THE NECESSITY OF MOTION BEFORE TRIAL TO SUPPRESS EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE

The two cases, *Bock v. City of Cincinnati* and *Tapp v. Same*, recently considered together by the Court of Appeals of Ohio, Hamilton County, stir interest in the question of the admissibility of evidence obtained by illegal search and seizure.

Two views upon the question are now somewhat crystallized; each has commanded analysis and criticism by eminent jurists on the bench and off. A large majority of the courts in this country have held that evidence otherwise competent is admissible notwithstanding the unlawful method by which it has been obtained. On the other hand, a respectable minority, headed by the United States Supreme Court, have taken the view that full effect can be given to the constitutional guaranties against unreasonable search and seizure and self-incrimination only by making such evidence inadmissible against the accused party. The Illinois Supreme Court has aligned itself with the latter group.

However, those courts which follow the minority rule have split on the question as to whether, as a matter of procedure, a defendant must make a motion prior to the trial for the return of, or to suppress, the evidence obtained by the illegal search and seizure. Two views are evident in the decisions.

One line of authority adheres to the rule that this is simply a question of competency of the evidence and, as in cases of other such evidential questions, it is proper to make an objection to evidence at the time it is sought to be introduced at the trial. Some of the courts taking this view regard it as the only proper

1 183 N.E. 119 (1932).
2 4 Wigmore, Evidence (2nd ed. 1923), 626, §§2183-4; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 386 (1921); Chafee, The Progress of the Law, 35 Harv. L. Rev. 673, 694 (1922); Atkinson, Unreasonable Searches and Seizures, 25 Col. L. Rev. 11 (1923); Harno, Evidence Obtained By Unlawful Searches and Seizures, 19 Ill L. Rev. 303 (1925); Knox, Self Incrimination, 74 Univ. Pa. L. Rev. 139 (1925).
5 People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923); People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924).
6 United States v. Wong QuongWong, 94 Fed. 832 (1899); State v. Sheridan, 121 Iowa 164, 94 N.W. 730 (1903); Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); Blum v. State, 94 Md. 375, 51 Atl. 26 (1902); Holmes v. State, 146 Miss. 351, 111 So. 860 (1927); Walker v. State, 239 Pac. 191 (Okla. Crim. App. 1925); State v. Slamon, 73 Vt. 212, 90 Atl. 1097 (1901); State v. Wills, 91 Vt. 183, 51 S.E. 261, 54 L. R. 1308 (1907); and see Holmes v. United States, 275 Fed. 49 (1921); Chafee, The Progress of the Law, 35 Harv. L. Rev. 673 (1922).
method which may be used to raise the issue, whereas most of them hold that it is proper to make an objection at the time of the trial, or to make a motion before the trial for the return of, or to suppress, the evidence wrongfully obtained. The general attitude is, that while this may be a collateral issue, and some delay may be caused in settling it, yet it is no more a collateral issue and would cause no greater delay than would the raising and settling of an objection to evidence for any other reason. There would seem to be much merit in this rule. As for the accused man, it insures him against losing his immunity from being faced with this type of evidence, in those cases where he was unaware that it was going to be used until the trial, and so had no earlier chance to protest its use. As for the prosecution, it may be contended that it should be prepared to defend against any attack upon its evidence, and so it is not an injustice to allow the objection to be made at the trial; and, as for the court, it would save the trial judge the useless formality of conducting a prior inquiry to determine the competency of testimony that may never be offered at the trial.

Another group of courts uphold the practice that, in order to take advantage of the constitutional guaranties, the defendant must make a timely motion, at least before the trial has begun, for the return of, or to suppress the use of, the illegally obtained evidence. If he does this, then the court should decide the matter at that time, but if it does not then decide the question, it may be raised upon objection, when the evidence is offered at the trial. This rule is commonly regarded as the orthodox corollary of the original minority rule of the United States Supreme Court. The practice was first attempted in 1908 in a federal district court as a means to circumvent the position of the United States Supreme Court in affirming Adams v. People. Such a motion before trial was successful

7 Holmes v. State, 146 Miss. 351, 111 So. 860 (1927).
8 See Youman v. Commonwealth, 189 Ky. 152, 169, 224 S.W. 860, 867 (1920).
9 See Holmes v. State, 146 Miss. 351, 358, 111 So. 860, 861 (1927).

12 176 N.Y. 351, 68 N.E. 636 (1903), aff. in 192 U.S. 585, 24 Sup. Ct. 372 (1904). In the Adams case the court had permitted evidence obtained by illegal search and seizure to be used on the trial over the objections of the defendant, giving as one reason that to allow the objection would raise a collateral issue. The new practice escaped that difficulty by trying the matter before the trial on the merits.
in a later case; and in 1914, the practice was made authoritative by the decision in *Weeks v. United States*.4

To this rule of practice the courts, under the leadership of the United States Supreme Court, have since made certain qualifications.3 The nature of these qualifications as well as the extent to which they have gone leads to an inquiry as to the true justification for the requirement of a motion before trial. The reason for the requirement is not disclosed in the cases dealing with this problem. The true reason would seem to be this: if no objection is voiced until the offer of the evidence at the trial, the prosecution is not usually aware that the method of obtaining the evidence is going to be called into question, and hence is rarely prepared to defend it. This is especially true when we consider the way the district attorney’s business is conducted, the trials very often being handled by officers quite remote from those who executed the arrest and the seizure of the evidence, and who are often entirely unfamiliar with the detailed manner by which the evidence was obtained. It might be contended, however, that this is the fault of the prosecutor’s office and it should not concern the court; if the prosecutor chooses to come into court not fully prepared to meet such contingencies, that is his misfortune and not the defendant’s. The courts, however, do not look at it in this way, but having an eye on the practical problems of law enforcement, they are somewhat more favorable to the state than exact justice would require, and will not permit the prosecution to be thus surprised. On the other hand, were the prosecution to be allowed time to prepare its defense of the evidence, it would entail prolonged interruption of the trial. This interruption might be of considerable length, for in these cases very often there is a question of whether or not there was probable cause for an arrest, upon which depends the legality of the search and seizure.

That the above suggestions are the real reasons for the rule is verified somewhat by an observation of the nature of the rule and the two recognized exceptions. The rule allows objections to be taken at the trial if a prior motion before trial has been made. The prosecution has then received a warning that certain evidence will probably be protested and has had an opportunity to prepare for such an objection. The court can require a quick hearing of the arguments without injustice to the State and without a long delay of the trial.

Again, we see this policy silently operating in the cases which are held to be within the qualifications of the rule. These are chiefly two. The first qualification is illustrated by *Gouled v. United States*6 in which the defendant, arrested and

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3 United States v. Mills, 185 Fed. 318 (1911).


6 *Supra*, note 15.
jailed, is unaware until the trial that evidence has been taken from his premises and is to be used against him. In this situation neither side has had a chance to be prepared; but the defendant has as the basis for his objection, a constitutional right, whereas against him is only a rule of convenience. Balancing these factors, the courts decide that in such cases the delay in the trial is warranted.

The second qualification is recognized in those cases where the unlawful seizure of the evidence is not disputed, but is admitted or patent at the time of the offer in evidence at the trial. Obviously in such cases it would do the state no good to have time to prepare itself upon this point; it is not unfair, therefore, to have a ruling upon the matter at the trial; and it is not inexpedient, for the court can decide the question speedily.

These qualifications seem, then, to confirm the idea that the real reason for the rule, and one with some merit, lies in the combined policy of not allowing the prosecution to be unduly prejudiced by a surprise attack, or in the alternative, of not allowing overlong delays in the trials of cases.

In the instant cases, the Ohio Court of Appeals apparently would create another qualification to the rule. Officers had taken certain evidence from the persons and premises of the defendants, without search warrants or probable cause to believe the defendants were violating the law. The appellate court held that the searches and arrests were unlawful and the evidence so obtained should have been excluded upon the defendants’ objections at the trials. It was urged on the court that no motion to suppress was made before the trial in either case. The authority in favor of such requirement was conceded, and the qualification in the Gouled case was referred to. Then the court lays down what, it is submitted, might ground a third qualification to the already rifled motion-before-trial rule.

What the Ohio Court is suggesting is this: in the haste and confusion of police court examination, the defendant, through lack of advice and ignorance of his legal rights, or through mere inadvertency, may fail to request a return or suppression of ill-gotten evidence; this being true, it would be unfair to de-

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7 Thus in Amos v. United States, 255 U.S. 313, 41 Sup. Ct. 266 (1921), the government witness testified on cross-examination that there had been no warrant for the arrest or search.

8 The influence of these rather recent decisions creating qualifications will, no doubt, be very important in the future considerations of the problem. Justice Cardozo, speaking as a member of the New York Court of Appeals, in People v. Defore, 242 N.Y. 413, 150 N.E. 505 (1926), states that “the procedural condition of a preliminary motion has been substantially abandoned, or if enforced at all, is an exceptional requirement.”

9 Supra, note 15.

10 183 N.E. 119, 122 (1932). The Court says: “We think, however, in the interest of an orderly administration of justice that a motion to suppress should be made before trial upon the merits, and the matter should not be raised as a collateral issue upon the trial. It is a matter of common knowledge, however, that the daily dockets of police courts are heavy, and that matters are presented therein rapidly and without the deliberation incident to trials in the upper court. For this reason, the consideration of such collateral matter with the case upon its merits, while not approved, may be excused.”
prive him of his constitutional immunity from the use of this evidence against him; the balance of policy lies on his side rather than in favor of the rule of practice.

The language of the court is not very strong; moreover, the circumstances presented a strong case for the application of the rule which requires a motion before trial. Far from being undisputed or admitted, the illegality of the search and seizure in the case is debatable, depending on whether the court feels that probable cause existed for the arrest and search. To decide this fairly would require delay in the trial to permit each side to marshal its facts and arguments. If the motion before trial rule is to be retained at all, these Ohio cases would seem to call for its application.

It is to be noted, that even if the result of these cases were accepted as proper practice, it would not affect the great bulk of cases in which the problem of illegal searches and seizures arises; the instant cases arose in police court, whereas the chief source of questions of this nature is felony cases which are tried in the felony and circuit courts. The confusion and haste of the police court does not exist there and a defendant can find no such excuse, as the Ohio court found for him, to excuse his failure to file a timely motion to suppress such evidence.

Finally, we might regard the cases as other illustrations of a general distaste for the motion-before-trial rule. This general attitude might be, in some degree, a result of the fact that the question has lately arisen most often in prohibition law violation cases; perhaps the courts were less disposed in such cases to insist on the prosecution being safe from surprise attacks.

In any event, if the true tendency of the decisions be to delimit the rule into ineffectiveness by a growing number of exceptions, it might be better to adopt a simple, uniform rule which allows the objection to be made on the trial in all cases.

JOHN N. FEGAN

THE CONSTITUTIONALITY OF THE ILLINOIS INCOME TAX LAW OF 1932

The recent case of *Bachrach v. Nelson* has made it impossible under the present provisions of the Constitution of Illinois to enjoy the advantages of the typical graduated income tax as a source of state revenue. The Illinois Constitution states that the General Assembly shall tax property in proportion to its value, authorizes a tax on certain designated businesses or occupations and on persons or corporations owning or using franchises or privileges, and provides that other objects or subjects can be taxed in such manner as may be consistent with principles of taxation fixed in the Constitution. The Illinois legislature enacted a law imposing a graduated tax upon residents of the state on entire net income, upon nonresidents with respect to net income from sources within the state.

1 182 N. E. 909 (Ill. 1932).

2 Const., art. 9, §§1, 2.