CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 5. SEARCH AND SEIZURE

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Subcommittee No. 2

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REPORTER'S FOREWORD

This draft is by no means inclusive of all aspects of search and seizure which should be included in any comprehensive legislative treatment. At the outset a major policy decision requires disposition before detailed provisions are examined. I refer to whether search and seizure law should be reduced to legislative statement at all. It is the firm belief of your Reporter that it should be. Legislatures can speak ahead of time to the police; courts can only speak after the police activity is questioned. Legislatures can enact comprehensively and with cohesive policy in mind; courts can act only sporadically as cases are brought to them. As a result, important search and seizure issues sometimes never reach the courts, or reach the courts on inappropriate factual backgrounds. The courts traditionally interpret the Constitution of Oregon and the United States, particularly with respect to what is "reasonable" search and seizure. Nevertheless it is entirely appropriate, and more oftentimes than not, helpful if the legislatures, speaking through laws, indicate what they believe to be "reasonable."

If the Commission decides, after examining this preliminary draft, that a legislative statement of search and seizure law for Oregon is desirable, it would then be necessary in a subsequent draft to include provisions covering searches pursuant to warrant, inspectional searches, border searches, emergency searches (of vehicles and, perhaps, premises), search of open lands, searches related to licensing authority, and some other miscellaneous searches. Additionally provisions would be needed covering disposition of seized things, evidentiary exclusion procedures and sanctions for illegal search activity.

This draft has selected some of the more general problems and areas of coverage familiar in some measure to the decisional law but virtually untouched by legislative statement. Included here are provisions dealing with search and seizure definitions and scope, search and seizure incident to arrest, and search and seizure by consent.

ARTICLE 5. SEARCH AND SEIZURE

Section 1. Definitions. [To be included here are definitions of the following words and phrases: search; seizure; search warrant; law enforcement officer; person; thing; reasonable cause to believe; reasonable belief. The ALI Model Code of Pre-arraignment Procedure (hereafter MCP) Tent. Draft No. 3, section ss 1.01 sets out definitions for all these terms which, with minor variation, seem to be adequate. However, they are not crucial at this stage to basic policy decisions and are intentionally omitted from this draft. They will, of course, be added later should the Commission decide to pursue a legislative statement of search and seizure law.]

Section 2. Prohibition of unauthorized searches and seizures. No search or seizure shall be authorized or executed otherwise than in accordance with the provisions of Article __ [stop and frisk provisions to be drafted, probably to be included in the Article dealing with investigation of crime presently covered in Article 2, Tent. Draft No. 2 of the MCP], and sections 3 through 15 of this Article, and Article 27 of the Oregon Criminal Code of 1971 [eavesdropping].

COMMENTARY

A. Summary

This section prohibits all searches and seizures except those specifically allowed in other sections of this Article (e.g., searches and seizures pursuant to a warrant, incidental

to an arrest), the provisions of the stop and frisk sections yet to be drafted and the electronic eavesdropping provisions presently included in Article 27 of the Oregon Criminal Code of 1971.

B. Derivation

The language of this section is based on section ss 1.02 of the MCP.

C. Relationship to Existing Law

No comparable provision exists in Oregon legislation on the general level of the proscription in this section. Like most other states the Oregon statutes in the search and seizure field (or lack of such statutes) leave to implication the prohibition of unauthorized searches and seizure. In a few instances ORS specifically authorizes seizures. See ORS 164.368 (stolen Christmas trees); 167.540 and 167.555 (gambling devices); 142.080 (vehicles used to transport stolen property). The silence of the legislature with respect to the kinds of searches and seizures which are permissible leaves the policy limits to be determined by the courts based on their notions of what is constitutionally permissible. Such a failure by the legislature has the effect of authorizing any search which the Constitution does not prohibit.

Statutes should, as pointed out in the MCP commentary (Tent. Draft No. 3, p 10), "be so phrased as to leave a certain amount of judicial elbow room for the exercise of discretion. But it is believed that there should be a statutory basis for every search and that searches lacking such a basis should be explicitly prohibited."

Section 3. Permissible objects of search and seizure. (1) The following are subject to search and seizure under Article __ [stop and frisk provisions], sections 1 through 15 of this Article, and Article 27 of the Oregon Criminal Code of 1971:

(a) Information concerning the commission of a criminal offense;

(b) Contraband, the fruits of crime, or things otherwise criminally possessed;

(c) Weapons or other things used or likely to be used as means of committing a crime; and

(d) An individual for whose arrest there is reasonable cause or who is unlawfully held in concealment.

(2) With the exception of handwriting samples and other writings or recordings of evidentiary value for reasons other than the testimonial content of such writings or recordings, things subject to search and seizure under subsection (1) shall not include personal diaries, letters, or other private writings or recordings, unless they have served or are serving a substantial purpose in furtherance of a criminal enterprise.

COMMENTARY

A. Summary

This section is intended to specify the things -- including information and individuals -- that are subject to search and seizure under the ensuing Articles of the draft.

Under subsection (1), paragraphs (b) and (c), the subject of search and seizure are tangible physical objects. Ordinarily, that will also be the case under paragraph (a),

which reflects the Supreme Court's recent decision removing the constitutional barriers to the seizure of "mere evidence." See Warden v. Hayden, 387 US 294 (1967). The draft uses the phrase "information concerning" instead of "evidence of" to cover the situation where the fruits of the search are not tangible objects, and where their value is negative rather than positive. When a homicide has been committed, the police may need a search warrant to examine the scene of the crime, and look for bloodstains, fingerprints, means of ingress and egress, and the like. The fact that the window in the deceased's room was locked and impossible of access from outside is not literally "evidence of the commission" of a criminal offense, but it is important "information concerning" the offense, because it establishes that the killer must have entered some other way. If the police cannot gain access by consent for such investigations, legal authority should be available.

Although paragraph (d) probably is not necessary, this view is not universally entertained, and there appears to be no objection to the authorization of search warrants to enter premises for purposes of arrest or rescue.

Subsection (2) covers the possibility of constitutional limitations on the seizure of private documents, such as diaries, which contain evidence of crime but have not been used as instrumentalities of crime. The diary of Sirhan Sirhan, for example, would probably fall into this category. The proposed exception does not extend to documents sought for reasons other than their testimonial content, nor to documents, however "private," that have been or are being used as instrumentalities of crime.

B. Derivation

The section draft follows closely the language in section ss 1.03 of the MCP. The policies, if not the exact language presently contained in ORS 141.010, which sets out the grounds for issuance of search warrants, are in substantial accord with the policies in the draft.

C. Relationship to Existing Law

The existing statutory material throughout the country on this matter exhibits great variety. Several states, including Oregon in its statute setting out the purposes for which a search warrant may be issued (ORS 141.010), follow a common and apparently elderly form which covers property

which is "stolen or embezzled," which has been "used as the means of committing a crime." In many other states this form is used as the base, with additions or variations. Specific reference to "stolen" or "stolen and embezzled" property is common to most of them, and no doubt reflects the ancestral common law warrant for stolen goods. Several states particularize the permissible objects by types of crime -- gambling, liquor, fish and game laws, etc. -- instead of by general categories.

"Evidence" as the object of a search warrant: Until the Court's recent decision in Warden v. Hayden, 387 US 294 (1967), there were constitutional obstacles to the issuance of a search warrant for mere "evidence" of a crime; some unlawful possessory aspect was required under the so-called "mere evidence" rule enunciated in Gouled v. United States, 25 US 298 (1921). But the Gouled case was explicitly overruled by the Hayden case, at least as concerns "non-testimonial" evidence.

The demise of the mere evidence rule had been widely predicted and in fact was anticipated in 1963 when the Oregon legislature added language to ORS 141.010 permitting the issuance of a search warrant for the purpose of seizing evidence of a crime, a development probably stemming from the tortured holding in State v. Chinn, 231 Or 259, 373 P2d 392 (1962). In Chinn the Oregon Supreme Court found that evidence was admissible under the instrumentality provision of ORS 141.010 when in reality the "instrumentalities" of the crime of rape (empty beer bottles, a camera, a soiled bed sheet) more closely resembled "mere evidence" of the crime.

Exception for diaries and other private records: Prior to the Court's decision in the Hayden case, two judges who had given recent and careful consideration to the shortcomings of the "mere evidence" rule had both expressed the view that certain kinds of documents might remain beyond the constitutional reach of a search warrant. In a case decided in 1965, Chief Justice Weintraub stressed the "marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect." In the Court of Appeals' decision in the Hayden case itself, Chief Judge Haynesworth drew a distinction between tangible evidentiary articles which might legitimately be seized, and "a diary containing incriminating entries," the seizure of which would be "prohibited by the Fourth and Fourteenth Amendments."

The Hayden case involved identifying garments, and thus raised no issue of the constitutional sanctity of private documents. Nevertheless, in his opinion for the Court, Mr. Justice Brennan was careful to leave the question open (387 US at 302-03):

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Schmerber v. California, 384 U.S. 757. This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

There is, of course, no special sanctity for documents as distinguished from other physical objects. A lottery ticket is a document but it is also, if lotteries are prohibited, an instrument of crime. Diaries and letters may be but are not necessarily instrumentalities of crime, and are testimonial utterances of the writer, which lottery tickets are not.

Since the ALI Council meeting in February 1970, the Court of Appeals for the Second Circuit has answered the question left open by Mr. Justice Brennan in the negative. United States v. Bennett, 409 F2d 888 (2d Cir 1969). Judge Friendly's rejection of any limitation on the type of documents subject to seizure was based in part on a belief that such considerations are relevant to the Fifth rather than the Fourth Amendment, and in part on a doubt that such limitations effectively serve the cause of privacy, inasmuch as ordinarily documents must be read in order to determine whether or not they are in fact instrumentalities, so that the limitation in seizability does not narrow the search. The ALI Council found these arguments persuasive and by a vote of 24 to 3 struck the provision from the MCP draft. However, the ALI membership voted to retain the provisions and this course is recommended by your Reporter.

Acknowledging the force of Judge Friendly's second point, your Reporter remains of the belief that documents which serve no purpose in the furtherance of any criminal enterprise, and are admissions pure and simple, should not

be permitted objects of search or subjects of seizure. Apart from the substantial constitutional doubts which the matter presents, there are sound reasons of policy for the proposed limitation. Seizure and disclosure of private letters and diaries is a particularly abrasive infringement of privacy. An area of complete freedom for personal conversation and writing, so long as there is no furtherance of crime involved, preserves important First Amendment values. The forced production of private diaries and letters, to obtain admissions or other statements against interest, runs perilously close to the ban on self-incrimination.

Search and Seizure Incidental to Arrest

Section 4. Permissible purposes. Subject to the limitations in sections 4 through 11 of this Article, an officer who has made a valid arrest under Article 4 of this Code [to be drafted] may, without a search warrant, conduct a search of the person, property, premises or vehicle of the arrested individual:

(1) To effect the arrest with all practicable safety of the officer, the arrested individual, and others;

(2) To furnish appropriate custodial care, if the arrested individual is jailed; or

(3) To obtain evidence of the commission of the offense for which the individual is arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in connection with the offense.

COMMENTARY

A. Summary

This section embodies the basic authorization for searches and seizures incidental to an arrest. The authority becomes effective only upon actually making the arrest. Requirements of a valid arrest to which reference is made in the draft are not yet drafted. Limitations on the permissible scope of search pursuant to an arrest are contained in sections 9 through 11 of this Article. The section also specifies the several purposes for which a search incident to an arrest may legitimately be made, and which furnish the conceptual basis for both the authorization and the limitations.

B. Derivation

The section is based on section ss 3.01 (1) of the MCP.

C. Relationship to Existing Law

There are no comparable statutory provisions in Oregon but the purposes authorized in this section do not appear to be in conflict with any Oregon decisional law.

In view of the almost total lack of legislative underpinnings for the search incident to arrest -- a lack surely due to its taken-for-granted character for centuries past -- the section specifies the permissible purposes.

The validity of the purpose stated in subsection (1) is recognized with virtual unanimity. Nor would much question be raised about the necessity for custodial searches of jailed persons; the practice, well-nigh universal, is largely devoid of statutory basis and has not been the subject of much professional consideration.

More controversial are the purposes stated in subsection (3). So far as concerns "evidence," the purpose was, of course, clearly invalid during the time (1921-67) that the "mere evidence" rule of the Gouled case was in effect. With the rejection of that rule in the Hayden case, and subject to the possible exemption of testimonial documents discussed in connection with section 3, supra, the two parts of subsection (3) now stand on much the same footing.

Limitations on the permissible physical scope of searches incidental to an arrest are discussed under sections 9, 10 and 11, infra.

Section 5. Things subject to seizure. In the course of a search conducted pursuant to sections 4 through 11, the arresting officer may seize only things subject to seizure as provided in section 3 of this Article. The provisions of section 7 of Article 5 [relates to force usable in serving search warrant -- to be drafted] with respect to the use of force shall be applicable to searches and seizures undertaken pursuant to sections 4 through 11 of this Article.

COMMENTARY

A. Summary

This section makes applicable to searches and seizures incidental to an arrest the general limitations on what may be seized in section 3 of this Article. The reference in the section to the amount of force which may be used is contained, as a structural matter, in MCP's provisions on warranted searches, which the Reporter has not yet developed for presentation. The provisions referred to are found in MCP section ss 2.03 (7) which allows only the use of non-deadly force except that deadly force may be used for self-defense or where there is reasonable ground to believe that delay of the seizure will result in the use of the objects to be seized to cause death or serious bodily injury.

B. Derivation

This section is based on MCP section ss 3.01 (2).

C. Relationship to Existing Law

Oregon has no comparable statutory provision.

Section 6. Intermingled documents. If in the course of a search conducted pursuant to sections 4 through 11 the arresting officer discovers documents and if he has reason to believe that intermingled with them are documents or portions thereof which are subject to seizure under section 3 of this Article and connected with the offense for which the arrest is made, the officer shall handle such documents in accordance with the provisions of section 9 of OD #2 [to be drafted as part of search warrant procedures], and a hearing, in accordance with the provisions of that section, shall be held before a [judicial magistrate officer] having jurisdiction of the offense for which the arrest was made.

COMMENTARY

A. Summary

Section 6 is the last of the provisions establishing special procedures for intermingled documents. It makes applicable to intermingled documents discovered during an arrest search the same procedures that are established for warranted searches by the sections to which reference is made. Since the Reporter has postponed presenting a draft of the sections covering warranted searches, a summary of the MCP provision covering the handling of intermingled documents, seized without a warrant as incident of arrest, is set out here. Pursuant to MCP section ss 2.05 the seized documents, such as letters, diaries, book entries, shall not be examined by the police. Instead the documents must be impounded and protected where found or removed and sealed. A hearing before a judicial officer must then be held before the documents may be searched, and the judicial officer may impose limits on the search or direct return of some or all of the documents.

B. Derivation

This section is based on MCP section ss 3.01 (3).

C. Relationship to Existing Law

Oregon presently has no comparable statutory provision.

Section 7. Search incidental to arrest for minor offense. The searches and seizures authorized by sections 4 through 11 of this Article shall not be authorized if the arrest is on a charge of committing a "violation" as defined in section 71 of the Oregon Criminal Code of 1971, a traffic offense, or a misdemeanor other than a traffic offense the elements of which involve no unlawful possession or violent, or intentionally or recklessly dangerous, conduct. This section 7 shall not be construed to forbid the search for dangerous weapons authorized by section ___ of Article __ [to be drafted] if the circumstances described in section __ of Article __ [to be drafted] are present at the time of arrest.

COMMENTARY

A. Summary

The section forbids a search incidental to an arrest if the offense is a violation, a traffic offense, or a misdemeanor other than a traffic offense where no violent or reckless conduct is involved and where no unlawful possession is an element of the misdemeanor. However, even in these kinds of offenses, the arresting officer may search within the confines of the stop and frisk provisions stemming basically from Terry v. Ohio, 392 US 1 (1968), with rather important refinements contained in s. 2.02 of the MCP (Tent. Draft No. 2). Pursuant to the MCP application of Terry, the officer would be authorized to frisk to protect himself from dangerous weapons where the officer has reason, because of the circumstances, to believe his safety is threatened. The search here permitted extends only to a patting down of the outer clothing. Of course, as was the case in Terry, if this frisk gives the officer reasonable cause to suspect a weapon, he may search more thoroughly and seize it. (As to the admissibility of evidence seized as the result of a frisk, see MCP commentary to s. 2.02, Tent. Draft No. 2, pp. 46-47 which discusses the troublesome problem of the admissibility of narcotics discovered during a frisk for weapons.)

B. Derivation

The section is based on MCP section ss 3.02 (1).

C. Relationship to Existing Law

No comparable statute exists in Oregon. This provision would probably have the effect of changing present police practices and some decisional law in Oregon. In most instances where the police arrest a misdemeanant or motorist (or issue a citation in lieu of arrest pursuant to ORS 133.045 through 133.080) no search is made. Where an arrest for a minor offense is made under circumstances where the officer fears for his safety, a frisk is proper legally (Terry v. Ohio, 392 US 1 (1968)) and as a practical matter. But occasionally where an arrest is made on a traffic charge or a minor misdemeanor charge in present practice, a search may be made beyond a mere frisk either because the officer has a suspicion that he will find evidence of another more serious crime (the pretext arrest) or because the officer has probable cause to arrest for a more serious crime but for reasons of the moment does not elect to do so but instead arrests on a minor, unrelated charge. The pretext arrest to facilitate a general search is frowned upon in the case law. See e.g., State v. Williams, 248 Or 85 (1967), where the Supreme Court construed the testimony to show that the arrest for vagrancy was not made because the police really believed the defendant had violated the vagrancy ordinance but because the police wished to question the defendant about a burglary. For this reason and because a Miranda warning was not given prior to obtaining consent to search a locker of the defendant, the court ruled the evidence of the burglary disclosed by the search must be suppressed. See also State v. Dempster, 248 Or 404 (1967), where the rule is approved but, because of the facts of the case, not applied. Further limiting the search pursuant to a pretext arrest is the rule that the search incident to arrest must be reasonably related to the offense which prompts the arrest. Perhaps the best recent example of this is State v. O'Neal, 251 Or 163 (1968), in which a marihuana cigarette was suppressed on a possession charge stemming from seizure of the cigarette from the wallet of the defendant after arrest for driving with an expired operator's license and failure to have a rear license plate. No reasonable connection existed, said the court, between the arrest and the place searched. See also State v. Krogness,

238 Or 135 (1964). See also U.S. v. Robinson, 8 Cr L Rep 1043, 2179 (DC Cir 1970), where complete search after a traffic arrest was held invalid.

The provision in this section will cause some difficulty in cases like State v. Cloman, 88 Adv Sh 567 (1969). The police had probable cause to arrest the defendant for burglary but instead chose to apprehend him on a curfew ordinance violation. The search pursuant to this arrest produced incriminating evidence used at the trial on a charge later brought for burglary. It is fairly clear that the police were not staging the arrest on the minor charge, or so the Oregon Court held, in approving use of the seized evidence at the trial.

The policy of the draft section seems advisable, despite cases like Cloman. If the police in fact have probable cause to arrest a citizen on a serious charge but choose not to do so, instead arresting for a traffic offense or an unrelated, nonviolent misdemeanor, there is no reason why the police should be allowed a search any more extensive than a frisk in order to protect themselves if the circumstances of the arrest warrant even this. The very fact that police showed later, as they did in Cloman, that they had probable cause to arrest for burglary serves to emphasize that the police ought not to be excused for arresting on a minor charge instead so they could search the defendant's car.

In Cloman the Oregon Court said, "We believe it reasonable to conclude that the officers gave this cause [curfew violation] for arrest because of their uncertainty of the law of probable cause for arrest. We also believe it reasonable to conclude that the actual cause for which the officers arrested Cloman was some charge concerning stolen wire. Under these circumstances we find nothing to be served by holding the arrest invalid because the officers were uncertain about a problem which puzzles the courts." State v. Cloman, 88 Adv Sh 567, 576 (1969). Despite this it seems the desirable policy to insist that police stop using the minor arrest technique in order to give excuse for a search directed at discovering evidence involving a larger crime about which the police already have much information. The draft section would restrict this practice by prohibiting all searches, except frisks in appropriate cases and custodial searches pursuant to section 7, infra, for arrest on a minor, nonviolent offense. Such a provision would go a long way to eliminate abuses in this area.

Section 8. Custodial search. A person arrested on a charge described in section 7 of this Article who is confined in jail because of his physical condition or on other reasonable grounds, may be subjected to such search of the person as is reasonably necessary for custodial purposes, and things subject to seizure under section 3 of this Article, discovered in the course of such a search, may be seized.

COMMENTARY

A. Summary

There may be occasions when a person charged only with a violation or a nonviolent misdemeanor must be jailed for his own protection because he is drunk or otherwise helpless, or for some other nonpunitive reason. Under these circumstances, a search may be desirable for purely custodial purposes. On the basic principle that the police are entitled to observe and seize whatever contraband comes to notice in the course of the lawful conduct of their duties, any things subject to seizure which such a custodial search turns up should be seizable.

B. Derivation

The section is based on MCP section ss 3.02 (2).

C. Relationship to Existing Law

There is no comparable statutory provision in Oregon although ORS 142.210 is indirectly relevant. Since it requires the jail custodian to receipt for a prisoner's "money or other valuables" when they are taken from the prisoner being jailed, the clear implication is that the jailer may conduct a search. In a related case, State v. Whitewater, 251 Or 304 (1968), the Supreme Court held that the clothing taken from a prisoner during booking at a jail on traffic arrest charges was subject to seizure as evidence of a different crime. For a further comment on custodial searches, see the commentary to section 9, infra.

Section 9. Search of the person incident to arrest.

(1) Permissible scope. An officer making an arrest on a charge other than as described in section 7 of this Article, and the authorized officials at the police station or other police building to which the arrested individual is brought, may conduct a search of the arrested individual's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

(2) Privacy. The search authorized by subsection (1) shall be carried out with all reasonable regard for privacy, and unless exceptional circumstances otherwise require, search of the arrested individual prior to his arrival at the police station shall be limited to such search as is reasonably necessary in order to effect the arrest with all practicable safety, or prevent destruction of evidence of the crime for which he is arrested.

(3) Search of body cavities. Search of an arrested individual's bloodstream, body cavities, and subcutaneous tissues may be conducted as incidental to an arrest only if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested, and if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search, and that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the physical invasion of the individual's person.

(4) Search limited by purpose. A search authorized by this section may be carried out only if, and to the extent that, there is reasonable cause to believe that it is necessary in order to effectuate one or more of the purposes specified in section 4 of this Article.

(5) Custodial seizure. Things not subject to seizure under section 3 of this Article, which are found in the course of a search conducted pursuant to this section, may be taken from the arrested individual's possession if reasonably necessary for custodial purposes. Documents or other recordings may not be read or otherwise examined. All such things must be returned to the arrested person, or to someone authorized to take them in his behalf, as soon as is reasonably practicable.

COMMENTARY

A. Summary

The first subsection of this section provides for the search, incidental to an arrest, of the arrested individual's person and personal effects, which is recognized in the traditional common law of search and seizure. The geographical scope of the search is confined to the area within which the arrestee might take action to obstruct the arrest or destroy contraband or evidence of the crime for which he is arrested.

Subsection (2) limits the scope of the search at the place of arrest, in the interests of privacy, to the scope necessary for safety and to prevent destruction of evidence.

Subsection (3) limits warrantless search of body cavities, bloodstream, and tissues to situations where there is a high degree of probability that seizable things have been concealed in this manner, and that delay might cause their disappearance or destruction.

Subsection (4) imposes the general limitations which follow from the purposes for which search incidental to arrest is authorized. If, for example, letters on the arrestee's person, or the contents of his wallet, cannot reasonably be expected to bear any relation to the offense for which he was arrested, then the documents may not be read, and the wallet may be opened only if necessary for purposes of safekeeping.

Custodial search may, of course, result in taking from the arrestee things which are not subject to seizure under section 3 of this Article. Such things are required by subsection (5) to be handled with due regard for privacy, and restored to the arrestee or his authorized representative as soon as possible.

B. Derivation

The section is based on MCP section ss 3.03.

C. Relationship to Existing Law

Like most other states Oregon has no statutory provisions similar to the ones in this section but the authority to search incident to arrest is well established in Oregon and all other states as a matter of common law and practice. The constitutional validity of the search authority conveyed in this section seems clear, and it also enjoys the support of long continued practice. Furthermore in almost every case where the arrested person is jailed, full custodial search is a reasonable procedure.

Scope of search. The permissible scope of search incidental to an arrest was dealt with extensively in the Supreme Court's recent decision, Chimel v. California, 395 US 752 (1969). That case dealt with a search of the premises wherein the arrest was made. The Court explicitly approved searches of the arrestee's person and "the area into which an arrestee might reach," both in order to effect the arrest with safety and to prevent the concealment or destruction of evidence. This "grabbing distance" standard is embodied in subsection (1) of the draft by the phrase "area within his immediate control," approved in the Chimel opinion (395 US at 763).

The Chimel case did not deal with custodial search requirements, and the Court appears not to have confronted them in the context of arrest. In Cooper v. California, 386 US 58 (1967), however, the Court supported the search of an automobile on custodial grounds, and there is no reason to think that custodial searches of persons, unless carried out in a brutal or oppressive way, would encounter judicial difficulties.

However, the scope of the search must be justified by its purpose, as subsection (4) requires. Custodial search does not require a reading of documents found on the arrestee, nor can such perusal be justified in order safely to effectuate the arrest. Only if the arresting authorities have reason to believe that the documents are fruits, instrumentalities, or evidence of crime are they seizable, subject to the special requirements for intermingled documents.

Bloodstream and body cavities. Searches of the type described in subsection (3) are so personally intrusive and uncomfortable that ordinarily they should not be permitted on the decision of the officer alone. Unlike the ordinary application for a search warrant, in which the magistrate is seldom in a position to question effectively the police showing, an application for a warrant for a special search of the body's interior presents issues of necessity and propriety on which the magistrate's review of police judgment may be worthwhile. The rule as stated in this subsection is in substantial congruity with the decision in Schmerber v. California, 384 US 757 (1966).

Section 10. Search of vehicle incident to arrest. (1) If, at the time of the arrest, the arrested individual is in a readily movable vehicle, or if he or another or others in his company are in apparent control of such a vehicle in the immediate vicinity of the place where the arrest is made, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are subject to seizure under section 3 of this Article and connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things, and seize any things subject to seizure under section 3 of this Article and discovered in the course of the search.

(2) Search of a vehicle under this section shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable. If the vehicle is impounded by authority of law, or if for other good cause it is retained in official custody, it may be searched at such time and to such extent as is reasonably necessary for its safekeeping.

COMMENTARY

A. Summary

It is to be noted that this section does not relate to the circumstances under which search of a vehicle is permissible without a warrant and independent of an arrest, under the rule of Carroll v. United States, 267 US 132 (1925), and related decisions. This will be covered in a section on emergency searches yet to be drafted. Rather it lays down criteria for searching a vehicle as incidental to the arrest of one of its occupants.

The essential limiting principles are that there must be reasonable ground to believe that the vehicle contains things subject to seizure and connected with the crime for which the individual is arrested, and that the vehicle is moving or readily movable, so that the things might be removed before a search warrant could be obtained.

B. Derivation

The language of the section is based on MCP section ss 3.04 (1).

C. Relationship to Existing Law

This section is in accord with existing Oregon case law on search of cars incident to arrest the latest of which is State v. Keith, 90 Adv Sh 531, ____ Or App ____ (1970), which cites and applies State v. McCoy, 249 Or 160 (1968), an opinion of the Oregon Supreme Court dealing with a similar situation. The rationale of McCoy, and to a certain extent of Keith, is based on the fragile concept of the contemporaneousness of the search with the arrest. This rationale is no longer necessary in light of Chambers v. Maroney, 90 S Ct 1975 (1970), in which the U.S. Supreme Court ends any indecision as to the effect of its earlier opinion in Chimel v. California, 89 S Ct 2034 (1969), a case involving search of premises incident to arrest, on delayed car searches. Chambers now says clearly that the police, under appropriate and reasonable circumstances, and where probable cause to search it exists, may seize a car in which the occupant was arrested and delay its search until it is taken to the station house. The opinion explicitly states that such a delayed search is not incidental to arrest. If probable cause to search the car existed at the time of arrest and the delay in the car search was reasonable, the police need not get a warrant before they search because "there is a constitutional difference between houses and cars." Chambers v. Maroney, supra, 90 S Ct at 1982. The kind of circumstances which gave rise to the seizure of the car for search approved in Chambers are not unlike the circumstances in the recent Oregon cases like Keith. In Chambers the occupants were arrested in the car in a dark parking lot in the middle of the night thus making the search on the spot, in the Court's view, impractical and probably dangerous.

Section 11. Search of premises incident to arrest. (1) If, at the time of the arrest, the arrested individual is in or on premises all or part of which he is apparently entitled to occupy, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that such premises or part thereof contain things which are:

(a) Subject to seizure under section 3 of this Article,

(b) Connected with the offense for which the arrest is made, and

(c) Likely to be removed or destroyed before a search warrant can be obtained and served,

the arresting officer may search the premises or part thereof for such things, and seize any things subject to seizure under section 3 of this Article and discovered in the course of the search.

(2) Search of premises pursuant to subsection (1) of this section shall only be made contemporaneously with the arrest and consequent upon the entry into the premises which was made in order to effect the arrest. In determining the scope of search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the individual arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

COMMENTARY

A. Summary

Subsection (1) of this section embodies a limited authorization for search of premises incidental to an arrest made therein. The principle is

the same as for s. 10, search of vehicles, except that the danger of removal of the seizable things arises not from the mobility of a vehicle, but from actions by friends or confederates of the arrested person.

Subsection (2) embodies the requirement that the search immediately follow the arrest, in line with established judicial construction of Fourth Amendment requirements. E.g., Preston v. United States, 376 US 365 (1964). Subsection (2) also contains standards to guide officers in determining the existence of reasonable cause for a search of premises.

Whether the arrest takes place in a vehicle or premises, the arresting officer may, of course, search the area in the immediate control of the person arrested, as authorized in s. 9 of this Article.

B. Derivation

The language of this section is based on MCP section ss 3.04 (2).

C. Relationship to Existing Law

Search of premises incidental to an arrest is limited to the vicinity of a person who, on the basis of reasonable belief, is a criminal. This circumstance is sufficient to justify a search of premises as a means of obtaining evidence otherwise likely to be destroyed or removed, and subject to the additional requirements embodied in the draft.

The U. S. Supreme Court's decisions in this area have made a rather murky sequence. The Chimel case has now indicated that an indoors arrest does not furnish justification "for routinely searching rooms other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." Such searches "in the absence of well-recognized exceptions," the Court declared, "can only be made under the authority of a search warrant."

What the "well-recognized exceptions" may be, the Court did not explicitly state, but may be gathered by implication from other parts of the opinion. The Chimel case was not one of hot pursuit; the police went to the defendant's home armed with an arrest warrant (invalid because the supporting affidavit was conclusory), and there certainly was ample time, whether or not there was adequate cause, to get a search warrant. In his opinion for the Court, Mr. Justice Stewart spoke approvingly of Trupiano v. United States, 334 US 699 (1948), which had laid down as a "cardinal rule" that "law enforcement agents must secure and use search warrants wherever reasonably practicable." This "cardinal rule" was disavowed two years later in United States v. Rabinowitz, 339 US 56 (1950), and the Rabinowitz case was in turn overruled in the Chimel case. The Chimel case, accordingly, appears to involve a revival of the short-lived Trupiano "cardinal rule," and this inference is borne out by a footnote in Justice Stewart's opinion (89 S Ct 2040 note 9) stating that: "Our holding today is of course

entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought,' Carroll v. United States, 267 US 132, 153...."

It appears, therefore, that the Chimel case is intended to rule out "routine" searches of premises incidental to an arrest, especially if the situation is such that a search warrant could have been obtained without danger to the success of the search.

Arrest should not, of course, furnish the basis for a general search for incriminating things, but only (1) for such things as are connected with the offense for which the arrest is made, (2) on the basis of a reasonable belief that they are to be found on the premises, and (3) on reasonable belief that they may be removed or destroyed if not promptly seized. In a great many cases, the joint application of these three standards may eliminate the basis for any search beyond the arrestee's immediate vicinity, and in many more the permissible scope of the search will be very narrow.

While the arresting officer's right to search is limited in purpose to things connected with the crime for which the arrest is made, of course anything properly seizable under s. 3 of this Article, discovered during the search, may be taken.

The limitation in subsection (2) embodies the constitutional rule established in Agnello v. United States, 269 US 20 (1925), and later cases, confining the search authority to the place and occasion of the arrest. Entry into premises can be justified only under a warrant, or to make an arrest on reasonable cause.

The last sentence of subsection (2) gives flexibility to the rule governing the permissible scope of search. If there are observable indications in the immediate vicinity of the spot where the arrest is made which suggest the likelihood of evidence or contraband on the premises, a broader search may then be reasonably justified. One must keep in mind, however, that this does not authorize a probable cause type search possible in the case of vehicles. Vale v. Louisiana, 90 S Ct 1969 (1970), makes this clear. In Vale the police arrested the defendant on the front steps of his house and, having probable cause to believe there were narcotics inside the house, went on in and conducted a search which indeed turned up the narcotics. The Supreme Court ruled the search invalid both on the theory that it

was a search incidental to arrest and that there was probable cause to search. The Court listed the situations under which a broad premises search without a warrant is justified as including only consent searches, Zap v. United States, 328 US 624 (1945); officers responding to an emergency, United States v. Jeffers, 342 US 48 (1951); where the officers are in hot pursuit of a fleeing felon, Warden v. Hayden, 387 US 294 (1966); where the goods ultimately seized were in the process of destruction, Schmerber v. California, 384 US 757 (1964) (a search of the person case but relevant in principle); or where the goods were about to be removed from the jurisdiction, Chapman v. United States, 365 US 610 (1960).

Search and Seizure by Consent

Section 12. General authorization; authority to search and seize pursuant to consent. (1) Subject to the limitations in the other provisions of this Article, an officer may conduct a search and make seizures, without a search warrant or other color of authority, if consent to the search is given.

(2) As used in this Article, "consent" means a statement to the officer, made voluntarily and in accordance with the requirements of sections 13 and 14 of this Article, giving the officer permission to make a search.

COMMENTARY

A. Summary

Subsection (1) contains the basic authorization to conduct searches on the basis of consent, and seize things subject to seizure found in the course of such a search.

Subsection (2) defines "consent" as a statement giving permission to conduct a specific search, given voluntarily and in accordance with the requirements prescribed in s. 13 of this Article. Pursuant to s. 15, infra, the scope of the search is limited by any limitation in the terms of the consent.

B. Derivation

The language is based on section ss 4.01 of the MCP.

C. Relationship to Existing Law

No comparable provision exists in the Oregon statutes. But the U. S. and Oregon Supreme Courts have long held that Fourth Amendment rights, like those arising under the Fifth Amendment, may be waived. Zap v. United States, 328 US 624 (1946); State v. La Plant, 149 Or 615, 42 P2d 158 (1935).

As a matter of policy, it might be argued that recognition of "consent" searches should be withheld, on the ground that they are over-productive of credibility issues, and susceptible to abuse. But such arguments might be urged with even greater force in the case of confessions or admissions made in the course of police interrogation. Nevertheless, the Miranda case did not go so far as to rule out such evidence, albeit the toleration accorded to confessions obtained from suspects in custody was given somewhat grudgingly.

It is apparent that, subject to the Miranda requirements, Fifth Amendment waivers will continue to be recognized, and confessions or admissions received in evidence, even though no counsel for the suspect is present, if the government is able to discharge the burden of proving that the waiver was voluntary and intelligent. If that is so, it would appear that, subject to comparable safeguards, "consent" searches should remain judicially cognizable, and their evidentiary fruits admissible.

Section 13. Persons from whom effective consent may be obtained. The consent justifying a search and seizure under section 12 must be given, in the case of:

(1) Search of an individual's person, by the individual in question or, if the person is apparently under the age of 16, by such individual's parent or guardian; or

(2) Search of a vehicle, by the person registered as its owner or in apparent control of its operation and contents at the time consent is given; or

(3) Search of premises, by a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent.

COMMENTARY

A. Summary

If the police wish to search an individual's person based on a consent search, they must, pursuant to subsection (1), obtain the person's consent. However, if the individual to be searched by consent is under 16, the police must obtain the consent of the person's parent or guardian.

Subsection (2) provides that the person who is the registered owner or who is in apparent control of a vehicle is the person from whom the police may obtain consent in order to validly search the vehicle. Note here that unlike subsection (1), if the person apparently in control of a vehicle is under 16, the consent to search such vehicle by the juvenile validates the police search without reference to the juvenile's parent or guardian.

Subsection (3) designates any person who by ownership or otherwise is apparently entitled to give consent for police to search premises. Here it is conceivable that a person under 16 could give such consent if it appeared reasonably to police that such person had the capacity to consent voluntarily and intelligently.

B. Derivation

The language of this section is based on MCP section ss 4.02 (1).

C. Relationship to Existing Law

Oregon statutory law is nonexistent on the question of who may validly consent to police searches. Some case law exists but is scant. The provisions of this section are an example of the need for a legislative statement aimed primarily at police setting out the limits they must observe.

The section generally reflects what is apparently the law in Oregon with the exception of the provision contained in subsection (1). Pursuant to this, persons under 16 years of age are incapable of giving valid consent, and this is contrary to the holding in State v. Little, 249 Or 297, 431 P2d 810 (1968). The Court approved a search based on the consent of the 15 year old defendant. It is interesting to note in passing, too, that the defendant's mother had also consented to the search of her son.

The policy of forbidding police to search the person of a juvenile under 16 without parental consent seems justified when considered with well established law that the consent to search must be intelligent as well as voluntary. Immaturity of the juvenile may well preclude him from understanding the gravity of the waiver of his Fourth Amendment rights.

Why the police may validly search a vehicle upon the consent of a juvenile of less than 16 who is in apparent control of the car when they are forbidden from search of the same juvenile's person without parental consent may be explained in at least two ways. First, not many persons under 16 will be found who are apparently in control of a vehicle. Second, where the rarity occurs the fact that the car is in operation places it into the special category of exceptions to general search rules recognized in such cases as Chambers v. Maroney, 90 S Ct 1976 (1970), and Carroll v. U. S., 267 US 132 (1925), thus obviating further restrictions on the reliance of police on appearances.

The owner of premises is authorized in this section as a proper person to give valid consent for search of premises. If the person giving the consent is in fact not the owner, still the consent given will validly authorize the search if the police reasonably rely on appearances. This reflects Oregon law as well. See State v. Cook, 242 Or 509, 411 P2d 78 (1966); State v. Frazier, 245 Or 4, 418 P2d 841 (1966). Under the language of the section even a juvenile under

16 may effectively consent to a search if it reasonably appears to the police that the youngster has this authority. It, of course, becomes a matter for the court to determine, in light of the age of the consenting juvenile and surrounding circumstances whether it was reasonable for the police to believe the child had authority to consent.

The consent based on appearances as provided in this section may be viewed as settling the ultimate question of the admission of evidence seized pursuant to the consensual search. However, it is possible to take a different view. A strong argument can be made that consent by one in apparent control of a vehicle or premises may validate the search on the grounds that the police cannot be blamed for acting reasonably. But this does not mean that evidence seized can be introduced at trial when the consent was not in fact given by the owner of the vehicle or premises. This issue will be dealt with in the section to be drafted later dealing with evidentiary exclusion.

One more aspect of subsection (1) of this section deserves comment. It may be difficult for police to determine the actual age of a young person they propose to search upon that person's consent. If the person gives police forged or otherwise spurious information to prove that he is 16 or over, the juvenile may not later be heard to argue that since he was in fact under 16 his consent would not be effective to support the ensuing search. As long as the police were relying reasonably on appearances as to the person's age, their search is valid.

Section 14. Required warning preceding consent search. (1) Required warning to persons not in custody or under arrest. Before undertaking a search under the provisions of sections 12 through 15 of this Article, an officer present shall inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.

(2) Required warning to persons in custody or under arrest. If the individual whose consent is required under section 13 of this Article is in custody or under arrest at the time such consent is offered or invited, such consent shall not justify a search and seizure under section 12 of this Article unless such individual has been informed:

(a) That he is not obliged to consent to a search and that if he does consent any evidence found may be used in evidence against him; and

(b) That he may consult with an attorney prior to making his decision to consent to a search; and

(c) If he wishes to consult with an attorney before making his decision, but is unable to obtain or afford one, an attorney will be furnished at public expense.

COMMENTARY

A. Summary

Subsection (1) of this section states the requisites of valid consent from a person not under arrest or other restraint at the time the consent is given. It is based on the view that a warning of rights

is essential to the giving of a valid consent. The individual must be made aware that he is under no obligation to give consent and that by consenting he exposes himself to the hazard of yielding up incriminating things. But unless the person whose consent is sought is in custody, a more limited warning than that required by Miranda v. Arizona is deemed appropriate.

If the individual is in custody at the time his consent to a search is given, the full panoply of Miranda concepts comes into play. The requirement in subsection (2) that an attorney be made available to the suspect, if he so desires, appears to be constitutionally necessary.

B. Derivation

The language of this section is based on MCP section ss 4.02 (2) and (3). The provisions in subsections (2) (a), (2) (b) and (2) (c) are drafted to reflect those portions of the Miranda warnings deemed appropriate to the consent search situation.

C. Relationship to Existing Law

The Oregon Supreme Court held in State v. Williams, 248 OR 85, 432 P2d 679 (1967), that Miranda type warnings must be given to a person in custody or under arrest before such person can validly consent to a search. The Oregon Court has not, however, dealt with the question whether a person not in custody or under arrest must be given some kind of warning about the consequences prior to obtaining his consent for a search. This section reflects existing law with respect to custodial consent and fills a void with respect to non-custodial consent.

It is clear from the cases that consent to a search can only be valid if it is given freely, voluntarily and knowingly. The courts have been quite unanimous in recognizing this principle. A problem arises, however, when courts attempt to define and apply the terms "free," "voluntary," and "knowing." While it is generally acknowledged that there is a presumption of involuntariness and that this presumption can be overcome only by clear and convincing evidence, the courts have faced the same problems of deciding after the fact what is such clear and convincing evidence as was the case in the confessions area.

Court decisions in other jurisdictions both before and since Miranda are divided on whether a warning of rights is a prerequisite

to a valid consent search. But it is believed that the position of the legislature in drafting legislation is quite different than that of a court deciding in a particular case, after the fact, whether to invalidate a search because a warning of rights was not given. This seems particularly true where, as here, the legislation is designed to speak primarily to the police. If there is one thing that comes through clearly from almost all of the cases on this issue, whichever way they come out on the warning requirement, it is the extreme difficulty of determining from the record the extent to which the person whose consent was sought acted on the assumption the police had a right to make the search. Unless the police undertake some responsibility for advising the person whose cooperation is sought of his rights, there are created the same problems of establishing that a consent to search is "freely and voluntarily given," as troubled the courts with confessions and led to the requirements imposed by Miranda.

While conflicting arguments can be made as to whether the Fourth Amendment rights involved in the consent search issue require the protection of a warning more, the same or less than the Fifth and Sixth Amendment rights involved in Miranda, the underlying issue in the two situations is similar. It seems unlikely that there is any greater knowledge of one's right to refuse a search than the right to silence. The law relating to availability of a warrant, the right to search without a warrant and the admissibility of evidence seized is at least as confusing to the layman as the law relating to oral admissions.

In this connection, it is important to bear in mind that frequently by obtaining consent officers will be able to make a search for which they would have been unable to obtain a warrant at all, or to make a search far broader in scope than a warrant would authorize. An example of the potential for abuse in a consent search is presented by People v. Stark, 80 Cal Rep 307 (1969). Three young people were stopped for a minor traffic violation--a sign illegally in their car window. The police officer, dissatisfied with their identification and suspicious because of the nervousness of one of the occupants (a 16 year old girl), asked for and received permission to search the car with no idea of what he might uncover. His warrantless search, which by any other criteria would have been deemed unreasonable, uncovered marihuana, and prosecution for the drug violation (not the traffic violation) followed. The giving of an explicit warning of rights seems little enough protection against the broad invasion of privacy involved in such a fishing expedition.

Concern may exist about the possibility that inadvertent and relatively minor errors in the form or timing of the warning might result in the inadmissibility of evidence. Section 8.02 (b) (ii) of the MCP provides that in this situation there must be a showing of prejudice to the defendant in order for evidence to be suppressed. In addition, when the provisions relating to search and seizure are integrated with other parts of the MCP, and presumably, this Oregon Code, it may be desirable to make applicable to warnings prior to consent searches a provision such as section 9.10 of Tent. Draft No. 1 of the MCP, which provides that inadvertent and minor violations shall not result in the exclusion of statements that would otherwise be admissible.

Section 15. Permissible scope of consent search and seizure.

(1) Search limited by scope of consent. A search conducted under the provisions of sections 12 through 15 of this Article shall not exceed, in duration or physical scope, the limits of the consent given under section 12 of this Article.

(2) Items seizable as result of consent search. The things subject to seizure in course of a search under sections 12 to 15 of this Article are the same as those specified in section 3 of this Article. Upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person consenting to the search.

(3) Withdrawal or limitation of consent. A consent given under section 13 or 14 may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent.

COMMENTARY

A. Summary

Subsection (1) makes explicit what is implicit in the structure of the draft: that a search based on consent may not exceed the limits of the consent.

Subsection (2) makes applicable to consent searches the provisions of section 3 of this draft, and provides for a list, similar to the list called for in the case of warranted searches (yet to be drafted).

Subsection (3) makes the consent revocable, in whole or in part, at any time during the course of the search. Of course, things already found at the time of the withdrawal remain subject to seizure. Likewise, as indicated by the phrase "under authority of the consent," the search may have disclosed the basis for an arrest, or for obtaining a warrant, in which case it may be continued, but not on the basis of the consent.

B. Derivation

This section is based on the language of section ss 4.03 of the MCP.

C. Relationship to Existing Law

No Oregon statute covers the situation of limiting or withdrawing consent; nor were any cases found dealing precisely with the issues. However, Oregon cases at least analogous in policy suggest that the provisions in the draft section would not be foreign to the present concepts. It is a well settled principle in Oregon, as elsewhere, that if a warrantless search follows an arrest, the scope of the search must be reasonably related to the arrest. State v. Krogness, 238 Or 135, 388 P2d 120 (1964), and cases cited therein at p. 144 dealing with the rule. By analogy then, if the search must be reasonably related to the arrest, then a consent search must be reasonably related to the nature of the consent given and the object being searched for.

If the individual whose consent to a search is sought is moved to give it at all, he is unlikely to specify geographical limits, since that would not disarm suspicion, and rather would direct attention toward the prohibited areas. Nor is he likely to give the officer "five minutes but no more." However, if he is told that the police suspect he is concealing burglars' tools or a sawed-off shotgun on his premises, an invitation to come in and look is a consent to look in places large enough to contain such articles, but not to probe tiny recesses or look through files of documents.

Accordingly, the idea of a limited consent may be practically important, and of course the search must stay within the bounds laid down.

Withdrawal or modification of consent as provided in subsection (3) involves the problems presented if the individual, who has given valid consent to a search, has a change of heart in its course, and seeks to withdraw his consent or attach new limits to its scope.

The practical aspects are obvious. May a guilty suspect seek to throw the police off the track by an appearance of innocence and willing disclosure, thinking his contraband is well hidden, and then terminate the consent if the searches come dangerously close to the hiding place? Will the result not be that whenever the police find something incriminating in the course of a consent search, the defendant will subsequently claim that he withdrew consent, and that the discovery was thus under coercive circumstances? On the basis of these considerations it has been forcefully argued that consent once effectively given is "binding" within the scope initially stated, and that a search is not "unreasonable" in the constitutional sense if it is conducted under a consent once validly obtained.

Case authority on the basic question is scanty and divided. An elderly Kentucky case held that consent once given may not be withdrawn. Smith v. Commonwealth, 197 Ky 192, 246 SW 449 (1923). The court did not give a reasoned basis for this conclusion, and the case was not followed in People v. Martinez, 65 Cal Rep 920 (1968), wherein the court thought that the Miranda case, insofar as it says that an arrestee may withdraw his waiver to questioning, dictates the same result for consent searches.

Your reporter thinks that there is much force in the reasoning of the Martinez case, and recommends the inclusion of subsection (3) or its substance. In addition to the conceptual point, weight must be given to the probability that, if consent once given is irrevocable, the warning would have to include a statement to that effect. In that event, it would probably be much more difficult to secure consent at all, and the rule of irrevocability would defeat its own object.

It seems clear that a consent once given by X may be withdrawn or limited by Y, who has equal or superior control over the premises. Lucero v. Donovan, 354 F2d 16 (19th Cir 1965).

If subsection (3) is included, the second sentence is a necessary clarification, though ordinarily if incriminating things have already turned up, a withdrawal of consent will be unlikely.