Open Fields and Conservation Law Enforcement

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Abstract: Included as an introduction to the open fields doctrine and a closely related concept, the plain view doctrine, are a brief historic overview, a review of some cases in which open fields law played an important role, and a statement about the importance of this legal concept in wildlife law enforcement.

Proc. Annu. Conf. Southeast. Assoc. Fish and Wildl. Agencies 37:519–523

Reduced to its simplest terms, the open fields concept is that an open field is not protected by the Fourth Amendment's limitations on search and seizure.

The concept[1] is linked closely to an individual's reasonable expectation of privacy, the plain view doctrine and the constitutional protection afforded that area designated as "curtilage." It is a tool of the prosecution that may often protect from exclusion evidence discovered and seized without a warrant, but the use of the concept depends upon a determination of whether the place in question is or is not an open field. As in most areas of law, this may not be as simple a problem as it would seem. In one of his novels, Herman Wouk described the job qualifications for a particular Navy position as being the ability to tell the difference between an object which is on fire and one which is not. Open field identification is not that easy.

Generally, however, an item of evidence that may be found outside the curtilage of an affected party is considered to be discovered in an open field, even if the "field" is a woodlot, swamp, or some other classification of terrain not normally described as a field.[2]

The Fourth Amendment lists "persons, houses, papers, and effects" as those areas where "the people" have a right to be secure. Subsequent case law

[1] Legal literature does not refer to the general areas of open fields as a doctrine, as it does with the area of "plain view," and the subject does not have the bulk of case law that attends many areas of search and seizure litigation. For the purposes of this paper, the term "concept" seems adequate.

[2] *Brinlee v. State,* Okla. Cr. 403 P2d 253 (1965).

has enlarged the definition of "houses" to include the curtilage, a term Black's Law Dictionary describes as "the enclosed space of ground and buildings immediately surrounding a dwelling house." For search and seizure purposes, Black's includes in its definition "those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment."[3]

"Enclosed" may also be misleading. If the area is fenced, as has normally occurred during times past, it certainly helps to define the curtilage, but the fence is not absolutely necessary. If a close connection or association can be shown between a dwelling and an area or structure some distance away, that structure or area may also be held to fall within the curtilage. In *Walker v. United States,* 225 F. 2d 447, and *Rosencranz v. United States,* 356 F 2d 310, barns were deemed to be within the curtilage even though 1 was 70 or 80 yards away and surrounded by a fence and the other an unspecified, but ostensibly significant distance away and conected by a driveway showing evidence of both pedestrian and vehicular traffic. In Rosencranz, the court quoted and upheld the Walker decision and pointed out that the "reach of the curtilage depends on the facts of a case." This holding is one of several recurring themes in this area of search procedure.

An Oklahoma cattle rustling case, *Brinlee v. State,* 403 P2d 253, extended the boundaries of curtilage to what would seem a distance approaching the limits of reason. In that 1965 case, a pilfered steer in a barn lot 100 yards from the dwelling was found to be in a protected area. From the tone of the Court of Criminal Appeals opinion, there is a strong possibility that the curtilage issue had less influence on the decision than did basic disregard for due process: the court objected to the fact that 4 experienced officers of the law with reason to believe that Brinlee had done the deed, went looking for stolen beef without a warrant.

Based on a similar 1973 rustling case, it is reasonable to assume that the bounds of curtilage would not extend so far in Kentucky. The Kentucky Court of Appeals, in *Maddox v. Commonwealth,*[4] upheld the seizure of a stolen calf from a fenced area only about 50 feet from a house. In this case, neither the calf nor the enclosure were visible from the roadway, but the warrantless search and seizure held up, in spite of the Brinlee precedent. Perhaps rustling is more of a novelty in Kentucky than in the Old West!

An interesting case that involved the curtilage question and approximately the same distance from a dwelling as the Brinlee case, and one that is more typical in its holding, was the trial of John Patler for the first-degree murder of George Lincoln Rockwell. Rockwell was head of the American

[3] Black's Law Dictionary, West Publishing Co., St. Paul, Minnesota (1979) p. 345.
[4] *Maddox v. Commonwealth,* Ky., 503 S.W. 2d 481.

Nazi party until 25 August 1967.[5] On that day, Rockwell was shot twice fatally in the chest as he sat in his car in the parking lot of an Arlington shopping center. His assassin had fired from the roof of the shopping center with an impressive display of pistol marksmanship, a skill he apparently developed in an open field near the home of his father-in-law. A farm laborer told police that Patler had been "target shooting with a pistol in a field on the farm," about a month earlier. Equipped with what later proved to be a defective warrant, officers searched the field and recovered shell casings and spent bullets that matched the murder weapon. Defense objections to the warrant (based upon an inadequate affidavit) were not challenged; the court held that the area was indeed an open field and no warrant was necessary.

This particular open field was separated from the curtilage by a new fence and a small creek or branch. The items seized were found about 250 feet from the dwelling, a distance not as great as that which proved to be within the curtilage in the previous case, once again illustrating the court's insistence on judging a case on its particular merits.

A case that makes it unnecessary to quibble over distance, fences, natural boundaries, tire tracks, foot prints, and such was decided by the Oregon Court of Appeals[6] in a matter involving marijuana farming. That court simply applied the "reasonable expectation of privacy" test[7] to the open fields concept. It also addressed the issue of trespass in relation to the discovery of evidence in an open field, and did not disqualify evidence as a result of simple trespass.

Details leading up to the arresting officer's presence in the field were somewhat fuzzy. Apparently, the officer was acting on a tip from and was guided by 1 of 2 youngsters who had observed the contraband crop while searching for lost cattle. The officer crossed at least 1 fence to get to the area where the weeds were growing (surrounded by another, smaller fence).

The court felt that it was important that the plants were growing "in plain view of anybody who happened to be on the property." They recognized the fact that there, as is true in most of Kentucky and other rural areas, "fences are designed more to keep livestock under control than to keep people out." The court also recognized the fact that there were any number of legitimate excuses for the public to be upon private property—searching for lost cattle, looking for missing or tardy children, and recreation, just to mention a few, and that it is reasonable to assume that contraband maintained in plain view would be observed, reported, and investigated. Under the circumstances, Stanton was entitled to no "reasonable expectation of privacy."

The plain view doctrine is associated with, related to and overlaps the open fields concept. *American Jurisprudence* breaks the plain view rule into

[5] *Patler v. Commonwealth,* 177 SE 2d 618 (1970).
[6] *State v. Stanton,* Or. App. 490 P. 2d 1274 (1971).
[7] *Katz v. United States,* 389 U.S. 347 (1967).

2 concepts, 1 dealing with extending the scope of a classic search, and the other, more germane to open fields, holding that "mere observation by an officer simply does not constitute a search at all and, consequently, the principles of the law of search and seizure do not apply."[8] The critical difference, in both open fields and plain view application, is that if the search is not of a person, house, paper, or effect, it is no search at all, as in borne out by the next case. (There are exceptions: automobiles, businesses, etc.)

The grandfather of modern open fields law, and a case that is probably still good law, was heard by the Supreme Court in 1924. It is referred to in most of the cases quoted here, and this paper would not be complete without at least a reference to that classic. The facts, briefly, were that 2 gentlemen fled on foot from federal revenue officers and in the heat of the chase, dropped their respective burdens, both of which were bottles containing handcrafted, untaxed liquor. Upholding the officers' right to that evidence, the court stated that "the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[9]

The open fields concept is particularly important in the field of conservation law enforcement, where the bulk of patrol work and investigation is done quite literally in the open fields. Kentucky conservation officers enjoy a remarkable degree of latitude in relation to their right to be upon private property in the normal course of their work. Kentucky Revised Statute 150.090 declares that "Conservation officers . . . shall have the right to go upon the land of any person or persons whether private or public for the purpose of conducting research or investigation of game or fish or their habitat conditions or engage in restocking game or fish or in any type of work involved in or incident to game and fish restoration projects or their enforcement or in the enforcement of laws or orders of the department relating to game or fish (and) may enter upon, cross over, be upon and remain upon privately owned lands for such purposes."

The available case law does not seriously question this statute, or the conservation officer's right to be in an open field, particularly in recent years. The latest case that tested this area was *Commonwealth v. Carr,*[10] heard by the Court of Appeals in 1950. Officers Herbert Saylor and B. H. (Bige) Hopper, on patrol in Whitley County, attempted to cross the property of George Carr to check fishermen on Watts Creek, a nearby public stream. Carr, according to a grand jury indictment, "did unlawfully, willfully . . . obstruct justice" by preventing them from doing so. The indictment, unfortunately for the forces of law and order, failed to state facts demonstrating the specific necessity for Saylor and Hopper to pass over Carr's property. The

[8] Am. Jurisprudence, 2nd ed. Searches and Seizures. Vol. 68, Sect. 88.
[9] *Hester v. United States,* 265 U.S. 57 (1924).
[10] *Commonwealth v. Carr,* 227 S.W. 2d 904 (1950).

fishermen they intended to check were not on that particular real estate, and the court objected to the omission of "particular circumstances of the offense charged."

Although this case was entered in the "lost" column, it was for procedural mistakes; there was no denial of the authority of the officers to enter upon private property. In fact, the court in Carr referred to *Draffen et al. v. Black,*[11] a 1946 case that affirmed that authority. This case dealt primarily with the issue of the right of the Department of Fish and Wildlife Resources to regulate the size and numbers of fish harvested on private property, and the holding was that it could and should. "We therefore conclude," the court concluded, "that the legislature has the right . . . to restrict the number and size of fish taken . . . and to require . . . licenses. It follows that the game conservation officers have the right to enter private property to enforce the provisions of the statute."

The same principles of law that hold true in criminal prosecutions in general also apply to conservation law enforcement. Perhaps because the penalties are usually mild for violation, many cases that should be appealed are not, thus depriving the responsible agency of the opportunity to defend the good laws and change the bad.

[11] *Draffen v. Black,* 196 S.W. 2d 362 (1946).