Admissibility of Evidence Illegally Seized--(Negative View)

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A sheriff arrested and searched the defendant and found a quart bottle of whiskey which the defendant was carrying wrapped in an apron. Another bottle was found in the defendant's pocket. The sheriff had no warrant for the defendant's arrest or search nor had the defendant violated any law in the sheriff's presence. The Commonwealth introduced the whiskey in evidence against the defendant who objected on the ground that it was obtained by an illegal search and seizure, and that, therefore, it was inadmissible. The court found that the evidence was obtained by an illegal search and seizure, and released the defendant on the ground that its obtainment was in violation of section 10 of the Kentucky Constitution. Section 10, supra, is as follows: "The people shall be secure in their persons, houses, papers, and possessions from unreasonable search and seizure, and no warrant shall issue to search any place or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." *Helton v. Commonwealth*, 195 Ky. 678, 243 S. W. 11 (1922). The decision is in accord with the Kentucky rule which is that evidence obtained by an illegal search and seizure by officers of the state is inadmissible. *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303 (1920); *Ash v. Commonwealth*, 193 Ky. 452, 236 S. W. 1032 (1922); *Hudgeons v. Commonwealth*, 233 Ky. —, 38 S. W. (2d) 232 (1931); *Miller v. Commonwealth*, 235 Ky. 825, 32 S. W. (2d) 416 (1930). The rule is known as the federal exclusion rule, having its inception in *Boyd v. U. S.*, 116 U. S. 616, 61 Sup. Ct. Rep. 524, 29 L. Ed. 746 (1886). The federal rule, briefly, is that evidence obtained by federal officers in an illegal search and seizure will be excluded as against the defendant upon a timely motion to that effect by him, *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. Rep. 341, 58 L. Ed. 652, L. R. A. 1915 B. 834, Ann. Cas. 1915 C., 1117 (1914); *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 64 L. Ed. 322, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182 (1919), unless the defendant first learns of the government's possession of evidence against him when it is offered at the trial, in which case a motion at the trial is sufficient for its exclusion. *Gouled v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1921). The federal rule is justified on the grounds that to admit evidence so obtained would be a violation of the "Search and Seizure" and "Self-Incriminating" privileges guaranteed in the fourth and fifth amendments, respectively, of the Constitution of the United States. *Boyd v. U. S.*, supra; *Gouled v. U. S.*, supra.

Evidence illegally obtained by state officers and private citizens is not excluded in federal courts because the fourth amendment is a limitation upon the federal government alone and not upon the states. *Youngblood v. U. S.*, 266 Fed. 795 (1920); *Burdeau v. McDowell*, 256 U. S. 465, 41 Sup. Ct. Rep. 574, 65 L. Ed. 1048 (1921); *Miller v. U. S.*, 50 Fed. (2d) 502 (1931). However, if the search by the state officers is authorized before or ratified after by federal officials the court will not admit the evidence on the theory that such authorization makes the

Kentucky goes farther than the federal rule in two respects. The question of admissibility of the evidence and the legality of the search may be raised at the trial in *Kentucky Youman v. Commonwealth*, supra. Evidence obtained by federal officers under invalid warrants is not admissible in the state courts. *Walters v. Commonwealth*, 199 Ky. 182, 250 S. W. 839 (1923).

That an exigency existed for the exclusion rule can be seen by the number of states, with the exception of Kentucky, that have adopted it in whole or in part since the case of *Boyd v. U. S.*, supra, they are: Gildrie v. State, 94 Fla. 134, 113 So. 704; *State v. Arregui*, 44 Idaho 43, 254 Pac. 758 (1927); *People v. Castree*, 311 Ill. 332, 143 N. E. 113 (1924); *Batts v. State*, 194 Ind. 609, 144 N. E. 23 (1924); Maryland, Acts Maryland, 1929, Ch. 194, art. 35, sec. 4A, Ann. Code, 1927-1929, p. 192; *People v. Marshausen*, 204 Mich. 559, 171 N. W. 567 (1919); *Owens v. State*, 133 Miss. 753, 98 So. 233 (1923); *State v. Owens*, 302 Mo. 348, 257 S. W. 100 (1924); *State ex rel King v. District Court*, 7 Mont. 191, 224 Pac. 862 (1924), 84 Okla. 73, 202 Pac. 310 (1921); *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588 (1922); *Sherow v. State*, 15 Tex. Cr. 650, 290 S. W. 754 (1927); *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (1901); *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922); *State v. Wills*, 91 W. Va. 659, 114 S. E. 261 (1922); *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342 (1920); *State v. Jokosh*, 181 Wis. 160, 193 N. W. 976 (1923).

Twenty-three states reject the federal doctrine (Cornelius on "Search and Seizure," pp. 37, 38), despite the fact that most states have constitutional provisions more or less similar to the fourth amendment of the federal constitution, 34 H. L. R., p. 361, n. 1. The state courts of last resort which reject the federal rule do not consider how the evidence was obtained but admit all evidence whether lawfully or unlawfully obtained if it is pertinent to the issue. *Commonwealth v. Wilkins*, Mass., 138 N. E. 11 (1923); *People v. Defore*, N. Y., 150 N. E. 585 (1926). The courts hold that the person making the illegal search is alone responsible to the wronged citizen, and that the government is in no way responsible if the search is made by one of its officers. *Commonwealth v. Wilkins*, supra. The doctrine of *Boyd v. U. S.*, supra, is assailed as being a novel introduction of a rule having a propensity to destroy the basic rules of evidence. Wigmore says that no authority exists for construing an admission of evidence obtained in an illegal search and seizure in violation of the fourth amend-
ment as a violation of the clause in the fifth amendment prohibiting compulsory self-incrimination. He points out that the doctrine of prohibiting compulsory self-incrimination originated one hundred years before the origin of the search and seizure doctrine, and contends that the fourth and fifth amendments are "complementary" to each other. "Wigmore on Evidence," section 2264. Despite the historical origins of the two rights, however, the idea that to permit the admission of evidence obtained by an illegal search and seizure is compulsory self-incrimination had its birth in England several years before the constitution of the U. S. was written. In the case of Rex v. Cornelius, 2 Strange 1210, 93 English Reports 1133 (1744), an action for a misdemeanor was brought against the defendant for taking money from alehouse keepers to whom he granted licenses. The prosecutor applied for a rule to inspect the books of the defendant, but this rule was refused on the ground that to grant it would be obliging the defendant indicted for a misdemeanor to furnish evidence against himself. A further step was made in the case of Entick v. Carrington, 19 How. St. Tr. 1350 (1765), in which case Lord Camden held general writs invalid. The value of the case to the federal practice of construing the fourth and fifth amendments together is shown by the following quotation from the case by Lord Camden: "It is very certain that the law obligeth no man to condemn himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem that search for evidence is disallowed upon the same principle." From the quotation it would appear that Lord Camden considered that illegal search and seizure should be prohibited because it was a form of compulsory self-accusation. Too, the quotation from the Boyd case, supra, which has been so severely criticized does not seem so absurd when compared to Lord Camden's opinion. The quotation is: "and we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him, is substantially different from compelling him to be a witness against himself." While the United States Supreme Court needs no authority in the interpretation of the Constitution and may construe it as they see fit, yet, the two English cases cited refute the contention of Wigmore, that no reason or authority exists for the federal practice of excluding illegally obtained evidence on the ground that it is compulsory self-incrimination. Judge Cardozo in People v. Defore, supra, said that there was no difference in accepting evidence obtained under authority of a valid search warrant and accepting that obtained illegally. His contention being that one was just as compulsory as the other in the light of compelling one to give evidence against one's self. This contention is either an absurd attack or else ignorance of the federal rule. The federal courts do not hold that evidence obtained legally is a violation of the fourth amendment. Therefore, since they construe the two amendments together, evidence obtained lawfully and under authority of the fourth amendment could not be a violation of the fifth.
The theory of the federal courts that to admit evidence obtained by an illegal search and seizure would be to destroy the protection given by the fourth amendment, *Silverthorne Lumber Co. v. U. S.*, supra, is likewise bitterly assailed by the states denying the federal doctrine *People v. Defore*, supra. In that case Judge Cardozo said that the only remedy given to the people by the Constitution against illegal searches and seizures was a civil action against the trespasser. The practice of excluding the evidence is said to be no punishment for or prevention against the illegal searches. In the first place, the federal courts do not exclude the evidence on the theory that to do so is to punish the officers violating the Constitution, but they do assert its practical value as an indirect method of securing to the people the immunities and privileges of the fourth amendment by simply showing that the federal rule removes all incentive that any officer might have to make an illegal search. *Silverthorne Lumber Co. v. U. S.*, supra. That the federal rule does remove such incentive cannot be denied. An officer knowing that no conviction can result from the results of an illegal search will confine his efforts to lawful enforcement of the law instead of a lawless one. With the advent of prohibition this problem of search and seizure became a serious one. The question as to whether or not an officer could station himself on a road and search every passing car in an effort to find violators of the eighteenth amendment confronted every state. Were homes liable to an illegal search at the whim of an officer? These questions and similar ones are answered very aptly in *People v. Marxhausen*, supra, and *Youman v. Commonwealth*, supra. The immunities of the fourth amendment are guaranteed to all the people. A man with a pint of whiskey in his car, or a moonshine still in the basement of his home is entitled to its protection to the same extent as a total abstainer. The evil nature of the non-exclusion rule, however, is that the illegal searches and seizures fall upon the innocent as well as the guilty. The absurd remedy of a civil action against the officer or a prosecution for oppression, as pointed out in *Commonwealth v. Wilkens*, supra, and *People v. Defore*, supra, while actually existing is of little effect in prohibiting such searches. Many of our officers are execution proof. A civil action against them would avail nothing. Prosecution for oppression or discipline by superior officers are of less effect than civil actions for trespass. (See summary of prohibitions, killings, and prosecutions in Chicago Tribune for Sept. 25, 1927.) This is further indicated when judges of Cardozo's caliber fail to cite instances in which such actions have been successful. *People v. Defore*, supra. A prosecuting attorney is not likely to curtail a source of wholesale convictions. The federal rule does not deny the existence of these remedies, but rightly ignores them because they are of little effect.

In recapitulating it is seen that the arguments of the adherents of Wigmore amount to a statement that the necessity for detecting crime should prohibit courts from considering the constitutional rights of the people, and leave civil actions against trespassing officers as the
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.

WILLIAM HUME.

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 amendments 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