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IN THE last fifty years the question whether illegality in the means of procuring evidence should affect its admissibility has been the subject of extensive litigation in the state and federal courts.[1] It was an orthodox principle of the common law that the admissibility of evidence depends upon its inherent probative value and not upon the outside circumstances of its procurement —in other words, the fact that it is secured through a violation of the law will not on that account render it inadmissible.[2] At one time this rule prevailed in most of our states even where the evidence was obtained in violation of constitutional provisions against unreasonable searches and seizures,[3] and still has the support of almost two-thirds of the States.[4]

THE FEDERAL RULE

In 1885 the Supreme Court of the United States, in *Boyd v. United States*,[5] departed from the orthodox rule, holding that

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[1] Recent legal literature covering various aspects of the topic include: Cowen, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523 .(1952). (An excellent article. While the primary emphasis is on the British decisions, the author traces the development of the Federal Rule and has some provocative comments); Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944); Ramsey, *Acquisition of Evidence by Search and Seizure* 47 MICH. L. REV. 1137 (1949); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L. J. 259 (1950); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 So. CAL. L. REV. 60 (1941). See also the excellent note, *Judicial Control of Illegal Search and Seizure*, 58 YALE L. J. 144 (1948).

[2] Commonwealth v. Dana, Metc. (Mass.) 329 (1841); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

[3] See 8 WIGMORE, *op. cit. supra*, note 2, collecting the early cases in this country. Every state now has in its constitution or bill of rights a provision against unreasonable searches and seizures.

[4] See Table I of Appendix to Wolf v. Colorado, 338 U. S. 25 (1949) indicating as of that time some thirty states following the orthodox rule. Texas is incorrectly listed. While the rule was followed by judicial decision, it was changed by statute.

[5] 116 U. S. 616 (1885). It has been suggested that the case could have been decided on the self-incrimination clause (Fifth Amendment) alone. 58 YALE L. J. 144, 150 (1948); Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1921).

evidence obtained by a federal officer through an illegal search and seizure was inadmissible because in violation of the Fourth Amendment to the United States Constitution.[6] Almost twenty years later the Court receded somewhat from this position.[7] However, in *Weeks v. United States*,[8] the original position was reaffirmed with one limitation, i.e., that the illegality will be noticed and the evidence excluded only where the defendant before the opening of the trial makes a motion for the return to him (if not contraband) or suppression (if contraband) of the evidence illegally obtained.[9] But where the first notice of the unlawful taking comes to the defendant when the papers are offered in evidence against him, he has been excused from making such prior application for their return.[10] This privilege of suppressing the evidence, however, is personal. Only the person aggrieved by the

[6] It provides "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."

[7] Adams v. New York, 192 U. S. 585 (1904).

[8] 232 U. S. 383 (1914), (use of the mails for lottery. Documents which were found in defendant's house entered and searched without a warrant were excluded. The Court attempts to distinguish Adams v. New York on ground that there the point was "collateral" while in this case defendant before trial moved for return of the documents, which was refused).

It will be noted that the Fourth Amendment in its terms only declares the illegality of such searches and seizures. But the Court holds that the inadmissibility of the evidence is a necessary corollary. In other words, that the clause requires this rule if the immunity granted is to be in fact enjoyed.

For a long list of cases showing the development of the federal rule see 8 WIGMORE, *op. cit. supra*, note 2, and § 2184a, and especially the pocket supplement for cases since 1940.

[9] This limitation was adopted by the FED. R. CRIM. P. 41, Search and Seizure (e) Motion for Return of Property and to Suppress Evidence. "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." See United States v. Edmonds, 100 F. Supp. 862 (D. C. 1951), (motion to suppress denied because not made before trial, as required by Rule 41).

[10] Gould v. United States, 255 U. S. 298 (1921); Amos v. United States, 255 U. S. 313 (1921), (motion made after jury sworn).

illegal seizure is entitled to the protection of the rule.[11] The other major limitation on the exclusionary rule is that it applies only where the federal government and its officers are a party to the unlawful obtaining of the evidence.[12] So evidence secured by state or local officers is admissible in the federal courts.[13] And the same is true where the evidence is obtained by private persons even though by theft.[14] Yet where state officers make the seizure with federal officers present and cooperating the evidence is inadmissible.[15]

The federal rule, though originated in the search and seizure cases, has subsequently been extended to other fields, such as illegal detention and wire tapping. Thus where a person has been arrested and held for an unreasonable length of time before being brought before a magistrate (as required by the Federal Rules of Criminal Procedure) a confession made during that time is regarded as unlawfully obtained and therefore inadmissible.[16]

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[11] This personal interest limitation has been developed in a long line of Federal decisions, and is now incorporated in FED. R. CRIM. P. 41(e) as follows: "If the motion (for return and suppression of evidence) is granted the property shall be restored unless otherwise subject to lawful detention, and it shall not be admissible at any hearing or trial." The draftsmen state in a note that they intended to codify the existing law and practice. See the excellent article by Edwards, *Standing to Suppress Unreasonably Seized Evidence* 47 Northwestern U. L. Rev. 471 (1952).

[12] This limitation as well as the personal interest limitation is almost universally accepted by those state courts where the rule is in force. Thus it may be generally stated that the rule applies only where the search and seizure have been made by persons other than the officials of the prosecuting government. See 58 Yale L. J. 144, 158 (1948). This note has an excellent analysis of the policy underlying the federal rule and is one of the best and most succinct discussions of the entire subject.

[13] Rowan v. United States, 281 F. 137 (5th Cir. 1922).

[14] Burdeau v. McDowell, 256 U. S. 465 (1921), 13 A.L.R. 1159, Justices Holmes and Brandeis dissenting. See 1 TEX. L. REV. 106 (1922).

[15] Byers v. United States, 273 U. S. 28 (1926); Lustig v. United States, 338 U. S. 74 (1949), (counterfeiting;illegal search of hotel room participated in by federal officers. Motion to suppress allowed. The Court reaffirms the Byers case and applies it very strictly; 5 to 4 decision. A concurring opinion argues that there should be no distinction between evidence illegally obtained by state officers and that secured by federal officers). So also if the local authorities were acting at the instigation of and for the federal authorities. Flagg v. United States, 233 F. 471 (2d Cir. 1916). And where state officers in New York illegally seized liquor and turned it over to the federal officers it was held that the evidence could not be received. Gambino v. United States, 275 U. S. 310 (1927), 52 A.L.R. 1381. The decision went on the ground that since New York had no prohibition law the state officers must have made the seizure solely for the purpose of prosecution in the federal court. See 6 TEX. L. REV. 390 (1928).

[16] McNabb v. United States, 318 U. S. 332 (1942), (prisoners held from Wednesday night until Saturday morning under constant interrogation from large number of arresting officers; not allowed to see each other nor any other person and not taken before magistrate until end of that period. The Court held that such detention was violation of 18 U.S.C. § 595, and evidence elicited from prisoners must be excluded).

In Upshaw v. United States, 335 U. S. 410 (1949), the Court went even further.

In *Olmstead v. United States* a majority of the Supreme Court held that the tapping of wires off the defendant's premises did not constitute an unreasonable search within the meaning of the Fourth Amendment and that the exclusionary rule did not apply.[17] In later cases, however, following the enactment of the Federal Communications Act (Section 605 of which prohibited the tapping of wires and the disclosure of such communications) the Court held that the statute forbade the reception in evidence in the federal courts of messages intercepted in violation of the Act.[18]

The federal rule rejects the evidence only if it is obtained as the result of an "unreasonable search and seizure." But the Fourth Amendment does not define "unreasonable searches and seizures" nor does it expressly say that the warrants which it mentions are necessary in order for the search to be reasonable. It has long been recognized that reasonableness of searches does not depend upon the presence or absence of a search warrant.[19] And the Su-

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Here the suspect was held for thirty hours before arraignment, and questioned several times but not for more than thirty minutes at a time, and by only one officer at a time. At the end of period he confessed and was taken before a magistrate. Overruling the two lower courts, the Supreme Court in a 5 to 4 decision reversed the conviction and held that the confession was inadmissible since made during an illegal detention due to failure to promptly carry the prisoner before a magistrate, whether or not the confession was the result of torture, physical or psychological. Admittedly the detention was unlawful under FEDERAL RULES OF CRIMINAL PROCEDURE Rule 52, but was the confession a result of the unlawful detention? See discussion in Gann, *Admissibility of Evidence Obtained During Illegal Detention*, 3 SW. L. J. 452 (1949).

[17] 277 U. S. 438 (1928), (the majority said that the Fourth Amendment applied only to the search of material things, such as the person, papers or effects. Brandeis and Holmes, JJ., wrote powerful dissenting opinions).

[18] In Nardone v. United States, 302 U. S. 379 (1937), and Weiss v. United States, 308 U. S. 321 (1939), it was held that the statute applied to the interception of both interstate and intrastate messages by law enforcement officers of the Government and prevented the use of such in evidence in the federal courts.

In the second Nardone case, 308 U. S. 338 (1939), the Court extended this prohibition to evidence obtained through the use of the intercepted messages. The Court, however, did not reverse Olmstead v. United States, as to the status of wire tapping under the Fourth Amendment.

Later the Court relied on the Olmstead case in holding that the use of detectaphones, like wire taps, did not violate the Fourth Amendment, but that, unlike wire tapping, it was not governed by § 605 of the FEDERAL COMMUNICATIONS ACT. Goldman v. United States, 316 U. S. 129 (1942). (Federal agents in a room adjoining that in which the defendants were present attached a detectaphone to the partition wall and overheard conversations. The majority of the Supreme Court held that no trespass had been committed and that the conversations were admissible. There had been a previous illegal entry to install a dictaphone which, however, failed to work. The Court indicated that had it been used, the trespass would have forced the exclusion of the evidence.)

[19] Weeks v. United States, 232 U. S. 383 (1914). 7 BISHOP'S NEW CRIMINAL PROCEDURE § 211 (2d ed. 1913); Agnello v. United States, 269 U. S. 20 (1925); United States v. Rabinowitz, 339 U. S. 56 (1950).

preme Court has recently held that whether a particular search and seizure is reasonable depends upon the facts and circumstances—the total atmosphere of the case and not upon the practicality of procuring a search warrant before the search.[20]

The federal rule of exclusion has now been adopted by judicial decision or statute in at least eighteen states, although prior to the *Weeks* case only one state court accepted this view.[21] However, by a very substantial majority the state courts have declined to follow the federal lead in this matter. In this connection it should be pointed out that the Supreme Court of the United States has held that there is no constitutional obligation on the states to exclude evidence obtained by an unreasonable search and seizure.[22] The rule excluding evidence illegally obtained has been

[20] United States v. Rabinowitz, 339 U. S. 56 (1950), (selling, possessing and concealing forged and altered obligations of the U. S. with intent to defraud; search without a warrant of places of business consisting of one room, incident to valid arrest, upheld). The Court said: "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define 'unreasonable' searches, and, regrettably, in our discipline we have no litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.... Reasonableness is in the first instance for the District Court to determine. We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money.

"Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded." For an excellent comment on the problem raised by this decision see note by Melvin Bruck in 5 Sw. L. J. 86 (1951).

[21] See Wolf v. People of Colorado, 338 U.S. 25 (1949), and Table I of the Appendix to the opinion.

[22] Wolf v. People of Colorado, 338 U. S. 25 (1949). ("The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. United States?...

"Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective....

"...We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.")

For notes on the decision see 50 COL. L. REV. 364 (1950); 48 MICH. L. REV. 118 (1949); 35 CORN. L. Q. 625 (1950). And see the comment: Falkner, *Searches and Seizures, Does the Fourteenth Amendment Require the Exclusion, in a State Prosecution, of*

the subject of a substantial volume of discussion by the legal commentators. It has its staunch defenders[23] and its severe critics.[24] In favor of the rule it is said that the Fourth Amendment is meaningless without it;[25] that in a democratic community it is important to maintain control over the methods and activities of the police, and that the only effective way of assuring their respect for the law is by denying the police the right to use evidence they have illegally obtained. It is reasoned, better that guilty men go free than that the government through its officials should play an ignoble part.[26] Those opposing the rule argue that it is undesirable to allow the guilty to escape by rejecting evidence secured illegally.[27] They say the police who violate the law in securing evidence should be subjected to criminal punishment and/or civil liability for their illegal acts, but that the evidence obtained through such acts should be admissible if relevant.[28] Further-

Evidence Obtained by Unreasonable Search?, Annual Survey of American Law 989 (1949).

[23] Chafee, *The Progress of the Law*, 35 HARV. L. REV. 673, 694 (1922); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Cornelius, SEARCH AND SEIZURE 39, 46 (2d ed. 1930); *Judicial Control of Illegal Search and Seizure*, note in 58 YALE L. J. 145 (1948).

[24] Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303 (1925); Knox, *Self-Incrimination*, 74 U. OF PA. L. REV. 139 (1925); Waite, *Police Regulations by Rules of Evidence*, 42 MICH. L. REV. 679 (1944); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L. Q. 337, (1939); Wood and Waite, CRIME AND ITS TREATMENT 390, 394 (1941); 8 WIGMORE, *op. cit. supra*, note 2, § 2184.

[25] Day, J., in Weeks v. United States, 232 U. S. 383, 393 (1914), stated it thus: "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 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

[26] Holmes, dissenting in Olmstead v. United States, 227 U. S. 438, 470 (1928), expressed it in these terms: "We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end 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 to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. 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."

[27] "When evidence tending to prove guilt is before a court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these constitutional guarantees are above the right of the community to protection from crime." Wheeler, J., in State v. Reynolds, 101 Conn. 224, 125 A. 636, 639 (1924). And see Cardozo, J., in People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).

[28] Wigmore was one of the most severe critics of the rule. He declared it mis-

more, they stress the great difficulty already encountered in securing evidence against suspects, and say this is increased by the federal rule.[29]

THE TEXAS RULE

Until 1925 Texas followed the orthodox rule favoring admissibility.[30] In *Welchek v. State* the Court of Criminal Appeals in a well-considered opinion expressly repudiated the federal doctrine and made it clear that the evidence was admissible.[31] But the next session of the legislature passed a statute to abrogate the rule of evidence laid down in the *Welchek* case.[32] It provided that: "No evidence obtained by any officer or other person in

guided sentimentality, resulting in "making justice inefficient and ... coddling the law-evading classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.... The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, i.e., by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."

[29] "The complexities and conveniences of modern life make increasingly difficult the detection of crime. The burden ought not to be added to by giving to our constitutional guarantees a construction at variance with that which has prevailed for over a century at least." Wheeler, J., in State v. Reynolds, 101 Conn. 224, 125 A. 636, 639 (1924). See also Waite, *Public Policy and Arrest of Felons*, 31 MICH. L. REV. 749, 763 (1933).

[30] Walker v. State, 7 Tex. App. 245 (1879), 32 Am. Rep. 595; Rippey v. State, 86 Tex. Cr. R. 539, 219 S. W. 463 (1920); Moore v. State, 87 Tex. Cr. R. 569, 226 S. W. 415 (1920).

[31] 93 Tex. Cr. R. 271, 247, S. W. 524 (1923). (An officer searched defendant's car without a warrant and found intoxicating liquor. It was held that the evidence was properly received, the constitutional provision against unreasonable search and seizure not laying down a rule of evidence with respect to the evidentiary value of the property so seized. The decision is commended in 2 TEX. L. REV. 249 (1924) and criticized in the same volume at 208). Lattimore, J., said, speaking of Amos v. United States, 255 U. S. 313 (1921): "We respectfully state that we think the opinion in said case rested upon a misapprehension of the purposes of the Fourth Amendment to the Federal Constitution, which is substantially the same as section 9, Art. 1 of our State Constitution." Further on: "We find ourselves unable to follow Justice Day in his effort to distinguish the Weeks case from the Adams case." (Justice Day wrote the opinion in both cases). "We believe that nothing in section 9, Art. 1 of our constitution, supra, can be invoked to prevent the use in testimony in a criminal case of physical facts found on the person or premises of one accused of crime, which are material to the issue in such case, nor to prevent oral testimony of the fact of such finding which transgresses no rule of evidence otherwise pertinent. The method or manner by which such proffered testimony came before the Court cannot be raised by any attempted application of said section 9, Art. 1, supra, but may only be determined by rules of evidence which are general and have become fixed in the wisdom and experience of the courts of all civilized countries." See also Balue v. State, 96 Tex. Cr. R. 233, 258 S. W. 167 (1924).

[32] Acts of 1925, 39th Leg. p. 186, c. 49, § 1. This statute became article 727a of TEX. CODE CRIM. PRO.

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." The constitutionality of this statute was sustained in *Odenthal v. State*[33] and it was there held applicable to evidence obtained by an illegal search and seizure. In 1929 the statute was amended by inserting the words "constitution of the" before the words "United States."[34] This was necessarily interpreted to mean that Article 727a did not bar the use of evidence secured in violation of federal laws as distinguished from constitutional provisions.[35] In the recent case of *Schwartz v. State* this position was reaffirmed, the Court of Criminal Appeals holding that recordings of a telephone conversation between defendant and an accomplice were admissible.[36] Without deciding whether the evidence was obtained in violation of Section 605 of the Federal Communications Act, as claimed by defendant, the court held that the federal statute did not affect the admissibility of evidence in a Texas court. On certiorari the United States Supreme Court affirmed this holding, saying 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.[37]

Within a few months after the final decision in the *Schwartz* case, the Texas Legislature again amended Article 727a, and its present language is: "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."[38] The effect of this legislation, for good or bad, is to reinstate the rule as it

[33] 106 Tex. Cr. R. 1, 290 S. W. 743 (1927). The cases excluding evidence under this statute, too numerous to cite, are collected in Vernon's annotated TEX. CODE CRIM. PRO. Art. 727a, note 1;Texas Digest, Criminal Law 394.

[34] Acts 1929, 31st Leg. 2d Called Sess. p. 79, c. 45, § 1, TEX. REV. CIV. STAT., Art. 727a (1925).

[35] Montalbano v. State, 116 Tex. Cr. R. 242, 34 S. W. 2d 1100 (1930).

[36] 158 Tex. Cr. App. 171, 246 S. W. 2d 174 (1951), (the accomplice was in the custody of the police and had agreed to the interception of the call).

[37] Schwartz v. State of Texas, 344 U. S. 199 (1952). (The court referred to Wolf v. Colorado, 338 U. S. 25 (1949), and said that assuming that the calls would be inadmissible in a federal court, it does not follow that they are inadmissible in a state court. This is up to the various states). Douglas, J., dissented on the ground that the evidence was obtained in violation of the Fourth Amendment, and because he though the holding in Wolf v. Colorado was wrong.

[38] Acts 1953, c. 253; Vernon's Texas Session Law Service, p. 669. (1953).

was first promulgated in 1925, and to complete the circle in which it has travelled in the last quarter of a century.[39]

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, and those cooperating with them, 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, and statutes such as those against wire tapping and illegal detention, the Texas statute excludes any evidence obtained in violation of any provision of the state or federal constitutions or laws. 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.[40]

[39] The wisdom of this action is open to question. For a rule which has stood for twenty-three years to be tossed aside, apparently without serious consideration of the consequences to effective law enforcement, is indeed regrettable. A contrary view is expressed in Weiss, *Aftermath of the Schwartz Case*, 7 Sw. L. J. 500 (1953), tracing the history of the Texas rule and presenting arguments in favor of the exclusionary rule.

[40] Straley v. State, 106 Tex. Cr. R. 130, 290 S. W. 766 (1927); Foster v. State, 104 Tex. Cr. R. 121, 282 S. W. 600 (1926).