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## Search and Seizure: Seizure of Purely Evidentiary Items Held Constitutional (Warden, Maryland Penitentiary v. Hayden, 87 S.Ct. 1642, 1967)

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the limits of good faith, to determine the qualifications of the jurors. Some textwriters and a few decisions go further, suggesting that the proper approach would be to abolish all rules excluding evidence of insurance coverage. Few courts apply the strict standards that the Montana Supreme Court applied in the *Avery* case. Underlying each of these methods of approach is a different theory as to how much prejudice results from the mention of insurance during the trial. If juries are always prejudiced against the defendant by the mention of insurance during the trial, perhaps the Montana approach is the best. But, if such a prejudice does exist, it would seem questionable to allow the exceptions to the exclusionary rule that Montana has recognized. On the other hand, if juries presume that the defendant is insured, the better rule would probably be to allow evidence of that coverage, or lack thereof, to be freely brought into the trial. The trend of recent decisions, the insurance companies' advertising campaigns, and the adoption of the Financial Responsibility Acts all seem to indicate that the latter view is more reasonable in the insurance conscious world of today.

GARY L. GRAHAM.

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SEARCH AND SEIZURE: SEIZURE OF PURELY EVIDENTIARY ITEMS HELD CONSTITUTIONAL. Petitioner was observed leaving the scene of an armed robbery. His description and whereabouts were relayed to police. Some five minutes after the suspect had entered his house, police officers knocked on the door and were admitted by his wife. The officers immediately began a search of the premises for the suspect, his weapons, and the stolen money. In the course of this search petitioner was arrested and clothing in a washing machine which fit the description given of the clothing worn by the suspect was seized. *Held*, that despite the fact that the articles of clothing were "of evidential value only," they were properly seized in a search incident to a lawful arrest and admissible in evidence. *Warden, Maryland Penitentiary v. Hayden*, 87 S. Ct. 1642 (1967).

The principle that a man ought to be free from unreasonable invasion of his privacy or seizure of his goods first appeared in Magna Charta. The framers of that document recognized that such seizures or invasions might be made under certain circumstances, but saw danger in allowing royal officials free rein to "seize a man's goods or proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."<sup>1</sup> Ensuing years have witnessed continuing attempts to define the scope of the rights recognized in this early document.

<sup>1</sup>Clause 39 of Magna Charta as translated in G.R.C. DAVIS, MAGNA CHARTA 21, published by the trustees of the British Museum.

In 1765 Lord Camden declared that the government had no right to enter a man's house, even with a search warrant, and seize his private papers for use as evidence against him.<sup>2</sup> His Lordship admitted that stolen property or contraband might be legally searched for and seized under a proper warrant, but he viewed the seizure of private papers as tantamount to compelling a man to be a witness against himself and thus illegal.<sup>3</sup> Modern decisions readily admit a need to prohibit "unreasonable" searches, but question of what items should be exempt from search and seizure continues to be the subject of judicial argument two hundred years later.

The Fourth Amendment to the Constitution guarantees citizens freedom from "unreasonable searches and seizures." The Amendment requires that probable cause be shown and that the items to be seized be precisely enumerated before a lawful warrant may issue. While compliance with these criteria presumably would establish a reasonable search as contemplated by the Amendment, the language fails to assist further in framing a workable definition. The Amendment makes no distinction between searches for mere evidence and searches for the fruits of crime or instrumentalities used to commit it. On its face the language would appear to allow either as long as such searches meet the tests of specificity and probable cause.

In *Boyd v. United States*<sup>4</sup> the Supreme Court was called upon to construe a provision of the Customs and Revenue Act of 1874,<sup>5</sup> providing that when a person was accused of its violation the government might, on motion to the court, require him to produce his private documents in support of the government's case against him. The Court saw this requirement as no different from a search and seizure and said that a "search and seizure" of a man's private papers for use as evidence against him was an unreasonable invasion of his rights. The Court spoke in terms of the Fourth and Fifth Amendments, saying that the Fifth Amendment's guarantee of freedom from compulsory self-incrimination established criteria for defining an unreasonable search as condemned in the Fourth Amendment.<sup>6</sup> The decision relied heavily on Lord Camden's opinion and noted a fundamental distinction between a search for and seizure of private papers, and a search for fruits of crime.

*Gouled v. United States*<sup>7</sup> also concerned the seizure of private documents, but the decision was far more sweeping. The petitioner was under

<sup>2</sup>Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807, (K.B. 1765).

<sup>3</sup>*Id.* at 1073. By speaking of the right to be free from unreasonable searches and the right not to testify against one's self in the same breath, the court spawned a judicial theory which has persisted in all United States Supreme Court decisions. See Note, 54 GEO. L. J. 593, 596 (1966), and cases there cited; *instant case* at 1648; 48 MARQ. L. REV. 172, 175 (1964).

<sup>4</sup>116 U.S. 616 (1886).

<sup>5</sup>Act of June 22, 1874, ch. 391, § 5, 18 Stat. 187.

<sup>6</sup>*Boyd v. United States*, *supra* note 4, at 633.

<sup>7</sup>255 U.S. 298 (1921).

indictment for fraud and the documents in question were taken from his private office by an otherwise valid warrant. The court declared that the papers were mere evidence of criminal fraud against their owner and could not constitutionally be searched for and seized even with a search warrant.<sup>8</sup> While prior cases had talked of a distinction between private papers and fruits of crime,<sup>9</sup> the *Gouled* case laid down a rule of more general application since it applied to items of evidence other than private papers. Any article which was not a fruit of or instrumentality of the crime could not be seized even though it constituted evidence.<sup>10</sup>

The "mere evidence" rule of *Gouled* proved difficult to apply.<sup>11</sup> For example, in *Marron v. United States*<sup>12</sup> a ledger and some bills seized by officers incident to a raid on a bootlegging establishment were held to be indispensable to the criminal enterprise and therefore properly subject to seizure as instrumentalities of the crime. But in *United States v. Lefkowitz*<sup>13</sup> virtually the same items<sup>14</sup> were seized from a similar establishment and held to be "mere evidence" and hence not subject to seizure. Recently the Court stretched the definition of instrumentalities of crime to include a forged birth certificate since with it one could pose as a United States citizen.<sup>15</sup>

In the instant case the evidentiary items were not testimonial and offered no Fifth Amendment problem of compulsory self-incrimination by private documents.<sup>16</sup> The Court was thus able to direct its attention squarely to the validity of the rule preventing seizure of items of mere evidence.<sup>17</sup> The Court rejected the *Gouled* distinction between items of

<sup>8</sup>*Id.* at 309-310.

<sup>9</sup>*Weeks v. United States*, 232 U.S. 383, 392-393 (1917).

<sup>10</sup>The distinction made in *Boyd* and confirmed in *Gouled* was incorporated into the Espionage Act of 1917, ch. 30, 40 Stat. 217 and after *Gouled*, into the Federal Rules of Criminal Procedure as Rule 41 (b). The Act provided for issuing warrants in cases: 1. when property is stolen or embezzled; 2. when property is used as the means of committing a felony; 3. when property, or any paper, is possessed, controlled or used in violation of section 22 (in violation of a penal statute or in aid of foreign governments or of United States rights under treaties or international law. Under Federal law only these categories were subject to search and seizure as "fruits and instrumentalities" of crime.

<sup>11</sup>*See* 20 U. CHI. L. REV. 319 (1953).

<sup>12</sup>275 U.S. 192 (1927).

<sup>13</sup>285 U.S. 452 (1932).

<sup>14</sup>Various books, papers and other things used to solicit orders for illicit liquor.

<sup>15</sup>*Abel v. United States*, 362 U.S. 217 (1960). *See also Mathews v. Correa*, 135 F.2d 534 (2nd Cir. 1943), address book held fruit of crime; and *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951), address book held mere evidence. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court admitted evidence of blood samples taken from the defendant after his arrest for drunken driving and in the case of *Cooper v. California*, 87 S.Ct. 788 (1967), the Court admitted a piece of paper found during a search of the defendant's car. In both of these cases the items were mere evidence and the searches were upheld without express ruling by the Court as to their character.

<sup>16</sup>*Instant case* at 1648.

<sup>17</sup>Items which had previously been considered as the proper objects of a search were "Instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be affected, and property the possession of which is a crime." *Instant case* at 1644.

mere evidence and fruits and instrumentalities of crime, finding such a distinction illogical. It reasoned that the primary purpose of the Fourth Amendment was protection of privacy, and a man's privacy is no more violated by a proper search for items of mere evidence than by a search for instrumentalities and fruits of crime. The Court said that Fourth Amendment requirements can be met in the case of a search for "mere evidence" by examining probable cause "in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."<sup>18</sup> Thus the fact that an article is "mere evidence" no longer exempts it from being the object of a lawful search and seizure. The effect of the decision is a broadening of the scope of a reasonable search and seizure.<sup>19</sup> However the question remains as to whether some items may continue to be immune from seizure on the basis of their self-incriminatory nature.<sup>20</sup> The Court in the instant case did recognize that there might be "items of evidential value whose *very nature* precludes them from being the object of a reasonable search and seizure."<sup>21</sup> (Emphasis added.)

The Supreme Court has always recognized that a man's private papers should be free from search and seizure.<sup>22</sup> This is consistent with the Fifth Amendment's guarantee of freedom from self-incrimination. It would have been possible to decide *Gouled* (and also *Boyd*) solely on that ground, reaching the same result without the necessity of lumping private papers and other evidentiary articles into the category of "mere evidence" and making the entire category immune from search and seizure. The instant case appears to extend the limit of a reasonable search only to items of evidence which are not testimonial and would thus preserve the primary significance of *Boyd*, *Gouled*, and other cases which have condemned the seizure of private papers.

Private papers may contain the most intimate and personal details of a man's existence. The principle that a man should not be forced to

<sup>18</sup>Instant case at 1650.

<sup>19</sup>There have been many other limitations established on the power to search and seize as for example: *Agnello v. United States*, 269 U.S. 20 (1925), search incident to an arrest was of defendant's house, which was too far away from the site of the arrest for the search to be reasonable as an incident to an arrest; *Gambina v. United States*, 275 U.S. 310 (1927), failure to establish probable cause for arrest voided search incident thereto; *Go-Bart Importing Company v. United States*, 282 U.S. 344 (1931), search void as exploratory; *Taylor v. United States*, 286 U.S. 1 (1932), sighting boxes suspected to contain liquor through window gave no right to officers to enter garage and seize the same; *Johnson v. United States*, 333 U.S. 10 (1948), smelling burning opium not an excuse for not obtaining a search warrant prior to entry of the premises; *United States v. Jeffers*, 342 U.S. 48 (1951), fact that articles seized without a warrant were on the premises of the defendant's aunt did not deprive defendant of his right to suppress the evidence so obtained; *Silverman v. United States*, 365 U.S. 505 (1961), sticking a spike microphone into an apartment is an unauthorized entry and the evidence so obtained must be suppressed; *Rochin v. California*, 342 U.S. 165 (1952), pumping stomach of accused to recover capsules of morphine swallowed was unreasonable and evidence was suppressed.

<sup>20</sup>It is quite possible that the definition of the word "testimonial" may give rise to as many problems of judicial interpretation as did the term "mere evidence."

<sup>21</sup>Instant case at 1648.

<sup>22</sup>*Boyd v. United States*, *supra* note 4; *Weeks v. United States*, *supra* note 9; *Gouled v. United States*, *supra* note 7; *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

divulge such information on the witness stand regardless of its possible value in determining his guilt or innocence is a fundamental one in American jurisprudence.<sup>23</sup> It should follow that what a man cannot be compelled to divulge on the stand should not be available merely because it is set down in a writing and placed in his desk. Compelling a man to produce such papers or seizing them with a search warrant is an unreasonable invasion of privacy and should be condemned. To hold otherwise would greatly lessen the protection from governmental interference afforded by both the Fourth and Fifth Amendments.

Former Montana statutes permitted a search warrant to issue for stolen or embezzled property, property used to commit a felony, or property used to commit a public offense.<sup>24</sup> However the newly-adopted Code of Criminal Procedure<sup>25</sup> provides that under a warrant or incident to a lawful arrest "instruments, articles or things which may have been used in the commission of, or which may constitute *evidence* of the offense," may be seized (emphasis added).<sup>26</sup> Read in light of the decision of the instant case, the Code seems to place Montana in line with the Supreme Court's holding.<sup>27</sup>

The need for effective law enforcement requires that officers making a reasonable search<sup>28</sup> incident to an arrest or with a search warrant be allowed to seize articles which are directly relevant to proving the crime committed. The decision of the instant case permits such a seizure with the possible exception of items which are testimonial in character. In ruling on the legality of a search and seizure, courts must determine whether a search is reasonable under the circumstances of each particular case.<sup>29</sup> The emphasis is not on *what* may be seized but the permissible extent of a

<sup>23</sup>In speaking of the *Entick* case, *supra* note 2, which condemned a seizure of private paper as in effect forcing a man to testify against himself, Mr. Justice Bradley declared: "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom (the *Entick* decision), and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd v United States*, *supra* note 4, at 626-627.

<sup>24</sup>REVISED CODES OF MONTANA, 1947, § 94-301-2.

<sup>25</sup>Montana Code of Criminal Procedure, REVISED CODES OF MONTANA, 1947, tit. 95, effective January 1, 1968.

<sup>26</sup>*Id.* at §§ 95-702(d) and 95-705(b).

<sup>27</sup>While no decisions rule directly on the point the Montana Supreme Court has generally not made the distinction of the *Gouled* case. In *State v. Benson*, 91 Mont. 21, 5 P.2d 223, 225 (1931), the court held that it was legal for an officer making a lawful arrest to seize "articles found on his (accused's) person or in his immediate possession." (Emphasis added.) The seizure of lottery tickets incident to an arrest has been upheld, the court there saying that an officer might properly seize any property "which reasonably would be of use at the trial." *State ex rel. Wong You v. District Court*, 106 Mont. 347, 78 P.2d 353, 354 (1938).

<sup>28</sup>The Montana Supreme Court has suggested criteria for determining the reasonableness of a search: 1. degree of surprise in arrest; 2. proximity to the time of commission of crime; 3. size of objects sought and availability of places to hide them. (Search here was incident to an arrest.) *State v. Callaghan*, 144 Mont. 401, 396 P.2d 821, 824 (1964).

<sup>29</sup>*United States v. Rabinowitz*, 339 U.S. 57, 65-66 (1950); *Go-Bart Importing Company v. United States*, *supra* note 19, at 357.

search and seizure. The right of privacy must yield at some point to the right of search<sup>30</sup> and only intelligent rulings by detached magistrates, mindful of established limitations, will insure the privacy guaranteed by the Fourth Amendment.

The "mere evidence" distinction was in many ways a troublesome one. In dealing with it courts often found it necessary to confine or enlarge its definition in a particular case. The ruling in the instant case provides a logical end for the rule and is not surprising in the light of recent court decisions.<sup>31</sup>

ALAN F. CAIN.

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ESTATE TAX MARITAL DEDUCTION: ELIGIBILITY OF A BEQUEST IN TRUST PROVIDING FOR MONTHLY PAYMENTS TO WIDOW. Decedent's will created a trust which gave his wife \$300<sup>1</sup> a month from the trust income and a testamentary power of appointment over the entire corpus. Decedent's executor included the interest in determining the estate's marital deduction. The Commissioner ruled the interest did not qualify and assessed a deficiency in the estate tax. The executor paid the deficiency and sued for a refund. The district court entered summary judgment for the executor,<sup>2</sup> which was reversed by the circuit court of appeals.<sup>3</sup> On writ of review the United States Supreme Court affirmed the district court. *Held*, a bequest in trust which provides decedent's spouse with a monthly stipend and power to appoint the entire corpus qualifies for the estate tax marital deduction. *Northeastern Pennsylvania National Bank & Trust Company v. United States*, 87 S. Ct. 1573 (1967).

Since an estate tax is assessed upon property which passes at death,<sup>4</sup> community property states initially enjoyed a distinct advantage over common law states. Each spouse in a community property state had a vested interest in half the community estate, so only the decedent's portion was taxable at his death. As a factual matter, in common law states the husband had legal title to a majority of the property. If he predeceased his spouse this property might be taxed not only upon his death, but also upon the death of his wife.

<sup>30</sup>*Johnson v. United States*, *supra* note 19, at 14.

<sup>31</sup>*See supra* note 15.

<sup>1</sup>Because the marital deduction is computed as of the date of the decedent's death, *Jackson v. United States*, 376 U.S. 503, 508 (1964), the parties agreed that although the trust provided for increasing the wife's interest to \$350 a month when her youngest daughter reached 18, this had no bearing on the amount of the marital deduction.

<sup>2</sup>*Northeastern Pennsylvania Nat'l Bank & Trust Co.*, 235 F. Supp. 941 (D.C.Pa. 1964).

<sup>3</sup>*Northeastern Pennsylvania Nat'l Bank & Trust Co.*, 363 F.2d 476 (3d Cir. 1966).

<sup>4</sup>INT. REV. CODE of 1954, § 2001.