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numerous proceedings to litigate several substantive offenses arising from one transaction may well be subject to criticism even though common questions of fact and law are not involved. When the subsequent proceedings involve substantially identical evidence, requiring no additional proof to that shown in the first trial, the immunity offered by Section 1938 provides little protection when applied as it was here.

The decision in the instant case also tends to obscure the fact that although an additional element had to be proved in the first prosecution, i.e., the homicide while the felony was in progress, the offense, at least to some of the co-defendants involved, is the same in both prosecutions, in fact and in law. Their single act of participating in the felony did not offend against two statutes. Although they were, through legislative definition, held accountable to conviction under both, in each trial their single offense is identical.

As a question of fairness, the defendant is forced to run the gantlet on a charge which gives the jury only a single alternative to conviction of murder in the first degree, an outright acquittal. And this is merely because the prosecution considers this form of indictment as offering less of an advantage to the defendant. Yet, having successfully defended the charge, the accused must again submit to another charge that should properly have been considered and disposed of at the first trial.

With the number of statutory offenses greatly increased, and because of the expense and delay involved in awaiting trial on burdened court calendars, it appears that a formidable weapon has been forged to prevent release of an individual currently running the gantlet of successive and related charges. Regardless of the results desired in any specific problem before the courts, the concept of double jeopardy should be deserving of a more acute analysis instead of a somewhat mechanical approach.

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LIMITATION ON EXPANDING SCOPE OF LEGALITY OF SEARCHES AND SEIZURES IN MICHIGAN

For years prior to 1914, but even more so since that time, the states in our country have vigorously belabored the issue of admissibility of evidence obtained during an illegal search and seizure. The United States Supreme Court stated its position on the subject in 1914 in the famous *Weeks* decision.[1] The rule promulgated in that case, for the Federal courts to follow in instances where a Federal officer did the searching, was that any evidence obtained in the course of an illegal search and seizure was inadmissible. Such exclusion, the court felt, was dictated by the Fourth Amendment to our Federal Constitution in order to safeguard the individual's right to privacy.

1. Weeks v. United States, 232 U.S. 383 (1914).

Some states had applied the rule of exclusion prior to the *Weeks* decision but the majority of the states were opposed to placing such an obstacle in the way of successful apprehension of criminals. Since *Weeks* there has been a gradual tendency in the direction of the exclusionary rule to the extent that today there is about an even split among the states, half applying the *Weeks* exclusionary rule and half adhering to a non-exclusionary policy.

New York exemplifies a state remaining firm in its application of a no exclusion type procedure. The New York Court of Appeals stated its position quite clearly in 1926 when it recognized that the Fourth Amendment, and its application as construed in the *Weeks* case, was not made binding on the states by the Fourteenth Amendment.[2] As long as the defendant is accorded a fair trial, the dictates of the Fourteenth Amendment, in so far as it embraces the Fourth, are satisfied. The exclusion of evidence obtained during an illegal search and seizure was not deemed necessary in order to guarantee a defendant a fair trial. The need for efficient and effective law enforcement was considered great enough to allow the possibility of an innocent person being subjected to an invasion of his right to privacy.

Taking the position that illegal search and seizure is not necessary in order to achieve an adequate enforcement of law and protection of society against the criminal, the other half of our nation forbids the admission of illegally obtained evidence. Michigan places itself among the states with this sentiment in the *Marxhausen* case, a 1919 decision.[3] The *Weeks* case apparently had a strong influence on the *Marxhausen* decision, since as late as 1911 Michigan professed adherence to the non-exclusion position.[4]

Due to an increasing tendency among the states toward an acceptance of the exclusionary rule, the question of what constitutes an illegal search and seizure is a question growing in importance. Once a state adopts the *Weeks* rationale, it must decide whether the search and seizure in a particular instance is legal or illegal, for upon this determination rests the result: admissible as evidence if legal; excluded if illegal. Michigan recently suggested a stringent test for the legality of an automobile search in *People v. Gonzales*.[5] An examination of the area of legal search and seizure of vehicles reveals the impact of this decision.

The Federal courts, and the state courts following the Federal exclusionary rule, have evolved a standard that a "reasonable" search and seizure constitutes a legal search and seizure for purposes of the admission of evidence. A reasonable search with a warrant has been determined to be one in which only that which the warrant expressly authorizes is seized. With regard to searches accompanying an arrest, only that which is incidental to the arrest is deemed

2. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
3. People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).
4. People v. Aldorfer, 164 Mich. 676, 130 N.W. 351 (1911).
5. 356 Mich. 247, 97 N.W.2d 16 (1959).

to be reasonably seized, namely, the fruits of the crime; the means by which it was committed; or instruments calculated to effect an escape from custody.[6]

The courts have been reluctant to go any further in categorizing the term "reasonable search and seizure." In fact the United States Supreme Court has conceded its ineptness in attempting to arrive at a more definitive description of the term, feeling that a case by case determination is the most satisfactory procedure.[7]

The Michigan Supreme Court encountered the problem of determining the reasonableness of a search and seizure in *People v. Case*,[8] a 1922 decision. In that case the Court suggested that the location of the search was a relevant factor in determining its reasonableness. The defendant had driven his automobile upon public fairgrounds where a county fair was in progress. The sheriff, searching the grounds for suspected violation of the prohibition laws then in effect, entered the defendant's parked, unoccupied truck and found liquor. When the defendant confessed ownership of the truck, he was tried and convicted of violating the prohibition laws. In affirming the conviction, the Michigan Supreme Court recognized that the automobile is merely a means of transportation for use on the public highways and is not actively used on private premises which the law guards more zealously from search and seizure without process. The availability of a search warrant for automobiles was ruled an impractical method of search, since the mobility of a vehicle enabled it to escape from the warrant's jurisdictional limits before the search could be conducted. Since the automobile is found on the public highway, as opposed to private premises, it was deemed not worthy of the high degree of protection from intrusion that is accorded a person's home under the Federal Constitution's Fourth Amendment.

In *Carroll v. United States*,[9] the United States Supreme Court added weight to that 1922 Michigan decision by recognizing the relevance of a distinction between an automobile and a dwelling house in determining whether a search and seizure was reasonable. The Court recalled how the First Congress distinguished, as to the necessity for a search warrant, between goods subject to forfeiture when they were concealed in a dwelling house, and like goods in the course of transportation when concealed in a movable vessel. Congress felt that it was not feasible to require a search warrant for vessels because their mobile nature would allow them to escape the grips of the warrant after it was obtained. The *Carroll* case suggested that the presence of probable cause for believing a crime had been committed would make the search and seizure within a vessel legal for purposes of admitting the evidence which was obtained. The definition of probable cause relied upon by the Court is found in *Stacy v. Emery:* "If the facts and circumstances before the officer are such

6. Agnello v. United States, 269 U.S. 20 (1925).
7. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
8. People v. Case, 220 Mich. 379, 190 N.W. 289 (1922).
9. People v. Carroll, 267 U.S. 132 (1925).

as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient,"[10] that is, they constitute probable cause.

The opinion in the *Carroll* case seems to indicate that more freedom will be allowed to an arresting officer in searching vessels without a warrant, than is accorded to an officer making an arrest and searching within a dwelling place. The Court doesn't appear to limit him to the requirement, in the case of a misdemeanor, that the crime be committed in his presence. Yet, today most of our states require the officer to witness a misdemeanor before he can arrest a person for committing it. Is this suggesting that a valid arrest is not a prerequisite to a valid search and seizure, at least when it concerns vessels? If not, it is at least suggesting that probable cause will be valid grounds for arrest in a vessel, and that a search and seizure of some degree will lawfully follow once probable cause is found.

The *Agnello* decision in the United States Supreme Court,[11] holding that a search of a private dwelling without a warrant is in itself unreasonable, followed closely on the heels of the *Carroll* decision, and further demonstrated the recognition of a distinction between vessels and dwellings by distinctly limiting its ruling to dwellings.

After the *Carroll* and *Agnello* decisions it soon became a commonly accepted policy among all the jurisdictions, both Federal and state, that warrants were not necessary for a lawful search of vessels, and the policy was extended to vehicles for the same reasons of practicality. Law enforcement officers, however, still were faced with the problem of meeting the "probable cause" requirement of the *Carroll* case.

As the automobile became more commonplace on the roads of Michigan and more frequently used as a means of violating the laws of Michigan, the Michigan Supreme Court loosened the control upon its police, and allowed greater liberality in conducting searches and seizures of motor vehicles. In 1929, the Michigan police stopped a car and arrested the driver for speeding. The automobile was searched and liquor was found in it. The Michigan Supreme Court sustained a conviction for the violation of the prohibition laws on the theory that the arrest for speeding was lawful, and it was therefore proper to search the car in which the arrested person was riding.[12] The arrest was considered probable cause for the search. The court indicated that a traffic violation was sufficient reason for allowing the police to search the automobile.

Five years later, when the Michigan police approached an automobile which they had stopped for speeding, they noticed the driver fumbling nervously in his pockets. They searched him and found a pistol in his pocket. The Michigan Supreme Court sustained his conviction for illegal possession of a weapon although the only provocation for the search and seizure was the fum-

10. Stacy v. Emery, 97 U.S. 642, at 645 (1878).
11. Supra note 6.
12. People v. Davis, 247 Mich. 536, 226 N.W. 337 (1929).

bling in the pockets.[13] The defendant could very well have been trying to locate his driver's license instead of a pistol. It certainly cannot be said that it is unusual for a driver who has been stopped by the police to get his driver's license and car registration out of his pocket for police investigation before being asked to do so by the police. It seems, therefore, that this is in essence another instance where a traffic violation prompted a search and seizure which was recognized as legal by the Michigan Supreme Court.

These latter two cases represent the furthest extent to which the Michigan Supreme Court had allowed police to penetrate the interior of the privately owned automobile prior to 1936. These decisions were reached even though Michigan followed the exclusionary rule and the State Constitution of Michigan contained a provision similar to the Fourth Amendment to the Federal Constitution.[14] Article 2, section 10 of the Michigan Constitution reads as follows:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

As was already noted, Michigan exempted vehicle searches and seizures from the requirement of obtaining a search warrant. The term "place" in Article 2, section 10 of the State Constitution was thereby confined to fixed locations, presumably dwellings in most instances. The constitutional provision lists "possessions" after person, houses, and papers when referring to items protected from unreasonable searches and seizures. While the order of listing is not conclusive, it may afford an indication of the degree of protection accorded to each of these items. It is certainly safe to say that under ordinary circumstances the individual's person, as distinguished from his house and possessions, merits a degree of protection second to none. Perhaps it follows that possessions, the category under which vehicles are placed, are rendered a lesser degree of protection than the preceding categories in the provision.

While these observations are primarily speculative, it cannot be doubted that houses and possessions are distinguished in the provision, since otherwise the term "house" would be a redundancy, because a house is a possession within the overall meaning of the term "possession."

In 1936, Article 2, section 10 was amended as follows:

> Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any firearm, rifle, pistol, revolver, automatic pistol, machine

13. People v. Lewis, 269 Mich. 382, 257 N.W. 843 (1934).

14. "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."

> gun, bomb, bombshell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state.[15]

In effect, doesn't this amendment permit the admission of evidence obtained during an illegal search and seizure conducted someplace other than in a dwelling when the article seized is categorized as dangerous? The amendment reserves the sanctity of the dwelling house, but beyond that it puts a big dent in Michigan's exclusionary rule. Not much, other than the general category of "papers," remains protected from admission into evidence because of an illegal search and seizure conducted outside the home.

Shortly after the amendment became effective, the Michigan Supreme Court decided that the search of a car in which the lawfully arrested person was riding was incidental to the arrest.[16] In a second instance the Court held that the police were justified in searching an automobile even though the arrested person was not in it at the time of the arrest.[17]

These cases, viewed in conjunction with the constitutional provisions and amendments, present a discernible policy in the state of Michigan of allowing police liberality within the bounds of legality regarding searches and seizures of automobiles; a policy which appeared to be consistently adhered to until last year when the Michigan Supreme Court wrote its majority opinion in *People v. Gonzales*.[18]

In the *Gonzales* case a car was stopped for a traffic violation, having only one headlight burning. After the occupants were asked to get out of the car, the police saw a pistol butt sticking out of the front seat. The police then searched the individuals and found a .38 caliber cartridge in the pocket of one of them. The court held that the evidence was admissible because the 1936 amendment to Article 2, section 10 was constitutionally authorized by *Wolf v. Colorado*,[19] and was controlling in this situation since the evidence concerned was a dangerous weapon. The part of the opinion which compelled attention was the manner in which the court classified the search and seizure as illegal. The language in the opinion indicated that no distinction between a person's home and his possessions was tolerable. The Court seemed to say that since the amendment permitted the admission of evidence obtained during an illegal search and seizure in the case of dangerous weapons, it would retaliate for the

15. In 1952 an amendment added "any narcotic or drugs" to the list.

16. People v. Overton, 293 Mich. 44, 291 N.W. 216 (1940).

17. In People v. Orlando, 305 Mich. 686, 9 N.W.2d 893 (1943), the defendants were found near the place where a stench bomb had been placed in a theater. Their clothing smelled of the stench bomb, so the officers searched the defendants' automobile which was parked several blocks away. Evidence which indicated that the defendants made a stench bomb was found in the vehicle and was held admissible since the search was legal.

18. Supra note 5.

19. Wolf v. Colorado, 338 U.S. 25 (1949), stated that the Fourteenth Amendment, which applies to the states, did not forbid the admission of relevant evidence even though it was obtained by an unreasonable search and seizure.

cause of the plighted motorist by saying that, regardless of admissibility, searches and seizures must comply with the "incident to arrest" or "probable cause" rules to be legal, and civil sanctions would be imposed upon officers in instances of illegal search and seizure. These rules, said the Court, will be applied equally to all searches regardless of where they take place.

The Court issued a firm warning to the police that searches of automobiles will not be tolerated unless there is probable cause for believing a crime was committed and the search is aimed at unveiling fruits of that crime or a means of escape. It was pointed out that the only apparent wrong in the *Gonzales* situation at the time the search was undertaken was a traffic violation. There was no suspicion of any other violation of the law. The Court felt that mere traffic violations are not grounds for conducting a legal search and seizure, noting that the 1936 amendment to Article 2, section 10 of the Michigan Constitution does not make more searches and seizures legal, it simply makes more evidence admissible in spite of the fact that it was illegally obtained.

In its attempt to discern the intent behind the 1936 amendment the Court took the position that this was as far as the legislature intended to go in trimming the general exclusionary rule prevailing in Michigan. An equally tenable position concerning the intent is that the amendment serves to facilitate the police efforts in their constant fight against crime, in the specific manner stated in the amendment, and also serves to indicate a continuing trend in the direction of relaxing the requirements for a legal search and seizure for purposes of admissibility. The purpose behind the amendment was to allow more evidence to be admissible. How, then, can the Court conclude, in the absence of any express intent in the amendment, that beyond the terms of the amendment, a stricter limitation on the meaning of legal search and seizure is dictated? Such a conclusion seems unjustified in the face of the decisions rendered by the Michigan Supreme Court before and since the 1936 amendment, construing most searches and seizures of automobiles legal when they follow a valid arrest regardless of the presence of cause for believing that the automobile harbored fruits of a crime or a means of escape. The "means of escape" category of permissible search following an arrest seems to be particularly absurd in the instance of motor vehicles because the vehicle itself is an excellent means of escape. How, then, can a position requiring the police to have cause for believing the vehicle contains a means of escape before they can legally search the vehicle be sustained?

It is difficult to accept the Court's distinction of the *Lewis* case from the *Gonzales* situation. In *Lewis* the court felt that the search was founded on reasonable grounds for believing a felony was being committed in their presence, namely, the occupant fumbling in his pockets was cause for believing he was searching for a weapon. Is the Court suggesting that if the police see a driver fumbling in his pockets they can lawfully search him and his car, but if the driver has the foresight to situate a weapon on the seat next to him where he

can put it to use without the difficulty of pulling it out of his pocket, that driver is protected from being legally searched. The overall appearance of the car and its occupants in the early hours of the morning in the *Gonzales* case could very well have appeared more suspicious to the police than did the "pocket-fumbler" in the *Lewis* case.

Forty years of judicial process in Michigan which attempted to keep abreast of the increase in the number of automobiles, and the problems of law enforcement that accompanied this increase, are challenged by the *Gonzales* point of view. Possibly the Michigan decisions prior to *Gonzales* gave the police as much freedom of search as was desirable. In the *Gonzales* case, the suggestion by the Court that the police have been given too much leeway in this area is difficult to accept in face of the steadily increasing crime rate involving automobiles, particularly in the commission of robbery, rape, burglary, murder and kidnapping. The Michigan Supreme Court recognized the usefulness of the automobile for unlawful purposes back in 1922 in *People v. Case*.[20] New York State, a non-exclusion jurisdiction, does not appear ready to limit its police in the area of search and seizure of automobiles to the point suggested by the *Gonzales* opinion.[21]

It does not seem to be too harsh an imposition on motorists to permit a search of the automobile when the search accompanies an arrest for violations of the law other than mere traffic violations, regardless of the purpose of the search. The fact that the vehicle is itself an instrument useful in escape should be cause enough to permit a search in conjunction with an arrest. Under such a policy only the law breakers would be subjected to the search, thereby pacifying those who oppose the non-exclusionary rule because it conceivably permits innocent persons to be subjected to intrusions of their privacy.

Another suggestion is that even mere traffic violations should be cause enough for permitting the search of the accessible parts of a car as distinguished from the locked glove compartment or the locked trunk.[22] Once again only violators of the law would be subjected to having their car searched.

In any event it seems that the better policy is to wait for the police to abuse their authority before limiting their activities to the extent suggested in *Gonzales*. A final solution to this problem, applicable to all traffic on our highways, is something to strive for but difficult to achieve. As Learned Hand once said:

> The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise.[23]

20. Supra note 8.
21. People v. Houghtaling, 16 Misc. 2d 459, 181 N.Y.S.2d 1015 (1959).
22. Turner, Search and Seizure—Search of an Automobile Without a Search Warrant, 43 Ky. L.J. 163 (1954).
23. In re Fried, 161 F.2d 453, at 465 (2d Cir. 1947).

Recognition of the distinction between a dwelling house and a vehicle, and the lesser protection of privacy accorded the latter, should be a starting point for future attempts at a practical compromise between the protection of individual rights and the furtherance of effective law enforcement.

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NECESSARY STATUS FOR COVERAGE UNDER THE JONES ACT.

Federal law, by means of the Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law."[1] On the other hand the Longshoremen's and Harbor Workers' Compensation Act provides fixed weekly compensation payments for employees injured on navigable waters (including any dry dock) and where applicable is the exclusive remedy.[2] It explicitly eliminates from its coverage vessel's crew members.[3]

In *Taylor v. Central R.R. Co. of N.J.*, an action brought in a New York Court, a bridge carpenter was injured while removing lumber from a dock and placing it on a lighter for transportation to the other end of the dock. At no time during this trip was the lighter to lose contact with the dock and in fact, it did not even possess means of self-propulsion. It was moved along the dock by winch-operated lines. The plaintiff alleged that lack of equipment (nets) aboard rendered the vessel unseaworthy as required by the Jones Act and that this was the cause of his injury. On trial the Court submitted the question of plaintiff's status as a seaman and the issues of defendant's negligence and plaintiff's contributory negligence to the jury, but refused to charge on the question of seaworthiness. On appeal, the Appellate Division held that the plaintiff was covered by the Jones Act, or so a jury could find, and was thus entitled to a charge on the issue of seaworthiness.[4]

A shipowner's liability for unseaworthiness, to those covered by the Jones Act, is absolute and is imposed regardless of fault.[5] The doctrine is based on the need for protection of seamen who have signed articles for a voyage and are thus put under control of the ship's master. Such seamen can be compelled to do the ship's work in any weather, under any conditions, using whatever equipment may be furnished.[6] This concept of strict liability is firmly entrenched in our maritime law, appearing as early as 1789 in *Dixon v. The Cyrus* where it was stated that,

1. 38 Stat. 1185 (1915), 46 U.S.C. § 688 (1958) as amended 41 Stat. 1007 (1920).
2. 44 Stat. 1426 (1927), 33 U.S.C. §§ 905-911 (1958).
3. 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958).
4. Supreme Court, New York County not reported, reversed — A.D.2d —, 191 N.Y.S.2d 690 (1st Dep't 1959).
5. Seas Shipping Co. v. Sierachi, 328 U.S. 85 (1946); Dimas v. Lehigh Val. Ry., 234 F.2d 151 (2d Cir. 1956).
6. Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).