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ILLEGAL SEARCH AND SEIZURE BY STATE OFFICERS AS AFFECTING ADMISSIBILITY OF THE EVIDENCE IN FEDERAL PROSECUTIONS

The growing policy among United States attorneys of basing their prohibition prosecutions on evidence secured by municipal officers gives the recent case of *Gambino v. United States*[1] an especial significance. In it the Supreme Court of the United States seems to have injected into the Federal rule barring evidence obtained in contravention to the fourth and fifth amendments of the Constitution a note as fully inharmonious with the trend of its recent decisions[2] as it did when it handed down the opinion in *Boyd v. United States*[3] which enunciated, subject to limitations laid down in succeeding cases,[4] what has been believed to be the present rule on the proposition.

Prior to the *Boyd* case practically all American courts had proceeded on the philosophy that the object of evidence is to elicit truth, concluding that the probative value of any evidentiary fact was not in any wise affected by the manner or the

[1] (1927), 72 L. Ed., 139, 48 S. Ct. 139.

[2] Silverthorne Lumber Co. v. United States (1920), 251 U. S. 385, 392, 64 L. Ed. 319, 40 S. Ct. 182; Rowan v. United States (1923), 260 U. S. 721, 67 L. Ed. 481, 43 S. Ct. 12.

[3] (1885), 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524.

[4] If defendant would have the evidence excluded he must file a petition before trial for its suppression. Weeks v. United States (1914), 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177. The exception to this rule is found where the defendant has only learned that the search was illegal at or immediately before the trial, and there has been no opportunity to file a petition for the return of the articles seized. Gouled v. United States (1920), 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. 261.

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means in which it was obtained and that only the credibility would be affected by the mode of the acquisition.[5] Since the *Boyd* case the United States courts have uniformly barred evidence seized illegally by Federal officers so long as the defendant has followed the proper procedure in having the evidence suppressed.[6] And as a corollary to that rule Federal courts uniformly have admitted evidence seized illegally so long as the seizure was not made by officers of the United States Government.[7]

But in the *Gambino* case the Supreme Court held it to be reversible error because the trial judge, in a prosecution under the Volstead Act, did not exclude evidence obtained as a result of an illegal arrest, search, and seizure on the part of police officers of the State of New York. The facts of the case, briefly, follow. The defendants, Gambino and Lima, were arrested by two New York State troopers near the Canadian border; their auto was searched without a warrant; and intoxicating liquor found therein was seized. The men, the liquor, and other property taken were immediately turned over to Federal authorities. The defendants moved seasonably, in advance of the trial and again later, for the suppression of the liquor as evidence and for its return on the ground that the arrest and seizure violated the fourth, fifth, and sixth amendments of the Federal Constitution. The motion was denied; the evidence was introduced at the trial; and the defendants were found guilty and sentenced. The result of the appeal has been indicated.

It should be noted that about nine months prior to this arrest and seizure the Mullan-Gage Law, the State prohibition act, had been repealed.[8] Consequently the state troopers were not seeking to enforce any state law in seizing the liquor. But Mr. Justice Brandeis points out the New York Governor, in approving the Act which repealed the state dry-law, declared that all peace officers would be required to aid in the enforcement of the Vol-

[5] Stockwell v. United States (1870), 3 Cliff. 284, Fed. Cas. No. 13,466; United States v. Hughes (1875), 12 Blatchf. 553, Fed. Cas. No. 15,417; United States v. Three Tons of Coal (1875), 6 Biss. 379, Fed. Cas. No. 16,515; Blackstone, COMMENTARIES, Book 3, p. 256.

[6] See footnote 4, *supra.*

[7] Twining v. New Jersey (1908), 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14; United States v. Falloco (1922), 277 F. 75.

[8] From the margin of the report: "Immediately after the repeal of the Mullan-Gage law the Federal Prohibition Director in New York City announced that he would call upon the Superintendent of State troopers, the sheriff of each county, and every chief of police to aid in arresting violators of the National Prohibition Act. In February, 1924, he attended a conference of State and Federal enforcement agencies at Albany, where he reiterated the need for cooperation. . . Arrests for violation were commonly made by the State troopers. . ."

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stead Act "with as much force and as much vigor as they would enforce any state law or local ordinance." Therefore he holds that when the Federal officials accepted the aid which was given as a result it became subject to the rules of exclusion applicable to evidence seized by Federal officers. However, the learned judge ruled expressly that although the State troopers were peace officers of the State, they "were not, at the time of the arrest and seizure, agents of the United States."[9]

The statement is made in the opinion that "The conclusion here reached is not in conflict with any of the earlier decisions of this court. . . ." Therefore, it is legitimate to examine the rule of the *Gambino* case in the light of the earlier Supreme Court decisions to determine whether there has not in fact been a departure from precedent.

As stated above, it was in the *Boyd* case that the Court first coined the fourth and fifth amendments into rules of exclusion. That case was one of forfeiture against the goods of an importer charged with a violation of the Customs Act. The Act provided for the compulsory production of the invoices of the defendant as evidence against him, to show the value of the goods against which forfeiture proceedings were brought, under penalty of a decree of forfeiture *pro confesso*. The effect of the statute was clearly to compel the production of the invoices of the defendant as evidence against himself in a criminal proceeding, for a criminal prosecution might later be instituted under the Act. The section of the Act in question was therefore held to be in contravention to the fifth amendment to the Constitution. The entire banc was agreed on that proposition; but a majority of the court went further and consented to the following *obiter dictum*, from which the Chief Justice and Mr. Justice Miller vigorously dissented: ". . . The unreasonable searches and seizure condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases, is condemned in the fifth amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the fifth amendment throws light on the question as to what is an 'unreasonable search and seizure,' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure

[9] This conclusion was reached for the purpose of showing that the troopers were not agents of the United States within the meaning of the Prohibition Act. One might speculate that possibly they were agents of the United States within the meaning of and from the standpoint of the fourth and fifth amendments to the Federal Constitution. But such a distinction seems shadowy at best, even if the fact that it conflicts with previous cases be left out of account. Compare Dodge v. United States (1926), 272 U. S. 530, 71 L. Ed. 392, 47 S. Ct. 191.

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of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." This *dictum* very obviously repudiated the doctrine that evidence is not affected by the illegality of the means by which the party obtained it.[10]

The principle underlying the *dictum* of the *Boyd* case became a rule of law in *Weeks v. United States*. That was a prosecution for a Federal offense, using the mails to defraud—a subject on which the state could not legislate. The defendant was arrested by a State police officer, without a warrant, near his place of employment in Kansas City. Other police officers had gone to the defendant's house, and after searching among the defendant's possessions, had taken certain papers, and articles found there. Later in the same day police officers returned with the United States marshal who, on searching among defendant's belongings, carried away certain other letters and envelopes found in a drawer. Neither the marshal nor the police had a search warrant. The defendant, before trial, filed a motion for return of the papers and letters, seized by the marshal, but his petition was denied. Upon their introduction during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant in violation of the fourth and fifth amendments to the Constitution of the United States, which objection was overruled by the trial court. The Government contended first, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but if competent would keep them and permit their use in evidence, and, second, that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of articles of personal property which are material and properly offered in evidence. The Supreme Court reversed the ruling of the trial judge and held that the defendant's petition for the suppression of the evidence should have been granted. The Court, in holding inadmissible evidence seized illegally by Federal officers for Federal prosecutions, was much concerned with preventing the reduction of the Constitutional provisions to a mere shadow. The closing words of the opinion, which are very pertinent in

[10] With the exception of New Jersey and Iowa, all state constitutions have provisions similar to the fourth and fifth amendments of the Federal constitution: in those two states they are unwritten rules of constitutional law and hence given similar force. But practically all state jurisdictions adhere to the proposition that illegality of seizure affects only credibility and not admissibility. This is frequently spoken of as the Massachusetts rule, after a long line of decisions in that State beginning with Commonwealth v. Dana, 2 Met. 329, a leading case on the subject. Missouri follows the Federal rule. See State v. Rebasti (1924), 306 Mo. 336, 267 S. W. 858.

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their bearing on the *Gambino* case, follow: "What remedies the defendant may have against them (the police officers) we need not inquire, as the fourth amendment is not directed to individual misconduct of such officials. *Its limitations reach the Federal government and its agencies.*"[11] It is difficult to perceive how the *Gambino* case is in accord with that limitation, considering the fact that no cooperation between the Federal agents and the State troopers was alleged.

A corollary to the rule thus crystallized was pronounced in *Flagg v. United States*[12] about two years later. There, evidence was excluded, though seized by municipal policemen, because the court concluded that the police raid was directed by United States officials who directly were responsible for the arrest and the seizure. In the words of the court: "To attribute such an elaborate and carefully prepared proceeding . . . to a few local patrolmen . . . makes too severe a demand upon the imagination."

But the degree of cooperation in that case is not at all comparable to the situation in the *Gambino* case, so as to give the latter some support in the *Flagg* ruling. No cooperation between State troopers and Federal authorities was pleaded in the principal case, and the only cooperation of which the Court took judicial notice was the Governor's proclamation (referred to above) and the general conferences between prohibition directors and county sheriffs. But from the standpoint of paragraph 26 of title II of the National Prohibition Act their conference would produce no legal consequence which differed from those effected when a Federal officer urges private citizens to obey the mandates of the law.[13] Yet, in *Burdeau v. McDowell*,[14] the defendant's conviction on a Federal charge was upheld even though the evidence offered by the prosecution had been illegally seized, where the seizure had been made by private individual. The Court said: "The fourth amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, *and was not intended to be a limitation on other than governmental agencies.*" Unless one resorts to logic so fine-spun that it approaches legal casuistry, the limitation of this excerpt, aside from one possible explanation, cannot be reconciled with the *Gambino* ruling;

[11] Italics the writer's.
[12] (1916), 233 F. 481, 147 C. C. A. 367.
[13] Dodge v. Unted States, *supra*.
[14] Burdeau v. McDowell (1920), 256 U. S. 465, 65 L. Ed. 1048, 41 S. Ct. 574, 13 A. L. R. 1159.

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for so long as there was no cooperation between the State troopers and national agents, it would follow that in contemplation of the Federal courts acts done by the state officers without color of authority were not different from the acts of private persons spurred on to law enforcement by public spirited citizens. The possible explanation referred to above would involve scrapping that array of decisions beginning with *Barron v. Baltimore*[15] in which it was held that ". . . the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states," and repudiating that long line of decisions beginning with *Twining v. New Jersey*[16] which provided a sort of anchor for the present Federal rule on the subject.

Viewed from still another aspect, the same conclusion must be reached. If the state of New York had never had a prohibition law of its own, then certainly the Federal Government, being the only one "interested" in enforcing the Volstead Act, could have used in evidence liquor which the troopers had seized without warrant and without cooperation of Federal authorities.[17] That is the manner in which the rule has been universally applied. And so in "dry" states like Kansas and New York before the repeal of the Mullan-Gage Act, evidence procured illegally by State officers could be used in Federal prosecutions even though the state courts would not permit its use.[18] But the effect of the *Gambino* decision is to provide that where a state statute and national act have dealt with the same subject matter, a repeal

[15] (1833), 7 Pet. 243.

[16] (1908), 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14.

[17] This conclusion rests on an interpretation of certain Supreme Court holdings. Rowan v. United States, *infra* note 2, in which the United States Supreme Court denied a writ of certiorari, permitted the use of evidence seized by municipal officers in a Federal prosecution on which there was no concurrent state legislation. United States v. Barber, *infra* note 24, accord. In the Weeks case, a prosecution for the unlawful use of the mails, the Supreme Court in excluding evidence seized by the United States Marshal, expressly approved the trial court's action in admitting the evidence illegally seized by the local police.

[18] In Landwirth v. United States (1924), 299 F. 281, the court said: "It must not be forgotten that the officers who made the search and seizure were state officers and not officers of the United States. The fourth and fifth amendments were designed to protect citizens from acts of oppression on the part of officers of the United States. Even though the record disclosed an illegal search on the part of state officers . . . their evidence, and evidence procured by them might have been received." In arriving at this conclusion the court relied on the express wording of the Weeks case. Accord, Coate v. United States (1923), 290 F. 134.

The court in Riggs v. United States (1924), 299 F. 273, said: ". . . . evidence procured by state officers by search and seizure without warrant

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of the state act, instead of re-establishing the common law on the proposition, establishes the Federal act as an act of the state; or it makes an act of the state have more force when repealed than when in force; or it makes an interpretation of the Constitution of the United States hinge on laws which state legislatures, at their whim or caprice, might enact or repeal. Any of the above "theories," is, of course, preposterous. Yet, if one has the *Burdeau* and *Weeks* cases in mind, he would be bound to accept one of these theories should he agree with the statement of the Court that, "The conclusion here reached is not in conflict with any of the earlier decisions of this court. . . ."

It should be noted that there have been several instances in which lower Federal courts have admitted the evidence under facts analagous to those in the principal case, although the opinion of the Supreme Court in the principal case did not treat them very seriously. *Schroeder v. United States*,[19] for example, is, as to facts, the parallel of the *Gambino* case, even to the point of having arisen in New York after the repeal of the State prohibition act. The Court there said: ". . . In *Twining v. New Jersey* . . . it was said that 'by the unvarying decisions of this court the first ten amendments are restrictive only of national action.' . . It is true that there is no state Enforcement Act in the state of New York; the Mullen-Gage Law having been repealed. That fact, however, in our opinion, is quite immaterial. If all these local police officers did, had been done by private citizens, acting without any color of authority, the result would not have been different." And upon the authority of the latter quotation, the same court in *Greenberg v. United States*[20] and *Katz v. United States*[21] reached the same conclusion. Judge Rogers, who delivered the opinions in the above cases, pointed out that they were not in the same category as the oft-cited case of *Flagg v. United States*, dealt with above. In commenting on the latter case, Judge Rogers said, "There is nothing in the [*Flagg*] opinion which indicated that the fourth and fifth amendments have any application to searches made by local police officers who act upon their own initiative and not upon the instigation of Federal officials." And the defendants' procedure in the *Schroeder* and *Gambino* cases was the same.

Several other Federal cases show that the general understanding as to the Federal rule was not that applied in the principal

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may be introduced upon a trial in the Federal court, although the Federal officers themselves would be inhibited from making search with or without a warrant." Accord: Kanellos v. United States (1922), 282 F. 461, and Thomas v. United States (1923), 290 F. 133.

[19] (1925), 7 F. (2d) 60.

[20] (1925), 7 F. (2d) 65.

[21] (1925), 7 F. (2d) 67.

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case. Thus, in *Rowan v. United States*,[22] for which the Supreme Court denied a writ of certiorari,[23] it was held permissible for the national government to make use of pertinent evidence wrongfully obtained when it had no part in wrongfully obtaining it. The evidence admitted in that case had been seized by Dallas policemen in a prosecution under the United States Criminal Code, the state of Texas having no statute regarding the particular offense. *United States v. Barber*[24] was a prosecution under a Federal act for breaking into an interstate freight car, a matter outside state control, and there the court held itself to be without authority to order the return of the evidence insofar as it had been seized by persons who were not Federal officers. Consequently, unless one is going to permit a state statute to influence rules of evidence in the Federal court—a doctrine toward which the Supreme Court itself is not inclined—he cannot but decide that the foregoing cases are in conflict with the *Gambino* decision.

A Missouri case, *State v. Rebasti*,[25] is quite similar to the principal case in fact and holding. There defendant was arrested by State officers, who, instead of obtaining a warrant to search his private effects, turned the matter over to Federal authorities, who illegally procured the evidence which was offered in the State court. The Court excluded the evidence on the ground that state courts must defend rights which a defendant has under the Constitution of the United States, reasoning that "It is unthinkable . . . to say that the act of an officer, or of any other individual is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question." That, no doubt, is good moralizing, but it is contrary to every utterance which the Supreme Court of the United States has made to the effect that the first ten amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely upon the Federal Government. Likewise it overlooks that constitutional truism that ours is a government having a division of powers, each supreme in its own sphere of activity. The case had a vigorous dissent by Mr. Justice Blair, and has been the subject of strong criticism.[26]

The foregoing review of Federal decisions tends to show that

[22] (1922), 281 F. 137.
[23] (1922), 260 U. S. 721, 67 L. Ed. 481, 43 S. Ct. 12.
[24] (1923), 289 F. 523.
[25] (1924), 306 Mo. 336, 267 S. W. 858.
[26] See State v. Arregui (1927), Idaho, 254 P. 788, and Judge Hinton in 20 Ill. L. Rev. 76.

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in the *Gambino* case the Supreme Court either has repudiated the limitations set down in the *Weeks* and *Byars* cases and the basic conception underlying *Twining v. New Jersey* and cases of like tenor, or has established a shaky foundation for determining the admissibility of evidence by making the instant decision turn on a distinction without meaning—the fact, namely, that the State enforcement act had been repealed.

ABRAHAM E. MARGOLIN, '29.

ADJUDICATION OF PARTNERSHIP AS BANKRUPT UNDER VOLUNTARY PETITION IRRESPECTIVE OF THE ADJUDICATION OF THE PARTNERS

The question of whether the adjudication of a partnership as bankrupt necessarily adjudicates the members composing the firm as bankrupts is one which has troubled the Federal courts ever since they have been granted jurisdiction in bankruptcy, with the result that there are two distinct lines of Federal cases. Not until the recent decision of *Liberty National Bank v. Bear*[1] did the Supreme Court of the United States definitely decide the point, holding that the adjudication of the firm did not of itself amount to an adjudication of the individual partners as bankrupt.

The question has always been a knotty one and its decision has always hinged on whether the court recognized the partnership as an entity or not. The very question of the entity of a partnership has troubled the common law courts ever since the idea of partnership associations was conceived. *Newman v. Eldridge*[2] gives us the holding of the law merchant and the civil law that a partnership is considered a legal entity distinct from the individuals composing it. However, the common law for the most part has recognized this entity,[3] and for nearly all practical purposes a partnership in the eyes of the common law is not an entity, but merely a group of individuals.

In equity the situation is somewhat different and as illustrated by *Farney v. Hauser et al.*,[4] the entity of a partnership will be recognized for some purposes. Thus, in the marshalling

[1] (1928), 48 S. Ct. 252.

[2] (1901), 107 La. 315, 31 So. 688.

[3] Flexner v. Farson, (1918), 248 U. S. 289, 63 L. Ed. 250, 39 S. Ct. 97; In re Peck (1912), 206 N. Y. 55, 99 N. E. 258; Cutting v. Daigulau (1890), 151 Mass. 297, 23 N. E. 839; E. I. Du Pont de Nemours Powder Co. v. Jones Bros. et al. (1912), 200 F. 638.

[4] (1921), 109 Kan. 75, 198 P. 178.

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