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NOTES AND COMMENTS

Evidence: Admissibility of Evidence Obtained Through Illegal Searches and Seizures

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A recently decided California case would seem worthy of notice among members of the legal profession in Colorado, since upon facts very similar to those of a leading Colorado case the Supreme Court of California, after extensive consideration of the Colorado case, arrived at a contrary result.

The California decision referred to is *People v. Cahan,*[1] which was decided April 27, 1955, and which by a four to three majority reversed a lower court conviction of Cahan and other defendants charged with conspiring to engage in horse-race bookmaking and related offenses. Most of the evidence introduced at the trial was obtained by police officers in violation of the United States Constitutional guarantees against unreasonable searches and seizures.

With permission of the Chief of the Los Angeles Police Department and without further authority, officers of that Department surreptitiously entered two houses and installed listening devices therein by means of which the officers were able to make recordings of all audible activities transpiring within the houses. The officers in question purported to act under Sec. 653h of the California Penal Code which provides as follows:

> Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

Furthermore, numerous forcible entries and seizures were candidly admitted at the trial by the officers as the means whereby additional evidence tending to establish the guilt of defendants was obtained.

The central question in the case was whether or not evidence illegally obtained by state officers is admissable in a state court against defendants on trial for violations of state criminal laws.

Mr. Justice Traynor, writing for the majority of the Court, disposed of the prosecution's claim that the California Penal Code authorized the acts of the police officers by commenting as follows: "Sec. 653h of the Penal Code does not and could not authorize

[1] 282 P. 2d 905, ... Calif.

violations of the Constitution, and the proviso under which the officers purported to act at most prevents their conduct from constituting a violation of that section itself."

In a well-reasoned and extremely persuasive opinion, Mr. Justice Traynor further concluded that evidence obtained in violation of constitutional guarantees against unreasonable searches and seizures was inadmissable in the prosecution of defendants for the violation of state laws.

The Colorado case referred to as being similar on its facts but in which the Colorado Supreme Court reached a contrary result is *Wolf v. People.*[2]

In the Wolf case, representatives of the district attorney's office, having no information concerning an abortion on one Mildred Cairo, but possessed of information concerning a similar one committed on another woman and the connection of defendant Wolfe therewith, went to Wolfe's office without a warrant of any kind and took him into custody and at the same time confiscated and removed from his office certain records of patients who consulted Wolfe professionally, which records were subsequently used as evidence in Wolfe's trial on charges of having committed a criminal abortion on Mildred Cairo.

The Colorado Supreme Court upheld Wolfe's conviction, saying that the point is well-settled in Colorado that evidence obtained by means of unreasonable searches and seizures is admissable in a prosecution in a state court for a state crime.

The Wolfe decision was considered by the United States Supreme Court in 1949, and that Court refused to disturb the ruling of the Colorado Supreme Court, Mr. Justice Frankfurter declaring that in a prosecution in a state court for a state crime the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.[3]

The Wolfe decision, of course, follows the traditional common law doctrine that the fact that evidence was illegally obtained is not a ground for exclusion. A slight majority of the states, even today, adhere to this doctrine.[4]

[2] 117 Colo. 279, 187 P. 2d, 926.
[3] Wolf v. Colorado, 338 U.S. 25 (1949).
[4] McCormick on Evidence 291 (1954).

On the other hand, the Federal rule, or so-called "Weeks doctrine," is that in a federal prosecution the 4th Amendment bars the use of evidence secured through an illegal search and seizure.[5]

It is interesting to note that prior to *People v. Cahan* supra, the rule that illegally obtained evidence was admissable in state courts was equally if not more firmly established in California than it is in Colorado today.[6] Not only was the non-exclusionary rule well-settled in California, but furthermore, the rule of the Wolf case that the 14th Amendment does not require the exclusion of evidence obtained by an unreasonable search and seizure was reaffirmed by the United States Supreme Court in disposing of a California case just the year before the decision in the Cahan case.[7] However, in doing so Mr. Justice Clark of the United States Supreme Court declared, "Perhaps strict adherence to the tenor of (the Wolf) decision may produce needed converts for its extinction."[8]

Even before the Cahan decision more than two-fifths of the states had aligned themselves either by decision or by legislation, in general agreement with the Weeks doctrine of excluding evidence secured in violation of constitutional guarantees against unreasonable searches and seizures.[9] A total of twenty states are today in general accord with the Weeks doctrine: California, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.[10]

When Mr. Justice Clark declared in the Irvine case, supra, that strict adherence to the tenor of the Wolf decision might perhaps produce needed converts for its extinction, it may very well be that the learned justice did not anticipate such prompt conversion as that demonstrated by the Supreme Court of California in the Cahan case. Nevertheless, as Professor McCormick has put it, "the tide seems to be flowing in that direction."[11] Under the circumstances and in light of the Cahan case, who can say that the non-exclusionary rule is so well settled in Colorado that our Supreme Court may not one day in the foreseeable future reexamine its present position on the question and itself join the ranks of those "needed converts" for the extinction of the Wolf decision?

[5] Weeks v. U.S., 232 U.S., 383 (1914).
[6] People v. Le Doux, 155 Cal. 535, 102 P. 517 (1909); People v. Mayen, 188 Cal. 237, 205 P. 435. 24 A.L.R. 1383 (1922); People v. Gonzales, 20 Cal. 2d. 165, 124 P. 2d. 44 (1942); People v. Kelley, 22 Cal. 2d 169, 137 P2d 1 (1943); and People v. Haeussler, 41 Cal. 2d 252, 260 P2d 8 (1953).
[7] Irvine v. People of Calif., 347 U.S. 128 (1954).
[8] Ibid.
[9] McCormick on Evidence 295 (1954).
[10] Wolf v. Colorado, 338 U.S. 25 (1949); McCormick on Evidence 295 (1954); People v. Cahan, Calif., 282 P 2d. 905 (1955).
[11] McCormick on Evidence 295 (1954).