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Article 14

Constitutional Law - Protection Against Unreasonable Searches and Seizures

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rule in the corporate field? If so, need for ratification would be dispensed with; third parties could safely deal with delegates in the first instance; and delay, the thorn in the side of modern business, could be minimized.

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Constitutional Law — Protection Against Unreasonable Searches and Seizures — The defendant was suspected of unlawfully receiving and concealing narcotics. He was apprehended by local and federal officers who did not have a warrant for his arrest or a search warrant. At the time of the arrest the defendant swallowed two capsules of heroin in order that the heroin would not be found in his possession. He was then *forced* to submit to a "stomach pump treatment" so that the officers could obtain the heroin from his stomach. A federal officer took part in the entire proceeding. The defendant was then indicted for knowingly and unlawfully receiving and concealing two grains of heroin. *Held:* Forcing a person to submit to a stomach pump treatment is an unreasonable search in violation of the Fourth Amendment.[1] Any evidence obtained by such a search is inadmissible. *United States v. Willis, 85 F. Supp. 745 (S. D. California 1949).*

The question raised by this decision is: to what extent will the courts protect an individual against compulsion of physical evidence both *of* and *from* the body? The answer to this question will depend upon what right an individual has to such protection. The principal case bases this right on a liberal interpretation of the Fourth Amendment. Since the Fourth Amendment is a prohibition against only those searches and seizures that are unreasonable, the protection of the individual hinges upon what is meant by "unreasonable". The courts say that the question of unreasonableness is relative and each case is to be decided on its own facts and circumstances.[2] The search may be unreasonable if it is out of proportion to the end sought.[3] The term unreasonable cannot, therefore, be precisely defined. However, the general trend in the United States Supreme Court is to extend or broaden the power of federal authorities to search for and seize goods *without a search warrant* or, stating this trend in other words, the Supreme Court

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to say that the power to fill up the details . . . is not legislative power." (italics ours).

[1] U.S. Const. Amend. IV provides: "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 warrant 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] United States v. Costner, 153 F. (2d) 23, 26 (C.C.A. 6th 1946).

[3] Zimmermann v. Wilson, 105 F. (2d) 583, 585 (C.C.A. 3rd 1939).

has a tendency to construe the Fourth Amendment in a limited or narrow sense.[4] As a result of this trend it is readily seen that protection against unreasonable searches and seizures is only granted in the more extreme cases.

In the federal courts the accused is protected under the Fourth Amendment against unreasonable search and seizure once the court decides that the search is unreasonable and that the Federal Government participated in the search or ratified it. This result follows since the federal courts still adhere to the Federal Exclusion Rule which was originated in the case of *Boyd v. United States*[5] and was further developed in *Weeks v. United States.*[6] The rule is that evidence obtained through a violation of the Federal Constitution is inadmissible if such evidence is obtained by[7] or for[8] the Federal Government. However, the rule in the *Boyd* and *Weeks* cases does not apply if the evidence was unlawfully obtained by a private person or a state authority for their own use and then subsequently given to the Federal Government.[9] Thirty states have rejected the rule of the *Weeks* case.[10] These states hold that illegally obtained evidence is admissible in court. In a stomach pump case the thirty states might agree with the principal case that the search

[4] In regard to the power to search without a search warrant as incident to lawful arrest, the officer originally only had the authority to search the person of the party arrested in order to discover and seize the fruits or evidence of the crime. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). This right was then extended to include the power to search the premises, other than a home, that are under the control of the party at the place of arrest. Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925). The Court then extended this privilege to the power to search a movable vehicle upon probable cause on the theory that such a vehicle could easily be moved from the jurisdiction where the search warrant would be sought. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The broadest extension of this power to search without a warrant was granted in Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947). There the court said it is permissible to search the home of the party arrested as incident to lawful arrest if such arrest is made in the home of the party so arrested. Finally, the rule of the Harris case was extended to include the place of business of the party if he is arrested there. United States v. Rabinowitz, 70 S.Ct. 430, 94 L.Ed. 407 (1950). The Rabinowitz case also represents another rather extreme view in this matter. The Court there held that the relevant test under the Fourth Amendment is not whether it is reasonable to secure a search warrant, but whether the search itself is reasonable. Thus the practicability of first obtaining a search warrant is no longer material in these unreasonable search and seizure cases.

[5] 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

[6] 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

[7] *ibid* at 398.

[8] Ward v. United States, 96 F. (2d) 189 (C.C.A. 5th 1938).

[9] Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

[10] Wolf v. Colorado, 338 U.S. 25, 29 69 S.Ct. 1359, 1362 (1949). *see* Table I in appendix on the present position of forty-seven states in regard to the *Weeks* doctrine.

was unreasonable, but such a finding would not preclude those states from introducing the heroin as evidence.

In the case of *Wolf v. Colorado*[11] an attempt was made to secure the protection of the Fourth and Fifth[12] Amendments as against state action on the ground that the due process clause of the Fourteenth[13] Amendment forbids the admission of evidence that is obtained in violation of the Constitution. In that case the Supreme Court ruled that, although the exclusion of such evidence may be an effective way of deterring unreasonable searches, the Court could not find that states that admit illegally obtained evidence violate due process. It has also been held that the privilege against self-incrimination is not a part of the right to a fair trial that is protected by the due process clause of the Fourteenth Amendment.[14]

Attempts have been previously made under the Fifth Amendment[15] to seek protection against stomach pump treatment and similar acts of obtaining evidence by physical compulsion. The majority view holds that this provision of the Fifth Amendment is a protection against oral or written testimonial compulsion only, rather than against all evidence, testimonial or physical.[16] In line with this view, the majority rule is that forcing the defendant to exhibit or use his body as evidence is not a violation of the self-incrimination privilege since this is not testimony *about* the body, but actual *use of* the body itself. Therefore, measuring the defendant, photographing him, using his clothes for identification purposes, requiring a medical examination, blood tests, urinalysis tests and forcing the defendant to submit to the taking of his fingerprints are accepted by the courts as valid and proper acts of the authorities.[17]

In recent cases similar to the principal case, different courts have found various reasons for holding that the search involved was valid or *excusable*. In the case of *Ash v. State*[18] the defendant swallowed two stolen rings to avoid being caught with them. The officers forced the defendant to take an enema. This caused the defendant to pass the rings against his will. The Texas court held the act of swallowing the rings was a felony committed in the presence of the officers. Therefore it was permissible to force the defendant to give up the rings. In

[11] See note 10, *supra*.
[12] Insofar as pertinent, U.S. Const. Amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
[13] Insofar as pertinent, U.S. Const. Amend. XIV, section 1 provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."
[14] Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947).
[15] See note 12, *supra*.
[16] Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910).
[17] See Wigmore on Evidence, vol. 8, sec. 2265 (1940).
[18] 139 Tex. Crim. App. 420, 141 S.W. (2d) 341 (1940).

the case of *People v. One 1941 Mercury Sedan*[19] the defendant, when apprehended, swallowed a package of marihuana. He was given the stomach pump treatment. The California court held that illegally obtained evidence is admissible. Furthermore, such evidence was not a violation of the self-incrimination immunity since that privilege only protects an individual from testimonial compulsion. Finally in the case of *In Re Guzzardi*[20] morphine was removed from the stomach of the defendant by means of the stomach pump treatment. The morphine was used to convict the defendant. A federal court held that the search was unreasonable, but that the defendant had waived his constitutional privilege by giving his written consent to the treatment. And since the federal officer did not participate in the proceedings, the evidence was admissible.

In summation the writer feels that the only adequate protection the accused will receive against forcible submission to stomach pump treatments is under the Fourth Amendment in the federal courts and also in the courts of the fourteen states that adopt the rule of he *Weeks* case. The protection granted in these jurisdictions seems more complete and certainly more adequate than any protection granted in these cases under the Fifth Amendment in any jurisdiction. The writer further feels that an adverse decision in the principal case or the result obtained in *Ash v. State*[21] is one step closer to the justification of the use of a truth serum. This in turn would revert the present judicial system, in a scientific manner, to the very evils that led to the creation of the Fourth and Fifth Amendments, namely the rack and governmental (royal) tyranny.

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[19] 74 Calif. App. (2d) 279, 168 P. (2d) 443 (1946).
[20] 84 F. Supp. 294 (N.D. Texas 1949).
[21] See note 18, *supra*.