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rule in requiring domicile of the child as a prerequisite to jurisdiction, the decision does no violence to the full faith and credit requirement.[30] Even if Alabama followed the rule suggested above, not requiring the domicile of the child if both parents are before the court, the result in the *Gafford* case probably would have been the same. The facts indicated sufficient change in condition to have warranted a new custody award.

Thus, in each of these cases the court consistently applies its rule that presence of the child is necessary to jurisdiction for an award of custody, and indicated the limits of the full faith and credit requirement in such cases.

O. E. Ross, III.

Constitutional Law—Use of Stomach Pump—Denial of Due Process

"Evidence forcibly extracted from the stomach of a prisoner may not be used validly to convict him of a crime, the Supreme Court ruled today. Such procedure, it held, violates the due process clause of the Fourteenth Amendment."[1] The American public was thus informed by the press of the decision in the case of *Rochin v. People of California.*[2] Several state law enforcement officers, without a search warrant, forced their way into the room in which the defendant had been sleeping, acting on information that defendant had narcotics in his possession. Upon their entry defendant swallowed two capsules which had been laying on a night stand. Following a struggle in which the officers were unable to force him to expel the evidence they handcuffed the defendant, took him to a hospital and after strapping him to an operating table, forced a stomach pump down his throat and retrieved the capsules. On this evidence defendant was convicted and sentenced, and the California Supreme Court denied certiorari. The United States Supreme Court unanimously reversed the conviction, however, without unanimity of opinion as to the reasons for the reversal. The majority held that through their actions the state officers had denied defendant due process of law. Justices Black and Douglas, concurring in the reversal, felt that this was too nebulous a standard, and that the specific point involved was that the defendant had been forced to give testimony against himself, thus denying him the protection of the Fifth Amendment.[3]

[30] See note 10 *supra.*

However, the court did not look to the Alabama cases to determine the jurisdiction of the Alabama court. Gafford v. Phelps, 235 N. C. 218, 222, — S. E. 2d —— (1952). This does not seem to conform with accepted principles of conflict of laws. RESTATEMENT, CONFLICT OF LAWS §§7, 8 (1934).

[1] N. Y. Times, Jan. 3, 1952, §1, p. 1, col. 6.

"The Supreme Court struck out today at the forcible use of a stomach pump to get narcotics evidence, denouncing such police methods as akin to the old-time rack and screw." Raleigh (N. C.) News and Observer, Jan. 3, 1952, §1, p. 1, col. 6.

See Time, Jan. 14, 1952, p. 22, col. 1, story entitled, "Freedom of the Stomach."

[2] 72 Sup. Ct. 205 (1952).

[3] Rochin v. People of California, 72 Sup. Ct. 205, 211 (1952).

By common law rules evidence illegally obtained was admissible so long as it was relevant and reliable, and defendant's only remedy was against the officer for the illegal seizure.[4] In 1914, *Weeks v. United States*[5] began a line of cases which has firmly established the federal rule that illegally secured evidence will be excluded from trials in the federal courts.[6] However, the majority of state courts continue to adhere to the common law rule.[7] Three cases involving the use of stomach pumps to procure evidence were reported prior to the *Rochin* case and each followed a separate line of reasoning. In *United States v. Willis*[8] the stomach pump treatment was administered at the instance of federal officers and the federal court held that this was such a violation of the individual's person as to make it an unreasonable search and seizure. In keeping with the federal exclusion rule, this automatically made the evidence inadmissible. In another federal court case, the use of a stomach pump by law enforcement officers was sternly condemned: "If the stomach pump can be justified, then the opening of one's person by the the surgeon's knife can be justified."[9] Three years prior to the *Willis* case the California court decided the case of *People v. One 1941 Mercury Sedan*,[10] again involving the use of a stomach pump in bringing to

[4] 8 WIGMORE, EVIDENCE, §2183 (3d ed. 1940).

[5] 232 U. S. 383 (1914). The common law rule was followed in both the state and federal courts for nearly one hundred years, until the case of Boyd v. United States, 116 U. S. 616 (1885) held that compulsory production of books and papers is unreasonable search and seizure, and that such evidence will be excluded. There was a brief relapse to the common law rule in Adams v. New York, 192 U. S. 585 (1904), but the Supreme Court revived the *Boyd* rule in *Weeks v. United States.* A limitation on the rule was therein made, to the effect that the illegal evidence question must be raised by motion before the trial, but even this was relaxed in Agnello v. United States, 269 U. S. 20 (1925), where it was held that if the defendant had no reason to know that there had been a seizure, a motion before the trial was not necessary. Since 1914 the "federal exclusion rule" has been consistently adhered to in the federal courts, but its limits have been strictly drawn to include only evidence secured by federal officers. For detailed history and criticism of the rule see 8 WIGMORE, EVIDENCE, §2184 (3d ed. 1940).

[6] Note, 35 GEO. L. J. 92 (1946).

[7] *E.g.*, State v. Frye, 58 Ariz. 409, 120 P. 2d 793 (1942); People v. Gonzales, 20 Cal. 2d 165, 124 P. 2d 44 (1942); People v. Richter's Jewelers Inc., 291 N. Y. 161, 51 N. E. 2d 690 (1943); State v. Vanhoy, 230 N. C. 162, 52 S. E. 2d 278 (1950). *But see*, N. C. GEN. STAT. §15-27 (Supp. 1951). For a complete line-up of authority, see 8 WIGMORE, EVIDENCE, §2183 (3d ed. 1940) and notes thereto.

[8] 85 F. Supp. 754 (S. D. Cal. 1949).

[9] *In re* Guzzardi, 84 F. Supp. 294 (N. D. Tex. 1949). However, in this case the stomach of the accused had been pumped by state officers and federal officers were given the evidence. Although saying that this was an unreasonable search and seizure and strongly condemning such practices, the court strictly construed the federal exclusion rule and admitted the evidence since it was gathered by state officers with no federal participation. This holding is in accord with Thompson v. United States, 22 F. 2d 134 (4th Cir. 1927); and Lotto v. United States, 157 F. 2d 623, 625 (8th Cir. 1946) where the court said, "The United States may avail itself of evidence improperly seized by state officers operating entirely on their own account."

[10] 74 Cal. App. 2d 199, 168 P. 2d 443 (1946). In People of California v. Rochin, 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3 (1950) the court affirmed the conviction but lashed out at the officers who had invaded the defendant's privacy and illegally

light evidence of illegally possessed narcotics. Conforming to the majority state rule the court held that the evidence was physical, relevant, and would be admitted without inquiry into the legality of its acquisition. In so holding the court cited with approval *Ash v. State of Texas*[11] where still another rationale was used to admit the evidence. In this case defendant swallowed two diamond rings in the presence of officers who, after locating them with a fluoroscope, forcibly administered an enema and retrieved the rings which were used in evidence to sustain a conviction for possession of stolen property. It was held that inasmuch as defendant had swallowed the stolen property in the presence of the officers, they had a right to search him without warrant. The court said that the method used was the only reasonable means of retrieving the property, and therefore the search and seizure was valid.

From a comparison of these cases involving the use of a stomach pump, all decided prior to the United States Supreme Court decision in the *Rochin* case, the line is still clearly drawn between the state and federal views as to the admissibility of the evidence.[12] The grounds on which the cases were decided, however, are significant. In federal court the evidence was eliminated on the ground of unreasonable search and seizure, and in the states which admitted it, this was the only point discussed. Contrary to the original concept of unreasonable search[13] it is now settled that forcibly taking evidence from the body of the accused violates his rights under the Fourth Amendment.[14]

Perhaps the majority in the *Rochin* case ignored the search and seizure angle because of a reluctance to extend the federal exclusion to the state courts, thereby overruling previous decisions.[15] In 1949 the Court said that the privilege against unreasonable search and seizure applied to protect citizens from state action, but it added that this protection did not force the states to apply the rule of exclusion.[16] This rule

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procured the convicting evidence. Although stating the record revealed "a shocking series of violations of constitutional rights" the court nevertheless followed the common law rule and admitted the evidence.

[11] 138 Tex. Cr. R. 420, 141 S. W. 2d 341 (1940).

[12] A detailed analysis of the admissibility rule in the state and federal courts is not within the scope of this note. However, for excellent discussion on the conflicting views *compare* Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 ILL. L. REV. 303 (1925) and Note, 35 MINN. L. REV. 457 (1951), *with* Comment, 45 MICH. L. REV. 605 (1947) and Note, 25 TULANE L. REV. 410 (1951).

[13] For historical background of the application of the Fourth Amendment, see Harno, *supra* note 12 at 303-307; Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures,* 34 W. VA. L. Q. 137 (1928).

[14] United States v. Willis, 85 F. Supp. 754 (S. D. Cal. 1949). The Fourth Amendment "shows the sacredness of the person. The well-informed practitioner of the law knows that one's home is one's castle. . . . It is rather difficult to reason one into the conclusion that the sacred person may be so violated, over the protest of that person . . ." *In re* Guzzardi, 84 F. Supp. 294 (N. D. Tex. 1949).

[15] See, Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950).

[16] Wolf v. Colorado, 338 U. S. 25 (1949).

is not a constitutional guaranty, but a mere rule of evidence which the Court was unwilling to extend to the states.[17] If it had been decided that Rochin's rights under the Fourth Amendment had been violated the decision would have given a more predictable standard to law enforcement officers, but the Court was apparently unwilling to reverse its position.[18]

Another alternative ground was that argued for in the concurring opinions by Justices Black and Douglas.[19] This was, that in forcing the incriminating evidence from defendant's stomach the officers had forced him to testify against himself in violation of his rights under the Fifth Amendment. This is the view of a minority of state courts in the closely analogous situation of blood tests (for determination of intoxication) taken against the will of the accused.[20] However, it has been decided by the United States Supreme Court that the privilege against self-incrimination extends only to the situation where the evidence forced from the accused is oral or testimonial.[21] This line of reasoning has been adhered to in the majority of state courts and in the lower federal courts.[22] Also, in order to base its opinion in the *Rochin* case on violation of the privilege against self-incrimination, the Court would have had to clear the hurdle of its previous holding that the Fifth Amendment is not made effective by the Fourteenth as to state action.[23]

With these two alternatives[24] unacceptable, the majority in the *Rochin* case, speaking through Mr. Justice Frankfurter, settled the issue on the broad but vague principles of the due process clause of the Fourteenth Amendment. The necessity of protecting the innocent from violations

[17] For criticism of holding in *Wolf* case see Note, 35 CORN. L. Q. 625 (1950).

[18] Note, 18 GEO. WASH. L. REV. 262 (1950).

[19] Rochin v. People of California, 72 Sup. Ct. 205, 211 (1952).

[20] *E.g.*, People v. Dennis, 131 Misc. 62, 226 N. Y. Supp. 689 (Sup. Ct. 1928); Apodaca v. State, 140 Tex. Cr. R. 593, 146 S. W. 2d 381 (1940).

[21] Holmes, J., in Holt v. United States, 218 U. S. 245, 252 (1910): ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him. . . ." (Italics added.) See Note, 22 So. CAL. L. REV. 483 (1949).

[22] State of Oregon v. Cram, 176 Ore. 577, 160 P. 2d 283 (1945). See Comment, 1 VAND. L. REV. 243 (1948).

It would seem to be an unrealistic and strained interpretation to bring the stomach pumping situation within the "testimonial" classification for purposes of the Fifth Amendment. However, it appears that the concurring justices would be willing to overrule the *Holt* case and hold that evidence forcibly taken from the accused does not have to be oral or testimonial in order to violate his rights against self-incrimination.

[23] Adamson v. People of California, 332 U. S. 46 (1947): "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. . . ." From this 5 to 4 decision Justices Douglas and Black of the present Court dissented. See Comment, 33 IOWA L. REV. 666 (1948) and Note, 1 VAND. L. REV. 131 (1947). With the present substantially decreased "liberal" minority, it is believed that the position of the dissent has little chance of becoming the majority rule.

[24] There is another alternative ground on which the decision might have been based, viz., by calling this a coerced confession.

of their persons by law enforcement officers had to be weighed against the inevitable result of allowing a guilty man to escape.[25] The split in authority on the admissibility of such evidence is a recognition of this long-standing judicial dilemma.[26] The Court decided in favor of protecting the individual in a case wherein the officers went far beyond the justifiable bounds of law enforcement activity. Speaking neither of unreasonable search, nor of self-incrimination, the majority declared that the tactics here used were not to be tolerated as they were "methods too close to the rack and screw to permit of constitutional differentiation."[27] The state, through its officers, denied the defendant a fair trial, and the Court stepped in to prevent his punishment under such circumstances.[28]

Here the Court has taken a set of facts, and without applying to them any preconceived definitive test, nevertheless concludes that the conduct violated the Constitution.[29] The precedents in this field are limited, in that particular fact situations are decisive in determining what the phrase "due process of law" entails. It was early recognized that due process was incapable of exact definition.[30] The phrase has acquired meaning only through the process of judicial inclusion and exclusion. Out of this process has come one relatively uniform concept: there are some rights which are so fundamental to liberty and justice that a violation of them involves denial of due process.[31] Since this nebulous criterion is the only limitation upon judicial determination, the Court has consistently felt it necessary to deny that it is resorting to "natural law."[32] Although the standards of due process lack precision and their application depends upon the Court's view of the facts, the judges are called upon to abide by the "community's sense of fair play and decency."[33]

[25] See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Search and Seizure,* 25 COL. L. REV. 11 (1925) at p. 25 *et seq.*

[26] Note, 35 GEO. L. J. 92 (1946).

[27] Rochin v. People of California, 72 Sup. Ct. 205, 210 (1952).

[28] Hughes, J., in Brown v. Mississippi, 297 U. S. 278, 285 (1936): "The state is free to regulate the procedure of its courts . . . unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

[29] Lisenba v. People of California, 314 U. S. 219, 236 (1941): "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence whether true or false. . . . As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. . . ."

[30] Davidson v. New Orleans, 96 U. S. 97 (1877).

[31] For comprehensive listing of these fundamental rights, see Comment, 21 So. CAL. L. REV. 47 (1947) at 57 and notes thereto.

[32] People v. Rochin, 72 Supp. Ct. 205, 209 (1952); Comment, *supra* note 31 at 59-60.

[33] People v. Rochin, *supra* note 32 at 210. In determining what facts offend this sense of fair play, the judges are not left to wander on their own, or draw upon their own feelings and beliefs. They must instead look to the history of prior decisions and to the wisdom of the judges who have gone before. These are the things that form limitations on the Court and keep decisions in the due process field from varying with the whims and idiosyncrasies of the individual judges. See Adamson v. People of State of California, 332 U. S. 46, 67 (1947) (Mr. Justice

Within this line of reasoning and into this pattern of decisions the Court has placed the *Rochin* case. Although lacking the predictability which the minority would like to give to the law of search and seizure,[34] the majority decision would seem to be preferred to one pin-pointed to a specific constitutional guaranty.[35] Its flexibility leaves the way open for the advance of medical science in the field of more accurate crime detection.[36] It appears that a more satisfactory result will be reached since each revolutionary detective device is likely to be tested constitutionally as it is used in securing evidence. Due process, as thus defined, sets an outside limit within which officers may work, but at the same time does not fetter them with power so closely defined as to make it incapable of beneficial use.

Contrary to the impression left by the press in reporting this decision,[37] stomach pumping is not declared to be an unreasonable search and seizure in state courts, nor must such evidence illegally obtained be excluded from state trials. The decision holds only that on the combined facts of this case, viz., the illegal entry into the defendant's room, the assault and battery there, and the further assault, battery, and torture at the hospital, the accused had been denied due process of law as guaranteed by the Fourteenth Amendment. It is believed that out of this and future decisions in similar situations, each of which will be decided on its individual facts, will come a flexible and practicable body of law on the admission of evidence gathered by modern medical devices.

JAMES D. BLOUNT, JR.

Contracts—Statute of Frauds—Recovery of Payments by Vendee

Contrary to most jurisdictions, the North Carolina Supreme Court has consistently carried out the original purpose of the statute of frauds relating to land by refusing to give effect to land contracts which are not in writing or which are not signed by the party charged therewith.[1] This is clearly illustrated by the fact that it is one of only four courts in the United States which does not recognize the part performance exception

Frankfurter concurring). "We ultimately rely, not upon courts of law, but upon the convictions, the habits, and the actions of the community." Curtis, *Due, and Democratic, Process of Law,* 1944 WISC. L. REV. 39 at 52.

[34] To base this decision on the Fifth Amendment would result in "an unequivocal, definite and workable rule of evidence for state and federal courts." People v. Rochin, 72 Sup. Ct. 205, 213 (1952).

[35] Note, 13 DETROIT L. REV. 220 (1950).

[36] See, Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication,* 24 IOWA L. REV. 191 (1939); Note, 36 J. CRIM. L. 132 (1945); Note, 30 N. C. L. REV. 302 (1952).

[37] See note 1 *supra.*

[1] "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some person by him thereto lawfully authorized." N. C. GEN. STAT. §22-2 (1943).