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# Admissibility of Illegally Obtained Evidence

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outside the state was held sufficient notice to satisfy the due process clause of the Constitution. The court said: "Enjoyment of the privileges of residence within the state and the attendant right to invoke the protection of its laws, are inseparable. . ."[66] from the various incidences of state citizenship.

Why cannot it be said that the enjoyment of the privilege to make contracts and do other acts within the state with the right to invoke the protection of the state laws be, as in relation to domicile, the reciprocal right of the State to cause submission to its jurisdiction for actions arising out of these specific acts enumerated in the statute? All the Constitution requires as to service is that it gives "reasonable assurance that the notice will be actual."[67] The sending of notice by ordinary mail by the Secretary of State after substituted service upon him has been held sufficient.[68] What would be better notice than service of the summons personally on the defendant?

The struggle by the states to acquire jurisdiction over nonresidents is finally nearing its goal. It seems only fair that a nonresident should be personally liable in the state where he has created the injury. The state where the action arose could try the case better because of its courts having judicial notice of their own laws, and also because the witnesses and evidence in the case would most certainly be in the local state. Section 17 of the Illinois Practice Act is most welcomed as in line with the gradual development of jurisdictional concepts.

[66] 311 U.S. 457, 463 (1940).

[67] International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[68] Wagenberg v. Charleston Wood Products, 122 F. Supp. 745 (E.D.S.C., 1954).

## ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

Evidence used in convicting the defendant of violating the California gambling laws had been obtained by the concealment of listening devices on defendant's premises and by numerous forcible entries and seizures without warrants. In reversing his convictions, the California Supreme Court, in *People v. Cahan*,[1] declared that the evidence used in convicting the defendant was seized in violation of both the California and U.S. constitutional provisions regarding search and seizure, and that such illegally obtained evidence should not have been entertained. The court expressly overruled its previous decisions (of some thirty-five years) about admission of evidence secured through an unlawful search and seizure,[2] laying emphasis on the fact that its new rule is not founded upon constitutional

[1] 282 P. 2d 905 (Cal., 1955).

[2] People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922); People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (1909); and "the cases based thereon."

or statutory provisions, but is merely a judicially created rule of evidence, which, as experience dictates, can be changed or nullified in the future by its own decisions, or by an act of the legislature.

By this holding, the California Supreme Court has, in a forthright and clear-cut manner, turned its back upon a long history[3] of steadfast enforcement of the common law rule that illegal search and seizure does not impart to evidence any characteristic that will effect its admissibility.[4] The court points up and in a sense fosters the distinction raised in *Wolf v. Colorado*[5] that the enforcement of the prohibition against unlawful search and seizure is an issue entirely separate from the prohibition itself, and that it does not necessarily follow from the prohibition that evidence secured in its violation must be excluded. It reiterates the proposition in the *Wolf* case that the due process clause of the 14th Amendment demands that the people be free from unreasonable search and seizure, and that such freedom be protected by more than an empty sanction. The court, reviewing other methods of enforcing this right of privacy, decided that a tort remedy for damages was unsatisfactory because no more than actual damages could be collected,[6] and since, as a rule, these would be small, there is little inhibiting effect, if any, upon the law enforcement officers. The other method of insuring the right of privacy, namely a criminal penalty, was rejected after a consideration of the number of prosecutions under the existing statutes.[7] Thus, by a process of elimination, the court settled upon the pros and cons of the exclusionary rule, deciding in the end that the only way to effectuate the prohibition against unlawful search and seizure was to refuse to entertain such illegally obtained evidence.

The court was careful to say that it is not bound by the decisions that have applied the federal rule and seems to foresee the necessity of formulating its own workable rule in such a manner as to avoid the needless refinements and distinctions to which other jurisdictions might have fallen prey. Thus, the court has adopted the general principle of the federal courts, that evidence obtained through an unreasonable search and seizure is inadmissible, emphasizing that for the moment, the principle is all that is

[3] People v. Haeussler, 41 Cal. 2d 252, 260 P. 2d 8 (1953); People v. Kelley, 22 Cal. 2d 169, 137 P. 2d 1 (1943); People v. Gongales, 133 Cal. App. 429, 24 P. 2d 553 (1933); People v. Mayen, 188 Cal. 237, 205 Pac. 535 (1922); People v. Le Doux, 155 Cal. 353, 102 Pac. 517 (1909).

[4] McCormick, Evidence § 137 (1954).

[5] 338 U.S. 25 (1949).

[6] Wallis, Measure of Damages When Property Is Wrongfully Taken by a Private Individual, 22 Harv. L. Rev. 419 (1909).

[7] 62 Stat. 696 (1948), 18 U.S.C.A. (1954) § 242. See Appendix to opinion of Mr. Justice Douglas in Irvine v. California, 347 U.S. 153 (1954).

being adopted and that it has a clear field ahead in modifying and applying the rule.

The federal exclusion rule made its first appearance in the case of *Boyd v. U.S.*[8] where the Supreme Court declared unconstitutional a portion of a customs statute which required the production of private papers under penalty of having allegations of opposing attorney taken as confessed. The court declared that to require such production would be equivalent to requiring a man to be a witness against himself, and in addition would be tantamount to a forcible search and seizure. By this decision, not only did the statute go down but also did the common law rule of admissibility. The rule was followed until 1904 when in *Adams v. N.Y.*[9] the Supreme Court was asked to apply the new Federal rule to a state proceeding. There the defendant had appealed to the U.S. Supreme Court from a conviction under the New York gambling laws, assigning the admission of illegally seized evidence as error. The court said that if there had been an illegal search and seizure, the admission of such evidence would not have violated the United States Constitution in any case, and for that reason the court did not discuss whether the Fourth and Fifth Amendments applied to the states. While some of the text writers point to that case as a repudiation of the *Boyd* doctrine, other cases up until the time of *Weeks v. U.S.*[10] speak of the *Boyd* case with respect.[11] The *Weeks* case, decided in 1913, was the first time the issue of admissibility was decided predominantly on the Fourth Amendment. Previous decisions cited the *Boyd* doctrine as being mainly a question of self-incrimination, as where legal pressure is put on a person to produce private papers, the legal pressure being equivalent to a search and seizure, and the production of the private papers being the self-incrimination. The *Weeks* case involved the search of a private residence without a warrant. In deciding that such evidence was inadmissible, the court saw fit to distinguish its problem from that in the *Adams* case by the fact that in this case, application had been made in due season for the return of the seized articles, and that the court's refusal had been in violation of the accused's rights. Thus, the use of the articles in the criminal trial amounted to prejudicial error. The approach was much the same as in the *Boyd* case, namely, "A man's home is his castle"; however, the emphasis was put more on the search and seizure as a violation of the Fourth Amendment.

Having been spearheaded by the federal courts, the adoption of the rule spread to the states in what Professor Wigmore called "misguided senti-

[8] 116 U.S. 616 (1886).

[9] 192 U.S. 585 (1904).

[10] 232 U.S. 383 (1914).

[11] Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Hale v. Henkel, 201 U.S. 43 (1906); Bullmann v. Fagin, 200 U.S. 186 (1906).

mentality."[12] Since the basis of the exclusion rule is not the reliability of the evidence, or the fact that it might be misleading, but rather the invasion of a person's constitutional right of privacy, the right of redress or objection attaches only to the person whose rights have been invaded. Also, since the Fourth Amendment's prohibition is directed at federal action, there have developed over the years, decisions which might be termed exceptions to the general rule:

1) The illegal search and seizure must be made by a Federal officer, or one in collusion with him to come within the rule.[13]

2) The illegal search and seizure must constitute an injury against the person invoking the rule,[14] either against his person or his property without his consent.[15]

Since the *Weeks* case softly reiterated the rule that a court will not stop in the midst of a trial to try collateral issues and since it was on this point that the court distinguished itself from the *Adams* case, the rule developed in the federal courts that a timely pre-trial motion must be made before the court will consider the illegality through which the evidence was secured. In recent years, the federal courts have relaxed this rule to allow the subject to be first considered at the trial if the facts regarding the unlawful seizure are not disputed,[16] or if the defendant did not know of the grounds for the motion.[17] The Federal Rules of Criminal Procedure have abrogated the rule even further by making it discretionary with the court whether or not the motion will be heard at the trial.[18] Some states follow the older federal rule and require a motion before the trial,[19] and others allow the issue to be determined by motion during the trial.[20]

The question of whether or not the federal rule of exclusion as a guarantee of the right of privacy is applicable to the states through the due process clause of the Fourteenth Amendment was presented to the United States Supreme Court in the *Wolf* case and reaffirmed recently in *Irvine v. California*.[21] There, the issue was put squarely before the court, and while the court recognized the principle of the Fourth Amendment as applying to the states through the Fourteenth Amendment, it declared that

[12] 8 Wigmore, Evidence § 2184 (3d ed., 1940).

[13] Rettich v. U.S., 84 F. 2d 118 (C.A. 1st, 1936); Bookbinder v. U.S., 287 Fed. 790 (C.A. 3d, 1923).

[14] Safarik v. U.S., 62 F. 2d 892 (C.A. 8th, 1933).

[15] Ah Fook Chang v. U.S., 91 F. 2d 805 (C.A. 9th, 1937).

[16] Agnello v. U.S., 269 U.S. 20 (1925).

[17] Gouled v. U.S., 255 U.S. 298 (1921).

[18] Fed Rules Crim. Proc. 41 (c); U.S. v. Asendio, 171 F. 2d 122 (C.A. 3d, 1948).

[19] People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).

[20] Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920).

[21] 347 U.S. 128 (1954).

the exclusion rule was merely a means of enforcing that principle, and was not essential to it. However, the wording in both cases was such as to leave the door open for the court later to declare that the due process clause demands such exclusion.

Illinois adopted the exclusion rule over thirty years ago in the case of *People v. Brocamp*.[22] There the court reaffirmed the proposition that a court will not stop to try collateral issues, but added that where timely motion for the return of illegally seized evidence has been made before the trial, it is error to admit such evidence. Later it was declared that the court can postpone determination of the motion to some time during the trial, so long as the motion was made before trial,[23] failure to make the motion at the proper time constituting a waiver of the objection.[24] However, if the motion is overruled the defendant must still object to the admission of the evidence at the trial in order to keep the issue alive so that it can be brought up again on appeal.[25] For the same reasons as in the federal courts, the Illinois exclusionary rule requires that the search and seizure be done by state officials or those in collusion with them, and that the person objecting be the person whose rights were invaded. Thus, it can be seen that the application of the rule in Illinois is very similar to that in the federal courts.

*People v. Berger*,[26] a companion case handed down on the same day and by the same court as the *Cahan* case, presented the additional questions of whether photostats of illegally seized evidence which had been returned on order of a previous mandamus proceeding could be introduced as evidence and whether the issue of search and seizure could be brought up at the trial without having been preceded by a pre-trial motion. The court held, citing *Silverthorn Lumber Co. v. U.S.*,[27] that the photostats were just as tainted by the unlawful search and seizure as the original evidence and for that reason are inadmissible. As to the timeliness of the objection, the court found no problem in holding that as a matter of practicality the question could be brought up at the trial without a preliminary motion. Thus, in two swift steps California has adopted the federal rule, giving it the same stature as other rules of admissibility.

The court in the *Cahan* case followed the lead in the *Irvine* case and without hesitation applied the exclusion rule to evidence obtained by dictographs which were placed on the defendant's premises by trespassing of-

[22] 307 Ill. 448, 138 N.E. 728 (1923).

[23] People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932).

[24] People v. Dalpe, 371 Ill. 607, 21 N.E. 2d 756 (1939).

[25] People v. Reid, 336 Ill. 421, 168 N.E. 344 (1929); People v. Saltis, 328 Ill. 494, 160 N.E. 86 (1928).

[26] 282 P. 2d 509 (Cal., 1955). [27] 251 U.S. 385 (1920).

ficers. The problem immediately brought to mind is whether the technical physical trespass to the home made in the process of secreting the devices or whether the eavesdropping by means of the device constituted a violation of the Fourth Amendment. More fundamentally, the question is whether the Fourth Amendment is truly a guarantee of a right to privacy in every sense of the word or is it merely a guarantee of a right to be free from trespass by meddling officials? The *Boyd* case understood the scope of the Fourth Amendment to include a constructive search and seizure by force of a statute, while later in *Goldman v. U.S.*[28] where a detectograph (amplifier) had been used to eavesdrop on private conversations, the court seemed to turn its decision on whether or not there had been a technical trespass. Certainly, the use of an amplifier to overhear conversations on the other side of a wall is just as much an invasion of privacy as the use of a dictaphone secreted by breaking and entering, yet the former is not within the prohibition of the Fourth Amendment, while the latter, because of the trespass is. The same principles are illustrated in the famous case of *Olmstead v. U.S.*[29] where wire tapping was held not to violate the Fourth Amendment. Thus, the law today seems to hinge on the fact of whether or not a technical trespass has been committed in the process of delving into a person's privacy. One wonders if the California Supreme Court in the *Cahan* case has made a sweeping condemnation of the principle of unreasonably invading a person's privacy whether it is by means of a dictograph, detectograph or battering ram, or whether it has merely condemned the trespass committed incidentally in such invasion. As the methods of scientific investigation progress, the question will have to be answered.

[28] 316 U.S. 129 (1942).

[29] 277 U.S. 438 (1928).

## DISCHARGED SERVICEMEN NOT CONSTITUTIONALLY AMENABLE TO COURTS-MARTIAL JURISDICTION

The amenability of an ex-serviceman to trial by court-martial for crimes allegedly committed while in the military service came before the United States Supreme Court this term in *Toth v. Quarles*.[1] The Court determined that a military tribunal had no jurisdiction over the discharged veteran and declared unconstitutional Article 3 (a) of the Uniform Code of Military Justice[2] which purported to give the military

[1] 76 S. Ct. 1 (1955).

[2] 64 Stat. 109 (1950), 50 U.S.C.A. § 553 (a) (1951) which provides: "Subject to the provisions of section 618 of this title, any person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chap-