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THE SCOPE OF THE CONSTITUTIONAL IMMUNITY AGAINST SEARCHES AND SEIZURES*

JOHN E. F. WOOD**

When an occasion is presented in which the officer could secure a search warrant, his power to proceed without one is determined by two major considerations, the degree to which his acts will invade one's privacy, and the practicability of first procuring the issuance of a warrant. Both these considerations turn largely upon the nature of the place where the search is to be made, and so it may be said that the place of the search is the controlling factor in determining the reasonableness of a search and seizure without a warrant. The Constitution affords protection to the people "in their persons, houses, papers and effects." The degree of protection throughout remains constant; the amount fluctuates as the interest in privacy and the necessities of law enforcement vary.

The great citadel of privacy is the home. It is there that the most intimate of human affairs are housed. It was intrusion into private homes which was held actionable in the English cases which first declared the law of search and seizure. Moreover, in our modern civilization, the home is a fixed and permanent structure. The officer may go in quest of a warrant, confident that the house will await his return. These facts make it a rare case indeed in which it would be reasonable to search a private dwelling without a warrant. The courts have consequently been almost unanimous in condemning such a search.\textsuperscript{157} The legislatures also have recognized the fact that the home is accorded the most complete protection.\textsuperscript{158} It is recognized in the Volstead Act which requires a stronger showing for the issuance of a warrant to search a home than for the search

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\textsuperscript{157} The cases to this effect are collected in a note, 27 A. L. R. 724.
\textsuperscript{158} Sullivan v. People, 71 Colo. 376, 206 Pac. 789 (1919).
of any other place. The Supreme Court has in a recent case stated very definitely its views on the subject:

"Save in certain cases as incident to arrest there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. * * * * And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 100

The undesirable results of so positive a rule have already been shown, but it will require a strong case to induce the courts to weaken it in any way.

When it is said that a home may never be searched without a warrant, save in one instance, the problem is only half solved. What is a home? How much of one's premises is included in the conception "home"? There is of course no doubt that an apartment or a suite of rooms actually used as a dwelling place is a home. And a rude cave dug into the side of a hill, in which the owner makes his abode, is entitled to all the protection accorded to a mansion. It frequently happens, however, that one's premises are large, and include outbuildings. In such a case, he is quick to assert that the whole is his home. It is obvious that some line must be drawn; its precise location is not so obvious. "Home" for this purpose does not necessarily include the entire domestic establishment, the common law messuage, because the same interest in privacy does not prevail throughout. It is probable that when the actual dwelling house is passed, the absolute right ceases, and outbuildings may be searched without a warrant on a showing that the officer acted prudently. 105 It has been said that the officer may search such outbuildings without a warrant only when he can do so without committing a

100 §25 of the Volstead Act (41 STAT. AT LARGE 307) provides that search warrants for the violation of the Act shall be issued as provided under the Espionage Act, except that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose."


104 Morse v. Commonwealth, 204 Ky. 772, 255 S. W. 37 (1924).

105 As to the extent of the messuage, see Marmet Co. v. Archibald, 97 W. Va. 778, 17 S. E. 399; Bouvier's Law Dict. 2207.

trespass. Such a distinction introduces a false standard; reasonableness is not to be ascertained so easily. The whole problem is simply a perplexing question of degree. The farther the officer goes into the outlying parts of the premises, the less the interest in privacy becomes, and the less the requirements of reasonableness. And a recent statement of Mr. Justice Holmes seems to indicate that when a certain line is passed, the protection of the Amendment ceases altogether. In Hester v. United States, he said,

"The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the former is as old as the common law."107

Somewhere between the extremes of the dwelling house on the one side and the open fields on the other, is the place where the officer may institute his search without a warrant. Its location depends upon all the circumstances of the particular case.

Probably the next field in the descending scale of interest in privacy is that of sealed mail matter. It was early decided that the mails were under the protection of the Fourth Amendment and could be opened only on a valid search warrant. Apparently the only exception which has been made to this rule is in cases of letters written by inmates of a penal institution. It is considered reasonable to intercept and examine such mail, because the measure is necessary to the proper maintenance of prison discipline.109 From a historical viewpoint, the Amendment does not properly extend its protection to the mails. It has apparently always been the law in England that the mails can be opened at will by the proper officers, and indeed that was one of the reasons advanced for having governmental postal service.110 It cannot be denied, however, that the American decisions reach a very desirable result. It would be in-

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167 Hester v. United States, 265 U. S. 67 (1924). A similar doctrine has been applied in Tritico v. United States, 4 F. (2d) 664 (C. C. A., 5th, 1923); Koth v. United States, 16 F. (2d) 69 (C. C. A., 5th, 1923); Reutlinger v. State, 234 Pac. 227 (Okla. 1925); Findley v. State, 234 Pac. 224 (Okla. 1925).
168 Ex parte Jackson, 95 U. S. 727 (1877); Stroud v. United States, 251 U. S. 15 (1919).
170 22 Law Notes 97.
tolerable to have the mails subject to an aimless perusal, merely in the hope of finding something objectionable.

Offices and places of business are frequently the resting place of implements of crime, and it becomes necessary to invade them. Here again the officer is confronted with the necessity for the exercise of judgment. An office, closed to the public in general, bears many of the attributes of the home. It therefore requires a strong case to justify search without a warrant.\(^{171}\) More public places, however, such as stores, are on a different footing. There it seems the officer may proceed with the search if he has a reasonable suspicion, even though he would have time to procure a warrant.\(^{172}\) The requirement of probable cause is quite sufficient to safeguard the interests of the individual when so little privacy is involved.

The search of a person presents sharply conflicting considerations. The personal indignity and embarrassment of such an act is great; and, on the other hand, to wait for a search warrant is to permit the offender to escape. The necessities of the case justify a search and seizure without a warrant; the due protection of the individual requires a rather well-founded suspicion that the search will bear fruit. It is sometimes said that this suspicion, this probable cause, must rest upon information brought home to the officer through his senses, and not on the information of others.\(^{173}\) This is not an inflexible rule, however, and a search of the person may be reasonable when the suspicion rests, in part at least, upon hearsay.\(^ {174}\) Here again the courts are prone to rely on the rules for arrest. A search of the person so frequently accompanies arrest, that the tendency is to determine first the validity of the arrest without a warrant, and then to justify the search as incidental to the arrest.\(^ {175}\) That makes the question of reasonableness turn

\(^{171}\) Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920); Amos v. United States, 265 U. S. 313 (1921); Gouled v. United States, 265 U. S. 298 (1924); Fidelity Co. v. State, 121 Miss. 569, 85 So. 610 (1919).

\(^{172}\) Kathrinna v. United States, 270 Fed. 808 (C. C. A., 9th, 1921); Dillon v. United States, 279 Fed. 639 (C. C. A., 9th, 1921); O'Connor v. United States, 282 Fed. 596 (D. C. N. J. 1923); Billingsley v. United States, 16 F. (2d) 764 (C. C. A., 8th, 1926); Hess v. State, 152 Ind. 50, 133 N. E. 689 (1922); State v. Llewellyn, 110 Wash. 360, 205 Pac. 384 (1922); People v. Chomis, 228 Mich. 289, 193 N. W. 796 (1923).


\(^{174}\) White v. United States, 16 F. (2d) 870 (C. C. A., 9th, 1925); State v. Mullon, 63 Mont. 50, 207 Pac. 634 (1922).

upon the distinction between felonies and misdemeanors, which is not an accurate method. Closely allied to search of the person is the search of grips and other luggage. It apparently rests upon the same basis.176

The proper enforcement of the prohibition laws has required rather extensive efforts to interrupt the transportation of intoxicating liquors. This means that vehicles must be stopped and examined, and has presented the question as to the requisites of a lawful search in such an instance. The automobile is so far removed from the home in the degree of privacy involved, and its ready mobility makes delay so disastrous, that some courts have been inclined to deny that it is protected at all by the Fourth Amendment. As one court facetiously said,

"The sacred attributes of the home or private premises have not yet been authoritatively ascribed to the automobile. No court has so far said that a man's touring car is his castle."177

The disagreeable incidents of a search and seizure are nevertheless present when its scene is a vehicle, to a lesser degree than in some other situations, but still sufficiently to justify the exaction of reasonableness from the officers. The victims go still further and contend that they should be allowed to escape while the officer is securing a warrant. The problem thereby presented to the courts has thus been analyzed by one of the state tribunals.

"While a possession in the sense of private ownership, they (automobiles) are but a vehicle constructed for transportation and travel on highways. Their active use is not in homes or 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 * * * 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 a search warrant is unreasonable is in its final analysis to be determined as a judicial ques-

tion in view of all the circumstances under which it is made."

It was not until rather recently that the problem was presented to the Supreme Court in such a way as to require a careful consideration of the whole subject. Carroll v. United States was a case where officers without a warrant had stopped and searched an automobile, and seized liquor found therein. The car itself was not suspicious in appearance; the officers had no indication from their senses that it contained liquor. Their suspicion was based solely upon the fact that some months previously the owner of the car had negotiated with them for the sale of liquor. The question presented was whether, upon these facts, the search and seizure was reasonable. The Court pointed out that from the beginnings of our government the Congress has recognized distinctions between the search of homes and that of movable vehicles. It repudiated the idea that such vehicles were not entitled to the protection of the Amendment, but held that such a search was reasonable on facts which might not justify the search of other places. As to the elements going to make up probable cause, the Court said,

“If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.”

Such a standard is quite sufficient to protect adequately the interest in privacy, and at the same time does not put insuperable obstacles in the way of efficient law enforcement. It has the further advantage of being flexible, so that results may be reached to fit the individual case, without regard to finely spun distinctions which have little or nothing to do with reasonableness or unreasonableness.

There is yet one other factor to be considered in looking to the lawfulness of a search and seizure, whether with or without a warrant. The existence of a valid search warrant, or the existence of such cause as will, in the particular instance, justify a search without a warrant, authorizes the officer to commence the search. It is in its inception

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179 267 U. S. 132 (1924).
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lawful. Whether it remains so depends upon the officer. The constitutions require of him moderation and judgment in the execution of the search and seizure, and his failure to exercise these qualities renders the whole procedure unlawful, no matter how proper it was in the beginning. This element of reasonableness depends to a certain extent upon the time of the search, but largely upon its manner and extent.

In the earliest days of search warrants, the opinion apparently prevailed that they could be executed only in the daytime. The reason for such a requirement is obvious. People have always had an innate feeling that the right of privacy becomes more absolute as night falls. It is also undoubtedly true that the invasion of private premises is more dangerous when made under cover of darkness. This historical attitude is illustrated in the rules of the common law as to the crime of burglary, and certain statutory distinctions as to arson. Hale suggested that all search warrants ought to require on their face that they be executed in the day time, and concluded,

"* * * and though they may not be unlawful without such restriction, yet they are very inconvenient without it, for many times under pretense of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance."183

The modern law in England apparently is that in the absence of statutes to the contrary, a search and seizure must be made in the daytime. In the United States, the situation is reversed: in the absence of statutes requiring execution in the daytime, they may be made either in the day or night. As has been shown, the federal statutes require that the search be in the daytime except in cases where the outcome of the search is not in doubt, whereas the West Virginia law is that the search may be either in the day or night. Although this matter is not looked upon as of so much importance as formerly, it is conceivable that even under a statute so broad as that in West Virginia, a search would be unreasonable when it could as well have been made in

180 Espinaso, Nis Alrius, vol. I, p. 381.
181 BISHOP, CRIMINAL LAW, vol. II, §§90.
182 W. V. A. CORP. c. 155, §§1, 2.
the daytime, and is for no good reason postponed until nightfall.

Another matter relating to the time of the search, particularly under a search warrant, is the length of time which has elapsed between the complaint and the execution of the search. The statutes of some jurisdictions provide that a search warrant shall become void if not executed within a certain time after its issuance.\(^{184}\) In the absence of such a statute, it has been held that a search and seizure under a stale warrant is unreasonable.\(^{185}\) No definite time can be set as the standard; it must be determined by looking to all the facts and circumstances, and a delay which is justified by the necessities of the case is quite lawful.\(^{186}\)

To be reasonable, a search and seizure must be effected in such a way as to cause the least possible inconvenience and damage to the victims. No search warrant can legalize the unnecessary and wanton destruction of property. An extreme case illustrating this principle has arisen in the state of Maine. Officers armed with a valid search warrant went to a house and searched it thoroughly. The property thought to be concealed was not discovered, and the officers sent for picks and crowbars, with which they tore out walls and practically wrecked the interior of the house. It is unnecessary to add that the court held the search unlawful.\(^{187}\) So where the officers having a valid search warrant, forced open a safe in the absence of the owner, the search was held unreasonable, the court saying that they should have awaited his return so that it could be opened without destroying it.\(^{188}\) Not only must the officers be circumspect in their methods, but they must be discreet as to the extent of their investigations. The fact that a warrant authorizes the search of a certain room does not empower the officers to search everybody found there, regardless of possible connection with the matter under investigation.\(^{189}\) The fact

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\(^{184}\) There is such a provision as to search warrants issued under federal statutes. 40 STAT. AT LARGE 225.


\(^{186}\) State v. John, 136 S. E. 842 (W. Va. 1926).

\(^{187}\) Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70 (1908).

\(^{188}\) Blackmar v. Nickerson, 188 Mass. 399, 74 N. E. 332 (1905).

\(^{189}\) Purkey v. Mabe, 33 Idaho 281, 193 Pac. 79 (1920); State v. Massie, 95 W. Va. 283, 120 S. E. 614 (1924).
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that an officer has probable cause to search one house does not justify him in searching one a slight distance away in the faint hope of finding further evidence of crime.\textsuperscript{100} The officer must search the places which his warrant or his probable cause justifies, as quickly and carefully as possible, and then leave. He cannot remain on the premises.\textsuperscript{101} Nor can he return to the premises without a showing of additional cause.\textsuperscript{102} The essence of these requirements is simply that the officers of the law be gentlemen. No other course of conduct is reasonable.

Here again the scene of the search may be of importance. Just as the degree of intensity of the interest in privacy controls in a large measure the right to search without a warrant, it may have a bearing on the extent to which the search may reasonably be carried. This idea has been stated by Judge Hand in a recent federal case,

"While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they may contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent."\textsuperscript{103}

The cases have not worked out this principle very clearly, but it seems altogether proper to let the nature of the search itself be governed by the degree to which it will invade privacy, as well as the lawfulness of undertaking the search without the sanction of legal process, so that an officer on a search of an automobile might go to greater lengths than he could at the home of the accused.

The constitutions provide no remedies for the violation of the rights which they secure. They have been supplied, partly by the legislatures, but largely by the courts. Even though not strictly a part of the constitutional provisions,

\textsuperscript{100} Agnello v. United States, supra, n. 150. For a doubtful extension of this principle, see State v. Adams, 136 S. E. 703 (W. Va. 1927).
\textsuperscript{102} Gamble v. Keyes, 35 S. D. 644, 163 N. W. 888 (1915).
\textsuperscript{103} United States v. Kirschenblatt, 16 F. (2d) 292 (C. C. A., 2d., 1926).
the means of redress available to a person whose privacy has been invaded in an unlawful way is a most important element in this study, for without a remedy, the right would be idle.

One question which perhaps belongs more properly in a discussion of the rights secured, but which has for reasons of convenience been classed as a topic under remedies, is as to who may complain of a wrongful search and seizure. As the interests involved are those of the individual, the protection accorded is peculiarly personal. One cannot object vicariously to a violation of the Fourth Amendment. The person whose premises were invaded and whose property was seized is the proper one to complain, even though the more direct injury be to another. This doctrine has been carried so far as to refuse the protection of the Amendment to the individual members of an unincorporated association when the property seized was that of the association. This holding may outrage principles of partnership law, but it shows clearly the personal nature of the rights secured. In applying this principle, the courts have apparently made the ownership of the property the criterion, without regard to possession. So where employees of the owner of premises were operating the owner's still, so as to be in unlawful "possession" of a moonshine still, they could not object to an unlawful search for and seizure of the property, and where an individual was in possession of public documents, he could not complain of an unreasonable search for them. It may be that the right of privacy ought not to be wholly dependent upon ownership, but the most of the cases clearly make such a test.

It is commonly said that as a necessary corollary of the personal nature of the interests secured, the right is one which may be waived. So when the accused actually in-
vites or freely acquiesces in the search, he cannot be heard to complain.200 Mere submission to apparent authority is not sufficient; it must appear that the victim knew of his rights and voluntarily laid them aside.201 It frequently happens that the alleged waiver is made by someone acting for the owner. In such case, it must appear that the person assenting had authority to do so,202 and that there was no coercion.203 In a sense, the use of the term “waiver” in such cases may be technically inaccurate. The right involved is to be free from unreasonable searches and seizures; a search which is made by invitation or consent is not unreasonable, and therefore there is no right to be waived. The difference is of course simply in the manner of speaking, and has no bearing on the result reached. Acts which in the one sense would constitute a waiver would in the other sense be circumstances making the search reasonable.

Assuming that there has been an invasion of the constitutional right to be free from unreasonable searches and seizures, and has been no waiver, the proper party has a variety of remedies. If the person who procured the issuance of the warrant acted in bad faith, there is of course an action for malicious prosecution or abuse of process.204 And even though he acted in good faith, it has been said that he is justified or not by the event. If the search reveal nothing, he is liable.205 It is submitted that these decisions are unsound, for they give an action for damages to one even though the search be lawful. It is well settled that the legality of a search does not depend upon what is found.206 The reasonableness of procuring the issuance of a search warrant should rather depend upon probable cause, and

202 Weeks v. United States, 228 U. S. 383 (1913); Amos v. United States, 255 U. S. 313 (1921); State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896); Smith v. McDuffee, 72 Oregon 276, 142 Pac. 536 (1915).
203 Coulé v. United States, supra, n. 171.
204 Hardin v. Hight, 105 Ark. 196, 183 S. W. 99 (1915); Gulsby v. Railway Co., 167 Ala. 122, 52 So. 392 (1910); Page v. Banking Co., 111 Ga. 75, 36 S. E. 415 (1900); Olsen v. Twele, 48 Minn. 225, 48 N. W. 914 (1891); Boeger v. Langenburg, 97 Mo. 260, 11 S. W. 223 (1899).
205 Reed v. Legg, 2 Har. (Del.) 173 (1837); Fennemore v. Armstrong, 6 Boyle (Del.) 36, 96 Atl. 204 (1916); Hale, P. C., vol. II, p. 150; Espinasse, Nisi Prius, vol. i, p. 381.
unless the findings of the magistrate on that question be upset, the informer has done no wrong. The person making the complaint has also been held liable to respond in damages to the person subjected to a search and seizure even though the unlawfulness be injected by another, as where the magistrate failed to follow statutory requirements in the wording of the warrant,\textsuperscript{207} or where the officer made his operations too extensive.\textsuperscript{208}

Where the search warrant is illegal on its face, both the magistrate who issued it and the officer who executed it are liable in damages.\textsuperscript{209} If, however, it was apparently legal, the fact that it contains latent invalidities will not render the officer executing it liable.\textsuperscript{210} An officer who makes an unreasonable search without a warrant is responsible in damages;\textsuperscript{211} and even though the search be lawful in its inception, the officer becomes a trespasser \textit{ab initio} if he abuses his powers.\textsuperscript{212} Private persons assisting an officer are protected by his command; but they are liable for a wrongful search if they are volunteers.\textsuperscript{213} The English courts allow exemplary damages in such cases;\textsuperscript{214} the decisions of the States are not uniform, some of them allowing only compensation.\textsuperscript{215}

It is practically impossible to obtain damages from the government in question. Municipal corporations are not liable for the wrongs of their officers in this connection because search and seizure is a governmental function.\textsuperscript{216} The states and the federal government are not suitable because they have in general failed to consent to such actions.\textsuperscript{217}

If the facts are such as to make it practicable, the accused may obtain an injunction against a proposed wrong-

\textsuperscript{207} Halstead v. Brice, 13 Mo. 171 (1850).
\textsuperscript{209} Dwinells v. Boynton, 3 Allen (Mass.) 310 (1862).
\textsuperscript{210} Kalloch v. Newbert, 106 Me. 23, 72 Atl. 795 (1908); O'Meara v. Merritt, 128 Mich. 249, 87 N. W. 197 (1901).
\textsuperscript{211} Caffoun v. Hermann, 112 Maine 282, 91 Atl. 1009 (1914).
\textsuperscript{212} Six Carpenters Case, 5 Coke 146; 77 Eng. Rep. 695 (1610); Lawton v. Cardell 22 Va. 552 (1860). In McGuire v. United States, 273 U. S. 95 (1927), the Court refused to apply this doctrine in dealing with the admissibility of evidence.
\textsuperscript{213} Reed v. Rice, 2 J. J. Marsh (Ky.) 44, 19 Am. Dec. 122 (1829).
\textsuperscript{215} Peoplesmore v. Armstrong, 6 Boyce (Del.) 32, 95 Atl. 204 (1915); Larthet v. Forgay, 2 La. Ann. 524 (1847); McClurg v. Brenton, 123 Iowa 866, 98 N. W. 381 (1904); Jones v. Fletcher, 41 Me. 254 (1856); Cloon v. Gerry, 18 Gray (Mass.) 201 (1859); Small v. McGovern, 117 Wis. 605, 94 N. W. 651 (1903).
\textsuperscript{216} Dillen v. Lynchburg, 35 Grat. (Va.) 37 (1880); Dilling, MUNICIPAL CORPORATIONS, §1665.
\textsuperscript{217} Cummings v. United States, 130 U. S. 469 (1888); Commonwealth v. Colquhoun, 2 H. & M. (Va.) 218 (1808).
ful search or against the wrongful destruction of the property seized. Trover cannot be maintained for the wrongful seizure of property, because there has been no conversion. In rare cases, there may be specific recovery by replevin, or an action in the nature of replevin. But if a criminal charge is pending in which the property may be used as evidence, it is deemed to be in custodia legis, and cannot be replevied. The Volstead Act provides that goods seized thereunder shall not be subject to replevin.

Only a bare enumeration of these remedies has been undertaken, because they are of comparatively little importance today. The really vital question of remedy, and one of the most widely discussed problems in the whole law of search and seizure, is that relating to the admissibility in evidence of property taken in violation of the accused's constitutional rights.

One of the well established rules of evidence is that in general the method by which the evidence was obtained does not affect its admissibility. The reason assigned for the rule is that the court will not pause in the trial of a case to determine a collateral issue. This rule was generally applied to property obtained by an unlawful search and seizure, until the decision of Boyd v. United States. In that case, the Supreme Court, seeing an intimate relation between the immunity from unreasonable searches, and the provisions against self-incrimination, held that evidence was not admissible when obtained in violation of the Fourth Amendment. The rule remained thus in the federal courts until 1904. In that year, the Supreme Court reverted to the orthodox doctrine of the earlier cases. This view prevailed for ten years; then arose the case of Weeks v. United States. In that case, the defendant did not wait until the

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218 Devlin v. McAdoo, 49 Misc. 77, 96 N. Y. S. 425.
220 Buller, Nisl Prians, p. 46.
221 Lawton v. Steele, 163 U. S. 133 (1896); Soper v. Michael, 123 Md. 542, 91 Atl. 684 (1914).
222 Goode v. Police Com'r., 137 Md. 192, 112 Atl. 294 (1920); Azparren v. Ferrel, 44 Nev. 157, 191 Pac. 671 (1920).
223 41 STAT. AT LARGE 306, §25.
225 Commonwealth v. Dana, 2 Metc. (Mass.) 329 (1841).
226 115 U. S. 616 (1886).
227 Wigmore, op. cit., vol. IV, §2184.
229 232 U. S. 383 (1914).
trial to interpose his objection, but moved beforehand that his property be returned. The Court distinguished the Adams case by saying that the issue here was presented before the trial, and therefore was not collateral. The effect of this distinction has been considerably weakened by subsequent cases. In Gouled v. United States, the defendant did not know of the wrongful seizure until the property was offered in evidence. His objection at that time was not too late. In the same year, in Amos v. United States, the objection and petition for return were interposed after the jury was empanelled and before the taking of testimony had begun, and was timely enough to exclude the evidence. The most recent Supreme Court case on the subject is Agnello v. United States. There the objection was not made until the actual offer of the evidence, and it was held timely, the Court saying that as the facts as to the illegality of the search and seizure were not in dispute there was no necessity for a preliminary motion. A recent decision of a lower federal court completes the breakdown of the requirement that the issue be raised before trial. It holds that even though the evidence obtained in an unlawful search and seizure be admitted without objection, the defendant may demand a peremptory instruction to acquit on the ground of the incompetency of the evidence against him. In view of the trend of these decisions, it is probably not going too far to say that the federal rule will exclude such evidence irrespective of the time when the objection is first raised.

The influence of the United States courts has led fifteen of the State courts to adopt the federal rule, and there are dicta in two other states that indicate a leaning toward it. On the other hand, a number of the states have un-
equivocally rejected the exclusion doctrine. The federal rule was imposed by statute in Texas, and a statute of Mississippi abrogating that rule was held unconstitutional. In such a situation, it is idle to undertake to declare a weight of authority.

The great champion of the earlier rule, admitting such evidence, is Dean Wigmore. In caustic language he brands the doctrine of the exclusionists as based in its inception on erroneous history, and in its renaissance on misguided sentimentality. He contends that the issue presented by an objection to evidence or for a motion for the return of property is collateral in the true sense of the word whenever it is raised; that the trial of such a collateral issue is an indirect enforcement of constitutional rights, when there are direct remedies available. The burden of his argument is summed up in this classical satire:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. That is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."

It has been suggested that the learned commentator has omitted a character from his dramatis personae, to-wit, Ray Spublica. Titus' quarrel is not with Flavius; it is with his

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235 Tex. Law. 1928, c. 149.


master, upon whom the Fourth Amendment weighs heavily. The conduct of Ray is characterized as being in literal obedience to Biblical injunctions, "for his right hand, enthusiastically waving aloft the Constitution, knoweth not that his left hand is just as enthusiastically offering evidence which was seized in violation of that sacred instrument." 280

Another ground proposed in support of the admissionist doctrine is that the wrong, the invasion of privacy, is already done, and the exclusion of the evidence gained thereby will not restore the victim to his former condition. 240 In answer to that proposition it is said that the same argument applies to any remedy for the wrong done; damages against the offender, or his imprisonment, will not put the party where he was. 241

The admission of such evidence has been justified by an intensely logical deduction somewhat as follows: the constitutional provisions are directed only at governmental action; when an officer forgets the law and proceeds unreasonably, he exceeds his authority, and therefore ceases to act for the government; his wrong is therefore done in a private capacity, and is not a violation of the Constitution. 242 Unless there is a fault somewhere in that reasoning, it is quite impossible to have a violation of the Fourth Amendment, for its force is to render all unreasonable searches and seizures ultra vires, and hence mere private trespasses. 243

Still another argument advanced is one of utility. It is said that the result of the federal rule has been to lead the courts following it into evasions of the law of search and seizure in order to establish exceptions by which the evidence may be admitted. 244 It may be said in answer that if there is to be a liberalizing trend in the law, it ought to take the form of adjustment of rights rather than a restric-

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280 18 Ill. L. Rev. 332.
240 People v. Mayen, 158 Calif. 237, 205 Pac. 485 (1922), discussed in 10 Cal. L. Rev. 165.
241 Yonman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920).
242 Williams v. State, 100 Ga. 511, 28 S. E. 624 (1897); Hall v. Commonwealth, 138 Va. 427, 121 S. E. 154 (1924).
243 State v. Owens, 305 Mo. 348, 259 S. W. 100 (1924).
244 35 Yale L. J. 536. The author points out that since the early months of 1920, 700 cases involving the admissibility of evidence taken by search and seizure have been decided in the federal courts, and that in 290 of those cases the evidence was admitted, upon some excuse.
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tion of remedies, and that the tendency of the federal courts is quite salutary.

And so the discussion advances, with learned men differing diametrically as to the proper conclusion.245 A question so fundamental as this should not be decided on technical grounds. Even the venerable stare decisis is poor justification for admitting the evidence simply because the law formerly was to that effect. It may well be that the orthodox rule is sound in so far as it applies to every-day illegality, but it is not properly to be invoked in the face of unconstitutionality.246 On the one hand, it must be admitted that an action for damages or the imprisonment of the offending officer is not an adequate remedy. Such persons are often financially irresponsible, and are therefore not worth-while defendants; and imprisonment of the officer is but poor compensation to a person who may be in an adjoining cell. It is common knowledge that these remedies are spurned every day. On the other hand, it cannot be denied that the federal rule imposes serious obstacles in the way of law enforcement, and leads to the undesirable result of allowing both offenders to go free. The proper adjustment of these conflicting considerations is a nice problem. The method of approach is well illustrated in a passage from an opinion by Judge Cardozo, in a case holding the evidence admissible,

"Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute247 would be greater from the point of view of the individual whose privacy would be invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall


246 The United States Supreme Court clings to the orthodox rule that wrongfully obtained evidence is admissible, when the wrong stops short of a violation of the Constitution. Berger v. McDowell, 260 U. S. 445 (1923), Holmes and Brandeis dissenting.
247 The New York provision as to searches and seizures in the Civil Rights Law, rather than in the Constitution.
not be flouted by the insolence of office. There are dangers in any choice.\textsuperscript{248}

The wisdom in the attitude of this learned judge renders it difficult to disagree with his conclusion; but it is not to be wondered at that the courts are in conflict on such a question.

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Were Lord Chatham in some miraculous way to return to his earthly state, and direct his attention toward the law of search and seizure as it has developed in America, he would doubtless be amazed. On every side officers of the law are going to lengths which enforcement methods of his day would not justify, even before the decision of \textit{Entick v. Carrington}. Perhaps his esteem of the American Constitution would not be enhanced when he learned that the security of the individual is more absolute in England, where fundamental rights are not embodied in a written constitution, than in the United States, where there are formal guarantees against oppressive searches and seizures.\textsuperscript{249}

And he would not be without sympathizers.\textsuperscript{250}

If it was the intention of the first Congress to petrify the common law rules as to searches and seizures, then we must admit that the courts and legislatures have done violence to that intention. If on the other hand it was their aim to declare the policy upon which that law was based, leaving its particular application to the wisdom of successive tribunals, then their intention has been effectuated in its integrity. There can be little doubt that the latter is the true purpose of the Fourth Amendment. Paradoxical as it may seem, the very fact that the people insisted upon a formal assurance of their immunity from unreasonable searches and seizures has made it less difficult to adjust the law to modern needs than it would have been had the subject been left to the slow evolution of the common law.

Another result of the flexibility of the standard set in the Fourth Amendment has been that it is difficult of uniform application. One cannot read the mass of cases on search

\textsuperscript{248} \textit{People v. DeFore}, 242 N. Y. 18, 150 N. E. 685 (1926).

\textsuperscript{249} \textit{The law in England apparently still is to the effect that there can be no search and seizure without a warrant; and in a number of other respects it is stricter than ours. See Halsbury, \textit{Laws of England}, vol. IX, §§ 624, 625.}

\textsuperscript{250} \textit{Youman v. Commonwealth, supra, n. 241.}
and seizure without being impressed with what is apparently a hopeless confusion. This disagreement among the courts is likely to be blamed, "as if it meant that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come." The trouble is that judicial mathematics, particularly in the field of constitutional law, does not deal with absolute quantities. Every element in the particular problem is a variable. When courts and judges differ as to whether a given search and seizure is reasonable, it does not necessarily mean that one side or the other has made an error. It simply means that somewhere in the process, the relative weight to be assigned to some consideration has been differently determined. The resulting uncertainties in the law are perhaps undesirable if the present litigation alone is considered; they are quite necessary if the Constitution is to be abidingly efficient.

The law of search and seizure has not settled down, and so long as we remain true to our constitutions, it will never settle down. Until our present system of government falls, the courts will constantly be faced with the old problems. Their point of departure in deciding them will be, not where former courts have left off, but where they began. In this endless process of saving to the individual the most complete protection that is consonant with public justice, there will necessarily be variations in the extent to which privacy is secured. We cannot forecast what the amount of the protection will be tomorrow. We can only rest secure in the knowledge that our interests are in competent and careful hands.

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