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Constitutional Law—Unreasonable Search and Seizure

Jack J. Lobdell

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It might have been expected that the court would apply the same reasoning in the *Mullaney* case due to the similarity of facts. But, on the contrary, in the instant case the court said that it could not presume that Congress authorized the territorial legislature to treat citizens of states the way states cannot treat citizens of sister states. The decision to apply the privileges and immunities clause was based on two sections of the Organic Act of Alaska: "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." 37 STAT. 512 (1912), 48 USC § 23 (1946); "The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." 37 STAT., 514 (1912), 48 USC § 77 (1946).

In 1947 Congress extended the privileges and immunities clause to Puerto Rico. 61 STAT. 772 (1947), 48 USC § 737 (1946, Supp. 4). By the *Mullaney* case it is applied to Alaska. And since the same two sections of the Organic Act of Alaska, cited in the *Mullaney* case, are also found in the Organic Act of Hawaii, it may be expected that the privileges and immunities clause will be extended to Hawaii should the question arise in the future. 36 STAT. 443 (1910), 48 USC § 495 (1946) and 31 STAT. 150 (1900), 48 USC § 562 (1946).

The decision represents a development which is taking place by which the territories are beginning to be treated more like states and the citizens of the territories, to be treated more like citizens of the states. In 1940 Congress specifically extended the "diversity of citizenship" jurisdiction of the federal courts to include citizens of the territories. 54 STAT. 143 (1940), 28 USC § 41(1) (1946). The Supreme Court sustained the validity of the 1940 statute, as applied to the District of Columbia, in the case of *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582 (1949). The *Mullaney* case illustrates that the Supreme Court now interprets the privileges and immunities clause to be applicable to the territories under the Organic Acts. The next step in this development would seem to be that of allowing citizens of the territories to claim the same rights under the privileges and immunities clause as are now available to citizens of the states.

PHILIP A. TRAUTMAN

Constitutional Law—Unreasonable Search and Seizure. A member of the Metropolitan Police of Washington, D.C. entered the hotel room of *A* and *B* for the purpose of subjecting it to a search. *A* and *B* were absent and no search warrant had been obtained. Narcotics, which had been stored there by *D* without knowledge of *A* or *B*, were found and later turned over to a federal agent. *D* was arrested and convicted of violating federal narcotics laws. 43 STAT. 328, 26 U.S.C. § 2553(a) (1924); 43 STAT. 657, 21 U.S.C. § 174 (1924). Prior to trial, *D* moved to suppress the use, as evidence, of the property seized. The motion was denied. The Court of Appeals held this motion should have been granted and therefore reversed the conviction. On certiorari, *Held*: affirmed. *U.S. v. Jeffers*, 342 U.S. 48 (1951).

U.S. CONST., AMEND. IV prohibits "unreasonable searches and seizures." The Supreme Court in numerous decisions has held that evidence which is gained as a result of such searches and seizures is inadmissible in federal criminal prosecutions. *Weeks v. U.S.*, 232 U.S. 383 (1913); *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1919); *Gouled v. U.S.*, 255 U.S. 298 (1920); *Agnello v. U.S.*, 269 U.S. 20 (1925). Rule 41(e) of the Federal Rules of Criminal Procedure codifies this doctrine.

It appears from the cases that, as a general rule, the procurement of a search warrant is a prerequisite to compliance with the constitution. *Taylor v. U.S.*, 286 U.S. 1 (1932); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Amos v. U.S.*, 255 U.S. 313 (1921). In

limited areas, however, searches and seizures have been held reasonable in spite of the lack of a valid search warrant. A gasoline station was searched without a warrant during business hours for illegally possessed gasoline ration coupons. The court held the search valid because the materials searched for and seized were government property and the demand was "one of right." *Davis v. U.S.*, 328 U.S. 582 (1946). Vehicles and boats may be searched without a search warrant where agents have probable cause to believe that contraband is being transported. *Carroll v. U.S.*, 267 U.S. 132 (1925); *U.S. v. Lee*, 274 U.S. 559 (1927). Where a valid arrest is made, the arrested person and his "immediate surroundings" may be searched without a search warrant. *Harris v. U.S.*, 331 U.S. 145 (1947); *Marron v. U.S.*, 275 U.S. 192 (1927). On the other hand, in other cases wherein defendant was validly arrested but no search warrant was obtained, the court has excluded evidence obtained as a result of a search of defendant's immediate surroundings because defendant was not "caught in the act" and the search was "general and exploratory." *Go-Bart Importing Co. v. U.S.*, 282 U.S. 344 (1931); *U.S. v. Lefkowitz*, 285 U.S. 452 (1932). The test became more stringent as a result of *Trupiano v. U.S.*, 334 U.S. 699 (1948) in which it was announced that no search without warrant would be held valid, regardless of the above fact situations, if a reasonable opportunity to obtain a search warrant had been open to the agents. However, a retreat was made from this position in *Rabinowitz v. U.S.*, 339 U.S. 56 (1950). Here the court held that the ultimate test is "reasonableness" and stressed the following factors in declaring the search in issue reasonable: the search was incident to a valid arrest; it was limited to a small business office which was under complete control of the defendant; there was no forced entry; and specific items of contraband were the object of the search. The court expressly overruled *Trupiano v. U.S.*, *supra*, in so far as the procurement of a search warrant was made an absolute requirement if conditions made it reasonably practical to obtain one.

In the instant case many reasons are present to support the holding that the search and seizure was unreasonable. A search warrant could have been obtained without endangering the apprehension of *D* or the confiscation of the contraband. A guard could have been posted at the door until the warrant was procured. No arrest was made and the entry was completely unauthorized. There was no emergency requiring precipitate action.

The doctrine which excludes this "tainted" evidence is not without limitations. Assuming that an illegal search and seizure has been made, evidence obtained as a result thereof will not be excluded in federal prosecutions unless the search was conducted by or with the active participation of federal agents. *Weeks v. U.S.*, *supra*; *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Lustig v. U.S.*, 338 U.S. 74 (1949); *Byars v. U.S.*, 273 U.S. 28 (1927). The holding in the instant case tacitly assumes that the Metropolitan Police of Washington, D.C. are federal agents.

Even though an unreasonable search and seizure has been made by federal agents, there is another limitation upon the exclusionary rule which has been developed by the District Courts and recently recognized by the Supreme Court. Standing will be denied ". . . to one not the victim of an unconstitutional search and seizure to object to introduction in evidence of that which was seized." *U.S. v. Goldstein*, 316 U.S. 129 (1942) (dictum). When the defendant neither owns the premises searched nor the chattels seized, he cannot obtain the benefit of the rule regardless of the unconstitutionality of the method by which the evidence was obtained. (See 28 U.S.C.A. 91 note 285 for a collection of lower federal court cases on this rule.) Where, as in the instant case, the defendant owned the chattels seized but not the premises which were searched, the Court of Appeals for the ninth circuit has held that the defendant has standing to have the evidence excluded. *Pielow v. U.S.*, 8 F. 2d 492 (C.A. 9th 1925). In the *Jeffers*

case, *D*'s motion to suppress could have been granted on the basis of ownership of the chattels seized in accordance with the ruling in the *Pielow* case. The court seemingly granted it on a broader basis. The government argued that the search did not violate *D*'s privacy. The court answered that the two events, the search and the seizure, ". . . are not capable of being viewed separately. . . ." and that the whole venture is a violation of the constitution and therefore the evidence is to be suppressed.

It is submitted that the opinion in the instant case leaves doubt on the question as to what persons have standing to invoke the exclusionary rule. The facts of the case permit the interpretation that the defendant must at least have ownership of the chattels seized before the rule can be invoked. The opinion, however, tends to indicate that the protective benefits of the rule will be granted because the constitution has been violated regardless of whether any rights of the particular defendant have been violated. If this is true, the exclusionary rule will have a broader application because one of the limitations upon its use has been destroyed.

JACK J. LOBDELL

Insurance—Endowment Policy Disbursement—Testamentary or Contractual. *S*, owner of a fully paid endowment life policy, elected Option 1 as a method of settlement. This gave him a lifetime access to the principal sum and interest, the right to name distributees for the residue, if any, at his death, but withheld the right to change the distributees once named. *P*, executor of *S*'s estate, claims the residue from *D*, the insurer, contending the Option 1 agreement to be in violation of the Statute of Wills. The trial court found for *D*. On appeal, *Held*: Affirmed. *Toulouse v. New York Life Insurance Co.*, 40 Wn. 2d 538, 245 P. 2d 205 (1952).

In contemplating the agreement embodied in the Option 1 settlement the court found the distributees to be donee beneficiaries of a third party contract. The court also infers that an exemption from the Statute of Wills is created by the section of the insurance code permitting companies to enter this kind of agreement. RCW 48.23.300 [REM. SUPP. 1947 § 45.23.30]. Further support is found in the decision of *Mutual Ben. Life Insurance Co. v. Ellis*, 125 F. 2d 127 (1942) wherein a seemingly testamentary disposition was held outside the Statute of Wills purely on a third-party-contract theory. A concurring justice in the *Toulouse* case asserted that the decision should rest solely on the conclusion that the contract is a valid third party donee-beneficiary contract.

So much would be a clear-cut addition to the law of third party contracts, but the case is confused by the efforts of the majority to take the transaction out of the testamentary category on the additional theory of the passage of a present right. It finds the passage of a present right in the vesting in the beneficiary of the mere right to have the contract performed by the promisor (albeit that the value to the beneficiaries might be nullified by subsequent lawful acts of the promisee). Analogy is drawn by the court to insurance policy cases, citing *Massachusetts Mut. Life Insurance Co. v. Bank of California*, 187 Wash. 565, 60 P. 2d 675 (1936), which holds that vesting is an incident of the renunciation of the right to change the beneficiary.

In the principal case the insured could have extinguished the distributee's expectancy by withdrawing the whole fund; the only right he has relinquished to them is that of cutting them off by changing the named beneficiary while keeping the contract extant. If such a nebulous right, presently passed, is adequate to make a disposition non-testamentary in Washington, does this indicate a modification of the criteria for presently passed rights necessary for testamentary dispositions? In *In re Murphy's Estate*, 193 Wash. 400, 75 P. 2d 916 (1938) the court, in finding a disposition to be void because testamentary, ignored an agreement not to sell or mortgage certain