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increased in value or changed in form. One may doubt that the doctrine of accession has application to a case in which a larger article is broken down into its constituent parts but can be reassembled.

Some general conclusions may be stated. Texas follows the preferred rules in applying the doctrine of accession. Where the improvement has been effected through the use of skill and labor, both a "great" increase in relative value and innocence on the part of the improver are required for title to pass from the original owner. It is to be noted that permitting the improver to acquire title to a new article when there is a 1:3 ratio in relative values is more favorable to the innocent trespasser than the rule followed in most jurisdictions. In determining whether articles pass by adjunction, the severability of the additions is considered. Where the added materials cannot be removed without impairing the principal material, title passes by accession.

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ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE—THE FEDERAL RULE

ONE of the most widely discussed controversies in American evidence law concerns the question of whether evidence of a crime, illegally obtained, is admissible upon a trial of the case. The orthodox rule, both in this country and in England, has been that the "admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."[1] However, in 1886, in the landmark case of *Boyd v. United States*,[2] the Supreme Court of the United States held that articles obtained by unlawful search were inadmissible in

[1] 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2183.
[2] 116 U. S. 616.

evidence, since admission of such evidence would effectively nullify the guarantees of personal protection afforded by the Fourth Amendment to the Federal Constitution.[3] As a consequence of the *Boyd* case, a decided conflict has developed in the rulings of the various state courts. Many states continue to hold that, other rules of admissibility being satisfied, the legality or illegality of the method of obtaining the evidence does not affect its admissibility; while an almost equal number of states, presumably in deference to the *Boyd* case, have adopted its doctrine as it applies to their respective state constitutions or laws.[4]

The basic rule of the *Boyd* case was later modified by the Supreme Court in the case of *Weeks v. United States*,[5] which added the condition that the illegality of the search and seizure must first have been established by a pre-trial motion for return of the articles seized, or (in the case of non-returnable contraband) for the suppression of evidence based upon such articles; otherwise, the evidence would be admissible. The Court acknowledged the general rule that "a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony . . . ."[6] But it ruled, in effect, that the pre-trial motion for return of the articles seized made the illegal seizure a material rather than a collateral issue.[7]

Since the federal rule utilizes the Fourth Amendment as its criterion, the question of the legality or illegality of a search or seizure in a federal case turns upon whether or not that search

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[3] The Fourth Amendment reads as follows: "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."

[4] Citations of state decisions holding in accord with, or contrary to, the federal rule as adopted in the *Boyd* case, are collected in 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2183; UNDERHILL'S CRIMINAL EVIDENCE (4th ed. 1935) §§ 797, 798; 1 WHARTON'S CRIMINAL EVIDENCE (11th ed. 1935) § 373.

[5] 232 U. S. 383 (1914).

[6] *Id.* at 396.

[7] The requirement of the pre-trial motion, as well as the basic rule set forth in the *Boyd* case, is soundly criticized by Professor Wigmore, EVIDENCE (3rd ed. 1940) § 2184.

or seizure was "unreasonable". The presence or absence of a search warrant has long been considered irrelevant in determining the reasonableness of searches of the person of an arrestee,[8] and this view has been expanded to include searches to discover fruits or evidences of the crime,[9] and searches of the premises where the arrest is made.[10] However, in the case of *Trupiano* et al. *v. United States*[11] the Supreme Court adopted a new measure of "unreasonableness", and applied a new specific test for determining unreasonableness of a search and seizure. In this case the defendants, including one Antoniole, leased farm property from one Kell and constructed a barn in which they housed a distillery and mash vats. Kell cooperated with the federal authorities. A revenue agent from the Alcohol Tax Unit, Nilsen, was planted as a hired hand at the farm and accepted employment by the defendants as a "mash man". Nilsen kept in close communication with his superiors by radio and informed them of the developments of the still operations. Three months after Nilsen's employment by the defendants, federal agents raided the premises. They found the defendant Antoniole engaged in operating the still and arrested him. They also seized the illicit still, and one of the agents made a thorough exploratory search of a truck standing outside the building. The agents had neither a search warrant nor an arrest warrant, and they did not deny that there had been sufficient time and opportunity to obtain such warrants before the raid. It was held that the search and seizure were unreasonable (and therefore illegal) because the arresting officers admittedly had had opportunity to obtain warrants beforehand; hence evidence obtained thereby should be suppressed.

The court impliedly rejected as inapplicable the established doctrine that an arresting official could, within the limits of "reasonable search and seizure", look around him at the time

[8] Weeks v. United States, 232 U. S. 383 (1914).

[9] 1 BISHOP'S NEW CRIMINAL PROCEDURE (2d ed. 1913) § 211.

[10] Agnello v. United States, 269 U. S. 20 (1925).

[11] 334 U. S. 699 (1948).

of arrest and seize the fruits and evidences of crime which were within the control of the arrestee, or within the sight or presence of the officer. It reasoned that the spirit of the Fourth Amendment required law enforcement officers to procure warrants wherever reasonably practical. The practicality of procuring a warrant appeared obvious to the Court in view of the fact that, because Nilsen had been on the scene for three months prior to the arrest, the arresting officers knew, or could easily have known, the specific contraband they would be likely to find "at the exact time and place of a foreseeable and anticipated seizure." Actually, then, the facts indicate a double basis for the Court's reasoning: the seizure itself was "foreseeable and anticipated"; and the specific quantity and quality of contraband likely to be at the scene of the crime were ascertainable in advance. Focusing its attention on the anticipated seizure of the property, the Court then determined that the presence of the arrestee, Antoniole, amid his contraband, was a "fortuitous circumstance which was inadequate to legalize the seizure."[12] What seemed to be in the mind of the Court was this: the officers were proceeding mainly against the still itself; they went to the still without a search warrant, and, finding one of the operators on the premises, they arrested him without a warrant, and are attempting to use that arrest as the justification for seizing the still without a warrant—which seizure was really the primary purpose of the visit, rather than the arrest of the person. The Court rejected this devious means of seizing property, basing its reasoning on the practicality of procuring a search warrant beforehand.

There was a vigorous dissent (the decision was five-to-four) attacking the basis of the majority's reasoning. Chief Justice Vinson, expressing the minority opinion, denied that an otherwise legal and reasonable search and seizure without warrant should be branded as illegal merely because it would have been practical to obtain a warrant beforehand. He contended that the words of

[12] *Id.* at 707.

the Fourth Amendment did not demand any such interpretation,[13] and would have based the decision on the historically accepted standards of what constitutes reasonable search and seizure without a warrant.[14]

Less than two years after the controversial *Trupiano* decision, the Supreme Court decided the case of *United States v. Rabinowitz*.[15] The facts of the case were as follows. Proceeding on information received from a printer who had been arrested in connection with the printing and disposition of postage stamps bearing forged overprints, federal authorities made a sample purchase of overprinted stamps from the defendant Rabinowitz and found them to be forged. They obtained a valid arrest warrant, based on all the information they had gained from the printer and from their own investigation. After entering the defendant's one-room public shop and arresting the defendant, the officers searched the premises thoroughly and seized 573 overprinted stamps which were later proved to have been forged. On trial, the defendant made a timely motion for suppression of the evidence pertaining to the stamps, but his motion was denied. On appeal from conviction, the case was reversed by the Court of Appeals for the Second Circuit, which relied on the *Trupiano* case. Certiorari was granted to the United States Supreme Court, which reversed, affirming the judgment of conviction in the trial court. It was held that whether or not a particular search and seizure is "unreasonable" depends on the total atmosphere of the case and not on the practicality of procuring a search warrant beforehand.

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[13] Chief Justice Vinson said, "Nothing in the explicit language of the Fourth Amendment dictates that result." He also said:

"[T]he vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. Here there can be no objection to the scope or intensity of the search." 334 U. S. at 711, 714.

[14] See text at notes 8, 9 and 10 *supra*.

[15] ——U. S.——, 70 S. Ct. 430 (1950), *rev'g* 176 F. 2d 732 (C. C. A. 2nd, 1949).

Thus, there was a fundamental change from the position the Court had taken in the *Trupiano* case. It is interesting to find that this reversal resulted from nothing more than a switch in the balance of power between the majority and minority factions involved in the *Trupiano* decision. With the exception of Justice Black, who dissented in each case, the alignment of justices who participated in both decisions was identical. The reversal resulted from the deaths of Justices Murphy and Rutledge (on the side of the majority in the earlier case) and their replacement by Justices Clark and Minton, who sided with the previous dissenters.[16]

The majority here, speaking just as it, as the minority, had spoken in the *Trupiano* case, acknowledged the historical acceptance of searches of the premises without warrant at the time of a lawful arrest.[17] It also cited with approval the ruling in *Marron v. United States*,[18] in which case the Court had said,

> "[The officers] 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.... 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."

Turning then to a criticism of the specific test formulated in the *Trupiano* decision, the Court said:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable'

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[16] The alignment of justices in the two cases was as follows:
Trupiano case:
Majority: Douglas, Frankfurter, Jackson, Murphy, Rutledge.
Minority: Black, Burton, Reed, Vinson.
Rabinowitz case:
Majority: Burton, Clark, Minton, Reed, Vinson.
Minority: Black, Frankfurter, Jackson.
Not Sitting: Douglas.

[17] "The right to search the place... seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused.... It became accepted that the premises where the arrest was made... under the control of the person arrested... were subject to search without a search warrant. Such a search was not 'unreasonable.'" 70 S. Ct. at 433.

[18] 275 U. S. 192, 199 (1927).

searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."[19]

There was particular criticism of any test which adopts a retrospective consideration of past events, in these words:

"It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant.... The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence... is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential."[20]

In summing up, the Court specifically overruled the test of the *Trupiano* case and indicated its concept of the true test as follows:

"To the extent that *Trupiano v. United States*... requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."[21]

The Fourth Amendment to the Constitution does not define "unreasonable searches and seizures", nor does it expressly say that the warrants which it mentions are necessary in order to avoid unreasonable searches and seizures. The opinions in these two cases indicate the two entirely different lines of reasoning which were applied in interpreting the letter of the Fourth Amendment. Stated in a few words, the difference in the approach of the two cases is that the majority in the *Trupiano* case read into the Amendment an implied connection between the words "un-

[19] 70 S. Ct. at 434.
[20] *Id.* at 435.
[21] *Ibid.*

reasonable search and seizure" and "no Warrants shall issue";[22] whereas the majority in the *Rabinowitz* case read into the Amendment the interpretation of "unreasonable search" as it has developed historically (generally, along lines of scope and intensity, and area to be searched) without regard to the juxtaposition of the reference to issuance of warrants.[23]

Does the decision in the *Rabinowitz* case overrule completely the test of the *Trupiano* case? It is true that the cases can be distinguished on the facts. In the earlier case, the officers knew, or could have known by radio from their agent, exactly what contraband they would find on their arrival at the still; whereas the officers in the later case did not know, for a certainty, that they would find any forged stamps on the premises of the arrested dealer. This circumstance would be a relatively stronger justification for their seizure of "evidences of the crime" not definitely foreseeable. But the general repudiation in the *Rabinowitz* case makes no allowance for this difference in the fact situation. The first part of the sentence denouncing the *Trupiano* rule sounds as though the overruling is to be qualified; but the latter part of the sentence substitutes another test as the complete criterion for the requirement of a search warrant. Thus the former rule is, in effect, completely cast aside.

This revocation of the earlier rule and substitution of the new, results in an even more lenient attitude toward searches without warrant than obtained before the *Trupiano* case. Before that case (as noted in Chief Justice Vinson's dissent) there had at least been a "scope and intensity" measure of determining a reasonable search and seizure.[24] But the *Rabinowitz* case calls for merely an "overall atmosphere" test, which can easily be read to be: "The

[22] Justice Frankfurter, with the majority in the *Trupiano* case, said in his dissent to the *Rabinowitz* case: "When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." 70 S. Ct. at 437.

[23] See notes 13 and 17 *supra.*

[24] See quotation from Chief Justice Vinson's dissent in note 13 *supra.*

test of whether a search is reasonable is: is it a reasonable search?" It is not the kind of test that lends itself to any manner of easy application. Moreover, in view of what the Court in the *Rabinowitz* case said in criticism of the "retrospective" aspect of the *Trupiano* test, it is entirely possible that future decisions will exclude any retrospective analysis of the "total atmosphere of the case." In other words, the Court may well judge the "total atmosphere" as it must have appeared to the participating officer at the time of the search and seizure in question. Justice Minton, in speaking for the majority in the *Rabinowitz* case, keynoted the spirit of the Court's decision when he said, "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." The elusive test laid down in the case would appear to give law officers the maximum of flexibility, and certainly imposes no new restrictions on their acting without warrants.

But the flexible rule may, as far as the trial courts are concerned, amount to no usable rule at all. Justice Black's separate dissenting opinion expresses his own misgivings as to the result of the majority decision:

> "The *Trupiano* case itself added new confusions 'in a field already replete with complexities'.... But overruling that decision merely aggravates existing uncertainty.... And I do not understand how trial judges can be expected to foresee what further shifts may occur."

The trial judge could, taking the letter of the rule, use it to depart completely from any former tests of "reasonable search," and decide each case on its own facts, without regard to precedent. If precedents are looked to at all, however, this case adds no new criterion of its own in the determination of "reasonableness." Rather, it seems to beg the question.

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