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Who May Complain in a Federal Court of an Unlawful Search and Seizure

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law studied by the individual up to that time. The weight to be given the grade received in a comprehensive examination has not yet been determined.

Another innovation will be an experiment with "reading courses" in a limited number of elective subjects. These will be taught by assigned readings in cases and text materials. Class meetings may be held, at the option of the instructor, to clarify parts of the material and to answer questions. An examination will be given at the end of each reading course.

The purpose in moving study of Administrative Law and the beginning of Equity study to the first year of law training is to give the student at the most formative period of his law school experience a complete picture of the legal system as it functions in law, in equity and before administrative tribunals, and thereby enable him better to understand the courses that follow.

Combining Trusts, Wills, Future Interests and Estate and Gift Taxation into one course is designed to give a more complete picture of and a more practical approach to estate planning than is possible when these subjects are taught in separate courses.

The comprehensive examinations are intended to add incentive to review, help emphasize the interrelation between "branches" of the law and give additional training in analysis of legal problems.

Through the reading courses the student is expected to increase his proficiency and confidence in "learning" a field of law with little outside aid—a task which he must eventually face in many fields of law not covered during his law school experience.

Who May Complain in a Federal Court of an Unlawful Search and Seizure

IN *McDonald v. United States,*[1] the most recent decision of the Supreme Court dealing with search and seizure, the court was faced with the question of who may move to suppress evidence which has been obtained in violation of the Fourth Amendment. While lower federal courts have developed a considerable body of law on the subject, the question had not heretofore been passed on directly by the United States Supreme Court. It is the aim of the writer to evaluate the *McDonald* decision in the light of the prior federal cases.

The facts in the *McDonald* case were as follows: Federal officers suspecting McDonald of engaging in the numbers racket,

[1]335 U. S. 451, 69 Sup. Ct. 191 (1948).

stood watch outside the house where he roomed. Upon hearing what was thought to be an adding machine, one of the officers opened a front window leading into the landlady's bedroom and climbed through. Pushing the startled woman aside, he went to the front door and admitted his fellows. They then searched the rooms on the ground floor and some of the rooms on the second floor. Seeing a closed door at the end of the second floor hallway, one of the officers climbed on a chair to look through the transom. He saw McDonald and Washington, his guest, operating an adding machine. Money and policy slips were piled on the table beside them. At the officer's demand McDonald opened the door, and he and Washington were arrested. Two adding machines, money, and a suitcase full of policy slips were seized from the room.

The two men were subsequently convicted of violating the gambling laws of the District of Columbia. Before trial McDonald had moved for the return and suppression in evidence of the articles seized, but the motion had been denied. On appeal both McDonald and Washington charged error in the denial of the motion. The conviction was affirmed by a divided Court of Appeals.[2] That court held that there had been an unlawful entry into the house, but that no rights of defendant McDonald were violated, because his room was not searched prior to the time of his arrest. The dissenting judge was of the opinion that McDonald's rights had been violated by the officers in spying on him from the corridor under the circumstances. All members of the court apparently conceded that Washington, as a mere guest on the premises, could not complain.

The Supreme Court, with three judges dissenting,[3] reversed the convictions of both defendants. The majority held that McDonald's constitutional rights were violated, and that he was a proper party to move for the suppression of the evidence. Further, the court held that Washington was prejudiced by the denial of McDonald's motion because the evidence would not have been available at Washington's trial had the motion been granted.

The Fourth Amendment itself does not specifically provide that

[2]McDonald v. United States, 166 F. 2d 957 (App. D.C. 1948).

[3]Justice Douglas wrote the opinion of the court. Justice Black concurred in the result. Justice Rutledge concurred in the opinion relating to McDonald, and in the result. He felt that the evidence, having been unlawfully obtained, should have been suppressed as to both—apparently whether prejudicial to Washington or not. Justice Jackson wrote a concurring opinion. Justice Frankfurter concurred in the opinion of the court and the concurring opinion of Jackson. Justice Burton dissented on the ground that there was no search of McDonald's room. Justices Vinson and Reed concurred in the dissent.

evidence obtained through an illegal search and seizure may not be used against a defendant in a federal court.[4] The Supreme Court in the case of *Weeks v. United States*,[5] however, feeling that the guarantees of the Constitution could be given effective operation only if federal courts refused to admit evidence so seized, held that such evidence should be suppressed upon a timely motion by the defendant. The lower federal courts in applying the rule of the *Weeks* case have put several restrictions upon it.[6] One of these restrictions is that only the person whose rights had been violated by the unlawful search and seizure can move for the suppression of the evidence.[7] The Supreme Court has never expressly sanctioned this restriction,[8] but it has been codified by an act of Congress.[9]

[4]U. S. CONST. AMEND. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

[5]232 U. S. 383, 34 Sup. Ct. 341 (1914).

[6]8 WIGMORE, EVIDENCE § 2184a (3rd ed. 1940).

[7]Leading cases are Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); Haywood v. United States, 268 Fed. 795 (C.C.A. 7th 1920). In the *Connolly* case is an excellent discussion of the rationale behind the rule. The court pointed out that suppression of the evidence is granted in order to give the defendant a complete remedy for the wrong done by the police. One who has not been wronged is entitled to no remedy.

[8]The closest the Supreme Court ever came to recognizing the rule was in Goldstein v. United States, 316 U. S. 114, 121, 62 Sup. Ct. 1000, 1004 (1942), "While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized . . . . We think no broader sanction should be imposed . . . in respect of violations of the Communications Act".

[9]The Fed. R. Cr. P., 41(e), 54 Stat. 688 (1940), 18 U.S.C.A. 687 (Supp. 1946): "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained . . . . If the notion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissable in evidence in any hearing or trial." The notes of the Advisory Committee on Rules expressly state that this section, with one exception not pertinent here, was meant to codify the existing law and practice prevailing in the federal courts. In the principal case, the Supreme Court did not construe the statute; it did not cite the statute. It has been construed by two lower federal courts. In United States v. Janitz, 6 F.R.D. 1 (D.N.J. 1946), *dismissed for want of appellate jurisdiction in* Janitz v. U. S., 161 F. 2d 19 (C.C.A. 3rd 1946), the court held that the statute broadened the existing law so that evidence obtained in violation of the Fourth Amendment could not be used in any hearing or trial regardless of who objected. The construction adopted by the District Court in the *Janitz* case was rejected in Lagow v. United States, 159 F. 2d 245 (C.C.A. 2d 1946), where the court said at 246, "We read the phrase, 'a party aggrieved', in the rule to cover only those persons who had been deemed 'aggrieved' before."

Thus when a defendant moves for the suppression of evidence the question arises: Were *his* constitutional rights violated by the unlawful search and seizure?[10]

To illustrate the issue, consider this extreme situation: Federal officers, without a warrant or probable cause, search the home of Smith. During the course of the search they find and seize a gun which tends to connect Jones with a bank robbery committed several months before. Jones is indicted for the robbery and he moves for the suppression of the gun in evidence. It is shown that he has no connection whatsoever with Smith or his house; and that Smith bought the gun from a pawn broker to whom Jones had sold it. It is safe to say that no federal court would grant this motion.[11] It would be denied on the ground that no constitutional right of Jones was violated by the unlawful search and seizure.[12]

Courts are not usually faced with such clear cut cases. Generally there is some relationship existing between the defendant who makes the motion and the premises searched, or the property seized, or the person whose rights were violated. The situations in which the question arises may be divided into ten categories.

1. Defendant Is Owner of the Premises Searched But Is Not in Possession.

An owner of premises who has given possession to a third party is in no position to complain of a search of such premises by way of a motion to suppress evidence.[13] He does not show that his rights under the Fourth Amendment have been violated merely by showing that he had legal title to the premises searched.

[10]The following secondary authorities are helpful in answering this question: Cornelius, The Law of Search and Seizure § 14 (2d ed. 1930); 8 Wigmore, Evidence § 2184a (3rd ed. 1940); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 374-76 (1920); Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 Minn. L. Rev. 1 (1928); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 Iowa L. Rev. 472, 490-91 (1948); Note, 17 Minn. L. Rev. 561 (1933); 56 C. J., Search and Seizure §§ 54-63; See Notes, 24 A.L.R. 1408, 1425 (1923); 32 A.L.R. 408, 415 (1924); 41 A.L.R. 1145, 1151 (1926); 52 A.L.R. 477, 487 (1928); 78 A.L.R. 343 (1932); 86 A.L.R. 346 (1933); 88 A.L.R. 348, 365 (1934); 134 A.L.R. 819, 831 (1941); 150 A.L.R. 566, 577 (1944).

[11]With the one exception perhaps of the court which decided the case of United States v. Janitz, 6 F.R.D. 1, (D. N.J. 1946). See note 11 *supra*.

[12]*See* Haywood v. United States, 268 Fed. 795, 803-04 (C.C.A. 7th 1920).

[13]United States v. Dellaro, 99 F. 2d 781 (C.C.A. 2d 1938); United States v. Muscarelle, 63 F. 2d 806 (C.C.A. 2d 1933); Chepo v. United States, 46 F. 2d 70 (C.C.A. 3rd 1930); Cantrell v. United States, 15 F. 2d 953 (C.C.A. 5th 1926); Driskill v. United States, 281 Fed. 146 (C.C.A. 9th 1922). *See* Thomas v. United States, 154 F. 2d 365 (C.C.A. 10th 1946); Schnitzer v. United States, 77 F. 2d 233 (C.C.A. 8th 1925).

2. DEFENDANT IS IN POSSESSION OF THE PREMISES SEARCHED.

If one is in possession of the premises, then his constitutional rights are violated by an unlawful search of such premises.[14]. This is true whether he occupies the premises as owner[15] or as a tenant.[16] It may be true even though he is a trespasser.[17] If his rights as the occupant were violated by the search, he may move for the suppression even though the property seized was not his property.[18] It is suggested that he should have the right to complain even though the property seized was in the actual possession of another on his premises.

It may be concluded that what the courts seek to protect under the Fourth Amendment is primarily the peaceful enjoyment of one's premises rather than the rights of ownership. Indeed, the guarantees of the Fourth Amendment have come to be termed the guarantees of privacy.[19]

3. DEFENDANT IS IN POSSESSION OF A PORTION OF THE PREMISES SEARCHED

The cases within this group[20] may be divided into three classes,

[14]Few cases have given much discussion to this phase of the problem. If the search of the premises is found to be unreasonable it is usually assumed without question that the rights of the party in possession have been violated and that he is therefore in a position to move for suppression of the evidence. The following cases directly or indirectly sustain the proposition: Gibson v. United States, 149 F. 2d 381 (App. D.C. 1945); Mathews v. Correa, 135 F. 2d 534 (C.C.A. 2d 1943); United States v. Edelson, 83 F. 2d 405 (C.C.A. 2d 1936); Kelly v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); Klee v. United States, 53 F. 2d 58 (C.C.A. 9th 1931); Cofer v. United States, 37 F. 2d 677 (C.C.A. 5th 1930); Alvau v. United States, 33 F. 2d 467 (C.C.A. 9th 1929); United States v. Hotchkiss, 60 F. Supp. 405 (D. Md. 1945); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D. N.Y. 1943); United States v. Esposito, 45 F. Supp. 39 (E.D. Pa. 1942). Note that in Trupiano v. United States, 334 U. S. 699, 68 Sup. Ct. 1229 (1948), all of the defendants were lessees of the barn in question.

[15]Alvau v. United States, 33 F. 2d 467 (C.C.A. 9th 1929).

[16]United States v. Edelson, 83 F. 2d 405 (C.C.A. 2d 1936).

[17]Klee v. United States, 53 F. 2d 58 (C.C.A. 9th 1931) would indicate that a trespasser in possession could not complain of the unlawful entry and search, but the case of Stakich v. United States, 24 F. 2d 701 (C.C.A. 9th 1928) indicates that a trespasser might complain if the evidence was unlawfully seized from the portion of the premises which he was actually possessing.

[18]United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D. N.Y. 1943); *see* Mathews v. Correa, 135 F. 2d 534 (C.C.A. 2d 1943).

[19]". . . the Fourth Amendment has interposed a magistrate between the citizen and the police . . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime . . . ." McDonald v. United States, 335 U. S. 451, 455, 69 Sup. Ct. 191, 193 (1948).

[20]Brown v. United States, 83 F. 2d 383 (C.C.A. 3d 1936); United States v.

depending upon the nature of the premises and the portion occupied by the defendant.

In the first class the premises consist of a dwelling house which defendant occupies in part as a roomer or a tenant on one of the floors. In *Brown v. United States*[21] two of the defendants, roomers in the home of Mrs. Gillman, moved for the suppression of evidence seized during an unlawful search of the house. The house had been thoroughly searched from cellar to attic; their rooms were apparently searched along with the rest. The appellate court reversed the convictions because the motion was denied. The court said that these defendants "were roomers in the house. It was their home, and so far as the unlawful search affected them it violated their constitutional rights."[22] The language of the court in regard to these defendants is somewhat cautious, and one may conclude no more from it than that the constitutional rights of a roomer are violated when his room has been unlawfully invaded and searched.

The Court of Appeals in the principal case of *McDonald v. United States*[23] said that McDonald's constitutional rights had not been violated because there had been no search of his room prior to his lawful arrest. The Supreme Court put its reversal on the ground that there had been an unlawful search of McDonald's room.[24] It is doubtful, then, that the *McDonald* decision has altered to any great degree the law as expressed in the *Brown* case. In his concurring opinion, however, Justice Jackson put his decision on broader grounds. He said that the rights of one occupying a room in a dwelling house have been violated when the integrity and privacy of any portion of the house have been invaded by an unlawful entry of the type there involved. It must be borne in mind that the police entered the house in what the court looked upon as a particularly outrageous manner; Justice Jackson described it as a criminal intrusion on a plane with burglary. If the

Muscarelle, 63 F. 2d 806 (C.C.A. 2d 1933); Safarik v. United States, 62 F. 2d 892 (C.C.A. 8th 1933); Chepo v. United States, 46 F. 2d 70 (C.C.A. 3d 1930); Nixon v. United States, 36 F. 2d 316 (C.C.A. 9th 1929); Coon v. United States, 36 F. 2d 164 (C.C.A. 10th 1929); Hardwig v. United States, 23 F. 2d 922 (C.C.A. 6th 1928); Stakich v. United States, 24 F. 2d 701 (C.C.A. 9th 1928); Graham v. United States, 15 F. 2d 740 (C.C.A. 8th 1926); Klein v. United States, 14 F. 2d 35 (C.C.A. 1st 1926); Rouda v. United States, 10 F. 2d 916 (C.C.A. 2d 1926); United States v. Vlakos, 19 F. Supp. 166 (D. Ore. 1937).

[21] 83 F. 2d 383 (C.C.A. 3d 1936).

[22] *Id.* at 386.

[23] 166 F. 2d 957 (App. D. C. 1948).

[24] 335 U. S. 451, 69 Sup. Ct. 191 (1948).

McDonald decision is given its fullest effect by future courts, then a roomer will have greater protection under the Fourth Amendment than he previously had, but the facts in the *McDonald* case will tend to limit its liberalizing effect.

In the second class of cases within this group the premises consist of a building more or less open to the public such as a hotel or store building in which defendant occupies one or more rooms. Illustrative of this type is *Rouda v. United States*[25] where defendants occupied a basement room in a commercial building. Officers followed one of the defendants into a store and down the basement steps. Approaching an open door at the rear of the basement they saw defendants illegally labeling liquor bottles. Defendants were placed under arrest by the officers who subsequently procured a warrant and returned to seize the liquor and other evidence from the room. Before trial defendants moved to suppress the evidence and quash the warrant, claiming that it was based upon information obtained through an unlawful entry into the basement. In affirming the trial court's denial of this motion the appellate court conceded that there had been an unlawful entry into the basement, but held that defendants were in no position to complain of this entry since their rights were not violated. It seems clear that the *McDonald* decision would not change the result reached in the *Rouda case*. There are two important distinctions. First, the entry, though unlawful, consisted of a mere trespass conducted in a not particularly outrageous manner. Second, the building entered was a commercial building and not a dwelling house.

In the third class the premises consist of a tract of land on which there are several structures and defendant occupies one of these structures. Illustrative is *Coon v. United States*.[26] The defendant had leased a shack on the homestead of Mrs. Oldham. An officer entered the homestead without a warrant, and after investigating the Oldham filling station and the Oldham residence, went to the defendant's shack. Smelling the odor of mash, he entered and found the defendant operating a still. Before trial defendant moved for the suppression of evidence, one of his grounds being that the officer had illegally entered the Oldham homestead. The court held that defendant's rights were in no way violated by the trespass upon that portion of the homestead in which he had no interest; further, the shack itself was searched upon probable cause. Nothing in the *McDonald* case indicates that the law as expressed in *Coon v. United States* has undergone a change.

[25] 10 F. 2d 916 (C.C.A. 2d 1926).
[26] 36 F. 2d 164 (C.C.A. 10th 1929).

4. DEFENDANT DWELLS IN THE HOUSE WITH THE FREEDOM OF THE HOUSEHOLD.

Two cases suggest that one who dwells within a house with the freedom of the household may complain of an unlawful search of any part of the house. In *Brown v. United States*[27] the court held that the rights of the householder's daughter dwelling on the premises were violated by an unlawful search of the house. In the case of *Alvau v. United States*[28] the court held that the rights of an employee dwelling within the house were violated by an unlawful search of the house.[29] As stated above, the right guaranteed by the Fourth Amendment is essentially the right of privacy.[30] It is therefore reasonable to say that the right of privacy of one who has the general freedom of the household is violated by an unreasonable search of any part of the house. Of course if it appears that defendant was actually nothing more than a roomer on the premises, not having the general freedom of the premises, then he should be treated accordingly.[31] It is then immaterial that he was an employee of the householder, or a member of the householder's family.

The distinction drawn may seem narrow, but it is supported by the words of the Fourth Amendment itself. That Amendment gives protection not only to the houses of the people, but also to their papers and effects. Adequate protection can be given to the effects of a roomer if the room which he occupies is immune from search, but if defendant has the freedom of the dwelling, then his effects are likely to be scattered throughout the house, and can be protected only by guaranteeing to him the privacy of the whole house and not only the privacy of the room in which he sleeps.

5. DEFENDANT IS AN EMPLOYEE, GUEST, OR CASUAL VISITOR ON THE PREMISES.

One who was on the premises searched merely as an employee, guest or casual visitor may not complain of an unlawful search of the premises.[32] In the principal case of *McDonald v. United*

[27]83 F. 2d 383 (C.C.A. 3d 1936).

[28]33 F. 2d 467 (C.C.A. 9th 1929).

[29]*Caveat:* The Brown and Alvau cases merely suggest the existence of this category to the writer.

[30]See note 19 *supra.*

[31]*See* Wida v. United States, 52 F. 2d 424 (C.C.A. 8th 1931); *cf.* Milyonico v. United States, 53 F. 2d 937 (C.C.A. 7th 1931).

[32]Gibson v. United States, 149 F. 2d 381 (App. D.C. 1945); *In re* Nassetta, 125 F. 2d 924 (C.C.A. 2d 1942); United States v. Dellaro, 99 F. 2d 781 (C.C.A. 2d 1938); Mello v. United States, 66 F. 2d 135 (C.C.A. 3d 1933); United

States, the defendant Washington was merely a guest on the premises. The court in its opinion assumed without deciding that his constitutional rights had not been volated and reversed his conviction on other grounds.[33]

If such person is to claim the protection of the Fourth Amendment he must show that the property seized belonged to him,[34] was in his possession,[35] or was taken from his person.[36] The requirement of possession in this regard is not necessarily satisfied by merely showing that defendant had actual control over the property. Control may be termed mere custody—especially if defendant was an employee.[37] There is an interesting contradiction here in view of the fact that mere custody may not be sufficient to entitle a party to object to unlawful seizure, while at the same time it may be sufficient to satisfy an indictment for illegal possession of the property.[38]

It is submitted that one casually on the premises is sufficiently protected under the Fourth Amendment if his person is protected from unlawful search, and his papers and effects are protected from unlawful seizure.

States v. Muscarelle, 63 F. 2d 806 (C.C.A. 2d 1933); Kelly v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); United States v. Crushiata, 59 F. 2d 1007 (C.C.A. 2d 1932); Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); United States v. De Vasto, 52 F. 2d 26 (C.C.A. 2d 1931); United States v. Messina, 36 F. 2d 699 (C.C.A. 2d 1929); United States v. Vlakos, 19 F. Supp. 166 (D. Ore. 1937); United States v. Gass, 17 F. 2d 996 (M.D. Pa. 1927); United States v. Mandel, 17 F. 2d 270 (D. Mass. 1927). *See* United States v. Conoscente, 63 F. 2d 811 (C.C.A. 2d 1933); Occinto v. United States, 54 F. 2d 351 (C.C.A. 8th 1931); Wida v. United States, 52 F. 2d 424 (C.C.A. 8th 1931); Cantrell v. United States, 15 F. 2d 953 (C.C.A. 5th 1926). *Cf.* United States v. Salli, 115 F. 2d 292 (C.C.A. 2d 1940); Rossi v. United States, 60 F. 2d 955 (C.C.A. 7th 1932); The Evelyn, 2 F. Supp. 911 (D. N.J. 1933).

[33]See category (10) on co-defendants, *infra.* One may wonder at the possible effect of Justice Jackson's remark that ". . . even a guest may expect the shelter of the rooftree he is under against criminal intrusion." 335 U. S. 451, 461, 69 Sup. Ct. 191, 196 (1948). Perhaps if this court had been forced to decide the question, it would have concluded that Washington's rights had been violated.

[34]United States v. Stappenback, 61 F. 2d 955 (C.C.A. 2d 1932); Pielow v. United States, 8 F. 2d 492 (C.C.A. 9th 1925); United States v. De Bousi, 32 F. 2d 902 (D. Mass. 1929).

[35]*See* United States v. Stappenback, 61 F. 2d 955 (C.C.A. 2d 1932); Pielow v. United States, 8 F. 2d 492 (C.C.A. 9th 1925).

[36]Hagen v. United States, 4 F. 2d 801 (C.C.A. 9th 1925). *But cf.* Kwong How v. United States, 71 F. 2d 71 (C.C.A. 9th 1931).

[37]*E.g.*, Kelly v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932).

[38]Kelly v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); United States v. Messina, 36 F. 2d 699 (C.C.A. 2d 1929). *Cf.* Graham v. United States, 15 F. 2d 740 (C.C.A. 8th 1926); United States v. Shelton, 59 F. Supp. 273 (D. Ky. 1945).

6. DEFENDANT HAS NO CONNECTION WITH THE PREMISES SEARCHED BUT DOES HAVE AN INTEREST IN THE PROPERTY SEIZED.

Where property in which the defendant had an interest was seized from premises with which he had no connection at all, or from a public place, he may still complain of the seizure though not of the search. The cases do not show too clearly, however, what sort of interest the defendant must have in the property seized in order to show that his rights were violated. So far as the writer can determine, the defendant must show legal title[39] and possession[40] of the property seized. This requirement is satisfied if another was merely holding custody on behalf of the defendant.[41]

In *Lewis v. United States*[42] a memorandum book was seized from the defendant's suitcase in a hotel storeroom. The court held that the defendant could not question the legality of the seizure because he admitted that the book did not belong to him. One may question the reasonableness of the court's requirement of legal title in the *Lewis* case. While it is true that defendant did not own the book, still he did own the suitcase and had the right to expect that the privacy of that suitcase be respected by all, including the police.

7. DEFENDANT'S PERSON IS SEARCHED DURING THE COURSE OF AN UNLAWFUL SEARCH.

In the event that defendant did not have a legally protected interest in the premises searched or the property seized, may he still move for the suppression of the evidence seized, if he can show that his person was searched during the course of the unlawful search? This interesting question seems never to have been answered by the federal courts,[43] but suppose the following case

[39]Lewis v. United States, 92 F. 2d 952 (C.C.A. 10th 1937). *See* Hurwitz v. United States, 299 Fed. 449 (C.C.A. 8th 1924); Tsuie Shee v. Backus, 243 Fed. 551 (C.C.A. 9th 1917). *Cf.* Schenck *ex rel.* Chow Fook Hong v. Ward, 24 F. Supp. 776 (D. Mass. 1938).

[40]United States v. One Ford Truck, 46 F. 2d 171 (S.D. Texas 1930); United States v. One Gardner Roadster, 35 F. 2d 777 (W.D. Wash. 1929); United States v. One Buick Automobile, 21 F. 2d 789 (D. Vt. 1927). *Cf.* United States v. Reiburn, 127 F. 2d 525 (C.C.A. 2d 1942); Davis v. United States, 138 F. 2d 406 (C.C.A. 5th 1943).

[41]United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D. N.Y. 1943); *See* syllabus 3 of *Ex parte* Jackson, 96 U. S. 727 (1877). *Cf.* Pielow v. United States, 8 F. 2d 492 (C.C.A. 9th 1925).

[42]92 F. 2d 952 (C.C.A. 10th 1937).

[43]*See* Kwong How v. United States, 71 F. 2d 71 (C.C.A. 9th 1931); Nelson v. United States, 18 F. 2d 522 (C.C.A. 8th 1927); Schenck *ex rel.* Chow Fook Hong

were to arise: Federal officers, suspecting gambling, enter the garage of Jones where he and several of his friends are sitting about talking. Without a warrant or probable cause the officers search all of the men and find nothing. They then search the garage and find gambling pharaphernalia belonging to Jones hidden in the rear of the garage. Before trial may any or all of Jones' friends move to suppress in evidence the gambling paraphernalia on the ground that his person was searched during the course of the unlawful search? The writer believes that any one should be in a position to make the motion. It is true that his property rights were not violated, but the right of each to the sanctity and privacy of his person was violated. This of all the guarantees of the Constitution should be most highly respected by the courts.

8. Defendant Is a Corporation or an Unincorporated Association, or a Member, Stockholder, Officer or Employee of Such Organization.

If the premises of a corporation or an unincorporated association such as a labor union are illegally searched and property of the organization is illegally seized, the organization may move for the return and suppression of the evidence in its own behalf.[44]

On the other hand, it is well settled that an individual does not show that his constitutional rights have been violated merely by showing that he was a member, stockholder, officer or employee of an organization whose rights were so violated.[45] This

v. Ward, 24 F. Supp. 776 (D. Mass. 1938). These cases indicate by way of dicta that the defendant could not move to suppress the evidence under such circumstances.

[44]Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 185 (1920) (which definitely settled previous doubts about a corporation's having protected rights under the Fourth Amendment); Go-Bart Importing Co. v. United States, 283 U. S. 244 (1931); Lagow v. United States, 159 F. 2d 245 (C.C.A. 2d 1946); *In re* No. 32 East Sixty-Seventh St., 96 F. 2d 153 (C.C.A. 2d 1938); McHie v. United States, 194 Fed. 895 (N.D. Ill. 1912). *See* Reeve v. Howe, 33 F. Supp. 619 (E.D. Pa. 1940).

[45]Lagow v. United States, 159 F. 2d 245 (C.C.A. 2d 1946); Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); United States v. De Vasto, 52 F. 2d 26 (C.C.A. 2d 1931); A. Guckenheimer & Bros. v. United States, 3 F. 2d 786 (C.C.A. 3d 1925); Haywood v. United States, 268 Fed. 795 (C.C.A. 7th 1920). *See In re* 14 E. Seventeenth St., 65 F. 2d 289 (C.C.A. 2d 1933); Bilodeau v. United States, 14 F. 2d 582 (C.C.A. 9th 1926); Newingham v. United States, 4 F. 2d 490 (C.C.A. 3d 1925); United States v. Wainer, 49 F. 2d 789 (W.D. Pa. 1931). *Cf.* Essgee Co. of China v. United States, 262 U. S. 151, 43 Sup. Ct. 514 (1923); Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158 (1913); Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538 (1911); Hale v. Henkel 201 U. S. 43, 26 Sup. Ct. 370 (1906). *But see Ex parte* Jackson, 263 Fed. 110,

is true though the defendant was the sole stockholder of the corporation in question.[46] There is some support for the proposition that officers and employees of a corporation will be able to complain if at the time the search was made corporate property was seized from their actual physical control,[47] or their persons were searched,[48] or their individual property was also seized.[49] This would seem sound. One does not show a violation of his rights merely because he is connected with a corporation whose rights were violated, but on the other hand, one should not lose the protection which the Constitution extends to him as an individual merely because he was connected with a corporation.[50]

9. DEFENDANT DISCLAIMS INTEREST.

Often it occurs that a defendant, in order to avoid the incriminating effect of evidence seized, will disclaim any interest in the premises searched or the property seized. It is well settled that in such a case he will not be allowed to raise the issue of the legality of the search and seizure whatever his true relationship to the premises searched and the property seized.[51] The courts have not

(D. Mont. 1920) (where the court was particularly influenced by the manner in which the search was conducted, as was the court in the principal case.)

[46]"There are occasions when the courts will pierce the veil of a corporate entity, but that is done not for the benefit of the persons who organized the corporation, but for the purpose of protecting the rights of third persons, and then only in exceptional instances." United States v. Lagow, 66 F. Supp. 738, 739 (S.D. N.Y. 1946).

[47]*See* Reeve v. Howe, 33 F. Supp. 619, 624 (E.D. Pa. 1940) where the court said, ". . . dispassionate reasoning must concede that the duly constituted corporate officer, having books, papers, records, money, and other property committed to his care for the proper use of which, within the scope of corporate powers he is personally responsible, has a 'right' therein and thereto." *See* also Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); United States v. De Vasto, 52 F. 2d 26 (C.C.A. 2d 1931).

[48]See in this connection: Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 Sup. Ct. 151 (1931).

[49]*Ibid.*; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 185 (1920).

[50]*See* United States v. Ebeling, 146 F. 2d 254 (C.C.A. 2d 1944) where the court said that defendant had no right to complain of the seizure of papers seized when his desk was rifled by federal officers, because the desk belonged to the company for which he worked. This is absurd. His right of privacy would have been no more violated if he had had title to the desk.

[51]Gowling v. United States, 64 F. 2d 796 (C.C.A. 6th 1933); Rossi v. United States, 60 F. 2d 955 (C.C.A. 7th 1932); United States v. Lee Hee, 60 F. 2d 924 (C.C.A. 2d 1932); Shore v. United States, 49 F. 2d 519 (App. D.C. 1931); Chepo v. United States, 46 F. 2d 70 (C.C.A. 3d 1930); McMillan v. United States, 26 F. 2d 58 (C.C.A. 8th 1928); Rosenberg v. United States, 15 F. 2d 179 (C.C.A. 8th 1926); Schenck *ex rel* Chow Fook Hong v. Ward, 24 F. Supp. 776 (D. Mass. 1938); United States v. Harnish, 7 F. Supp. 305 (D. Me. 1934);

set forth the rationale behind this rule. Perhaps it may be explained on the ground that defendant will not be permitted to assume two contradictory positions at the same time, i. e., disclaim all interest in order to avoid conviction, yet claim interest in order to move for suppression. The only difficulty with this explanation is that if it applies to the defendant it should apply with equal force to the government which occupies the reverse of the same dual position.[52] Probably the true basis for the rule lies in the fundamental hostility of courts to the exclusion of evidence, even though wrongfully seized. It is questionable whether this is a proper basis for such an inroad on the federal exclusion rule. It would seem more desirable for the trial court, when the issue is raised, to investigate the facts to determine if the defendant's rights actually were violated, considering the disclaimer as merely one piece of evidence against him. It the court finds as a matter of fact that defendant's rights were violated, the evidence should be suppressed.

Somewhat analogous to the disclaimer rule is a rule of pleading which has developed in this class of cases. When defendant comes before the court in order to petition for a return and suppression of the property seized, he must set out with directness and clarity his true relation to the premises searched and/or property seized.[53] In *Connolly v. Medalie*[54] Justice Learned Hand said: "Men may wince at admitting that they were the owners,

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United States v. 185 Cases Scotch Whiskey, 15 F. 2d 563 (D. R.I. 1926). *See* Ingram v. United States, 113 F. 2d 966 (C.C.A. 9th 1940); Creech v. United States, 97 F. 2d 390 (C.C.A. 5th 1938); Lewis v. United States, 92 F. 2d 952 (C.C.A. 10th 1937); Patterson v. United States, 31 F. 2d 737 (C.C.A. 9th 1929); Driskill v. United States, 281 Fed. 146 (C.C.A. 9th 1922); *But cf.* Cofer v. United States, 37 F. 2d 677 (C.C.A. 5th 1930); United States v. Dean, 50 F. 2d 905 (D. Mass. 1931).

[52]"The only special circumstance in the present case which calls for notice is that Dean at first claimed to the officers that he had leased the garage and did not have present possession or control of it. The government contends that he is not, therefore, in a position to question the legality of the search. The indictment, however, involves an assertion that the property was in the possession or control of Dean. The government cannot maintain that he was the owner of the property for the purpose of convicting him and was not the owner for the purpose of searching it." United States v. Dean, 50 F. 2d 905, 906 (D. Mass. 1931).

[53]Brown v. United States, 61 F. 2d 363 (C.C.A. 8th 1932); Connolly v. Medalie, 58 F. 2d 629 (C.C.A. 2d 1932); Kelleher v. United States, 35 F. 2d 877 (App. D.C. 1929); Chicco v. United States, 284 Fed. 434 (C.C.A. 4th 1922); United States v. Shelton, 59 F. Supp. 273 (E.D. Ky. 1945); United States v. Miller, 36 F. Supp. 391 (W.D. N.Y. 1941); United States v. Gass, 14 F. 2d 229 (D. Pa. 1926). *See* Belcher v. United States, 50 F. 2d 573 (C.C.A. 8th 1931); Nunes v. United States, 23 F. 2d 905 (C.C.A. 1st 1928); Armstrong

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."[55] The reasonableness of this requirement seems apparent. If the court must determine whether or not defendant's rights were violated, it deserves, at least, a true statement of defendant's position.

10. DEFENDANT IS BEING TRIED WITH ONE WHOSE RIGHTS WERE VIOLATED.

Until the decision in the principal case the rule was well established that a defendant had no right to demand the suppression of evidence in his own behalf merely because he was being tried jointly with another whose rights under the Fourth Amendment had been violated.[56] Apparently it was not considered material that he would be prejudiced by the admission of the evidence in question, for even a casual reading of the cases will show that he usually was prejudiced by its admission. In *Agnello v. United States* [57] a conviction of one of several defendants was reversed on the ground that certain evidence had been illegally seized from him. The court affirmed the convictions of the others saying that they had not been prejudiced by its admission. The case has not

v. United States, 16 F. 2d 62 (C.C.A. 9th 1926); Lewis v. United States, 6 F. 2d 222 (C.C.A. 9th 1925); United States v. Murray, 17 F. 2d 276 (N.D. Cal. 1927). *But cf.* Simmons v. United States, 18 F. 2d 85 (C.C.A. 8th 1927).

[54]58 F. 2d 629, 630 (C.C.A. 2d 1932).

[55]For an example of an extraordinarily frank pleading see Coon v. United States, 36 F. 2d 164 (C.C.A. 10th 1929).

[56]Hall v. United States, 150 F. 2d 281 (C.C.A. 5th 1945); Gibson v. United States, 149 F. 2d 381 (App. D.C. 1945); *In re* Nassetta, 125 F. 2d 924 (C.C.A. 2d 1942); Bushouse v. United States, 67 F. 2d 843 (C.C.A. 6th 1933); United States v. De Vasto, 52 F. 2d 26 (C.C.A. 2d 1931); Cofer v. United States, 37 F. 2d 677 (C.C.A. 5th 1930); Brooks v. United States, 8 F. 2d 593 (C.C.A. 9th 1925); A. Guckenheimer & Bros. v. United States, 3 F. 2d 786 (C.C.A. 3d 1925); MacDaniel v. United States, 294 Fed. 769 (C.C.A. 6th 1924); United States v. Olmstead, 7 F. 2d 760 (W.D. Wash. 1925); United States v. Wexler, 4 F. 2d 391 (S.D. N.Y. 1925). *See* United States v. Park Avenue Pharmacy Inc., 56 F. 2d 753 (C.C.A. 2d 1932); Todd v. United States, 48 F. 2d 530 (C.C.A. 5th 1931); Winslett v. United States, 43 F. 2d 358 (C.C.A. 10th 1930); Benese v. United States, 25 F. 2d 231 (C.C.A. 5th 1928); Nielson v. United States, 24 F. 2d 802 (C.C.A. 9th 1928); Bilodeau v. United States, 14 F. 2d 582 (C.C.A. 9th 1926); Canada v. United States, 5 F. 2d 489 (C.C.A. 5th 1925); Van Dam v. United States, 23 F. 2d 235 (C.C.A. 6th 1925); Schwartz v. United States, 294 Fed. 528 (C.C.A. 5th 1923); Remus v. United States, 291 Fed. 501 (C.C.A. 6th 1923); Lusco v. United States, 287 Fed. 69 (C.C.A. 2d 1923).

[57]269 U. S. 20, 46 Sup. Ct. 4 (1925).

been taken by the lower courts to mean that a co-defendant may object to the admission of evidence so obtained if its admission *would* tend to prejudice him. Indeed the *Agnello* case has sometimes been cited for the broad proposition that a defendant could not object to the admission of evidence obtained in violation of the rights of a co-defendant.[58]

The decision in the *McDonald* case may change the rule. It was there held that the conviction of Washington should be reversed because he was prejudiced by the denial of McDonald's motion to return and suppress. The court said that if the motion had been granted and the evidence returned to McDonald, it would not have been available for use in the trial of Washington. While this was literally true, nevertheless the trial court could have framed its order in such a way as to make the evidence available against Washington at the same time that it ordered its return to and suppression as against McDonald.[59] Or the trial court could have denied the part of the motion which requested return and merely ordered that it be suppressed in evidence against McDonald.[60] The Supreme Court apparently did not take these two possibilities into consideration when it said that the evidence would not have been available against Washington had the motion been granted. Perhaps the way is still open then for future courts to follow the old rule that a defendant may not complain of the violation of the rights of a co-defendant. The writer suspects, however, that this phase of the *McDonald* decision may lead to confusion in the lower courts and that much judicial time will be consumed in attempting to determine whether the rights of defendants are prejudiced by the denial of his co-defendant's motion. It may possibly lead to the practice of trying defendants separately in such situations, an obviously undesirable result because of the added time and expense involved.

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[58]*E.g.*, Bushouse v. United States, 67 F. 2d 843 (C.C.A. 6th 1933); Holt v. United States, 42 F. 2d 103 (C.C.A. 6th 1930).

[59]In United States v. Lagow, 66 F. Supp. 738 (S.D. N.Y. 1946), the trial judge granted the motion of the corporation to return and suppress the evidence, but said that he wanted it clearly understood that he was not suppressing in favor of the individual, and that as against him the evidence could be subpoenaed.

[60]See the orders in United States v. Olmstead, 7 F. 2d 760 (W.D. Wash. 1925); United States v. Kaplan, 286 Fed. 963 (S.D. Ga. 1923). Rule 41(e) of the Fed. R. Cr. P., 54 Stat. 688 (1940), 18 U.S.C.A. 687 (Supp. 1946) provides: "If the motion is granted the property shall be restored unless *otherwise subject to lawful detention* . . . ." (Italics supplied). The things seized in the McDonald case were contraband and subject to lawful detention. See 22 D.C. Code 1502 (1940); 23 D.C. Code 304 (1940).