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Federal Protection against State Searches and Seizures

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During its next term, the United States Supreme Court must dispose of two cases which involve the issue of whether or not the right to be free from unreasonable searches and seizures, guaranteed through the federal courts by the Fourth Amendment to the Constitution,[1] will be extended to cover state action. The cases are similar in nature, and in each it is claimed that the freedom from unreasonable search and seizure is a fundamental right guaranteed to all citizens by the due process clause of the Fourteenth Amendment.

In *Fong v. Superior Court*,[2] money, guns and other items were taken from the tourist cabin of the petitioners by detectives who suspected Fong and the others of being involved in a burglary.[3] Subsequently, the petitioners were charged with a burglary other than that which the detectives were investigating, and the state seeks to use this evidence to support the charge. Petitioners claim that the arrest was made without probable cause, and seek return of their property before their case goes to trial.[4] The state court denied their petition for return of personal property, without reference to the federal constitutional problem raised by petitioners, and the latter seek a review of the Washington court's adverse decision. In *Wolf v. People of Colorado*,[5] the record books of a physician were seized by officers who entered his office without a warrant and names taken from the books were used to obtain witnesses and ultimately a conviction against the physician for abortion.[6] The conviction is appealed on the ground that the evidence was illegally obtained and thus could not be used at the trial.

It is clear from a consideration of the facts in both cases that the conduct of the police officers would transgress the rules laid down by the United States Supreme Court to test the reasonableness of searches by federal agents.[7] However, in order to reach the merits of the cases on appeal, the Supreme Court would have to decide that the Federal Con-

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1 "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2 ___Wash.___, 188 P. (2d) 125 (1948).

3 The detectives who made the arrest suspected the relator Fong of being involved in a burglary, but had obtained no warrant for his arrest. The burglary for which Fong and two others were subsequently indicted occurred the night before the arrest and had no relation to the previous burglary which the detectives were investigating.

4 Fong also filed a petition for the suppression of the evidence thus obtained, but no appeal was carried when the petition was denied. The appeal in this case is from an order of the Washington court denying the petition for the return of personal property, which would accomplish the same result as a suppression order.

5 ___ Colo. ___, 187 P. (2d) 926 (1947).

6 The records were seized in the absence of the physician and used to contact women whose names appeared therein. These women were subsequently used as witnesses in the abortion prosecution.

7 In the *Fong* case, the arrest upon which the search was predicated was made without probable cause, as defined by the U.S. Supreme Court. United States v. Leftkowitz, 285 U.S. 452 (1932); Johnson v. United States, 332 U.S. 10 (1947). See Ely, Probable Cause in Connection with Applications for Search Warrants (1928) 13 St. Louis L. Rev. 101. In the Wolf case, although the officers apparently had probable cause, their failure to procure a search warrant where the opportunity was open would render the seizure unreasonable under the rules laid down by the Supreme Court. Trupiano v. United States, 334 U.S. 699 (1948).

stitution protects the petitioners against an unreasonable search and seizure. If this decision were reached by the Court then the petitioners in the Washington case will have succeeded, since Washington follows the federal rule[8] in holding that evidence illegally obtained cannot be used at the trial. The Colorado case, however, cannot be disposed of on this issue. Colorado adheres to the majority rule that matter obtained through an unlawful search and seizure may nevertheless be used as evidence to convict the accused.[9] Even were the Supreme Court to decide that the protection of the Fourth Amendment is afforded to the states through the due process clause of the Fourteenth, they would still have to make the federal rule relating to the suppression of evidence applicable to state courts in order to reverse the Colorado court's decision.

Considering the main issue involved, which concerns the incorporation of the Fourth Amendment's protection into the Fourteenth, it must be noted at the outset that this question has never been squarely before the Supreme Court. In one case which raised this issue, *Adams v. New York*,[10] the Court held that since the search and seizure were reasonable, there was no occasion to consider the constitutional problem.[11] The same conclusion was reached in *Consolidated Rendering Co. v. Vermont*.[12] In several other pertinent cases, the Court has held that the protection of the Fourth Amendment does not extend to cover state action, but in none of these cases was the argument made that the same protection is afforded as "due process" by the Fourteenth Amendment.[13]

The rules for applying the provisions of the Bill of Rights through the due process clause have been well established by that famous trilogy of cases, *Twining v. New Jersey*,[14] *Palko v. Connecticut*,[15] and *Adamson v. California*,[16] in the second one of which the Court stated the due process requirements in broad terms, noting that the claimed right or freedom must be "implicit in the concept of ordered liberty,"[17] or "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[18] In accord with this line of reasoning the

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8 The federal rule is followed by 18 states. For compilation of cases, see Annotation, Suppression of Evidence Unlawfully Obtained, 150 A.L.R. 566 (1944).

9 Massantonio v. People, 77 Colo. 392, 236 P. 1019 (1925). This rule is followed by 28 states. See note 8, *supra*.

10 192 U.S. 585 (1904).

11 The court assumed the contention of appellant, that the fourth amendment's protection was available against state action, and then considered the merits of the search and seizure issue.

12 207 U.S. 541 (1908).

13 Weeks v. United States, 232 U.S. 383 (1914). The lower federal courts have consistently ruled that the fourth amendment is not applicable, but without any consideration of the fourteenth. Kanellos v. United States, 282 Fed. 461 (C.C.A. 4th, 1922); Robinson v. United States, 292 Fed. 683 (C.C.A. 9th, 1923). In Hague v. C.I.O., 307 U.S. 496 (1939), the court also held that there was no occasion to decide the question. The court below had held that the fourth amendment's protection was guaranteed by the privileges and immunities clause of the fourteenth amendment. Hague v. CIO, 101 F. (2d) 787 (C.C.A. 3rd, 1939). This argument has been expressly repudiated by the Supreme Court, first in the *Slaughterhouse* Cases, 16 Wall. (U.S.) 36 (1873), and later in Twining v. New Jersey, 211 U.S. 78 (1908). For a complete discussion of the development of the privileges and immunities clause, see Konvitz. The Constitution and Civil Rights (1st ed. 1947) 29-47.

14 211 U.S. 78 (1908).

15 302 U.S. 319 (1937).

16 332 U. S. 46 (1946).

17 Palko v. Connecticut, 302 U.S. 319 (1937).

18 Palko v. Connecticut, 302 U.S. 319 (1937).

Court has held that rights guaranteed by the Fifth, Sixth, and Seventh amendments do not meet these requirements,[19] but it has seen fit to include in the due process interpretation freedoms of press, speech, religion and assembly.[20] It is certainly possible to argue soundly and validly that the freedom from unreasonable search and seizure should be placed on a par with these other freedoms.[21] The Court itself has stated many times that it is a fundamental freedom which is vitally necessary to our free form of government.[22] Indeed, its history as a right sought in the protection of citizens against the arbitrary action of government can be traced back to the time of the Magna Charta.[23] There is certainly an excellent prospect that the Supreme Court will find that this freedom fits the doctrines previously laid down by it in the *Twining* and *Palko* cases.[24]

A further argument in support of this view can be made by pointing out that the Fourth Amendment is designed to protect the citizen against the arbitrary action of government police officials. As such, it can better be grouped with the freedoms guaranteed by the First Amendment—freedoms which have been read into the due process clause. The Fourth Amendment cannot be grouped with the Fifth, Sixth, and Seventh, since they are protective guarantees against the arbitrary action of the judiciary,[25] and the right to be free from unreasonable searches and seizures cannot logically be termed a procedural matter which should be left to the discretion of the state courts.

Even assuming, however, that the Court will thus extend the protection of the Fourth Amendment, this will still not dispose of the Colorado case. The further question arises as to whether or not the Supreme Court will hold that the federal rule of exclusion of evidence illegally obtained will be applied to all states. An affirmative answer might be indicated by those federal cases which hold that the protection of the Fourth Amendment would be illusory if not buttressed by the rule of exclusion.[26] On the other hand, the court has been disinclined to bind the

19 Double-jeopardy, Palko v. Connecticut, 302 U.S. 319 (1937); Self-incrimination, Twining v. New Jersey, 211 U.S. 78 (1908); grand jury indictment, Hurtado v. California, 110 U.S. 516 (1883); indictment and trial by jury, Maxwell v. Dow, 176 U.S. 581 (1899).

20 Freedom of speech, De Jonge v. Oregon, 299 U.S. 353 (1936); freedom of press, Grosjean v. American Press Co., 297 U.S. 233 (1935); Near v. Minnesota, 283 U.S. 697 (1930); freedom of religion, Hamilton v. Regents, 293 U.S. 245 (1934); freedom of assembly, De Jonge v. Oregon, 299 U.S. 353 (1936).

21 In Harris v. United States, 331 U.S. 163 (1946), the court stated: "How can there be freedom of thought or freedom of speech or freedom of religion if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature."

22 Olmstead v. United States, 277 U.S. 438, 478, 479 (1927); Interstate Commerce Commission v. Brimson, 154 U.S. 447, 478, 479 (1893).

23 For origin of the requirement of a search warrant, see Fraenkel, Concerning Searches and Seizures (1920) 34 Harv. L. Rev. 361. Lord Coke stated that the improper use of search warrants is against the Magna Charta. Institutes, Bk. 4, pp. 176, 177 cited in People ex rel. Simpson v. Kempner, 208 N.Y. 16, 101 N.E. 794 (1913).

24 See notes 17 and 18, *supra*.

25 e.g. fifth amendment: double jeopardy, self-incrimination: sixth amendment: right to trial by jury in criminal cases; seventh amendment: right to trial by jury in civil cases.

26 Weeks v. United States, 232 U.S. 383, 393 (1914); Silverthorne v. United States, 251 U.S. 385, 391 (1919).