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1928

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MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 13

DECEMBER, 1928

No. 1

RECENT DEVELOPMENTS IN THE LAW OF SEARCH AND SEIZURE

BY OSMOND K. FRAENKEL*

SOME years ago, before the rapid development of the subject under prohibition, I wrote an article which attempted to summarize the history of the fourth amendment and the then state of the law concerning searches and seizures.¹ Others have since discussed various aspects of the situation² and Mr Cornelius has

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¹Concerning Searches and Seizures, (1921) 34 Harv. L. Rev. 361.

²Atkinson, Admissibility of Evidence obtained through unreasonable searches and seizures, (1925) 25 Col. L. Rev. 11. Atkinson, Prohibition and the Doctrine of the Weeks Case, (1925) 23 Mich. L. Rev. 748 and 59 Am. L. Rev. 728. Baker, Searches and Seizures under the National Prohibition Act, (1928) 16 Geo. L. J. 415. Carpenter, Admissibility of Evidence illegally obtained, (1925) 4 Or. L. Rev. 160. Carroll, Search and Seizure Provisions of the Federal and State Constitutions, (1923) 10 Va. L. Rev. 124. Chaffee, Progress of the Law, 1919-1922, Evidence: Searches and Seizures, (1922) 35 Harv. L. Rev. 694. Elledge, Evidence Illegally Obtained, Inadmissible in Criminal Trial, (1927) 5 Tex. L. Rev. 424. Ely, Federal Constitutional Limitations on Searches by State Authority, (1927), 12 St. L. L. Rev. 159. Ely, Probable Cause, (1928) 13 St. L. L. Rev. 101. Freund, Search and Seizure, (1924) 56 Chic. Leg. N. 211. Gault, Requirements as to Search Warrants and the Use of Evidence obtained with and without Warrant, (1926) 4 Mich. S. B. J. 163. Harno, Evidence obtained by Illegal Search and Seizure, (1925) 19 Ill. L. Rev. 303. Lechner, Right of Search under the Federal Constitution, (1923) 6 Bi-Mo. L. Rev. 222. McKee, Admissibility of Evidence illegally obtained, (1923) 20 Ohio L. B. 593. Meuth, Admissibility of Evidence obtained by Illegal Search and Seizure, (1923) 11 Ky. L. J. 223. Nelson, Search and Seizure, (1923) 9 A. B. A. J. 773. Patterson, Case for admitting in evidence liquor illegally seized, (1924) 3 Ore. L. Rev. 334. Powell, Supreme Court's construction of the Federal Const. in 1920-21, (1922) 20 Mich. L. Rev. 381, 390. Rosebraugh, Case for the exclusion of evidence obtained by illegal search, (1924) 3 Or. L. Rev. 323. Skipworth, Law of Search and Seizure, (1924) 3 Ore. L. Rev. 179. Statler, Searches and Seizures, (1922) Wash. S. B. A. 125. Thormodsgard, The Agnello case and the Seasonable Demand Rule, (1927) 1 Dak. L. Rev. 3. Trueman, Right of Search and Seizure as ap-

compiled an extensive book on the subject.³ There have, however, been recent developments which justify further discussion.

(a) THE USE OF ILLEGALLY OBTAINED EVIDENCE

The sharp difference of opinion among the various states on the admissibility of evidence obtained by illegal search has been generally noted. Professor Wigmore has been a persistent opponent of the rule laid down by the Supreme Court.⁴ At the time of my earlier article (1920) this federal rule had received the support of only one state—Michigan.⁵ It had, however not been explicitly rejected, the almost complete opposition being based on the old rule that no collateral inquiry would be made at trial as to the manner in which evidence had been obtained.⁶ Iowa⁷ and Vermont⁸ had, however, permitted such inquiry and anticipated the result, if not the practice, of the *Weeks Case*⁹

In the intervening years the question has been reconsidered in almost every state. New Hampshire,¹⁰ New Mexico¹¹ and Vermont¹² alone have had no new cases.

plied to Person and Vehicle, (1927) 2 Ala. L. J. 233. White, Admissibility of Evidence illegally obtained, (1923) 20 Ohio L. B. 623. Wigmore, Using Evidence obtained by Illegal Search and Seizure, (1922) 8 A. B. A. J. 479. Wood, Scope of Constitutional Immunity against Searches and Seizures, (1927) 34 W. Va. L. Q. 1, and (1928) 34 W. Va. L. Q. 137. Woodson, Search of Automobile on Information without Warrant, (1927) 6 Or. L. Rev. 177. See also notes in 24 A. L. R. 1408 32 A. L. R. 408 40 A. L. R. 1145 and 52 A. L. R. 477

³Cornelius, *The Law of Search and Seizure*.

⁴Wigmore, *Evidence*, 1st ed. sec. 2264 pp. 3125-7 8 Am. B. A. J. 479
⁴Wigmore, *Evidence* 2d ed., secs. 2183, 2184, pp. 626-639; sec. 2264, pp. 867-71 but see *contra* 4 Jones *Evidence*, 2d ed., pp. 3864-80.

⁵*People v. Marxhausen*, (1919) 204 Mich. 559, 574, 171 N. W. 557 See 34 Harv. L. Rev. 371, note 59.

⁶See 34 Harv. L. Rev. 368, notes 41, 45.

⁷*State v. Sheridan*, (1903) 121 Ia. 164, 96 N. W. 730.

⁸*State v. Salmon*, (1901) 73 Vt. 212, 50 Atl. 1097 (but see *State v. Krinski*, (1905) 78 Vt. 162, 62 Atl. 37 refusing to extend the rule to contraband)

⁹*Weeks v. United States*, (1914) 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, 34 Harv. L. Rev. 372.

¹⁰*State v. Agalos*, (1919) 79 N. H. 241, 107 Atl. 314, (reaffirming the old rule of *State v. Flynn*, (1858) 36 N. H. 64)

¹¹*State v. Barela*, (1917) 23 N. M. 395, 168 Pac. 545. (This was a "shoe" case merely holding that there was no illegal search.) The question has been considered at length in an unreported case now pending on rehearing. This is *State v. Hammond*, originally decided in 1924, which reviews the authorities and holds the evidence admissible upon the ground that it was not the intention of the constitutional guarantee to limit the use of evidence, and also because the use of evidence in such cases does not result in injury to the innocent. It is interesting to note that the case was a civil proceeding arising out of supplementary proceedings, but the evidence apparently was sought for use in projected criminal proceedings.

¹²See note 8 *supra*.

Fifteen courts of last resort of the remaining forty-five have adopted the federal rule and twenty have rejected it, although in only fourteen was the discussion necessary to the decision. Upholding it are. Florida,¹³ Idaho,¹⁴ Illinois,¹⁵ Indiana,¹⁶ Kentucky,¹⁷ Michigan,¹⁸ Mississippi,¹⁹ Missouri,²⁰ Montana,²¹ Oklahoma,²² Tennessee,²³ Washington,²⁴ West Virginia,²⁵ Wisconsin,²⁶ and Wyoming.²⁷ In opposition Alabama,²⁸ Arkansas,²⁹ California,³⁰

¹³Hart v. State, (1925) 89 Fla. 202, 103 So. 633. See also 1 Fla. Laws 1927 ch. 12257 cited and discussed—footnote 108.

¹⁴State v. Arregui, (1927) 44 Id. 43, 254 Pac. 788 (one judge dissenting without opinion).

¹⁵People v. Castree, (1924) 311 Ill. 392, 143 N. E. 112. (one judge dissenting).

¹⁶Fium v. State, (1923) 193 Ind. 585, 141 N. E. 353. See also Wallace v. State, (1927) 199 Ind. 317, 157 N. E. 657 (two judges dissented on the ground that the warrant was sufficient). (See State v. Shumaker, (Ind. 1927) 157 N. E. 769, upholding a contempt charge against attorneys of The Anti-Saloon League for criticisms of the decisions of the Indiana courts and election threats against its members).

¹⁷Youman v. Commonwealth, (1920) 189 Ky. 152, 224 S. W. 860. See also Gilliland v. Commonwealth, (1928) 224 Ky. 453, 6 S. W. (2d) 467

¹⁸People v. Marxhausen, (1919) 204 Mich. 559, 171 N. W. 557, People v. Bass, (1926) 235 Mich. 588, 209 N. W. 927, (the evidence was received, three judges dissenting because no motion had been made—See 11 MINNESOTA LAW REVIEW. 179.

¹⁹Owens v. State, (1923) 133 Miss. 752, 98 So. 233, (two judges dissenting). See also Chrestman v. State, (1927) 148 Miss. 673, 114 So. 748.

²⁰State v. Owens, (1923) 302 Mo. 348, 259 S. W. 100, (two judges dissenting).

²¹State ex rel. Samlin v. District Court, (1921) 59 Mont. 600, 198 Pac. 362. (See State v. Gardner, (1926) 77 Mont. 8, 249 Pac. 574 permitting use of evidence where seizure was by federal officers).

²²Hess v. State, (1921) 84 Okla. 73, 202 Pac. 310.

²³Hughes v. State, (1921) 145 Tenn. 544, 238 S. W. 588. See also State v. Bass, (1925) 153 Tenn. 162, 281 S. W. 936.

²⁴State v. Gibbons, (1922) 118 Wash. 171, 203 Pac. 390. See also State v. Buckley, (1927) 145 Wash. 87, 258 Pac. 1030.

²⁵State v. Wills, (1922) 91 W. Va. 659, 114 S. E. 261. See also State v. Koil, (1927) 103 W. Va. 19, 136 S. E. 510.

²⁶Hoyer v. State, (1923) 180 Wis. 407, 193 N. W. 89.

²⁷State v. Peterson, (1920) 27 Wyo. 185, 194 Pac. 342. See also State v. George, (1924) 32 Wyo. 223, 231 Pac. 683.

²⁸Banks v. State, (1921) 207 Ala. 179, 93 So. 293. See also McCormick v. State, (Ala. 1927) 112 So. 809.

²⁹Benson v. State, (1921) 149 Ark. 633, 233 S. W. 758. (The federal rule was not discussed). Von Hook v. Helena, (1926) 170 Ark. 1083, 282 S. W. 673. (Although a motion was made before trial the Benson Case was held controlling. The search was held lawful and the general question was not decided. Two judges dissented without opinion). Knight v. State, (1926) 171 Ark. 882, 286 S. W. 1013. (The search was held lawful. Two judges dissented in an exhaustive opinion upholding the federal rule). Milton v. City of Fort Smith, (1927) 175 Ark. 694, 1 S. W. (2d) 45. (The earlier cases were held controlling. Three judges dissented without opinion).

³⁰People v. Mayen, (1922) 188 Cal. 237, 205 Pac. 435.

Colorado,³¹ Connecticut,³² Delaware,³³ Iowa,³⁴ Kansas,³⁵ Louisiana,³⁶ Maryland,³⁷ Massachusetts,³⁸ Nebraska,³⁹ Nevada,⁴⁰ New York,⁴¹ North Dakota,⁴² Pennsylvania,⁴³ South Carolina,⁴⁴ Texas,⁴⁵ Utah,⁴⁶ and Virginia.⁴⁷ Five states have refused to apply the federal rule to contraband, leaving the general question open Min-

³¹Massantomo v. People, (1925) 77 Col. 392, 236 Pac. 1019.

³²State v. Magnano, (1922) 97 Conn. 543, 117 Atl. 550. (The search was held lawful, but the practice of moving before trial was condemned) See also State v. Reynolds, (1924) 101 Conn. 224, 125 Atl. 636. (The search was also held lawful but the federal rule was discussed and rejected).

³³State v. Chucola, (1922) 32 Del. 133, 120 Atl. 212. (The decision is only that contraband can be used in evidence, but the federal rule is criticized, one judge dissented).

³⁴State v. Tonn, (1923) 195 Iowa 94, 191 N. W. 530. (This overruled earlier Iowa cases, see note 7 and the recent case of State v. Rowley (1923) 187 N. W. 7 which on rehearing was reversed (1924) 197 Iowa 977 195 N. W. 881. Two judges dissented).

³⁵State v. Johnson, (1924) 116 Kan. 58, 226 Pac. 245. (In this case there was no claim by defendant to ownership of what had been seized, one judge dissented) See also State v. Kelly, (1928) 125 Kan. 807 265 Pac. 1109.

³⁶State v. Eddins, (1926) 161 La. 240, 108 So. 468. (Three judges dissented without opinion).

³⁷Meisinger v. State, (Md. 1928) 141 Atl. 536. (Three judges dissented, (Md. 1928) 142 Atl. 190).

³⁸Commonwealth v. Wilkins, (1923) 243 Mass. 356, 138 N. E. 11. (There was only meagre discussion of the federal rule)

³⁹Billings v. State, (1923) 109 Nebr. 596, 191 N. W. 721.

⁴⁰State v. Chin Gin, (1924) 47 Nev. 431, 224 Pac. 798.

⁴¹People v. Defore, (1926) 242 N. Y. 13, 150 N. E. 585, certiorari denied, (1926) 270 U. S. 657 46 Sup. Ct. 355, 70 L. Ed. 784.

⁴²State v. Pauley (1922) 49 N. D. 488, 192 N. W. 91. (The search was held lawful two judges dissented). See also State v. Fahn, (1925) 53 N. D. 203, 205 N. W. 67

⁴³Commonwealth v. Dabbierio, (1927) 290 Pa. St. 174, 138 Atl. 679. (The court considered only the question of self-incrimination and permitted the use of evidence which might have been seized under a warrant one judge dissented without opinion)

⁴⁴State v. Green, (1922) 121 S. C. 230, 114 S. E. 317 (The search was held lawful, and the Weeks Case distinguished on ground that timely motion was made in that case). State v. Kanellos, (1923) 124 S. C. 514, 117 S. E. 640. (The search was held lawful, four judges dissented). State v. Prescott, (1923) 125 S. C. 22, 117 S. E. 637 (The Green Case was held controlling five judges dissented on the ground that the federal rule should apply). State v. Maes, (1923) 127 S. C. 397, 120 S. E. 576. (The search was held lawful, but the federal rule was discussed and rejected). State v. Griffin, (1924) 129 S. C. 200, 124 S. E. 81. (The search was held lawful) State v. Brown, (1924) 129 S. C. 286, 124 S. E. 87 (The practice of preliminary motion was condemned). State v. Gault, (1926) 138 S. C. 459, 136 S. E. 739. (The search was held lawful and the Prescott Case was reviewed and approved).

⁴⁵Welchek v. State, (1923) 93 Tex. Cr. 271, 247 S. W. 524.

⁴⁶State v. Aime, (1923) 62 Utah 476, 220 Pac. 704.

⁴⁷Lucchesi v. Commonwealth, (1922) 122 Va. 872, 94 S. E. 925. (The search was held lawful). See also Hall v. Commonwealth, (1924) 138 Va. 727 121 S. E. 154. (In a later case of Hall v. Commonwealth, (1925) 143 Va. 554, 130 S. E. 416 the search was held lawful; one judge dissented in favor of the federal rule).

nesota,⁴⁸ North Carolina,⁴⁹ Ohio,⁵⁰ Rhode Island,⁵¹ and South Dakota.⁵² But most of these are decisions that the search was lawful. Georgia,⁵³ Maine,⁵⁴ and New Jersey⁵⁵ have not really reviewed the federal rule but have reaffirmed the old rule against collateral inquiry. The question remains open in Arizona⁵⁶ and Oregon.⁵⁷

⁴⁸State v. Hesse, (1923) 154 Minn. 89, 191 N. W. 267 (The search was held lawful and the court expressly refrained from deciding whether the federal rule should be followed and earlier decisions overruled, such as State v. Stoffels, (1903) 89 Minn. 205, 94 N. W. 675, which rested on the common law objection to collateral inquiry). State v. Pluth, (1923) 157 Minn. 145, 195 N. W. 789. (The search was held unlawful, but the federal rule interpreted as not forbidding the use of evidence which would not be returned because contraband. Where no contraband was involved the question was left undecided).

⁴⁹State v. Simmons, (1922) 183 N. C. 684, 110 S. E. 591. (The search was held lawful and the general question not discussed). See also State v. Godette, (1924) 188 N. C. 497, 125 S. E. 24.

⁵⁰Rosanski v. State, (1922) 106 Ohio St. 442, 140 N. E. 370. (The search was held lawful, the court intimated that the result would have been different had the liquor been lawfully owned). See also State v. Sabo, (1923) 108 Ohio St. 200, 140 N. E. 499 (Search also held lawful).

⁵¹State v. Chester, (1925) 46 R. I. 485, 129 Atl. 596. (The search was held lawful).

⁵²City of Sioux Falls v. Walser, (1922) 45 S. D. 417 187 N. W. 821. (The search was held lawful). See also State v. Newhart, (1926) 50 S. D. 272, 209 N. W. 542. (There was no preliminary motion).

⁵³Calhoun v. State, (1916) 144 Ga. 679, 87 S. E. 893. (The federal rule was not referred to). Johnson v. State, (1921) 152 Ga. 271, 109 S. E. 662. (The federal rule was not reviewed, as the cases were held not binding on state courts). Kennemer v. State, (1922) 154 Ga. 139, 113 S. E. 551. (The Calhoun Case was held controlling).

⁵⁴State v. Choroszy, (1923) 122 Me. 283, 119 Atl. 662. (This case was decided without discussion on State v. Schoppe, (1915) 113 Me. 10, 92 Atl. 867, which without discussion rested on State v. McCann, (1873) 61 Me. 116).

⁵⁵State v. King, (1926) 4 N. J. Misc. 218, 132 Atl. 312.

State v. Merra, (1927) 103 N. J. L. 361, 137 Atl. 575.

State v. Gillette, (1927) 103 N. J. L. 523, 138 Atl. 381. (These cases rest on State v. Lyons, (1923) 99 N. J. L. 301, 122 Atl. 758 and State v. McQueen, (1903) 69 N. J. L. 522, 55 Atl. 1006, in which no motions before trial were made and the exceptions at the trial were badly taken. The federal rule is not discussed in any of these cases but was rejected by an inferior court, State v. Black, (1926) 5 N. J. Misc. 48, 132 Atl. 685).

⁵⁶Argetakis v. State, (1923) 24 Ariz. 599, 212 Pac. 372.

⁵⁷State v. McDaniell, (1925) 115 Or. 187 234, 237 Pac. 373. (The search was held lawful on rehearsing, three judges dissenting. Originally, (1925) (115 Or. 187 208, 231 Pac. 965) the search was held illegal and the Federal rule applied, three judges dissenting, on the authority of a dictum in State v. Laundry, (1921) 103 Or. 443, 495, 204 Pac. 958, 975). See 3 Or. L. Rev. 323, 334 4 Or. L. Rev. 160·5 Or. L. Rev. 162).

State v. Harris, (1926) 119 Or. 422, 299 Pac. 1046. (The search was held unlawful, but as no preliminary motion had been made the court refused to consider the question). See State v. Hilton, (1926) 119 Or. 441, 249 Pac. 1103, State v. DeFord, (1926) 120 Or. 444, 250 Pac. 220· State v. Lee, (1927) 120 Or. 643, 253 Pac. 533 and State v. Muetzel,

In two states the legislatures have differed from the courts. In Texas the federal rule has been adopted and extended to its fullest possible scope.⁵⁸ In Mississippi a law permitting testimony in liquor cases despite illegal search was held unconstitutional by a divided court.⁵⁹

There can, therefore, be counted in support of the federal rule eighteen states,⁶⁰ in opposition nineteen,⁶¹ non-committal six,⁶² the remaining five not having reviewed the new rule but having approved the old.⁶³ It can no longer be said that there is weight of authority against the federal rule, especially in view of the fact that in many of the cases opposing the rule the question was not necessary to the decision and often the result depended on one judge's vote.

Perhaps the most satisfactory statement of the opposition to the federal rule is to be found in *People v. Defore*.⁶⁴ In this case a blackjack was found on a search made incident to an illegal arrest. This is the first discussion of the subject by the New York court of appeals. *People v. Adams*,⁶⁵ had rested on the common

(1927) 121 Or. 561, 254 Pac. 1010. (In all these cases the searches were held lawful and the general question therefore not discussed).

⁵⁸Texas, Laws 1925, 49, amending Title 8, chap. 7 Texas, C. C. P. 1911, by adding article 787a "No evidence obtained by an officer or other person in violation of any provision of the constitution or laws of the state of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." See *Sherow v. State*, (1927) 105 Tex. Cr. 650, 290 S. W. 754.

⁵⁹*Orick v. State*, (1925) 140 Miss. 184, 105 So. 465. (Two judges dissented).

⁶⁰Ohio (dictum, see note 50 supra), Texas (statute, see note 58 supra) and Vermont (old case, see note 12) in addition to the states listed in notes 13 to 27 supra. It may be that Oregon might be added to the list. See note 57 supra. (Sixteen states are listed in 52 A. L. R. 477 478—Ohio, Vermont and Washington not being included while Oregon is)

⁶¹Excluding Texas (see note 58 supra) from the states listed in notes 28 to 47 supra. (Twenty-eight states are listed in 52 A. L. R. 477 478—by including those allowing the use of contraband evidence, except Rhode Island and those following the old rule). To these apparently should be added New Mexico. (See unreported case referred to in note 11 supra).

⁶²The states listed in notes 48, 49, 51, 52, 56 and 57 supra. (Four states are apparently called doubtful in 52 A. L. R. 477 478—Arizona, Pennsylvania, Rhode Island and Washington).

⁶³New Hampshire (old case, see note 10 supra) and New Mexico (old case, see note 11 supra) in addition to the states listed in notes 53-55 supra. (In 52 A. L. R. 477 478 all these states are listed as against the federal rule) But New Mexico does not belong in this group if the decision in the unreported case (see note 11 supra) is followed on the pending rehearing.

⁶⁴(1926) 242 N. Y. 13, 150 N. E. 585.

⁶⁵(1903) 176 N. Y. 351, 68 N. E. 636, affirmed as *Adams v. New York*, (1904) 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

law rule. For a time the federal rule was followed by a number of lower courts in New York.⁶⁶ But in the *Defore Case* Judge Cardozo, writing for a unanimous court, rejected that rule on grounds of public policy. He held that the search was unreasonable because the arrest was illegal, and that the search was not justified because the object found was contraband. He pointed out that warrants can issue only for contraband, not for evidential matter and that therefore to dispense with warrants on the ground that the thing found was contraband is to dispense with them altogether.

Although Judge Cardozo deemed the *Adams Case* decisive, he reconsidered the question in the light of the later cases of the United States Supreme Court. He stated that the *Agnello Case*⁶⁷ overruled the *Adams Case* and practically abandoned the procedural condition of a preliminary motion, saying "there has been no blinking the consequences, the criminal is to go free because the constable has blundered." He noted the difference of opinion among the states, and stated that thirty-one had rejected the federal rule. He does not list these states and cites only a few cases. Ohio is among those cited as typically in opposition but, as has been noted, the Ohio court, while refusing to apply the federal rule to contraband, intimates that it would be applied to evidential matter.⁶⁸

Judge Cardozo notes that the federal rule "is either too strict or too lax." He criticizes the doctrine which permits the federal government to use evidence obtained by the state police or private individuals, saying, "the professed object of the trespass rather than the official character of the trespasser should test the rights of the government." The criticism is just, but the line has been drawn less finely than Judge Cardozo supposes. It is only where the seizure is really independent of the federal prosecution that the evidence can be used.⁶⁹

⁶⁶People v. Kinney, (1920) 185 N. Y. S. 645 Matter of Horschler, (1921) 116 Misc. 243, 190 N. Y. S. 355 People v. Jakira, (1922) 118 Misc. 303, 193 N. Y. S. 306.

⁶⁷(1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145.

⁶⁸See note 50 supra. Judge Cardozo also errs by listing among the authorities supporting the older doctrine my own article. The page cited (386) contains an approval of Wigmore's criticism of the identification between the fourth and fifth amendments and not of the federal doctrine as to the fourth amendment alone, which is distinctly approved at pages 372 and 385.

⁶⁹See 34 Harv. L. Rev. 377 notes 100, 101 and infra notes 83, 84.

Judge Cardozo argues that since the privilege against unreasonable searches is in New York statutory, the legislature, by not having amended the statute, has acquiesced in the court's interpretation.

Scrutinizing the consequences of the federal rule he finds them contrary to the public good.

"The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious."

The shadow of a murderer let go because of the federal rule haunts Judge Cardozo as it has haunted others. To meet the argument that without the federal rule the protection against unreasonable searches becomes illusory, Judge Cardozo refers to the civil actions of the time of Wilkes. He does not, however, refer to similar verdicts in modern times and it is doubtful if substantial ones can be found. He concludes that more than the refusal of juries to bring in verdicts would be necessary to change the law of evidence. As to the social policy, he says

"There are dangers in any choice. The rule of the *Adams Case* strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass."

The privilege against self-incrimination is considered and the *Adams Case* also held decisive. Judge Cardozo holds that since a warrant could have issued to seize the thing used in evidence without violation of the privilege, use of the evidence without a warrant cannot violate it. The confusion of the two privileges by the Supreme Court is criticized. Reservation, however is made as to the application of the privilege against self-incrimination to things lawfully possessed. It may be, therefore, that the court of appeals has left this door open to a substantial application of the federal rule in a case not involving contraband.

Some of the other cases reach the same conclusion on similar grounds. The California case of *People v. Mayen*⁷⁰ has been often cited with approval. Distinction is made in that case between seizure of evidence which violates the constitution and its subsequent use which does not. One case speaks of the federal rule as a "bomb proof dugout for criminals."⁷¹ In Connecticut the

⁷⁰(1922) 188 Cal. 237 205 Pac. 435.

⁷¹*Massantonio v. People*, (1925) 77 Col. 392, 236 Pac. 1019.

court rejects the federal rule as based on fallacious reasoning and as "reaching a result which we conceive to be against the peace and welfare of the community"⁷² In Iowa earlier decisions barring the use of evidence were overruled on the ground that the weight of authority and public policy were against the federal rule.⁷³ There was strong dissent on the ground that where a preliminary motion was made the federal rule was well established. In Kansas it was admitted that punishment of the offending officer was not effective, but held that the legislature, not the courts, should give relief.⁷⁴ In this case there was also a strong dissent. In Louisiana the court refused to follow the federal rule, partly because some years previously the Constitutional Convention had rejected a provision barring evidence illegally obtained.⁷⁵

It must be admitted that it is not at all clear that the federal doctrine has actually restricted illegal searches. The mass of litigation on the subject would indicate the contrary. There seems to be an unfortunate tendency on the part of police and prosecutors alike to take a chance. It is also true that innocent persons are seldom the victims of illegal searches. In this respect the fourth amendment is of much less importance than the fifth amendment. The basis of the privilege against self-incrimination is that innocent persons might, through nervousness or fear, condemn themselves.⁷⁶ This has, in Anglo-Saxon jurisprudence, been deemed of sufficient importance to warrant serious restriction on the prosecuting arm. No similar reason exists with respect to the fourth amendment. Nevertheless that amendment prescribes a course of conduct for government for the benefit of the citizen so that he can pursue his life without fear of the unreasonable invasion of his privacy. It is well established that no search warrant can be secured solely for the purpose of obtaining evidence.⁷⁷ The old rule would permit the government to do wrongfully that which it could not lawfully do.⁷⁸ Respect for the law is itself an

⁷²State v. Reynolds, (1924) 101 Conn. 224, 125 Atl. 636.

⁷³See note 34 supra.

⁷⁴State v. Johnson, (1924) 116 Kan. 58, 226 Pac. 245.

⁷⁵State v. Eddins, (1926) 161 La. 240, 108 So. 468. See Journal of Constitutional Convention, (1921) pp. 423, 455, 471, 1011.

⁷⁶See 4 Wigmore, Evidence, 2d ed., sec. 2251, pp. 819-28. 6 Jones, Evidence, 2d ed., sec. 2474, p. 4899.

⁷⁷Gouled v. United States, (1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647.

People v. Chagles, (1923) 237 N. Y. 193, 142 N. E. 583. See also 34 Harv. L. Rev. 379 note 116.

⁷⁸See State v. Wills, (1922) 91 W. Va. 659, 114 S. E. 261.

end of government, more important than specific convictions. Such respect is destroyed if the old rule is adhered to. The questions of public policy involved are fully treated in a recent article by Prof. Atkinson.⁷⁹

Those cases which cling to the old rule on the ground that no collateral inquiry will be permitted are clearly on untenable ground. As has often been pointed out, collateral inquiry is always permitted when a confession is attacked as improperly obtained.⁸⁰ So the qualifications of an expert, the knowledge of a child witness or the competency of an idiot witness,—these and many other matters are subjects of collateral inquiry at a trial, which result often in preliminary cross-examination and decision by the court in effect a trial in miniature.⁸¹ None of the cases resting on this rule have attempted to analyze it, they seem content to refer to its antiquity.⁸² The Supreme Court has, however, decided that where the facts of illegality are undisputed and the defendant had no reason to know that there had been a seizure, a motion before trial is not necessary.⁸³

The proponents of the new rule are not always free from confusion. They sometimes refer to the constitutional prohibition, sometimes to the impropriety of courts and prosecutors aiding and abetting wrongdoers. It must be admitted that the text of the constitution alone does not support the rule—the fourth amendment, as has often been said, is not a rule of evidence. Moreover, as Judge Cardozo points out, the second ground for the rule goes much further than the rule itself and should extend the prohibition to all illegally obtained evidence.

It is suggested there is a formula explaining these apparent inconsistencies which seems to have been recently adopted by the Supreme Court. The purpose of the fourth amendment (and its

⁷⁹25 Col. L. Rev. 11. See also Connor Hall, 8 A. B. A. J. 646 5 Jones, Evidence, 2d ed., 3865 et seq. See also 36 Yale L. J. 988.

⁸⁰State v. Wills, (1922) 91 W. Va. 659, 114 S. E. 261, 5 Jones, Evidence, 2d ed., 3878.

⁸¹It is interesting to note that the New York district attorney in opposing the federal rule in the Defore Case (see note 41) recognized the unsound basis of the old rule against collateral inquiry.

⁸²But see Seguro v. United States, (1927) 275 U. S. 106, 48 Sup. Ct. 77 (The objection to the evidence was not made until the end of the trial and was held too late, the rule against collateral inquiry being reaffirmed).

⁸³Gouled v. United States, (1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, Agnello v. United States, (1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145. See 1 Dakota L. Rev. 3 20 Mich. L. Rev. 93 6 MINNESOTA LAW REVIEW 245 11 MINNESOTA LAW REVIEW 179.

analogues in state constitutions) was to protect against the use of *governmental* compulsion. Therefore, every seizure made by persons purporting to be government agents or under color of governmental power is within its condemnation. In our peculiar dual system a seizure by state officers, if they are acting with a view to federal proceedings, should be within the prohibition, and this was the decision in *Byars v. United States*⁸⁴ and *Gambino v. United States*.⁸⁵ In the first of these cases the evidence was obtained by state officers in the presence of a federal officer, in the second by state officers alone. But in each case there was no state offense under consideration, only a federal one. The metaphysics of the case of a state officer making an unlawful search in aid of a state prosecution, finding evidence of a federal crime and turning it over to federal authorities, is of peculiar subtlety. Presumably, it can be said of such case that the original search, having been in aid of the state government, was not a violation of the restrictions on the federal government. State officers may as to the United States, be deemed private persons, and use of evidence seized by the latter is not prohibited.⁸⁶

This formula justifies the distinction between officers and ordinary citizens. Search by the former involves government compulsion, by the latter it does not. But it would seem that where a private citizen impersonates an officer he should be treated as such. The theory of this distinction undoubtedly is the greater freedom possessed by the ordinary person in protecting himself against trespasses by other private citizens. Clearly he is not free to use similar methods in repulsing a public officer. If, as seems likely, the fourth amendment was enacted because of this difference in freedom, it should be interpreted so as completely to effectuate it. This the federal rule substantially does.

It may be the federal rule goes further indeed. In *Gouled v. United States*⁸⁷ it was held that seizure by stealth is within the

⁸⁴(1927) 273 U. S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520.

⁸⁵(1927) 275 U. S. 310, 48 Sup. Ct. 137 See 28 Col. L. Rev. 511 37 Yale L. J. 784.

⁸⁶*Burdeau v. McDowell*, (1921) 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048. (Seizure was made by private detectives sometime before the prosecution was contemplated. Justices Brandeis and Holmes dissented on the ground that the owner of stolen property was entitled to have it returned).

See CRITICISM 6 MINNESOTA LAW REVIEW 70.

⁸⁷(1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (It did not appear in this case whether the officer obtained access by virtue of his governmental position. The court, however, condemned a taking by stealth whether in the presence or absence of the owner).

prohibition. If the person making the seizure gains access to the premises under claim of governmental power, then this seems sound. If access as well is obtained by stealth the case is not within the first reason for the rule. It is, however, within the second reason stated above, namely that the government should not use improper methods, that it is shocking to the public conscience to condone an illegal search by using the evidence. This position abandons the conception of governmental compulsion inherent in the fourth amendment. It would extend the prohibition to all cases, whether of fraud or force, where the object of the search, whether by private persons, state or federal officers, was in relation to the crime under prosecution. It would permit the use of evidence, although illegally obtained, if the circumstances of the taking had no relation to the particular prosecution. Probably this is a better justification than the one above noted for the distinction between seizures by state officers and federal officers.

Such formulation of the rule, however raises another question. Suppose the search to be the result of a breach of the criminal law but not a violation of the fourth amendment. Some of the authorities and decisions seem to recognize a difference between an illegality based on constitutional prohibitions and an illegality due to mere statutory restrictions.⁸⁸

The question was recently in the minds of some members of the Supreme Court in *Casey v United States*.⁸⁹ A conviction was attacked upon the ground that it had been instigated by federal detectives. The majority held there was no such instigation, without discussing what result would follow had there been one. Justice Brandeis dissented on the ground that without the instigation there would have been no crime and that there should be no punishment as this would be ratification by the government of its officers unjustifiable conduct. Justice Butler concurred in this dissent.

The question as to illegally obtained evidence was directly involved in *Olmstead v. United States*.⁹⁰ Evidence was obtained by federal agents by tapping telephone wires, which was a misdemeanor in the state where the acts were committed. Two ques-

⁸⁸5 Jones, *Evidence*, 2d ed., sec. 2075 note 3. *Hughes v. State*, (1921) 145 Tenn. 544, 566, 238 S. W. 588. *State v. Wills*, (1922) 91 W. Va. 659, 677 114 S. E. 261. *People v Castree*, (1924) 311 Ill. 392, 396, 143 N. E. 112.

⁸⁹(1928) 276 U. S. 413, 48 Sup. Ct. 373.

⁹⁰(1928) 48 Sup. Ct. 564. (Rehearing denied October 8, 1928).

tions were before the court—was the tapping a violation of the fourth amendment and did the illegality under the state statute bar the evidence. Both questions were decided by Mr. Justice Taft for the majority in the negative. Mr. Justice Brandeis, in a long opinion, dissented on both points. Mr. Justice Holmes was not prepared to dissent on the first point but did on the second. Mr. Justice Butler passed only on the first point and vigorously dissented from the majority. Mr. Justice Stone agreed with the other dissenters.

Let us assume for the moment that the majority was unquestionably sound on its first point, so as better to understand the ramifications of the second. Justice Taft starts out with the premise that a common law illegality of taking does not affect the admissibility of evidence and cites a precise distinction by Jones to the effect that unless the illegality arises out of a constitutional prohibition, it will not bar the evidence.

There can be no doubt that at common law illegality did not bar evidence. It may be doubted, however, whether the distinction between constitutional and statutory illegalities is well taken. It must not be forgotten that, resting on the common law the Supreme Court of the United States as late as 1904 refused to bar evidence obtained by unlawful search upon the ground that the issues could not be collaterally raised.⁹¹ That was indeed the real reason for the old common law rule. It is a reason not possible to justify and has indeed been ignored in many cases.⁹² But it was explicitly recognized as such by the courts and has been circumvented by the practice of motion before trial. In other words, the reason for the existence of the common law rule has disappeared with the newer practice. Nevertheless Justice Taft merely says that the *Weeks Case* created an exception based on constitutional grounds and that the states which follow a similar rule have declared likewise.

In discussing the state statute, Justice Taft confines himself to the observation that the statute did not declare that evidence obtained by interception should be inadmissible and that a state statute could not affect the laws of evidence in United States courts.

⁹¹Adams v. New York, (1904) 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

⁹²See 34 Harv. L. Rev. 368 notes 42, 43.

Justice Brandeis emphasizes the fact that the criminal interception was in effect a governmental act and was the basis of the whole case of the government and therefore use by the government of the evidence amounted to lawbreaking. He argues that courts will not assist one who comes into court with unclean hands and that this doctrine should be applicable to criminal cases in order that respect for law and the administration of justice should be maintained. It is a noble plea, unfortunately, without precedent to support it.

Justice Holmes puts the matter on more precise footing by appealing directly to general policy and concluding it is more important that the government obey the law than that a few criminals escape. He also recognizes that the *Weeks Case* showed the way to a method for testing such questions which is the only reason given for the common law restriction. Finally, he states that all the reasons which lead to the exclusion of evidence obtained by constitutional illegalities apply equally where the illegality arises only from a statute. It is a pity that these points of view were not more fully developed for they seem more substantial than those set forth by Justice Brandeis. As already stated, Justice Butler did not pass on this point and Justice Stone wrote no opinion.

The thought suggests itself, what if the statute violated had been enacted by Congress? There is nothing in the majority opinion to justify the expectation of a different result and yet a statement by Justice Holmes somewhat indicates that a distinction existed in the minds of some of the judges. It may be that some of the silent judges composing the majority might join the minority in reaching a different result if a United States statute had been violated, and it will be interesting to watch such a case should it arise.

The difference of opinion in the *Olmstead Case* may be likened to the conflict of authority among the various states. In both problems the fundamental reasons are the same. It is surprising to find the United States Supreme Court, which has really developed the new rule as to violations of the constitution, side with its opponents when facing violations merely statutory. It may be that the Supreme Court is preparing to modify its former views. The statement of Justice Taft that the *Gouled Case* carried "the inhibition against unreasonable searches and seizures to the extreme limit" may be such indication. It seems to me that both questions

call for the same answer. If the original seizure was unlawful and can be attributed to governmental act, use of the evidence should be prohibited.

In the end, it comes to a question of general policy. Is it better that a few offenders go free and respect for the law be maintained, or is it better that society be protected against the mistakes of overzealous officers and they be punished independently? The answer depends on the point of view. There is no doubt that in many cases the evidence might have been seized under a search warrant, wherefore the courts are reluctant to deprive the state of what might, with a little care, have become available. It is also an open question whether unlawful searches will be more readily restrained by barring the evidence or by independent proceedings against the offenders. Neither curb seems to have been successful in the recent past. The federal rule is undoubtedly also in the spirit of the privilege against self-incrimination, if not within its logic. Modern ideas tend to discredit that privilege and perhaps call for an entire reconsideration of our bill of rights, including such doubtful benefits as due process of law under the fourteenth amendment. But that leads us to a wider field than can here be discussed.

(b) RECENT SUPREME COURT DECISIONS ON WHAT
ARE ILLEGAL SEIZURES

At the time my previous article was in the press the *Gouled Case* was before the Supreme Court. Certain questions had been certified⁹³ which presented three important subjects for the first time to the Supreme Court: was a taking by trickery within the condemnation of the fourth amendment, was a search warrant for evidence only a violation of the fourth amendment, can property seized for one crime be used on a trial for another?

On the question of trickery the Supreme Court in the *Gouled Case* decided in favor of the defendant on the ground that trickery was the equivalent of force, much as fraud is often held to be the equivalent of force. This decision was characterized by Judge Taft in the *Olmstead Case* as carrying the inhibition "to the extreme limit."

Both the other questions in the *Gouled Case* were also decided

⁹³(1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647. See 34 Harv. L. Rev. 386, 35 Harv. L. Rev. 694.

in favor of defendant. The Supreme Court made a memorable statement of the purposes for which search warrants may be used

“ they may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.”

Since then the Supreme Court has decided that consent is not to be inferred from mere passivity,⁹⁴ that seizure without warrant after arrest in a dwelling distant from the arrest is unjustified,⁹⁵ but that trespass does not prevent the use of knowledge obtained by eyesight.⁹⁶ That general warrants are void and that the things to be seized must be particularly described has been reaffirmed.⁹⁷ There must also be more than suspicion in the affidavit on which the warrant was based.⁹⁸ What constitutes a sufficient statement of probable cause has been recently under review;⁹⁹ and this is a question to be determined by the court, not the jury¹⁰⁰ Where the seizure was lawful other unlawful acts do not render the evidence inadmissible.¹⁰¹

The protection of the fourth amendment does not extend to open fields,¹⁰² nor to a bankrupt’s books when in the hands of the trustee.¹⁰³

⁹⁴*Amos v. United States*, (1921) 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654. See 5 MINNESOTA LAW REVIEW 465.

⁹⁵*Agnello v. United States*, (1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145. See 35 Yale L. J. 612.

⁹⁶*Hester v. United States*, (1924) 265 U. S. 57, 44 Sup. Ct. 445, 68 L. Ed. 898. See also *United States v. Lee*, (1925) 274 U. S. 559, 47 Sup. Ct. 746, 71 L. Ed. 1202. See 35 Yale L. J. 382; 37 Yale L. J. 270.

⁹⁷*Marron v. United States*, (1927) 275 U. S. 192, 48 Sup. Ct. 74. See 34 Harv. L. Rev. 381, note 127 28 Col. L. Rev. 383.

⁹⁸*Byars v. United States*, (1927) 273 U. S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520. See 34 Harv. L. Rev. 381, note 128 382, note 130 6 MINNESOTA LAW REVIEW 602.

⁹⁹*Steele v. United States*, No. 1 (1925) 267 U. S. 498, 45 Sup. Ct. 414, 69 L. Ed. 757 and *Dumbra v. United States*, (1925) 268 U. S. 435, 45 Sup. Ct. 546, 69 L. Ed. 1032. See 34 Harv. L. Rev. 382, note 134.

¹⁰⁰*Steele v. United States*, No. 2, (1925) 267 U. S. 505, 45 Sup. Ct. 417 69 L. Ed. 761.

¹⁰¹*McGuire v. United States*, (1927) 273 U. S. 95, 47 Sup. Ct. 259, 71 L. Ed. 556. See 25 Col. L. Rev. 497

¹⁰²*Hester v. United States*, (1924) 265 U. S. 57 44 Sup. Ct. 445. 68 L. Ed. 898.

The rights of corporations have been more precisely defined.¹⁰⁴ A reasonable subpoena cannot be attacked, since a corporation cannot plead immunity from self-incrimination.¹⁰⁵ But the court did not suppose that Congress in the Federal Trade Act intended to permit fishing expeditions, since these would violate the fourth amendment.¹⁰⁶

All the foregoing decisions were unanimous and they follow quite normally from earlier decisions of the Supreme Court.

It must not be forgotten that not all searches without warrant are prohibited.¹⁰⁷ Many of the cases heretofore cited from the various states held the evidence admissible not only because they rejected the federal rule but also because the search was deemed lawful. In *Carroll v. United States*¹⁰⁸ the Supreme Court held not unreasonable the seizure of an automobile and its search for liquor without warrant where the officer had reasonable cause to believe a crime was being committed under the liquor laws. The decision was based in part on the ground that the thing seized was contraband, in part because it was in a moving vehicle, and in part because of the language of the Act of Congress exempting the seizing officer from personal liability when he had probable cause. Justices McReynolds and Sutherland dissented on the ground that the Volstead Act did not justify arrest without warrant unless the officer discovered a person in the act of committing a crime, that mere belief a crime was being committed justified neither arrest nor seizure and that, in fact, there was here no probable cause for such belief.

The Supreme Court, on the other hand, has refused to follow some of the state courts¹⁰⁹ which permit the use of contraband

¹⁰³Ex parte Fuller, (1923) 262 U. S. 91, 43 Sup. Ct. 496, 67 L. Ed. 881. See 34 Harv. L. Rev. 379, note 112.

¹⁰⁴See 34 Harv. L. Rev. 374, notes 74-79.

¹⁰⁵Essgee Co. v. United States, (1923) 262 U. S. 151, 43 Sup. Ct. 514, 67 L. Ed. 917.

¹⁰⁶Federal Trade Com. v. American Tobacco Co., (1923) 264 U. S. 298, 44 Sup. Ct. 336, 68 L. Ed. 696. See 34 Harv. L. R. 383, note 138, 36 Harv. L. Rev. 340. See also article by M. Handler, 28 Col. L. Rev. 708.

¹⁰⁷See 34 Harv. L. Rev. 370, note 53, 27 Col. L. Rev. 300.

¹⁰⁸(1925) 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543. See 23 Mich. L. Rev. 891 9 MINNESOTA LAW REVIEW 474 6 Or. L. Rev. 177 32 Yale L. J. 490. The rule of this case has been made the law of Florida by statute. 1 Fla. Gen. Laws, 1927 ch. 12257

¹⁰⁹State v. Chucola, (1922) 32 Del. 133, 120 Atl. 212. State v. Pluth, (1923) 157 Minn. 145, 195 N. W. 789. State v. Krinski, (1905) 78 Vt. 162, 62 Atl. 37 See 19 Ill. L. Rev. 303 35 Yale L. J. 512.

evidence unlawfully seized. This question was involved in several recent cases,¹¹⁰ although not discussed in the opinions.

It will also be remembered that the protection of the fourth amendment was, a long time ago, extended to letters in the mail.¹¹¹ Does it also extend to telephone and telegraph messages? It would seem that the seizure of a telegraph blank with a message written on it from the possession of the accused is a clear violation on familiar grounds. A seizure from the other party, not a defendant, or from the telegraph company, seems also not a violation as to defendant, upon the familiar principle that only the owner or person in whose possession the property was may object.¹¹² But there has been no decision on this subject by the Supreme Court of the United States.¹¹³ In regard to a memorandum of a telephone message the same considerations as these would apply

But suppose that no tangible paper has been seized and the message—whether telephonic or telegraphic—has been intercepted by wire tapping. This, in the case of a telephone message, has been held by the Supreme Court in the *Olmstead Case*¹¹⁴ not a violation of the fourth amendment.

Justice Taft, for the majority, bases this partly on the very narrow ground that the fourth amendment contemplated only material things, the language of the amendment being "person, house, papers, effects." A double distinction is made as to letters they are tangible and under the peculiar protection of the government because of its monopoly. He points out, however, that governmental compulsion which is the principle of the amendment and the basis of the various decisions, was absent in the case at bar.

Justice Brandeis pleads for an extension of the language of the fourth amendment to cover its purpose as protection of privacy. He points to numerous instances in which the constitution has been extended to matters which could not have been contemplated by the framers but which are within the spirit of the pertinent

¹¹⁰*Amos v. United States*, (1921) 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 645, *Agnello v. United States*, (1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145, and *Gambino v. United States*, (1927) 275 U. S. 310, 48 Sup. Ct. 137.

¹¹¹*Ex parte Jackson*, (1877) 96 U. S. 727, 24 L. Ed. 877.

¹¹²See 34 *Harv. L. Rev.* 375, notes 82, 84, 85.

¹¹³See *Carroll v. United States*, (1925) 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 reserving this point and dictum in *Agnello v. United States*, (1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145.

¹¹⁴(1928) 48 Sup. Ct. 564. (Rehearing denied October 8, 1928) See 41 *Harv. L. Rev.* 258.

constitutional provision. He pictures further possible extensions by means of scientific discoveries of invasion against privacy which should be within the protection of the fourth amendment. The *Boyd Case* is quoted for its explicit emphasis on the true meaning of the fourth amendment, not force exerted on material things but the invasion of personal security and privacy.

He also quotes in a foot note from the brief of counsel for the telephone companies who, as amicus curiae, argued for the application of the constitutional guaranties on the ground that by no other method could citizens be safeguarded from unjustifiable interference in their private lives.

Justice Holmes, in passing, states some doubt on the subject but characteristically expresses sympathy with the point of view which seeks the spirit even if disregarding the letter.

Justice Butler makes the point rather strangely overlooked by both Justices Taft and Brandeis that wire tapping involves a physical interference which can very aptly be described as a search, if perhaps not so aptly as a seizure. He also relies on the *Boyd Case*.

In *Boyd v. United States*¹¹⁵ there was neither search nor seizure of any kind. Defendant produced papers at the request of the government, not in obedience to any subpoena carrying punitive force, but merely to avoid the effect of a presumption otherwise applicable against him. Nevertheless the court held that there had been an illegal seizure.

It must be realized, however, that in the *Boyd Case* and all the other cases since decided by the Supreme Court there was some form of direct compulsion by the government on defendant or his property. In the *Olmstead Case* there was no compulsion whatever, no act which acquired sanction because of governmental authority. The acts of the agents were secret and unknown to defendant. The decision of the majority therefore, seems sound so far as the fourth amendment is concerned, although unfortunate, if within existing precedent, on the broader question of illegally obtained evidence.

(c) AS TO SELF-INCRIMINATION

There has been much difficulty with the inter-relation between the fourth and fifth amendments.¹¹⁶ The application

¹¹⁵(1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

¹¹⁶See 34 Harv. L. Rev. 366, 367 notes 31-35.

of the fifth to all cases where the fourth also applies seems to have been taken for granted by the Supreme Court in the *Gouled Case*¹¹⁷ despite contrary intimations in *Adams v. New York*¹¹⁸ and the vigorous criticism of this doctrine by Wigmore.¹¹⁹ While on logical principles Wigmore is undoubtedly correct, historical considerations are probably responsible for the decision of the Supreme Court. It must be remembered that in the *Boyd Case*¹²⁰ what was really self-incrimination was held also to be an unlawful search, so that it is not surprising to find the use of evidence obtained by unlawful searches also held tantamount to self-incrimination. The matter seems to have received no further attention from the Supreme Court. The conclusions of the *Gouled Case* were simply followed in *Agnello v. United States*.¹²¹ In the *Olmstead Case*¹²² the court appreciated the dependence of the one on the other by concluding that the fifth amendment had no application unless the fourth was first violated.

As we have noted, Judge Cardozo in *People v. Defore*¹²³ discusses the confusion between the two amendments. He leans toward the conclusion of Wigmore and various courts in making the test of self-incrimination "testimonial compulsion" which would exclude searches and seizures from its scope. But he reserves the question whether perhaps the unlawful seizure of evidential matter which could not have been seized under a search warrant might violate the privilege against self-incrimination.

In *Commonwealth v. Dabbiero*¹²⁴ the supreme court of Pennsylvania in its first consideration of the subject of illegal searches considers it solely from the point of view of self-incrimination. The court considers merely the language of the constitution and concludes that the ordinary meaning of that language does not support the claim of the defendant.

It will be interesting to see how such states as New York and Pennsylvania will treat a case in which purely evidential matter is unlawfully seized and objection is taken under the privilege against self-incrimination.

¹¹⁷(1921) 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 467 See 20 Mich. L. Rev. 394.

¹¹⁸(1904) 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

¹¹⁹4 Wigmore Evidence, 1st ed. 3122-3127 see also 31 Yale L. J. 518.

¹²⁰(1886) 116 U. S. 616, Sup. Ct. 524, 29 L. Ed. 746.

¹²¹(1925) 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145.

¹²²(1928) 48 Sup. Ct. 564.

¹²³(1926) 242 N. Y. 13, 150 N. E. 585. See page 7 supra.

¹²⁴(1927) 290 Pa. St. 174, 138 Atl. 679.