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Elbert W. Washington

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## UNLAWFUL SEARCH AND SEIZURE IN ILLINOIS

W. ELBERT WASHINGTON

**I**F UPON his wife's complaint, a man is arrested and the police search his home with his wife's permission, does he have the right to have evidence thus seized excluded upon trial of the case? The manner in which the Supreme Court of Illinois resolved the foregoing question<sup>1</sup> and its treatment of other vexing problems arising from the use of evidence obtained as a result of searches and seizures concerns not only attorneys practicing criminal law, but all persons interested in law enforcement and constitutional guarantees. Guideposts and tests used in determining whether certain evidence should be excluded as being illegally obtained, the basis for motions to suppress evidence obtained as a result of illegal search and seizure, as well as Illinois cases dealing with the problem, constitute the material of this article. By way of a caveat, it should be borne in mind that the constitutional guaranty against unlawful search and seizure applies to governmental bodies and their agencies, and has no application when an individual has been subjected to an unlawful search and seizure by a private party not connected with the particular organ of government interested in the matter.

### BASIS FOR SUPPRESSION OF EVIDENCE

The basis for the exclusion of evidence unlawfully obtained may be found in the Fourth and Fifth Amendments of the United States Constitution and in the provisions of the constitutions and laws of the various states and territories. Some twenty-one states, two territories

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*MR. WASHINGTON is a graduate of De Paul University College of Law, is a member of the Illinois and Michigan Bars, and a partner in the Chicago law firm of Washington and Durham.*

<sup>1</sup> *People v. Shambley*, 4 Ill. 2d 38, 122 N.E. 2d 172 (1954).

and the District of Columbia have provisions patterned, by and large, upon those of the Federal Constitution.<sup>2</sup> The pertinent provisions in Illinois are Sections 6 and 10 of Article II of the Illinois Constitution. Section 6 provides:

The right of the people to be secure in their persons, papers, and effects shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons and things to be seized.

The provisions of Section 10 of Article II are as follows:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

In Illinois there is, by statute, a further limitation on searches and seizures, in that only certain types of items may be the subject for the issuance of search warrants.<sup>3</sup> The objects that may be subject to search by warrant are usually classified as being contraband objects. In reading the provisions of the Illinois Constitution<sup>4</sup> and the Illinois statutes governing the issuance of search warrants,<sup>5</sup> it may be seen by implication that the constitutional privilege against unlawful search and seizure was most certainly intended to include contraband articles, because those are the only properties for which a search warrant may lawfully issue. It is a requirement of the Illinois Constitution and the Illinois statutes that before a search warrant shall lawfully issue, the objects sought to be seized must be particularly described as must the place that is sought to be searched.<sup>6</sup>

In the case of *People v. Castree*,<sup>7</sup> the accused occupied a building, one room of which was used as a store, and the rest of which was used by the accused as a dwelling. A search warrant issued permitting the search of that portion of the building used as a store. After the issuance of the search warrant, the officers searched the dwelling of the accused and discovered certain intoxicating liquors which were kept in violation of the law. At the trial of the case, a motion to suppress

<sup>2</sup> United States, Alaska, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming, as set forth in 50 A.L.R. 2d 556.

<sup>3</sup> Ill. Rev. Stat. (1874) c. 38, § 692, as amended, Ill. Rev. Stat. (1933) c. 38, § 691.

<sup>4</sup> Ill. Const. Art. II, §§ 6, 10.

<sup>5</sup> Authority cited note 3 supra.

<sup>6</sup> Authorities cited notes 3 and 4 supra.

<sup>7</sup> 311 Ill. 392, 143 N.E. 112 (1924).

the liquors was properly made and the court overruled it. In an opinion of the Illinois Supreme Court the following statement was made, after quoting Article II, Section 6, of the Illinois Constitution:

Not all searches are prohibited, but unreasonable searches, only. Warrants may issue but not without probable cause, supported by affidavit, and only to search the place particularly described. A search without a warrant is an unreasonable search, and *a search of a place not described is without a warrant and is unreasonable. The search of the plaintiff in error's dwelling under a warrant particularly describing a store was unreasonable,*<sup>8</sup> and therefore was an invasion of the right of security guaranteed him by section 6 of the Bill of Rights.<sup>9</sup>

The application of Section 10, Article II, apparently is necessarily correlated to the application of Section 6 of the same article. In order for Section 6 to have any meaning whatsoever, as a practical matter, it is necessary that Section 10 be applied. Section 6 sets out the prohibition, against unlawful search and seizure, but that section does not specifically state what is to be done when a person or place is subjected to an unlawful search and seizure and the evidence obtained is sought to be used against that person. It is at the time when such evidence is sought to be used against the accused that the operation of Section 10 comes into effect. By invoking his rights under Section 10, the accused may ask and demand that evidence obtained by a violation of another constitutional right of his, the right against unlawful searches and seizures, is not thereby used against him to his detriment. In the case of *People v. Grod*,<sup>10</sup> the Illinois Supreme Court said: "The seizure or compulsory production of a man's private papers, property or effects to be used in evidence against him is equivalent to compelling him to give evidence against himself, and in a criminal case is prohibited by the Constitution."

#### THE EXCLUSIONARY RULE

The jurisdictions excluding evidence obtained as a result of unlawful searches and seizures have become widely known as exclusionary jurisdictions, or jurisdictions applying the "exclusionary rule." The so-called "exclusionary rule" was developed in the case of *United States v. Weeks*,<sup>11</sup> a 1914 case. Jurisdictions applying the rule of ex-

<sup>8</sup> Italics added.

<sup>9</sup> *People v. Castree*, 311 Ill. 392, 395, 143 N.E. 112, 113 (1924).

<sup>10</sup> 385 Ill. 584, 590, 53 N.E. 2d 591, 594 (1944).

<sup>11</sup> 232 U.S. 383 (1914).

clusion do not permit the use of evidence which is obtained by unlawful search and seizure, if "timely" application to exclude is made by the accused, but there is no uniformity as to what amounts to "timely" application.

Illinois is supposedly committed to the view that a pre-trial motion must be made to exclude evidence, or otherwise the court will not take cognizance of how the evidence was obtained.<sup>12</sup> The reason given for the Illinois view is that courts should not interrupt the orderly course of a trial and try collateral issues such as the source of evidence sought to be introduced. The decision to which the cases applying the rule that a pre-trial motion must be made in order to exclude the fruit of unreasonable searches and seizures usually refer is *People v. Gindrat*.<sup>13</sup> At this point, therefore, a brief discussion of that case is in order. The defendants in the *Gindrat* case were tried for larceny of a diamond ring. The facts indicate that an off-duty policeman, dressed in civilian clothes, went to defendants' home, and searched the place without a search warrant or other authority. He discovered certain imitation diamond rings, which were subsequently introduced into evidence over the objections of defendants. In its opinion the Illinois Supreme Court indicated that the police officer who had obtained the imitation rings had done so as a private citizen, that no governmental agency had been involved in the procurement of the evidence, and that although the police officer could be sued in a civil court for trespass, the criminal court had no right to go into the collateral question as to how the evidence was obtained.

The court indicated that there was no unlawful search as to the criminal case, but that the evidence had come from an independent, private source which would be the concern of a civil court. The court then indicated that since there was no question as to whether the constitutional rights and privileges of defendants had been invaded, the only proper objection to the evidence at that stage of the trial would be as to the competency and relevancy of such evidence.

*People v. Brocamp*<sup>14</sup> is supposedly the first Illinois Supreme Court

<sup>12</sup> *The City of Chicago v. Lord*, 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); *People v. Velecek*, 404 Ill. 461, 89 N.E. 2d 368 (1949); *People v. Dalpe*, 371 Ill. 607, 21 N.E. 2d 756 (1939); *People v. Anderson*, 337 Ill. 310, 169 N.E. 243 (1929); *People v. Drury*, 335 Ill. 539, 167 N.E. 823 (1929); *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924); *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).

<sup>13</sup> 138 Ill. 103, 27 N.E. 1085 (1891).

<sup>14</sup> 307 Ill. 448, 138 N.E. 728 (1923).

decision to rule on the question of whether property was obtained by unlawful search and seizure. One of the court's statements<sup>15</sup> started the present line of Illinois authority that a pre-trial motion is necessary in order to take advantage of the constitutional provision against evidence unlawfully obtained. In the *Brocamp* case,<sup>16</sup> proper motions were made to exclude certain evidence as being obtained unlawfully, prior to the commencement of the trial. The trial court denied the motions, the evidence was admitted and defendant was found guilty. In reversing the decisions of the trial court, the Illinois Supreme Court held that the evidence should have been excluded because obtained by an unlawful search and seizure. In elaborating further, the court made the following statement:

An offer of proof made on the trial of a cause raises no other question than that of the competency, relevancy and materiality of the evidence offered.<sup>17</sup> Consequently the court, on an objection being made, cannot be expected to stop the trial of the case and enter upon the trial of a collateral issue as to the source from which the evidence was obtained. This court has repeatedly refused to enter upon the trial of such collateral issues even when the objection raised to the competency of the evidence was based upon the claim that the evidence had been secured by means of unlawful search and seizure, in violation of the defendant's constitutional rights.<sup>18</sup>

In corroboration of that view the court cited the *Gindrat* case.<sup>19</sup> The court also said in the *Brocamp* case:

In 10 R.C.L. 933, after laying down the rule of law that in the orderly course of the trial the court will not stop the trial to determine in what manner the evidence has been obtained, and that an objection that exhibits have been obtained by unlawful search and seizure will only be considered as raising an objection to the competency and relevancy of the evidence, it is said: "It is obvious, and the courts have frequently declared, that if letters and private documents may be seized in violation of the constitutional safeguard and held and used in evidence against a citizen accused of crime then the constitutional provision is ineffectual and of no value." It is further stated by the author, in substance, that the defendant should make timely application to the court, before the beginning of the trial, for an order directing the return to the applicant of the property or of the papers unlawfully seized, and that on such an application the question of the legality of the seizure must be fully heard, and if the court erroneously refuses to order such return and thereafter receives the property in evidence against the applicant over his objection; it is an error for which a judgment of conviction must be reversed.

<sup>15</sup> *Ibid.*, at 456 and 732.

<sup>16</sup> Authority cited note 14 *supra*.

<sup>17</sup> No such question was before the court.

<sup>18</sup> *People v. Brocamp*, 307 Ill. 448, 454, 138 N.E. 728, 731 (1923).

<sup>19</sup> *People v. Gindrat*, 138 Ill. 103, 27 N.E. 1085 (1891).

In *People v. Castree*,<sup>20</sup> the Illinois Supreme Court did not discuss the point independently, but referred to its decision in the *Brocamp*<sup>21</sup> case and stated that that case was the law. Most of the recent cases<sup>22</sup> have stated that the law was settled a long time ago by *People v. Brocamp*. In *People v. Anderson*,<sup>23</sup> the Illinois Supreme Court did not entirely rule out the possibility of the court's sustaining a motion to suppress made for the first time after the commencement of trial. In the *Anderson* case the court said:

Plaintiff in error did not make a motion for a suppression of this evidence before the commencement of the trial but waited until after the jury had been impaneled and the trial commenced. Where it is claimed that evidence against one accused of crime has been obtained by an unlawful search of his house and seizure of his effects, the question of such unlawful search and seizure must be presented to the court before the trial, if possible.<sup>24</sup>

It is submitted that older opinions like the *Gindrat* case<sup>25</sup> were not liberal in their application of the pertinent constitutional provisions against unlawful search and seizure. Few jurisdictions, if any, applying the exclusionary rule would hold an off-duty police officer (whether in uniform or not) to be a stranger and private citizen not connected with governmental authorities in any way, if such officer obtained evidence against a citizen by unlawful search and seizure.

The real difference between the earlier cases and the *Brocamp* case is that the latter tended to give some meaning to the constitutional provisions against unlawful search and seizure instead of the very limited construction and application in the earlier cases. The better view, which appears possible under the Illinois cases, appears to be for the courts to hold that when the accused has knowledge prior to trial of the intended use against him of evidence unlawfully obtained from him or his premises, he must make a motion to exclude such evidence prior to the commencement of the trial; but if, on the other hand, an accused first learns of such evidence during the course of the trial, he should not be denied his constitutional rights because of

<sup>20</sup> 311 Ill. 392, 143 N.E. 112 (1924).

<sup>21</sup> 307 Ill. 448, 138 N.E. 728 (1923).

<sup>22</sup> *The City of Chicago v. Lord*, 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); *People v. Drury*, 335 Ill. 539, 167 N.E. 823 (1929).

<sup>23</sup> 337 Ill. 310, 169 N.E. 243 (1929).

<sup>24</sup> *Ibid.*, at 328 and 249. The court indicates that the rule should not be ironclad by adding, "if possible."

<sup>25</sup> *People v. Gindrat*, 138 Ill. 103, 27 N.E. 1085 (1891).

a fact over which he had no control. In the latter instance an accused should have a right to a hearing to determine whether the evidence was unlawfully obtained, even though it would cause an interruption of the trial of the cause. Constitutional rights and privileges are treasured ones, and if they are to be deemed waived by an individual it should be only upon his neglect or refusal to invoke them when he knows they are in issue.

#### WHAT SEARCHES AND SEIZURES ARE UNLAWFUL

The cases show that what amounts to an unlawful search is not a static thing always exhibiting the same shape. As to the search of a building or premises without a search warrant, the law seems to be very clear (except in a few instances) that such a search is definitely unlawful. In *People v. Brocamp* the court said:

It is very clear that the defendant's constitutional rights were ruthlessly and unlawfully violated. The officers had no right whatever to enter his home by force or by permission of another in his absence and search his premises without first obtaining a proper warrant for such search and seizure, as required by our constitution.<sup>26</sup>

There were some later cases in which the principles announced in the preceding case, as to the search of a dwelling or other premises without a search warrant, were discussed with approval.<sup>27</sup> Later in the case of *People vs. Grod*,<sup>28</sup> the court stated that the search of a dwelling or other premises without a search warrant is unreasonable as a matter of law. In the *Grod* case, an opinion written by Mr. Justice Gunn, the Illinois Supreme Court said, that "[t]here is a distinction between the search of a dwelling house without a warrant, and the search of the person of the defendant, or of the vehicle in which he is riding, in that the first is unreasonable as a matter of law, whereas the latter may depend upon the particular circumstances of the case."<sup>29</sup> Before making the aforementioned decision, the court reviewed the previously decided cases on the point and said that the "exact question before us was not decided in any of these cases, but the conclusion to be drawn from them is that the search of one's dwelling without a

<sup>26</sup> 307 Ill. 448, 453, 138 N.E. 728, 730 (1923).

<sup>27</sup> *People v. Dalpe*, 371 Ill. 607, 21 N.E. 2d 756 (1939); *People v. Lind*, 370 Ill. 131, 18 N.E. 2d 189 (1938); *People v. Poncher*, 358 Ill. 73, 192 N.E. 732 (1934); and *People v. Castree*, 311 Ill. 392, 143 N.E. 728 (1924).

<sup>28</sup> 385 Ill. 584, 53 N.E. 2d 591 (1944).

<sup>29</sup> *Ibid.*, at 592 and 595.



warrant is unreasonable, and any articles taken may, upon motion, be either impounded by the court, or ordered returned to defendant, and not be permitted to be used as evidence in the case."

Where the search warrant fails to describe the premises to be searched, it seems to be very clear that the search and seizure based thereon are unlawful.<sup>30</sup> There is no question about the unlawfulness of the search when the search warrant does not describe the property to be seized, or the affidavit on which a warrant is obtained is insufficient or lacking, because the statutory provisions under which search warrants may issue clearly set forth the requirements.<sup>31</sup>

The trouble area as to what searches are unlawful starts when there has been a lawful arrest of the accused prior to the search. It is a well-settled principle of law that when an individual is lawfully arrested, the officer or other person making the arrest has a lawful right to search that person as an incident to the arrest.<sup>32</sup> There is little argument as to whether the portable personal property which one has with him at the time of a lawful arrest is subject to search as an incident to the lawful arrest, although the language used in *People v. Poncher*<sup>33</sup> seems to limit the search of the personal property which accused may have with him to property "involved" in the crime charged. In commenting on *People v. Poncher*,<sup>34</sup> and *People v. Davies*,<sup>35</sup> the Illinois Supreme Court, in the opinion of *People v. Grod*, quoted from the *Poncher* case with approval as follows: "What the opinion means to hold, and does hold, is, that if a person is arrested he may be searched for weapons and for property in his immediate personal possession *which are involved in the crime charged*."<sup>36</sup>

As to the right of an officer to make a search of premises as an incident to a lawful arrest of a person, the Illinois cases are contradictory. The better reasoned cases seem to indicate that there is a very limited right, if any, to search premises as an incident to a lawful arrest. *People v. Davies*,<sup>37</sup> apparently the first case relied on for the

<sup>30</sup> *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924).

<sup>31</sup> Ill. Rev. Stat. (1874) c. 38, § 692, as amended, Ill. Rev. Stat. (1933) c. 38, § 691.

<sup>32</sup> *People v. Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944); *People v. Lind*, 370 Ill. 131, 18 N.E. 2d 189 (1938); *People v. Poncher*, 358 Ill. 73, 192 N.E. 732 (1934); *People v. North*, 139 Ill. 81, 28 N.E. 966 (1891).

<sup>33</sup> 358 Ill. 73, 192 N.E. 732 (1934).

<sup>34</sup> *Ibid*.

<sup>35</sup> 354 Ill. 168, 188 N.E. 337 (1933).

<sup>36</sup> 385 Ill. 584, 590, 53 N.E. 2d 591, 594 (1944) (Italics added).

<sup>37</sup> Authority cited note 35 supra.

above proposition, certainly does not stand for such proposition. The facts in that case do not indicate that there was a search at all. The police officers went to the home of defendant, and defendant drew a gun on them and ordered them off his premises. Defendant also used very foul language and threatened to kill the officers, although one of the officers pulled off his star and held it against the window so defendant could see it. Despite the actions of the officers defendant refused to admit them although he was told that he was under arrest. The police officers left the premises and returned with some other officers, at which time they were admitted to defendant's home. Upon admission to defendant's home, the officers found defendant sitting in the kitchen, but he did not have the gun. The officers asked defendant to give them the gun, and, at first, he refused to do so, but subsequently instructed his wife to get the gun and give it to the officers. There is nothing about the facts in that case that remotely indicates a search of one's premises may be made as an incident to a lawful arrest. From the facts previously stated there was no search at all, but there was a demand for a gun which was produced in response to the demand. There could have been a question of coercion, but certainly there was no search.

Another case which has been cited as standing for the proposition that premises of a defendant may be searched as an incident to a lawful arrest is *People v. Dubin*.<sup>38</sup> In that case the officers had a warrant for the arrest of defendant for violating certain laws relating to the practice of dentistry. When the officers arrived at defendant's offices they saw the premises being used for similar violations to the ones charged in the warrant. The entire premises were being used for such violations, and when the officers arrested defendant they searched the premises and seized devices that were being used in violation of the act charged in the warrant. The court held that the officers saw the premises being used for the violation of the law and they certainly had a right to search the premises which they saw being so used. The circumstances in that case are not distantly related to a search of premises being incident to a lawful arrest of a person. The law is definitely settled, by statute, that if an officer or other person sees a crime being committed that such officer or person may arrest the offender without a warrant.<sup>39</sup>

<sup>38</sup> 367 Ill. 229, 10 N.E. 2d 809 (1934).

<sup>39</sup> Ill. Rev. Stat. (1955) c. 38, § 657.

There is no reason why officers should be denied the right to search premises for instruments of crime when the officers see the premises being used for crime. It is the opinion of the author that the result in that case is and should be limited to instances where the arresting officers actually see the premises searched being used for crime. In such instances, the premises cannot be arrested, so it appears to be logical that a search should be permitted when the crime or crimes are being so committed.

In *People v. Marvin*,<sup>40</sup> the search did not involve premises or a house or building but involved an automobile, although that case has been many times cited as standing for the proposition that premises may be searched as an incident to a lawful arrest. The preceding statement is also true as to the case of *People v. Tabet*.<sup>41</sup> In the case of *People v. Tillman*,<sup>42</sup> (assuming that the arrest was lawful, which is doubtful) the defendant was lying on the mattress at the time of the arrest; and the narcotics, which were found under the mattress, were in such close proximity to the person of defendant that it could be said to be a part of his person. The facts in that case do not tend to give an open license to officers to search premises as an incident to a lawful arrest.

The case that comes closest to permitting a search of premises as an incident to a lawful arrest is *People v. McGowan*.<sup>43</sup> In that case the officers saw three parties emerge from a basement carrying bags and arrested them because one of the three was carrying a bag which was open and which showed policy slips. The other two bags also contained policy slips. The officers went into the building from which they had seen the men emerge and saw a man looking through a small window. The officers asked admittance and were refused. They proceeded to break in and arrest all parties in the room and searched the place. In its opinion on the case, the Illinois Supreme Court indicated that the officers saw the premises being used in the commission of a crime, but the court later gave as its reason for the decision the fact that the officers had a right to search the premises incident to the lawful arrest of the first three individuals. In support of that contention a number of cases were cited, all of which stand

<sup>40</sup> 358 Ill. 426, 193 N.E. 202 (1934).

<sup>41</sup> 402 Ill. 93, 83 N.E. 2d 329 (1949).

<sup>42</sup> 1 Ill. 2d 525, 116 N.E. 2d 344 (1953).

<sup>43</sup> 415 Ill. 375, 114 N.E. 2d 407 (1953).

for the proposition that the "person" of an accused may be searched as an incident to a lawful arrest.

Of all the cases referring to the search of premises as an incident to a lawful arrest, *People v. Grod*<sup>44</sup> (which came subsequent to a number of those cases) is either cited with approval or is not cited at all, although the language in that case appears to be directly opposed to the idea of search of premises as an incident to the lawful arrest of a person. In citing from other cases with approval, the Illinois Supreme Court said in *People v. Grod* that the law ". . . cannot . . . mean that, if a person is lawfully arrested on a criminal charge which involves his possession of particular property, the officers are at liberty to search his home, his place of business, or buildings of which he may have the right of occupancy, without first obtaining a search warrant therefor."<sup>45</sup> Later in the same opinion the court stated that search of a dwelling house of an accused is unreasonable as a matter of law.

As to the question of the search of an automobile as an incident to a lawful arrest when the defendant is riding therein, the cases seem to hold that such searches are incident to the arrest and may be made without a search warrant, and in support thereof cases are cited holding that the person of an individual lawfully arrested may be searched as an incident to the arrest.<sup>46</sup> In *People v. Tabet*,<sup>47</sup> the question was brought before the Illinois Supreme Court concerning the necessity of obtaining a search warrant to search an automobile. The defendant raised the question of statutes setting forth the requirements for obtaining search warrants, specifically naming automobiles as things for which search warrants may issue.<sup>48</sup> In that case the court stated that since the constitutional prohibition, Article II, Section 6 of the Illinois constitution, does not list automobiles, they were not intended to be included in the prohibition. The court stated that the original statutes controlling the issuance of search warrants were passed in 1874 when no automobiles were in existence, so therefore, the use of the word "place" in those statutes could not include an automobile. The court

<sup>44</sup> 385 Ill. 584, 53 N.E. 2d 591 (1944).

<sup>45</sup> *Ibid.*, at 590 and 594.

<sup>46</sup> *People v. Edge*, 406 Ill. 490, 94 N.E. 2d 359 (1953); *People v. Tabet*, 402 Ill. 93, 83 N.E. 2d 329 (1949).

<sup>47</sup> 402 Ill. 93, 83 N.E. 2d 329 (1949).

<sup>48</sup> Ill. Rev. Stat. (1933) c. 38, §§ 691, 693.

spoke of the amendment of those statutes in 1933, but did not show what effect the amendment is to have on the search of automobiles.

#### POSSESSION OR OWNERSHIP OF PROPERTY SEIZED

In all of the jurisdictions applying the "exclusionary rule," the question arises as to what interest one has to have in property seized in order to avail himself of the constitutional privileges against unlawful search and seizure. Again there seems to be no uniformity in the courts of the several jurisdictions in solving the problem. Illinois is allegedly committed to the view that in order to assert his constitutional privileges against search and seizure, an accused must allege ownership.<sup>49</sup> The cases that seem to hold that an allegation of ownership is necessary also use the disjunctive connective "or" along with the words "request the return" of the property. It seems as though wide latitude in showing the "interest" of a person in property seized is permissible under the decisions.

*People v. Poncher*<sup>50</sup> indicates that possession on the part of an accused is sufficient to entitle an accused to the constitutional privileges against unlawful search and seizure. In *People v. Grod*,<sup>51</sup> the court discussed those cases in which language had been used to the effect that in his motion to exclude evidence a defendant must allege ownership thereof, and stated that in all of those cases the search was of an automobile, in which the respective defendants were riding at the time of their arrest. The court stated that it ". . . is to be observed that in all of these cases the search complained of was that of an automobile, in which the respective defendants were riding at the time of their arrest. None of them involved the search, without a warrant, of a dwelling house of the defendant while he was in custody."<sup>52</sup> Certain dictum in *People v. Perry*<sup>53</sup> indicates that in order for an accused to avail himself of the protection afforded by the constitutional guarantees against unlawful search and seizure, he must show an interest in either the seized property or the premises from which it was taken, and that he request a return of the same.

<sup>49</sup> *People v. Perry*, 1 Ill. 2d 482, 116 N.E. 2d 360 (1953); *People v. Tabet*, 402 Ill. 93, 83 N.E. 2d 329 (1949); *People v. Exum*, 382 Ill. 204, 47 N.E. 2d 56 (1943).

<sup>50</sup> 358 Ill. 73, 192 N.E. 732 (1934).

<sup>51</sup> 385 Ill. 584, 53 N.E. 2d 591 (1944).

<sup>52</sup> *Ibid.*, at 586 and 593.

<sup>53</sup> 1 Ill. 2d 482, 116 N.E. 2d 360 (1953).

## PERSONAL ASPECTS OF CONSTITUTIONAL GUARANTIES

A reading of the provisions of the Illinois Constitution granting immunity from unlawful search and seizure indicates that the rights and privileges granted thereunder are personal to the individual affected. There have been several cases in which the Illinois Supreme Court, in deciding cases involving those provisions of the constitution, held that the rights given thereby are personal to the individuals involved.<sup>54</sup> In *People v. Lind*, the court noted that “. . . the constitutional barrier to unreasonable searches and seizures is in the nature of a personal privilege of such high character that it cannot be waived by anyone except the person whose rights are invaded, or by someone specifically authorized to act for him in the matter.”<sup>55</sup> In *People v. Dent*,<sup>56</sup> the Illinois Supreme Court said:

[T]he gist of the act of invitation by another to enter premises without a search warrant is that the invitation must be extended under specific authorization. If anyone may indiscriminately waive the rights of another, the waiver is not a personal one; hence the constitutional privilege would be of no value.

In the former case, a defendant had been arrested and placed in jail. The officers went to his home while he was in jail, and they told his wife who they were and that they wished to search the premises. She permitted the search and certain evidence which was sought to be used against the husband was found. The trial court permitted the use of the evidence against defendant although a proper motion to suppress was made, and the defendant was found guilty. On the appeal, the Illinois Supreme Court decided that the presence of the officers amounted to coercion although some strong statements were made concerning the constitutional guarantees against unlawful search and seizure being personal. In the latter case, the officers went to the home of defendant and knocked on the door. The defendant and a guest were sitting in a room of the house. The guest invited the officers into the home where they discovered some policy devices in open view on a table. The defendant was arrested and tried after a proper motion to suppress the evidence thus obtained was made. After being found guilty, the defendant appealed the case, and the Illinois Supreme Court held that the evidence should have been suppressed because the

<sup>54</sup> *People v. Grod*, 385 Ill. 584, 53 N.E. 2d 591 (1944); *People v. Dent*, 371 Ill. 33, 19 N.E. 2d 1020 (1939); *People v. Lind*, 370 Ill. 131, 18 N.E. 2d 189 (1938).

<sup>55</sup> 370 Ill. 131, 136, 18 N.E. 2d 189, 191 (1938).

<sup>56</sup> 371 Ill. 33, 19 N.E. 2d 1020 (1939).

guest of defendant did not have specific authority to invite the officers into the home.

PEOPLE *v.* SHAMBLEY

In the case of *People v. Shambley*,<sup>57</sup> the defendant was accused by his wife of assaulting her with a gun. Defendant and his wife were purchasing the home in which they lived. At the time of the alleged altercation there was no one home except defendant and his wife. She called the police and met them outside of the building. She invited the officers into the premises and pointed out defendant who was sitting in the living room. The officers arrested defendant and searched his person, but did not find a weapon. They took defendant to a squad car and left him with some officers. Other officers returned to the premises and searched with the permission of defendant's wife until they found a gun which defendant kept in the home. Prior to the trial of the cause, defendant made a motion to suppress the gun as evidence and to return it to defendant. The court denied the motion and the case was tried by a jury. The gun was admitted into evidence over defendant's objections. The gun was displayed to the jury in such a manner as to prejudice defendant's case. The jury returned a verdict finding defendant guilty and defendant appealed from the judgment on the verdict. The case raised the question, among others, as to the legality of the search and seizure of the gun and its use as evidence against defendant. But perhaps the most significant question was whether the right to waive one's privileges against an unlawful search and seizure is personal to the defendant, or whether, in the case of husband and wife, either spouse may waive the privilege of the other. It was the position of defendant that such a right to waive did not exist without specific authority from the other spouse, and if such a peculiar right existed as between husband and wife it would not be applicable in the case before the court because the person waiving such right was admittedly antagonistic toward defendant. In its opinion, the Illinois Supreme Court upheld the validity of the search and said as follows:

In this case the consent of the wife was freely and fully given; in fact, her action appears to have been tantamount to an invitation. It is clear that in giving her consent she was not acting as agent for her husband but was acting in her own right as occupant of the premises. Such being the case, it is our con-

<sup>57</sup> 4 Ill. 2d 38, 122 N.E. 2d 172 (1954).

clusion that the search was both reasonable and lawful and that the court did not err in refusing to suppress the gun as evidence. <sup>58</sup>

In its discussion the court seemed to have ignored all decided law on the question. The court noted that "[t]he rule seems to be well established that where two persons have equal rights to the use and occupation of premises, either may give consent to a search and the evidence thus disclosed can be used against either."<sup>59</sup>

The decision and the language used by the court in that decision seem to destroy the greater portion of an accused's rights against unlawful searches and seizures. If the rights are personal, no one but the person whose rights have been invaded should be permitted to waive those rights. It would appear that constitutional rights are not rights at all if they hang by so thin a thread that someone else, whose rights have not been invaded, and whose interests are diametrically opposed to the accused's rights, may waive those rights merely by living with or occupying the same premises as the accused. The protection offered is intended for those whose rights have been violated or invaded, and not for those who are not subject to the processes of the law in a case in which the evidence obtained may be used against those persons waiving the right.

#### CONCLUSION

The author realizes that all of the facets of the problem of unlawful search and seizure have not been covered, and that some of the problems covered and situations pointed out may be covered in a great deal more detail than has been attempted here, but this article is an effort to scan the field by pointing out certain recurring problems, and by discussing some decided cases bearing on those problems.

It is the writer's view that the rules, principles and conclusions to be drawn from the Illinois cases, on the question of unlawful search and seizure, are as follows: (1) that the constitutional guarantee against unlawful search and seizure is to be liberally construed in favor of the accused; (2) that when evidence which is the fruit of an unreasonable search is admitted in evidence over proper objection of the defendant, his constitutional privilege against self-incrimination is necessarily violated; (3) that an officer who lawfully arrests a person has a right to search that person and his portable personal property which he has with him at that time, as an incident to the arrest; (4)

<sup>58</sup> *Ibid.*, at 43 and 174.

<sup>59</sup> *Ibid.*, at 42 and 174.



that an officer who saw a crime committed on the premises may search the premises for necessary evidence which was used to perpetrate the crime; (5) that the dwelling, home, residence, place of business and any other place to which an accused has a right to possession, use and occupancy, all come within the scope of the protection offered by the constitution against unlawful and unreasonable search and seizure; (6) that when the dwelling or other places to which a person has a right to possession, use and occupancy, are searched without a valid search warrant, the search is unlawful as a matter of law, unless consented to by such person or unless the arresting officer saw a crime committed therein, the commission of which crime makes it necessary to search for evidence of the same; (7) that the constitutional guarantees against unlawful search and seizure and against self-incrimination are personal to the accused and can be waived by the accused or some person with specific authorization by the accused so to do; (8) that a spouse has no implied authority to waive the other spouse's personal constitutional privileges, *People v. Shambley*<sup>60</sup> notwithstanding; and (9) one who seeks to invoke his constitutional immunity against unlawful search and seizure does not necessarily have to allege ownership of the evidence sought to be suppressed to afford him the protection offered by the constitution against unreasonable and unlawful search and seizure.

<sup>60</sup> Authority cited note 57 supra.