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Constitutional Law -- Criminal Law -- The "Mere Evidence" Rule -- Applicability to the States

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rule was a good one."[50] Whether or not this is the North Carolina court's position, there is good argument for the court making express exceptions to protect legal rights now often nullified by crossing state boundaries. As suggested, the exception would be a very narrow one and apply only to residents injured in automobiles driven by a resident while in transit from and intended to return to the state of residence. This approach would allow the court to alleviate inequities and effect clear policies while awaiting a suitable alternative, if the court desires an alternative, to *lex loci delicti.* Such an approach would preserve predictability and consistency in North Carolina conflicts law.

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Constitutional Law—Criminal Law—The "Mere Evidence" Rule—Applicability to the States

The mere evidence rule of *Gouled v. United States,*[1] that it is a violation of the fourth amendment prohibition against unreasonable search and seizure to take evidence from a defendant's premises unless that evidence is contraband, stolen property, or an instrumentality of a crime, was declared by the United States Supreme Court in 1921. Courts have found it difficult to apply the instrumentality exception, and the theory of the rule has been harshly criticized.[2] After the decision in *Mapp v. Ohio,*[3] which requires that evidence taken in violation of the fourth amendment be excluded in state trials, the question was certain to arise whether *Gouled* should be applied to the states.[4]

[50] —— N.H. at ——, 222 A.2d at 207.

[1] 255 U.S. 298 (1921).

[2] MAGUIRE, EVIDENCE OF GUILT § 5.04 (1957); 8 WIGMORE, EVIDENCE §§ 2184a, 2264 (McNaughton rev. ed. 1961).

[3] 367 U.S. 643 (1961).

[4] Although the mere evidence rule rests primarily on the fourth amendment, the peculiar origin of the rule in Boyd v. United States, 116 U.S. 616 (1886), gave rise to a theory that the rule rests on a dual basis of the fourth and fifth amendments. *Boyd* did not involve a search at all, but a court order to produce incriminating documents. In invalidating the order the United States Supreme Court first announced that a search for mere evidence was prohibited by the fourth amendment. Next the order was declared invalid under the fifth amendment prohibition against self-incrimination. Although a dissent insisted that the fifth amendment alone was the correct basis for the decision, a third justification for the holding was added:

In *Hayden v. Warden, Md. Penitentiary*[5] the Fourth Circuit Court of Appeals became the first federal court to consider this question. In *Hayden* the police entered a house in hot pursuit of an armed robber and found Hayden undressed in bed. During an otherwise lawful search of the house the police seized a cap found under a mattress and a jacket and trousers found in a washing machine. This clothing was admitted in evidence at the state trial as proof that Hayden was the man seen running from the scene of the robbery. In federal habeas corpus proceedings Hayden objected to the admission of the clothing in evidence on the grounds that it was mere evidence. The Fourth Circuit Court of Appeals agreed, and holding that the *Gouled* rule applies to the states, ordered a new trial.[6]

The United States Supreme Court has set no standard for determining how close the relationship between the evidence and the crime must be before that evidence can fairly be termed an instrumentality.[7] In *Marron v. United States*[8] the Court indicated that the exception should be broadly construed in favor of the prosecution when it held that receipts and utility bills seized in a raid were instrumentalities of a prohibition violation because they were part

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the order was equated with a search and the opinion concluded that any search for mere evidence was prohibited by the joint operation of the fifth and fourth amendments. The theory that one of the functions of the fourth amendment is to prevent self-incrimination fails to account for the fact that once the safeguards of oath, specificity, and particularity are met, the fourth amendment allows the use of force to exact evidence from a suspect's premises. If followed to a logical conclusion, the fifth amendment would allow no search whatsoever, or would at least protect the suspect from seizure of the most damaging evidence. But the effect of the rule is just the opposite. Because of the exceptions for contraband, stolen property, and instrumentalities, only the least incriminating evidence is protected. See State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965); Comment, 66 COLUM. L. REV. 355, 360-64 (1966); Comment, *A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 324-27 (1953), Comment, 31 YALE L.J. 518, 522 (1922). For some time after the decision in *Mapp* it was thought that the states would not be faced with the mere evidence rule because Mapp applies only the fourth amendment to the states. The fifth amendment was applied to the states as well in Malloy v. Hogan, 378 U.S. 1 (1964). See Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172, 180, (1964).

[5] 363 F.2d 647 (1966).

[6] Under N.C. GEN. STAT. § 15-25.2 (Supp. 1965) a search warrant may issue for anything "which may constitute evidence of a felony. . . ." The holding in *Hayden* invalidates this portion of the statute.

[7] Note, *Evidentiary Searches: The Rule and The Reason*, 54 GEO. L.J. 593, 614 (1966).

[8] 275 U.S. 192, 199 (1927).

of the outfit used by operators of a speakeasy. But five years later the Court favored a narrow construction in *United States v. Lefkowitz*[9] when similar items were held to be mere evidence. The court attempted to distinguish the cases by saying that the search in *Lefkowitz* was more extensive and exploratory,[10] but as far as the nature of the evidence is concerned, the cases cannot be reconciled.[11] Due to this lack of a standard the lower federal courts have found it difficult to apply the rule evenly and many inconsistencies have resulted. For example, in *United States v. Lerner*[12] an address book was held to be mere evidence. But in *Matthews v. Correa*[13] a similar address book was held to be an instrumentality.[14]

The property theory that is used to support the *Gouled* rule has been harshly criticized.[15] The basic idea of the rule is that property of the defendant may not be seized. Stolen property may be seized because it does not belong to the defendant. Contraband may be taken because the defendant's property rights in it have been voided by statute.[16] To justify seizure of instrumentalities the courts resort to the ancient deodand principle that things used in the commission of a crime are forfeited to the state.[17] To justify this property theory it is sometimes said that stolen property may be seized because the law wishes to return it to the owner and that contraband

[9] 285 U.S. 452 (1932).

[10] *Id.* at 465.

[11] LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 135-36 (1937).

[12] 100 F. Supp. 765 (N.D. Cal. 1951).

[13] 135 F.2d 534 (2d Cir. 1943).

[14] As to documentary items *compare* United States v. Loft on Sixth Floor of Bldg., 182 F. Supp. 322 (S.D.N.Y. 1960) (letters offering obscene materials for sale were mere evidence) *and* Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944) (letter containing evidence of criminal fraud held inadmissible) *and* Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933) (documents ordered returned after search) *with* United States v. Klaw, 227 F. Supp. 12 (S.D.N.Y. 1964) (advertising circular for obscene materials held to be instrumentality) *and* Landon v. United States Attorney, 82 F.2d 285 (2d Cir. 1936) (invoice used in smuggling operation was instrumentality) *and* Sayers v. United States, 2 F.2d 146 (9th Cir. 1924) (where business records were held to be instrumentalities). As to non-documentary items *compare* Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief with evidence of sex crime not instrumentality) *with* United States v. Guido, 251 F.2d 1 (1958) (shoes worn in bank robbery were instrumentalities).

[15] Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 478 (1961).

[16] Boyd v. United States, 116 U.S. 616, 623 (1886).

[17] United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

is confiscated to prevent further use.[18] The forfeiture of instrumentalities cannot be so easily explained. Some instrumentalities such as weapons should be taken to prevent further use in crime or to protect the searching officers from attack.[19] But other instrumentalities such as a cancelled check, that cannot be used in crime again and are certainly not dangerous, may be seized as well.[20] Critics consider this property theory archaic and arbitrary. They argue that the primary purpose of search is to secure evidence[21] and that the police should not be hindered by ancient notions of forfeiture. The protection given to mere evidence is arbitrary because it defeats the policy of making evidence available to the police without balancing any comparable interest of the defendant against that policy.[22]

In defense of the rule it is said that it protects privacy by preventing an exploratory search or fishing expedition among the papers and effects of a suspect.[23] Learned Hand provided the most famous statement of this idea in *United States v. Poller*,[24] "it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his personal effects to secure evidence against him . . . limitations upon the fruit to be gathered tend to limit the guest itself." Critics argue, however, that in practice the rule does not protect privacy. During a search for contraband, stolen property or instrumentalities the police must typically go through a suspects's

[18] United States v. Boyette, 299 F.2d 92, 98 (1962).

[19] Palmer v. United States, 203 F.2d 66 (D.C. Cir. 1953).

[20] Zap v. United States, 328 U.S. 624 (1940).

[21] See Abel v. United States, 362 U.S. 217, 239 (1960). This is the attitude of the North Carolina Supreme Court. See State v. Bullard, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966) (dictum). *But see* Church v. State, 151 Fla. 24, 31, 9 So. 2d 164, 167 (1942).

[22] Comment, 66 COLUM. L. REV. 355, 360 (1966).

[23] Proponents of the rule also argue that it is required by the history of the fourth amendment. Citing Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1785), the English landmark case prohibiting the general warrant, they conclude that the first clause of the fourth amendment includes a prohibition against a search for mere evidence. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1921); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L. REV. 257-77 (1925). Later critics insist, however, that the fourth amendment must be read as a whole as a safeguard against general search and that no ban on seeking evidence per se is included in the prohibition against unreasonable search. Kamisar, *The Wiretapping-Eavedropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914 (1960). Comment, 66 COLUM. L. REV. 355, 363-67 (1966).

[24] United States v. Poller, 43 F.2d 911, 914 (1930).

papers and effects as thoroughly as they would if they were permitted to search for all relevant evidence.[25] If the police are going to find the evidence in any event, they should be allowed to use it.[26]

Since *Mapp*, defendants have urged acceptance of the rule in the state courts with increasing frequency, but the states have found the rule undesirable.[27] The California Supreme Court[28] has challenged the rule saying that although the United States Supreme Court has paid lip service to it, it has in fact been abrogated and cannot be considered a constitutional standard that should apply to the states under *Mapp*.[29] It is suggested that the rule, if it is to be retained at all, should be reduced to an expression of the Supreme Court's power to supervise the federal courts.[30] Other state courts have not

[25] Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 477 (1961). *But see* Ramsey, *Acquisition of Evidence by Search and Seizure*, 47 MICH. L. REV. 1137, 1155 (1930).

[26] The test of reasonableness under the circumstances offers protection from excessively extensive searches. Kremen v. United States, 353 U.S. 346 (1957); Harris v. United States, 331 U.S. 145 (1947). Although the test of reasonableness applies to persons, the mere evidence rule does not. See Schmerber v. California, 384 U.S. 757 (1966) where police were allowed to take a blood test over the objection of a suspected drunk driver. In Weeks v. United States, 232 U.S. 383, 392 (1913) (dictum) it was said that the state has always had the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime." If the type of evidence is immaterial in the search of a person, it would seem that any type of evidence should be available in the search of a dwelling.

[27] State v. Raymond, 142 N.W.2d 444 (Iowa 1966); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963); People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (1963). *Contra*, Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962).

[28] People v. Thayer, 47 Cal. Rptr. 780, 408 P.2d 108 (1966).

[29] The California Supreme Court in People v. Thayer, 47 Cal. Rptr. 780, 782, 408 P.2d 108, 110 (1966) relies on Ker v. California, 374 U.S. 23, 34 (1963) where it was said, "The States are not . . . precluded from demands of effective law enforcement in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . ." Thus the United States Supreme Court has indicated willingness to reinterpret older decisions which might be onerous to the states. The holding of *Ker*, that state police do not have to give the traditional knock and notice on the door of a dwelling place before beginning a search if giving notice will result in immediate danger that persons inside will destroy evidence, was not, however, a concession of the same magnitude that a re-evaluation of the mere evidence rule would be. There is only one United States Supreme Court case on the knock and notice requirement and it is based on a statute rather than the Constitution. Miller v. United States, 357 U.S. 301 (1958). The mere evidence rule has been directly applied three times by the United States Supreme Court in *Boyd*, *Gouled*, and *Lefkowitz* to suppress evidence and it is well represented in dicta. See *e.g.*, United States v. Rabinowitz, 339 U.S. 56, 64 (1950).

[30] The Gouled rule has been incorporated into FED. R. CRIM. P. 41(e).

been so direct but have attempted to avoid application of the rule through broad construction of the instrumentality exception. For example, in *State v. Chinn*[31] the Oregon Supreme Court recently held that bed linen, a camera, and film showing a photograph of the prosecutrix in the defendant's bedroom were instrumentalities of the crime of statutory rape.

In *Hayden* the Fourth Circuit Court of Appeals has rejected both these approaches. Although the court shows little enthusiasm for the rule it concludes that the holdings and dicta of the United States Supreme Court require application of the rule to the states.[32] The court also serves notice that it intends to enforce the rule strictly in favor of the defendant and will resist "stretching to the point of distortion the category of 'instrumentality of crime,' in order to achieve the admission in evidence of articles manifestly of evidential value only."[33]

It would nevertheless seem that practical difficulties from application of the rule in the states will outweigh its benefits. Although the rule does make a search somewhat less onerous for a suspect,[34] especially where papers are involved,[35] it has been suggested that

[31] 231 Ore. 259, 373 P.2d 392 (1962). See also Elder v. Board of Medical Examiners, 50 Cal. Rptr. 304, 318 (Dist. Ct. App. 1966), *but see* Cagle v. State, 147 Tex. Crim. 354, 180 S.W.2d 928 (1944).

[32] 363 F.2d at 651.

[33] There is room for doubt that the Fourth Circuit Court of Appeals will adhere to this narrow construction. A dissent in *Hayden*, 363 F.2d at 655, that the clothing should be considered instrumentalities of the crime of armed robbery because it was hidden in an attempt to perfect escape, is one of the most extreme applications of the rule that has been suggested in the federal reports. See United States v. Boyette, 299 F.2d 96 (4th Cir. 1962), where the court gave the instrumentality exception an extremely broad construction in holding that receipts on which a prostitute recorded the amounts received from customers were instrumentalities of a Mann Act violation.

[34] Hand was apparently motivated by this consideration in *Poller*. See note 24 *supra* and accompanying text. Kaplan, *supra* note 15, at 479 has suggested that this "pro tanto" protection of a suspect would be "just as well served by a restriction on search to the even-numbered days of the month."

[35] The New Jersey Supreme Court, noting that all United States Supreme Court cases applying the mere evidence rule to suppress evidence involved papers, has suggested that papers, and not effects, should be protected by the rule. State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965). Under this view papers deserve more protection than effects because of their thought content and closer relationship to privacy. Searches of papers can also be extensive. Alioto v. United States, 216 F. Supp. 48 (E.D. Wis. 1960). At times the mere evidence rule may be helpful in preventing excessive seizure of papers on the grounds that they throw light on the suspect's operations, but it would seem that this is a question of relevancy on which other and more appropriate rules are available. See United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y. 1943).

the state police are faced with a greater variety of situations than federal officers were evidence such as that in *Hayden* is necessary for a conviction.[36] It is further urged that if confessions are often to be denied the state police and greater emphasis on scientific investigation is desirable, the police in the states should be allowed maximum access to evidence in an otherwise lawful search.[37]

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Constitutional Law—Illegal Search and Seizure—Injunction

Dissatisfied with the more common remedies for unlawful police searches, the United States Court of Appeals for the Fourth Circuit, in *Lankford v. Gelston*,[1] has added significant dimensions to the use of the federal injunction. The case arises from the efforts of Baltimore police to apprehend two Negroes suspected of killing a city policeman. Possessing arrest warrants, but no search warrants, the police entered more than three hundred homes within a period of nineteen days. The searches, largely based on anonymous tips, were conducted predominately in Negro neighborhoods. Plaintiffs, owners of the homes searched, sought a temporary restraining order in the federal district court against further searches. Jurisdiction was based on section 1983 of the Judicial Code.[2] Since the searches had ceased and the police commissioner had issued a general order[3] prohibiting further searches without probable cause, the court refused relief.[4]

The court of appeals, however, was unimpressed with the general order, primarily because it left determination of probable cause[5]

[36] Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327-32 (1962); Weinstein, *Local Responsibility for Improvement of Search and Seizure*, 34 ROCKY MT. L. REV. 150 (1962).

[37] Hayden v. Warden, Md. Penitentiary, 363 F.2d 647, 658 (1966).

[1] 364 F.2d 197 (4th Cir. 1966).

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).

[3] For a full text of the order see 240 F. Supp. at 555 n.2 (1965).

[4] Lankford v. Schmidt, 240 F. Supp. 550 (D. Md. 1965).

[5] See U.S. CONST. amend. IV.