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Admissibility of Evidence Illegally Seized--(Affirmative View)

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only prevention or remedy. Assuming that the federal courts had no constitutional authority for their stand, and no justification except that the interest of the public demanded the abrogation of a strict rule of evidence their position would not be open to attack. However the federal rule, being based upon fundamental constitutional rights and the necessity of preserving those rights to the people of the U. S., is fast meeting with the approval of state courts of last resort.

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ADMISSIBILITY OF EVIDENCE ILLEGALLY SEIZED—(AFFIRMATIVE VIEW). —Defendant was charged with keeping and exposing for sale intoxicating liquors. Before the trial he filed a petition for the return of two bottles of whisky taken from him by an officer without a warrant, which was denied. On the trial the defendant objected to the admission of the liquor in evidence on the ground that it was illegally seized. The objection was overruled. This ruling was sustained by the Supreme Judicial Court of Massachusetts which held that the competency of evidence is determined by its inherent probative value rather than upon outside circumstances. *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N. E. 11 (1923).

Briefly, the question raised is the admissibility in a criminal case of evidence illegally seized for the purpose of convicting the owner of that evidence.

The federal rule, as enunciated in *Boyd* v. *United States*, 116 U. S. 616 (1885); *Weeks* v. *United States*, 232 U. S. 383 (1914); and *Gouled* v. *United States*, 255 U. S. 298 (1921), is—where the federal government or its agencies has obtained possession of property of a defendant thru an unlawful search and seizure, and such defendant has made a timely demand for the return thereof, which demand has been denied, such property cannot be used in evidence against him without a violation of the fourth and fifth ammentments to the federal constitution. This is called the federal exclusion rule.

The emphatic stand of the Kentucky courts is clearly established by the decision in *Walters* v. *Commonwealth*, 199 Ky. 182, 250 S. W. 839 (1923), where it was held that the admission of evidence under the above circumstances was violative of the state constitutional provisions against unreasonable search and seizure and compulsory self-incrimination.

It is the purpose of this note to briefly state the law in those jurisdictions where the federal exclusion rule is rejected and to attempt to show wherein those jurisdictions have the preferable rule.

The law in those courts that admit evidence illegally seized is very well settled. The contentions they make are that the admission of evidence is not affected by the way it was obtained, whether lawful or unlawful, that it is not violative of the constitution, and that the tried and established rules of evidence support their holdings. *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (1926). Where defendant's room was searched without a warrant for a stolen overcoat and a blackjack

was found, for which defendant was indicted. *State* v. *Black et al.*, (N. J.) 135 Atl. 685 (1926). Where books of a corporation were seized unlawfully and defendants were indicted for conspiracy. *Commonwealth* v. *Hunsinger*, 290 Pa. 185, 138 Atl. 683 (1927). Where intoxicating liquor was seized under an invalid search warrant and defendant was indicted for the possession of it. *People* v. *Mayen*, 188 Cal. 237, 205 Pac. 435 (1922). Where papers and other articles were seized under an improper search warrant and defendant was indicted for an attempt to commit larceny.

This was undoubtedly settled as the correct rule of evidence both in England and the United States prior to the appearance of the ill-starred Boyd case, which introduced a novel doctrine into the law of evidence. *Legatt* v. *Tollervey*, 14 East 302 (1811); *Commonwealth* v. *Dana*, (Mass.) 2 Met. 329 (1841); Wigmore on Evidence, Vol. 4, Sec. 2184. The rule had been followed for almost a century since the adoption of the constitution. The fourth and fifth amendments were recognized as operative; yet, until the introduction of the rule in this and subsequent cases, it was never doubted that the admission of evidence illegally seized was not a violation of either. 19 Ill. Law Review 303. It was almost thirty years later that this doctrine was first followed by the court that created it. *Weeks* v. *United States*, supra. Meanwhile, it was practically repudiated by *Adams* v. *New York*, 192 U. S. 585 (1904).

Now, since this is a novel doctrine that seeks both to alter a fundamental rule of evidence and to give a meaning to two of our constitutional amendments heretofore not attributed to them, it is altogether fitting and proper that we understand the impelling reasons for this radical move.

There are two broad grounds used to support the federal exclusion rule. First, there is the practical argument; or the consequences that would ensue if the rule were otherwise. Second, there is the constitutional argument; or the contention that a different ruling would violate the search and seizure amendment or the self-incriminatory amendment or both.

Dealing with the first contention, we find the courts arguing to the effect that it would break down and shatter on the rocks the fundamental principles and inalienable rights that we have sought so long to keep as the most sacred and cherished possessions of society; that if the federal exclusion rule were not adopted the secrecy and privacy of the home could no longer be maintained, and the age-old tradition that "a man's home is his castle" would no longer remain fixed in the hearts of mankind as the most comforting security. *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860 (1920). Professor Wigmore calls this "misguided sentimentality." Sec. 2184.

As a matter of fact if the federal exclusion rule is adopted for this purpose the principle that "the means adopted should be adapted to the end sought" is not being followed, for it does not cure the evil. The officer is not punished by permitting the criminal to go free. If

the high-handed policeman gloats in rampaging thru a man's house under apparent color of authority, it is no deterrent to him that the conviction fails by virtue of his unlawful act. We should remedy the situation, not by creating another evil, but by appropriate legislation to destroy it directly.

Even the federal courts will admit the evidence if there is a valid search warrant. They do not, in their argument as to the practical consequences, go behind the issuance of the search warrant and let the test be probable cause for the issuance of it. The small amount of probable cause required to evade the rule permits the same evil to remain. "A Critique of the Carroll Case," 29 Columbia Law Review 1068.

If it is the right of the citizens to remain secure in their homes and not have their privacy disturbed by officers of the law that the courts seek to protect, why is it then "they are not so scrupulous about evidence brought to them by others"? *People* v. *Defore*, supra. *Burdeau* v. *McDowell*, 256 U. S. 465 (1921). Where a private detective seized the evidence illegally for the purpose of using it for prosecution in a criminal case. *Schroeder* v. *U. S.*, 7 Fed. (2d) 60 (1925). Where a city policeman procured liquor from a car without a search warrant or probable cause. In both of these cases the court admitted the evidence.

Thus, having disposed of the practical argument, we will look to the contention that the admission of such evidence would be unconstitutional. The Boyd case said that the fourth and fifth amendments should be construed together, and that each was to throw light on the other in the interpretation of both. This seems to be a hard doctrine to support. First, let us look to the history behind the two amendments. The basis for the fourth was an outgrowth of the protest in Massachusetts against the Payton Case. Quincy, Mass. Reports 51 (1761), where it was held that general writs or "writs of assistance" might be legally granted, and the officers might, by that authority, search houses at will. This doctrine was also in question in *Entick* v. *Carrington*, 19 How. St. Tr. 1030 (1765) where the issuance of general search warrants was held to be illegal. The provision against self-incrimination, however, was embodied in the law before this time. It had its origin in the opposition by the law courts in England to the 'ex-officio' oath of the ecclesistical courts during the 16th and 17th century. It was passed on in Liburn's Trial, 3 How. St. Tr. 1315 (1636-1645) where it was held that defendant was not obliged to take an oath which would force him to answer all questions asked him. Wigmore on Evidence, Sec. 2250. It will also be observed that the fourth amendment is composed exclusively of the provision against unreasonable search and seizure and requisites for a warrant to search, while there are five distinct provisions in the fifth amendment. It would seem very logical that had the framers of the constitution intended that the self-incrimination clause be construed along with the search and seizure provision, they would have made it a part of that amendment rather

than inserted it into another amendment the provisions of which did not so strikingly "throw light on and help to interpret it."

It is illogical to suppose that these two amendments can be construed together. Wigmore on Evidence, Sec. 2264, p. 868. One is designated to protect an accused against compulsory testimony against himself in a criminal trial, and the other to punish the wrongful invasion of the home or unwarranted seizure of property, and render invalid legislation or judicial decisions having such effect. *Lawrence* v. *State*, 103 Md. 17, 63 Atl. 96, 104 (1906).

We will now attempt to show that the self-incrimination clause is not violated by the admission of evidence illegally seized. There is a direct split of authority as to whether this clause applies to evidence other than strictly testimonial acts of the defendant. *Banks* v. *State*, 207 Ala. 179, 93 So. 293 (1922) says that it does not. *Blum* v. *State*, 94 Md. 375, 51 Atl. 26 (1902) says that it does. It would seem tho, that to hold that it is self-incrimination to give as evidence property of the defendant illegally seized would be to give a construction to that provision that it does not merit.

Everyone will admit that the property, if procured legally, would not be inadmissible. Is it any the less incriminatory, any the less involuntarily given, or any the less the property of the accused to admit it in those cases? *People* v. *Defore*, supra, p. 589. As already shown, the courts will admit the evidence if seized illegally by private persons. What is the difference between an officer acting wholly outside his authority and a private citizen? They are subject to the same actions. They have committed the same act. Since the seizure is in no way authorized by the government it cannot be deemed as committed by it. The officer is no longer an agent of the state, but a private trespasser. He, and not the government is responsible for that trespass. *Commonwealth* v. *Wilkins*, supra, p. 13. The use of such evidence might be as injurious to the accused as a confession forced from him by torture, but since the constitutional provision is not violated the injurious consequences are not to be taken into consideration. *Commonwealth* v. *Dabbicenio*, 290 Pa. 174, 138 Atl. 679 (1927); *Commonwealth* v. *Hunsinger*, 290 Pa. 185, 138 Atl. 683 (1927). Hence, "documents or chattels obtained from the person's control without the use of process against him as a witness are not in the scope of the privilege." Wigmore on Evidence, sec. 2264, p. 865.

Let us now observe the other constitutional provision, which is an immunity against unreasonable search and seizure. Even less, can it be argued that the admission of evidence illegally seized is a violation of this amendment. First, looking at the context of the amendment itself, the provision is against unreasonable rather than illegal search and seizure. Unreasonable means not according to reason, while illegal means not according to law. A search and seizure might be absolutely unreasonable and be at the same time according to law, were it not for this amendment. Hence, it would seem apparent that the purpose of this amendment was to prevent the

agencies of the government from making legal searches and seizures that are unreasonable. It seems as tho this must necessarily be the extent of the immunity. *People* v. *Mayen*, 205 Pac. 435, p. 441. By the federal exclusion rule a double immunity is given the people. One against the legalization of a trespass, and the other affecting a rule of evidence. There is no provision that after the trespass is committed the evidence obtained in the course of the illegal act shall not be admitted. 19 Ill. Law Review 307. It might be urged that the admission of the evidence condones the method of obtaining it. But how can we sustain this argument in the face of the fact that the same court will subsequently prosecute the officer for the illegal act and will not recognize as a defense that the evidence was admitted in a prior trial. The trespass is complete when the property is seized. The government is not committing an illegal act. The individual is the offender. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U. S. 95, 99 (1927).

Finally, there is the fact that the federal exclusion rule violates a rule of evidence, in permitting improper grounds for objections. *State* v. *Fahn*, 53 N. D. 203, 205 N. W. 67, 69 (1925). This is not denied by the courts that support the exclusion rule, and is affirmed by all the great authorities on evidence. Wigmore on Evidence, sec. 2183, and Greenleaf on Evidence, sec. 254a. It would appear then that the courts would entertain some hesitancy in openly violating the rules of procedure laid down for them both by the common law and by their codes.

In light of the procedure in the federal courts and in those state courts that adopt the exclusion rule, is it not strange that the great mass of laymen wonder at the total inadequacy of the American legal system to cope with the present day prevalence of crime? It may be that the constitutional guarantees discussed in this paper have yielded benefits that were not deserved. "Neither of the amendments had a genesis that can be said to have been prophetic of the great repute they have come to enjoy. My impression is, that so many have been the criminals who have worshipped at the shrine of the amendments, and so seldom have honest and law-abiding men had occasion to seek their protection, that their adulation by the law-breaker has given the people at large a false conception of their proper breadth and compass." Jno. C. Knott, 74 Pa. Law Review 141.

We must be cautious in granting a creature powers that will enable it to be a thorn in the side of its creator, and vigilant to forestall a protector against wielding a sword that wounds its master.

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CRIMES—DUTY TO RETREAT "TO THE WALL".—In the Kentucky case of *Gibson* v. *Commonwealth*,[1] A was killed in a drunken brawl. B and C along with D were convicted of manslaughter. The decision of the

[1] 34 S. W. 926 (1931).