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The Exclusion of Evidence Illegally Obtained

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NOTES & COMMENT

THE EXCLUSION OF EVIDENCE ILLEGALLY OBTAINED.—In commenting upon that rule of the Federal Courts which excludes evidence obtained through illegal searches and seizures, Professor Wigmore has remarked that "Since the enactment of the Eighteenth Amendment and its auxiliary legislation, a new and popular occasion has been afforded for the misplaced invocation of this principle."[1] Popular, indeed, must be the "occasion" which induced the appearance of three Supreme Court decisions[2] within practically two months of the convening of the current term. However, it is no thought of emphasizing the "popularity" phase that suggests as an interesting study these three correlated cases well exemplifying the recent development and present status of the Federal rule of exclusion—or, to fit our quotation, illustrative of further "misplaced invocation of this principle."

Prior to the decision of the Supreme Court in Boyd *v.* United States,[3] there had been uniform adherence to the general rule that illegal or irregular means of procuring evidence is not cause for its rejection.[4] In that case, a cause of seizure and forfeiture of property for violation of the customs laws, the District Attorney, desiring to show the quantity and value of previous importations by the claimants, applied to a Federal Judge for an order directing that notice be given to claimants requiring them to produce an invoice in court for inspection. The order was granted, and obeyed by the claimants, who, however, objected to the validity and constitutionality of the statute[5] authorizing the procedure. The overruling of this objection furnished the ground for the Supreme Court's reversal of a judgment of forfeiture. Though the statute attacked was expressly restricted to "suits and proceedings other than criminal arising under any of the revenue laws of the United States," and required that the Federal Attorney "make a written motion particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove," and further provided that "the court in which the suit

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[1] 4 Wigmore, Evidence (2 ed.) § 2184.

[2] Segurola *v.* U. S., 275 U. S. 106 (Nov., 1927); Marron *v.* U. S., 48 Sup. Ct. 74 (Nov., 1927); Gambino *v.* U. S., 48 Sup. Ct., 137 (Dec., 1927).

[3] 116 U. S. 616 (1886).

[4] 4 Wigmore, op. cit., *supra*, note 1, § 2183; Comm. *v.* Tibbetts, 157 Mass. 519; Atkinson, *Admissibility of Evidence Obtained through Unreasonable Searches and Seizures*, 25 Col. L. Rev. 11 (1925).

[5] Act of June 22, 1874, § 5.

or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant," the majority opinion held the act violative of both the Fourth and Fifth Amendments, for "even the act under which the obnoxious writs of assistance were issued did not go so far as this." Assuredly, there was no seizure directed, for the statute specifically provided that the person producing the papers should have "the custody of them except pending their examination in court." Nor is it believed that the effect of a refusal or failure to produce, namely that "the allegation stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court," provided a consequence signally more drastic than that of the ordinary discovery proceeding.[6] When it is recalled that orders issued only at the discretion of the court, and that a defendant or claimant was afforded opportunity to explain to the court any default, it seems difficult to agree that an unreasonable search and seizure was authorized.[7]

While the Court recognized that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting," nevertheless "it accomplishes the substantial object of those acts in forcing from a party evidence against himself" [8]—obviously a line of reasoning that ignores a distinction between the proper and improper *modus operandi,* and which would, if followed to its conclusion, prohibit *all* searches and seizures no matter how meticulously conducted. In the main, the Court based its opinion upon *extra*-legal considerations. It resorted to history (that is, so much history as is contained in the opinion of Lord Camden in historic Entick v. Carrington [9] and in the resume of James Otis' address [10])—stated generally the pertinent Constitutional restrictions, that of the Fourth Amendment against unreasonble searches and seizures, that of the Fifth Amendment, "No person * * * shall be compelled in any Criminal Case to be a witness against himself"—became satisfied that the proposers of those Amendments "never would have approved them (*i.e.,* the statute under discussion and its predecessors)"—and with finality denounced compulsory discovery which "may suit the purposes of despotic power; but cannot abide the pure atmosphere of political liberty and personal freedom." [11]

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[6] *E.g.,* N. Y. Civ. Prac. Act § 325.

[7] To this effect was the opinion of Waite, C. J., and Miller, J., 116 U. S. 616, 640.

[8] 116 U. S. 616, 622.

[9] 19 How. St. Tr. 1029 (1765).

[10] Paxton's Case, Quincy's Mass. Rep. (1761).

[11] *Supra,* note 8, 631, 632.

The Court's historical allusions appear inaccurate. The searches condemned by Lord Camden and Otis were those under the writs of assistance—writs issued not as incidents to regular legal proceedings for the punishment of crime, upon proof by affidavit, and under reasonable restrictions, but upon suspicion merely, and so used as to be instrumentalities of political and economic persecution. The Fourth Amendment, practically identical in phraseology with a similar provision of the Massachusetts Declaration of Rights of 1765, emanated from those states which had been the principal sufferers in the closing days of British rule.[12] It is but a fair inference that the evil sought to be guarded against was the use of the writ of assistance. Nevertheless, the Court concluded that the protection of the Fourth Amendment included, within its purview, searches incident to judicial proceedings, conducted under the supervision of the courts and under safeguards sufficient, it is believed, to insure freedom from abuse.

But the Court proceeded even further. It declared that evidence obtained by illegal search and seizure, though otherwise competent, need must be excluded. Clearly this was an innovation. The holding of the *Wilkes*[13] cases had been that the participants in searches under writs of assistance were liable in trespass to the persons wronged. The Fourth Amendment implies nothing more than that the offender against private security should answer for his act. "The right of the people to be secure * * * shall not be violated"; but when it has been violated and valuable evidence discovered, what should be the consequence? If there has been a violation, punish the violator; but punish also the party whose criminal activities have been unearthed. As has been so pointedly demonstrated,[14] the Federal courts do neither. The prisoner customarily goes free, and the violator is occasionally rebuked. The weakness inherent in the rule of the *Boyd* case has not been more aptly demonstrated than in a masterful opinion in which Judge Cardozo held admissible evidence so secured: "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequence would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. * * * In so holding, we are not unmindful of the argument that unless the evidence is excluded, the statute becomes a form and its protection an illusion. * * * The question is whether protection for the individual

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[12] For an exhaustive discussion of the historical basis of the Fourth Amendment see Fraenkel. *Concerning Searches and Seizures,* 34 Harv. L. Rev. 361 (1921).

[13] Reported in 19 How. St. Tr.

[14] 4 Wigmore, op. cit., *supra,* note 1.

would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office." [15]

The entire Court in the *Boyd* case joined in condemning the statute under consideration as violative of the Fifth Amendment. While the statute expressly excepted criminal proceedings and while the case concerned "an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth," nevertheless the Court deemed the statutory provisions "within the spirit of both."[16] Apparently it concluded that the Fourth and Fifth Amendments were so closely related and interdependent that one could, under the latter, justify a refusal to surrender documents sought by a lawful official search. The Fifth Amendment protects a person from being "compelled in any Criminal Case to be a witness against himself." We are told that "witness is the keyword," [17] and, again to quote Judge Cardozo, "The keyword is disregarded, however, when compulsion not testimonial is brought within the orbit of the privilege." [18] But, says the Supreme Court, "It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" [19]

Boyd *v.* United States initiated the Federal rule of exclusion. Subsequent decisions have successively narrowed and extended the scope of its application. The development has not been uniform, still the rule persists.

In tracing briefly its development, the first case of major significance encountered is Adams *v.* New York.[20] State officers lawfully searching Adams' premises for gambling paraphernalia, seized other and private papers, which were used in evidence against him. These papers were not contraband, but of evidentiary value merely. While the case involved the action of state, and not federal officers, the Court attempted no distinction upon this head. Less than twenty years after Boyd *v.* United States, we find it saying, "The question * * * arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight

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[15] People *v.* Defore, 242 N. Y. 13, 23, 24 (1926).

[16] *Supra* note 8, 633.

[17] Haywood *v.* U. S. 268 Fed. 795, 802 (C. C. A. 7th, 1920).

[18] *Supra* note 15 at 27.

[19] *Supra* note 8, 635.

[20] 192 U. S. 585 (1904).

of authority as well as reason limits the inquiry to the competency of the proferred testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained" (citing 1 Greenleaf Ev. §254a and approved state cases). Further, the Court held the admission of the papers to be not in violation of the guaranty against self-incrimination—"He was not compelled to testify concerning the papers or make any admission about them." A feeble attempt was made to distinguish the *Boyd* decision—the court before which Adams was tried "was not called upon to issue process or make any order calling for the production of the private papers of the accused. * * * In *Boyd's* case the law held unconstitutional, virtually compelled the defendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the Fourth and Fifth Amendments." [21]

Ten years later in Weeks v. United States,[22] the Supreme Court, speaking through the writer of the *Adams* opinion, reverted to the doctrine of the *Boyd* case. While the defendant, who had been arrested at his place of employment, was being taken to custody, other state police officers, acting without a warrant, searched his home and seized property which they turned over to the U. S. Marshal. Later in the day the Marshal, in company with state officers, returned and seized additional property. Defendant was indicted for a Federal crime, and convicted. Before the trial he petitioned for the return of his property. The petition was granted only as to matter not pertinent to the charge. At the opening of the trial defendant again urged the return of his property and seasonably objected to its admission in evidence. In reversing a judgment of conviction, the Court attempted a distinction of the *Adams* case, and in so doing imposed a condition upon its exclusionary doctrine. The private papers of Adams, admittedly not specified in the search warrant, were here said "in effect" to have been "incidentally seized in the lawful execution of a warrant. * * * It is therefore evident that the *Adams* case affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment." [23] The generally accepted practice of courts not to permit collateral inquiry as to the source of competent evidence was declared to be applicable to the situation of the *Adams* case, but the preliminary application here made was considered sufficient basis for a contrary ruling. This unsubstantial condition seems now to have been obviated.[24]

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[21] *Ibid.* 597, 598.

[22] 232 U. S. 383 (1914).

[23] *Ibid.* 396.

[24] Gouled *v.* United States; Agnello *v.* U. S., *infra.*

Since the *Weeks* case, the Supreme Court has made no radical departure from its doctrine. Gradual modification has taken place, but the rule of exclusion persists and expands. Gouled *v.* United States [25] is important. The defendant appealed from a judgment convicting him of conspiring to defraud the Federal Government. Prior to his indictment, and while he was under suspicion, a former business friend, then enlisted in government service, called at his office ostensibly to pay a friendly visit. While there, the government operative secretly extracted several papers. The use of these was unsuccessfully objected to at the trial. The Court, in reversing the conviction, denominated the attempted distinction between the *Adams* and *Weeks* cases, "a rule of practice," further saying, "where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." [26] The requirement of a preliminary motion was being written out of the rule.

Chief Justice Taft wrote an interesting opinion in Carroll *v.* United States.[27] An automobile transporting liquor was stopped and searched. The officers had no warrant, but, the majority was satisfied, acted upon probable cause. The necessities of the case (the search of a movable vehicle could not be delayed to procure a warrant) and the fact that the defendants had some months previous unwittingly disclosed their activities to the identical federal officers, made the search not unreasonable. The defendants' preliminary motion for the return of the seized property and their objections at the trial were of no avail. The act charged was a misdemeanor, but the Court overruled as too nice a distinction, defendants' contention that a lawful arrest without a warrant was dependent upon the commission of the act in the presence of the officers and detectable by their senses. This decision, it is believed, represents the widest departure from the *Weeks* case thus far attempted. Whatever doubts may have been raised by the *Carroll* case were shortly dispelled by Agnello *v.* United States,[28] a prosecution for violation of the Federal Narcotic Tax Act. The defendants had been arrested with cocaine in their possession. While they were being taken to a place of detention, federal officers, accompanied by a city policeman, searched the homes of two of the

[25] 255 U. S. 298 (1921).

[26] *Ibid.* 312. While the Boyd and Weeks cases were continually cited as controlling, no mention was made of the Adams case.

[27] 267 U. S. 132 (1925).

[28] 269 U. S. 20 (1925).

defendants. In Agnello's bedroom they found a can of cocaine, which they seized and which was later offered in evidence in proof of the government's case. It was, at this time, excluded. While testifying in his own behalf, Agnello denied ever having seen or possessed the can of cocaine. In rebuttal, over the defendants' objection, the government was permitted to introduce the previously excluded evidence of the search and seizure. In reversing Agnello's conviction, the Court held that his rights under the Fourth and Fifth Amendments had been violated. His failure to move before trial for the return of the property was excused—he claimed never to have possessed the can and presumably he had no knowledge of its seizure. Still the Court was solicitous lest its use in evidence compel him to self-incrimination.

The setting is now complete for the three most recent decisions:—first. Chief Justice Taft, as in the *Carroll* case, apparently cognizant of the consequences, refusing to reverse a conviction not brought squarely within the accepted rule—Mr. Justice Butler reiterating the rule of the previous cases, but finding opportunity not to apply it—and, finally, Mr. Justice Brandeis applying the rule, and in doing so, eliminating an objectionable feature of it.

In Segurola *v.* United States,[29] the defendants, as the result of telephoned information, were arrested in the act of illegally transporting liquor. On cross-examination, they were not permitted to inquire the source of the information as bearing upon the question of probable cause for the police action. A sample of the liquor was offered and received in evidence. "Thereafter, counsel for defendants moved to suppress the liquor, as evidence, on the ground that the search was without a warrant and did not appear to have been made upon probable cause." The motion was denied, and rightly says the Court, for it "was plainly an after thought." [30] Since no motion had been directed to the uncontroverted evidence of the *finding* of liquor in the car, the convictions were affirmed.

In Marron *v.* United States,[31] the petitioner and others had been convicted of conspiring to violate the National Prohibition Act. A federal agent had procured a warrant authorizing the seizure of liquor and manufacturing paraphernalia that might be found upon Marron's premises. At the time of the search, Marron was absent, but the warrant was delivered to one of his co-defendants. The officers seized liquor, a ledger and various bills for lighting, telephone service, etc. Marron's petition for the return of the papers was denied and the matter (most

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[31] *Supra* note 2.

[30] 275 U. S. 106, 110.

[29] *Supra* note 2.

damaging) was admitted in evidence against him. The Court believed it "clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant." [32] However the conviction was sustained, for when the officers arrested the co-defendants, they had the right without a warrant to search the place, a right which "extended to all parts of the premises used for the unlawful purpose." [33]

In Gambino *v.* United States,[34] the defendants' automobile was stopped by state police and searched without a warrant. Liquor was found. The prisoners and liquor were immediately delivered to federal authorities. At the time, the state prohibition law had been repealed. Defendants' motion to supress the liquor as evidence was denied, and it was later introduced at the trial. The Court, in reversing the conviction, determined that the state officers had acted without probable cause and in the erroneous belief that it was their duty to enforce the National Prohibition Act. While they were not, at the time, "agents of the United States," still "the wrongful arrest, search, and seizure were made solely on behalf of the United States." The "protection of the Fourth and Fifth Amendments" (restrictions upon federal action) was here extended to embrace state action "on behalf of the United States." [35] If there must be a rule of exclusion it is only proper that it be logically applied.[36]

In conclusion, it might be observed that but fourteen of the forty-six states in which the question has arisen, have subscribed to the federal rule.[37] The argument that exclusion is the only feasible means of enforcing the Fourth Amendment [38] has been generally rejected in the interests of the greater social need that crime go not unpunished.

V. J. K.

FURTHER LIMITATION OF MOTORCAR OWNERS' STATUTORY LIABILITY.—It is interesting to observe that revolutionary extensions of

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[32] 48 Sup. Ct. 74, 76.

[33] *Ibid.* 77.

[34] *Supra* note 2.

[35] 48 Sup. Ct. 137, 138.

[36] In Byars *v.* U. S., 273 U. S. 28 (1927), the Court had said, following its previous decisions, "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

[37] See in this connection an editorial, N. Y. L. J., Dec. 1, 1927.

[38] See Atkinson, *supra* note 4, at page 26, exclusion is "warranted as the only practical method of giving force to the letter of the Fourth Amendment." Self-help and proceedings against the offender were considered ineffectual.