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Constitutional Law -- Searches and Seizures -- Search of Premises Without Warrant Reasonable as Incident to Legal Arrest

must be specifically confined to a consideration of time and place of the speech. When the discretion extends to a determination of the permissible contents of a speech, the statute is unconstitutional.[22]

In the present case, the statute in question makes no provision for any discretionary action. However, the court decided that a discretionary power of revocation was implied. But the necessary standards of limitation upon the discretion of the commissioner are not present in the statute. Nor did the court, through its decision, provide a basis upon which permits may be refused. Rather, it only finds a power to prevent possible religious riots analogous to the power to ban all raucously noisy advertising devices.[23] The court decided that defendant had no constitutional right to wantonly wound the feelings of others and thus create a possibility of riot necessitating the presence of police. But, the fact that a speech arouses animosity is not a sufficient clear and present danger of a substantial evil to justify restraint.[24] Nor can free speech be suppressed under the guise of maintaining desirable conditions.[25] It may be that the speech came within the fighting words doctrine of the *Chaplinsky* case[26] and that defendant could have been punished for a breach of the peace. However, an absolute restraint upon the right to speak in the future because of past misconduct is not in keeping with the Supreme Court's views.[27]

Though the statute requiring a permit for street preaching appears to be constitutional on its face as being only a necessary and reasonable regulation of the use of public streets, the court's decision has placed an unconstitutional power of discretion and censorship in the police commissioner, such decision being as effective as if the statute had been so amended.[28] Because of the unlimited power of discretion by the commissioner, the statute should be held unconstitutional without the necessity of deciding if the defendant's action came either within the *Chaplinsky* rule or created a clear and present danger of a substantial evil.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — SEARCH OF PREMISES WITHOUT WARRANT REASONABLE AS INCIDENT TO LEGAL ARREST

Federal officers, knowing well in advance that defendant had committed the crime of selling forged and altered postal stamps with intent to defraud[1]

22. Hague v. C.I.O., *supra*; Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, *supra*.

23. Kovacs v. Cooper, 336 U.S. 77 (1949). See also 3 MIAMI L.Q. 452 (1949).

24. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

25. *See* Hague v. C.I.O., 307 U.S. 496, 514 (1939).

26. *See* Chaplinsky v. New Hampshire, *supra* at 572.

27. Near v. Minnesota, *supra*; *but cf.* Milk Drivers Union v. Meadowmoor Co., 312 U.S. 287 (1941) (Picketing enjoined because of past violence).

28. *See* Winters v. New York, 33 U.S. 507, 514 (1947).

1. 18 U.S.C. § 268 (1946).

and was probably committing the further crime of possessing and concealing them with the same intent,[2] arrested him in his one-room office under a valid arrest warrant. Over his objection and without a search warrant, they searched his desk, safe and file cabinets for an hour and a half, finding and seizing many stamps which later proved to be forgeries. His motions to suppress and strike the seized evidence denied, he was convicted on both counts. The court of appeals reversed the conviction.[3] *Held,* on certiorari, judgment reversed and conviction affirmed. The search and seizure as incident to a legal arrest were reasonable and not within the prohibition of the Fourth Amendment,[4] even though the officers had time in which to procure a search warrant and failed to do so. *United States v. Rabinowitz,* 70 Sup. Ct. 430 (1950).

While recognizing the resulting restraint on enforcement of the criminal laws, the Supreme Court has often declared that the Fourth Amendment should be liberally construed in favor of the individual.[5] However, it has never been held to require that every valid search and seizure be effected under the authority of a search warrant.[6] It is only those searches that are unreasonable that fall within the Constitutional prohibition.[7] Thus the right to search, without warrant, the *person* of the accused as an incident to a legal arrest[8] was early established in English and American law[9] and is no longer questioned.[10] Similarly, the right exists to seize, without warrant, goods and papers on ships[11] or other moving vehicles,[12] where it is known to a competent official authorized to search that there is probable cause for believing that the vehicle is carrying contraband or illegal merchandise.[13] The reason for this holding is based on necessity, for were it not so a vehicle could be quickly moved out of the jurisdiction in which the warrant must

2. 18 U.S.C. § 265 (1946).

3. United States v. Rabinowitz, 176 F.2d 732 (2d Cir. 1949).

4. U. S. CONST. AMEND. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.")

5. *See* Sgro v. United States, 287 U.S. 206, 210 (1932); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Marron v. United States, 275 U.S. 192, 196, 197 (1927); Byars v. United States, 273 U.S. 28, 32 (1927); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616, 635 (1886).

6. *See* Harris v. United States, 331 U.S. 145, 150 (1947).

7. Carroll v. United States, 267 U.S. 132 (1925).

8. United States v. Di Re, 332 U.S. 581 (1948).

9. *See* Weeks v. United States, 232 U.S. 383, 392 (1914).

10. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lee, 274 U.S. 559 (1927); Agnello v. United States, 269 U.S. 20 (1925).

11. United States v. Lee, *supra.*

12. Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925). *But cf.* United States v. Di Re, *supra* at 584-586.

13. Gambino v. United States, 275 U.S. 310 (1927); Carroll v. United States, *supra.*

be sought. The third and most recent development, not yet fully formulated, is that of a reasonable search of the *premises* incident to a legal arrest. Suggested by the Court in three earlier cases,[14] it was not until *Marron v. United States*[15] that the suggestion emerged in a direct holding.

Under this theory the arrest upon which the search and seizure is to be based must be valid, *i.e.*, either lawfully made on a legal warrant for the offense charged in the initial complaint,[16] or, where there is no arrest warrant, it must be justifiable as having been made for a felony, by officers believing upon probable cause that the person committed it and that when arrested he was actually engaged in the commission of a crime.[17] For the Government to invoke this proposition the offender must be present on the premises during the search.[18] While the right covers a search of the place where the arrest is made, it does not extend to other places.[19] The search is not limited only to the room where the arrest occurs;[20] it may extend to all parts of the premises under the arrestee's immediate control, including a closet[21] or a bedroom.[22] Similarly, the character of the place searched is not conclusive,[23] although it appears that stricter requirements of reasonableness may be applied where a dwelling is being searched.[24] The subject matter which may be seized includes all things used in the criminal enterprise,[25] the fruits of the crime, and weapons and other implements with which an escape from custody can be effected.[26] Furthermore, the evidence seized need not relate to the crimes charged in the warrant of arrest if it does, in fact, relate to some crime.[27]

It has been said that the legal arrest doctrine does not condone general exploratory searches.[28] The cases standing for this principle distinguish themselves by showing that the evidence seized was not "visible and

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14. Agnello v. United States, *supra*; Carroll v. United States, *supra*; Weeks v. United States, 232 U.S. 383 (1914).

15. 275 U.S. 192 (1927).

16. *E.g.*, United States v. Lefkowitz, *supra*.

17. *E.g.*, Marron v. United States, *supra*.

18. Taylor v. United States, 286 U.S. 1 (1932); Agnello v. United States, *supra*.

19. Agnello v. United States, *supra* (a house several blocks from the scene of the arrest).

20. Harris v. United States, 331 U.S. 145 (1947).

21. Marron v. United States, *supra*.

22. Harris v. United States, *supra*.

23. *Ibid.*

24. *See* Davis v. United States, 328 U.S. 582, 592 (1946); Matthews v. Correa, 135 F.2d 534, 537 (2d Cir. 1943).

25. Marron v. United States, *supra* (a ledger held seizable as part of the equipment used to violate Prohibition Act).

26. *See* Agnello v. United States, *supra* at 30.

27. Harris v. United States, *supra* (the warrants of arrest charged violations of the Mail Fraud Statute and the National Stolen Property Act, while the things seized were draft cards, the possession of which was an unrelated crime).

28. United States v. Lefkowitz, *supra*; Go-Bart Importing Co. v. United States, *supra*.

accessible"[29] or "in plain view."[30] If this be the only distinction, it was removed by the *Harris* case, where the Court permitted a painstaking five-hour search and seizure of things not visible and accessible, yet was careful to refer to this as other than an exploratory search. In doing this the Court was in effect changing the meaning of "general" from a general physical search to a search with a general mental intent. The import of the *Harris* case was to leave a single decisive factor. That is, the intent and purpose of the searching officers as evidence in the *modus operandi* of effecting the valid arrest, either in the arrest warrant or in the crime being committed in their presence. Whether something in particular was being sought became the sole question.[31]

In *Trupiano v. United States*,[32] the proponents of a strict interpretation of the Fourth Amendment having mustered a bare majority, the Court held that search warrants must be secured and used wherever reasonably practicable, even when the search is incident to a legal arrest.[33] The instant case expressly overrules the *Trupiano* decision and rejects the test of the apparent need for summary seizure applied therein. The opinion reasserts the new interpretation of the *Go-Bart* and *Lefkowitz* cases[34] laid down in *Harris v. United States*. It is submitted, inasmuch as the arrest exception bypasses the constitutional necessities of having to name with particularity the property sought[35] and the place to be searched,[36] that this extension should not be without due deliberation.[37] Furthermore, with the probability almost upon us that the law will reach out and embrace a new category of political offenses,[38] it would seem that the Court should be less anxious to narrow its prior interpretations of the Amendment in such fashion than it appears to be.

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29. Go-Bart Importing Co. v. United States, *supra*.

30. United States v. Lefkowitz, *supra*.

31. *Contra*, see Frankfurter, J. in Harris v. United States, *supra* at 162 (dissenting opinion) (" 'Unreasonable' is not to be determined with reference to a particular search and seizure considered in isolation. The 'reason' by which search and seizure is to be tested is the 'reason' that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant.")

32. 334 U.S. 699 (1948).

33. Although the opinion limited the holding to cases wherein the officers were aware of the precise nature and location of the evidence long before making the arrest, in *McDonald v. United States*, 335 U.S. 451 (1948) the principle was applied with this factor absent.

34. See note 28 *supra*.

35. Marron v. United States, *supra* at 196.

36. Steele v. United States, 267 U.S. 498 (1925).

37. *See* Butler, J. in United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

38. " . . . nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Hand, J. in United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).