EVIDENCE

Admissibility of Evidence Obtained by Illegal Search and Seizure

The recent Ohio case of *State* v. *Lindway*[1] again brings to the front a question upon which courts have fluctuated from the time of *Boyd* v. *U. S.*[2] and upon which there is a diversity of opinion among text and writers of law review articles. This question is that of the admissibility of evidence obtained by illegal search and seizure.[3]

It was a generally recognized common law rule that any evidence which is competent, material and relevant and which is not barred by any special rule of evidence will be admissible and the courts will not inquire into the manner in which the evidence was obtained.[4] This rule was first questioned in the Boyd case. Since that time, though with a temporary change of heart in *Adams* v. *New York*,[5] the Supreme Court of the United States has held that when evidence is obtained by an illegal search and seizure, its use will be in violation of the fourth amendment and it is therefore inadmissible.[6] In some of its later opinions the Supreme Court of the United States has held that the use of such evidence is a violation of both the fourth and fifth amendments.[7]

The state courts have been greatly influenced by the United States Supreme Court's decisions and by the popular prejudice against search and seizure under the eighteenth amendment. In 1920 three states at the most followed the Federal rule,[8] today there are eighteen states

[1] 131 Ohio St. 166, 2 N.E. (2d) 255, 5 Ohio Op. 538 (1936).

[2] 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

[3] For some general review of cases and the problem involved, see 23 Mich. L. Rev. 748, 13 Minn. L. Rev. 1, 24 A.L.R. 1408, 32 A.L.R. 408, 41 A.L.R. 1145, 52 A.L.R. 477, 88 A.L.R. 348, 34 Harv. L. Rev. 361.

[4] Wigmore, Evidence, Sec. 2183, *Shields* v. *State*, 104 Ala. 35, 16 So. 85 (1893); *State* v. *Flynn*, 36 N.H. 64 (1868); *Commonwealth* v. *Dana*, 2 Metc. (Mass.) 329 (1841); *Cohn* v. *State*, 120 Tenn. 61, 109 S.W. 1149 (1908); *Cluett* v. *Rosenthal*, 100 Mich., 193, 58 N.W. 1009 (1894).

[5] 24 Sup. Ct. 372, 192 U.S. 585, 48 L. Ed. 575 (1904) affirming 176 N.Y. 351, 68 N.E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675 (1903).

[6] *Weeks* v. *U. S.*, 34 Sup. Ct. 341, 232 U.S. 383, 58 L. Ed. 652 (1914).

[7] *Gouled* v. *U. S.*, 255 U.S. 298, 41 Sup. Ct. 261 (1921); *Amos* v. *U. S.*, 255 U.S. 313, 41 Sup. Ct. 266 (1921); 25 Col. L. Rev. 11.

[8] Mich., *People* v. *Marxhausen* (1919) 204 Mich. 559; 171 N.W. 557 Ky., *Youman* v. *Commonwealth* (1920) 189 Ky. 152, 224 S.W. 860, 13 A.L.R. 1303; Vermont, perhaps. See *State* v. *Slaymon*, 73 Vt. 212, 62 Atl. 37 (1901). However, the recent case of *State* v. *Story* (1932) 104 Vt. 379, 160 Atl. 257, reargument denied 104 Vt. 411, 160 Atl. 747 says *State* v. *Suiter* (1906) 78 Vt. 391, 63 Atl. 182, and *State* v. *Barr* (1905) 78 Vt. 97, 62 Atl. 93, had the effect of over-ruling *State* v. *Slaymon*, *supra*, 52 A.L.R. 477 states that only six states originally followed the Federal rule.

following this rule.[9] Twenty-seven states follow the common law rule of admissibility.[10] Maryland is difficult to classify.[11] In Rhode Island

[9] Florida, *Atz* v. *Andrews* (1922) 84 Fla. 43, 94 So. 329; Idaho, *State* v. *Arregui* (1927) 44 Ida. 43, 254 Pac. 788; Illinois, *People* v. *Castree* (1924) 311 Ill. 392, 143 N.E. 112; Indiana, *Callendar* v. *State* (1922) 136 N.E. 10, rehearing (1923) 193 Ind. 91, 138 N.E. 817; Ky., *Youman* v. *Commonwealth* (1920) 189 Ky. 152, 224 S.W. 860, 13 A.L.R. 1303; Michigan, *People* v. *Mitroff* (1925) 231 Mich. 661, 204 N.W. 726; Mississippi, *Williams* v. *State* (1922) 129 Miss. 469, 92 So. 584. This state held a statute, Miss. Law C. 244 par. 3, abolishing the federal rule and adopting the orthodox rule in liquor cases as unconstitutional in *Orick* v. *State*, 140 Miss. 184, 105 So. 465 (1925); Missouri, *State* v. *Owens* (1924) 302 Mo. 348, 259 S.W. 100; Montana, *State ex rel. King* v. *Dist. Ct.* (1924) 70 Mont. 191, 224 Pac. 862; Oklahoma, *Gore* v. *State* (1923) 24 Okla. Crim. Rep. 394, 218 Pac. 545; Oregon, *State* v. *McDaniel* (1925) 231 Pac. 965, affirmed (1925) 115 Oreg. 187, 237 Pac. 373; South Dakota, *State* v. *Gooder* (1931) 57 S. D. 619, 234 N.W. 610; Tennessee, *Hampton* v. *State* (1923) 148 Tenn. 155, 252 S.W. 1007; Texas, this state after many years of following the orthodox rule, by statute, Sec. 1, c. 49, Acts of 39th leg. (1925), Article 727A, Tex. Code Crim. adopted the Federal rule which was followed in *Odenthal* v. *State* (Tex. Crim. App. 1927) 290 S.W. 743; see 5 Tex. L.R. 424 (1927); Washington, *State* v. *Buckley* (1927) 145 Wash. 87, 258 Pac. 1030; West Virginia, *State* v. *Wills* (1922) 91 W. Va. 659, 114 S.E. 261; Wisconsin, *Hoyer* v. *State* (1923) 180 Wis. 407, 193 N.W. 89, 27 A.L.R. 73; Wyoming, *Wiggin* v. *State* (1922) 28 Wyo. 480, 206 Pac. 373.

[10] Alabama, *Shields* v. *State* (1893) 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17, 9 Am. Crim. Rep. 149; Arkansas, *Starchman* v. *State* (1896) 62 Ark. 538, 36 S.W. 940; California, *People* v. *Mayen* (1922) 188 Cal. 237, 205 Pac. 435; Colorado, *Roberts* v. *People* (1926) 78 Colo. 555, 243 Pac. 544; Connecticut, *State* v. *Reynolds* (1924) 101 Conn. 224, 195 Atl. 636; Delaware, *State* v. *Chuchola* (1922) 32 Dela. 133, 120 Atl. 212. This was a case of contraband; Georgia, *Williams* v. *State* (1897) 100 Ga. 511, 28 S.E. 624, 39 L.R.A. 269. Originally Georgia had the theory that evidence taken from illegal search of person was inadmissible. *Wright* v. *State* (1911), 9 Ga. App. 266, 70 S.E. 1126. This was overruled by *Calhoun* v. *State* (1916) 144 Ga. 679, 87 S.E. 893; Iowa, *State* v. *Lozier* (1925) 200 Ia. 652, 204 N.W. 256; Kansas, *State* v. *Miller* (1901) 63 Kans. 62, 64 Pac. 1033; Louisiana, *State* v. *Zeblit* (1922) 152 La. 594, 93 So. 912; Maine, *State* v. *Plankett* (1874) 64 Me. 534; Maassachusetts, *Commonwealth* v. *Mercier*, 257 Mass. 353, 153 N.E. 834; Minnesota, *State* v. *Hoyle* (1906) 98 Minn. 254, 107 N. W. 1130; Nebraska, *Billings* v. *State* (1923) 191 N.W. 721, 109 Neb. 596; Nevada, *State* v. *Chin Gin* (1924) 47 Nev. 431, 224 Pac. 798; New Hampshire, *State* v. *Ogelus* (1919) 79 N.H. 241, 107 Atl. 314; New Jersey, *State* v. *Gould* (1923) 99 N.J.L. 17, 122 Atl. 596; New Mexico, *State* v. *Dillon* (1929) 34 N.M. 366, 281 Pac. 474; New York, *People* v. *Defore* (1926) 242 N.Y. 13, 150 N.E. 585; North Carolina, *State* v. *Wallace* (1913) 162 N.C. 622, 78 S.E. 1, Ann. Cas. 1915B, 423; North Dakota, *State* v. *Lacy* (1927) 55 N.D. 83, 212 N.W. 442; Ohio, *State* v. *Lindway*, 131 Ohio St. 166, 2 N.E. (2d) 255; Pennsylvania, *Common-*

and Arizona the question remains open.[12] A slight turning back toward the orthodox view is seen in the recent Ohio case[13] and in Vermont's definite stand.[14] Even the Federal Court in *Olmstead* v. *United States*[15] has put a definite limit on its doctrine by stating that the only evidence obtained by illegal methods that will be inadmissible is that obtained in violation of a constitutional provision and not that obtained in violation of a state statute. The Federal doctrine is also limited by the rule that there must be a motion to suppress the evidence before trial or the evidence will be admissible.[16] Not all the states following the Federal rule apply this doctrine.[17] A further limitation on the Federal rule is that only evidence obtained illegally by Federal officers will be barred, not that obtained by state officers or private persons.[18] Since the state con-

wealth v. *Dabbierio* (1927) 290 Pa. St. 174. 138 Atl. 679. It is not certain that Pennsylvania should be placed in this class. This case merely said the use of evidence illegally obtained did not violate the self-incrimination clause of the Pennsylvania Constitution. It left the point undecided as to whether use of such evidence violated the illegal search and seizure clause; South Carolina, *State* v. *Campbell* (1925) 131 S.C. 357, 127 S.E. 439; Utah, *State* v. *Aime* (1923) 62 Utah 476, 220 Pac. 704; Vermont, *State* v. *Stacy* (1932) 104 Vt. 379, 160 Atl. 257, reargument denied, 104 Vt. 411, 160 Atl. 747.

[11] The reason for this is that in 1929, Maryland passed a law adopting the federal rule as to misdemeanors, Sec. 4A of Art. 35 of code, Ch. 194 Pub. Gen. Laws of Maryland (1929); *Gorman* v. *State* (1932) 161 Md. 700, 158 Atl. 903 applies this statute in a misdemeanor case. However in *Zukowski* v. *State* (1934) 175 Atl. 595 the court said in the absence of statute they would apply the orthodox view of admissibility.

[12] The nearest cases are *State* v. *Chester* (1925) 46 R. I. 485, 129 Atl. 596, and *Adkins* v. *State*, 28 Pac. (2d) 612, 42 Ariz. 534 (1934). In both of these cases the searches were held lawful.

[13] See note 10, *supra*.

[14] See note 8, *supra*.

[15] 277 U. S. 438, 48 Sup. Ct. 564, 72 L.Ed. 944 (1928). No case has been found dealing with the violation of a national statute distinct from the constitution.

[16] See note 6, *supra*. However in certain exceptional cases as where defendant did not know that illegally obtained evidence was to be used against him, such a motion was held unnecessary; *Amos* v. *U. S.*, 255 U.S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654 (1920); *Gouled* v. *United States*, 255 U.S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1926).

[17] *Griffin* v. *Commonwealth* (1925) 209 Ky. 143, 272 S.W. 403; *Kitlein* v. *State* (1925) Okla. Crim. Rep. . . ., 235 Pac. 625. As to necessity of such a motive see 1 U. of Chi. L. Rev. 120.

[18] *Bordeau* v. *McDonald*, 256 U.S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1054 (1926). However if state officers obtain such evidence at request of federal officers so that they are in reality agents of federal officers such evidence will be barred. *Gambino* v. *United States*, 275 U.S. 310, 48 Sup. Ct. 137 (1927). See note in 8 Boston U. L. Rev. 139, 16 Cal. L. Rev. 246, 28 Cal. L. Rev. 511, 23 Ill. L. Rev. 78, 12 Minn. L. Rev. 424, 6 Tex. L. Rev. 390, 37 Yale L. J. 784.

stitutional limits do not apply to Federal officers, it seems that evidence obtained illegally by Federal officers is admissible in state courts.[19] Another limitation is that it must be a violation of defendant's constitutional rights, not a third party's. That is, evidence illegally taken from A can be used against B.[20] Further an interest in either the property seized or property searched is required.[21, 22]

The question of admissibility of illegally obtained evidence has been the subject of a diversity of both opinion and theory in the State of Ohio. The first Supreme Court case of any significance was *Ciano* v. *State*.[23] This indicates that evidence is admissible though illegally obtained where there is no objection until trial. However, the court seems to say that if evidence were illegally taken and a motion to suppress such evidence was made before trial, the motion would be granted and the evidence would be inadmissible. The next cases were those of *Rosanski* v. *State*[24] and *Sabo* v. *State*.[25] They held that if a residence is not a bona fide dwelling, contraband taken by illegal seizure may be admitted in evidence regardless of a motion to suppress. These cases have caused some writers to classify Ohio as taking a middle ground on this question, viz; the contraband theory.[26] The contraband theory as such has received little support elsewhere nor does it seem to be relied upon in later Ohio cases. In *Porello* v. *State*,[27] the court, though holding the search lawful, said, "While there is some conflict in the question of returning evidence secured by a search without the issue of a warrant, the courts of twenty-eight states, including Ohio, hold that such evidence is admissible." Then in *Nicholas* v. *Cleveland*[28] and *Browning* v. *Cleveland*[29] the court held non-contraband property seized by illegal search to be

[19] *Walters* v. *Commonwealth*, 199 Ky. 182, 250 S.W. 839 (1923). This case declared that the evidence to be admissible must be procured under a valid federal warrant though such warrant was invalid in the state.

[20] *Holt* v. *United States*, 42 Fed. (2d) 103 (C.C.A. 6th 1930); *Kelly* v. *United States*, 61 Fed. (2d) 843 (C.C.A. 8th 1932); *State* v. *Laundy*, 103 Oreg. 443, 498, 204 Pac. 958, 206 Pac. 290 (1922); 17 Minn. L.Rev. 561 (1933).

[21] *Alvau* v. *United States* (C.C.A. 9th 1929), 33 Fed. (2d) 467. See 17 Minn. L.Rev. 551 as to amount of interest required.

[22] For material on the limitations and ramifications on the federal doctrine and for review of the federal cases see 34 Harv. L.Rev. 673, 694, 7 Minn. L.Rev. 152, 36 Yale L. J. 536.

[23] 105 Ohio St. 229, 137 N.E. 11 (1922).

[24] 106 Ohio St. 442, 140 N.E. 370 (1922).

[25] 108 Ohio St. 200, 140 N.E. 499 (1923).

[26] See Law Rev. Art. cited in note 3, *supra*.

[27] 121 Ohio St. 280, 168 N.E. 135 (1929).

[28] 125 Ohio St. 474, 182 N.E. 26 (1932).

[29] 126 Ohio St. 285 (1933).

inadmissible when there was a motion to suppress the evidence before trial. Lastly, in the recent case of *State* v. *Lindway*,[30] the court deliberately took the view that all evidence, contraband or non-contraband, is admissible though obtained by illegal search and seizure.

It is quite understandable that there should be this diversity of opinion both among the states and in one particular state for there is much to be said on both sides of this question. The decision must rest upon what is the best public policy. Are we going to let officers of the law have an unlimited freedom subject only to the action of trespass against them if they violate the constitutional provisions of unreasonable search and seizure? Or, are we, in order to prevent any interference with such constitutional guarantee, going to throw aside convicting evidence and let obvious criminals go free because an officer has blundered?

There is nothing conclusive in the rationalization of either of these views, though the argument in favor of admitting such evidence seems to be somewhat stronger.

Those who favor the Federal rule claim that if such evidence is received by the courts, the fourth amendment will be practically nullified, since the admission of such evidence will encourage officers of the law to violate the homes of our citizens without reasonable suspicion, thus leaving our citizens subject to an autocratic official body that knows no limits.[31] They add that the action of trespass against the officer is not adequate.[32] Therefore to uphold the fourth amendment such evidence will not be received. Furthermore those maintaining this view say that the admission of such evidence is also a violation of the fifth amendment against self incrimination.[33] The defendant could not be compelled to testify as to such evidence or produce such evidence by a *duces tecum* because it would be self-incriminating and so if the evidence is illegally taken it amounts to self-incrimination. Writers maintain that the fourth and fifth amendments overlap if not in history at least in spirit.[34]

On the other hand courts which uphold the common law or orthodox view of admitting such evidence and which are supported by the writings of Wigmore[35] take the practical view that the fourth amendment says nothing about evidence, that it is merely a check on the legis-

[30] See note 1, *supra*.

[31] See any of the cases in note 9, *supra*; 8 Am. Bar. Ass. J. 646, 22 Ky. L.J. 63, 62 Cent. L.J. 392, 25 Col. L. Rev. 11, 3 Oreg. L. Rev. 323.

[32] Law Rev. Art. materials in note 32, *supra*, and 13 Minn. L.Rev. 1, 15; 43 Yale L.J. 897.

[33] See note 7, *supra*, and note 34, *infra*.

[34] 25 Col. L. Rev. 11, 34 Harv. L. Rev. 361.

[35] 4 Wigmore, Evidence Sec. 2183, 8 Am. Bar Assn. J. 479.

lature so that that body may never declare an illegal official invasion of private rights not to be a trespass.[36] Wigmore and others demonstrate that the fourth and fifth amendments arose at entirely different times and in no way overlap.[37] The fifth amendment only applies to testimony by compulsion of legal process. "Witness" is the keyword of this amendment.[38] It does not say evidence will not be admissible because it is incriminating or if it is taken from the defendant but only if defendant is forced to say or do something by way of testimonial compulsion.[39] They point out that the motion to suppress rule of the federal court does not do away with a collateral issue because it is collateral no matter when presented and that if such evidence is inadmissible as in violation of the Constitution at one time, it should be at all times.[40] Constitutional rights are not lost by failure to object at a proper time. This view concludes with the practical argument that it is no way to aid society by letting both the criminal and trespassing officer go. Instead both should be punished.[41] There is the civil remedy of trespass against the invading officer.[42]

In the case of *State* v. *Lindway*[43] the officers found in their illegal search two shotguns, three revolvers, and a rifle, some loaded, some not. They also found a quantity of all sorts of ammunition, a tear gas pistol, and two completed bombs having a nitroglycerine content of 23%. Here was a veritable arsenal. In such a situation few people would think that the accused should escape because the officers have erred. Society is united in condemning the acts of the accused. There is no feeling that the offense is a minor one or that there is no moral wrong. With the repeal of the eighteenth amendment and with future cases more likely to be those involving offenses almost universally condemned, it seems likely that the stronger sentiment will favor admissibility of such evidence. So it is not unlikely that many state courts which once held the evidence admissible will return to their former position. The principal case presents a sound and healthy attitude.

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[36] 19 Ill. L. Rev. 303.

[37] See notes 36 and 37, *supra*, 31 Yale L.J. 518, 8 Corn. L. Quart. 76.

[38] Cardozo, J., in *People* v. *Defore*, 242 N.Y. 13, 27 (1926) quoting from Baker, J., in *Haywood* v. *United States*, 266 Fed. 795, 802 (1920).

[39] 4 Wigmore Evidence, Secs. 2263, 2264.

[40] See note 36, *supra*.

[41] See note 36, *supra*.

[42] 19 Ill. L. Rev. 303, 8 Corn. L. Quart. 76. *The American Guaranty Co.* v. *McNiece, et. al.* (1924); 11 Ohio St. 532, 146 N.E. 77.

[43] See note 1, *supra*.