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### Use in a State Court of Evidence Unlawfully Seized by Federal Officer

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dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso."

If any provision of the federal Constitution was violated by the Texas decision it was the Fourteenth Amendment and the judgment was invalid not because of the Contract or the Full Faith and Credit clauses but because the suit should not have been brought in Texas at all, the insurance company being a foreign corporation and only liable to suit in the State of Texas on contracts made in that state. This is not the rule which has been announced by the majority of the state tribunals,<sup>9</sup> which seem to hold that since the foreign corporation has no vested or original right to a residence in the state at all that right may be given with any limitations or burdens that the state may impose, including the liability to a suit on contracts made without as well as within the jurisdiction, and that where the corporation appoints an agent upon whom service can generally be had, or the statute appoints one for it, service upon that agent is impliedly acquiesced in as to all transitory suits. It is, however, at least as we understand the cases, the rule of the United States Supreme Court.<sup>10</sup>

ANDREW A. BRUCE.

EVIDENCE—USE IN A STATE COURT OF EVIDENCE UNLAWFULLY SEIZED BY FEDERAL OFFICERS.—[Missouri] The Supreme Court of Missouri has given a new turn to the rule excluding evidence obtained by unlawful search and seizure.

When the defendant was arrested on a charge of robbery, a search of his person disclosed a safety deposit box key, and a recent receipt for the rent of the box. Apparently the federal authorities were also investigating the prisoner on suspicion of a violation of the narcotic act.

Without a sufficient affidavit therefor, the United States commissioner issued a search warrant, under which the narcotic officers opened the deposit box and found a large amount of money corresponding to that stolen. At the trial in the state court on the robbery charge, the defendant's motion to suppress the evidence thus obtained was overruled, and the evidence admitted. On the defendant's appeal the Supreme Court held:

1. That the search of the prisoner's person when arrested was neither unlawful nor unreasonable, and any information *properly* obtained in consequence thereof might be used.
2. That the search warrant issued by the United States commissioner, under which the safety deposit box had been opened, was illegal for want of an affidavit showing sufficient cause, and that the evidence thus disclosed was inadmissible because obtained by an

9. See cases cited in 14 Corpus Juris p. 1383.

10. *Old Wayne Mutual Life Assoc. v. McDonough* 204 U. S. 8; *New York Life Insurance Co. v. Head* 234 U. S. 149; *Simon v. Southern Railway* 236 U. S. 115. Har. Law Rev. 32:877. But see *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100.

illegal search and seizure in violation of the defendant's privilege under the Fourth Amendment to the Constitution of the United States.<sup>1</sup>

Assuming that the arrest of the defendant was lawful, it is well settled that a search of his person was not unreasonable, whether the purpose was to discover fruits of the crime or evidence of guilt, and the defendant had no constitutional protection against the use of such evidence.<sup>2</sup>

The second proposition announced by the court, that, because the federal search warrant was unauthorized, the evidence thereby discovered could not be used in a state court on a prosecution for an offense solely against the laws of the state, does not seem to follow as a necessary consequence of the much controverted<sup>3</sup> rule excluding evidence obtained by an unreasonable search and seizure in violation of the Fourth Amendment.<sup>4</sup>

It will be noted that while the Fourth Amendment prohibits unreasonable searches and seizures, it does not declare the consequence of a violation of the prohibition. Since it declares that the right to be secure against unreasonable searches and seizures shall not be violated, it would follow quite naturally that a federal officer violating the right would have no defense to an action for the trespass.

Since it prescribes the basis and requisites of a search warrant, it naturally follows that a warrant failing to comply with the standards thus prescribed would furnish no protection to the federal officer executing it.

The rule of evidence in the federal courts, excluding evidence obtained by an unreasonable search, which seems to have originated in the *Boyd* case,<sup>5</sup> does not so clearly result from a violation of the prohibition. There is no common law rule excluding evidence merely because it was obtained by some illegal act.<sup>6</sup>

1. *State v. Rebasti* (1924) 267 S. W. (Mo.) 858.

2. *People v. Chiagles* (1923) 237 N. Y. 193; *Marrs v. Comm.* (1924) 265 S. W. (Ky.) 459; *People v. Ruthenberg* (1924) 201 N. W. (Mich.) 358; *Peterson v. Comm.* 267 S. W. (Kv.) 160; *Carroll v. U. S.* (1925) 45 Sup. Ct. Rep. 280; see also *Carpenter* "Search and Seizure" (1925) Oregon Law Rev. 4:160.

3. For the various views on the rule itself, see: *Wigmore* "Evidence Obtained by Illegal Search" (1922) Amer. Bar Ass'n Jour. 8:479; *Harno* "Evidence Obtained by Illegal Search" (1925) ILL. LAW REV. 19:303; *Atkinson* "Evidence Obtained Through Unreasonable Search" (1925) Columbia Law Rev. 25:11.

4. "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 person or things to be seized": Amendments to the Constitution, Art. IV.

5. *Boyd v. United States* (1886) 116 U. S. 616, followed in *Weeks v. United States* (1914) 232 U. S. 383, and in *Gould v. United States* (1921) 255 U. S. 298. The influence of these decisions resulted in a like construction of the corresponding provision of the state constitution in many states; *People v. Castree* (1924) 311 Ill. 292.

6. *Adams v. New York* (1904) 192 U. S. 585; *Burdeau v. McDowell* (1921) 256 U. S. 465; *Hester v. United States* (1924) 265 U. S. 57.

The real basis of the rule thus developed seems to be that the exclusion of evidence obtained in violation of the Amendment is the only practicable way to make the prohibition effective.<sup>7</sup> The rule, as applied in the federal courts, is accordingly limited to the cases covered by the Amendment itself.

Since the Amendment is construed as solely applicable to unreasonable searches by the United States and its officers, federal courts freely admit evidence obtained by a federal officer by means of a civil trespass not amounting to an unreasonable search or seizure.<sup>8</sup> For the same reason the federal courts admit evidence obtained by means of unreasonable searches and seizures by state officers<sup>9</sup> and by private persons.<sup>10</sup>

On similar reasoning it has been held that since the corresponding provision of a state constitution was not designed to afford protection against federal officers, it does not exclude evidence obtained by federal officers by unreasonable searches.<sup>11</sup>

The majority opinion in the *Robasti* case concedes that the *state* constitution does not exclude evidence obtained by federal officers by means of unreasonable searches, and that the national constitution does not exclude evidence obtained by state officers by means of unreasonable searches, but concludes that the national Constitution excludes in a state court, as well as in a federal court, evidence obtained by a violation of the Fourth Amendment, because state courts are bound to respect rights created by the Constitution of the United States.

"A different question is presented when we consider the claim that the production of the evidence obtained was in violation of the defendant's rights under the federal Constitution. State courts are as much under obligation to protect the rights guaranteed him by the United States Constitution, as those guaranteed him by the constitution of this state."

This is unquestionably sound so far as the Constitution of the United States creates or protects rights as against the state. For example, the Fourteenth Amendment declares that no *state* shall deprive any person of life, liberty or property without due process of law. Obviously this amendment does guarantee certain rights against the state which the state courts must enforce. And in numberless cases the Supreme Court of the United States has reversed the judgment of the highest state court because it failed to enforce the defendant's right to due process.

But does the Fourth Amendment give the defendant a right to the benefit of the rule of evidence in question in a state court? The

7. Chafec, Review of Wigmore on Evidence (1924) Harv. L. Rev. 37: 513, Loc. 515.

8. *Hester v. United States* (1924) 265 U. S. 57.

9. *Weeks v. United States* (1914) 232 U. S. 383; *Kanellos v. United States* (1922) 282 Fed. (C. C. A.) 461; *Robinson v. United States* (1923) 292 Fed. (C. C. A.) 683.

10. *Burdcau v. McDowell* (1921) 256 U. S. 465; *Chapman v. Comm.* (1924) 267 S. W. (Ky.) 181.

11. *Novak v. State* (1924), 200 N. W. (Wis.) 369.

opinion supposes an action against a federal officer in a state court for a wrongful seizure under a void federal search warrant, and asks whether the state would not be obliged to enforce the claim.

If the Supreme Court of the United States construed the Amendment as imposing a tort liability on the offending officer, it would, without question, be just as enforceable in a state court as in a federal court.

But let us suppose that the Amendment declared that a violation of the defendant's immunity should bar a prosecution of him, as is provided in the statute<sup>12</sup> granting immunity to a witness who is forced to give self-incriminating testimony. Would that give the defendant a right to plead the violation of his immunity by a federal officer in bar of a state prosecution of a felony committed against the laws of the state?

It seems clear beyond question that, under the unbroken line of decisions that the Fourth Amendment does not restrict the power of the state,<sup>13</sup> it would have no more effect on a state prosecution than the act of Congress granting immunity to a witness compelled to give self-incriminating testimony.

The Seventh Amendment declares that, "in suits at common law . . . the right of trial by jury shall be preserved," but this is a rule of procedure for the federal courts and does not guarantee the party a trial by jury in the state court.<sup>14</sup> The Fourth Amendment itself requires process for the seizure of a thing to be based on an oath or affirmation, but this does not require a like basis for state process.<sup>15</sup>

The Sixth Amendment declares that the accused shall have the right to be informed of the nature and cause of the accusation, and hence entitles him to an indictment measuring up to certain standards of criminal pleading in the federal courts, but not in the state courts.<sup>16</sup>

The Fifth Amendment expressly declares that no person shall be compelled in any criminal case to be a witness against himself, thus creating an immunity against the United States, but not against the state.<sup>17</sup>

If the state could force the defendant to give self-incriminating testimony because the Fifth Amendment is not a limitation on its power, but solely a limitation on federal power, it is difficult to see how that Amendment would prevent the state from making such use as it saw fit of self-incriminating statements which the defendant had erroneously been compelled to make in a federal court.

To have that effect the Fifth Amendment must be construed as a limitation on the power of the state, which the Supreme Court of the United States has uniformly denied.

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12. Act of Feb. 11, 1893, c. 83, 27 Stat. 443: construed and sustained in *Brown v. Walker* (1896) 161 U. S. 591.

13. *Ohio v. Dollison* (1904) 194 U. S. 445.

14. *Iowa Central Ry. v. Iowa* (1896) 160 U. S. 389.

15. *Smith v. Maryland* (1855) 18 How. 71.

16. *Twitchell v. Comm.* (1868) 7 Wall. 321.

17. *Twining v. New Jersey* (1908) 211 U. S. 78.

For the same reason the Fourth Amendment does not prescribe rules of evidence for the state court or require it to exclude evidence obtained by unreasonable search and seizure by federal officers. The immunity from the use of such evidence, created by the federal courts for the better protection of the right to be secure, etc., is no more available against the state than the right itself to be secure against unreasonable search.

But, although neither the common law nor the Fourth Amendment require the courts of Missouri to exclude evidence obtained by unreasonable search, it was perfectly competent for the Supreme Court of Missouri to create a new excluding rule as a matter of policy.

The opinion suggests the danger of collusion between state and federal officers. The question of policy should be considered on its own merits, which is difficult, if not impossible, so long as the court believes itself bound by the restrictions of the Fourth Amendment.

In two recent cases<sup>18</sup> dealing with the enforcement of the prohibition laws the Court of Appeals of Kentucky appears to have taken the view that the policy broadly indicated by the Fourth Amendment and the corresponding provision of the state constitution to protect the citizen from unreasonable searches and seizures is best promoted by excluding the evidence thereby obtained whether the search was made under color of state or federal authority.

E. W. HINTON.

HUSBAND AND WIFE—POST-NUPTIAL TORTS—LIABILITY OF HUSBAND UNDER MARRIED WOMEN'S PROPERTY ACT.—[England] The House of Lords has just dealt with a question of interpretation of the Married Women's Property Act that has sharply divided American courts for many years. The English Act of 1882, sec. 1, subs. 2, provides that a married woman shall be capable of entering into and becoming liable to the extent of her separate property on any contract, and of suing and being sued, in contract or tort or otherwise, in all respects as if she were a feme sole; that her husband need not be joined as plaintiff or defendant, or made a party to any action brought by or against her; that damages recovered by her shall be her separate property; and that damages recovered against her shall be payable out of her separate property and not otherwise. Other parts of the act (secs. 2 and 5) deprive the husband of all marital interest in his wife's property and earnings. A Mrs. Porter fraudulently represented to the plaintiffs that her husband had asked her to borrow money from them to be used by him for the maintenance of certain real property. The plaintiffs, induced thereby, made the loan, and Mrs. Porter misapplied the money to her own use. Plaintiffs sued Mr. and Mrs. Porter for damages due to fraudulent representations. The King's Bench<sup>1</sup> and the

18. *Walter v. Commonwealth* (1923) 199 Ky. 182; *Commonwealth v. Dincler* (1923) 201 Ky. 129.

1. (1923) 1 K. B. 268.