); *State* v. *Reed*, 26 Conn. 202 (1857) (acquittal); *State* v. *Green*, 16 Iowa 239 (1864) (acquittal); *People* v. *Cuatt*, 126 N. Y. S. 1114 (1910) (conviction); *Halbert* v. *State*, 18 Okla. Cr. Rep. 378, 195 Pac. 504 (1921) (conviction); *Richardson* v. *State*, 109 Tex. Cr. Rep. 403, 5 S. W. (2d) 141 (1928).

In theory there may be a distinction between the above cases of collusive prosecution, and the instant case of *bona fide* prosecution coupled with a subsequent fraud by the defendant. But viewed as a practical problem of criminal law administration, the distinction becomes even more tenuous. See *McDermott* v. *Commonwealth*, 30 Ky. 1227, 100 S. W. 830 (1907) (collusive dismissal of charges not a bar to later prosecution); *State* v. *Swepson*, 79 N. C. 674 (1878) (fraudulent acquittal no bar to new prosecution, and *mandamus* to reopen former prosecution refused); *cf. Schneider* v. *State*, 33 Ohio App. 125, 168 N. E. 568, 569 (1929); but see *Shideler* v. *State*, 129 Ind. 523, 28 N. E. 537 (1891) (bribery of prosecuting attorney did not render verdict of acquittal void, the state being a party). Writers on the problem agree that a verdict of acquittal obtained by fraud of the accused should be no bar to a subsequent prosecution. 1 BISHOP, CRIMINAL LAW (9th ed. 1923) §1039; 1 CHITTY, CRIMINAL LAW (1819) §657; 2 WHARTON, CRIMINAL PROCEDURE (10th ed. 1918) §1381; Comley, *Former Jeopardy* (1926) 35 Yale L. J. 674, 677. Since the fraudulent verdict in the instant case was not a trial on the merits, it should not bar a subsequent prosecution.

It is interesting to note that defendant's attorneys were disbarred as a result of the discovery of their conduct in the *Kroekel* case. See *In re Salus*, 22 Pa. D. & Co. R. 573 (1935), *aff'd*, 321 Pa. 106, 184 Atl. 70 (1936); *In re Goldberg*, 22 Pa. D. & Co. R. 582 (1935), *aff'd*, 321 Pa. 109, 184 Atl. 74 (1936).

EUGENE R. MELSON.

PRINCIPAL AND ACCESSORY—INDICTMENT—PRINCIPAL AS CORPORATION.—[Illinois] The president of a corporation was convicted as an accessory of his corporation in violation of the Motor Fuel Tax Act. The court fined him $2000 on each of eighteen counts charging the collection of taxes and the refusal to account therefor to the Department of Finance. A sentence of one to five years in the penitentiary was imposed on four counts charging the principal with doing business as a distributor without a license. On appeal, reversed. *Held:*

Defendant could not be sentenced to prison under the statute requiring accessories before the fact to be considered as principals since the corporate principal could not be imprisoned. *People* v. *Duncan,* 2 N. E. (2d) 705 (Ill. 1936).

The sole ground of reversal in this case was the decision of the court that an accessory of a corporation violating the criminal law cannot be imprisoned whenever his principal could not be imprisoned. The court apparently read the provision in the Illinois law to be "shall be considered the same as *his* principal" instead of "shall be considered as principal," as it reads.

Under the Illinois statute it has been held that an accessory is punishable as a principal even though the principal is not convicted and is not amenable to justice as where the principal has been found insane or has been promised immunity. *Conley* v. *People,* 170 Ill. 587, 48 N. E. 911 (1897); see *People* v. *Armstrong,* 299 Ill. 349, 353, 132 N. E. 547, 549 (1921), *People* v. *Rees,* 268 Ill. 585, 593, 109 N. E. 473, 476 (1915). Thus, the amenability of the principal to punishment should have no effect upon the amenability of the accessory to punishment, and the instant case should not have been reversed upon the grounds stated.

Under the Illinois statute providing that accessories be considered as principals, the courts have held that to receive the punishment of a principal, the defendant must have been indicted as principal, not as accessory. *Baxter* v. *People,* 8 Ill. 368 (1846), *Usselton* v. *People,* 149 Ill. 612, 36 N. E. 952 (1894), *Fixmer* v. *People,* 153 Ill. 123, 38 N. E. 667 (1894), *People* v. *Van Bever,* 248 Ill. 136, 93 N. E. 725 (1911). Since the defendant in the instant case was indicted as accessory, the decision could have been reversed on the ground that he could not be punished as principal. The reason for such a rule is not apparent, since the punishment is the same in all ordinary cases, and the defendant is not really harmed by the form of the indictment.

Both these objectionable limitations would have been avoided had the defendant been indicted as a principal. This could easily have been done, since where the act constituting the offense was done by the corporation under the direction or permission of the officer, he is a principal. *United States* v. *Winslow,* 195 Fed. 578 (D. C. Mass. 1912), *City of Wyandotte* v. *Corrigan,* 35 Kan. 21, 10 Pac. 99 (1886), *People* v. *Cooper,* 193 N. Y. S. 16 (1922), *State* v. *Thomas,* 123 Wash. 299, 212 Pac. 253 (1923).

Many courts in states having statutes like that of Illinois providing that accessories before the fact be considered as principals hold that the defendant *may* be indicted as accessory and still receive the punishment of a principal. *People* v. *Rozelle,* 78 Cal. 84, 20 Pac. 36 (1888), *Geutling* v. *State,* 198 Ind. 718, 153 N. E. 765 (1926), *Commonwealth* v. *Bain,* 240 Ky. 749, 43 S. W. (2d) 8 (1931), *State* v. *Ross,* 29 Mo. 32 (1859), *People* v. *Smith,* 177 N. Y. S. 519 (1919). Under all such statutes the accessory may be prosecuted, tried, and punished though the real principal be neither prosecuted nor tried. *Lake* v. *State,* 100 Fla. 373, 129 So. 827 (1930), *Commonwealth* v. *Long,* 246 Ky. 809, 56 S. W. (2d) 524 (1933), *People* v. *Smith,* 271 Mich. 553, 260 N. W. 911 (1935), *People*

v. *Beinter,* 168 N. Y. S. 945 (1918), *Thomas* v. *State,* 40 Okla. Cr. Rep. 204, 267 Pac. 1040 (1928).

Where, however, the statute says that the accessory shall be deemed an accomplice and equally criminal as the principal offender, and shall be punished in the same manner, the defendant *must* be indicted as accessory. *Schwartz* v. *State,* 185 Atl. 233 (Del. 1936). Under such a provision the rule of the instant case, if accepted, could not be avoided.

Had the defendant in the instant case been the manager for an individual or a partnership the reason given for reversal would have been inapplicable. And yet the criminality of each act would be identical, and there is no reason for supposing that the legislature intended any distinction.

PAUL ZEMPEL.

STATUTORY PRESUMPTION—PRIMA FACIE EVIDENCE OF FELONIOUS INTENT IN UNLICENSED POSSESSION OF WEAPON.—[California] Defendant was convicted of second degree murder. At the time of the crime he was carrying a pistol without a license. The court instructed the jury, without comment, that the possession of a concealable weapon without a license "was prima facie evidence of intent to commit a felony against the person." CAL. GEN. LAWS (Deering, 1931) Act 1970, §3. The defendant pleaded self defense and submitted evidence that apparently would have satisfied the jury of his innocence but for the statutory presumption. On appeal, reversed. *Held:* The statute violates due process. *People* v. *Murguia,* 57 P. (2d) 115 (Cal. 1936).

Seemingly approving the manner of giving the charge, and directing its attention to the statute, the court concluded that there existed no rational evidentiary relation between "the mere absence of a license to carry a weapon" and "the intent with which the holder of a weapon used it," and for this reason declared the statute unconstitutional. *Manley* v. *Georgia,* 279 U. S. 1 (1929); *State* v. *Grimmet,* 33 Idaho 203, 193 Pac. 380 (1920); see *People* v. *Cannon,* 139 N. Y. 32, 43, 34 N. E. 759, 763 (1893); *Mobile* v. *Turnipseed,* 219 U. S. 35, 43 (1910). The dissenting opinion approved the applicability of the test used by the majority, but stated that the inference was not unreasonable nor "a purely arbitrary mandate."

There is authority for the proposition that the judiciary may not inquire into the validity of a *prima facie* inference established by statute. 2 WIGMORE, EVIDENCE (2d ed. 1923) §1356. This view, however, presupposes the court's use of the term *prima facie* in its ordinary meaning, *i. e.,* that the presumption is rebuttable by introduction of evidence by the defendant. 5 WIGMORE, *op. cit. supra* §2487. Where, however, the statute creates an arbitrary presumption that is given the effect of evidence and is to prevail unless the opposing testimony is found by the jury to preponderate, due process of law is violated when there is no rational connection between the fact and the inference. *Western & Atlantic R. R.* v. *Henderson,* 279 U. S. 639 (1929); *Manley* v. *Georgia, supra; Morrison* v. *California,* 281 U. S. 82 (1934); *cf. Casey* v. *United States,* 276 U. S. 394, 425 (1928); see Note (1929) 43 Harv. L. Rev. 100. Such was the effect of the presumption

in this case, and the test of rational relation was proper. But one recent decision has gone so far as to hold that a criminal statute is unconstitutional if the fact upon which the inference rests would be of itself insufficient to support a conviction. *Powers* v. *State*, 204 Ind. 472, 184 N. E. 549 (1933) noted (1934) 10 Ind. L. Rev. 180. This extreme view, which seems to set at naught the entire theory of presumptions, is not noticed in the present opinion.

By its very broadness this statute may facilitate, or even produce, convictions of the most unfortunate nature, for it creates in any gun carrying, unlicensed defendant a *prima facie* intent to commit any "felony against the person" with which he is charged by the prosecuting officer. By this undiscriminatory creation of inference persons unable to adduce evidence of lack of intent might be convicted of a felony upon mere proof of simple assault—if charged with assault with intent to commit felony —or of felonious attempt upon mere proof of a threatening act. Moreover, conviction caused by passion or prejudice of the jury, otherwise resting solely upon the presumption, could not be inquired into. In the absence of precedents, the court has as a matter of reason, supported as well by considerations of justice and the background of the statute, made a proper determination that the statute is unconstitutional for the lack of reasonable connection between the fact of carrying a concealed weapon unlicensed, and the intent to commit a felony.

This case is particularly interesting in that it is one of the first to consider the validity of a statute which, as a part of uniform legislation, has been enacted in eight states. Rigorous firearm regulation began in the United States in 1887 by the passage of a "license to purchase" act in New York, which was made more stringent in 1911 by the famous "Sullivan Law," by which purchase or possession of a concealable firearm became a misdemeanor, and the carrying of such a weapon without a license, a felony. Laws of New York (1911) c. 195, §442. Little or no regulation of firearms prevailed in other jurisdictions, and the periodical literature after the turn of the century was rich in an outcry for more effective control of firearms. See [1909] Miss. B. A. Rep. 10; Garner, *Is the Pistol Responsible for Crime?* (1912) 1 J. Crim. L. 793; (1913) 16 Law Notes 207; (1917) 84 Cent. L. J. 182; *Prohibition of Manufacture and Sale of Weapons* (1922) 8 A. B. A. J. 127. Soon thereafter laws of many types were passed to deal with the problem, but no state enacted as stringent a law as New York, partly because of the concerted resistance of those who wanted easy accessibility of firearms for legitimate purposes. Frederic, *Pistol Regulation: Its Principles and History* (1932) 23 J. Crim. L. 531. Constitutional restrictions themselves presented little or no obstacle to the regulation of firearms. Emery, *The Constitutional Right to Keep and Bear Arms* (1915) 28 Harv. L. Rev. 473. Following the World War those who formerly resisted firearm regulation suggested uniform state legislation drafted under the auspices of the United States Revolver Association. This draft was enacted in California in 1923 and also in Indiana, New Jersey, North

Dakota and Oregon, failing in Illinois, but adopted in the District of Columbia only after Section 3 (the one in controversy in the present case) was stricken out. The Uniform Firearms Act, approved in 1926, withdrawn, reconsidered and approved again in 1930 (now adopted in Pennsylvania, Rhode Island and South Dakota), was modelled upon this draft and contains substantially all its provisions. HANDBOOK OF THE NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS (1924) 224, 316, 854; (1927) 866, 914; (1930) 124, 530; Imlay, *Uniform Firearms Act Reaffirmed* (1930) 16 A. B. A. J. 799. Beyond the licensing of dealers, of whom extensive records are required, and the prohibition of sale to certain defective persons, felons, drug addicts and minors, nothing in the Act prohibits the acquiring of a concealable weapon by any citizen. Control of evil use is sought by means of heavy penalties for unlicensed carrying, by wide increase of punishment for being armed while committing a felony, and, through Section 3 by technical facilitation of conviction for felony, of those who carry pistols without a license. Because of the obvious impossibility of wide publication, or understanding of this highly techincal legality among those who carry their weapons but neglect to obtain a license, this statute is but a negligible deterrent to their criminal use.

RICHARD C. SHELDON.