THIRD PARTY CONSENT TO SEARCH AND SEIZURE

One of the common means of securing evidence to be used against criminal suspects is the consent search. When the authorities have no warrant, and have made no arrest, they may ask the person who ultimately becomes the defendant to consent to a search, thereby "waiving" his constitutional rights. Some of the most troublesome questions which occur in consent searches arise when someone other than the defendant consents to a search of a premises in which incriminating evidence is found.

Limitations upon the consents of third parties must ultimately rest upon the fourth amendment. But here, as in other areas, the Supreme Court has formulated only vague and general guidelines. In fact, it has not spoken at all on many important consent problems. Nonetheless, the third party consent issue has been considered several times.

Amos v. United States,[1] decided in 1921, has often been cited for the proposition that a wife may not consent to a search for evidence to be used against her husband.[2] The Court actually held, however, that the consent was coerced; thus, it was not legally obtained, and many courts have read this issue as controlling.[3]

In *Chapman v. United States*,[4] a non-resident landlord, suspecting that his tenant was operating a still, consented to a search of the leased premises by the police. The Court held the search unconstitutional, declaring that a non-resident landlord cannot consent to a search of property in the possession of a tenant. Though the terms of the lease gave the landlord the right to enter for various reasons, the Court said:

> It is unnecessary and ill-advised to import into the law . . . subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch . . . has been shaped by distinctions whose validity is largely historical.[5]

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1. 255 U.S. 313 (1920).

2. *E.g.*, Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923).

3. *E.g.*, Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923); *see* cases cited notes 16-23 *infra*.

4. 365 U.S. 610 (1961).

5. *Id.* at 617.

Many courts had already reached similar conclusions,[6] but *Chapman* seemed to settle the matter.[7]

Stoner v. California[8] extended the *Chapman* rule to the hotel manager-guest situation. The state argued that the manager had apparent authority to allow the search, but the Supreme Court answered, "Our decisions make clear 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.' "[9] This quotable language would seem to eliminate the use of agency *doctrines* by lower courts to validate a third party's consent.[10]

The Supreme Court decisions seem to give support to the rule which has long been generally accepted; that is, one who does not have rights of possession and control in the premises searched cannot validly consent. Perhaps this will eventually be held explicitly to be a doctrine of constitutional compulsion. However, the language in *Chapman* and *Stoner* referring to property law and agency concepts seems to have had no significant impact upon lower court decisions.[11] Perhaps the Court is willing to permit the state and lower federal courts to experiment with third party consent law, intending later to accept the approach or combination of approaches which best balances the mandate of the fourth amendment with the needs of law enforcement.

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6. *E.g.*, Fitzgerald v. State, 80 Okla. Crim. 43, 156 P.2d 628 (1945); *see* Duncan v. State, 278 Ala. 145, 176 So. 2d 840 (1965); People v. Faris, 63 Cal. 2d 518, 407 P.2d 282, 47 Cal. Rptr. 353 (1965); People v. Currier, 232 Cal. App. 2d 127, 42 Cal. Rptr. 562 (1965); People v. Frank, 225 Cal. App. 2d 339, 37 Cal. Rptr. 202 (1964); People v. Bankhead, 27 Ill. 2d 18, 187 N.E.2d 705 (1963); State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963). *But see* State v. Louden, 15 Utah 2d 64, 387 P.2d 240 (1963).

7. *Chapman* is perhaps better known for its intimation that no search without a warrant is reasonable if a warrant could conveniently have been obtained. United States v. Rabinowitz, 339 U.S. 56 (1950), overruled Trupiano v. United States, 334 U.S. 699 (1948), insofar as the latter held that the reasonableness of a search incident to an arrest depended solely upon the practicability of procuring a search warrant, rather than upon all the circumstances. However, Mr. Justice Frankfurter, concurring in *Chapman*, thought that the majority was ignoring *Rabinowitz* and relying on *Trupiano*, an interpretation of the majority opinion which may have re-opened the question whether the police must obtain a warrant if convenient. However, the third party consent cases assume that *Rabinowitz* is the law.

8. 376 U.S. 483 (1964).

9. *Id.* at 488. The Supreme Court had earlier decided that a hotel manager's consent is valid once the defendant has abandoned the room. Abel v. United States, 362 U.S. 217 (1960).

10. For a discussion of cases using "authority" *language* see notes 115-16 *infra* and accompanying text.

11. *See, e.g.*, United States v. Botsch, 364 F.2d 542 (2d Cir. 1966); People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966).

I. Matters Which Should Be Isolated from the Consent Issue

Precisely stated, the problem under consideration is: when does consent by a third party validate the search for, and seizure of, evidence which would otherwise be inadmissable because of constitutional limitations? This statement of the problem assumes that several issues which exist in many third party consent cases have already been decided in a certain way. Examples include decisions that the consent was not obtained by coercion, that the defendant has standing to object, and that the consent was not given by a co-defendant.

These issues tend to confuse the consent question. For example, if the consent was obtained by coercion, there has been no actual consent, and the court need not consider whether a consent given under the circumstances would have validated the search. The courts have not always followed this approach. Much of the third party consent law has developed in cases in which the resolution of some other issue obviated the need to decide the consent question.[12] This does not necessarily mean that if one of these issues is present in a case involving third party consent, the consent question *should* not be considered, only that it *need* not be considered. For example, if a defendant does not have standing to object to the introduction of certain evidence, there is no reason to decide whether the consent which led to the seizing of that evidence was valid. On the other hand, if it is held that the consent validated the search and seizure, it makes no difference whether the defendant has standing. Neither issue must be decided before the other; the point is that either issue alone, if decided against the defendant, can obviate discussion of the other. Realistically, if both a defendant's lack of standing and a valid consent search are present in a case, a court will certainly mention both; however, the analyses must be kept separate and the fact that either one could be decisive should be recognized.

Because so many third party consent cases have involved this problem, and so many of these decisions have not clearly distinguished the consent question, these extraneous issues must be considered.

A. *Coercion*

If the consenter is coerced into giving his permission to search, actual consent has not been given and the search is invalid.[13] Coercion ordinarily

12. *E.g.*, United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) (no standing to object); United States v. Rykowski, 267 Fed. 866 (E.D. Ohio 1920) (invalid search warrant); People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938).

13. Amos v. United States, 255 U.S. 313 (1921). *See also* United States v. Reckis, 119 F. Supp. 687 (D. Mass. 1954); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963).

means that something was obtained by force or threat of force. However, coercion in third party consent cases usually refers to something less than force or threats.[14] Though each case is decided on its particular facts, courts seem to find coercion if the "consent" was obtained under such circumstances that the consenter could not have made a rational decision.[15] Yet there is no question that the consent need not be voluntary in the sense that the consenter "wants" the search to be made.[16] Though it is placed

14. Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940) (request equivalent to demand under circumstances). Threats of adverse consequences other than force may be sufficient to require a holding that consent was coerced. Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955) (threat to ransack house when warrant obtained).

15. Frequently, the courts use the term "implied coercion" to describe the situation in which the manifestation of assent was not voluntarily given, despite the absence of physical force. *E.g.*, Amos v. United States, 225 U.S. 313 (1921); People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936). The unexpected appearance of law enforcement officers may result in an acquiescence's lacking the "spontaneity and attributes of an invitation," State v. Lindway, *supra*, at 171, 2 N.E.2d at 493, or the "dignity of a consent," United States v. Linderman, 32 F. Supp. 123, 124 (E.D.N.Y. 1940); *see* State v. Bonolo, 270 Pac. 1065 (Wyo. 1928). The time the search is made may be an important factor. *See* United States v. Roberts, 179 F. Supp. 478 (D.C. Cir. 1959); People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964); People v. Porter, 227 Cal. 2d 211, 38 Cal. Rptr. 621 (1964); People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839 (1964); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964). But the fact that the search is made in the middle of the night does not inevitably mean it will be held unreasonable. *E.g.*, People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957). Courts should consider the ability of the consenting party to understand what the officers are doing. United States v. Roberts, 179 F. Supp. 478 (D.C. Cir. 1959); *see* People v. Jennings, 142 Cal. App. 2d 105, 298 P.2d 56 (1956).

Care must be taken not to confuse coerced search cases, such as State v. Manning, 134 N.W.2d 91 (N.D. 1965), in which no consent was asked for or given, with coerced consent cases. Also distinguishable are cases in which a consent to search was held invalid when given after a coerced entry. People v. Shelton, 60 Cal. 2d 740, 388 P.2d 665, 36 Cal. Rptr. 433, (1964); People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939); People v. Boyle, 39 Misc. 2d 917, 242 N.Y.S.2d 90 (Port Jervis City Ct. 1963); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963); *see* People v. Di Blasi, 228 Cal. App. 2d 338, 39 Cal. Rptr. 416 (1964).

16. Third party consent searches would be almost non-existent if this were required. The cases would be limited to: (1) situations in which the consenter was ignorant of the defendant's crime, *see* Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965), *remanded on other grounds*, 384 U.S. 312 (1966); (2) cases in which the third party wished to dispel suspicion and believed that the evidence would not be found, *see* United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945); People v. Nelson, 218 Cal. App. 2d 359, 32 Cal. Rptr. 675 (1963); People v. Megliorino, 192 Cal. App. 2d 525, 13 Cal. Rptr. 635 (1961); Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957); or (3) the rare case in which the consenter planted bogus evidence hoping that it would be found and exculpate the defendant, *see* Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

The hostility of the consenter to the defendant may result in an invalid consent. Notes 104-08 *infra* and accompanying text. When there is no hostility, the consenter's inviting the police to the premises is strong evidence of the lack of coercion. *See, e.g.*,

in this section of the note for convenience, the problem of coercion is admittedly not neatly classifiable as either separate from, or included in, the consent issue. It is often nearly impossible to say whether a given search and seizure has been held violative of the fourth amendment because: (1) the consent of a coerced person cannot validate a search (which would seem to approach a true consent rule); (2) because a coerced person does not "consent"; or (3) because the coercive elements in the case make the search unreasonable, despite a consent given by a person whose consent would ordinarily be valid. However, the distinction seems academic because either rationale results in the exclusion of the evidence.

In California, the basic focus of the consent rule is on the reasonableness of the police conduct; the question is put primarily in terms of whether the police reasonably believed that the consenter had authority to allow a search.[17] This "apparent authority" inquiry is, nevertheless, separated from the question of coercion, which is an indicator of police misconduct independent of reasonableness of consent.

B. *Standing to Object*

A defendant must have standing to object to the admission of unconstitutionally seized evidence to bar the use of that evidence.[18] Therefore, when the defendant does not have standing, a court does not have to consider whether a valid third party consent to the search and seizure was obtained. However, some courts have considered the consent issue in opinions holding that the defendant had no standing,[19] and several decisions have confused the standing and consent issues.[20]

Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied,* 382 U.S. 1010 (1966). The same is true when the police arrive uninvited, if the first suggestion of a search is made by the consenter. United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937).

17. Notes 117-33 *infra* and accompanying text.

18. *See* Jones v. United States, 362 U.S. 257 (1960). For a complete discussion of the standing rules see Note, *Standing to Object to an Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488.

19. *See* Reeves v. Warden, 226 F. Supp. 953 (D. Md. 1964); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); Tribue v. State, 106 So. 2d 630 (Fla. 1958); Lindsey v. State, 204 N.E.2d 357 (Ind. 1965); Bucholtz v. Warden, 233 Md. 614, 195 A.2d 690 (1963); People v. Matthews, 21 App. Div. 2d 883, 251 N.Y.S.2d 736 (1964); Lucas v. State, 368 S.W.2d 605 (Tex. Crim. App. 1963), *cert. denied,* 375 U.S. 925 (1963); Nagel v. State, 126 Tex. Crim. 265, 71 S.W.2d 285 (1934); State v. Zuehlke, 239 Wis. 111, 300 N.W. 746 (1941).

20. *See* Curry v. United States, 192 F.2d 571 (5th Cir. 1951); People v. Washington, 163 Cal. App. 2d 833, 330 P.2d 67 (1958); Brown v. State, 155 Tex. Crim. 347, 235 S.W.2d 142 (1950).

C. *Procedural Deficiencies in Defendant's Case*

If the defendant fails to make a timely objection to the introduction of certain evidence, it will be admitted even though it was unconstitutionally seized.[21] Other procedural deficiencies may preclude his raising an objection on appeal.[22] Yet some courts have unnecessarily "decided" the third party consent issue in such situations.[23]

D. *Searches Incident to a Valid Arrest*

A reasonable search incident to a valid arrest is constitutional.[24] When a co-defendant has been arrested and a search made incident to his arrest (and with his consent as well), the other defendant may not successfully attack the search on consent grounds.[25] Because consent need not be given in valid arrest cases, it should not be necessary for courts to consider the issue.[26]

E. *Invalid or Unexecuted Search Warrants*

Searches made pursuant to a valid and executed search warrant are, of course, constitutional irrespective of consent.[27] Problems arise, however, when the warrant is invalid, or valid but unexecuted, and third party con-

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21. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954); Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied,* 344 U.S. 844 (1948); Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965); People v. Walker, 27 Cal. Rptr. 225 (Dist. Ct. App. 1962); Henry v. State, 253 Miss. 263, 154 So. 2d 289 (1963); Petition of Watson, 146 Mont. 125, 404 P.2d 315 (1965).

22. Pennsylvania *ex rel.* Craig v. Maroney, 348 F.2d 22 (3d Cir. 1965), *cert. denied,* 384 U.S. 1019 (1966); Nelson v. California, 346 F.2d 73 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965).

23. *E.g.,* Henry v. State, 253 Miss. 263, 154 So. 2d 289 (1963).

24. United States v. Rabinowitz, 339 U.S. 56 (1950).

25. If the police make a lawful *entry* pursuant to third party consent, see evidence which gives probable cause to arrest, and make the arrest, they may then conduct a reasonable search incident to the arrest. Davis v. California, 341 F.2d 982 (9th Cir. 1965); People v. Contreras, 211 Cal. App. 2d 641, 27 Cal. Rptr. 619 (1963); People v. Amado, 208 Cal. App. 2d 780, 25 Cal. Rptr. 539 (1962); Shade v. State, 196 Ind. 665, 149 N.E. 348 (1925); Carter v. Commonwealth, 234 Ky. 695, 28 S.W.2d 976 (1930). However, one court found that there had been a reasonable search incident to a lawful arrest solely because consent was given. If there had been no consent, the search would have come too long after the arrest to have been incident thereto. Commonwealth v. Cabey, 201 Pa. Super. 433, 193 A.2d 663 (1963).

26. *E.g.,* People v. Wright, 216 Cal. App. 2d 866, 31 Cal. Rptr. 432 (1963).

27. U.S. CONST. amend. IV.

sent is claimed as the basis for the search.[28] When one is confronted with a warrant, he will naturally acquiesce in a search. However, this is not a voluntary acquiescence but is rather a submission to apparently legal authority and should not be considered consent.[29] Though these cases can be decided solely on the warrant issue, several courts have unnecessarily stated that wives may validly consent to a search for evidence to be used against their husbands.[30] However, if consent is obtained before the warrant is mentioned, the decision may depend on the validity of the consent rather than that of the warrant.[31]

F. *Consent to Enter*

Third parties may give consent to enter a premises under circumstances in which they may not give consent to search.[32] Generally, anyone with the right to allow callers to enter, which is probably anyone lawfully on the premises, may consent to an entry by police.[33] Consent to enter is

28. United States v. Rykowski, 267 Fed. 866 (S.D. Ohio 1920); Stroud v. Commonwealth, 295 Ky. 694, 175 S.W.2d 368 (1943); Bannister v. State, 112 Tex. Crim. 158, 15 S.W.2d 629 (1929); *see* United States v. Birrell, 243 F. Supp. 36 (S.D.N.Y. 1965); Ellis v. State, 130 Tex. Crim. 220, 93 S.W.2d 438 (1936).

29. State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963). *But see* Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1960); *cf.* Smith v. McDuffee, 72 Ore. 276, 142 Pac. 558 (1914).

30. *See* United States v. Rykowski, 267 Fed. 866 (E.D. Ohio 1920); State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963).

31. Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957); Miers v. State, 136 Tex. Crim. 475, 126 S.W.2d 484 (1939); Ellis v. State, 130 Tex. Crim. 220, 93 S.W.2d 438 (1936); Bannister v. State, 112 Tex. Crim. 158, 15 S.W.2d 629 (1929); *cf.* Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958) (effect upon third party consent of magistrate's refusal to issue warrant). *But see* Garcia v. State, 138 Tex. Crim. 188, 135 S.W.2d 107 (1940). In United States v. Heine, 149 Fed. 485 (2d Cir. 1945), the possibility of obtaining an executive search warrant during World War II somehow helped validate a "consent" in which the wife "at best resented the search." *Id.* at 488.

32. Davis v. California, 341 F.2d 982 (9th Cir. 1965); *see* Davis v. United States, 327 F.2d 301 (9th Cir. 1964) (defendant's minor daughter). *See also* State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963).

33. People v. Walters, 148 Cal. App. 2d 426, 306 P.2d 606 (1962); Franklin v. State, 208 Md. 628, 119 A.2d 439 (1956); Williams v. State, 164 Tex. Crim. 347, 298 S.W.2d 590 (1956); Oakley v. State, 152 Tex. Crim. 361, 214 S.W.2d 298 (1948); Holt v. State, 17 Wis. 2d 468, 117 N.W.2d 626 (1962), *cert. denied,* 374 U.S. 844 (1963); *see* Miers v. State, 136 Tex. Crim. 475, 126 S.W.2d 484 (1939). *Contra,* United States v. Sully, 56 F. Supp. 942 (S.D.N.Y. 1944). In State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963), a landlady had a right to enter the leased premises because she was using "self help" to repossess property the defendant had stolen from her. She called the police to accompany her, and even though they could make a lawful entry to protect her, it was held that they could not base a search and seizure on her purported consent.

invalid only when the police demand that the door be opened,[34] gain entry by deceit,[35] or fail to identify themselves.[36]

After the police have entered, further consent is needed for a search.[37] However, when the police are lawfully on the premises subsequent to a third party consent to enter, and see evidence which gives them probable cause to arrest, they may make the arrest and search incident to the arrest.[38] Although reaching the same result, some courts do not employ this rationale; rather, they hold that because the police did not pry into hidden places, there was no search,[39] and, thus, the fourth amendment need not be complied with. Regardless of how a case is analyzed, the fourth amendment certainly should apply when there has been a seizure, even if the "no search" rationale applies.[40]

G. *Consent Given by Co-Defendant*

When a co-defendant consents to a search which leads to evidence used against another defendant, several courts have indicated that the third party consent rules described in Section II need not be applied, apparently on the theory that since a defendant may consent to a search for evidence to be used against himself, another defendant may not suc-

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34. People v. Di Blasi, 228 Cal. App. 2d 338, 39 Cal. Rptr. 416 (1964).

35. People v. Porter, 227 Cal. App. 2d 211, 38 Cal. Rptr. 621 (1964).

36. People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939).

37. *See* People v. Carrillo, 50 Cal. Rptr. 185, 412 P.2d 377 (Cal. 1966).

38. Lindsey v. State, 204 N.E. 2d 357 (Ind. 1965); McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952), *cert. denied,* 344 U.S. 928 (1953); Oakley v. State, 152 Tex. Crim. 361, 214 S.W.2d 298 (1948); *see* People v. Alvarez, 236 Cal. App. 2d 115, 45 Cal. Rptr. 721 (1965); *cf.* Reed v. Rhay, 323 F.2d 498 (9th Cir. 1963), *cert. denied,* 377 U.S. 917 (1964). The police can, of course, testify to what they saw. Oakley v. State, *supra.*

39. People v. Alvarez, 236 Cal. App. 2d 115, 45 Cal. Rptr. 721 (1965); People v. Amado, 208 Cal. App. 2d 790, 25 Cal. Rptr. 539 (1962); Lindsey v. State, 204 N.E.2d 357 (Ind. 1965); Gutridge v. State, 236 Md. 514, 204 A.2d 557 (1964); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965); *cf.* Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965).

40. *E.g.,* People v. Garner, 234 Cal. App. 2d 241, 44 Cal. Rptr. 217 (1965); People v. Speice, 23 Ill. 2d 38, 177 N.E.2d 122 (1961); People v. Helmus, 50 Misc. 2d 47, 269 N.Y.S.2d 613 (Nassau County Ct. 1966). In Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963), the court held that though the evidence may not have been obtained through a "search," the reasonableness requirement of the fourth amendment was still applicable.

The evidence may still be seized pursuant to a warrant or any of the fourth amendment exceptions, including third party consent. However, it is interesting to note that if an original entry was unlawful—and the evidence was in plain view—subsequent third party acquiescence in the entry will not validate the seizure. People v. Boyle, 39 Misc. 2d 917, 242 N.Y.S.2d 90 (Port Jervis City Ct. 1963).

cessfully challenge the consent.[41] (If the evidence could be used only against the consenter, all co-defendants might be immunized from conviction.) Other courts apply the usual consent rules, however, recognizing that from the point of view of the nonconsenting defendant, the case is indistinguishable from one in which the consenting party is not also a defendant, and that, analytically, the mere fact that the evidence is also to be used against the consenter is of no special relevance.[42]

H. *Searches by Private Citizens*

If a private citizen makes a search, seizes evidence, and hands it to the police, the evidence is admissible without any reference to third party consent law.[43] However, when an individual invites the police to conduct a search with him, the courts have held that this is not a search by an individual but a search by the police incident to a third party's consent, and have applied the rules discussed in Section II to determine whether the consent validated the search.[44]

In cases in which a joint occupant, in response to the directions of the police, seeks out and hands over the requested items, some courts entirely avoid the issue of who made the search by holding that there has been no search.[45]

II. Factors Considered in Deciding the Third Party Consent Issue

If none of the factors discussed above is determinative of the search and seizure issue, the court must decide if the consent given by a third party is sufficient to validate an otherwise unconstitutional search. Because such decisions are based on the fourth amendment, the ultimate question

41. Shafer v. State, 214 Tenn. 416, 381 S.W.2d 254 (1964), *cert. denied,* 379 U.S. 979 (1965). As one court put it, a joint defendant cannot "vicariously assert the constitutional rights of others who do not complain." Curry v. United States, 192 F.2d 571 (5th Cir. 1951).

42. *E.g.,* Drummond v. United States, 350 F.2d 983 (8th Cir. 1965), *cert. denied,* 384 U.S. 944 (1966); United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954); People v. La Peluso, 239 Cal. App. 2d 715, 49 Cal. Rptr. 85 (1966); People v. Guyette, 231 Cal. App. 2d 460, 41 Cal. Rptr. 875 (1964).

43. Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963); Lucas v. State, 368 S.W.2d 605 (Tex. Crim. App.), *cert. denied,* 375 U.S. 925 (1963); *see* Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied,* 382 U.S. 1010 (1966); People v. Helmus, 50 Misc. 2d 47, 269 N.Y.S.2d 613 (Nassau County Ct. 1966); *cf.,* Day v. State, 157 Tex. Crim. 614, 252 S.W.2d 180 (1952).

44. State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963); *see* Gutridge v. State, 236 Md. 514, 204 A.2d 557 (1964).

45. *See, e.g.,* Gutridge v. State, 236 Md. 514, 204 A.2d 557 (1964); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965).

in each case is whether the search and seizure is made reasonable by the consent.[46] To decide this issue, the courts consider several elements of the search. Any one or more of these elements may be present in a given case, and in many cases no single element is decisive. Moreover, some courts do not recognize the significance of some of these factors.

A. *Relationship between Consenter and Searched Premises*

Courts have often looked to the consenter's property interest in the searched premises to test the validity of third party consent. The most accurate generalization which can be gleaned from the cases considering this relationship is that consent may be validly given by one having a right to the possession and control of the premises.[47] Of course, if the consenter's right to possession and control is superior to that of the defendant, the case is still stronger.[48]

The general rule can best be illustrated through a discussion of the distinctions drawn in cases in which the consenting party is the defendant's landlord. A landlord may not validly consent if his only right to possession and control is incident to his status as landlord; for example, his right to view the premises for waste.[49] However, his consent may be valid if he has a right to temporary possession granted by the occupant-tenant.[50] Otherwise, consent can be validly given only after the tenant has terminated his possessory rights in the premises.[51] Thus, if the tenant has

46. Foster v. United States, 281 F.2d 310 (8th Cir. 1960); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951); Lindsey v. State, 204 N.E.2d 357 (Ind. 1965); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963).

47. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954) (partner); United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946) (employee); People v. Banks, 238 Cal. App. 2d 43, 47 Cal. Rptr. 499 (1965) (roommate); People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839 (1964) (wife); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962), *cert. denied,* 373 U.S. 951 (1963) (tenant); Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940) (landlord); McGraw v. Commonwealth, 208 Ky. 239, 270 S.W. 832 (1925) (fellow employee); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923) (parent); State v. McCreary, 179 Neb. 589, 139 N.W.2d 362 (1966) (host); Bannister v. State, 112 Tex. Crim. 158, 15 S.W.2d 629 (1929) (husband).

48. State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965) (parent); *see* United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) (parent); State v. Hagan, 47 Idaho 315, 274 Pac. 628 (1929) (parent).

49. Chapman v. United States, 365 U.S. 610 (1961); *cf.* Stoner v. California, 376 U.S. 483 (1964).

50. *See* United States v. Botsch, 364 F.2d 542 (2d Cir. 1966).

51. Abel v. United States, 362 U.S. 217 (1960); Feguer v. United States, 302 F.2d 214 (8th Cir.), *cert. denied,* 371 U.S. 872 (1962); People v. Thomsen, 239 Cal. App. 2d 84, 48 Cal. Rptr. 455 (1965); People v. Crayton, 174 Cal. App. 2d 267, 344

breached a condition, giving the landlord the right to evict him, the landlord cannot effectively consent if the tenant is still in possession.[52]

Courts have carefully distinguished searches of areas in which the landlord has some rights of possession or control.[53] The landlord may consent to a search of a common passageway[54] or bathroom[55] or a closet outside the tenant's room.[56] Of course, a landlord who is a co-occupant with his tenant has a right to immediate possession and control.[57]

The general rule that consent is valid if the consenter has the right to possession and control is often expressed in other ways. Joint occupants clearly have a right to possession and control of the jointly occupied premises and the status of joint occupancy has been said to be sufficient to validate third party consent.[58] Some courts have added weight to decisions applying the general rule by commenting, when they could, that the consenter was the "head of the household"[59] or has exclusive possession and control of the premises.[60] Another makeweight, used when appropriate,

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P.2d 627 (1959); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963); Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 782 (1964).

52. Antoszewski v. State, 5 Ohio Op. 264, 31 N.E.2d 881 (Ct. App. 1936); *cf.* Johnson v. United States, 358 F.2d 139 (5th Cir. 1966). However, by denying his possessory interest, the tenant may validate the absentee landlord's consent. Bucholz v. Warden, 233 Md. 614, 195 A.2d 690 (1963); *cf.* Elledge v. United States, 359 F.2d 404 (9th Cir. 1966). *But cf.* People v. Faris, 63 Cal. 2d 566, 407 P.2d 282, 47 Cal. Rptr. 370 (1965). *See also* State v. Mark, 46 N.J. 262, 216 A.2d 377 (1966).

53. *See* State v. Medley, 400 S.W.2d 87 (Mo. 1966) (consent to enter).

54. People v. Corrao, 201 Cal. App. 2d 848, 20 Cal. Rptr. 492 (1962).

55. Burge v. United States, 342 F.2d 408 (9th Cir.), *cert. denied,* 382 U.S. 829 (1965).

56. People v. Manning, 239 Cal. App. 2d 416, 49 Cal. Rptr. 433 (1966); People v. Hicks, 165 Cal. App. 2d 548, 331 P.2d 1003 (1958).

57. Milyonico v. United States, 53 F.2d 937 (7th Cir. 1931); People v. Davis, 211 Cal. App. 2d 455, 27 Cal. Rptr. 436 (1962); *cf.* Drummond v. United States, 350 F.2d 983 (8th Cir. 1965), *cert. denied,* 384 U.S. 944 (1966).

58. Driskill v. Unites, 281 Fed. 146 (9th Cir. 1922) (roomer); People v. Banks, 238 Cal. App. 2d 48, 47 Cal. Rptr. 499 (1965) (roommate); People v. Coblentz, 229 Cal. App. 2d 296, 40 Cal. Rptr. 116 (1964) (mistress); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1960) (mistress); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962) (roomer); People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954) (wife); McGraw v. Commonwealth, 208 Ky. 239, 270 S.W. 832 (1925) (fellow employee); McCray v. State, 236 Md. 9, 202 A.2d 320 (1964) (parent); Van Wyck v. State, 56 Okla. Crim. 241, 37 P.2d 321 (1934) (landlord); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948) (wife).

59. Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948) (parent); State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965) (parent); Bannister v. State, 112 Tex. Crim. 158. 15 S.W.2d 629 (1929) (husband).

60. Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965), *cert. denied,* 384 U.S. 312 (1966); People v. Crayton, 174 Cal. App. 2d 267, 344 P.2d 627 (1959); State v. Cook, 242 Ore. 535, 411 P.2d 78 (1966); *see* Abel v. United States, 362 U.S. 217

is that the consenter was "in charge of the premises" at the time of the search.[61] And if the owner of the premises is the consenting joint occupant, his ownership may be mentioned by a court to support the validity of his consent.[62]

However, it should be noted that these formulations, as well as the general possession-control rule, cannot be relied upon to validate a consent in every case in which they apply.[63] For example, if the consenting joint occupant is away from the premises when he consents, and the defendant is present when the search is made, the consent is invalid, despite the rights of the joint occupant.[64]

The landlord-tenant cases demonstrate that the possession-control rule

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(1960). The statement that the consenter has exclusive possession and control usually means nothing more than that the defendant was not present at the time of the search. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957).

When the consenter was the owner of the article seized, the exclusive possession rationale has been applied to the article, rather than the premises. United States v. El Rancho Adolphus Prods., Inc., 140 F. Supp. 645 (M.D. Pa. 1956), *aff'd*, 243 F.2d 367 (3d Cir.), *cert. denied*, 353 U.S. 976 (1957); Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); People v. Matthews, 21 App. Div. 2d 883, 251 N.Y.S.2d 736 (1964).

61. Reszutek v. United States, 147 F.2d 142 (2d Cir. 1945) (apartment house superintendent); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) (wife); People v. Dominguez, 144 Cal. App. 2d 63, 300 P.2d 194 (1956); State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896); (employee); Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 77 (1948) (parent).

62. People v. Rodriquez, 212 Cal. App. 2d 525, 28 Cal. Rptr. 150 (1963) (wife); Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1960) (grandparent); Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769 (1923) (parent); Gordon v. State, 160 So. 2d 73 (Miss. 1964) (step-parent); Petition of Watson, 146 Mont. 125, 404 P.2d 315 (1965) (wife); State v. Hunt, 178 Neb. 783, 135 N.W.2d 475 (1965) (parent); Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958) (wife); State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916) (sister); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963) (parent).

The ownership makeweight is also applied if the defendant and the consenter are *joint* owners. People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948); *see* Stein v. United States, 166 F.2d 851 (9th Cir. 1948).

63. For example, a twenty year old employee—in charge of the business while the defendant, his employer, was on vacation—whose only duties were to keep the place open for shipments, to keep it clean, and to handle a small amount of business, could not validly consent to a search for evidence to be used against his employer. This result was reached even though the consenter had exclusive possession and control at the time. United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962).

64. Tompkins v. Superior Ct., 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).

is based upon the relationship of the consenting party to the premises searched. The general rule can be further illustrated by considering the position of a nonresident, temporary guest who is lawfully in the apartment or home which is to be searched when consent is requested. As is true of a landlord, a guest does not have the right to possess or control the premises. Though a nonresident, temporary guest[65] can validly give consent to enter,[66] no court has upheld a consent to search given by such a guest.[67]

B. *Exclusive Use*

Some jurisdictions which decide the validity of consent on the basis of the consenter's interest in the searched premises invalidate any consent to search a part of the premises or a closed container[68] in which the defendant had rights superior to those of the consenter. A recent federal case invalidated a consent given by the defendant's mother to search his private bureau because its "exclusive use"[69] was enjoyed by the defendant. On the other hand, though only the defendant had been behind the basement stairs, that area was held not subject to his exclusive use because others had the right to use it.[70] The exclusive use doctrine applies when others can enter the area only with the defendant's permission—for example, to return laundry to the bureau drawer—but not when others have an independent right to enter the area.

Whether the area searched is within the exclusive use doctrine may depend upon what is sought. If, with an employer's consent, the police look for and seize a purse from an employee's desk drawer, it can be reasoned that the employee had exclusive use of the desk to store her purse and that the doctrine should apply. If the subject of the search was business papers, the evidence would be admissible because the employee could not exclude others wishing to enter for business-connected purposes.[71]

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65. Such a person has the smallest interest in a premises of all who might lawfully be present. *See* United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963).

66. Davis v. California, 341 F.2d 982 (9th Cir. 1965); People v. Contreras, 211 Cal. App. 2d 641, 27 Cal. Rptr. 619 (1963). *See also* People v. Corrao, 201 Cal. App. 2d 848, 20 Cal. Rptr. 492 (1962). *But see* People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939).

67. *See* Davis v. California, 341 F.2d 982 (9th Cir. 1965); People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939).

68. People v. Overton, 51 Misc. 2d 140, 273 N.Y.S.2d 143 (Sup. Ct. 1966).

69. Reeves v. Warden, 346 F.2d 915, 925 (4th Cir. 1965).

70. Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964).

71. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). The court did not say

The exclusive use doctrine may apply only when it is reasonably apparent that the area or container searched belonged solely to the defendant.[72] Thus, there seems to be a stronger tendency to apply the doctrine if the police had to break into something to effect the seizure, because this demonstrates that the consenting party was excluded from its use.[73]

Though the cases developing the exclusive use doctrine have been carefully reasoned, most jurisdictions have not yet adopted it.[74] The number of cases employing the exclusive use rule is increasing, however, and the doctrine may be of growing importance.

C. *Relationship Between Consenter and Defendant*

Even if the consenter has the requisite relationship to the premises, in some jurisdictions his consent may be invalid because of his relationship to the defendant.[75]

1. *Consent by Spouse*

Instances in which consent was given by the defendant's wife provide

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whether the item seized or the original intent of the officers was governing. *See* State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962).

Some courts hold the consent invalid if the police were seeking the defendant's "personal effects." Invariably, the exclusive use doctrine is being applied. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Blok, *supra;* State v. Evans, *supra;* People v. Gonzalez, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (Sup. Ct. 1966). If there were a rule which excluded the defendant's personal effects, seldom would a third party consent search by valid. A personal effect would seem to be any item of which the defendant is the sole owner or possessor. In Roberts v. United States, 332 F.2d 892, 898 (8th Cir. 1964), *cert. denied* 380 U.S. 980 (1965), the court held that a bullet lodged in the ceiling was not a personal effect, since it did not have an "intimate relation to the person of the firer of the weapon."

72. Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965), *aff'd on other grounds,* 384 U.S. 312 (1966).

73. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); *see* People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964).

74. In the following cases the exclusive use doctrine could have been applied but was not mentioned: Maxwell v. Stephens, 348 F.2d 325 (8th Cir.), *cert. denied,* 382 U.S. 944 (1965); People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513 (1956), *cert. denied,* 351 U.S. 972 (1957); People v. Shepard, 212 Cal. App. 2d 697, 28 Cal. Rptr. 297 (1963); People v. Galle, 153 Cal. App. 2d 88, 314 P.2d 58 (1957); Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); *See* State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied,* 384 U.S. 909 (1966); Williams v. State, 164 Tex. Crim. 347, 298 S.W.2d 590 (1956).

75. Several discussions of third party consent have been centered around the consenter-defendant relationship. 1 J. VARON, SEARCHES, SEIZURES, AND IMMUNITIES 419-50 (1961); Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property,* 69 DICK. L. REV. 69 (1964); Note, *Effective Consent to Search and Seizure,* 113 U. PA. L. REV. 260 (1964); 1964 U. ILL. L.F. 653; Annot., 31 A.L.R.2d 1078 (1953).

the largest number of third party consent cases. When a consideration of this issue is necessary to a decision, the majority of cases hold that consent given by a wife is just as effective as consent given by any other person.[70]

76. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied,* 380 U.S. 981 (1965); United States v. Heine, 149 F.2d 485 (2d Cir.), *cert. denied,* 325 U.S. 885 (1945); United States v. Pugliese, 153 F.2d 497 (2d. Cir. 1945); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937); *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); People v. Leal, 46 Cal. Rptr. 78 (Dist. Ct. App. 1965), *vacated,* 413 P.2d 665, 50 Cal. Rptr. 777 (Cal. 1966); People v. Alvarez, 236 Cal. App. 2d 106, 45 Cal. Rptr. 721 (1965); People v. Garner, 234 Cal. App. 2d 212, 44 Cal. Rptr. 217 (1965); People v. Rodriquez, 212 Cal. App. 2d 525, 28 Cal. Rptr. 150 (1963); People v. Megliorino, 192 Cal. App. 2d 525, 13 Cal. Rptr. 635 (1961); People v. Dominguez, 144 Cal. App. 2d 63, 300 P.2d 194 (1956); People v. Harvey, 48 Ill. App. 2d 261, 199 N.E.2d 236 (1964); People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839 (1964); People v. Speice, 23 Ill. 2d 40, 177 N.E.2d 233 (1961), *cert. denied,* 369 U.S. 848 (1962); People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958), *cert. denied,* 359 U.S. 1004 (1959); People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954); Gutridge v. State, 236 Md. 514, 204 A.2d 557 (1964); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964); Commonwealth v. Cabey, 201 Pa. Super. 433, 193 A.2d 663 (1963); Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957); Padilla v. State, 160 Tex. Crim. 618, 273 S.W.2d 889 (1954); Brown v. State, 155 Tex. Crim. 347, 235 S.W.2d 142 (1950); Ennox v. State, 130 Tex. Crim. 328, 94 S.W.2d 473 (1936); Ellis v. State, 130 Tex. Crim. 220, 93 S.W.2d 438 (1936); Cass v. State, 124 Tex. Crim. 208, 61 S.W.2d 500 (1933); *See* Aldridge v. State, 278 Ala. 470, 179 So. 2d 51 (1965); State v. Koelzer, 348 Mo. 468, 154 S.W.2d 84 (1941); Petition of Watson, 146 Mont. 470, 404 P.2d 315 (1965); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965); Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Sup. Ct. 1958); Camp v. State, 70 Okla. Crim. 68, 104 P.2d 572 (1940); Smith v. McDuffee, 72 Ore. 276, 142 Pac. 558 (1914); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948); *cf.* United States v. Best, 76 F. Supp. 857 (D. Mass. 1948), *aff'd,* 184 F.2d 131 (1st Cir. 1950), *cert. denied,* 340 U.S. 939 (1951).

The following cases have held such a consent to search inadequate, either because of coercion or another matter which should be isolated from the consent issue, or because of an express rule that wives may not consent: Jones v. United States, 357 U.S. 493 (1958); Amos v. United States, 255 U.S. 313 (1920); Foster v. United States, 281 F.2d 310 (8th Cir. 1960); Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); United States v. Rykowski, 267 Fed. 866 (S.D. Ohio 1920); Fitter v. United States, 258 Fed. 567 (2d Cir. 1919); State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); State v. Darwin, 25 Conn. Supp. 153, 198 A.2d 715 (Super. Ct. 1964); Rivers v. State, 59 So. 2d 740 (Fla. 1952); Sheftall v. Zipperer, 133 Ga. 488, 66 S.E. 253 (1909); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962); People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); Manning v. Commonwealth, 328 S.W.2d 421 (Ky. 1959); Stroud v. Commonwealth, 295 Ky. 694, 175 S.W.2d 368 (1943); Meredith v. Commonwealth, 215 Ky. 705, 286 S.W. 1043 (1926); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923); Henry v. State, 253 Miss. 263, 154 So. 2d 289 (1963), *vacated on procedural grounds,* 379 U.S. 443 (1965); State v. Wilkerson, 349 Mo. 205, 159 S.W.2d 794 (1942); People v. Beshany, 43 Misc. 2d 521, 252 N.Y.S.2d 110 (Sup. Ct. 1964); State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965); State v. Manning, 134 N.W.2d 91 (N.D. 1965); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, *appeal dismissed,* 299 U.S. 506

The well-reasoned recent cases do not invalidate a consent solely because it was given by a wife. Courts recognize that early statements that wives cannot consent are found in cases which reached the correct result, but are not authority in all circumstances.[77] An example would be the cases in which coercion vitiated what may have been an otherwise valid consent.[78] The trend has been toward greater acceptance of the validity of consents given by wives.

A mistress, or woman living with the defendant, has been considered a wife for consent purposes.[79] In the few cases in which a husband has consented to a search directed against his wife, the rules are similar to those in the more common situation.[80] There may be a tendency to approve a consent by a husband more readily than a consent by a wife if he owns the premises, because he is head of the household.[81]

2. *Consent by Parents and Other Relatives*

Of all the possible relationships between the consenting party and the defendant, the parent-child combination is most likely to result in a court's holding a search valid.[82] Perhaps this means nothing more than that the

(1936); Simmons v. State, 94 Okla. Crim. 18, 229 P.2d 615 (1951); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963); Humes v. Tabor, 1 R.I. 464 (1850); Kelly v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946); Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930); Garcia v. State, 138 Tex. Crim. 180, 135 S.W.2d 107 (1940); State v. Bonolo, 39 Wyo. 299, 270 Pac. 1065 (1928).

77. *E.g.*, People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962).

78. *E.g.*, Amos v. United States, 255 U.S. 313 (1920).

79. Stein v. United States, 166 F. 2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948); People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966); People v. Shelton, 60 Cal. 2d 740, 388 P.2d 665, 36 Cal. Rptr. 433 (1964); People v. Guyette, 231 Cal. App. 2d 460, 41 Cal. Rptr. 875 (1964); People v. Smith, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866 (1960); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958); Baugus v. State, 141 So. 2d 264 (Fla.), *cert. denied*, 371 U.S. 879 (1962); Brown v. State, 155 Tex. Crim. 347, 235 S.W.2d 142 (1950).

80. Jones v. State, 83 Okla. Crim. 358, 177 P.2d 148 (1946); Bannister v. State, 112 Tex. Crim. 158, 15 S.W.2d 629 (1929); *cf.* People v. Weaver, 241 Mich. 616, 217 N.W. 797 (1928).

81. *See* cases cited note 80 *supra.*

82. Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); United States *ex rel.* McKenna v. Meyers, 232 F. Supp. 65 (E.D. Pa. 1964), *aff'd*, 342 F.2d 998 (3rd Cir.), *cert. denied*, 382 U.S. 857 (1965); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); People v. Walker, 27 Cal. Rptr. 225 (Dist. Ct. App. 1965); People v. Ortiz, 210 Cal. App. 2d 489, 26 Cal. Rptr. 677 (1962); People v. Galle, 153 Cal. App. 2d 88, 314 P.2d 58 (1957); People v. Cahan, 150 Cal. App. 2d 786, 310 P.2d 661 (1957); Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); State v. Hagan, 47 Idaho 315, 274 Pac. 628 (1927); People v. Polenik, 407 Ill. 337, 95 N.E.2d 414 (1950); 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); State

parent has the right to possession and control of the premises and, thus, can consent to a search.[83] However, some jurisdictions which recognize the exclusive use doctrine may refuse to apply it when a parent consents to the search of a minor child's room.[84]

Valid consent has also been given by a grandfather,[85] a brother,[86] a sister,[87] a step-father,[88] a sister-in-law,[89] a brother-in-law,[90] and a great aunt.[91] If the consenting relative is not a parent, the relationship itself is unlikely to affect the decision on the validity of the consent; rather, the usual relationship to the premises rules will be controlling. However, though minor children may give consent to enter,[92] their consent to a search will not validate it.[93]

3. *Consent by Employers and Employees*[94]

An employee's consent to a search for evidence to be used against his

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v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied*, 384 U.S. 909 (1966); State v. Hunt, 178 Neb. 783, 135 N.W.2d 475 (1965), *cert. denied*, 382 U.S. 994 (1966); Hahn v. State, 38 Ohio App. 461, 176 N.E. 164 (1930); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963); Williams v. State, 164 Tex. Crim. 347, 298 S.W.2d 590 (1956), *cert. denied*, 355 U.S. 850 (1957); State v. Tuttle, 16 Utah 2d 288, 399, P.2d 580, *cert. denied*, 382 U.S. 872 (1965). The following cases found the search to be invalid: Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965) (exclusive use doctrine; defendant over twenty-one); Elmore v. Commonwealth, 282 Ky. 443, 138 S.W.2d 956 (1940) (implied coercion); *cf.* United States v. Roberts, 179 F. Supp. 478 (D.D.C. 1959).

83. Notes 47-48 *supra* and accompanying text.

84. *See* State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied*, 384 U.S. 909 (1966); State v. Hunt, 178 Neb. 783, 135 N.W.2d 475 (1965), *cert. denied*, 382 U.S. 994 (1966); *cf.* Woodward v. United States, 254 F.2d 312 (D.C. Cir.), *cert. denied*, 357 U.S. 930 (1958).

85. Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1960).

86. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954); People v. Lind. 370 Ill. 131, 18 N.E.2d 189 (1938).

87. Carter v. Commonwealth, 234 Ky. 695, 28 S.W.2d 976 (1930); State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916).

88. Gordon v. State, 160 So. 2d 73 (Miss. 1964).

89. People v. Kinard, 210 Cal. App. 2d 85, 26 Cal. Rptr. 377 (1962); People v. Ransome, 180 Cal. App. 2d 140, 4 Cal. Rptr. 347, *cert. denied*, 364 U.S. 887 (1960).

90. People v. Silva, 140 Cal. App. 2d 791, 295 P.2d 942 (1956).

91. Woodward v. United States, 254 F.2d 312 (D.C. Cir.), *cert. denied*, 357 U.S. 930 (1958).

92. Davis v. United States, 327 F.2d 301 (9th Cir. 1964); *cf.* Franklin v. State, 208 Md. 628, 119 A.2d 439 (1956); People v. Boyle, 39 Misc. 2d 917, 242 N.Y.S.2d 90 (Port Jervis City Ct. 1963).

93. *See* People v. Jennings, 142 Cal. App. 2d 160, 298 P.2d 56 (1956). The same is true of an incompetent adult. People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966) (dictum).

94. An employer-employee relationship does not exist between partners. Hence, the discussion in this sub-section does not apply to a consent given by one partner to a

employer has been held valid. If the employer has instructed the employee to permit the search, there is no problem in upholding the consent.[95] However, when there is no express authority, the approaches taken by the courts seem to vary. Some courts recognize that an employee is an agent and may possess apparent authority to permit a search.[96] It must then be determined whether the employee's powers included control over the area searched and the item seized[97] and whether the police reasonably believed that this was the case.[98] Other courts merely look to whether the employee had sufficient possession and control of the premises to permit searches. To determine sufficient possession and control, the courts look to the importance of the position held by the employee and the amount of responsibility vested in him by his employer. So, an office manager who ordinarily cares for corporate papers may consent to a "search" of the papers.[99] In fact, the two approaches are very similar though the latter does not expressly consider agency principles.[100]

An employer may validly consent to a search for evidence to be used against an employee by virtue of the possession and control rule,[101] but the

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search for evidence to be used against another partner. Such searches have been upheld. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954); United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961); People v. Herrmann, 40 Misc. 2d 1089, 244 N.Y.S.2d 1022 (Sup. Ct. 1963). If the consenter is also a defendant, there may be no question that the evidence is admissible. Notes 41-42 *supra* and accompanying text.

An independent contractor also is not an employee; the cases dealing with consent by an independent contractor involve situations in which the defendant has bailed the seized property to an accountant or attorney. These cases are discussed in notes 138-39 *infra* and accompanying text.

If the employer-defendant is a corporation, consent by an employee may be considered consent by the defendant rather than by a third party. Application of Fried, 68 F. Supp. 961 (S.D.N.Y. 1946).

95. Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965).

96. *See* United States v. Ruffner, 51 F.2d 579 (D. Md. 1931); Hays v. State, 38 Okla. Crim. 331, 261 Pac. 232 (1927); State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896) (concurring opinion).

97. United States v. Ruffner, 51 F.2d 579 (D. Md. 1931).

98. *See* Lord v. Kelley, 223 F. Supp. 684 (D. Mass. 1963), *appeal dismissed*, 334 F.2d 742 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

99. United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946); *see* State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896); *cf.* United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962).

100. The application of both articulations to the same case may have caused some confusion. Raine v. United States, 299 Fed. 407 (9th Cir.), *cert. denied*, 266 U.S. 611 (1924); United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962); United States v. Lagow, 66 F. Supp. 738 (S.D.N.Y. 1946), *cert. denied*, 331 U.S. 858 (1947).

101. *E.g.*, McGinnis v. Commonwealth, 208 Ky. 239, 270 S.W. 832 (1925).

exclusive use doctrine may be controlling if the search is of the employee's desk.[102]

4. *Consent by Landlords and Tenants*

The validity of a consent by a landlord or tenant to a search for evidence to be used against the other is not dependent on the relationship between the parties but rather on the relationship between the consenting party and the premises.[103]

D. *Hostility of Consenter To Defendant*

It has been held that when a wife's attitude in inviting and consenting to a search against her husband is one of hostility, the consent cannot validate an otherwise unreasonable search.[104] California has accepted this position,[105] but has refused to extend it to cases in which the spouse's hostility was not apparent to the police. This is justified by the general California attitude which looks to police conduct, and the likelihood that otherwise an "estrangement" would be claimed in any case in which the spouse consented.[106] Furthermore, the hostility doctrine is not applicable when the consenter seeks the aid of the police to protect herself.[107] Some courts have simply failed to consider the doctrine, implicitly rejecting it.[108]

E. *Whereabouts of Defendant*

If the defendant is not present when third party consent to a search is given, his whereabouts has no effect on the decision. Even if the defendant is in police custody and has refused to consent,[109] or if his conduct has not

102. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). Another subsequent employee may give the police evidence left in his desk by a predecessor. State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916).

103. For a discussion of cases dealing with consent by a landlord see notes 49-57 *supra* and accompanying text. Tenants may consent to a search of the leased premises because they have the right to possession and control. Driskill v. United States, 281 Fed. 146 (9th Cir. 1922); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962), *cert. denied*, 373 U.S. 951 (1963); Dyer v. State, 61 Okla. Crim. 202, 66 P.2d 1104 (1937).

104. Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946).

105. *See* People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958).

106. *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965).

107. People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954); *see* People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958).

108. Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948); People v. Helmus, 50 Misc. 2d 47, 269 N.Y.S.2d 613 (Nassau County Ct. 1966); *see* Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958).

109. People v. Smith, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866 (1960); People v. Ransome, 180 Cal. App. 2d 140, 4 Cal. Rptr. 347, *cert. denied*, 364 U.S. 887 (1960). *But see* Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955).

been requested,[110] the police may conduct a search pursuant to third party consent. But when the defendant is present and objecting to the search, and the third party consent was obtained away from the premises, the consent is ineffective.[111] One important recent case held that if the person against whom the search is directed is present, that person's express objection invalidates the search and overrides the consent given by a third party who *is* on the premises.[112] However, in most of the cases in which the defendant was present (and not objecting) during the search, the issue did not seem to be considered important, and the third party consent was held valid.[113] At times, of course, the police do not direct the search at a specific person in the sense that they expect to find evidence to be used against that person rather than anyone else. When this is true, they cannot be expected to ask the consent of the eventual defendant merely because he is present during the search. However, even when the police realize they are searching for evidence to be used against someone who is present but not asked to consent, the cases indicate that the defendant's presence is insignificant in the absence of an express objection by him before the search is made.[114]

F. *Authority to Consent*

Although many cases dealing with third party consent speak in terms of the consenter's authority, implied authority, or apparent authority to permit the search, few of these cases use the word "authority" in the usually under-

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110. *E.g.*, Maxwell v. Stephens, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); People v. Banks, 238 Cal. App. 2d 43, 47 Cal. Rptr. 499 (1965).

111. Tompkins v. Superior Ct., 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963) (per Traynor, J.); *see* People v. Murillo, 241 Cal. App. 2d 227, 50 Cal. Rptr. 290 (1966).

112. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965). *Contra*, People v. Walker, 27 Cal. Rptr. 225 (Dist. Ct. App. 1962).

113. People v. La Peluso, 239 Cal. App. 2d 579, 49 Cal. Rptr. 25 (1966); People v. Walker, 27 Cal. Rptr. 225 (Dist. Ct. App. 1962); People v. Smith, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866 (1960); People v. Silva, 140 Cal. App. 2d 791, 295 P.2d 942 (1956); People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966); Bannister v. State, 112 Tex. Crim. 158, 15 S.W.2d 629 (1929); *cf.* United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937); People v. Ortiz, 210 Cal. App. 2d 489, 26 Cal. Rptr. 677 (1962). *Contra*, Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965).

If the defendant had no right of control over the premises, his presence will not invalidate the consent. Tribue v. State, 106 So. 2d 630 (Fla. 1958); Shade v. State, 196 Ind. 665, 149 N.E. 348 (1925); Carter v. Commonwealth, 294 Ky. 695, 28 S.W.2d 976 (1930); *see* People v. Cahan, 150 Cal. App. 2d 786, 310 P.2d 661 (1957); Gordon v. State, 160 So. 2d 73 (Miss. 1964). *Contra*, People v. Murillo, 241 Cal. App. 2d 227, 50 Cal. Rptr. 290 (1966).

114. *See* cases cited note 111 *supra*.

stood agency law context.[115] In fact, the word is usually used to express the conclusion that the search is valid or invalid, rather than the reason for the decision.[116]

G. *Police Conduct: The California Rule*

Certain police conduct may lead to a finding that a consent was involuntarily given and was thus invalid.[117] In such cases, the third party consent issue need not be considered at all. In California, the courts look to police conduct to test whether a third party consent validated a search. (Of course, all jurisdictions look to police conduct when the consent is claimed to have been obtained by coercion, but this is a separate matter.)[118] Justice Traynor suggested the California approach in *People v. Gorg,* [119] when he stated, "We are . . . concerned with . . . discouraging unreasonable activity on the part of law enforcement officers."[120]

In *Gorg,* the defendant was a law student who lived in the home of a family friend in return for light gardening services. The police searched the defendant's room after obtaining the consent of the home owner and found narcotics, which were introduced at the trial. The court concluded that the consent should be upheld because the police acted in good faith, reasonably beleiving that the consenter had authority to permit the search.

The approach presented in *Gorg* may be significantly different from that followed in other jurisdictions. It is impossible to discern whether the court considered Gorg a tenant, a servant, or a guest. If he was a tenant, other jurisdictions almost certainly would not have upheld the search.[121] If Gorg was a servant or guest, other courts might not have approved the search because of the exclusive use doctrine.[122] However, because the California court decided the issue in terms of "unreasonable activity on the part of law enforcement officers," it did not have to consider these problems.

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115. Those cases which actually employ agency principles are discussed in notes 95-102 *supra* and accompanying text and notes 115-16 *infra* and accompanying text. California cases referring to "apparent authority" in a non-agency sense are considered in the next subsection.

116. *See, e.g.,* Application of Fried, 68 F. Supp. 961 (S.D.N.Y. 1946); Carlton v. State, 111 Fla. 777, 149 So. 767 (1933); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); Cass v. State, 124 Tex. Crim. 208, 61 S.W.2d 500 (1933).

117. Notes 13-17 *supra* and accompanying text.

118. *See* notes 13-17 *supra* and accompanying text.

119. 45 Cal. 2d 776, 291 P.2d 469 (1955).

120. *Id.* at 783, 291 P.2d at 474.

121. Notes 57-62 *supra* and accompanying text.

122. Notes 73-78 *supra* and accompanying text.

The lower courts have interpreted *Gorg* and other California Supreme Court cases[123] as formulating a rule that a consent will be upheld if the consenter had apparent authority to permit the search.[124] However, in *Stoner v. California,*[125] the state attempted to apply the test to a consent given by a hotel manager to search a guest's room. The United States Supreme Court held the consent invalid and criticized an approach based on "strained applications of the law of agency or . . .'apparent authority.' "[126] It is unclear whether the Supreme Court held the entire California approach invalid, or merely that the police in that case could not reasonably assume that the clerk had been authorized to permit a search. The California Supreme Court has subsequently held that *Stoner* applies only to the hotel clerk-guest relationship and has continued to use the apparent authority rule.[127]

Because of the possible conflict between the California approach and the Supreme Court's opinion in *Stoner,* it is essential to examine the limits of the California rule. The language of some California cases indicates that the police must reasonably believe that the consenter has authority from the defendant to consent to a search.[128] Yet, in most of the cases validating a consent, the police could not have reasonably assumed that the defendant had expressly authorized anything of the kind.[129] It appears that the rule actually is that police must reasonably believe that the consenter had authority and control over the area searched and the object seized.[130] For example, it is doubtful that any one could reasonably believe

123. People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513, *cert. denied,* 351 U.S. 972 (1956); *see* People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957).

124. People v. Leal, 46 Cal. Rptr. 78 (Dist. Ct. App. 1965), *vacated,* 413 P.2d 665, 50 Cal. Rptr. 777 (Cal. 1966) (wife); People v. Nelson, 218 Cal. App. 2d 359, 32 Cal. Rptr. 675 (1963) (mistress); People v. Ransome, 180 Cal. App. 2d 140, 4 Cal. Rptr. 347 (1960), *cert. denied,* 364 U.S. 887 (1961) (sister-in-law); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958) (mistress); People v. Ambrose, 155 Cal. App. 2d 513, 318 P.2d 181 (1957) (landlord); People v. Misquez, 152 Cal. 2d 471, 313 P.2d 206 (1957) (baby sitter). The authority of the Ambrose case is very doubtful in view of People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956). Both of these cases preceded *Chapman* which was decided in 1961.

125. 376 U.S. 483 (1964).

126. Id. at 488. *See* Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), *cert. denied,* 383 U.S. 968 (1966).

127. People v. Smith, 63 Cal. 2d 838, 409 P.2d 222, 48 Cal. Rptr. 382 (1966).

128. *E.g.,* People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955); People v. Kinard, 210 Cal. App. 2d 85, 26 Cal. Rptr. 377 (1962); People v. Corrao, 201 Cal. App. 2d 848, 20 Cal. Rptr. 492 (1962); *see* People v. Davis, 211 Cal. App. 2d 455, 27 Cal. Rptr. 436 (1962).

129. *See, e.g.,* People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955).

130. *E.g.,* People v. Potter, 49 Cal. Rptr. 892 (Dist. Ct. App. 1966).

that a defendant had given a baby sitter authority to consent to a search; but, in caring for the children, she did have control of the entire premises and the articles seized, and this was sufficient to allow her to consent under the California rule.[131]

In many cases, application of the apparent authority rule leads to the result that would be reached in other jurisdictions. While other courts usually decide the consent issue by looking to the relationship between the consenter and the searched premises,[132] California looks to the same relationship but only to determine if the police reasonably believed that the consenter had authority over the area searched.[133] Theoretically, at least, the California courts will validate a greater number of third party consent searches, and in fact this seems to be the case. In California if the requisite relationship between the consenter and the premises does not exist, a consent will be held valid if it is found that the police reasonably believed that the relationship existed.

H. *Consent by Bailees*

Singular problems arise when the defendant has bailed the seized property to the consenter. Because the defendant has entrusted the chattel to the bailee, the possession and control rule would validate the consent in all such cases.[134] However, the relatively few bailment cases have not been so analyzed.

Some courts have upheld the bailee's consent by reasoning that the defendant accepted the risk of a search and seizure by giving the article

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131. People v. Misquez, 152 Cal. App. 2d 471, 313 P.2d 206 (1957). Some opinions do not use the "apparent authority to consent to a search" language but rather apparent control over the premises. People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513 (1956), *cert. denied*, 351 U.S. 972 (1957); People v. Garner, 234 Cal. App. 2d 212, 44 Cal. Rptr. 217 (1965).

132. Notes 47-67 *supra* and accompanying text. Occasionally other jurisdictions have applied the California reasoning. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); *see* State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962). Courts may be more likely to find a search reasonable if the consenter invited the police into the premises. This may be an indication that they consider the police conduct more reasonable. McCray v. State, 236 Md. 9, 202 A.2d 320 (1963); Commonwealth v. McKenna, 202 Pa. Super. 360, 195 A.2d 817 (1963); Williams v. State, 164 Tex. Crim. 374, 298 S.W.2d 590 (1956), *cert. denied*, 355 U.S. 850 (1958) (consent to enter); Oakley v. State, 152 Tex. Crim. 361, 214 S.W.2d 298 (1948); *cf.* Gordon v. State, 160 So. 2d 73 (Miss. 1964).

133. People v. Banks, 238 Cal. App. 2d 43, 47 Cal. Rptr. 499 (1965); People v. Ransome, 180 Cal. App. 2d 140, 4 Cal. Rptr. 347 (1960); People v. Silva, 140 Cal. App. 2d 791, 295 P.2d 942 (1956); *see* People v. Coblentz, 229 Cal. App. 2d 296, 40 Cal. Rptr. 116 (1964); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958).

to a third party.[135] (However, this view has recently been discredited.)[136] On the other hand, if the defendant expressly denies the bailee the right to let others inspect the property, any consent will be invalid.[137] Courts have placed emphasis on the type of article seized. So, an accountant did not possess such "dominion" over tax records that he could authorize a seizure of them.[138] When this approach is taken, the courts seem to look to the expectations of the bailor.

Two cases involving bailed automobiles have raised special problems, and received considerable attention. Because of the automobile's mobility, courts have consistently approved more liberal search rules in automobile search cases.[139] In the much-cited case of *United States v. Eldridge,*[140] the Fourth Circuit held that when an automobile is loaned to a friend, the latter may consent to a search of the trunk.[141] Such consent was thought to be "not inconsistent with its entrustment."[142] However, if it would have been necessary to explore behind the upholstery or under the carpeting, or if the defendant had warned his friend of the contraband or specifically limited his rights under the bailment, the consent might have been held inconsistent with the bailment.

The later case of *State v. Bernius*[143] appears to have contradicted *Eldridge. Bernius* interpreted *Eldridge* as based on an apparent authority rationale which had been implicitly overruled by the Supreme Court in *Stoner v. California.*[144] The court also held that the mere entrustment of possession and control of an automobile does not include authority to consent to a search. Further, in *Bernius,* the police knew that the con-

134. *See* Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied,* 383 U.S. 938 (1966); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962); Cutting v. United States, 169 F.2d 951 (9th Cir. 1948); Clarke v. State, 402 S.W.2d 863 (Tenn.), *cert denied,* 87 S. Ct. 303 (1966).

135. *E.g.,* Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied,* 383 U.S. 938 (1966); *see* United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962).

136. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (overruling Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *cert. denied,* 383 U.S. 938 (1966)).

137. Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963).

138. *Id.*; Lord v. Kelly, 223 F. Supp. 684 (D. Mass. 1963), *cert. denied,* 379 U.S. 961 (1965); *cf.* United States v. Birrell, 243 F. Supp. 36 (S.D.N.Y. 1965).

139. *E.g.,* Carroll v. United States, 267 U.S. 132, 158 (1925). When a consent is given to search an automobile at the defendant's home, the courts employ the rules applicable to a search of the home. Idol v. State, 233 Ind. 307, 119 N.E.2d 428 (1954); Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952); Henry v. State, 253 Miss. 263 154 So. 2d 289 (1963).

140. 302 F.2d 463 (4th Cir. 1962).

141. *See* Camp v. State, 70 Okla. Crim. 68, 104 P.2d 572 (1940).

142. United States v. Eldridge, 302 F.2d 463, 466 (4th Cir. 1962).

143. 177 Ohio St. 155, 203 N.E.2d 241 (1964).

144. 376 U.S. 483 (1964).

senter did not own the car when they conducted the search, and they broke into a locked case to find the evidence. Thus, *Eldridge* could have been distinguished factually. In any event, further litigation in this area is necessary before precise rules can be developed.

CONCLUSION

Evidence which is seized through an invalid third party consent search is excluded because of the fourth amendment. In theory, there should be certain minimum requirements based on that amendment as interpreted and applied by the Supreme Court. However, with the exceptions of *Chapman v. United States*[145] and *Stoner v. California*,[146] the Supreme Court has declined to define third party consent law, and those cases provide almost no indication of what the Supreme Court will eventually decide the law to be.

Chapman and *Stoner* clearly hold that absentee landlords and hotel managers may not consent to searches of premises occupied exclusively by a tenant-defendant. Beyond this the Supreme Court has said only that third party consent law may not be founded on principles of property and agency law which do not also consider the elements of reasonableness. With such vague directions, the lower courts have continued to apply the possession and control test. (California, of course, utilizes the "apparent authority" doctrine.) These approaches do not necessarily violate the Supreme Court ruling that the fundamental question is always the reasonableness of the search. Some courts have applied the *Chapman-Stoner* approach to factually different cases in which the search was held unreasonable.[147]

Clearly further guidance on third party consent law is needed from the Supreme Court because of disagreement among the courts in their interpretations of the fourth amendment, and because of the large number of searches which are made pursuant to third party consent. Even within a single jurisdiction, because a majority of the problems are probably solved by trial courts, there is need for specific guidance which *Chapman* and *Stoner* have not provided.

The use of these searches is more frequent than indicated by the number of reported appellate decisions. This does not ncessarily imply that current third party consent rules are too lenient. After further consideration, the Supreme Court may decide that an approach similar to that of California

145. 365 U.S. 610 (1961).
146. 376 U.S. 483 (1964).
147. *E.g.*, State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

is best, perhaps resulting in an increase of the number of third party consent searches.

When attempts are made to provide definite solutions to third party consent problems, several questions which are unanswered by the existing case law must be considered. Heretofore, the courts have been almost exclusively concerned with the circumstances under which valid third party consent can be given. Once it is determined that the consent was valid, little attention has been given to the scope of the search. It is apparently assumed that since the consent validates the search, it may be limited only by the consenter.[148] When a search is made incident to a valid arrest, the area searched may be limited.[149] Similarly, there are limitations on searches made with search warrants.[150] Under third party consent law, however, the police might return several times over an extended period; if consent is reasonably obtained each time, the "search" is valid.[151] Furthermore, there is little indication that the physical area must be limited in consent searches.[152] Hence, even though most opinions state that the *search* was either reasonable or unreasonable, the courts do not actually question the reasonableness of the search but rather that of the *consent.*

It is suggested that third party consent cases contain two issues. Courts could consider not only the circumstances under which the consent was given but also the reasonableness of the search, once it is determined that under the usual consent rules the consent is valid. That is, the second issue would be: in the totality of the circumstances, was the search reasonable? Though this might be based upon rather vague criteria, it would allow a court to invalidate a search which, on the whole, seems unreasonable, even though under the more established consent rules alone, the evidence would have to be admitted. It should be noted that this kind of inquiry is not the policy behind the exclusive use doctrine. Analytically, that doctrine is merely an extension of the general consent rule; that is, the consenter has no right to possession or control over a part of the premises or a thing which is subject to another's exclusive use.

Another seldom considered problem in third party consent cases is that

148. Very few cases make such a statement; however, it is implied in many opinions. *See* People v. Murillo, 50 Cal. Rptr. 290 (Dist. Ct. App. 1966).

149. Marron v. United States, 275 U.S. 192 (1927); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953).

150. The fourth amendment limits the search to the place and thing named in the warrant.

151. People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957).

152. *See, e.g.,* Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962).

the consenter is often ignorant of the circumstances surrounding the request that he permit a search. He may not realize the gravity of the consequences which might result from his consent. He may be unaware that a crime has been committed; or he may readily consent to avoid drawing suspicion toward himself.

Many consentors are not aware of their right to refuse to allow the search; they may assume that the police are merely being polite. A recent confession case[153] requires that defendants be apprised of certain rights before waiving them, and this may foreshadow similar requirements (such as disclosure of the right to refuse) before third parties can be asked to consent.[154] Undoubtedly many consenters do not realize that if permission to search is not given, the police might not be able to obtain a warrant, or that a search pursuant to a warrant might be more restricted than a consent search.

These factors tend to lead to an inequality of bargaining positions, an inequality of knowledge of constitutional rights and of the facts giving rise to the search, between the police and consenting parties. In developing consent rules, it is necessary to ascertain the extent of this inequality and the extent that rules narrowing the inequality might restrict the number of consents given. It would be virtually impossible to eliminate completely the consenting party's disadvantage. However, by requiring the police to make certain disclosures, the gap in bargaining positions can be narrowed.[155] The police could be required to disclose in writing what they are

153. Miranda v. Arizona, 384 U.S. 436 (1966).

154. Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 148-50 (1967).

155. In some cases, the courts have considered the importance of police disclosures but did not require them. Maxwell v. Stephens, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965); Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965), *remanded on other grounds*, 384 U.S. 312 (1966); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); People v. Palmer, 31 Ill. 2d 58, 198 N.E.2d 839 (1964); McCray v. State, 236 Md. 9, 202 A.2d 320 (1964); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964). Usually if there is a disclosure it is that the police are looking for a specific piece of property or type of evidence. *E.g.*, People v. Alverez, 236 Cal. App. 2d 106, 45 Cal. Rptr. 721 (1965); People v. Galle, 153 Cal. App. 2d 88, 314 P.2d 58 (1957); People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958), *cert. denied*, 359 U.S. 980 (1959). If the third party is told that he has a right to refuse, the court will consider this as an element of reasonableness. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); United States v. Roberts, 179 F. Supp. 478 (D.D.C. 1959); State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied*, 384 U.S. 909 (1966). However, the fact that the third party is ignorant of his right to refuse will not invalidate an otherwise valid consent. *E.g.*, State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965). *But see* United States v. Roberts, *supra*.

looking for, whether a crime has been committed, and whether there is a present suspect. Further, the third party could be informed that he can refuse to allow the search, and that if he consents any evidence found may be used against the defendant.

All of this information could be contained in a written waiver form which would have a greater impact upon the consenter than verbal disclosures. Written waiver forms are currently in use, and are of utility to the police in eliminating disputes as to whether consent was given.[156] However, they do not seem to be required in any jurisdiction. Obviously, a requirement that consent could only be obtained if the third party signed a form disclosing certain types of information would decrease the number of third party consent searches.

Another difficulty is the absence of a pre-search point of view as to the constitutionality of the search. Of course, even a search with a warrant can be attacked.[157] However, in this situation, there is at least a point of view—that of the magistrate—from which reasonableness can be tested. With a search pursuant to a valid arrest, the point of view of the reasonably prudent policeman is available to test probable cause to make the arrest. Arguably California has adopted a similar approach by requiring that the police, before making the search, reasonably believe that the third party has sufficient control over the premises to authorize the search.

However, in other jurisdictions, validity rests primarily on the relationship of the third party to the premises, a fact which can readily be determined by the courts in deciding whether to suppress evidence, but which may cause difficulties at the time of the search, when fourth amendment questions must initially be answered to avoid a violation of individual rights. It could be reasoned that the possession and control test forces the police to ascertain whether the third party has such a property interest before searching. However, because a third party on the premises possesses the requisite property interest in most situations, it is likely that the police never make the inquiry. Further where the exclusive use doctrine is recognized, the police would have to make further determinations once

156. If the third party signs a consent waiver form, this will also be considered an element of reasonableness. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955); United States v. Meyers, 232 F. Supp. 65 (E.D. Pa. 1964), *cert. denied*, 382 U.S. 857 (1965); People v. Harvey, 48 Ill. App. 2d 261, 199 N.E.2d 236 (1964). However, refusal to sign will not invalidate an oral consent. McCray v. State, 236 Md. 9, 202 A.2d 320 (1963).

157. *E.g.*, United States v. Pearce, 275 F.2d 318 (7th Cir. 1960); Baysden v. United States, 271 F.2d 325 (4th Cir. 1959); Sparks v. State, 39 Ala. App. 517, 104 So. 2d 764 (1958); People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931).

they have received consent to search the entire premises. In short, it can be argued that the possession and control test is unworkable if its purpose is to prevent unconstitutional searches.

California does not necessarily solve the problem by approving searches when the requisite relationship does not exist if the police have made a reasonable mistake about the relationship. It is possible that the California rule encourages the police to learn as little as possible about the third party's control over the premises searched and the items seized so that mistakes will appear to be reasonable. Perhaps California could require the police to make certain inquiries of the consenter before relying on his consent. This would strengthen the California test, which is based on the premise that evidence should be excluded only when its seizure results from police misconduct.

In one third party consent case the court said that consent is the weakest basis for supporting a search.[158] Therefore, if the potential defendant is available, the police might make the search "more reasonable" by requesting his consent rather than that of the third party. If this is so, the possession and control test could be tempered by rules which look to the whereabouts of the defendant. If he is present or in custody when the search is conducted, the search could be held unreasonable if the police do not ask him to consent; a subsequent third party consent could be held invalid once the defendant refuses. However, such a rule should not be adopted without caution. One commentator has said that the federal courts will not allow a defendant to consent if he is in custody, reasoning that such consent is inherently involuntary.[159] If third party consent were also forbidden under such circumstances, no search could be made in a case in which the defendant is in custody unless a warrant is obtained. Furthermore, the fact that defendant's consent has a more reasonable basis than that of a third party does not necessarily mean that third party consent is not reasonable for fourth amendment purposes.

Third party consent law provides an excellent opportunity to re-evaluate the balancing of police needs against fourth amendment rights. Recently the tendency has been to strenghten enforcement of fourth amendment rights and, arguably, law enforcement objectives have suffered. Third party consent law may not be following this trend. Though some opinions have stated that decisions are based on whether a third party should be permit-

158. *See* People v. Gonzalez, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (Sup. Ct. 1966).

159. Lafave, *Search and Seizure: "The Course of the True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 316.

ted to waive the defendant's rights,[160] this approach is not recommended because it is doubtful that anyone's constitutional rights can be waived by another. In these cases, the third party waives *his* right to prevent the search.[161] If the defendant also has rights in the premises, perhaps those rights are being violated; however, the fourth amendment does not guarantee freedom from all searches and seizures, but rather only freedom from unreasonable ones. From a police misconduct point of view, assuming that coercive factors do not exist and that the circumstances surrounding the search and the legal consequences which will result from the consent are known to the consenter, the third party consent search appears entirely reasonable; the police have asked for and received the permission of one who has the right to invite others onto or exclude others from, the premises. Even from the defendant's point of view, the search is not entirely unreasonable. The defendant does not have a reasonable expectation of an absolute right to privacy; he has decided to share the premises with another and could not realistically expect that his effects would be entirely secure, especially if they are not subject to the exclusive use doctrine.

Hence, a policy which permits free use of well-regulated third party consent searches can be supported. It cannot be denied that such a policy would limit individual rights to some extent. The question is whether legitimate police objectives are sufficiently furthered by third party consent searches to make the resulting infringement of these rights reasonable under the fourth amendment.

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160. People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938); *cf.* United States v. Sully, 56 F. Supp. 942 (S.D.N.Y. 1944).

161. Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965).