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Aftermath of the Schwartz Case

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NOTES and COMMENTS

AFTERMATH OF THE SCHWARTZ CASE

THE Texas rules concerning the admissibility of evidence illegally obtained and, particularly, that gained through wiretapping have been finally and conclusively settled — again! The frequent shift that has featured the development of this aspect of the law of evidence warrants a review of its recent history.

The question in its most simple form is: should evidence which is otherwise admissible be excluded because it was gathered by an illegal act? The common law rule was that admissibility was in no way affected by the illegality of the means through which the evidence was obtained.[1] Although there is nothing in the Federal Constitution expressly stating that illegally obtained evidence should be inadmissible, the Supreme Court in *Boyd v. U. S.*[2] departed from the common law rule by holding that the reception of evidence obtained through an illegal search and seizure would violate the Fourth Amendment read in the light of the Fifth Amendment. The doctrine of the *Boyd* case, after being at least partially repudiated by *Adams v. N. Y.*,[3] was reinstated by *Weeks v. U. S.*,[4] with exceptions not here important. Thus was formed an exception to the common law rule of admissibility of the evidence. The history of the exception has been one of restriction, in a sense. On the one hand, this has been done by limiting its application to the federal courts,[5] to evidence obtained by illegal acts of federal officers,[6] or someone acting under or in conjunction with federal officers.[7] On the other hand, it has been done by nar-

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1 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2183; MCCORMICK AND RAY, THE TEXAS LAW OF EVIDENCE (1937) § 220.

2 116 U. S. 616 (1885).

3 192 U. S. 585 (1904).

4 232 U. S. 383 (1914).

5 Wolf v. Colorado, 338 U. S. 25 (1949).

6 Burdeau v. McDowell, 256 U. S. 465 (1921); Rowan v. U. S., 281 Fed. 137 (5th Cir. 1922).

7 Byars v. U. S., 273 U. S. 28 (1926).

rowing, or rather, refusing to expand the field of "unreasonable searches and seizures" beyond those specific means of searching and seizing of which our Founding Fathers knew, and this in spite of the fact that new methods of intrusion unthought of by them have given greater effectiveness to the same approach. Dean Wigmore claimed that this constant restriction "serve[d] merely to illustrate the practical unwisdom of the rule."[8]

Olmstead v. U. S.[9] would seem to bear out Mr. Wigmore's contention. In this case the Supreme Court held that wire-tapping did not fall within the "unreasonable search and seizure" of the Fourth Amendment and that evidence obtained thereby was admissible. Certainly the reasoning of the court was not compelling, and one wonders if perhaps the act of wire-tapping might not have been found to violate the Fourth Amendment had not such finding involved holding the evidence inadmissible. Be that as it may, the holding left it to the Congress to attach a stigma to wire-tapping and to extend to it by statute the burden which the Court had refused to recognize under the Constitution itself. Section 605 of the Federal Communications Act of 1934[10] (hereafter referred to as Section 605) provides:

> ... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person....

This has been interpreted to mean that evidence obtained by wire-tapping — telephone or telegraph[11] — by federal officers is not admissible in a federal court.[12] Further, it is not necessary that

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[8] 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2184a.

[9] 277 U. S. 438 (1928).

[10] 47 U. S. C. 1946 ed. § 605.

[11] The main purpose of this Section was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio. Weiss v. U. S., 308 U. S. 321 (1939).

[12] Nardone v. U. S., 302 U. S. 379 (1937).

the conversation be interstate.[13] Distinct phrases of the Section condemn the interception of messages and the divulging or publishing of them — by use as evidence, for example. Where the statute operates as a rule of evidence, the inadmissibility extends to all evidence indirectly traceable to the interception.[14] Section 501 of the same Act[15] provides for fine and/or imprisonment for violation of the Act.[16]

By the time *Schwartz v. State*[17] came to the Texas Court of Criminal Appeals, several states had already considered the applicability of Section 605 to actions in the state courts. The state courts had uniformly held that such evidence was admissible.[18] In the *Schwartz* case recordings were made of a telephone conversation between defendant and his accomplice, who was then in custody of the police and who agreed to the interception of the call. The records were held by the court of criminal appeals to be admissible to corroborate testimony of the accomplice and another. Defendant complained of the use of the evidence as a violation of Section 605. The court, without deciding whether the evidence was obtained in violation of the Act, proceeded immediately to "the question of the applicability of a Federal procedural statute to a trial in a State court."[19] The usual rule is that a federal procedural statute does not apply in the absence of adoption by a state. At the time Article 727a of the *Texas Code of Criminal Procedure (Vernon, 1948)* provided that evidence was inadmissible if obtained in violation of "the Constitution or

13 Weiss v. U. S., 308 U. S. 321 (1939); Diamond v. U. S., 108 F. 2d 859 (6th Cir. 1938); Sablowsky v. U. S., 101 F. 2d 183 (3d Cir. 1938); McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951).

14 Nardone v. U. S., 308 U. S. 338 (1939).

15 47 U. S. C. 1946 ed. § 151 *et seq.*

16 Section 501 provides that those who violate the other sections of the chapter (including § 605) may be punished by "a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both."

17 ——Tex. Crim. Rep.——, 246 S. W. 2d 174 (1952).

18 People v. Channell, 107 Cal. App. 2d 192, 236 P. 2d 654 (1951); Hubin v. State, 180 Md. 279, 23 A. 2d 706 (1942); Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854 (1946); State v. Steadman, 216 S. C. 579, 59 S. E. 2d 168 (1950).

19 246 S. W. 2d at 177.

laws of the State of Texas, or of the Constitution of the United States." Judicial interpretation established[20] that the Article did not apply if the evidence was obtained in violation of the *laws* of the United States.

The Supreme Court of the United States granted certiorari and affirmed the opinion of the Texas court.[21] The Court pointed out an interesting distinction between inadmissibility of evidence in state courts under Section 605 and admissibility in those courts of evidence obtained in violation of the Fourth Amendment, by saying that in the case of Section 605 the very act of introducing the intercepted communication would be a violation of the statute. But the Supreme Court decided that the statute did not exclude such evidence in state courts, the illegality of the act of introducing being "simply an additional factor for a state to consider in formulating a rule. . . ." The Court took note of the uniform holdings of the state courts on the matter and then discussed the Texas statute (Article 727a). The Court concluded that it would not extend by implication an Act of Congress so as to invalidate the specific language of a state statute or a clear rule of its courts. The result of the case was to leave the matter entirely in the hands of the state, just as had previously been done as to evidence obtained in violation of the Fourth Amendment.

In 1925 the Texas legislature for the first time made illegally obtained evidence inadmissible in Texas courts by providing:

> No evidence obtained by an officer or other person in violation of any provision of the constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.[22]

In 1929 the act was changed by insertion of the phrase, "of the Constitution" just after the third "or;" thus, the expression became "violation of any provision of the constitution or laws of the

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[20] Montalbano v. State, 116 Tex. Crim. Rep. 242, 34 S. W. 2d 1100 (1930).
[21] 344 U. S. 199 (1952).
[22] See Historical Note, VERNON'S ANN. TEX. CODE CRIM. Proc. (1941) art. 727a.

State of Texas, *or of the Constitution* of the United States." (Emphasis added.) This expression excluded from the statute evidence obtained in violation of laws (but not the Constitution) of the United States, and the *Schwartz* case affirmed the right of the legislature to control the matter.

Within a few months after the opinion of the United States Supreme Court in the *Schwartz* case, the Texas legislature again amended Article 727a. It now reads:

> No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case.[23]

The effect of this legislation was to reinstate the original Texas act, and to complete the circle in which the Texas rule has traveled during the last twenty-eight years.

It is not amiss at this point to discuss the wisdom of such a rule. It is, after all, an evidentiary rule, and as such should be one most likely to provide for the discovery of truth. Of course, there is no pretense that it is geared to that end. Actually it is a means of discouraging violation of other laws and principles: a means of destroying the incentive to acts which are otherwise attractive to law enforcement agencies and to acts which, if they become a part of law enforcement, will cut deeply into our liberty and reconstruct with new scientific effectiveness a tyranny mirroring that from which freedom was originally sought. Dean Wigmore said that the rule was an indirect means of punishment and that "[t]he judicial rules of Evidence were never meant to be indirect process of punishment."[24] Certainly the rules were set up as a guide to the truth, and not to provide a method of punishment. However, it often happens that pure doctrines of law are modified in order that some strong public policy may be served. The conclusions of the doctrinaire, in a system intended to administer

[23] Acts 1953, c. 253.

[24] 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2183.

to the practical needs of a society, must frequently bow to practical justice. In the field of evidence the search for truth is handicapped in favor of certain privileged communications[25] because public policy requires that there should be trust and privacy in them.

To refuse to punish a criminal because the evidence against him is illegally obtained, said Mr. Wigmore, is to say:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.[26]

But the evidentiary rule does not mean that one cannot also make a direct attack and criminally prosecute Flavius. The penal side of Flavius' act has already been noted. Therefore, half of Mr. Wigmore's illustration is built upon false grounds. It is interesting to note that in spite of all the cases arising under Section 605 wherein evidence has been rejected as illegally obtained, few if any actions have been brought under Section 501 to punish those gathering evidence.[27]

Also Mr. Wigmore's fable fails to state the facts clearly. It fails to bring out the causal relationship between the crime of Flavius and the conviction of Titus. It is the government that plays the part of Flavius, and its crime is always committed with an eye to the conviction of the Tituses. Eliminating the conviction is a most effective means of preventing a crime by those who are

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[25] Thus, communications between attorney and client, husband and wife, and, in some states, physician and patient are protected from the search for truth because public policy demands they be privileged. See McCormick and Ray, The Texas Law of Evidence (1937) §§ 223-224.

[26] 8 Wigmore, Evidence (3d ed. 1940) § 2184.

[27] The 1952 Cumulative Annual Pocket Part for U. S. C. A., Title 47, lists no cases under § 501 brought for violation of § 605.

charged with the responsibility for apprehending wrongdoers. Mr. Wigmore said a more direct remedy should be invoked, but there is no satisfactory and practical remedy available to the victim of the illegal search and seizure.[28] Certainly such other remedies as are available, while they may provide a technical slap to an erring wrist and provide some salve for a righteous indignation, cannot restore the injured party and cannot effectively align law enforcement agents with the mandatory language of the Fourth Amendment that the "rights of the people to be secure . . . against unreasonable searches and seizures, *shall not be violated. . . .*"

It is true that law enforcement agents are subject to many limitations in catching criminals, who are armed with privileges and surrounded with safeguards. But these safeguards are the marks of a way of life. They are in a very real sense the measure of difference between a governmental system that is free and one that is not free. In a government of laws in which great principles are to remain unaffected by the influences of individual generations, such bulwarks must be afforded the utmost protection. As Mr. Justice Holmes said in his dissent in the *Olmstead* case, "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained. We have to choose, and for my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[29] Not only would that part be ignoble, but it would be dangerous as well. There is risk in relying entirely on self-restraint on the part of a police force, and conspicuous examples exist of police agencies which are the tools of oppression. The plain fact is that however honest and loyal most police enforcement officers are, illegal searches and seizures occur, and

[28] See Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 Col. L. Rev. 11, 22, 23 (1925).
[29] 227 U. S. 438, 470 (1928).

abuses of police power happen from time to time. Said Mr. Justice Brandeis in his dissent in the *Olmstead* case: "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent."[30] These considerations Mr. Wigmore referred to as "misplaced sentimentality,"[31] and it is true that the nature of the argument produces phrases expressive of emotion rather than reason. But certainly the accusation does nothing to negate the substance of the viewpoint.

A powerful argument may be made that the courtroom should not be the terminal of ill-gotten gains. To make use of the machinery of justice in this way seems inherently wrong. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against unauthorized action."[32]

In general, the policy of refusing to admit illegally obtained evidence seems supported by good morality and reason. While the closeness of the question and the great names which support one side or the other of the argument can explain the wobbly history of the Texas rule, it is believed that the legislature has come to a commendable result.[33]

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[30] 277 U. S. at 479.

[31] 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2184.

[32] Mr. Justice Day, speaking for the majority in Weeks v. U. S., 232 U. S. 383, 394 (1913).

[33] *Cf.* the following statement made sixteen years ago: "It may not be amiss to point out some contrasts between the Federal rule and the Texas statute. The Texas statute lays down a rule far broader than that existing in any other state and goes much beyond the doctrine of the Boyd and Weeks cases. In the first place, while the federal rule excludes only evidence illegally obtained by federal officers, the Texas statute makes a clean sweep and excludes evidence thus obtained by anyone. Secondly, although the federal courts are concerned only with evidence obtained in violation of the Fourth Amendment to the Federal Constitution, the Texas statute excludes any evidence obtained in violation of any Texas law, the state constitution, or the Federal constitution. A third difference is that under the federal rule defendant must in most instances make a motion before trial for the return or suppression of the evidence. This is not required in Texas. The only proper or necessary procedure is an objection to the evidence when it is offered." MCCORMICK AND RAY, THE TEXAS LAW OF EVIDENCE (1937) § 222.