CONSTITUTIONAL LAW—CONSTITUTIONALLY PROTECTED AREAS—SEARCH AND SEIZURE

By TERRELL GRIFFIN*

INTRODUCTION

The fourth amendment to the United States Constitution[1] vests in the people one of the most comprehensive and valuable rights of civilized man; the right to be let alone.[2] The framers of our Constitution recognized the importance of protecting Americans in "the full enjoyment of personal security, personal liberty, and private property."[3] Thus, they inserted this provision to perpetuate the English doctrine as promulgated by Sir Edward Coke and reasserted by the Earl of Chatham that:

> The poorest man may in his cottage bid defiance to all the forces of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.[4]

Over the years this amendment has spawned much litigation. Probably the most contentious issue, and the one still largely unresolved, is that of defining which areas are protected against unreasonable and unwarranted searches. The wording of the amendment explicitly exempts "persons, houses, papers, and effects" from such searches, but there has been a great deal of confusion as to how this is to be construed. It has been stated time and again that this amendment should receive a liberal construction so as to "prevent stealthy encroachment upon or gradual depreciation of the rights secured"[5] by it. However, possibly because of the paucity of Supreme Court decisions in this area, the confusion remains. Therefore, this comment will deal with the narrow point of what is a constitutionally protected area within the meaning of the fourth amendment. Since *Mapp v. Ohio*[6] has made the federal standards applicable to the several states, this comment will be limited almost entirely to federal decisions.

HOUSES

There has never been any doubt that a private dwelling house is a constitutionally protected area, and therefore cannot be searched without a proper warrant,[7] unless the search is incident to a lawful arrest.[8] To en-

*Second year student, Walter F. George School of Law, Mercer University.

1. U. S. CONST. amend IV.
2. Olmstead v. United States, 277 U.S. 438, 478 (1928). (Brandeis, J. dissenting).
3. Gouled v. United States, 255 U.S. 298, 303 (1921).
4. As quoted in Flagg v. United States, 233 Fed. 481 (2d Cir. 1916).
5. Gouled v. United States, *supra* n. 3.
6. 367 U.S. 643 (1961).
7. United States v. Shultz, 3 F. Supp. 273 (D. Ariz. 1933).
8. Agnello v. United States, 269 U.S. 20 (1925); United States v. Lee, 83 F.2d 195 (2d Cir. 1936).

able officers to search a home incident to such a lawful arrest, the arrest must take place within the home. It has been held illegal to search the home of an arrested party when the arrest took place several blocks away.[9] There have been a number of decisions deciding how broadly to interpret the term "house". It has been held that a house does not lose its character as a home because it is temporarily unoccupied.[10] Thus, a summer home retains its cloak of constitutional protection even during the parts of the year that it stands vacant.[11] This protection against unwarranted searches is extended to the underside of a private home[12] but does not go so far as to protect the area underneath a motel cabin rented temporarily.[13]

The fourth amendment protects one's privacy notwithstanding the fact that he is residing in the home of another. A search of a bureau drawer used exclusively by the defendant was held illegal even though the officers had the permission of the defendant's mother who owned the home.[14] The living area of a roomer in a rooming house is likewise protected.[15] However, halls and stairways of a semi-public nature that are used by the roomer are not protected,[16] though a locked cupboard in such a hallway would be.[17] To a degree the home loses its sanctity when it is converted into a business establishment to which outsiders are invited.[18] It will be given the same protection that any other business establishment has a right to, but this protection is not as broad as that of a home.[19]

The concept that seems to present the most difficulty is that of curtilage. The term "house" has always been construed to include its curtilage,[20] but there has been a great deal of confusion as to what should be included as within the curtilage. In *Care v. United States*[21] it was said that "whether the place searched is within the curtilage is to be determined by the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." However, some courts have limited the scope of curtilage to just the dwelling house itself,[22] or buildings attached thereto.[23] All jurisdictions seem to agree that open

9. Agnello v. United States, *supra* n. 8; United States v. Coffman, 50 F. Supp. 823 (S.D Calif. 1943).
10. Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948).
11. United States v. Brougrer, 19 F.R.D. 79 (W.D. Penna. 1956).
12. California v. Hurst, 325 F.2d 891 (9th Cir. 1963).
13. Marullo v. United States, 328 F.2d 361 (5th Cir. 1964). Differentiating between private dwellings and motels.
14. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).
15. Brown v. United States, 83 F.2d 383 (3d Cir. 1936).
16. Polk v. United States, 314 F.2d 837 (9th Cir. 1963); Williams v. United States, 260 F.2d 125 (8th Cir. 1958).
17. United States v. Lumia, 36 F. Supp. 552 (W.D.N.Y. 1941).
18. Lewis v. United States, 382 U.S. 1024 (1966).
19. See *infra*.
20. Bare v. Commonwealth, 122 Va. 783, 94 S.E. 168 (1917).
21. 231 F.2d 22, 25 (10th Cir. 1956).
22. United States v. Hayden, 140 F. Supp. 429 (D.Md. 1956).
23. Carney v. United States, 163 F.2d 784 (9th Cir. 1947).

fields are not to be considered as within the curtilage.[24] This is one area in which the Supreme Court came to a relatively early decision,[25] and the lower courts have not tried to narrow its broad scope. However, there is some indecision as to whether this extends up to the doors of the house or stops at what would commonly be thought of as the yard. This protection has been rejected by the Third Circuit,[26] but upheld in the Eighth Circuit,[27] and impliedly so in the Fifth Circuit.[28]

Some courts have sweepingly held that buildings other than the dwelling house itself are protected areas if they are used in connection with the home[29] or are within the curtilage[30] regardless of whether or not they are empty.[31] This has been rejected by other courts.[32] It has generally been held that an outbuilding which would be a protected area so far as the occupant of the premises is concerned, loses the cloak of protection when the premises are unoccupied.[33] Generally, however, whether or not an outbuilding is to be considered a protected area seems to turn on the facts, as suggested in the *Care* case.[34] Thus, a garage has been held to be protected when it was underneath a one-story dwelling;[35] where it was outside the fence surrounding the house and other small buildings;[36] and where it was used by the owner partly for his personal use and partly for hire.[37] One court has held that a garage is protected regardless of whether or not it is within the curtilage of a private dwelling.[38] The Ninth Circuit seems to hold that a garage is not protected unless it is attached to the dwelling house.[39] One court has extended fourth amendment protection to a barn in which an illegal business was being carried on by holding that the barn was the defendant's place of business.[40] Other courts have extended this protection to smokehouses[41] and Finnish bathhouses,[42] but denied it to

24. Janney v. United States, 206 F.2d 601 (4th Cir. 1953); Stark v. United States, 44 F.2d 946 (8th Cir. 1930); United States v. McBride, 287 Fed. 214 (S.D.Ala. 1922).
25. Hester v. United States, 265 U.S. 57 (1924).
26. United States v. Feldman, 104 F.2d 255 (3d Cir. 1939). See also, United States v. Hayden, *supra* n. 22.
27. Hobson v. United States, 266 F.2d 890 (8th Cir. 1955).
28. Brock v. United States, 223 F.2d 681 (5th Cir. 1955).
29. Janney v. United States, *supra* n. 24; Wakkuri v. United States, 67 F.2d 844 (6th Cir. 1933); Temperani v. United States, 299 Fed. 365 (9th Cir. 1924).
30. Morrison v. United States, *supra* n. 10.
31. *Ibid.*
32. Schnorenberg v. United States, 23 F.2d 38 (7th Cir. 1927); Carney v. United States, *supra* n. 23; United States v. Hayden, *supra* n. 22.
33. Schnitzer v. United States, 77 F.2d 233 (8th Cir. 1935); Tritico v. United States, 4 F.2d 664 (5th Cir. 1925).
34. *Supra* n. 21.
35. Temperani v. United States, *supra* n. 29.
36. United States v. Novero, 58 F. Supp. 275 (E.D.Mo. 1944).
37. United States v. Slusser, 270 Fed. 818 (S.D.O. 1921).
38. United States v. Hayden, *supra* n. 22.
39. Carney v. United States, *supra* n. 23; *accord,* Temperani v. United States, *supra* n. 29.
40. United States v. DiCorvo, 37 F.2d 124 (D.Conn. 1927).
41. United States v. Mullin, 329 F.2d 295 (4th Cir. 1964); Roberson v. United States, *supra* n. 10.
42. Wakkuri v. United States, *supra* n. 29.

outhouses,[43] lean-tos,[44] chicken coops,[45] a cabin several hundred feet from the dwelling house,[46] and a concrete outbuilding deemed to be standing outside the curtilage.[47]

Apartments have long been protected,[48] and today people residing in hotel rooms are given constitutional protection[49] regardless of how transient the occupant's stay may be.[50] The question of how long the room retains its status as a protected area after the occupants leave is in some dispute. The Supreme Court held that after a guest paid his bill and left the hotel officers could enter with the manager's permission and search the room without a warrant.[51] In a later case a district court held that a motel room whose occupant had been arrested several hours earlier, could not be searched without a warrant even though the manager requested that the search be made.[52] The distinction here may be that the occupant in the latter case was arrested while still renting the room. The case did not explain this point sufficiently. The protection afforded a hotel or motel room is limited to the room itself. It does not extend to halls, sidewalks, yards or trees because of the element of public or shared property.[53] Thus, in considering motels and hotels we have no trouble with the term "curtilage."

The constitutional protection of the fourth amendment extends to places of business as well as homes.[54] Although a place of business is not as sacrosanct as is one's home, it is nevertheless protected from unreasonable searches and seizures.[55] Such a place of business includes a bottling plant,[56] a warehouse,[57] an office,[58] and a store.[59] It will also include a public utility, but the right is somewhat limited because of the duty owed the public.[60] In one case this protection was even extended to a government-owned desk in a government office.[61]

AUTOMOBILES

The automobile falls into the category that the Constitution terms

43. Schnitzer v. United States, *supra* n. 33.
44. United States v. One Ford V-8 Sedan, 7 F. Supp. 705 (W.D.Mich. 1934).
45. Schnorenberg v. United States, *supra* n. 32.
46. Dulek v. United States, 16 F.2d 275 (6th Cir. 1926).
47. Brock v. United States, 256 F.2d 55 (5th Cir. 1958).
48. Rigby v. United States, 247 F.2d 584 (D.C. Cir. 1957).
49. Stoner v. State, 376 U.S. 483 (1964); United States v. Jeffers, 42 U.S. 48 (1951).
50. Eng Fung Jem v. United States, 281 F.2d 803 (9th Cir. 1960).
51. Abel v. United States, 362 U.S. 217 (1960).
52. Gandy v. Watkins, 237 F. Supp. 266 (N.D.Ala. 1964).
53. Marullo v. United States, *supra* n. 13.
54. United States v. Edelson 83 F.2d 404 (2d Cir. 1936); United States v. One Kemper Radio, 8 F. Supp. 304 (N.D.Calif. 1934).
55. Wallace v. Ford, 21 F. Supp. 624 (N.D.Tex. 1937)
56. United States v. Rabstein, 41 Fed. 227 (D.N.J. 1930).
57. United States v. 1013 Cases of Empty Old Smuggler Whiskey Bottles, 52 F.2d 49 (2d Cir. 1931).
58. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
59. United States v. Edelson, 83 F.2d 404 (2d Cir. 1936).
60. United States v. Alabama Highway Express, Inc., 46 F. Supp. 450 (N.D.Ala. 1942).
61. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1950).

"effects".[62] In this area the Supreme Court, in *Carroll v. United States*,[63] made another early decision as to what rules would prevail in the searching of vehicles. Because of this, the law is a little more stabilized with respect to automobiles. In the *Carroll*[64] case the court recognized the difference between the search of a stationary building and a boat, wagon, or automobile with their inherent mobility. Thus, such a mobile vehicle as an automobile may be searched so long as the officer has sufficient probable cause.[65] While the stopping of a car for the purpose of inquiring whether the driver has a valid driver's license is not unreasonable,[66] the indiscriminate stopping and searching of an automobile,[67] as well as a random search pursuant to an arrest for a minor traffic violation,[68] is violative of the fourth amendment. However, it has been held that where the search is conducted at an international border, it is not unreasonable even though made without probable cause.[69] These rights are in no way diminished because the automobile may not be owned by the occupant. They have also been extended to taxi-cabs.[70] Boats and ships seemingly have been put in the same category as automobiles.[71] Generally, then, the courts in deciding on the reasonableness of searches of automobiles must decide the thorny question of whether or not the officers had probable cause to make the search.

PRIVACY

The decisions in this area of the law seem to be moving away from the idea that there are constitutionally protected areas as such, and toward the proposition that the fourth amendment's primary function is the protection of privacy. Thus, we come to two areas that seem to owe what fourth amendment protection they have to this idea that privacy is an absolute right protected by the Constitution. These areas are public toilet stalls and telephone booths. In a split decision[72] the United States Court of Appeals for the Ninth Circuit has decided that the public interest in privacy must be subordinated to the public interest in law enforcement. Thus, it held that federal officers had not violated the fourth amendment rights of occupants of a toilet stall by spying on them from a hole in the roof while trying to catch homosexuals. Judge Pope, in his concurring opinion, made it clear that there had been no intrusion into a constitutionally protected area. However, Judge Browning, in a strong dissent, stated, "The fourth

62. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962).
63. 267 U.S. 132 (1925).
64. *Ibid. But see,* United States v. DiRe, 332 U.S. 581 (1948).
65. Mabee v. United States, 60 F.2d 209 (3d Cir. 1932); United States v. Keown, 19 F. Supp. 639 (W.D.Ky. 1937).
66. Lipton v. United States, 348 F.2d 591 (9th Cir. 1965).
67. Brinegar v. United States, 338 U.S. 160 (1949); United States v. One 1937 Model Studebaker Sedan Auto., 96 F.2d 104 (10th Cir. 1938); Moring v. United States, 40 F.2d 267 (5th Cir. 1930).
68. United States v. Washington, 249 F. Supp. 40 (D.D.C. 1965).
69. Carroll v. United States, *supra* n. 63; Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); See also Olson v. United States, 68 F.2d 8 (2d Cir. 1933).
70. Rios v. United States, 364 U.S. 253 (1960).
71. United States v. Coppolo, 2 F. Supp. 115 (D.N.J. 1932).
72. 352 F.2d 251 (9th Cir. 1965).

amendment protects limited privacy—which after all, is the only kind people ordinarily know. . . . In sum, the fourth amendment protects such privacy as a reasonable person would suppose to exist in given circumstances."[73]

Three recent state decisions in this area seem to agree with Judge Browning. In California it has been held that police surveillance of people using public toilet stalls constitutes a violation of that person's fourth amendment rights regardless of whether it is a pay toilet[74] or not.[75] A Florida court in the case of *State v. Coyle*,[76] came to the opposite conclusion, but in discussing the California cases, seemed to distinguish them because doors were present on the stalls whereas in the Florida case there were no doors. The point seems to have been made that the officers in the *Coyle* case could not have invaded a person's privacy when he had none; that is, when the stalls had no doors.

There is a definite split of authority on the question of whether a telephone booth should come within the ambit of the fourth amendment. In almost identical factual situations trial courts within the Fifth[77] and District of Columbia[78] Circuits have held a telephone booth to be a protected area, whereas a trial court in the Second Circuit[79] has held it not to be protected. However, in all three of these cases, the physical intrusion into the phone booth took place prior to anyone's occupying it. Had the intrusion taken place while someone was using the telephone booth for the purpose of making a phone call, possibly the courts would be more inclined to invoke the fourth amendment. As yet there have been no Supreme Court decisions in either of these areas, bringing us once again to the problem of having no real guidelines to follow.

CONCLUSION

The confusion that abounds in respect to how far the fourth amendment protection against unwarranted and unreasonable searches extends seems attributable to the dearth of Supreme Court decisions. This vacillation among the federal courts will only be stabilized by strong determinative Supreme Court decisions placing the fourth amendment in its proper perspective. It is suggested that the right to be free of unwarranted and unreasonable searches is too basic to every American to be left to the decisions of the many and varied trial courts within our system. We need a uniform rule so that what is a constitutionally protected area in one part of our nation will be a protected area in every part. Freedoms as basic as those arising from the fourth amendment should be settled and clear to all Americans—the persons they were designed to protect.

73. *Id.* at 259, 260 (Browning, J. dissenting).
74. Bielicki v. Superior Court 57 Cal. App.2d 602, 371 P.2d 288 (1962).
75. Britt v. Superior Court, 58 Cal. App. 2d 469, 374 P.2d 817 (1962).
76. State v. Coyle, 181 So.2d 671 (Fla. 1966).
77. United States v. Stone, 232 F. Supp. 396 (N.D.Tex. 1964).
78. United States v. Madison, 32 Law Week 2243 (D.C. Ct. Gen. Sess. 1963).
79. United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).