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A GUIDE FOR MORE EFFICIENT LAW ENFORCEMENT

This Note was written in an attempt to establish a guide for Montana attorneys and law enforcement officers to the legal procedures which must be observed when obtaining evidence against an accused. In the past numerous prosecutions have failed because crucial evidence was rejected, yet convictions might have been obtained had the officers been aware when gathering evidence that it would be unavailable on trial of the accused unless properly obtained. Not only is improperly obtained evidence often inadmissible, but in addition officers may be subject to civil and criminal liability.

If society is to be adequately protected against modern crime syndicates and widespread criminal activities, the officers must be informed as to the constitutional and statutory limitations which must be observed. These are necessary safeguards, established as a bulwark against the transgression of personal liberties; and they should not be limited through the actions of pressure groups which maintain that crime cannot be suppressed because the police powers are too closely shackled by so called "legal technicalities." This Note is a summary of the Montana constitutional provisions, statutory enactments, and decisions which affect the admissibility of evidence obtained as a result of confessions, search and seizure, blood tests and wire tapping. In formulating this guide, decisions from other jurisdictions have been incorporated in the absence of applicable Montana decisions on the subject.

CONFESSIONS

A confession is a statement by a person that he committed or participated in the commission of a crime made at any time after the crime.[1] This is to be distinguished from an admission which is a "statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction."[2]

Confession Must Be Voluntary

Before a confession will be admissible as evidence in a criminal proceeding it must be shown that it was voluntarily given. This means that the state must establish that the law enforcement officers obtained the confession from the accused without the use of physical threats, coercion, duress, or undue restraint.[3] An admission on the other hand, need not be proved to be voluntary before it is admissible.[4]

A showing of the voluntary character of a confession is required, not to exclude the truth, but to avoid the possibility of a false confession by one who is in fact innocent.[5] Not only is an involuntary confession inherently untrustworthy,[6] but its admission into evidence against the accused may amount to a denial of due process because it offends the community's fundamental sense of justice and fair play.[7] This may be so even though the

[1]State v. Guie, 56 Mont. 485, 186 Pac. 329 (1919).
[2]State v. Stevens, 60 Mont. 390, 402, 199 Pac. 256, 259 (1921).
[3]Territory v. McClin, 1 Mont. 394 (1871).
[4]State v. Stevens, 60 Mont. 390, 199 Pac. 256 (1921).
[5]State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927).
[6]State v. Guie, 56 Mont. 485, 186 Pac. 329 (1919).
[7]Brown v. Mississippi, 297 U.S. 278 (1936).

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state courts have previously declared it to be voluntary, since the Supreme Court will make an independent finding of the facts in determining whether or not a confession was obtained in violation of the due process clause of the fourteenth amendment.[8]

The Montana courts, in determining whether a confession is voluntary, use the following test: "Was the inducement held out to the accused such as that there is any fair risk of false confession?" In other words, was the confession prompted by some inducement, threat or promise under circumstances showing that the confessor, as a reasonable person, might prefer to speak falsely rather than remain silent?[9] Each case must be judged on its own particular facts and circumstances,[10] and it is a question of law for the courts in the first instance to determine if the confession is voluntary.[11]

No Duty to Caution Accused of Right to Remain Silent

A number of decisions have further clarified the rules indicating when a confession will be deemed voluntary under the Montana test and the due process clause of the fourteenth amendment. Where a confession is made while the accused is under arrest or in cutsody of an officer, such fact alone will not void an otherwise valid confession.[12] Likewise a police officer is ordinarily under no duty to caution the accused to the effect that "anything you say may be held against you." Some jurisdictions recommend that the confessor be warned of his right to remain silent.[13] The Montana court in *State v. Robuck*[14] suggested that such might be the rule in Montana, but did not decide the question. To safeguard admissibility of the confession, therefore, the officer probably should advise the accused of his right to remain silent.

Confession May Be Oral or Written

A confession may be oral or written, but the latter is preferable because of the greater evidentiary value which the jury will ultimately attach to it. It may be in the handwriting of the confessor and signed by him, or his oral confession can be taken down in writing by another and read back to the accused. If he signs and adopts it as his own it will then be a valid written confession.[15] Some jurisdictions hold that an oral confession is admissible when transcribed by another on behalf of the accused, and is thereafter read and acknowledged, even though he does not sign it.[16] It is good procedure for police officers to incorporate in the confession a statement that "This confession is made voluntarily, of my own free will, and is not prompted by any promises of leniency or reward."

In Montana a confession otherwise admissible, is not vitiated because made in the absence of counsel.[17]

[8]Chambers v. Florida, 309 U.S. 227 (1940).
[9]State v. Sherman, 35 Mont. 512, 90 Pac. 981 (1907).
[10]State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927).
[11]State v. Sherman, 35 Mont. 512, 90 Pac. 981 (1907).
[12]State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927).
[13]Reagen v. Colorado, 49 Colo. 316, 112 Pac. 785 (1911); State v. Ellington, 4 Idaho 529, 43 Pac. 60 (1895).
[14]126 Mont. 302, 248 P.2d 817 (1952).
[15]State v. Berberick, 38 Mont. 423, 100 Pac. 209 (1909).
[16]State v. Harris, 74 Wash. 60, 132 Pac. 735 (1913).
[17]State v. Robuck, 126 Mont. 302, 284 P.2d 817 (1952).

Mere Admonishment Will Not Vitiate Confession

A mere admonishment to speak the truth, unconnected with promises of leniency, threats, or physical harm made by the person receiving the confession will not vitiate the confession. It is very important, however, that the police officers do not make statements to the confessor which will induce him to make a false confession. In *State v. Dixson*[18] the court held that statements by an officer that "if a person told the truth, as a rule, he got out of it a whole lot easier than he would by telling a lot of lies," and that "if he would come clean chances are it would be easier with him," were held not to render the confession involuntary. The court also approved the adjuration that it would be better for him "to confess or tell the truth." A confession was held to be involuntary when the arresting officer informed the accused that it would be better for him to go back and tell the authorities all about it; that he thought they would be as lenient as possible if he would give evidence against the other two.[19]

Artifice or deception will not of itself render a confesion involuntary but either will make it more difficult to lay the necessary foundation. In *State v. Robuck*,[20] the police officers informed the defendant's accomplice that it would probably help the defendant if she were to confess, and the accomplice thereafter told the accused, in absence of the officers, "that it would probably go a little easier on her if she did." These statements did not render the confession involuntary since the accused had been previously informed of her right to counsel and of her right to remain silent. But the use of deception in *State v. Rossell*[21] was held to vitiate the confession. There the defendant relied upon false statements and, thinking his defense to the crime was lost, confessed.

Confessions Involving Promises or Inducements and Threats

Promises or inducements by police officers which raise any hope of leniency or reward ordinarily will create such a risk of a false confession that the courts unhesitatingly declare such a confession void.[22] A confession was held to be inadmissible in *State v. Duran*[23] when the county attorney told the accused he would drop a prior charge if the accused would confess. Montana law requires that the invalidating inducements or promises be made by the public prosecutor, magistrate, arresting officer, one having custody of the defendant, or by a private person in the presence of an officer so as to give the accused reasonable grounds to believe that the promises will be fulfilled.[24] *State v. Sherman*[25] held that promises made to the defendant by his father were sufficient to invalidate the confession because the accused could reasonably believe that the officers sanctioned the inducement made by a third party in their presence.

Threats of physical violence to the person of the accused will vitiate a

[18]80 Mont. 181, 260 Pac. 138 (1927).
[19]Territory v. Underwood, 8 Mont. 131, 19 Pac. 398 (1888).
[20]126 Mont. 302, 248 P.2d 817 (1952).
[21]113 Mont. 457, 127 P.2d 379 (1942).
[22]People v. Heide, 302 Ill. 624, 135 N.E. 77 (1922).
[23]127 Mont. 233, 259 P.2d 1051 (1953).
[24]Territory v. McClin, 1 Mont. 354 (1871).
[25]35 Mont. 512, 90 Pac. 981 (1907).

confession if there is "a fair risk of false confession" as determined by the court.[26] Section 94-3918[27] provides:

> It shall be unlawful for any sheriff, constable, police officer, or any persons charged with the custody of any one accused of crime, of whatever nature, or with the violation of a municipal ordinance, to frighten or attempt to frighten by threats, torture, or attempt to torture, or resort to any means of an inhuman nature, or practice what is commonly known as the "third degree" in order to secure a confession from such person.

Questioning of Accused

Short of threats and torture, the permisible limits beyond which law enforcement officers may not go in questioning of the accused are not well defined. The only definite rule in Montana seems to be that the questioning cannot be so persistent and continuous as to fall within the fair risk of false confession test. The questioning can be harsh and vigorous[28] and some courts permit the questioning to be accompanied by abusive language.[29] Prolonged questioning considered in light of the circumstances under which it was conducted may vitiate the confession especially if the interrogation is carried to a point of exhaustion.[30] Interrogation may be extended over a considerable period of time if the questioning is reasonable and the comfort and well-being of the defendant is taken into consideration by the interrogators.[31]

Unreasonable Delay in Arraignment

The Montana court has not been confronted with the question of whether a confession should be declared involuntary because it was obtained after an unreasonable delay in taking the accused before a magistrate in contravention of law. Section 94-3916 provides:

> Every public officer or other person, having arrested any person upon a criminal charge, who wilfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

One Utah decision has held that a confession is not vitiated merely because it is taken during the delay in arraignment.[32] The federal courts follow the rule of *McNabb v. United States*[33] which held that confessions obtained during a period of unreasonable detention and delay are void. However, in *Mitchell v. United States*[34] a confession obtained without coercion immediately after the accused was brought to the police station was held admissible even though the defendant was illegally held eight days thereafter. The *McNabb* case was distinguished in that there coercive methods had been employed in obtaining the confession. *Upshaw v. United States*[35] reaffirmed

[26]State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927).
[27]All section numbers in the text refer to the REVISED CODES OF MONTANA, 1947, unless noted otherwise.
[28]People v. Nelson, 320 Ill. 273, 150 N.E. 686 (1926).
[29]Buschy v. People, 73 Colo. 472, 216 Pac. 519 (1903).
[30]Bruner v. People, 113 Colo. 194, 156 P.2d 111 (1945).
[31]Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952); People v. Curley, 114 Cal. App. 2d 577, 250 P.2d 667 (1952).
[32]State v. Gardner, 119 Utah 579, 230 P.2d 559 (1951).
[33]318 U.S. 332 (1943).
[34]322 U.S. 65 (1944).
[35]335 U.S. 410 (1948).

the rule of the *McNabb* case by declaring a confession void because it was obtained after the period of a reasonable delay had elapsed, even though no coercion was applied. This is a rule of federal policy, not one required by the Constitution. The states are not obliged to follow it.

Psychologically Coerced Confessions Are Inadmissible

Confessions are inadmissible when the confessor is insane or incapable of using his mental faculties to a degree enabling him to fully comprehend the effect of his confessions.[36] In *State v. Berberick*[37] the defense offered to prove that the defendant was "weak-minded" at the time the confession was made, but the court declined this offer. On appeal to the Supreme Court of Montana it was determined that the accused should have been granted an opportunity to introduce testimony as to his mental condition before the confession was admitted into evidence. The court stated that the accused in making a confession must have the degree of competency required of a witness by section 93-701-3. A confession made by an uneducated Negro of low mentality, when he was isolated for a week, removed to a state prison far from his home and questioned reasonably for five days, was held in *Fikes v. Alabama*[38] to be obtained by the state officers in violation of the due process clause of the fourteenth amendment. This is an extreme case of psychological coercion but it illustrates the degree of care required by the law enforcement officers in obtaining voluntary confessions.

SEARCH AND SEIZURE

In their quest for evidence upon which a conviction can be based, law enforcement officers have been repeated violators of the rights protected by our Constitution. As a result of these unlawful searches and seizures and the unavailability of the evidence obtained by them, the guilty have been set free and the public has been subjected to unnecessary expense in retrying cases. In addition innocent people have been the subject of unjustified invasions of privacy causing them to become indignant and uncooperative with the police.

The right of the people to be free from unreasonable searches and seizures is guaranteed by the fourth amendment[39] to the Constitution of the United States and by article III, section 7, of the Constitution of Montana. The Montana provision reads 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.

Is evidence obtained by an unlawful search and seizure admissible on trial of the accused? This question should be of vital concern to a law enforcement officer in view of the fact that Montana[40] follows the federal ex-

[36]Reed v. People, 122 Colo. 308, 221 P.2d 1070 (1950).
[37]38 Mont. 423, 100 Pac. 209 (1909).
[38]77 Sup. Ct. 281 (1957).
[39]"The right of 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."
[40]State v. Fuller, 34 Mont. 12, 89 Pac. 369 (1906).

clusionary rule as enunciated in the case of *Weeks v. United States.*[41] This judicially created rule provides that evidence obtained in violation of the constitutional prohibition against unreasonable search and seizure is inadmissible in federal proceedings. It was clearly established in *Wolf v. Colorado,*[42] however, that the federal exclusionary rule is not based upon the fourth or fourteenth amendments to the United States Constitution. In that case the Court ruled that the states are free to adopt their own policy as to evidence illegally obtained as the result of an unreasonable search and seizure. As previously stated, Montana has decided to follow the exclusionary rule of the federal courts.[43]

Subjects afforded constitutional protection include the individual's person, home, effects and papers. Cases interpreting the first of these subjects have declared that the protection extends to an arrest of an individual,[44] although there is contrary authority.[45] It would seem that a person should logically be entitled to constitutional protection against unwarranted arrest at least equal the protection afforded to his home, effects and papers. The word "home" means dwelling place and has been interpreted to include curtilage,[46] but an open field or roadway has been held not within the scope of that term.[47] "Effects," as set forth in the Constitution, means personal belongings[48] such as baggage and clothing.[49] Books, papers and documents should clearly come within this constitutional protection.

Waiver of Constitutional Rights

One consenting to an unreasonable search and seizure cannot later be heard to object to evidence acquired in the course thereof.[50] Such consent was manifested in the case of *State ex rel. Muzzy v. Uotila*[51] where the sheriff, having heard that the defendant was violating the liquor laws, informed the defendant that he "wanted to look it over" and the defendant replied, "All right go ahead." This was held to be a waiver of his constitutional right of protection against an unreasonable search and seizure. It has elsewhere been said that the waiver must be intelligently and voluntarily made by the accused after he has been informed of his rights.[52] The Oklahoma Supreme Court has held that an accused's statement, "No, go ahead look around," in reply to the officer's question whether he objected to a search of the premises did not constitute a waiver because the officer had manifested an intent to search the premises without a warrant.[53]

[41]232 U.S. 383 (1914).
[42]338 U.S. 25 (1949). See *infra* p. 228.
[43]State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906); State *ex rel.* Samlin v. District Court, 59 Mont. 600, 198 Pac. 362 (1921).
[44]State *ex rel.* Wong You v. District Court, 106 Mont. 347, 77 P.2d 353 (1938); State v. Mullaney, 92 Mont. 553, 16 P.2d 407 (1932); State *ex rel.* Neville v. Mullen, 63 Mont. 50, 207 Pac. 634 (1922); State *ex rel.* Nolan v. Brantley, 20 Mont. 173, 178, 50 Pac. 410, 411 (1897).
[45]State v. Hum Quock, 89 Mont. 503, 300 Pac. 220 (1931) (see strong dissent by Justices Galen and Ford).
[46]Ratzell v. State, 270 Okla. Crim. 340, 228 Pac. 166 (1924).
[47]State v. Arnold, 84 Mont. 348, 358, 275 Pac. 757, 759 (1929); State v. Ladue, 73 Mont. 535, 237 Pac. 495 (1925).
[48]State v. Mullaney, 92 Mont. 553, 16 P.2d 407 (1932).
[49]State v. Hum Quock, 89 Mont. 503, 300 Pac. 220 (1931).
[50]State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906).
[51]71 Mont. 351, 229 Pac. 724 (1924).
[52]State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944).
[53]Helfer v. State, 84 Okla. Crim. 304, 181 P.2d 862 (1947); Dawson v. State, 83 Okla. Crim. 263, 175 P.2d 368 (1946).

Search and Seizure Under a Search Warrant

Search warrants were instituted for the purpose of establishing legal safeguards against unlawful searches and seizures. They supplanted the general warrants issued in colonial times in the form of writs of assistance.[54] The legislature of Montana in furtherance of the constitutional provision enacted statutes specifying the conditions upon which a search warrant could issue. Although the search warrant has long been recognized as essential to effective enforcement of the law, it has from time immemorial been cautiously framed and carefully pursued because of its arbitrary character. The law has always construed a search warrant very strictly and required that it conform in every particular to the exact terms of the statutes. Officers conducting searches under the authority of the warrant have likewise been held to strict accountability.[55] A search warrant may issue only in furtherance of public prosecution and not private litigation.[56]

Section 94-301-2 enumerates the following grounds upon which a search warrant may be issued: (1) for property which has been stolen or embezzled, (2) for property which has been used to commit a felony, (3) for property in possession of one intending to use it for committing a public offense, or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery. It is, therefore, self evident that a search warrant may not be procured for the single purpose of conducting a "fishing expedition" to obtain evidence.[57] Section 94-301-3 provides:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

Before a warrant may issue, the application must set forth sufficient facts for the judicial officer to ascertain whether or not probable cause exists.

Scope of the Search Warrant

A search conducted outside the scope of the search warrant will be held to violate the Constitution. This means that there must not be any uncertainty or obscurity as to the premises to be searched or the property to be seized. The officer requesting a warrant must be certain that he gives a complete description of the place, the particular dwelling house, and the property to be seized, in order to establish without question the scope of the contemplated search. As illustrated in *State ex rel. King v. District Court*,[58] a search warrant containing the legal description "the dwelling house and all outbuildings" was held to be void because it failed to state specifically whose dwelling house or which of several sheds was to be included in the search. "The warrant must point unerringly to the object of the search," and not leave the law enforcement officer any discretion as to its extent. That warrant authorized search and seizure of "intoxicating liquor, vessels, furniture, and implements used in making it." Seizure of sugar thereunder was unlawful because it was not accurately described in the warrant.

[54]Boyd v. United States, 116 U.S. 616 (1886).
[55]State *ex rel.* King v. District Court, 70 Mont. 191, 224 Pac. 862 (1924).
[56]*Id.* at 197, 224 Pac. at 864.
[57]State *ex rel.* Thibodeau v. District Court, 70 Mont. 202, 224 Pac. 866 (1924).
[58]70 Mont. 191, 224 Pac. 862 (1924); see Fall v. United States, 33 F.2d 71 (9th Cir. 1929).

A variance between the search warrant as issued by the magistrate and the return by the sheriff concerning the property seized or the premises searched (*e.g.*, 906 A. Street instead of 609 A Street) will also vitiate the warrant. This error cannot be corrected by amending the return to read "as described in the search warrant."[59]

Contraband property, although seized under a void search warrant, will not be returned to the owner because this property is of such a nature that a person has no right to possession.[60] However, this does not mean that the defendant cannot object to the use of the contraband property against him on his trial.[61] A search unlawful in its inception will not become lawful by what is later found even though the articles are contraband or weapons used to commit a crime.[62] Section 94-301-11 requires:

> The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

Search Incident to an Arrest

It is well settled that a search and seizure conducted without a search warrant, but as incident to a lawful arrest, is justifiable if reasonable in scope.[63] An arrest has been defined in *State ex rel. Sadler v. District Court*[64] as the "taking, seizing or detaining of the person of another either by touching, or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person of the accused to the actual control and will of the person making the arrest." An arrest pursuant to a warrant[65] is clearly lawful. Problems concerning the validity of the arrest and hence the reasonableness of the search may arise, however, when a police officer makes an arrest without a warrant as[66] prescribed in section 94-6003. This statute provides:

> A peace officer . . . may, without a warrant, arrest a person— (1) For a public offense committed or attempted in his presence; (2) When a person arrested has committed a felony, although not in his presence; (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; (4) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested; (5) At night,

[59]State *ex rel.* Thibodeau v. District Court, 70 Mont. 202, 210, 224 Pac. 866, 870 (1924); State v. Malarky, 57 Mont. 132, 187 Pac. 635 (1920).

[60]State *ex rel.* King v. District Court, 70 Mont. 191, 224 Pac. 862 (1924).

[61]State *ex rel.* Thibodeau v. District Court, 70 Mont. 202, 224 Pac. 866 (1924); Allen v. Holbrook, 103 Utah 319, 135 P.2d 242 (1943) (A general description of contraband or goods of an illicit character is sufficient, whereas a particular description is necessary when seizing ordinary chattels).

[62]State *ex rel.* King v. District Court, 70 Mont. 191, 198, 200, 224 Pac. 862, 865 (1924); State v. Hum Quock, 89 Mont. 503, 300 Pac. 220 (1931) (Legality of an arrest cannot depend upon what is found on the person of the accused, but the property found may have a bearing on the good faith of the belief of the arresting officer.)

[63]State *ex rel.* Sadler v. District Court, 70 Mont. 378, 225 Pac. 1000 (1924). See R.C.M. 1947, §§ 94-5901 to 94-5918.

[64]70 Mont. 378, 225 Pac. 1000 (1924); State v. Bradshaw, 53 Mont. 96, 161 Pac. 710 (1916); R.C.M. 1947, § 94-6008.

[65]R.C.M. 1947, §§ 94-5901 to 94-5918.

[66]For a detailed analysis see Mason, *Arrests Without a Warrant in Montana*, 11 MONTANA L. REV. 1 (1950).

when there is reasonable cause to believe that he has committed a felony.

These constitute the officer's authority to arrest. Including this there are said to be four requisites for a lawful arrest: "[1] a purpose to take the person into custody; [2] under a real . . . authority; [3] an actual or constructive seizure or detention of his person; [4] so understood by the person arrested."[67]

"Probable Cause" Must Preexist

"Probable cause" or "reasonable cause to believe"[68] is a necessary but nebulous element of all arrests with the exception of subsection 2 of section 94-6003. In determining whether or not "probable cause" exists the facts and circumstances of each case must be considered. Although subsection 1 of section 94-6003 does not expressly require a finding of "probable cause," the court in *State ex rel. Neville v. Mullen*[69] held that, for a misdemeanor, before a valid arrest without a warrant can be consummated, the circumstances must be such that a warrant could be obtained. When "probable cause" is found to exist prior to or contemporaneous with the arrest, a search and seizure otherwise reasonable as incident thereto will be held to be within the constitutional safeguards.[70] But a search and seizure which is based upon mere suspicion and not upon "reasonable cause to believe" is void.[71] Subsection 2 of section 94-6003 authorizes the arrest of one in fact a felon although the felony was not committed in the presence of the arresting officer, thus eliminating the need for "probable cause." The court apparently overlooked this statute in the case of *State v. Mullaney*[72] when it held that the arrest and search and seizure of the defendant in fact guilty of illegally possessing narcotics (a felony) was void because the arresting officer did not have "probable cause" for believing the defendant guilty at the time of the arrest. Mere suspicion based upon proof of general reputation does not constitute "probable cause."

The search and seizure must be conducted contemporaneously with or

[67]State *ex rel.* Sadler v. District Court, 70 Mont. 378, 386, 225 Pac. 1000, 1001 (1924). There can be no arrest when arrestee is not conscious of his liberty being restrained and mere submission, whether pretended or real, will not constitute an arrest if the arrestee is not within the control of the person arresting. Harrer v. Montgomery Ward and Co., 124 Mont. 295, 221 P.2d 428 (1950).

[68]Various definitions of probable cause found in Montana decisions are as follows: "Probable cause is the knowledge of the facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." State *ex rel. Neville v. Mullen*, 63 Mont. 50, 58, 207 Pac. 634, 637 (1922). "In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest without a warrant if the offense which the circumstances tend to establish was committed in his presence; and it is settled in this jurisdiction that the officer need not have actual, personal knowledge of the facts which constitute the offense in order to be able to make complaint and secure a warrant." *Id.* at 58, 207 Pac. at 636. "An arrest without a warrant, and likewise a search and seizure without a warrant, is illegal and, therefore, unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances, or credible information calculated to produce such belief." State *ex rel.* Sadler v. District Court, 106 Mont. 347, 354, 78 P.2d 353, 355 (1938).

[69]63 Mont. 50, 207 Pac. 634 (1922).

[70]State v. Hum Quock, 89 Mont. 503, 300 Pac. 220 (1931).

[71]State *ex rel.* Sadler v. District Court, 70 Mont. 378, 225 Pac. 1000 (1924).

[72]92 Mont. 553, 16 P.2d 407 (1932).

subsequent to the arrest but not prior thereto."[73] The time lapse between the arrest and the search must not be too great or the search will not be considered incident to a lawful arrest. The arresting officer is authorized to take possession of any articles which may reasonably be of use at the trial,[74] including instrumentalities used in the commission of a crime[75] or even mere evidence which could not be taken under a search warrant.

The decision of *State v. Reed*[76] further illustrates the broad scope of permissible search and seizure as incident to a lawful arrest. In that case the accused was arrested and a search of his person disclosed a set of keys which the officers took and used to obtain access to his private papers. Letters obtained in the search were held admissible because taken as incident to a lawful arrest. The court did not indicate where the arrest took place. However, the general rule does not permit an unrestrained search by law enforcement officers but limits the search to the person of the arrestee and his immediate surroundings.[77] Apparently search of a dwelling house is permissible only when the arrest is made therein.[78] It should again he noted that it is only the *unreasonable* searches and seizures by officers which are declared to be in violation of the constitutional prohibition.[79] What constitutes a search of the "immediate surroundings" seems to be a judicial question which has to be decided according to the facts and circumstances of each individual case.[80] The federal courts have adopted the "rule of reasonableness" as the only limitation upon searches and seizures conducted as incident to an arrest.[81]

It appears somewhat inconsistent to permit such a broad and unlimited search and seizure power in our law enforcement officers when they conduct a search as incident to a lawful arrest yet at the same time greatly limit search and seizure under a search warrant. The latter is conducted under judicial supervision according to established legislative enactments but cannot be used to search for or seize mere evidence for use on trial of the ac-

[73]Papani v. United States, 84 F.2d 160 (9th Cir. 1936); Walker v. State, 89 Okla. Crim. 66, 205 P.2d 335 (1949).

[74]State v. Hum Quock, 89 Mont. 503, 300 Pac. 220 (1931); State *ex rel.* Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928).

[75]State v. Benson, 91 Mont. 21, 5 P.2d 223 (1931); State v. Ladue, 73 Mont. 535, 237 Pac. 495 (1925); State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906), citing State v. Edwards, 51 W. Va. 220, 41 S.E. 429 (1902), to the effect that "there is such a thing as unreasonable search, which the law will not permit, but where a person stands charged with a crime, and an instrument or device is found on his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the state and may be taken from him and used for that purpose."

[76]53 Mont. 292, 163 Pac. 477 (1917).

[77]Wallace v. State, 42 Okla. Crim. 143, 275 Pac. 354 (1929).

[78]*Ibid.*; State v. Neidamire, 98 Mont. 124, 37 P.2d 670 (1934).

[79]State v. Ladue, 73 Mont. 535, 237 Pac. 495 (1925).

[80]Phillip v. State, 95 Okla. Crim. 336, 245 P.2d 129 (1952). Search of defendant's motel was permitted as incident to an arrest. State *ex rel.* Fong v. Superior Court, 29 Wash. 2d 601, 188 P.2d 125 (1948). Search and seizure was held to be reasonable where officers conducted a search of a room which was used in defendant's business; reasonableness of a search is not determined by any fixed standard but must be looked at in light of the facts and circumstances of each particular case. United States v. Rabinowitz, 339 U.S. 56 (1950).

[81]Kremen v. United States, 231 F.2d 155 (9th Cir. 1956), *cert. granted* 77 Sup. Ct. 46, stretches to the limit the rule of reasonableness laid down in Harris v. United States, 331 U.S. 145, 151 (1947) (Reasonable search and seizure is not rendered void by the fact that a whole apartment was searched). Agnello v. United States, 269 U.S. 20 (1925) (The right to search as incident to an arrest cannot extend to a man's dwelling house several blocks distant from the place of the arrest).

cused, whereas the search and seizure incident to a lawful arrest is not subject to any prior restraints, but is judged only on the basis of reasonableness.

Search Authorized by Special Statute

There are some exceptions to the general rule requiring a search warrant when the search and seizure is not conducted as incident to a lawful arrest. The most notable of these was developed in *Carrol v. United States*[82] as a rule of necessity during the "probihition" era. That case emphasized the necessity of distinguishing, under the fourth amendment, the difference between a search of a dwelling house and search of a ship, wagon, automobile, or other vehicle which is highly mobile and can be readily removed from the locality before it is possible to obtain a search warrant. Section 26 of the National Prohibition Act[83] provided that when any "officer shall discover a person in the act of transporting he shall seize the liquor and arrest the person in charge." A search was held to be valid even though conducted prior to the arrest if the officer had probable cause to believe contraband liquor was being illegally transported in the automobile. The Court based its decision on public policy and the need for such a rule if the laws were to be effectively enforced.

Montana enacted a similar provision in section 11073 (since repealed) of the Revised Codes of 1921. The Montana Supreme Court in *State ex rel. Brown v. District Court*[84] held that where search of an automobile revealed liquor being unlawfully transported it was both the duty and right of the officer to seize the liquor together with the vehicle and arrest the accused. Thus the search and seizure without a warrant was held to be valid although the defendant was not under arrest when the search was made.

In the absence of a statute authorizing such a search and seizure it would seem that the law enforcement officers must either procure a search warrant or make an arrest before attempting to search an automobile and seize articles to be used against the accused.[85] According to a Washington decision, when a seizure is not preceded by a search, however, and the articles seized are contraband, the evidence is admissible although taken without a warrant and while the accused is not under arrest. No constitutional provisions are violated when the unlawful subject matter is seized without aid of a search and is fully disclosed to the eye and open to the hand.[86]

[82]267 U.S. 132 (1924).
[83]Act of Oct. 28, 1919, c. 85, 41 STAT. 305.
[84]72 Mont. 213, 232 Pac. 201 (1925).
[85]State v. Ladue, 73 Mont. 535, 237 Pac. 495 (1925). The possibility should not be foreclosed that the courts will recognize that a search of an automobile carrying concealed weapons or narcotics and other items which are inherently dangerous will be held to be valid because it was conducted without a warrant on the grounds of necessity. The court might declare the search and seizure reasonable even in the absence of a statute permitting such a search. (If the search is not prohibited as being unreasonable it does not matter whether the officer had a warrant when he had probable cause for believing an offense was being committed in his presence.)
[86]State v. Miller, 121 Wash. 153, 209 Pac. 9 (1922); *accord*, State v. Hawkins, 362 Mo. 152, 240, S.W.2d 688 (1951); State v. Vandetta, 108 W. Va. 277, 150 S.E. 736 (1929). Officers entered business premises to determine whether or not a tax had been paid and the court held that they could seize illegally held slot machines, which machines could be used against the accused. The officers were not acting under any search warrant nor did they make an arrest; such a search and seizure would not have been permitted if the premises had been a dwelling house. State v. Hoffman, 245 Wis. 367, 14 N.W.2d 146 (1944).

Who Can Object to Unlawful Search and Seizure

The individual whose rights have been violated by an unreasonable search and seizure must move to suppress the evidence illegally obtained in a direct proceeding prior to the commencement of the trial. After a finding for the defendant, it then becomes the duty of the court to return the articles wrongfully taken.[87] If the motion is not timely the remedy of suppression is waived.[88] The rule is otherwise when a defendant learns for the first time at the trial that the article was illegally obtained.[89] The right to invoke the constitutional provision against an unreasonable search and seizure is a personal one which can be raised only by the person whose rights have been transgressed, and if the defendant disclaims ownership of the articles he is held to have waived any rights.[90] Mere custody over the article wrongfully seized is not enough to claim the right.[91] However, a defendant was held to have a valid right to object to the introduction of contraband articles into evidence when the officer seized the articles in a friend's apartment without the friend's consent although the defendant was absent at the time the search took place.[92]

Exclusionary Rule Not Applicable to "Strangers"

Under the doctrine of *Wolf v. Colorado* the federal exclusionary rule applies only to federal agents[93] and evidence is admissible in federal proceedings although obtained in violation of the Constitution by "strangers," *i.e.*, persons not working in collusion or conjunction with federal agents.[94] Montana has followed the federal policy in this area and declared evidence obtained in violation of the search and seizure provision inadmissible only if acquired by officers or agents of the State of Montana. In *State v. Gardner*[95] federal officers acting under a void federal search warrant searched and seized the defendant's property. The state court said the evidence was admissible whether or not it was obtained in violation of the Montana constitutional prohibition. The court emphasized the fact that the state officers did not in any respect participate in or have any knowledge of the search.

Before an officer attempts to make a doubtful search he should proceed to the nearest magistrate and procure a warrant. This is the only way in which the law enforcement officers can be sure of preserving the evidence necessary to sustain a conviction. Otherwise the wrongfully obtained evidence will be inadmissible and the officer will be subject to civil[96] and criminal actions.[97]

COMPULSORY BLOOD TEST

A corollary of search and seizure and of evidence obtained thereby is that of the admissibility of blood tests taken without consent of the accused

[87]State *ex rel.* Samlin v. District Court, 59 Mont. 600, 198 Pac. 362 (1921).
[88]State v. Gotta, 71 Mont. 288, 229 Pac. 405 (1924).
[89]Gouled v. United States, 255 U.S. 298 (1921).
[90]State v. Nelson, 304 P.2d 1110 (Mont. 1956).
[91]Kelly v. United States, 61 F.2d 843 (8th Cir. 1932).
[92]United States v. Jeffers, 342 U.S. 48 (1951).
[93]Weeks v. United States, 232 U.S. 383 (1914).
[94]Burdeau v. McDowell, 256 U.S. 465 (1921).
[95]77 Mont. 8, 249 Pac. 574 (1926); State *ex rel.* Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928).
[96]State v. Lindway, 131 Ohio 166, 2 N.E.2d 490 (1936).
[97]*In re* Siracusa, 125 Misc. 882, 212 N.Y.S. 400 (1925). R.C.M. 1947, § 94-35-122.

by law enforcement officers for the purpose of determining whether a driver of an automobile is intoxicated. Can the officers require a driver to submit to a blood test in order to obtain evidence against him?

There are three possible constitutional objections which could be raised to such a compulsory examination. These are (1) the privilege against self incrimination,[98] (2) the prohibition against unreasonable search and seizure,[99] and (3) the due process clause of the fourteenth amendment.[100]

Privilege Against Self Incrimination

The first of these objections is clearly not applicable to the use of real evidence (such as blood tests) but only to "testimonial compulsion."[101] Cases have held that taking shoes to compare footprints,[102] compelling the accused to be fingerprinted,[103] and examining the defendant for identifying wounds or scars are not within this constitutional guarantee.[104]

Unreasonable Search and Seizure

Involuntary submission to a physical examination for the purpose of obtaining evidence against the accused, not under arrest, violates the constitutional provision against unreasonable search and seizure.[105] If the accused is under arrest the blood test may be taken as incident to the arrest without the taking constituting an unlawful search and seizure if it is otherwise reasonable.[106] Certainly there is a possibility that the invasion may be deemed unreasonable especially if the specimen is not taken by a medical technician. In *State v. Kroening*,[107] the officers had a blood specimen taken from the accused without his consent, while he was unconscious but before he had been placed under arrest, and the Wisconsin court held that the results of the test were inadmissible. It is apparent that the court would have admitted the test if the officers had placed the accused under arrest. However, arrest nine days later caused the court to decide the taking could not be construed to be incidental to arrest. As stated in *State ex rel. Muzzy v. Uotila*,[108] one consenting to an unreasonable search and seizure cannot later be heard to complain that his constitutional rights were violated because such rights are deemed to be waived. This presents a very difficult situation since technically an unconscious defendant can neither consent nor be placed under arrest according to the rule of *Harrer v. Montgomery Ward and Co.*[109] The court could give a liberal construction to the phrase "incidental to a lawful arrest" if the arrest were made immediately after the defendant regained consciousness. Kansas has attempted by statute to induce voluntary submision to blood tests by providing that anyone operating a vehicle on the public highway must consent to a chemical test of his breath, urine, saliva, or blood or his license is suspended automatically.[110]

[98]MONT. CONST. art. III, § 18.
[99]MONT. CONST. art. III, § 7.
[100]U.S. CONST.
[101]State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906).
[102]*Id.* at 25, 85 Pac. at 374.
[103]United States v. Kelly, 55 F.2d 67 (2d Cir. 1932).
[104]State v. Oschoa, 49 Nev. 194, 242 Pac. 582 (1926).
[105]Austin & N.W.R.Co. v. Cluck, 97 Tex. 180, 77 S.W. 403 (1903).
[106]State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956).
[107]*Ibid.*
[108]71 Mont. 351, 229 Pac. 724 (1924).
[109]124 Mont. 295, 221 P.2d 428 (1950).
[110]KAN. GEN. STAT. ANN. §§ 8-1001 to 8-1007 (Supp. 1955).

Due Process Clause

The due process clause of the fourteenth amendment was invoked in the case of *Rochin v. People of California*[111] when officers took a defendant to the hospital and a doctor used a stomach pump to obtain narcotic capsules swallowed by the defendant. The court held that the conviction could not be sustained upon evidence obtained by a method which "shocks the conscience and offends the sense of justice" so as to violate the due process clause.

Breithaupt v. Abram,[112] however, upheld a conviction for involuntary manslaughter based upon the use of a blood test obtained while the defendant was unconscious. The court distinguished the *Rochin* decision on the grounds that the evidence in this case was not obtained by brutal or offensive methods since there was no physical resistance and that the taking of a blood sample by a doctor is a routine procedure familiar to all so as not to shock the conscience of the community. Three justices dissented, two on the grounds that there was no consent and there need be no physical resistance to result in a violation of the due process clause. Chief Justice Warren stated that "due process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth." Justice Douglas, dissenting, expressed the view that the majority would have declared the taking to be in violation of the due process clause if the defendant struggled and the officers countered with force in order to obtain the specimen.

WIRE TAPPING

There are no Montana decisions directly on the subject of wire tapping or the admissibility of evidence intercepted while being communicated over telephone or telegraph lines. However, with the modern methods of communications and means of interception, this is an area which will produce litigation in the future. Officers and attorneys therefore must recognize the possibility that necessary evidence obtained in this manner may be excluded on trial of the accused.

At common law, the offense of eavesdropping was considered an invasion of privacy which would sustain a civil cause of action, but the evidence obtained as a result of the eavesdropping would still be admissible in the criminal case.[113] With the advent of modern devices of communication such as the telephone and telegraph, interception and recording of conversations became a problem. The clamor which arose because of the invasion of a person's privacy by such interceptions was only aggravated by the decision of *Olmstead v. United States,*[114] in which the Supreme Court decided that interception of a telephone conversation did not violate any constitutional provisions. Neither the fourth amendment, which prohibits unreasonable searches and seizures, nor the fifth amendment, protecting the accused from being compelled to be a witness against himself, was violated

[111] 342 U.S. 165 (1951).
[112] 77 Sup. Ct. 408 (1957).
[113] 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).
[114] 277 U.S. 438 (1928).

in permitting evidence obtained through wire tapping to be admitted into evidence.

To remedy this inadequacy of the law, Congress in 1934 passed the Federal Communications Act.[115] Section 605 of this Act provided that "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . ."

Federal Exclusionary Rule

Shortly thereafter in *Nardone v. United States*[116] the Supreme Court interpreted the phrase "no person" as set forth in section 605 of the above act as meaning "any person," thereby embracing federal agents and precluding them from divulging the contents of an intercepted message in federal proceedings. The second *Nardone* case[117] broadened the scope of the act even further when it held that evidence obtained indirectly from the use of the intercepted message was inadmissible. Thus the "fruit of the poisoned tree" doctrine came into existence and caused the exclusion of any evidence tainted by wire tapping.

United States v. Guller[118] held that an interception is forbidden under the Federal Communications Act when there is the interposition of a transmitting apparatus, consisting of an independent receiving device, between the lips of the sender and ear of the receiver . Earlier, use of a detectaphone in the next room in *Goldman v. United States*[119] was found not to fall within the prohibition of section 605 because it was not an interception of a message in the course of transmission.

State Courts Free to Adopt Own Rule as to Wire-Tap Evidence

What is the effect of the federal rule as to evidence obtained by wire tapping on the state courts? Section 605 of the Federal Communications Act was declared to be inapplicable in the state court of Texas for the purpose of excluding evidence acquired by wire tapping. The decision of *Schwartz v. Texas*[120] stated that in absence of an expression by Congress that the federal statute required the states to exclude evidence obtained in violation thereof, the individual states could formulate their own rule as to admissibility. The court did not decide whether Congress has the power to impose a rule of evidence upon the states in the event it desired to do so. The possibility that statutory extension in the future will prohibit the use of wire-tap evidence in the state courts has thus not been extinguished. *Weiss v. United States*[121] involved a federal proceeding which charged the defendant with conspiracy and use of the mails to defraud. The court held that section 605 was applicable in federal courts to an intrastate interception as well as an interstate interception. The decision was based on the broad power which exists under the commerce clause when intrastate transactions affect interstate commerce.

[115] 48 STAT. 1064 (1934), 47 U.S.C. § 151 (1954).
[116] 302 U.S. 379 (1937).
[117] Nardone v. United States, 308 U.S. 338 (1939).
[118] 101 F. Supp. 176 (E.D. Pa. 1951).
[119] 316 U.S. 129 (1942).
[120] 344 U.S. 199 (1952).
[121] 308 U.S. 321 (1939).

As stated previously the state courts are free to adopt their own rules as to wire-tap evidence and may therefore follow the provisions of section 605. California decisions have many times discussed the applicability of section 605 but have never given a decisive answer as to whether wire-tap evidence will be excluded because it was obtained in violation of the federal statute.[122] That section may be of increased importance today in view of a recent decision[123] in which the California Court decided to follow the federal exclusionary rule for evidence obtained illegally. In that case the police officers broke into the defendant's home and installed microphones and devices to record telephone conversations. The court, without mentioning the Federal Communications Act, held that such methods of obtaining evidence violated the constitutional provision against unreasonable search and seizure. The majority applied the constitutional provision to the breaking and entering of the house to obtain the evidence. However, state courts are still free in establishing their policy to interpret their constitutional provisions against unreasonable search and seizure so as to include wire tapping.

Wire-Tap Evidence in Montana

Montana courts have been confronted with the question of admissibility of evidence obtained by wire tapping only indirectly. In *State v. Porter*[124] recordings of telephone conversations were attempted to be introduced before the court for impeachment purposes. The offers of proof showed that the recordings were obtained in compliance with the rules of the Montana Public Service Commission and did not violate any Montana statutes. The prosecuting counsel objected to the introduction of these recordings on the ground that the federal statutes were violated. The court found nothing in the record to indicate that any state or federal statute had been violated in acquiring this information and held it was improper for the lower court to refuse the admission of such evidence. When a clear test case arises Montana has three statutes which may be construed as forbidding disclosure of such evidence in court proceedings. The first of these is section 94-3203 which provides:

> Any person who wilfully and maliciously displaces, removes, injures, destroys or obstructs any telegraph, telephone or electric light line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto, or maliciously and wilfully cuts, breaks, taps, or makes any connection with any telegraph or telephone line, wire, cable, or instrument belonging to another, or maliciously and wilfully reads, takes or copies any messages, communication or report intended for another passing over any such telegraph or telephone line, wire, or cable, in this state, or who wilfully and maliciously prevents, obstructs or delays by any means or contrivance whatsoever the sending, transmission, conveyance or delivery in this state of any message, communication or report by or through any telegraph or telephone line, wire or cable or who uses any apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned . . . shall be deemed guilty of a misdemeanor. . . .

At first glance the above statute appears to have been enacted to protect

[122]People v. Malotte, 46 Cal. 2d 59, 292 P.2d 517 (1956).
[123]People v. Cahan, 141 Cal. App. 2d 891, 297 P.2d 715 (1955).
[124]125 Mont. 503, 242 P.2d 984 (1952).

the public communication systems. However, evidence may be declared inadmissible under the exclusionary rule.

Another statute, which was enacted for the express purpose of curtailing wire tapping, is section 94-35-220:

> Every person who, by means of any machine, instrument, or contrivance, or in any other manner, wilfully and fraudulently reads, or attempts to read, any message, or learn the contents thereof, while the same is being sent over any telegraph line, or wilfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any message, whilst the same is in any telegraph office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is punishable. . . .

Section 94-3321 would seem to give the courts authority to exclude all evidence obtained as a result of wire tapping. This statute provides:

> Every person who wilfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person without the permission of such person, *unless directed so to do by the lawful order of a court,* is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment. (Emphasis added.)

Sections 94-35-220 and 94-3321 have not been amended since 1895 when they were first enacted to prevent persons from divulging the contents of telegraph messages, and the courts of Montana may follow the lead of California and hold that these statutes should be construed to include "telephone line" and "telephone message" respectively.[125] The California Court determined that the rule of strict construction as applied at the common law was not meant to apply to a situation like that presented. A similar result might be achieved in Montana either because the application is remedial and not penal, or under section 94-101, which provides:

> The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

In light of the above statutes, it seems that the Supreme Court of Montana could exclude evidence obtained by wire tapping.

Section 94-3321 could be construed, however, to authorize the courts to issue *ex parte* orders allowing police officers to obtain evidence by wire tapping when the officers can show the court that they have reasonable grounds to believe that evidence of a crime can be obtained. Further, it is submitted that the statutes by their very terms may be interpreted as not encompassing wire tapping activities of the law enforcement officers. Section 94-3203 lists the elements of "wilfully and maliciously" which must be proved before a conviction can be had under that section. Likewise sections 94-35-220 and 94-3321 respectively establish "fraud" and "wilfully" as necessary elements of the crime. It cannot be said that police officers acting in their official capacity usually come within the prohibition of the above statutes if these words are given their normal meaning.

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[125] Davis v. Pacific Telephone Co., 127 Cal. 312, 59 Pac. 698 (1899).