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Evidence--Criminal Law--Search and Seizure Not Valid Where Search Warrant Could Have Been Obtained (Trupiano v. United States, 92 L. Ed. 1198 (1948))

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cross the border of proper regulation into the field of free speech. While the right of free speech is not absolute, any restriction of the right must not be substantial,[5] and must be aimed at the correction of a definite evil which Congress believes to be imminent.[6] It is not for the court to say whether Congress acted wisely, but merely whether it has the power so to act.[7] Where a statute is reasonably susceptible of two interpretations, the court must adopt that construction which will save the statute from constitutional infirmity.[8] In determining the constitutionality of this statute when such issue is squarely presented, the questions to be decided will be: (1) is the new phraseology expansive, (2) does it substantially abridge freedom of speech, and (3) is it reasonable?

J. F. W.

EVIDENCE—CRIMINAL LAW—SEARCH AND SEIZURE NOT VALID WHERE SEARCH WARRANT COULD HAVE BEEN OBTAINED.—In January, 1946, agents of the Alcoholic Tax Unit of the Bureau of Internal Revenue were informed by one Kell that petitioners were seeking to lease a part of his farm with the intention of erecting a building thereon and that he suspected their purpose was to build and operate an illegal still. The federal agents instructed Kell to accept the proposition and assigned one of their men to work on the farm in the disguise of a farm hand. This agent kept the Government currently informed as to every detail of petitioners' activities during the month prior to the arrest. When federal agents approached the premises, they observed, through an open door, petitioner Antoniole apparently in the process of operating the still and immediately entered and arrested him. The agents then proceeded to seize the equipment and all other tangible evidence of the illegal distillery. The agents had neither a search warrant nor warrants of arrest. Petitioners were charged with various violations arising out of their ownership and operation of the distillery, but before being indicted made a motion to exclude and suppress the evidence secured by the agents, alleging that it had been obtained by an illegal seizure. The United States Circuit Court of Appeals for the Third District affirmed an order of the District Court of the United States for the District of New Jersey denying this motion. *Held,* reversed on the ground that since there was ample opportunity to obtain a search warrant and no need for summary seizure, the search was not jus-

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[5] Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N. E. 2d 115 (1946).

[6] Whitney v. California, 274 U. S. 357, 71 L. ed. 1095 (1927).

[7] United Public Workers of America v. Mitchell, 330 U. S. 75, 91 L. ed. 754 (1947).

[8] United States v. Delaware & H. Co., 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849 (1909).

tifiable as an incident of legal arrest. *Trupiano v. United States,* — U. S. —, 92 L. ed. 1198 (1948).[1]

In arriving at its conclusion, the Court conceded that Antoniole had been validly arrested, recognizing the well established rule that law enforcement officers have a right to arrest without a warrant for a felony committed in their presence.[2] The Court stated that the validity of such an arrest is not obliterated by the mere fact that there was sufficient time to procure a warrant of arrest. An entirely different conclusion was reached with regard to search warrants. The Court did not adhere to the principle laid down by a long line of cases that when a valid arrest has been made, the arresting officer has the right to seize all evidence of crime[3] within sight,[4] but instead restricted that right to situations where there has not been ample time to obtain a search warrant. Since the federal agents had been fully aware of petitioners' illegal activities for several months prior to the raid, the Court felt that they had had more than ample opportunity to procure a search warrant. In *Harris v. United States,*[5] decided one year earlier, the Court held that when a man has been validly arrested in his home, the arresting officers may search his entire home, even though without a search warrant, provided that the scope of their search does not extend beyond that required for the object being sought. Any article ordinarily subject to seizure[6] could be seized and made the basis of a charge against the person arrested, even though it was not the object originally sought and even though those conducting the search had not the slightest notion that the person arrested possessed the same.[7] The practical result of this case was to make an arrest in one's home far more effective than a search warrant, and thereby diminished the protection that a man's home had previously afforded him. The decision was met with a storm of disapproval and several groups even went so far as to petition the Supreme Court to reverse itself.[8] Nor were the writers of legal literature lax in adding their criticism.[9] Despite these protesta-

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[1] *Reversing in part* 163 F. 2d 828 (C. C. A. 3d 1947). Petitioners had also moved to have the evidence returned to them and the judgment denying this motion was affirmed in this decision.

[2] *See* Carroll v. United States, 267 U. S. 132, 156, 157, 69 L. ed. 543, 552, 553 (1925).

[3] Such evidence is generally limited to instrumentalities of crime, contraband materials, weapons and fruits of crime.

[4] Harris v. United States, 331 U. S. 145, 150, 151, 91 L. ed. 1399, 1405, 1406 (1947), and cases cited in note 12 therein.

[5] 331 U. S. 145, 91 L. ed. 1399 (1947).

[6] See note 3 *supra.*

[7] Formerly, a search made in connection with an arrest was limited to the person of the one arrested and objects that were visible and accessible and within his immediate custody. United States v. Lefkowitz, 285 U. S. 452, 76 L. ed. 877 (1932); Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374 (1931).

[8] DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 263 n. a (1948).

[9] Kizer, *The Fourth Amendment to the Federal Constitution—The Harris*

tions, it could hardly have been expected that there would be any immediate change in the policy of the Supreme Court. Yet, this is precisely the result brought about by the instant case. Though declining to comment on what effect its ruling would have on the *Harris* decision and pointing out that the circumstances were different in that case, the Court nevertheless stated that when there again arose a situation similar to the one that existed in the *Harris* case it would have to be tested by the present ruling that "search warrants are to be obtained and used wherever reasonably practicable." [10] While the *Harris* decision has not been overruled, it has, in effect, been greatly modified. A valid arrest in one's home will no longer entitle the arresting officer to make a search of the home; now it must also be shown that no opportunity existed to obtain a search warrant. The Court established a new principle of law and in so doing was compelled to go well out of its way to avoid the precedent of prior decisions. Four cases were cited as a basis for the proposition that law enforcement agents must secure and use search warrants wherever reasonably practicable.[11] However, not one of these cases involved a situation where visible and accessible articles immediately in the custody of the offender had been seized pursuant to a valid arrest and for that reason they are completely distinguishable from the present case. The Court stated that what would have been an illegal seizure should not be made legal by the fortuitous circumstance of discovering some one in the act of committing a felony.

It is believed that this decision falls well within the purpose of the Fourth Amendment to the Federal Constitution [12] in protecting individuals against unreasonable search, and that the Court was justified in veering from the course pointed out by the *Harris* decision. While this decision may afford an avenue of escape for those guilty of crime it must be remembered that whenever such a result is brought about, it is due entirely to the negligence of the Government officials in failing to obtain a search warrant. In the absence of such negligence, there can be no harm. In any event, it is better to be overzealous in protecting the individual's right to privacy than to go to the other extreme and to allow it to be invaded and partially destroyed by decisions such as the one in the *Harris* case.

T. A. B.

Case, 7 LAW. GUILD REV. 122 (1947); Lunderman, *Constitutional Law—Search and Seizure*, 5 NAT. B. J. 343 (1947); 23 N. Y. U. L. Q. REV. 186 (1948); 36 ILL. B. J. 140 (1947); 22 ST. JOHN'S L. REV. 167 (1947).

[10] — U. S. —, 92 L. ed. at 1204.

[11] Johnson v. United States, 333 U. S. 10, 92 L. ed. 323 (1948); Taylor v. United States, 286 U. S. 1, 76 L. ed. 951 (1932); Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374 (1931); Carroll v. United States, 267 U. S. 132, 69 L. ed. 543 (1925).

[12] U. S. CONST. AMEND. IV provides: "The right of the people to be secure . . . , 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."