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Evidence -- Admissibility in Civil Actions of Evidence Illegally Obtained by Private Persons

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Evidence—Admissibility in Civil Actions of Evidence Illegally Obtained by Private Persons

Evidence illegally obtained by a trespass or a breaking and entering by private persons is freely admissible in civil actions. In *Sackler v. Sackler*[1] the New York Court of Appeals rejected the attempt of a lower court to abandon this universal rule.[2] A divorce granted to the husband on grounds of adultery was allowed to stand, though the evidence used, including photographs, was obtained by the husband and private detectives in a predawn forcible entry of the wife's separately maintained apartment.[3]

The courts have constantly sought effective means of protecting persons from illegal searches. In England in 1762-1763 messengers of King George III conducted an infamous series of searches, seeking evidence of seditious libel. General warrants issued as authority for the searches were declared illegal, and trespass actions instituted by the search victims resulted in substantial damage judgments against the messengers and against the Earl of Halifax who, as Secretary of State, issued the warrants.[4] These actions are early and prominent examples of the traditional means used in the courts' attempts to control illegal searches—damages from the searchers are relied upon to discourage such acts of trespass, however much success on the principle issue as a direct result of the illegal search may encourage them.

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[1] 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964), *affirming* 16 App. Div. 2d 423, 229 N.Y.S.2d 61, *reversing* 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962).

[2] See 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961) for the rationale of the non-exclusionary rule. *E.g.:*

> It does not, logically, follow, however that records, being obtained can not be used as instruments of evidence, for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the *competency* of the witness!

Stevison v. Earnest, 80 Ill. 513, 517-18 (1875). See also Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841).

[3] 33 Misc. 2d at —, 224 N.Y.S.2d at 795.

[4] Money v. Leach, 3 Burr. 1742, 97 Eng. Rep. 1075 (K.B. 1765); Entick v. Carrington, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765); Wilkes v. Wood, 2 Wils. 203, 95 Eng. Rep. 766 (K.B. 1763). More detailed reports of these cases can be found at 19 Howell's St. Tr. 1001, 19 Howell's St. Tr. 1029, and 19 Howell's St. Tr. 1153, respectively.

A concept of exclusion was introduced into American law in 1886 when the United States Supreme Court handed down its decision in *Boyd v. United States*.[5] In that opinion Mr. Justice Bradley described Lord Camden's opinion in *Entick v. Carrington*[6] as "one of the landmarks of English liberty"[7] and an incentive to the adoption of the fourth amendment.[8] But in *Boyd* the Court found it necessary to rely upon the fifth amendment's protection against self-incrimination to declare erroneous and unconstitutional the introduction of evidence obtained by a process it deemed an illegal search.[9]

In *Weeks v. United States*,[10] twenty-eight years after *Boyd* and ten years after exclusion based solely on the fourth amendment had been considered but rejected in *Adams v. New York*,[11] the Court finally made it clear that the federal rule would be to exclude evidence in criminal cases when it had been seized in violation of the fourth amendment. While limiting the rule to unconstitutional searches made by officers of the federal government and its agencies,[12] Mr. Justice Day, speaking for a unanimous Court, reasoned:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[13]

But in *Burdeau v. McDowell*[14] the Court refused to invoke this protective rule when the unconstitutional searches or seizures

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[5] 116 U.S. 616 (1886).
[6] 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).
[7] 116 U.S. at 626.
[8] The amendment reads:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[9] Wigmore approves the decision as "correct on simple Fifth Amendment grounds" but asserts that it made "fallacious conclusions" as to the fourth amendment. 8 WIGMORE, *op. cit. supra* note 2, § 2184a at 32.
[10] 232 U.S. 383 (1914).
[11] 192 U.S. 585 (1904). See 232 U.S. at 396, where the *Weeks* Court attempts to distinguish the decision in this case.
[12] 232 U.S. at 398.
[13] *Id.* at 393.
[14] 256 U.S. 465 (1921).

were by private persons, even when federal officials proposed to use evidence thus obtained in criminal prosecutions.[15] Mr. Justice Day, speaking for the majority,[16] said of the fourth amendment:

> Its origin and history clearly show that it was intended to be a restraint on the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . .
>
> In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure . . . . We assume that the petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.[17]

In *People v. Defore*,[18] a 1926 decision, Judge Cardozo, then on the New York Court of Appeals, had to consider whether, in the light of the federal exclusionary rule manifested in *Weeks*, the state of New York should adopt a like policy. Both New York and the Supreme Court had rejected such a policy in *Adams*. Cardozo found nothing in the controlling New York statute[19]

> whereby official trespasses and private are differentiated in respect of the legal consequences to follow them. . . . Evidence is not excluded because the private litigant who offers it has gathered it by lawless force. By the same token, the State, when prosecuting an offender against the peace and order of society, incurs no heavier liability.[20]

Cardozo found the federal exclusionary rule "either too strict or too lax. . . . We must go farther or not so far."[21] And he chose not to go so far because

> the Legislature, which created it [the statute], has acquiesced in the ruling of this court that the prohibition of the search did not anathematize the evidence yielded through the search. If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right.[22]

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[15] *Id.* at 470, 476.

[16] Mr. Justice Brandeis and Mr. Justice Holmes dissented. *Id.* at 476.

[17] *Id.* at 475.

[18] 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926).

[19] N.Y. CIV. RIGHTS LAW § 8. In 1938 this became part of the New York state constitution. N.Y. CONST. art. 1, § 12. The law is identical in wording with the fourth amendment. See note 8 *supra*.

[20] 242 N.Y. at 21-22, 150 N.E. at 588.

[21] *Id.* at 22, 150 N.E. at 588.

[22] *Id.* at 23, 150 N.E. at 588.

The United States Supreme Court eventually concluded that searches and seizures by state officers might violate the fourteenth amendment when the fourth amendment standard of reasonableness was not met, but for a long period the Court, like Cardozo, refused to widen the consequences.[23]

Of course, *Mapp v. Ohio*[24] changed all this. After refusing to allow federal officers to continue to turn over illegally seized evidence to state officers for state court prosecutions,[25] and destroying the "silver platter" doctrine that permitted evidence of federal crime illegally obtained by state officers to be used in federal courts,[26] the Court in *Mapp* forced the states, including New York,[27] to go just so far as the federal rule. The Court declared that "time [had] . . . set its face against . . . the 'weighty testimony' "[28] of *Defore* and reasoned that a uniform, if still severely limited,[29] rule of exclusion was "not only the logical dictate of prior cases, but it also makes very good sense."[30]

[23] See Irvine v. California, 347 U.S. 128 (1954); Salsburg v. Maryland, 346 U.S. 545 (1954); Wolf v. Colorado, 338 U.S. 25 (1949).

[24] 367 U.S. 643 (1961).

[25] Rea v. United States, 350 U.S. 214 (1956).

[26] Elkins v. United States, 364 U.S. 206 (1960).

[27] People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

[28] 367 U.S. at 653.

[29] As it now stands, the federal exclusionary rule in criminal cases: (a) applies to evidence obtained as an indirect result of the illegal search—to the "fruits of the poisonous tree," Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), including verbal evidence obtained after an illegal entry, Wong Sun v. United States, 371 U.S. 471 (1963); (b) does not operate to quash indictments based on tainted evidence, Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956); Holt v. United States, 218 U.S. 245 (1910); (c) probably need not be raised by pretrial motion for suppression where the prosecution's evidence discloses the illegality for the first time, Gouled v. United States, 255 U.S. 298 (1921); FED. R. CRIM. P. 41(e); (d) applies to suppress contraband, though not to compel its return, Henry v. United States, 361 U.S. 98 (1959); United States v. Jeffers, 342 U.S. 48 (1951); Trupiano v. United States, 334 U.S. 699 (1948); (e) does not apply to searches or seizures by private persons, Burdeau v. McDowell, 256 U.S. 465 (1921); (f) applies only to searches of " 'persons, houses, papers, and effects,' " Hester v. United States, 265 U.S. 57 (1924), but automobiles are within the rule, Carroll v. United States, 267 U.S. 132 (1925); (g) applies only to searches invading defendant's own privacy, McDonald v. United States, 335 U.S. 451 (1948); (h) may be invoked by a corporate defendant, Silverthorne Lumber Co. v. United States, *supra*; (i) applies only to evidence seized in violation of the fourth amendment standard, with rare exception, Miller v. United States, 357 U.S. 301 (1958) (violation of D.C. local statute).

[30] 367 U.S. at 657.

Against this progression on the criminal side, it is, at first, strange that until *Sackler* was decided by the trial court no reported American court, with one limited exception,[31] had extended any like protection on the civil side.[32] However, since it is apparently still the rule that evidence illegally seized by private persons is not to be excluded in state[33] or federal[34] criminal actions, it is perhaps not so surprising, at least to one trained in legal niceties. The trial court, in excluding the *Sackler* evidence, thought the non-applicability of the exclusionary rule to seizures by persons other than federal agents (state officers *or* private persons)[35] "appears to have been overruled by *Elkins v. United States.*"[36] In his dissent, Judge Van Voorhis of the Court of Appeals also thought the *Elkins*[37] rejection of the "silver platter" doctrine should apply when the platter is offered by a private individual as well.[38] But the Court of Appeals majority's insistence that *Burdeau's* "definitive holding that the Fourth Amendment has nothing to do with nongovernmental intrusions . . . has never been overruled in this respect,"[39] is probably more accurate. This had been the Appellate Division's conclusion in reversing the trial court.[40]

If this is so, the fourth amendment is a poor peg on which to hang a civil exclusionary rule. And, despite Judge Bergan's extra-

[31] Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958). This case would exclude evidence of alcohol in a blood sample taken from defendant by a nurse at the direction of a state police officer, a violation of security of the person, and its application is probably limited to such extreme facts. Compare Breithaupt v. Abram, 352 U.S. 432 (1957).

[32] See, *e.g.*, Hair v. McGuire, 188 Cal. App. 2d 348, 10 Cal. Rptr. 414 (Dist. Ct. App. 1961) (no violation of federal mail law in seizure of evidence); Walker v. Penner, 190 Ore. 542, 227 P.2d 316 (1951) (personal injury; error in excluding whiskey bottle illegally taken from defendant's car by plaintiff's husband); Hartman v. Hartman, 253 Wis. 389, 34 N.W.2d 137 (1948) (divorce for adultery; no illegal search, but dictum that illegal search would not prevent admission of evidence).

[33] See, *e.g.*, People v. Johnson, 153 Cal. App. 2d 870, 315 P.2d 468 (Dist. Ct. App. 1957).

[34] See Burdeau v. McDowell, 256 U.S. 465 (1921).

[35] *Ibid.*

[36] 33 Misc. 2d at —, 224 N.Y.S.2d at 793. See also Williams v. United States, 282 F.2d 940, 941 (6th Cir. 1960).

[37] Elkins v. United States, 364 U.S. 206 (1960).

[38] 15 N.Y.2d at —, 203 N.E.2d at 484, 255 N.Y.S.2d at 87.

[39] *Id.* at —, 203 N.E.2d at 483, 255 N.Y.S.2d at 85.

[40] 16 App. Div. at —, 229 N.Y.S.2d at 63. Justice Hopkins disagreed. *Id.* at —, 229 N.Y.S.2d at 67 (dissenting opinion).

polation from Cardozo in *Defore*,[41] similar state statutory or constitutional provisions[42] are probably no better.

In England, where the doctrine behind such provisions first developed, "the question [of exclusion] has apparently arisen very infrequently,"[43] on either the criminal or civil side. There has been little discussion of illegal governmental seizures since the oft-quoted *Entick v. Carrington*[44] opinion of Lord Camden in 1765, and exclusion of evidence so seized is apparently discretionary with the trial judge.[45] However, in one English civil case[46] an exclusionary policy was announced, the evidence being copies[47] of privileged communications between attorney and client obtained "by collusion"[48] between the defendant and the attorney's clerk. An injunction was allowed against production of the copies as evidence. Cozzens-Hardy, Master of the Rolls, saw "no ground whatever in principle why we should decline to give the plaintiff the protection which in my view is his right as between him and . . . [the defendant]."[49]

This is a somewhat backhanded statement of what perhaps is a better basis for an exclusionary rule in civil actions. Not the fourth amendment, but something akin to the equitable doctrine of clean hands[50] and the common law maxim: "No one can take advantage of his own wrong."[51] However strictly a court is

[41] 15 N.Y.S.2d at —, 203 N.E.2d at 485, 255 N.Y.S.2d at 88 (dissenting opinion). See text accompanying note 21 *supra*.

[42] *E.g.*, N.C. CONST. art. I, § 15, which provides:

> General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

[43] Cowen, *The Admissibility of Evidence Procured Through Illegal Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523, 528 (1952).

[44] 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

[45] 15 HALSBURY'S LAWS OF ENGLAND, *Evidence* § 487 (Simonds ed. 1956).

[46] Ashburton v. Pape, [1913] 2 Ch. 469.

[47] Nor, because of the privilege, could the originals be introduced. *Id.* at 473. They had to be returned to the attorney. *Id.* at 472. Compare LeLong v. Siebrecht, 196 App. Div. 74, 187 N.Y. Supp. 150 (1921). See generally 8 WIGMORE, *op. cit. supra* note 2, §§ 2325, 2326; N.Y. CPLR § 4503.

[48] [1913] 2 Ch. at 471.

[49] *Id.* at 473.

[50] See McCLINTOCK, EQUITY § 26 (2d ed. 1948).

[51] BLACKSTONE, COMMENTARIES 952 (Gavit ed. 1941).

engaged in the matter strictly before it, can it afford to ignore the type of conduct its blindness may encourage in private persons?[52] The traditional legal remedy of a trespass suit against the illegal searchers is almost certainly inadequate.[53]

Something of this argument is implicit in the trial court's decision in *Sackler*. There Judge Brenner pointed out that "the divorce laws of the State of New York, confined as they are to the single cause of adultery are outmoded and archaic. . . . Hence, they foster disrespect of the law which the courts are powerless to halt."[54] He also noted that direct evidence of adultery, as might be obtained in a raid, frequently staged, is unnecessary.[55] "The continued disclosure of evidence of adultery procured in violation of fundamental civil liberties thus works a double harm upon the integrity of the judicial process."[56]

Judge Bergan's dissent in the Court of Appeals echoes this point:

> It is not possible to draw a fully logical difference on the question of admissibility between evidence wrongfully obtained by a private citizen and evidence wrongfully obtained by public authority. Indeed, since the motivation of public authority is the common good of the community and the motivation of the pri-

[52] Plaintiff's conduct in *Sackler* was not the innocent procedural error so often made by police, unskilled in constitutional subtleties, but a deliberate, planned trespass. 33 Misc. 2d at —, 224 N.Y.S.2d at 794. Plaintiff was accompanied by private detectives who had equipped themselves in advance to take photographs of what they found. Suppose a raid had been conducted by the wife instead of by the husband, and she had been the plaintiff in a New York divorce action. Her conduct might have prevented her from obtaining alimony. See N.Y. DOM. REL. LAW § 236, making the award of alimony discretionary with the court. However, if the wife herself is guilty of adultery, the court *cannot* award her alimony, though her husband is guilty of the same conduct, and no matter who seeks the divorce.

[53] *Quaere,* if the wife-defendant in *Sackler* were to sue the husband-plaintiff for trespass, would her loss of alimony be an element of damages? Probably not; her recoverable damages may be purely nominal. *But see* Humble Oil & Ref. Co. v. Kishi, 276 S.W. 190 (Tex. Comm. App. 1925), *modifying* 261 S.W. 228 (Tex. Civ. App. 1924) (damages allowed for destruction of speculative value). Compare Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862 (1927). See generally 11 CORNELL L. Q. 416 (1926); 48 HARV. L. REV. 485 (1935); 4 TEXAS L. REV. 215 (1926); 36 YALE L. J. 1167 (1927). For the difficulties that arise in suing the perpetrators of an unconstitutional search, see Bell v. Hood, 327 U.S. 678 (1946), *on remand,* 71 F. Supp. 813 (S.D. Cal. 1947).

[54] 33 Misc. 2d at —, 224 N.Y.S.2d at 796.

[55] *Id.* at —, 224 N.Y.S.2d at 795.

[56] *Id.* at —, 224 N.Y.S.2d at 796.

> vate citizen the advantage of his lawsuit, it might be supposed we would more readily suppress wrongfully taken evidence in the private suit than in the criminal action.[57]

In allowing the use of evidence obtained by illegal acts by private persons is a court not involved in *unconstitutional* state action as in *Shelley v. Kraemer?*[58] In *Shelley* it was held violative of the fourteenth amendment's equal protection clause for a court to enforce a privately-made restrictive covenant. Is not the *Sackler* court, in allowing the illegally seized evidence, giving validity to an act that would violate the fourteenth amendment's due process clause if performed by any other branch of government? One writer has distinguished the court's role in *Sackler* as merely passive,[59] noting also that the concept of *Shelley* has yet to be applied to any but racial segregation cases.[60]

As *Sackler* suggests, the present state of the law is "clear and plain,"[61] and the only hope for change is in state legislatures, despite the *Sackler* defendant's attempt to ride "the crest of [*Mapp* and subsequent] . . . holdings."[62] *Mapp,* of course, indicates the reluctance of many states to adopt an exclusionary rule on the criminal side. But in civil litigation the interest that would be harmed by an exclusionary rule, that of private litigants who have committed illegal acts themselves rather than that of the public as a whole, seems hardly as meritorious. Some moves have been made. For example, New York has by statute adopted an exclusionary rule as to wiretap evidence in civil actions,[63] while per-

[57] 15 N.Y.2d at —, 203 N.E.2d at 485, 255 N.Y.S.2d at 88. Judge Bergan also argues that the landmark New York decision (*Defore*) "makes [it] quite clear that there is no distinction under the New York Civil Rights Law . . . between a private and a public invasion of privacy." *Ibid.*

[58] 334 U.S. 1 (1948).

[59] 46 MINN. L. REV. 1119 (1962). "In *Shelley* the lower court was asked to compel a private citizen to do an act which would be unconstitutional for the state to perform, whereas in the instant case the court was merely asked to give evidentiary status to illegally seized information." *Id.* at 1124-25. As to passive state action, consider Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied,* 350 U.S. 983 (1956).

[60] 46 MINN. L. REV. 1119, 1125 (1962).

[61] 15 N.Y.2d at —, 203 N.E.2d at 484, 255 N.Y.S.2d at 86.

[62] 33 Misc. 2d at —, 224 N.Y.S.2d at 791.

[63] N.Y. CPLR § 4506. In Silverman v. United States, 365 U.S. 505 (1961), the exclusionary rule was applied to electronic eavesdropping by federal officers.

mitting such evidence in criminal cases.[64] It hardly seems that courts are significantly hindered in their search for the truth by such rules. And, if exclusion is to continue to be the rule in criminal cases, there is little logic in not extending it to civil litigation as well.[65]

CHARLES B. ROBSON, JR.

Guardian and Ward—Estate Planning—Gifts by Guardian from Estate of Incompetent Ward

Petitioner in *In re Trusteeship of Kenan*,[1] as trustee of the person and estate of an incompetent ward, sought authority, pursuant to legislative enactments,[2] to make gifts from the ward's income;[3] to make gifts from the principal of the ward's estate;[4] and, with regard to an inter vivos trust created by the incompetent, to surrender a reserved right of revocation and to make charitable gifts of the income therefrom which had been reserved to the incompetent for her lifetime.[5] On the first appeal,[6] the lower court orders[7] granting the requested authority were reversed by the North Carolina Supreme Court on the ground that the lower court's finding that the incompetent, if competent and heeding sound advice, would make the gifts was not supported by the evidence. Petitioner, apparently having relied solely on the statutes in his initial pleadings, was given leave to obtain permission to amend his petitions to al-

[64] N.Y. CODE CRIM. PROC. § 813-a; N.Y. CONST. art. I, § 12. See People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, *cert. denied*, 371 U.S. 877 (1962).

[65] With sponsorship of the Bar Association of the City of New York, a commission to review and make recommendations on all aspects of the antiquated New York divorce laws has been proposed to the 1965 New York Legislature. Editorial, N.Y. Times, Feb. 11, 1965, p. 38, col. 2. If such a commission is established, it would be well for it to consider as a part of its task the evidentiary implications of these laws as they are illustrated by the *Sackler* case.

[1] 261 N.C. 1, 134 S.E.2d 85 (1963); 262 N.C. 627, 138 S.E.2d 547 (1964).

[2] N.C. GEN. STAT. §§ 35-29.1 to -29.16 (Supp. 1963).

[3] See N.C. GEN. STAT. §§ 35-29.1 to -29.4 (Supp. 1963).

[4] See N.C. GEN. STAT. §§ 35-29.5 to -29.10 (Supp. 1963).

[5] See N.C. GEN. STAT. §§ 35-29.11 to -29.16 (Supp. 1963).

[6] *In re* Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1963).

[7] Three separate proceedings took place in the superior court—one relating to gifts from income, another to gifts from principal, and the last to surrendering the right to revoke the trust and the lifetime income interest. Thus, three orders were issued below, and the proceedings were consolidated for purposes of appeal.