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EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE

By M
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INTRODUCTION

Since the enactment of the Volstead Act for the enforcement of the Eighteenth Amendment, the question as to the use of evidence obtained by illegal search and seizure has obtained a greatly increased importance, and has given rise to many controversies in the courts. Evidence is often obtained by methods that are reprehensible in good morals and offensive to fair dealing. And evidence is sometimes obtained under circumstances which meet with the unqualified disapprobation of the courts.

The real question upon which the courts and writers are debating is whether evidence, obtained by violations of constitutional guaranties against unreasonable searches and seizures, is admissible. There are two lines authorities, one holding that such evidence is admissible, while the other line of authority holds that such evidence is not admissible. Although a majority of the states have adopted the former view, the Supreme Court of the United States, the Federal Courts, and a few of the state courts adhere to the latter doctrine.

HISTORY OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." Similar provisions are found in all of the state constitutions, except in New York, where such

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1 For readings on the history of the Fourth Amendment see: Howard, Preliminaries of the Revolution (1905) (Am. Nation Vol. 8); Bancroft, History of the United States (1890); Black on Constitutional Law, 3rd edition (1910); Hildreth, History of the United States, 31 Yale Law Journal 518.
provision is not in the constitution but has been written into the Civil Rights Law.  

The historical reasons for the Fourth Amendment are well known. Osmond K. Frankel has well related this historical narrative in substance which is as follows:

The demand for this amendment can be traced to two nearly contemporaneous incidents in the history of England and the American colonies. From ancient times it had been customary for justices to issue search warrants for the seizure of stolen property. The circumstances under which such warrants might be issued were discussed by Lord Coke and Sir Matthew Hale. They were looked upon with disfavor. As was said by Lord Camden, they "crept into the law by imperceptible practice."

By the time of Charles II, search warrants were issued in Star Chamber proceedings to find evidence among the papers of political suspects. So there grew up the easy method of issuing general warrants which permitted the widest discretion to petty officials. Wilkes, the great champion of individual rights and liberties, was instrumental in destroying the practice. The objectionable warrants were declared illegal by Lord Camden in Entick v. Carrington, by Lord Mansfield in Money v. Leach, by Lord Pratt in Huckle v. Money, and finally by the House of Commons.

At about the same time similar proceedings were taking place on this continent. Smuggling was a general offense, both in England and in the Colonies. Before the close of the French and Indian War, in order to obtain money for meeting its cost and to suppress an extensive illegal traffic with the enemy islands, the attempt was made to discover smugglers and to confiscate their goods by the use of writs of assistance. These much resembled the general warrants used in England. James

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3 "Concerning Searches and Seizures" by Osmond K. Frankel, 34 Harvard Law Rev. 361 (1921).
4 Institutes, Book 4, pages 176-177.
5 2 Pleas of the Crown 149.
6 19 How St. Tr. 1029.
7 3 Burr. 1742.
8 2 Wilson, 205.
9 Commons Journal, April 22-25, 1776.
10 3 Channing's History of the U. S. 2-4.
Otis, then Attorney-General of the colony of Massachusetts, resigned his office to attack these warrants. In a speech of great eloquence he questioned the right of Parliament to authorize such writs. Regarding this speech John Adams subsequently said: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was born."

Therefore it was but a natural incident that the people should demand a constitutional provision expressly denying to the new government the right to authorize unreasonable searches and seizures. The securing of such a guaranty, both in England and in this country, was considered by the people as the emancipation of the right of privacy from the prying eyes of the government. Chatham, in his speech on general warrants, said: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter."

**THE COMMON LAW RULE**

The common-law rule regarding the admissability of evidence is that the courts will not inquire into how the evidence was obtained when one it has been presented. The illegal method of obtaining the same does not taint its veracity. In the following twenty-three states the courts have held that the illegal or irregular means of procuring evidence is not cause for its rejection at the trial: Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia. Ohio, Delaware, Rhode Island and Maine make some restrictions on evidence so obtained, while in Arizona the question has been expressly reserved for future decision.

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11 Amer. History Leaflets (Channing & Hart), No. 33, on James Otis' speech on the Writs of Assistance, 1761.
12 Letter from John Adams to William Tudor, March 29, 1817, Old South Leaflets, Vol. 8, No. 179, page 60.
13 Vol. II Willoughby on the Constitution of the U. S.
15 Cornelius on Searches and Seizures.
The rule is based on the theory that a far-reaching miscarriage of justice would result if the public were to be denied the right to use convincing evidence of a defendant's guilt because it had been brought to light through the excessive zeal of an individual, whether an officer or not, whose misconduct must have been deemed his own act and not that of the state.\(^{16}\)

**The Exclusion Rule**

Although a majority of the states have adopted the common-law view, the Supreme Court of the United States, in the case of Boyd v. United States,\(^{17}\) adopted what has come to be known as the "exclusion rule." In this case the plaintiffs in error had, against their protest, been required to produce the invoice of certain cases of goods, which invoice had been used as evidence against the plaintiffs upon a charge of defrauding the customs, of which charge they had been convicted. There was thus raised the double issue as to whether the plaintiffs in error had been unconstitutionally compelled to incriminate themselves and, secondly, whether the compulsory production of the invoice had amounted to an unreasonable search and seizure. In both respects it was held that the rights of the plaintiffs had been unconstitutionally violated, and the evidence was rejected.

The converse of the Boyd case is the case of Weeks v. United States,\(^{18}\) in which the court held that documents and contraband lottery tickets illegally seized were inadmissible because the taking was in violation of the Fourth Amendment of the United States Constitution. The Weeks doctrine was affirmed in Gouled v. United States\(^{19}\) where writings were seized illegally by federal officers, and in Amos v. United States\(^{20}\) where contraband liquor was found in a search of defendant's home without a warrant. In the Gouled and Amos cases it was held that the privilege against self-incrimination found in the Fifth Amendment to the United States Constitution was also violated by the admission of the evidence.

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\(^{16}\) *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (1910).
\(^{17}\) 116 U. S. 616 (1886).
\(^{19}\) 255 U. S. 298, 41 Sup. Ct. 261 (1921).
\(^{20}\) 255 U. S. 313, 41 Sup. Ct. 266 (1921).
The case of Silverthorne Lumber Co. v. United States\textsuperscript{21} gives additional strength to the Constitution. Representatives of the Department of Justice, without a shadow of authority, went to the office of a corporation and made a clean sweep of all the books, papers and documents found there. Photographic copies of material papers were made and an indictment was framed based upon the knowledge thus obtained. The originals were then returned to the corporation. Subpoenas to produce these originals were then served and failure to obey these was punished by the District Court as contempt. The Supreme Court reversed the judgment. Justice Holmes said that it would reduce the Fourth Amendment to mere words if the protection of the Constitution covered only the physical possession of the documents but not the advantages that the Government gains over the object of its pursuit by doing the forbidden act. The seizure was, he said, "an outrage," and he refused to allow the Government to make any use of the knowledge gained through its wrongdoing.

Nineteen state courts have followed the exclusion doctrine as announced by the United States Supreme Court and as followed by the Federal courts. These states that refuse, subject to certain restrictions and limitations, to admit evidence obtained by illegal search and seizure are: Florida, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Oklahoma, Oregon, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin and Wyoming.\textsuperscript{22}

It is submitted by the author of this article that the minority rule is the better one. The exclusion rule is more subservient to the principles of justice; it is an embodiment of the legislative intents of the framers of our federal and state Constitutions; it is a pragmatic necessity in proper law enforcement.

**The Kentucky Rule**

The Fourth Amendment to the United States Constitution has been substantially written into the Kentucky Constitution which declares, in Section 10, as follows:

\begin{quote}
"The people shall be secure in their persons, houses, papers and\textsuperscript{23}\n\end{quote}

\textsuperscript{21}251 U. S. 385 (1920).
\textsuperscript{22}Cornelius on Searches and Seizures.
possessions from unreasonable search and seizure; and no warrant shall issue to search a place, or seize any person or thing, without describing as nearly as may be, nor without probable cause supported by oath or affirmation."

The Kentucky view has been well stated in the case of Divine v. Commonwealth. In that case the defendant was convicted of the crime of grand larceny, and a sentence of imprisonment for a term of three years was imposed upon him. He thereupon prosecuted an appeal from the judgment, one of the grounds being that certain evidence obtained by a search of his home under an invalid search warrant was inadmissible against him. The validity of the search warrant was assailed upon the grounds that the affidavit therefor was in sufficient, and that the warrant itself was not signed by the county judge in person, but by his official stenographer. The Court of Appeals did not consider the question of the insufficiency of the affidavit, but held that the failure of the county judge to sign the search warrant was fatal to its validity. Then the court stated that "the evidence obtained by virtue of the search of appellant's house under the invalid warrant was not admissible against him, and failure to exclude it requires reversal of the judgment." The court relied upon the cases of Mabry v. Commonwealth, Keith v. Commonwealth and Reed v. Commonwealth.

In Bruner v. Commonwealth Justice Quinn, speaking for the Court of Appeals, said: "'Both the federal and state Constitutions guarantee to the people security of their persons, houses and possessions from unreasonable search and seizure . . . . rights that will be protected, though to do so in certain instances might retard or defeat the ends of justice. The courts have ever protected the sanctity of the home, and will always guard with zealous care one's indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.'"

Analogous with the exclusion rule adopted by the United States courts, the Kentucky Court of Appeals holds that the protection against illegal searches and seizures is directed at the sovereignty acting through its officers, and has no application to

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23 235 Ky. 579, 33 S. W. (2d) 627 (1930).
24 196 Ky. 626, 245 S. W. 129 (1922).
25 197 Ky. 364, 247 S. W. 42 (1923).
26 233 Ky. 184, 25 S. W. (2d) 77 (1930).
27 192 Ky. 386, 233 S. W. 795 (1921).
illegal searches made by private individuals as to whom the injured party is limited to his remedy in trespass. Likewise, the state guaranties against unreasonable search do not apply to the acts of federal officers and evidence obtained by such officers by a search under a warrant not conforming to state law may be admitted against the accused in a prosecution in the state court, though such evidence will be excluded by the state court unless the acts of the federal officers were under a warrant valid under the federal law.

The Kentucky court further agrees with the federal exclusion rule in that the constitutional provisions against unreasonable searches and seizures do not extend to woods, fields, or open spaces remote from the dwelling, and evidence procured in a search, even though made without a warrant at all, is competent if the search was made with the consent of the person in possession of the premises.

However, the Kentucky rule has gone even beyond the orthodox exclusion rule in one important respect. The United States Supreme Court, the Federal Courts, and all of the state courts that adhere to the exclusion theory, require a seasonable application for the return of the evidence to be made within a reasonable time after the accused learns of the illegal search and seizure. But in Kentucky the accused may demand the return of such evidence at the time of trial. In Youman v. Commonwealth the Kentucky court said: "In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of witnesses is when it is offered during trial, and we cannot think of any good reason this practice should not obtain in a case like the one we are now considering."

THE ENFORCEMENT OF CONSTITUTIONAL PROVISIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

However strong may be the language of the Fourth Amend-

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27 Walters v. Commonwealth, 199 Ky. 182, 250 S. W. 839 (1923); Roberts v. Commonwealth, 203 Ky. 75, 268 S. W. 880 (1924).
28 Brent v. Commonwealth, 194 Ky. 504, 240 S. W. 45 (1922).
29 Marshall v. City of Newport, 200 Ky. 663, 255 S. W. 259 (1923); Richardson v. Commonwealth, 205 Ky. 434, 268 S. W. 1 (1924).
30 189 Ky. 152, 224 S. W. 860 (1920).
ment to the United States Constitution, the fact remains that it is not self-executing. The same is true of most of the similar provisions found in state constitutions. Although they unequivocally prohibit unreasonable searches and seizures they usually fail to state what disposition is to be made of the evidence so secured. The language of these provisions is mandatory. To be at all sensible it is necessary that a construction be given which will effectively curtail the acts that are prohibited.

Chief Justice Carroll, in the case of Youman v. Commonwealth, was prompted to ask: "Will courts, established to administer justice and enforce the laws of the state, receive, over the objection of the accused, evidence offered by the prosecution that was admittedly obtained by a public officer in deliberate disregard of the law, for the purpose of securing the conviction of an alleged offender? In other words, will courts authorize and encourage public officers to violate the law, and close their eyes to methods that must inevitably bring the law into disrepute, in order that the accused may be found guilty?"

Opponents of the exclusion doctrine reply that: (1) It has long been established that the admissability of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence; (2) as an original proposition, it is an unwise policy to refuse to permit the government to use such evidence in that there is no exigent requirement of such, a rule in the Constitution, and the enforcement of law is unnecessarily hampered by its adoption. Proponents of this argument would have the courts permit evidence to be used, though obtained by ever so flagrant a violation of the Constitution, and would secure the protection of the citizen by the direct punishment of the officer for his intrusion.

This is reducing an academic theory to a practical absurdity. Any observing layman can readily see that, as a matter of fact, the officer is not punished and any talk of punishing him is but a sham, a pretense and a travesty upon justice. The adoption of such unsound, unreasonable and unjust practices would only result in a growing sentiment of utter disregard for the law. It is but a mockery of the Constitution for a court, whose duty it is to protect the citizens, to retain the fruits of unconstitutional

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33 Cited supra.
34 8 American Bar Association Journal 646-647.
searches and seizures and give the citizen nothing but a pretense of redress by threatening against the wrongdoer a punishment which is seldom or never inflicted.

Several methods of enforcing these constitutional provisions against unreasonable searches and seizures have been suggested by Mr. Thomas E. Atkinson and may be briefly stated as follows:

1. Self help, which means making physical resistance to attempts to make unreasonable searches and seizures.

   In many cases this remedy would fail because the search is often made in the person's absence. However, if the person be present he may exert sufficient force to prevent the unreasonable search and, possibly, may kill the officer if necessary. But this method is extremely complicated and perilous. The person must decide for himself whether or not the search is reasonable, and if he erroneously decides that it is unreasonable he lays himself open to serious consequences in resisting.

2. Civil suit against the offending officer.

   This remedy is also unsatisfactory. The injury sustained by the innocent person is usually not a substantial physical or property injury, but is an injury based on an unlawful invasion of the person's right of privacy. Only a very few jurisdictions have as yet recognized the existence of such a right, and even in those states where the right has been recognized juries are somewhat reluctant to assess large damages where there is no tangible evidence of the injury.

3. Criminal action against the offending officer.

   This is a ridiculous suggestion. Certainly a court that believes that the end justifies the means will not take advantage of unconstitutionally seized evidence for the purpose of convicting the defendant and then face about and convict the officer who secured the evidence. And, even assuming that the court would practice such hypocrisy, it is reasonable to predict that the prosecuting attorney would be lenient toward one who has overstepped the bounds of his authority in an over-zealous effort to help the present administrators of justice establish a record for law and order.

   If punishment of the officer should become effective such a practice would render the enforcement of the law even more inefficient. Enforcement officers, ever mindful of the probable serious consequences of their acts, would become timorous and pusillanimous guardians of the public welfare. In many cases they would refrain from executing their official duties because of fear of future punishment.

One of the most illogical arguments ever presented by the opponents of the exclusion theory was advanced in the case of

Hall v. Commonwealth. In this case the Virginia court says: "A police officer, when acting without a warrant or under a void warrant, acts without authority or color of authority from the state, and ceases to be its agent and he alone is responsible for his illegal acts."

A careful analysis of this decision shows that it absolutely nullifies the constitutional provisions against unreasonable searches and seizures which apply to governmental officers. If the officer is armed with a warrant, or other lawful authority, the provisions found in the constitution would not apply because the search is not unreasonable. On the other hand, if the officer makes a search without lawful authority then, according to the Virginia court, he acts for himself and not as an agent of the state. It would therefore be impossible to conceive of a case in which the constitutional provisions against unreasonable searches and seizures would apply.

There is only one means of satisfactory enforcement of these constitutional provisions and that is the adoption of the exclusion theory. This theory will effectively enforce the legal maxim that "every man's house is his castle," which is a part of our Constitutional law and which has always been looked upon as of high value to the citizen. Although other kinds of illegality do not keep out evidence, in this particular instance the illegality is condemned by the United States Constitution which is the "supreme law of the land," or by the state constitutions which are the supreme laws of their respective states.

CONCLUSION

In the foregoing pages the author has attempted to briefly sketch the historical background of the Fourth Amendment to the United States Constitution, which amendment has been substantially written into practically all of the state constitutions. The author has shown the different interpretations placed upon these constitutional provisions by various jurisdictions, and has stated his reasons for holding that the exclusion doctrine offers

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36 138 Va. 727, 121 S. E. 154 (1924).
37 State v. Owens, 302 Mo. 348, 259 S. W. 100 (1924).
38 Cooley on Constitutional Limitations.
the only practical method of enforcing these safeguards of personal liberty.

The need of these guaranties has not ceased to exist. With the increase in population and the migration of people to cities and towns there has developed a cosmic political and social structure in which "the right of the people to be secure in their persons, houses, papers and effects" is as sacred and valuable today as in the early colonial period. If this fundamental right is not secured to the people by declaring that any evidence obtained by unreasonable searches and seizures is inadmissible, there is no limit to the extent that evangelical and fanatical enforcement officers may violate the sacred "right of castle" doctrine expressed in the constitutional provisions against unreasonable searches and seizures.