Volume 70
Issue 4 *Dickinson Law Review - Volume 70, 1965-1966*

6-1-1966

Waiver of the Right Against Unreasonable Searches and Seizures by a Third Person on Behalf of the Accused in Delaware

COMMENT

WAIVER OF THE RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES BY A THIRD PERSON ON BEHALF OF THE ACCUSED IN DELAWARE

The inviolable right against unreasonable searches and seizures is guaranteed to every person by the fourth amendment.[1] It is clear that this right may be waived by the accused.[2] A difficult and challenging question, however, is whether a third person may waive that right in behalf of the accused. This Comment will analyze this question, and special emphasis will be placed on the state of the law in Delaware.

HISTORY

In spite of the fourth amendment and similar provisions in

---

1. 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.

Unreasonable searches and seizures were considered a violation of man's liberty as early as 1215. The Magna Charta, which summed up the liberties of the English people, provided:

> No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or anyways destroyed; nor will we go upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land.

Chap. IV, Art. 39.

Following the reformation in England, general search warrants, issued from the Court of Star Chamber, were used in an attempt to suppress freedom of the press. In 1765, a series of cases, headed by *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), denounced these obnoxious warrants. Lord Camden, Chief Justice of the Common Please, ruled that such warrants were absolutely illegal.

While the American colonies were being formed, English revenue agents were enabled by writs of assistance to enter private homes and search for smuggled goods without specifying either houses or goods. Andrews, *Historical Survey of the Law of Searches and Seizures*, 34 LAW NOTES 42 (1930). The misuse of these writs was attacked by the colonists in Paxton's Case, Quincy's Reports 51 (Mass. 1761). Finally, to avoid the evils of such a practice, the drafters of the Bill of Rights included a provision securing persons from unreasonable searches and seizures.

2. Zap v. United States, 328 U.S. 624 (1946); People v. Preston, 341 Ill. 407, 173 N.E. 383 (1930).

state constitutions,[3] the admissibility of evidence illegally obtained was not affected:

> If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice how they were obtained,—whether lawfully or unlawfully,—nor would they form a collateral issue to determine that question.[4]

The principle rationale behind the common law rule of evidence was that the illegal obtainment did not change that which the evidence tended to prove.[5] The evidentiary rule was also supported on the ground that the constitutional inhibition against unreasonable searches and seizures only placed restrictions on the legislative, executive and judicial bodies of government from authorizing, justifying or declaring lawful any unreasonable search and seizure.[6]

The rule was never doubted until *Boyd v. United States*.[7] The United States Supreme Court noted that evidence seized in violation of the fourth amendment was inadmissible.[8] *Boyd* was repudiated in *Adams v. New York*,[9] but subsequently was revived in *Weeks v. United States*.[10] Weeks was convicted of using the mails to transport lottery coupons. The evidence was obtained in two searches of Weeks' premises, and both searches were made without a warrant and in Weeks' absence. One search was made solely by state officials, while the other was conducted by both a federal marshal and state officers. The Court held that the fourth amendment afforded Weeks no protection with respect to evidence illegally seized by state officers.[11] With respect to the evidence seized by the federal marshal, however, it was held that prejudicial error was committed by admitting it into evidence at the trial.[12] The Court, citing *Boyd*, said:

> To sanction such proceedings would be to affirm by judicial

3. For example, note the similarity between the Delaware Constitution and the fourth amendment. It provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

DEL. CONST. art. I, § 6.

4. Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841).
5. *E.g.*, Stevison v. Earnest, 80 Ill. 513, 518 (1875).
6. Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897).
7. 116 U.S. 616 (1885).
8. *Id.* at 638 (dictum).
9. 192 U.S. 585, 598 (1904).
10. 232 U.S. 383 (1914).
11. *Id.* at 398.
12. *Ibid.*

> decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[13]

Thus evolved the federal rule that evidence obtained by *federal officers* in violation of federal search and seizure provisions is inadmissible in *federal proceedings*.

The rationale underlying the federal exclusionary rule was elucidated by a state supreme court, abandoning the common law rule of evidence. In *People v. Cahan*[14] the court said:

> [O]ther remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.[15]
>
> [I]f courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of the law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.[16]

Following *Weeks*, many states began to apply the federal rule,[17] but it was not made binding on the states. In *Wolf v. Colorado*[18] the Supreme Court held that the fourteenth amendment does *not* require the states to exclude evidence obtained in violation of the fourth amendment. Hence, the majority of jurisdictions held fast to the common law rule, for otherwise, as Justice Cardozo said, "the criminal is to go free because the constable has blundered."[19] Likewise, Delaware, until 1950, refused to adopt the federal rule.[20]

In *Richards v. State*[21] the Supreme Court of Delaware, with one dissent, reversed the state's prior position and adopted the federal rule. The Court said:

> We prefer the rule followed in the federal courts. We con-

---

13. *Id.* at 394.
14. 44 Cal.2d 434, 282 P.2d 905 (1955).
15. *Id.* at 911.
16. *Id.* at 914.
17. Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Washington, West Virginia and Wyoming. See 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).
18. 338 U.S. 25 (1949).
19. People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587 (1926).
20. State v. Episcopo, 37 Del. (7 W.W. Harr.) 439, 189 Atl. 872 (Ct. Gen. Sess. 1936); State v. Chuchola, 32 Del. (2 W.W. Harr.) 133, 120 Atl. 212 (Ct. Gen. Sess. 1922).
21. 45 Del. (6 Terry) 573, 77 A.2d 199 (1950). The dissenting justice, citing *Defore*, argued that the rights of the people to be protected from violations of the law are superior to the individual rights guaranteed by the Constitution.

> ceive it the duty of the courts to protect constitutional guarantees. The most effective way to protect the guarantee against unreasonable search and seizure and compulsory self incrimination is to exclude from evidence any matters obtained by a violation of them.[22]

In 1961 the states were deprived of the power to decide for themselves whether to apply the common law or federal rule. The Supreme Court in *Mapp v. Ohio*[23] held that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."[24]

NATURE OF THE WAIVER PROBLEM

Although *Mapp* affords the protection of the fourth amendment to every person by excluding illegally obtained evidence from both federal and state proceedings, it has long been established that this right may be waived by the accused. One who has consented to a search and seizure of his property cannot be heard to complain of the irregularities under which it was made.[25] But is such a waiver personal only to the accused? The fourth amendment was adopted in part to enable people to be secure in their homes. This would seem to protect a property right. If so, it may be argued that *any* person having sufficient control over the property should be able to decide whether the right should be waived. It would appear that under certain circumstances a third person may waive the rights of the accused against unreasonable searches and seizures.

The occupant-in-common, lessor-lessee, parent-child and husband-wife relationships are the most frequently involved categories typifying the waiver problem, but other important relationships will also be considered. In both state and federal courts the decisions on the issue are conflicting, even though the facts are seemingly indistinguishable. To effectively analyze the concept of waiver of the accused's rights by the consent of a third person, a comparison of the rationale of the cases should be made.

Capacity to Consent

As a prerequisite to waiving an accused's right against unreasonable searches and seizures, a third person must have capacity

---

22. *Id.* at 585, 77 A.2d at 206.

23. 367 U.S. 643 (1961).

24. *Id.* at 655. See also Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution,* 50 A.B.A.J. 815 (1964); Silverman, *Protecting the Public from Ohio v. Mapp,* 51 A.B.A.J. 243 (1965).

25. Davis v. United States, 328 U.S. 582 (1946); Zap v. United States, 328 U.S. 624 (1946); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); People v. Allen, 142 Cal.2d 267, 298 P.2d 714 (1956); People v. Preston, 341 Ill. 407, 173 N.E. 383 (1930); Commonwealth v. Gockley, 411 Pa. 437, 192 A.2d 693 (1963); Commonwealth v. Smith, 201 Pa. Super. 511, 193 A.2d 778 (1965).

to consent to the search. It is firmly established that consent to a search and seizure will not bind the owner or occupant of the property or premises searched when a third person was actually or impliedly coerced to allow the search.[26]

In the recent Delaware case of *State v. DeKoenigswarter*[27] the defendant was arrested and charged with unauthorized possession of narcotics. The defendant, while driving through Delaware, was stopped by a state trooper who desired to question one of the defendant's passengers. The passenger, after refusing to get out of the car, was placed under arrest by the trooper. The arresting officer summoned the help of other troopers and with their aid threw the passenger from the car and beat him. More than two hours after the defendant's registration card and driver's license had been taken from her, she gave the officers permission to search her pocketbook and car. The search yielded the evidence which was the basis for the lower court's conviction. The superior court invalidated the search on grounds of duress and coercion. The court said:

> In general a valid search may be made under one of three circumstances:
>
> 1. Pursuant to legally issued search warrant.
> 2. As an incident to a legal arrest.
> 3. With the affirmative consent of those owning or in possession of the property to be searched.[28]

Since no search warrant was issued and since the search was not made pursuant to a legal arrest, the validity of the search depended on the voluntary consent of the defendant. The court held the search to be unconstitutional because consent had been given by the defendant after two hours of illegal arrest and after having seen her companion twice beaten by police for passively resisting arrest on a minor charge.

Although *DeKoenigswarter* involved the consent of the accused rather than that of a third person on behalf of the accused, the opinion would seem to also apply to the latter situation. Certainly no less stringent standard should apply to a third person's consent than to the accused's consent. Indeed, *DeKoenigswarter* has already been cited in a recent Delaware case[29] as authority for the proposition that the coerced consent of a third person on behalf of

26. Amos v. United States, 255 U.S. 313 (1921); Fitter v. United States, 258 Fed. 567 (2d Cir. 1919); People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938); Connor v. State, 201 Ind. 256, 167 N.E. 545 (1929); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923); People v. Weaver, 241 Mich. 616, 217 N.W. 797 (1928); State v. Wilkerson, 349 Mo. 205, 159 S.W.2d 749 (1942); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936); Carignano v. State, 31 Okla. Crim. 228, 238 P. 507 (1925); Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930); Arnold v. State, 110 Tex. Crim. 529, 7 S.W.2d 1083 (1928); State v. Bonolo, 39 Wyo. 299, 270 P. 1065 (1928).

27. 177 A.2d 344 (Del. Super. Ct. 1962).

28. *Id.* at 346.

29. State v. Malcom, 203 A.2d 270 (Del. Super. Ct. 1964).

the accused is insufficient and will not render a subsequent search legal.

Similarly, a third person must be of sufficient mentality and maturity to be able to understand the nature of his act before he will be deemed capable of waiving an accused's constitutional rights by consenting to a search of the accused's property.[30]

Family Relationship

Blood or marital ties between the accused and a third person frequently give rise to the contention that one so related can waive the constitutional rights of the accused by consenting to a search of the accused's property. The husband-wife and parent-child relationships are the most typical. The mere existence of the relationship without more, however, is not sufficient to give validity to an otherwise invalid consent. The third person's control over the accused's property is the real basis for legalizing an otherwise illegal search.

There is a direct conflict of authority as to whether one spouse may consent to a search and seizure of the other spouse's property. Many jurisdictions hold that marital status alone does not impliedly authorize one spouse to consent for the other.[31] These jurisdictions recognize only the husband's capacity, as head of the household, to waive his spouse's constitutional rights.[32] The wife has no right to consent for her husband.[33]

Jurisdictions which permit one spouse to waive the guarantees of the fourth amendment for the other usually base their decision on the joint-ownership and control over the couple's premises.[34] While it has been admitted that in some instances a wife might consent to a search that would bind her husband, no cases go "so far as to hold that a wife in joint occupancy of the home can permit

30. People v. Jennings, 142 Cal. App.2d 160, 298 P.2d 56, 61 (1956) ruled that the consent of the accused's minor daughters was insufficient; Gilliland v. Commonwealth, 224 Ky. 453, 6 S.W.2d 467 (1928) held that a senile father was incapable of consenting to a search, the fruits of which were to be used against his two sons.

31. Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); United States v. Rykowski, 267 Fed. 866 (S.D. Ohio 1920); Henry v. State, 154 So.2d 289 (Miss. 1963); State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962); Rivers v. State, 59 So.2d 740 (Fla. 1952); Carlton v. State, 111 Fla. 777, 149 So. 267 (1933); Veal v. Commonwealth, 199 Ky. 634, 251 S.W. 648 (1923).

32. Jones v. State, 83 Okla. Crim. 358, 177 P.2d 148 (1946).

33. Simmons v. State, 94 Okla. Crim. 18, 22 P.2d 615 (1951); Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946).

34. United States v. Heine, 149 F.2d 485 (2d Cir. 1945); United States v. Sergio, 21 F. Supp. 553 (E.D. N.Y. 1937); People v. Carter, 48 Cal.2d 737, 312 P.2d 665 (1957); People v. Dominguez, 144 Cal. App.2d 63, 300 P.2d 194 (1956); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962); Bellam v. State, 233 Md. 368, 200 A.2d 344 (1964); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948); May v. State, 129 Tex. Crim. 2, 83 S.W.2d 338 (1935).

a search of her husband's personal effects to discover jewelry hidden in a cuff link case in a bedroom bureau drawer."[35]

It is generally held that parents of the accused can consent to a search of their premises in which the accused also resides.[36] The parent's right to waive their offspring's constitutional rights is based on their control and possession of the premises. The accused's control or possession of the premises is held to be in subservience to the power, ownership and authority of the parent. In some instances, it has even been held that a minor child may consent to a search, the fruits of which are admissible against the parent.[37]

Other Relationships

Other relationships which may raise the waiver question primarily include the occupant-in-common and lessor-lessee situations. However, they are not exclusive. To show the extent of the question and its underlying rationale, the employer-employee and gratuitous bailee situations will also be considered.

The rule is well established that when two persons have equal rights to the use, occupancy or possession of a premises, either may consent to a search and the fruits of that search may be used against either.[38] Joint ownership or possession gives each owner an undivided interest in the premises, and each owner may consent to a search that will be binding against all joint owners.

United States v. Sferas[39] is illustrative of the occupant-in-common principle. Secret service agents investigating a counterfeiting operation went to the printing plant operated by Sam and James Sferas. The agents did not have search warrants. Consent to search the premises was voluntarily given by James Sferas. Evidence uncovered during the search was used to convict both Sam and James. On appeal the seventh circuit upheld the conviction,

35. State v. Evans, 45 Hawaii 622, 372 P.2d 365, 372 (1962).

36. Maxwell v. Stephens, 229 F. Supp. 205 (D.C. Ark. 1964); Rees v. Payton, 225 F. Supp. 507 (D.C. Va. 1964); Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); State v. Hagan, 47 Idaho 315, 274 P. 628 (1929); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923); McCray v. State, 236 Md. 9, 202 A.2d 320 (1964); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963).

37. Davis v. United States, 327 F.2d 301 (9th Cir. 1964) (eight-year old daughter of the accused could validly consent); Franklin v. State, 208 Md. 628, 119 A.2d 439 (1956) (sixteen-year old stepdaughter of the accused could consent to a search and seizure of his premises).

38. United States v. Walker, 190 F.2d 481 (2d Cir. 1951); Stein v. United States, 166 F.2d 851 (9th Cir. 1948); Driskill v. United States, 281 Fed. 146 (9th Cir. 1922); People v. Howard, 166 Cal. App.2d 638, 334 P.2d 105 (1958); People v. Harvey, 48 Ill. App.2d 261, 199 N.E.2d 236 (1964); McGinnis v. Commonwealth, 208 Ky. 239, 270 S.W. 832 (1925); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948).

39. 210 F.2d 69 (7th Cir. 1954).

finding that the consent to search obviated the necessity for a search warrant. The court held that the consent given by James Sferas was binding upon his brother since James had equal rights to the use or occupation of the printing plant.

United States v. Eldridge[40] illustrates the gratuitous bailee situation. A divided court held that the fourth amendment precludes only unreasonable searches and seizures and that a bailee's consent makes the search reasonable. Here the defendant's car was loaned to a friend. The friend consented to a search of the car by police who never executed the search warrant which they previously had obtained. In reaching its decision the court reasoned that since the bailee had a right to open the trunk incident to normal use of the car, he had a right to open it for the police officers. The dissenting justice, however, felt that there was insufficient privity between the bailor and bailee to imply authority to consent to a search.

When the lessor-lessee relationship exists, it has been uniformly held that a landlord's consent to search the leased premises will not render the search legal as against the lessee.[41] Similarly, a transiently occupied room is generally held to be within the protection of constitutional prohibitions against unreasonable searches and seizures.[42]

Applying this principle, *Stoner v. California*[43] held that the right to search the accused's hotel room without a warrant is personal to the accused and cannot be waived by the consent of the hotel clerk. The court stated that "the rights protected by the fourth amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of apparent authority."[44]

Conversely, it has been held that a householder who has taken in non-paying guests may effectively consent to a search of their room.[45] Similarly, the lessor of a transiently occupied room may consent to its search, not only *after* it has been vacated by the occupant,[46] but also when the occupant has not departed by the designated checkout time.[47]

A lessee, however, may consent to a search of the leased premises. The landlord has no right to object and evidence seized dur-

40. 302 F.2d 463 (4th Cir. 1962).
41. Chapman v. United States, 256 U.S. 610 (1961); State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963).
42. Lustig v. United States, 338 U.S. 74 (1949); Feguer v. United States, 302 F.2d 214 (1962).
43. 376 U.S. 483 (1964).
44. *Id.* at 488.
45. Woodard v. United States, 102 App. D.C. 393, 254 F.2d 312 (1958).
46. Abel v. United States, 362 U.S. 217 (1960). *Cf*, People v. Kortwright, 236 N.Y.S.2d 385 (1962).
47. People v. Crayton, 174 Cal. App.2d 267, 344 P.2d 627 (1959).

ing the course of the search is admissible against him.[48]

There is a split of authority on the validity of a search of an employee's desk made pursuant to the consent of a superior. It has been held that, although the defendant-employee's superior might consent to a search of the desk for official property, a superior lacks capacity to waive the defendant's constitutional rights by consenting to a search for personal effects.[49] However, a similar case has held that the defendant's constitutional guarantees had not been violated since he had no special property or possessory rights in the desk.[50]

The cases are also in a state of confusion regarding the question of an employee's authority to consent to a search of his employer's business premises. *United States v. Antonelli Fireworks Co.*[51] held that an employee left in charge of the premises by the employer could consent to a valid search of the premises. The employee's authority to consent is generally based on the fact that he has been left in control of the premises during the absence of the employer. Cases to the contrary reason that the search is invalid because there is no proof that the employer had authorized the employee to waive his constitutional rights.[52] It is held that the presumption of such authority does not arise merely from the fact of employment.

The cases are also split on the issue of whether a custodian of a building may consent to a search thereof.[53]

State of Law in Delaware

It is evident from a review of the cases that the authority of a third person to consent to a search and seizure of the accused's property does not rest on a single rule or principle. Either a doctrine of control or some theory of agency has been used in cases which cannot be distinguished on the facts. Until the United States Supreme Court sets positive guidelines on waiver problems, state and lower federal courts must continue to use their discretion. With this background in mind this Comment will now analyze the circumstances under which a third person will be able to waive the accused's constitutional rights against unreasonable searches and seizures in Delaware.

---

48. Dyer v. State, 61 Okla. Crim. 202, 66 P.2d 1104 (1937); Vejih v. State, 185 Wis. 21, 200 N.W. 659 (1924).

49. United States v. Blok, 88 App. D.C. 326, 188 F.2d 1019 (1951).

50. State v. Zuehlke, 239 Wis. 111, 300 N.W. 746 (1941).

51. 155 F.2d 631 (2d Cir. 1946). See also, Bowles v. Chew, 53 F. Supp. 787 (D.C. Cal. 1944); Fuller v. State, 159 Fla. 200, 31 So.2d 259 (1947).

52. United States v. Ruffner, 51 F.2d 579 (D.C. Md. 1931); Hays v. State, 38 Okla. Crim. 331, 261 P. 232 (1927).

53. Reszutek v. United States, 147 F.2d 142 (2d Cir. 1945); Idol v. State, 233 Ind. 307, 119 N.E.2d 428 (1954). *Cf*, People v. Carswell, 149 Cal. App.2d 395, 308 P.2d 852 (1957).

Delaware statutes provide that where a search has been made without a warrant, the evidence obtained must be the product of a search incident to a lawful arrest[54] or a search made for a person hotly pursued, where there is probable cause to believe that the party pursued has committed a felony.[55] However, the statutory provision applicable to the question involved provides that:

> No person shall search any house, place, conveyance or person without the consent of the owner (or occupant, if any) unless such search is authorized by and made pursuant to statute.[56]

Thus, an owner or occupant of the premises may consent to its search where no warrant has been issued and the search is not incident to an arrest or made during the hot pursuit of a supposed felon. However, the great weight of authority holds that the owner of property cannot consent to its search when it is leased to another.[57] Since "occupancy" of a house can mean many things, a mere reading of the statute leaves the question unanswered. Judicial interpretation must finally determine the answer, and only one Delaware case[58] has considered the question of whom, other than the accused, can consent to a search of the accused's property.

In *State v. Malcom*[59] the defendant was indicted for burglary. The defendant's mother and sixteen-year old son permitted a Delaware state police officer without a search warrant to enter the defendant's home. The defendant gave no consent to the entry or subsequent search of his home. Upon receiving the consent of the two "occupants" of the house, the officer commenced his search and found allegedly stolen goods. In this proceeding to suppress the goods as evidence, the Delaware Superior Court held that the search was valid and the goods were admissible into evidence.

The precise question involved in the case was whether or not the defendant's mother and son could legally consent to the search. In holding only the mother's consent to be valid, the court stated that "the consent was given by a mature woman, who had been in charge of defendant's home for at least two or three days."[60] Thus, control over the premises and maturity in the person granting consent would seem to be determining factors. A review of the authorities cited in the instant case will lead to a more definitive statement of the basis for the holding.

Delaware adheres to the basic principle that constitutional immunity from unreasonable searches and seizures is not applicable if

54. DEL. CODE ANN. tit. 11, § 2303 (1953).
55. DEL. CODE ANN. tit. 11, § 2302 (1953).
56. DEL. CODE ANN. tit. 11, § 2301 (1953).
57. Chapman v. United States, 256 U.S. 610 (1961); State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963).
58. 203 A.2d 270 (Del. Super. Ct. 1964).
59. *Id.* at 270.
60. *Id.* at 271.

consent to make the search was given by the accused.[61] In considering whether another person may consent to a waiver of the accused's constitutional rights, the court cited a series of cases[62] in which parents of the defendant gave their consent. In each case the parent owned the house searched and had control, possession and authority over the premises. Delaware is thus in accord with the majority of jurisdictions which hold that parents of an accused may consent to a search of their premises in which the accused also resides.[63] But in the instant case Malcom's mother was not the owner of the house; the defendant was the owner. Ownership of the premises, therefore, was not a prerequisite for capacity to consent to a search. However, it is submitted that substantial control and possession of the premises are still essential.

The Delaware Court supported the control doctrine by citing two cases[64] where a search of personal property was made. In both cases the possession and control that the consenting party had over the defendant's property was the determining factor that validated the search.

In addition to the control doctrine *Malcom* also recognized an agency theory, citing *People v. Misquez*[65] as at least partial authority for its decision. In *Misquez* the defendant's babysitter, a mature, married woman, was in charge of the premises and consented to a search of the defendant's home. The defendant had given the babysitter a key so she would have access to the apartment to look after the children. Saying it was reasonable for both the babysitter and the police officer to assume she had authority to consent to the search, the court held the consent to be valid.[66] The court felt that the defendant, by giving the key to his apartment to the babysitter, had thereby given her "some control" over the premises and that she was therefore authorized to permit the officer to enter.

From *Misquez* it is evident that *Malcom* does not place sole emphasis on a control doctrine. An agency doctrine of apparent authority has been given great weight.

The premise that Delaware would hold a third person's consent to search valid under two distinct theories is reinforced by *People v. Correo.*[67] There the court held a landlady's consent to

61. On Lee v. U.S., 343 U.S. 747 (1952).

62. Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); State v. Hogan, 47 Idaho 315, 274 P. 628 (1929); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923); State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916) where sister of defendant consented.

63. See cases cited note 36 *supra.*

64. State v. Eldridge, 302 F.2d 463 (4th Cir. 1962); Sartain v. United States, 303 F.2d 859 (9th Cir. 1962).

65. 152 Cal. App.2d 471, 313 P.2d 206 (1957).

66. *Id.* at 478, 313 P.2d at 211.

67. 20 Cal. Rptr. 492 (1962).

police officers to enter a second floor hallway used in common by her with all her tenants to be valid.[68] The court reasoned that where a landlord leases space in a building to several tenants and provides facilities for their common use, the landlord has retained control over those facilities and may therefore consent to a search.[69]

The California Court does not stop by resting its decision on the control theory alone. The power of a third person to consent to a search and seizure is broadened under an agency theory. The court stated that even if the landlady had exceeded her actual authority, her apparent authority to consent to the entry would render it lawful.[70] The investigating officers may draw an inference of authority to authorize a search if the person present and in charge possesses the keys to the premises and willingly permits the officers to enter.

Thus, from *Malcom* it would appear that Delaware does not restrict itself to a single theory when considering whether the consent of a third person will render a search of the accused's premises valid. Either a control doctrine or an agency doctrine may be invoked. Substantial control over the defendant's property or place of residence would give a third person the power to waive the accused's right against unreasonable searches and seizures by consenting to its search. What constitutes substantial control will depend on the circumstances of the particular case. It is submitted, however, that substantial control cannot exist unless the consenting party has possession of the place or property searched. This should at least mean free access to the property and substantial freedom to do with it as one pleases, either by the express or implied consent of the accused.

Secondly, a third person would have the power to consent to a search of the accused's premises if he had apparent authority to consent to the search. *Malcom* does not define what facts will establish a third person's apparent authority. It would seem that the doctrine should only be invoked where the accused has authorized representations of the third person or has done something from which investigating officers would draw such an inference, since the doctrine rests on an appearance created in the agent by the principal. The consenting party's possession of the keys to the premises given to him by the accused would seem to be sufficient. An officer cannot, however, reasonably assume that anyone who might open the door to the defendant's home has authority to permit entry and consent to a search. The consenting party must be a "mature" person.

The *Malcom* court stated that "it goes without saying that if the state had to rely on the consent of the minor son, necessarily I

68. *Id.* at 495.
69. *Id.* at 495.
70. *Id.* at 495.

would have to hold the consent to be insufficient."[71] It then cites *People v. Jennings*[72] for the proposition that consent by a seventeen-year old or fifteen-year old daughter would not be sufficient. The court does not state directly how old one must be before he would have the authority to consent. The court does suggest, however, that a *minor* could not give a valid consent: "if I had to rely on the consent of the *minor* son, necessarily I would have to hold the consent to be insufficient."[73] It would seem, therefore, that one would have to be at least eighteen years of age, but more probably twenty-one years of age,[74] to consent to a search and seizure of the accused's property in Delaware. Since *Malcom* emphasizes that, in each case cited as authority, consent was voluntarily given, it would appear that the possibility of a coerced consent is the evil to be remedied. This is a sound basis for denying a minor the right to waive a defendant's constitutional rights against unreasonable searches and seizures.

Many arguments may be advanced for preventing a third person from having the power to consent to a search of the accused's property. It may be said that if immunity against unlawful searches and seizures is personal to the one whose private rights are invaded, then the right to waive the immunity is also personal. However, if a third person may waive the accused's constitutional rights, they would not be personal. Consequently, constitutional rights are of little value if they may be waived with ease.

Furthermore, it may be argued that the language of the fourth amendment and the Delaware Constitution affords protection of the property interest that one has in the object seized. However, control or possession of the accused's premises does not give a third person a proprietary interest in the property. Why protect a man's right of privacy if someone else can consent to embarrassing invasions of his domestic peace, seizure of his property and possible incrimination?

In addition, a third person in joint-occupancy with the accused has the right to possess and make use of the premises. However, joint-occupancy does not give that third person any rights in the personal belongings of the accused. He cannot arbitrarily use or sell them, so why should he have any authority to give a police

71. State v. Malcom, 203 A.2d 270 (Del. Super. Ct. 1964).

72. 142 Cal. App.2d 160, 298 P.2d 56 (1956). Note, however, that this case does not stand merely for the proposition that a seventeen- or fifteen-year old cannot give consent because of his tender age. In this case the court held that the consent was coerced.

73. State v. Malcom, 203 A.2d 270, 273 (Del. Super. Ct. 1964). (Emphasis added.)

74. No Delaware cases or statutes define what the proper age to consent should be. A strong argument may be made for either age. It would appear, however, that by citing *Jennings* the court would not consider the consent of an eighteen year old sufficient to waive an accused's constitutional rights.

officer the right to search and seize them? The accused would not consent to a search and seizure that would incriminate him without a search warrant. By precluding a third party from having the authority to consent to a search and seizure of the accused's property, the guilty will be protected in some instances, but more importantly the innocent will be protected at all times.

Although the above arguments have been advanced, the fact remains that the courts do permit third persons to waive the constitutional guarantees of the accused under certain circumstances. The problem in each case is to determine what circumstances should permit such a waiver.

Malcom is sound when considered in light of the facts of the case, but unfortunately the court did not clearly define the basis for its holding. Two theories were advanced for supporting the premise that a third person may waive the rights of an accused against unreasonable searches and seizures. The control theory rests on stronger ground. One in control and possession of property has a strong personal interest in that property. Such persons should be able to give a valid consent to search the property, which would waive the accused's constitutional rights.

However, such support for using a doctrine of apparent authority as a basis for waiving an accused's constitutional rights against unreasonable searches and seizures cannot always be found. Although control and apparent authority often go hand in hand, apparent authority alone should never be the basis for allowing a third person to consent to a search of the accused's property. It is a doctrine arising out of a business context which courts apply in a criminal context in order to justify an illegal search. Too often the consenting party, rather than the accused, creates the appearance of authority, and this defeats the rationale behind the rule. Such a doctrine should be precluded from becoming a tool to undermine constitutional safeguards.

It remains to be seen how far Delaware will go in allowing a third person to waive the accused's constitutional right against unreasonable searches and seizures. The question in every case is whether the search was reasonable, and reasonableness is determined by the facts and circumstances of each case. To attain substantial justice in all cases the courts must balance the constitutional rights of the accused against the effective administration of the criminal law.

JAMES A. ERISMAN