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Evidence: Standing to Object to an Unlawful Search of the Person

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that the basic purpose behind the rule against perpetuities is violated. Since the lessor has no way of setting aside the lease, this would result in placing a cloud upon the lessor's title. Such a result would be contrary to the *alienability* of a clear title and therefore violative of the basic purpose of the rule.¹⁵ The effect of the rule, and its operation, is to declare as void the lessee's interest and thereby restore the power of alienation to the lessor.¹⁶ This cloud would not arise in the trust case as the power to convey clear title is always there. This fact may well be the reason why the possibility that the interested party's rights would not be exercised didn't receive attention.

The technical violation of the rule, as mentioned earlier, is not necessarily controlling nor is the lack of remedy in the lessor an insurmountable obstacle in light of present reflection. To hold that the parties to this lease would have allowed this contractual arrangement to remain executory after the expiration of 21 years is "fantastic" and still more so if it would be found that the lessee would have an enforceable right, not barred by the statute of limitations or the doctrine of laches, at such time. It would seem therefore that the status of the lessor would be substantially the same as it would have been had the lease contained a specific date for performance and the lessor had not performed. The relation as between the lessor and the lessee is such as to render the lessor's title as to a third party sufficiently alienable so as not to offend the purpose behind the rule.

There appears to be no practical difference between an inherent limitation of a reasonable time for performance of a lease, which in a particular contract may be construed by the courts to be less than 21 years, and a specific limitation which is less than 21 years. In either case, the contract fails within the period allowed by the rule. The court, in each case of this nature, must determine, by reference to the terms of the contract and intent of the parties, whether a reasonable time could or could not extend beyond a period of 21 years. To hold in the present case that there is a "bare possibility" of the lease, *by its terms*, remaining contingent after 21 years is "legalistic formalism completely out of step with modern concepts and conditions."¹⁷

Chester Morris

EVIDENCE: STANDING TO OBJECT TO AN UNLAWFUL SEARCH OF THE PERSON

As the scene opens, the defendant is talking in whispered tones to a friend at one end of a bar. Presently he moves to the other end of the bar and engages in whispered conversation with another friend. When he walks to the check stand near the exit to get his coat, he is arrested by the police on a charge of unlawful possession of narcotics. At his side is a sack which the officer claims he observed him carrying. The defendant denies any ownership or possession of the sack or the narcotics which are found therein by the officer.

At the trial for unlawful possession of narcotics, the defendant defends on two grounds. First, he denies possession, putting the prosecution to a proof of the substantive offense. Second, he claims that if possession of the narcotics is proved against him, the evidence of it should be suppressed because it is the result of

¹⁵ See Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560, 561 (1922).

¹⁶ *Ibid.*

¹⁷ 161 Cal. App. 2d., 326 P.2d 957, 968 (1958).

an unlawful search and seizure.¹ The prosecution asserts that the defendant must claim possession of the narcotics in order to have standing to object to the unlawful search and seizure in the federal courts. Thus, even if the defendant's arrest and subsequent search were unlawful, he would have two major difficulties in the proposed line of defense. The first difficulty is the property interest required to be asserted in order to raise the issue of unreasonable search and seizure. The second difficulty is the necessity of making a timely motion for suppression of the evidence, which under federal rules² generally must be a pre-trial motion. These problems indirectly arose in the recent federal case of *Christensen v. United States*.³

The general rule is that "objection to evidence obtained in violation of . . . [the fourth] amendment may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized, . . ."⁴ If this rule were applied to the present case, it would place the defendant in a dilemma. The price of his claiming the privilege against unreasonable search and seizure is a withdrawing of his guarantee in the fifth amendment against self-incrimination.⁵ This is so because the claiming of possession would be tantamount to a confession of guilt on a criminal charge.

Many of the federal courts seem little concerned about this dilemma. On the contrary the second circuit, speaking through Judge Learned Hand, would require an unequivocal admission of possession, for as he said in *Connolly v. Medalie*:⁶

Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

Thus even those who would force the choice admit the dilemma.⁷ In the present case if the defendant does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him.⁸ Such a choice should not be forced in the absence of clear necessity.

Evidence obtained by illegal search and seizure by federal officers is not admissible in the federal courts.⁹ The principal theory behind this rule of exclusion is that it is against public policy to admit evidence obtained in violation of the basic constitutional right of persons to be secure against unreasonable search and seizure.¹⁰ Judge Learned Hand states that a rule excluding the evidence is the only

¹ U.S. CONST. amend. IV: "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated."

² FED. R. CRIM. P. 41(e).

³ 259 F.2d 192 (D.C. Cir. 1958).

⁴ *Gibson v. United States*, 149 F.2d 381, 384 (D.C. Cir. 1945).

⁵ U.S. CONST. amend. V: "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

⁶ 58 F.2d 629, 630 (2d Cir. 1932).

⁷ That the imposition of such a view is unconstitutional see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U.L. REV. 471, 478 (1952).

⁸ On admissibility in evidence of such claims see notes 25 and 29 *infra*.

⁹ *E.g.*, *Weeks v. United States*, 232 U.S. 383 (1914). See also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *McCORMICK, EVIDENCE* § 139 (1940). Cases, including state cases following the federal rule, are collected in annot., 50 A.L.R. 2d 531 (1956).

¹⁰ *Weeks v. United States*, 232 U.S. 383 (1914).

practical way of enforcing this constitutional privilege.¹¹ According to the United States Supreme Court this interest in privacy guaranteed by the fourth amendment is greater than the opposing interest in punishing those guilty of crime by means of evidence that is the fruit of the invasion of privacy.¹² They therefore presumably accept a balancing of policies in favor of individual constitutional rights.

However, the lower federal courts have developed stringent requirements for asserting the application of the rule in order to limit its operation. Foremost among these requirements is the standing necessary to object to an unreasonable search and seizure.¹³ For asserting constitutional rights or contesting the validity of governmental action, the Supreme Court has imposed the requirement that the claimant have a certain basic litigable interest.¹⁴ This concept of a "justiciable controversy" is a self-imposed limitation on the application of the court's jurisdiction. The court asserts jurisdiction only when necessary to protect rights of a particular person, since the right to object is personal.¹⁵

In applying the rule of standing to cases of unlawful search and seizure, the courts have been neither consistent nor clear. All courts do, however, seem to agree on the basic premise that "one not a *victim* of an unlawful search and seizure cannot object to the introduction of evidence obtained from an unlawful search and seizure."¹⁶

Although the Supreme Court has never squarely settled this question,¹⁷ standing is generally denied in cases of searches of property where the person complaining claimed no right in *either* the premises searched or the property seized.¹⁸ However, on at least one occasion, the eighth circuit indicated that the claimant must show ownership of *both* the premises searched and the property seized.¹⁹

In addition to the above inconsistencies the courts are not altogether uniform as to whether the requirement is for *ownership* or *possession*. Generally, the courts at least give lip service to ownership either as a requirement or as sufficient to fulfill the requirement, but the actual test usually seems to be possession.²⁰ One might

¹¹ *United States v. Pugliese*, 153 F.2d 497, 499 (2d Cir. 1945).

¹² See *McDonald v. United States*, 335 U.S. 451 (1948); *McCORMICK*, EVIDENCE § 138, at 293-94 (1954).

¹³ *Grant, Circumventing the Fourth Amendment*, 14 So. CAL. L. REV. 359, 368 (1941); Comment, 55 MICH. L. REV. 567, 569 (1957).

¹⁴ F.C.A. Const. Art. III, § II, Cl. I at 306-08.

¹⁵ See *Goldstein v. United States*, 316 U.S. 114 (1942).

¹⁶ *Id.* at 121.

¹⁷ See *United States v. Jeffers*, 342 U.S. 48 (1951); *Goldstein v. United States*, 316 U.S. 114 (1942).

¹⁸ *E.g.*, *Gaskins v. United States*, 218 F.2d 47 (D.C. Cir. 1955) (search of an apartment, the defendant being a nonresident guest); *Washington v. United States*, 202 F.2d 214 (D.C. Cir. 1953); *Gibson v. United States*, 149 F.2d 381 (D.C. Cir. 1945); *Williams v. United States*, 66 F.2d 868 (10th Cir. 1933) (search of an automobile); *Belcher v. United States*, 50 F.2d 573 (8th Cir. 1931); *Shore v. United States*, 49 F.2d 519 (D.C. Cir. 1931) (a defendant who did not claim property in trunks searched or property seized); *Hogg v. United States*, 35 F.2d 954 (5th Cir. 1929) (search of a car and seizure of whisky therefrom); *Klein v. United States*, 14 F.2d 35 (1st Cir. 1926) (seizure of liquor in an apartment not occupied by defendant).

¹⁹ *Occinto v. United States*, 54 F.2d 351 (8th Cir. 1931). See also *Wrightson v. United States*, 222 F.2d 556 (D.C. Cir. 1955) (defendant claiming ownership of suitcases but not their contents was denied standing); *Hurwitz v. United States*, 299 F. 449 (8th Cir. 1924), *cert. denied*, 226 U.S. 613 (1924) (defendant's rights not invaded by seizure from defendant's car of drugs belonging to third party).

²⁰ *Edwards, Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471, 485 (1952). See also annot., 96 L.Ed. 66, 70 (1952).

think at first blush that either would be sufficient to make one a "victim" of an unlawful search and seizure but the courts have not so held. Thus the courts have often required more than the "basic litigable interest" required to assert other constitutional rights.²¹

The cases dealing with searches of premises can be rationalized (except for the distinctions between ownership and possession) on the theory that a person's privacy is not invaded with relation to someone else's premises unless further facts appear. It seems that the only logic in requiring an interest in the premises when there is a search thereof is to show a violation of some right which we might call "security of premises." The logical requirement when dealing with searches of persons is to require a violation of "security of person."

Viewing the cases on standing, it is difficult to tell just what the requirements for standing are. The real reason for development of these requirements of standing seems to be a disposition to limit the application of the federal rule requiring exclusion of such evidence. It is partly a question of policy—how far to protect the individual's privacy at the expense of more difficult law enforcement. In addition it is also a question of constitutional construction—of how far the constitution *requires* such protection. However, as mentioned earlier, the United States Supreme Court, having adopted the exclusionary rule as the only practical means of making the fourth amendment presently meaningful, presumably recognizes a great interest in privacy. At any rate, it would seem that the courts should come to grips with the real heart of the problem on standing and recognize it for what it is; a question either of policy or of constitutional rights and not merely a question of procedural standing. The tests of standing, as stringently and inconsistently applied, seem only to be a judicial facade. It is desirable that the courts recognize this and simply determine in each case whether any rights of the person have been violated. If they have, then the violation of those rights ought to give one standing to object.

Applying this approach to the factual situation of the principal case, we see that the real problem is one of proving a violation of security of the person if the defendant does not claim that anything was taken from his person. It is undoubtedly true that a person's privacy is violated by a *search* of his person, irrespective of whether any property was seized from him. However, our present problem goes deeper and deals not just with searches but with *evidence* obtained from a seizure. Thus the question becomes: How can the defendant claim that some evidence (contraband goods), whose introduction is anticipated, was obtained through a violation of his person unless he claims the evidence was on his person? The procedural rule requiring standing or ownership of the property seized is meaningful only in the context of determining whether there was in fact an unlawful seizure. To treat it as merely a rule of procedure is to confuse the substance of the problem.

The courts have also applied a purely procedural rule which aggravates the dilemma posed to such a person as the defendant in the present case. According to the Federal Rules of Criminal Procedure, rule 41 (e), which codifies preexisting law, a motion must be made *before* the trial by the "person aggrieved" if he wishes the return of something illegally seized or the suppression of evidence ob-

²¹ See note 19 *supra*. See also 96 L.Ed. 66 (1952).

tained by illegal search and seizure. This procedure is adopted so that the trial will not have to deviate from the main issue.²² Accordingly some courts have held that a defendant with full knowledge of the grounds for the motion who fails to make the motion before the trial waives his opportunity to assert his constitutional right against unreasonable search and seizure at the trial.²³ Where, however, an opportunity is lacking or the defendant was unaware of the grounds for the motion, the trial court must allow the motion at the trial. Where he has no such knowledge, *Agnello v. United States*²⁴ held that the admissions can be avoided where the prosecution has shown *by its own proof* an unlawful search and seizure. The defendant can then have the evidence excluded.

The *Agnello* case involved a search of the defendant's house. In the present case the search is of a person so that it cannot easily be maintained that the defendant was unaware of the search and seizure if one in fact has occurred. Therefore the question arises: Does the defendant, having full information on which to base his pre-trial motion, waive his right to object if he does not assert it before the trial? The answer to this question depends on interpreting the *Agnello* case and the law surrounding rule 41(e). In *Agnello* the court states that the reason or purpose for rule 41(e) is to prevent the trial court from having to pause to determine collateral issues of how evidence was obtained. It is to prevent the delay and attendant confusion resulting from attacks during a trial on admissibility of illegally seized evidence. If this is the real basis of the *Agnello* case rather than the lack of knowledge by Agnello of the search, then the defendant in the present case could avoid the dilemma by failure to make a pre-trial motion and then moving for exclusion at the trial after the prosecution has by its own evidence proved the unlawful search and seizure. This would avoid the admission of possession of the drugs.

However, if the defendant does not wish to gamble on the possibility that the prosecution will prove an unlawful search and seizure, he must make a pre-trial motion. To show standing he must admit possession or ownership, an admission which may prove an element of the very crime charged.

The federal courts generally hold that admissions appearing in the allegations of the motion to suppress and the affidavits in support thereof are admissible as evidence in a subsequent trial against the defendant, at least where the motion has been properly overruled on the ground that the search was legal.²⁵ Also testimony given by a defendant at a hearing on his motion to suppress evidence has been admitted in evidence against him at his prosecution over the objection that it was not voluntary. Thus in *Kaiser v. United States*²⁶ the court said, "[W]e are at a loss to understand just what the compulsion was. The statement was voluntarily made. . . . The government did not compel him to make the statement."²⁷ Thus the court felt that there was no *compulsory* self-incrimination.

In one case, where the motion has been overruled and the affidavits of admission had been used against the defendant, the court drew no distinction between

²² *Agnello v. United States*, 269 U.S. 20 (1925).

²³ *Segurolo v. United States*, 275 U.S. 106 (1927).

²⁴ 269 U.S. 20 (1925).

²⁵ *Fowler v. United States*, 239 F.2d 93 (10th Cir. 1956); *Kaiser v. United States*, 60 F.2d 410 (8th Cir. 1932); *Heller v. United States*, 57 F.2d 627 (7th Cir. 1932).

²⁶ 60 F.2d 410 (8th Cir. 1932).

²⁷ *Id.* at 413.

situations where the motion was sustained and where it was overruled.²⁸ This of course would make it possible for the government always to benefit by an illegal search. If the thing or evidence itself is not suppressed because sufficient interest is not alleged to give standing to object, then of course the evidence is used. If it is suppressed, then the defendant's claim of possession can be used. The Supreme Court has not yet decided this question of admissibility.

The eighth circuit has held that where the motion for suppression has been sustained, then neither the motion nor the supporting testimony are admissible against the defendant at the trial.²⁹ The court pointed out that the admission of such evidence would violate the guarantees against both unreasonable search and seizure and self-incrimination.³⁰ The decision was rested partly on the theory that such admission resulted from or were the "fruits" of the unlawful search and seizure and that the government is forbidden to take advantage of such admissions.³¹ It would be allowing them to do indirectly what they could not do directly.

The eighth circuit case presents a partial solution to the dilemma of such a defendant. However, to give full and adequate protection to one's right to object to an unlawful search and seizure, it is necessary to extend the rule to cases where the motion has been previously overruled. The reason for this necessity is that sometimes a person is subjected to an unlawful search and seizure but is not positive he can prove it. In such a situation, he will not dare to make a pre-trial motion to suppress evidence if the admissions made in the motion can be used against him should the motion be overruled. The burden of proof is on the defendant to show an unlawful search and seizure. If we use the admissions against him for failure to meet that burden, it would greatly limit the scope of the fourth amendment.

If the police can search persons indiscriminately and use the evidence so obtained because no one can object without convicting himself, it would be a travesty on the rights of the individual protected by the Constitution.

The precise question of standing where a person has been unreasonably searched being an open one, the writer concludes that fairness, logic and the Constitution require that such a person not be placed in this dilemma of having to incriminate himself.

William L. Caraway

²⁸ *Heller v. United States*, 57 F.2d 627 (7th Cir. 1932).

²⁹ *Safarik v. United States*, 62 F.2d 892 (8th Cir. 1933).

³⁰ *Id.* at 898.

³¹ *Ibid.*