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Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court*

By E. G. Trimble**

The first important case involving the Fourth Amendment which came before the Supreme Court under the prohibition Act was Carroll v. United States.¹ It was especially important because it involved the application of the Fourth Amendment to the automobile. The facts of the case were that prohibition agents on December 15, 1921, while patrolling the highway between Grand Rapids and Detroit—the latter city a notorious source of supply of liquor for the “bootlegging” business—passed a car containing John Carroll, his brother, and others, coming from the direction of Detroit. The agents had heard that the Carroll brothers were “bootleggers”. In fact, on a previous occasion the agents had negotiated with the Carroll brothers to purchase some liquor, but delivery was not made. When on the night of December 15th they saw a car which they recognized as belonging to the Carrolls, they turned and followed it, overtook it, and stopped and searched it. On finding liquor concealed in the seat they arrested the occupants and seized the liquor and car. The agents had no warrant to arrest the men or to search the car. The occupants were tried and convicted, and appealed to the Supreme Court on the ground that the evidence was obtained in violation of the Fourth Amendment and hence could not be used against them. Counsel for defendants contended that the true rule was that officers could arrest without a warrant for a misdemeanor—the offense involved here—only when committed in their presence. This meant that the offense had to be discoverable without a search, which was not possible in this case.

¹ This is the second of three installments of this article. The first installment appeared in the January, 1953 issue of this Journal.

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¹ 267 U. S. 133 (1924). Immediately prior to this case the Court had held in Hester v. U. S., 265 U. S. 57 (1924), a “moonshine” case, that the Fourth Amendment did not apply to the open field.
Chief Justice Taft wrote the opinion for the majority upholding the conviction, with Justices McReynolds and Sutherland dissenting. The Chief Justice quoted Section 26, Title II of the National Prohibition Act to the effect that:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any... automobile... it shall be his duty to seize any and all intoxicating liquors found therein... and... arrest any person in charge thereof."

He then quoted Section 6 of an Act Supplemental to the National Prohibition Act which provided that any officer who, while engaged in the enforcement of the Prohibition Act,

"Shall search any private dwelling without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without probable cause search any other building or property shall be guilty of a misdemeanor."²

Penalties were provided. The Chief Justice, in order to arrive at an interpretation of this latter section, reviewed its legislative history. The Senate had adopted the Supplemental Act and added to it an amendment known as the Stanley Amendment. This amendment made it a misdemeanor for any officer to "search or attempt to search the property or premises of any person without previously securing a search warrant". The House Judiciary Committee objected to this and offered a substitute. In its report the Committee objected to the broad language of the Stanley Amendment because it prohibited any search or attempt to search "any property or premises without a search warrant". The report continued, "there are on the statutes books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeably to the constitution search may in many cases be legally made without a warrant." The amendment would, it said, "make it impossible to stop the rum-running automobiles engaged in like illegal traffic," for "before a warrant could be secured the automobile would be beyond the

² Carroll v. United States, 267 U. S. 133, 144 (1924).
³ Id. at 146.
reach of the officer with its load of illegal liquor disposed of.” 3
Section 6 of the law was the result of the work of a Conference
Committee reconciling the Senate and House versions. This sec-
tion, the Chief Justice said, “left the way open for searching an
automobile, or vehicle of transportation, without a warrant, if the
search was not malicious or without probable cause.” The intent
of Congress “to make a distinction between the necessity for a
search warrant in the searching of a private dwelling and in that
of automobiles and other road vehicles in the enforcement of the
Prohibition Act is thus clearly established,” 4 he concluded.

He then asked if such a distinction was consistent with the
Fourth Amendment, and said that it was. To establish this he
reviewed the previous decisions of the Court interpreting the
Amendment and showed that none of these decisions involved
the exact question here raised. But he continued by saying that

“On reason and authority the true rule is that if the search
and seizure without a warrant are made upon probable
cause, that is, upon a belief, reasonably arising out of the
circumstances known to the seizing officer, that an auto-
mobile . . . contains that which by law is subject to seizure
and destruction, the search and seizure are valid.” 5

The Amendment, he said, was “to be construed in the light of
what was deemed an unreasonable search and seizure when it
was adopted, and in a manner which will conserve public interests
as well as the interests and rights of individual citizens.” He dis-
cussed what the Amendment had meant when adopted, and, al-
though he recognized that the Boyd 6 case did not turn on the
question of the reasonableness of a search without a warrant, he
quoted from the opinion to the effect that “search for and seizure
of stolen or forfeited goods or goods liable to duties and con-
cealed to avoid the payment thereof . . . are totally different from
search and seizure of a man’s private books and papers” to be
used against him which was the question in the Boyd case. This
quotation was used for “the purpose of showing the principle on
which the Fourth Amendment proceeds.” This would seem to be

4 Id. at 147.
5 Id. at 149.
6 For discussion see the first installment of this article in 41 Ky. L. J. 196
(1953).
relevant only because illegally transported liquor was subject to forfeiture.

He then referred to a number of laws passed by Congress after the Amendment was adopted which authorized search and seizure without a warrant and which were referred to in the Boyd Case. These laws, five in number, were passed between 1789 and 1834, and all had to do with the enforcement of revenue laws or the suppression of the selling of liquor to the Indian Tribes. They permitted revenue officers or Indian agents to search boats, wagons, stores, vehicles, etc., without a warrant on "suspicion" or when there was "probable cause" to believe that there were concealed goods subject to duty or that were otherwise contraband. These laws, he said, showed that the Fourth Amendment had been "construed practically since the beginning of the Government as recognizing a necessary difference between a search of a store, dwelling houses or other structures in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."7

The Chief Justice then addressed himself to the question as to just what circumstances justified a search of vehicles without a warrant. His conclusion was that it could be done on "probable cause" and cited Section 970 of the Revised Statutes. This section provided that:

"When in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress it appears to the court that there was reasonable cause of seizure, the Court shall cause a proper certificate thereof to be entered, and the claimant shall not in such case be entitled to costs, nor shall the person who made the seizure . . . be liable to suit or judgment on account of such suit or prosecution."

"It follows from this," he said, "that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation

7 Carroll v. United States, 267 U. S. 133, 153 (1924).
and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause." This, he concluded, furnished the "line of distinction between legal and illegal seizure of liquor in transport in vehicles," and was a "reasonable distinction" that "fulfills the guaranty of the Fourth Amendment."

He then considered the argument of the defense that if the search of the car resulted in the finding of liquor and led to the arrest of the driver the right of seizure be limited to the common law right of arrest without a warrant for a misdemeanor. (Under the Prohibition Act the first two offenses of transporting liquor were considered misdemeanors, while the third offense was a felony. This case was a first offense for the defendants.) The Chief Justice said the common law rule was that "a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." He restated the rule and made it more accurate by saying, "In cases of misdemeanor, a peace officer ... has at common law no power of arresting without a warrant, except when a breach of the peace has been committed in his presence. . . ."9

The defense had argued that "in his presence" meant that the officer must be able to detect the offense by one of his senses. This interpretation, if accepted, together with the argument that the right of seizure was limited by right of arrest would have vitiated the whole proceeding (unless of course this could be considered a breach of peace committed in the officer's presence). But the Chief Justice pointed out that under this interpretation, liquor, if being carried by anyone for the third time, could be seized on information other than the senses; while if it was a first offense for the one transporting the liquor it could not be seized unless the officer could detect the presence of the liquor by his senses as the car passed. This interpretation, he thought, would be a very narrow one, and such a nice distinction was not applicable in the present case. "The right to search and the validity of the seizure are not dependent," he said, "on the right to arrest,"

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8 Id. at 155.
9 Id. at 157.
but "are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offended against the law."\(^\text{10}\)

In conclusion, he took up the question of whether there was probable cause for the search and seizure. He took judicial notice of the fact that Detroit was one of the most active centers for introducing liquor illegally into the United States, and that Grand Rapids was 152 miles from Detroit. He defined "probable cause" as the existence of "facts and circumstances" which "warrant a man of reasonable caution" in believing that an offense has been committed. He found this situation to have existed and said that the officers were entitled to use their reasoning faculties upon the facts of which they had previous knowledge.

This opinion has been severely criticized.\(^\text{11}\) The Court in order to uphold conviction had to show that the officers had authority to search the car. This authority was found in Section 6 which made it a misdemeanor for an officer to search a dwelling without a warrant, or other property maliciously and without probable cause without a warrant. Did this clearly show that Congress meant to change the common law rule and permit search of an automobile without a warrant? Certainly there was no clear positive grant of authority to search cars without a warrant; and without statutory authority there is no power to arrest for a misdemeanor committed out of the presence of the officer, according to the Chief Justice's own statement of the common law rule. If Congress had intended to give officers authority to search cars without a warrant it could have, and no doubt would have said so in a positive way. Even then there might have been a question as to whether Congress could constitutionally give such power in view of the Fourth Amendment, but as Justice McReynolds pointed out in his dissent in this case, Congress had not attempted to do so.

Nor do the acts of Congress authorizing customs officials and Indian agents to search and seize on suspicion and on probable cause prove the Chief Justice's assertion that on "reason and authority" vehicles generally could be searched without a war-

\(^{10}\) Id. at 158.
\(^{11}\) See Black, ILL STARRRED PROHIBITION CASES (Boston: The Gorham Press, 1931), Chapter I.
rant. Again, as Justice McReynolds pointed out, these statutes were specific in conferring authority, leaving nothing to be inferred. And the enforcement of revenue laws was said by the Court in the *Boyd* case to be exceptions to the rule embodied in the Fourth Amendment. What Congress had done in regard to the enforcement of prohibition was entirely consistent with the intention of leaving the law as it was. The only difference between searching a house and an automobile as far as Section 6 was concerned was the fact that the words "maliciously and without probable cause" were added in regard to the search of property other than a building. But the words "without probable cause" were by the Fourth Amendment itself made applicable to the search of "person, houses, papers and effects"; so, actually, "maliciously" was the only new element applicable to the search of vehicles. It may well have been that Congress used this word, not as a method of granting authority to search without a warrant as was assumed by the Court, but merely because Congress realized that the search of vehicles lent itself much more readily to "malicious" use than did the search of a dwelling. Criminal statutes are to be strictly construed and the Fourth Amendment, the Court had said, was to be liberally construed by the courts to protect the rights guaranteed by it. It would seem that neither of these rules was followed here.

The Chief Justice cited Section 26 of the Prohibition Act which said that whenever an officer "discovers" liquor being transported he could seize it. He interpreted this as not limiting the officer to what he learned through his senses but as permitting him to use his reasoning powers. It should be pointed out that this section said nothing about the right to "search" as a preliminary to "seizure." If officers were to seize only when they "discovered" a violation, it does not follow that they could search on suspicion or probable cause, and then seize what they found. The legality of a search is not to be determined by what is found, but the search must be legal from the beginning. He no doubt was correct in taking the view that the right of seizure was not dependent on the making of a valid arrest, but that the right to arrest resulted

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12 See first installment of this article in 41 Ky. L. J. 196 (1953).
13 For discussion of *Boyd v. United States*, see 41 Ky. L. J. 196, 201 (1953).
from finding the contraband liquor being transported. But if the
officer found the contraband goods by illegal methods, neither the
seizure nor the arrest would be justified. Since the statute author-
ized the seizure only (and not the search), and then only when
the officer “discovered” the illegal transportation, the basic ques-
tion was the meaning of the word “discovered”. The Court inter-
preted it to mean to learn by any reasonable process, which of
course meant what the Court considered reasonable. It is interest-
ing to note that this identical question was passed upon by the
Supreme Court of Minnesota. The Minnesota statute said that
“whenever any peace officer shall discover any person in the act
of transporting liquor within the state... such officer shall seize,”
etc. The Minnesota Court said, “the Statute gives authority to
seize but not to search and an officer acting under it is authorized
to seize only what he may discover without the unreasonable
search prohibited by the Constitution.” This interpretation
would seem to be more in keeping with the principles of inter-
preting the Fourth Amendment followed by the Court in the
Boyd case.

Nor was the Chief Justice entirely clear or accurate in his
statement and application of the common law rule as to arrest
without a warrant for a misdemeanor not committed in an officer’s
presence. His first statement said that the usual rule was that a
police officer “may only arrest without a warrant one guilty of a
misdemeanor if committed in his presence.” This is broad enough
to cover all misdemeanors, but in his next sentence he said:

“The rule is sometimes expressed as follows: ‘In cases of mis-
demeanor, a peace officer like a private person, has at com-
mon law no power of arresting without a warrant except
when a breach of peace has been committed in his presence or
there is reasonable ground for supposing that a breach of
peace is about to be committed or renewed in his pres-
ence.’ The reason for arrest for misdemeanor without a war-
rant at common law was promptly to suppress breaches of the
peace.”

35 State v. Pluth, 157 Minn. 116, 195 N.W. 189 (1923), quoted in Black op.
cit. supra, note 11, at 41.
This, it would seem, is the correct statement of the original common law rule, but there is conflict of authority on this point.\textsuperscript{17} But in this case there was no question of a breach of peace. The defendants were peacefully driving down the highway. Their arrest could not, therefore, be justified under the common law rule, even if this misdemeanor had been committed in the officer's presence.

Furthermore, the Chief Justice's use of the term "in his presence" is subject to serious question. The term seems generally to have been interpreted to mean in the officer's physical presence, that is, that the officer must be able to see or hear or acquire knowledge by some of his senses.\textsuperscript{18}

But he said officers were permitted to use "their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants." This would seem clearly to defeat the purpose of the rule restricting an officer's right to arrest without a warrant to misdemeanors committed in his presence, for an officer might frequently acquire information about offenses committed out of his presence. The Chief Justice ruled out restricting an officer to his physical senses by pointing out that under the Prohibition Act, which made the first two offenses misdemeanors and the third a felony, the officer could, if physical presence was used, arrest for a third offense on information other than that acquired through his senses; while for the first two offenses he would be restricted to information gained through his senses. He thought this quite an unsatisfactory rule when the forfeiture of the liquor and car was the object and not the arrest of the driver of the car. There may be some force in this argument but the responsibility would seem to be with Congress, not with the courts.

The reliance placed by the Chief Justice on Section 970 of the Revised Statutes seems also to have been improperly placed. This section provided legal immunity for any officer who seized property on "probable cause" if it developed that his actions were mistakenly taken. This section of course did not confer or attempt

\textsuperscript{17} See discussion on this point in Black, \textit{op. cit.}, supra note 11, at 30-32; but for conflicting authority see \textit{Restatement, Criminal Procedure}, Comments to Sec. 21 (1931).

\textsuperscript{18} See \textit{Restatement, Criminal Procedure}, Comments to Sec. 21 (1931).
to confer authority to search or seize without a warrant, and the
immunity was available whether the officer acted with or without
a warrant. It seems clearly intended to protect an officer who
acted in good faith, and furnished no test for the legality of a
seizure.

The decision might conceivably be considered sound as a
proper adjustment of the Fourth Amendment to modern condi-
tions, but that the Court took liberties with previous rules of law
can hardly admit of doubt.19

In United States v. Lee20 the Court applied the ruling laid
down in the Carroll case to a vessel seized on the high seas. The
Coast Guard had stopped an American vessel beyond the 12-mile
limit, thrown a search light on it, and, detecting what was thought
to be liquor, brought it to port where it was searched, the liquor
found, and the defendants arrested. Justice Brandeis for the
Court said that the Federal Statute authorized the seizure on the
high seas of American vessels subject to forfeiture for violation of
revenue laws. “From that power,” he said, “it is fairly to be in-
ferred that they are likewise authorized to board and search such
vessels when there is probably cause.” He found there was prob-
able cause and said the seizure was “lawful, as like search and
seizure of an automobile and arrest of the persons therein by
prohibition officers on land is lawful,”21 citing the Carroll case.
The Court, however, did not clearly find a search on the high seas.
The opinion said, “search, if any, of the motor boat at sea did not
violate the Constitution for it was made by the boatswain as an
incident of a lawful arrest.”22 But at a further point the opinion,
in referring to the use of the searchlight, said, “no search on the
high seas is shown . . . such use of a searchlight is comparable to
the use of a marine glass or a field glass” and is “not prohibited
by the Constitution.”23

Beginning with Agnello v. United States24 the Court had be-
fore it a number of cases involving the question as to the extent
of the authority to search as an incident of a lawful arrest. Frank

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19 Accord with Case, Husty v. United States, 282 U. S. 694 (1930).
20 274 U. S. 559 (1927).
21 Id. at 562.
22 Id. at 563.
23 Id. at 563. See also, Maul v. United States, 274 U. S. 501 (1927).
Agnello along with others was arrested for selling narcotics. Federal agents had stood outside the house of Stephen Alba, one of the defendants, and watched through the window while the defendants sold narcotics to other federal agents. After the sale the agents who were watching outside entered the house and arrested defendants. The agents then went to the home of Agnello several blocks away, from which the package of narcotics had been obtained, searched his house without a warrant, and found an additional can of cocaine. The question before the Court was whether search of Agnello's house and the seizure of the narcotics therein violated the Fourth Amendment, and whether the admission of the evidence found by the search violated the Fifth Amendment. The Court, speaking unanimously through Justice Butler, said:

"the right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed ... is not to be doubted. ... The legality of the arrests ... made at the home of Alba is not questioned ... or of the searches and seizures. ... But the right does not extend to other places. ... When it (Agnello's house) was entered and searched, the conspiracy was ended and defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrests."

After discussing decisions of the state and federal courts to find authority for what was done here, he said,

"absence of any judicial approval is persuasive authority that it is unlawful. Belief, however, well founded, that an article sought is concealed in a dwelling furnishes no justification for a search of that place without a warrant."

The government contended that, even if the search and seizure were unlawful, the evidence was admissible because no application had been made by defendants to have the evidence (a can of cocaine) returned. But the Court pointed out that prior to its being offered as evidence Agnello did not know his house had

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25 Id. at 30.
26 Id. at 33.
been searched and evidence found therein. Under these circumstances the Court thought it would be "unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had." As to the Fifth Amendment the opinion said:

"Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized."\(^2\)

The judgment of conviction of Agnello was, therefore, set aside but the conviction of the other defendants allowed to stand since the illegal evidence was used against Agnello only.

In *Marron v. United States*\(^2\) the Court had a more difficult case involving seizure incidental to a lawful arrest. Marron, Birdsell, and others were indicted for conspiracy to violate the prohibition law by maintaining a nuisance where liquor was sold. Petitioner was a lessee of the entire second floor of a building consisting of six or seven rooms. Prohibition agents got a warrant to search for and seize "intoxicating liquor and articles for its manufacture." When the agents arrived petitioner was not there but Birdsell was in charge selling liquor to about a dozen people. Birdsell was arrested and the agents searched the place and found liquor, some of which was in a closet. While in the closet, they seized a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and they found beside the cash register a number of bills against petitioners for gas, electricity, water, and telephone service. They seized the ledger and bills but reported only the seizure of the liquor in the return on the warrant. Petitioner applied before trial in the lower court for the return of the ledger and bills and asked to have the evidence concerning them suppressed because they were not described in the warrant. This was denied, and at the trial the evidence showed that the entries in the ledger were made by petitioner Marron and that he was the proprietor. The government contended that the

\(^2\) Id. at 34.

\(^2\) 275 U. S. 192 (1927).
seizure of the ledger and bills could be justified either as an incident to the execution of the search warrant or as a right incident to the lawful arrest of Birdsall when caught in the act of violating the law.

Justice Butler spoke for the Court in a unanimous opinion. He took up first the argument that the seizure was justified as incident to the execution of the warrant. Beginning with the statement that the Fourth Amendment clearly prohibited general searches, he quoted the Weeks' case that the Court had to protect the people "against unreasonable searches and seizures under the guise of law." He cited the various sections of federal statutes which set forth detailed and specific requirements as to issuing and executing search warrants. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible," he said, "and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." He discussed Adams v. New York which was relied on by the government as permitting the use of evidence not within the scope of a valid warrant, and said it did not support the government's argument since in that case the Court did not decide whether the seizure violated the Fourth Amendment. He concluded this part of the opinion by saying, "It is clear that the seizure of the ledger and bills . . . was not authorized by the warrant."

He took up the additional argument of the government, namely that the seizure was justified as an incident of a lawful arrest. The Prohibition Act made the maintenance of a place for the selling of liquor a nuisance and provided punishment for maintaining such a place. Birdsall was caught in the act of maintaining the nuisance. "The officers were authorized to arrest for crime being committed in their presence," he said, and "they had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." He then pointed out that the closet was used as

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29 Id. at 196.
30 Id. at 196.
31 192 U. S. 585 (1904). For a discussion of this case, see the first installment of this article in 41 Ky. L. J. 196, 202-205 (1953).
part of the saloon and that the ledger was part of the “equipment actually used to commit the offense,” and, “while it was not on Birdsall’s person at the time of his arrest, it was in his immediate possession and control.” “The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose,” he concluded. The ledger and bills were, therefore, lawfully seized as an incident of the arrest.

Three years after the above case two others very similar in facts and involving the principle of the Marron case came before the Court. These were Go-Bart v. United States and Lefkowitz v. United States. In the Go-Bart case prohibition agents had on June 5, 1929 secured a warrant for the arrest of Gowens, Bartels, and others, officers of the company, on the ground that they had been engaged in a conspiracy since January 1st to violate the Prohibition Law by having, selling, and transporting liquor. The agents went to the company’s office and arrested Bartels, secretary-treasurer, who was there when they entered, searched his person and took some papers from him; Gowens, president of the company, came in and was arrested and searched. The agents then took keys from the men and through threats of force compelled them to open a desk and safe and under the pretense of having a search warrant they searched the office taking books, papers, letter files, insurance policies, cancelled checks, index cards, etc. belonging to the company. The warrant for the arrest was admitted by the government later to be defective on its face and there was no search warrant at all. But the agents did have reliable information about the conspiratorial activities of the petitioners during 1927-28, which the government claimed justified arrest without a warrant and search of the place as incident

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3 Id. at 199.
4 282 U. S. 344 (1931); 285 U. S. 452 (1931). In McGuire v. United States 273 U. S. 95 (1927), revenue agents under a warrant searched McGuire’s premises and found liquor, destroying some of it and keeping part of it as evidence. Petitioner contended the destruction was illegal and hence the officers became trespassers ab initio and lost the protection and authority of the warrant. But the Court held that the rule of trespasser ab initio has “only been applied in civil actions”, and that its extension was not favored. There was no invasion here without a warrant, said the Court, and the seizure and retention of the liquor was distinct from the offense of destroying some of it. “Neither the seizure of this liquor nor its use as evidence infringed any constitutional immunity of the accused,” it concluded.
to the lawful arrest. The petitioners asked the court before trial to enjoin the use of the papers as evidence and to have them returned as having been taken contrary to the Fourth and Fifth Amendments.

Justice Butler wrote the opinion for the Court. He began by emphasizing that the Fourth Amendment should be liberally construed to prevent unreasonable searches and seizures, but said there was no formula for determining reasonableness. The only question before the Court was the validity of the search and seizure of the papers. He assumed that the arrests were legal not because the warrant was good but because the agents had enough information as to past conduct of the petitioners to authorize their arrest. As to the validity of the search and seizure as an incident to a lawful arrest, he said it could not be claimed that "the officers saw conspiracy being committed . . . and there is no suggestion that Gowens or Bartels was committing a crime when arrested." A conspiracy might have existed in 1927-28 but "the record does not show any criminal overt act in 1929." He then pointed out that the agents had the necessary information and time to get a search warrant and failed to do so but pretended to have one. "It was a lawless invasion of the premises and a general exploratory search," he concluded.

In the Lefkowitz case the facts were almost identical with those in the Go-Bart case except that here the federal agents had a valid warrant for the arrest of the respondents on the charge of conspiracy to violate the Prohibition Law by selling, possessing, transporting, and taking orders for and delivering liquor. The respondents operated from room 604 at 1547 Broadway, New York City. The room was ten feet wide and twenty feet long but was divided by a partition. In the outer office was a stenographer's desk, towel cabinet, and waste basket; in the inner part was a desk and waste basket. The agents arrested the two respondents, searched them and the room, opening desks and carrying away books and papers; they searched the towel cabinet and took papers from it and from the waste basket which they pieced together. The question before the Court was the legality of the search and seizure of the papers as incident to a valid arrest.

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35 Id. at 358.
Justice Butler again wrote the opinion and decided the case on the strength of the *Go-Bart* ruling. He pointed out that the offense charged involved the use of the room to take orders for liquor, cause it to be delivered, and to collect and divide the proceeds. He said the records did not support the claim that at the time of arrest "the offense for which the warrant issued or any other crime was being committed in the presence of the officers." No conspiracy was "being had, made or formed in their presence," he said. As to the right to search as an incident of a lawful arrest, he said it was no greater than the right to search under a search warrant, and the papers here "could not lawfully be searched for and taken even under a search warrant" because of the ruling in *Gould v. United States*, which held that a man's own private papers could not be seized to be used against him.

In both this case and in the *Go-Bart* opinion Justice Butler was faced with his decision in the *Marron* case in which he had said that as an incident of a lawful arrest the "place" (in that case the entire second floor consisting of six or seven rooms) could be searched to find and seize the things used to carry on the criminal enterprise. In the *Marron* case, he pointed out, Birdsall was found in the act of running the saloon in carrying out the conspiracy, and as an incident of the lawful arrest the officers seized the ledger from the closet, some bills found beside the cash register which were used in furthering the conspiracy and which "were visible, accessible and in the offender's immediate custody." The offense there, he said, "involved the element of continuity . . . the ledger and bills being in plain view were picked up by the officers . . . no search for them was made," and "the ledger was held to be part of the outfit actually used to commit the offense;" while in the *Lefkowitz* case "the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime." The papers and other articles "though intended to be used to solicit orders for liquor in violation of the Act . . . were in themselves unoffending."

His effort to distinguish the *Marron* case from the other two is

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88 *Id.* at 465. For a discussion of Gould v. United States see, first installment of this article in 41 Ky. L. J. 196, 207-208 (1953).
certainly not entirely convincing. In the former case as an incident of a lawful arrest the agents were permitted to search the "place", six or seven rooms; they searched a closet and took from it a ledger, and also took from beside the cash register some bills—all of which were "in themselves unoffending." In each of the latter two cases the agents were not permitted to search a small office. In the Marron case the charge was a conspiracy to violate the Prohibition Law in a number of ways, including the maintenance of a nuisance; in the latter two cases the charge was a conspiracy to violate the law by buying, selling, and delivering. Yet in both of these cases the Court said that the accused when arrested in their offices where the illegal conspiracies were being carried on and with incriminating papers in their possession were not committing any conspiracy in the presence of the arresting officers. If the ledger and bills in the Marron case were evidence of the criminal enterprise and used in carrying it on it is difficult to see why the papers and books in the latter case were not also. The decisions left unanswered the question of exactly how far the right to search as an incident of a lawful arrest extended.

Two prohibition cases which came before the Court involved the question of the use in the federal courts of evidence acquired by illegal search and seizure by state officials. The use of evidence seized illegally by private individuals was considered in Burdeau v. McDowell,40 and the court took the view that the Fourth Amendment protected the individual only from unreasonable search and seizure by government officials. And in Adams v. New York41 the Court had refused to concern itself with the method by which competent evidence was obtained.

In the first of the prohibition cases, Byars v. United States,42 the question before the Court involved both the validity of the search warrant and the legality of joint action by state and federal authorities. Petitioner had been convicted for having in his possession with fraudulent intent some counterfeit strip stamps used on whiskey bottled-in-bond. His house was searched and the stamps found under a warrant issued by an Iowa municipal judge to "any peace officer in Des Moines, Polk County, Iowa" and

40 See, first installment of this article in 41 Ky. L. J. 196, 209 (1953).
41 Id. at 202.
which authorized the search for and seizure of liquor and material and instruments used in making liquor. The warrant stated only that "affiant has good reason to believe and does believe the defendant has in his possession" such liquor and instruments. It was given to a police officer who took with him three other policemen and Adams, a federal officer. Adams kept the stamps and they were used against the petitioner over his objection that the seizure violated the Fourth Amendment.

Justice Sutherland wrote the opinion for a unanimous Court. He began by saying "the warrant is clearly bad if tested by the Fourth Amendment," citing three lower federal court decisions holding that a valid warrant must state more than that the affiant "has good reason to believe," and that the evidence must show probable cause. The fact that four police officers went with Adams to search a four room house showed, he thought, that Adams was not needed and that his participation "in the search was under color of his federal office and that the search in substance and effect was a joint operation." "In that view . . . the effect is the same as though he had engaged in the undertaking as one exclusively his own," the opinion said. Nor did the fact that evidence was found make the search legal, for an illegal search "is not made lawful by what it brings to light." He pointed out that the stamps were not within the purview of the writ and hence presumably the seizure was bad for that reason also, but his decision was based primarily on the ground of the vagueness of the warrant.

In Gambino v. United States, New York state troopers, believing they were required by law to help enforce the Prohibition Law (after the New York Prohibition Law had been repealed), arrested Gambino and Lima, searched their car and seized liquor which was found in it. The troopers had no warrant. The men and the liquor were turned over to federal authorities who in-

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41 Ripper v. United States, 178 F. 24 (1910); United States v. Borkowski, 268 F. 408 (1920); United States v. Kelly, 277 F. 485 (1921). In the first of these cases the warrant was held bad because it was based on "good reason to believe" but the evidence was admitted on the basis of Adams v. New York, 192 U. S. 585 (1904). In United States v. Kelly the warrant was held bad for the same reason, the warrant was quashed, and the property ordered returned.
43 Id. at 29.
44 275 U. S. 310 (1927).
dicted and convicted the men of conspiracy to import and transport liquor in violation of the Prohibition Act. The defendants moved before trial to have the liquor returned to them and suppressed as evidence because the arrest and search were without a warrant and without probable cause in violation of the Fourth, Fifth, and Sixth Amendments. The government contended the evidence was admissible because there was probable cause and because it was not shown that the state troopers were agents of the United States. The defense, in addition to pleading lack of probable cause, claimed that the Prohibition Law in imposing the duty of enforcement upon "any officer of the law" made the state troopers federal agents.

Justice Brandeis wrote the unanimous opinion. Without going into details of facts or reasons he said, "We are of opinion on the facts, which it is unnecessary to detail, that there was not probable cause. We are also of the opinion that the term 'any officer of the law' used in Section 26 refers only to federal officers, and that the troopers were not, at the time of the arrest and seizure, agents of the United States." But he said, there was a question as to whether the troopers' "relation to the federal prosecution was such as to require the exclusion of their evidence wrongfully obtained." Judicial notice was taken of the fact that the "troopers believed that they were required by law to aid in enforcing the National Prohibition Act," and that they acted in performance of that "supposed duty." He quoted from a statement made by the Governor of New York when he signed the bill repealing that state's prohibition law in which it was stated that state peace officers were "required to aid in the enforcement of the federal law." Such aid had been previously given and accepted by federal authorities, he said. Although in this particular case the troopers had not acted under the direction of federal officials, yet they acted "solely on behalf of the United States." Rights under the Fourth and Fifth Amendments "may be invaded as effectively by such cooperation as by the state officers' acting under direction of the federal officials," he said. He continued by saying that the prosecution "instituted by the federal authorities

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47 Id. at 313.
48 Id. at 314.
49 Id. at 315.
was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States.”\(^{50}\)

In discussing previous decisions, none of which he thought conflicted with his conclusion here, he distinguished *Burdeau v. McDowell* by saying that there the papers were taken by “private detectives”. He admitted that in several cases lower federal courts had admitted evidence obtained by illegal search by state officials but maintained that in only three could it be contended that the search and seizure was “made solely for the purpose of aiding in the enforcement of the federal law.” Only one of these, *Schroeder v. United States*,\(^ {51}\) was worthy of consideration, he thought, and in that case “the police officer was a confidential investigator, charged with the task of detecting corruption and other dereliction of duty on the part of other police officers”\(^ {52}\) and was not acting solely to enforce the prohibition law.

This was extending the principle laid down in the *Byars* case considerably. There the use of the evidence was not permitted because a federal official participated with state police, thus making it a joint enterprise under a warrant which would have been fatally defective if issued to a federal official; here the evidence was excluded because it had been taken illegally by state officials on the theory that its use by the federal government constituted ratification of the illegal seizure. On similar reasoning a lower federal court barred evidence taken illegally by state police under circumstances indicating that federal officials inspired the illegal search and seizure.\(^ {53}\) It would seem that on the same reasoning the use in *Burdeau v. McDowell* of the evidence taken “by private detectives” would have been a ratification of their illegal act also, but the majority would not go so far at that time. It should be noted that both Justices Brandeis and Holmes dissented in the *Burdeau* case and wanted to exclude the evidence there.

In another prohibition case, *Olmstead v. United States*,\(^ {54}\) a new and novel question came before the Court. It involved the application of the Fourth Amendment to telephone conversations. The facts were that federal agents knew that Olmstead was the

\(^{50}\) Id. at 317.


\(^{52}\) *Flagg v. United States*, 233 F. 481 (1916).

\(^{53}\) *277 U. S. 438* (1928).
head of a large rum-running and "bootlegging" ring with headquarters in an office building in Seattle, Washington. In order to secure evidence against the group, federal agents tapped the telephone wires of Olmstead outside his office by dropping a wire attached to his telephone down to the basement of the building, where they listened and made a typewritten record of the conversations. This record was used as evidence against Olmstead over his objection that the method of gathering the information and its use violated the Fourth and Fifth Amendments.

Chief Justice Taft wrote the majority opinion holding the evidence admissible. Justice Holmes, Brandeis, Stone, and Butler dissented. The Chief Justice took a strictly literal interpretation of the Amendment. He reviewed previous court decisions interpreting it and pointed out its historical purpose to protect the individual from the government. "The amendment itself shows," he said, "that the search is to be of material things—the person, the house, his papers or his effects." In this case, he pointed out, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." He distinguished the case of Ex parte Jackson in which the court held the Amendment protected a sealed letter from search except with a search warrant, saying "the letter is a paper, an effect," a material thing. He thought the language of the amendment could not be expanded to include telephone wires reaching from the defendants' office or house. "The intervening wires are not part of his house or office, any more than are the highways along which they are stretched," he said.

He then considered the view that the evidence ought not to be admitted because it was obtain by unethical methods and in violation of the law of Washington, which made wire tapping a misdemeanor. He dealt with the argument that the evidence was obtained by illegal means by saying, "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained." The Weeks case was, he said, an exception to the common law rule required by the Fourth and Fifth Amendments and was not followed by many state

55 Id. at 464.
56 Id. at 465.
courts. "The common law rule must apply in the case at bar," he said. As to the argument that the evidence was obtained by unethical methods, he took the position that without the sanction of congressional legislation the courts had no "discretion to exclude evidence . . . because unethically secured." "This would," he said, "be at variance with the common law doctrine generally supported by authority." 57

The majority opinion, therefore, took a very literal view of the Amendment and said there was no search or seizure of a material thing and there had been no entry of the houses or offices of the defendants. It should be pointed out that in the Boyd case, 58 where the Amendment was first interpreted and applied and which the Chief Justice discussed approvingly, there was no entry into a house or office and actually no literal search or seizure. The defendant was ordered to produce his papers in court on penalty of having the charges taken as confessed and his property forfeited if he failed to produce the papers. The Court considered this the equivalent of an unreasonable search and seizure, and decided the case on the basis of principle.

In their separate dissents both Justices Holmes and Brandeis thought it was bad policy to admit evidence obtained by unethical and criminal conduct. Justice Holmes stated his position thus: "For my part I think it a less evil that some criminals should escape than that the government should play an ignoble part." 59 Justice Brandeis thought that if the amendment protected a sealed letter when the mail is a governmental service it should protect a telephone conversation, and pointed out that the "invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard." 60 This latter consideration was also emphasized by Justice Butler in his dissent.

The last significant prohibition case was Taylor v. United
Agents had received complaints about the selling of liquor from Taylor's garage. About 2:30 a.m. they went to his garage without a warrant of any kind; they thought they smelled whiskey inside and looking through a small opening with a search light they saw several cardboard boxes which they assumed contained liquor. They broke open a door, searched the garage, and found 122 cases of whiskey which they seized. Taylor came from the house and was arrested. Justice McReynolds wrote a brief opinion for the entire Court, reversing the conviction in the lower court which had refused to suppress the evidence. He said:

"the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions. . . . We think the evidence was obtained unlawfully and should have been suppressed."

He went on to say that agents could:

"rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search."

This seems at variance with a federal Circuit Court's decision upholding the search without a warrant of a dwelling in reliance upon the sense of smell. In writing the opinion the judge said:

"I see no reason why the power of arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

In the Taylor case above the use of smell was supported by the sense of sight, for the agents with the use of a light looked through the cracks in the garage. It may well be that the attitude of the Court here and in the Go-Bart and Lepkowitz cases which seem out of line with previous decisions reflected somewhat the increasing public hostility to prohibition.

Interpretations by the Supreme Court of the term "probable cause" have been important in determining the significance of
the Fourth Amendment, and in some cases the specific set of facts are important in understanding the Court's ruling.

In the *Carroll* case, as has been seen, the Court defined probable cause as “facts and circumstances . . . such as to warrant a man of prudence and caution in believing that an offense has been committed.” In the *Byars* case it said a warrant based on an affidavit that affiant “had good cause to believe and did believe” without stating facts to show probable cause was bad. In *Lee v. United States* and in *Gambino v. United States*, Justice Brandeis merely stated that probable cause did exist without detailing the facts which constituted it. In *Husty v. United States* prohibition agents received reports by telephone that Husty, who was known to the agents as a “bootlegger” by his previous arrests and convictions, had two loads of liquor in cars parked in a certain place. They went without a warrant to the parking place and found Husty in the process of driving away. They stopped him, searched the car, found liquor and arrested him. The Court upheld the conviction by the evidence thus obtained on the basis of the *Carroll* case saying that the search of a car without a warrant was legal whenever there was probable cause and that “arrest for illegal transportation or possession need not precede the search.” “To show probable cause,” the opinion said, “it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act . . . it is enough if the apparent facts . . . are sufficient to lead a reasonably discreet and prudent man to believe liquor is illegally possessed in the automobile to be searched.”

In *Grau v. United States* the petitioner was convicted on two counts, one charging unlawful manufacture of whiskey, and the second, possession of property designed for that purpose. He challenged the use of the evidence obtained by officers searching his house under a warrant because it failed to state particular grounds or probable cause and also because it was based on two affidavits neither of which did so. Justice Roberts wrote the opinion, and said it was not necessary to consider the validity of the warrant itself because the objection to the affidavits was well

44 282 U. S. 694 (1930).
45 Id. at 701.
taken. Only one of them attempted to state the grounds and did so as follows:

"On or about October 18, 1931 he, affiant, went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises."\textsuperscript{67}

Section 25 of the Prohibition Act said there shall be no search of a "private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house."\textsuperscript{68} The lower court had held that the affidavit warranted the belief that the dwelling was being used as headquarters for "merchandising" of liquor and that this was sufficient compliance with Section 25 as to the sale of liquor. But Justice Roberts said this broad interpretation of the Act "unduly narrowed the guarantees of the Fourth Amendment in consonance with which the statute was passed." He pointed out that "the affidavit fails to say the place is not a private dwelling and the evidence shows that it was." "At most," he said, "the deposition charges the manufacture of whiskey; no averment of sale is made; indeed no facts are given from which sale . . . necessarily is to be inferred." "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury . . ." and "would lead a man of prudence and caution to believe that the offense has been committed,"\textsuperscript{69} he concluded. This would seem to be going pretty far in restricting the issuance of warrants even to search a dwelling, especially when lower federal courts have held that officers in reliance on their sense of smell can search a building without a warrant.\textsuperscript{70} It would seem that the evidence here would justify a man of "prudence and

\textsuperscript{67} Id. at 127.

\textsuperscript{68} 27 U. S. C. A., Sec. 39.


\textsuperscript{70} United States v. Borkowski, 268 F. 408 (1920); McBride v. United States, 284 F. 216 (1922).
caution” in believing a violation of the law was being committed. Two justices, Stone and Cardozo, dissented without writing opinions. No doubt the extremeness of the decision was due partly to the fact that it was a dwelling that was searched as in the *Byers* case rather than personal property such as an automobile which was involved in the cases above in which the warrants were upheld on a more liberal interpretation of probable cause.\(^7\)

(To be continued)

\(^7\) In *Syro v. United States*, 287 U. S. 206 (1932), the Court, in interpreting a provision of the Federal statute requiring search warrants to be executed within ten days, held that one was void if not executed in that time and that redating it would not revive it. “The proceeding by search warrant is,” the Court said, “a drastic one. Its abuse led to the adoption of the Fourth Amendment,” and therefore the amendment and legislation regulating the process “should be liberally construed in favor of the individual.” In *Albrecht v. United States*, 273 U. S. 1 (1926), the Court said an arrest under a warrant based on an affidavit before a state notary public not authorized to administer oaths in federal criminal proceedings violated the Fourth Amendment.