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Evidence - Searches and Seizures - Admissability in Civil Case When Illegally Obtained by Private Persons

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outside the city limits are continually under threat of the nuisance of feed lots which may move into this area adjacent to the city. By modifying the restricting clause, the exclusion of livestock programs from land adjacent to cities would prevent these nuisances. Upon modification of existing statutes as suggested above, the dissenting opinion would be sound in result.

EDMOND REES

EVIDENCE—SEARCHES AND SEIZURES—ADMISSABILITY IN CIVIL CASE WHEN ILLEGALLY OBTAINED BY PRIVATE PERSONS—In a jury trial the plaintiff was granted a divorce on the ground of his wife's adultery. The wife appealed on the theory that the evidence of her adultery should have been excluded because it was obtained by a violation of her rights under the fourth amendment to the United States Constitution.[1] The violation consisted of an illegal, forcible entry into the wife's home by the husband and several of his private investigators. The New York Court of Appeals *held*, two judges dissenting, that evidence of a wife's adultery was admissable in a divorce action even though obtained by an illegal, forcible entry. The dissenting judges reasoned that the exclusionary rule applied in criminal cases should be extended to civil cases where the violation of rights was committed by a private person rather than a governmental unit. *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481 (1964).

The common law rule regarding admissibility of evidence was that the court would not be concerned with how it was obtained.[2] Under this rule, evidence obtained by unreasonable search and seizure was admissable even though the United States Constitution forbids such invasion.[3] The reason given was that crime detection should not be needlessly burdened and that the accused's remedy was a civil action for trespass rather than exclusion of the evidence so obtained.[4] The first step toward abrogating this rule was the exclusion of such evidence from federal courts[5] and the adoption of the exclusionary rule by a number of states through their own constitutions.[6] The next step came in 1949 when the United States Supreme Court ruled that the fourth amendment was enforceable against the states through the fourteenth amendment. But the prohibition against unreasonable search and seizure did not

1. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."
2. Olmstead v. United States, 277 U.S. 438, 467 (1928).
3. *Supra* note 1.
4. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
5. Weeks v. United States, 232 U.S. 383 (1914).
6. Elkins v. United States, 364 U.S. 206, Appendix at 224-32 (1960).

require enforcement by excluding the evidence so obtained.[7] This decision prompted a few more states to adopt the exclusionary rule.[8] Finally, in 1961, the Court held in *Mapp v. Ohio*[9] that evidence obtained by unreasonable search and seizure was inadmissible in state as well as federal courts.

Prior to *Mapp*, the history of this rule in New York was one of definite rejection.[10] A number of subsequent decisions have followed the federal rule.[11] It has, however, been narrowly construed[12] and applied only to criminal cases where the search and seizure was by governmental forces.[13] The court said, in *People v. Appelbaum*,[14] that the constitutional provision against unlawful search and seizure related solely to sovereign authority and its agencies, and not to private individuals.

Since the New York courts are reluctant to exclude any evidence that has probative value, it is likely that *Mapp* will be distinguished whenever possible. In the *Sackler* case[15] where the evidence was illegally obtained by a private individual in a civil suit, two distinctions can be drawn: first, *Mapp* was a criminal case and secondly, the illegal search was by governmental representatives. *Sackler* was apparently decided on the theory that the constitutional protection does not extend to searches by private individuals, a proposition which has considerable supporting authority.[16] Therefore, the difficult question of whether the rule should be applied to civil cases was avoided. The two dissenting judges, however, would extend the protection of the fourth amendment to illegal search and seizure by private persons as well as government officials and would make no distinction between civil and criminal cases.[17] The case of *One 1958 Plymouth Sedan v. Pennsylvania*,[18] decided by the Supreme Court subsequent to *Sackler* lends support to the theory that there should be no distinction between civil and

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7. Wolf v. Colorado, 338 U.S. 25 (1949).
8. Elkins v. United States, *supra* note 6.
9. 367 U.S. 643 (1961).
10. *E.g.*, People v. Variano. 5 N.Y.2d 391, 157 N.E.2d 857 (1959); People v. Defore, *supra* note 4; People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903).
11. *E.g.*, People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441 (1964); People v. O'Neill, 11 N.Y.2d 148, 182 N.E.2d 95 (1962).
12. *E.g.*, People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964). Defendant suspected of a crime was stopped and "frisked." The court said that *Mapp* did not apply, and the evidence was admitted. Judge Fuld, dissenting, would expand *Mapp* to apply in this case.
13. *Supra* note 11.
14. 301 N.Y. 738, 95 N.E.2d 410 (1950).
15. Sackler v. Sackler, 15 N.Y.2d 401, 203 N.E.2d 481 (1964).
16. *E.g.*, Berdeau v. McDowell, 256 U.S. 465 (1921); United States v. Jordan, 79 F. Supp. 411 (E. D. Pa. 1948); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (1963); People v. Appelbaum, *supra* note 14.
17. Sackler v. Sackler, *supra* note 15 at 484, 85; *Cf.* People v. Defore, *supra* note 4 at 588. Judge Cardozo said that it made no difference who made the illegal search, private individual or government agent, he would admit the evidence in either case. In Sackler the dissenters also said that it made no difference who made the illegal search. They would, however, exclude the evidence.
18. 33 U.S.L. Week 4387 (1965). In this case The United States Supreme Court held that the fourth amendment's ban on use of illegally seized evidence in state criminal proceedings applied to a state proceeding to forfeit an automobile for transporting liquor not bearing state tax seals. The Court held that although this was technically a civil proceeding, it was in substance and effect a criminal action.

criminal cases. Another possible reason for the court's decision in the instant case is that the rigid New York divorce law lists adultery as the only grounds for divorce.[19] Thus the exclusion of this evidence would have precluded the plaintiff from freeing himself from an adulterous spouse.[20]

The New York court has seemingly upheld the doctrine of stare decisis and maintained judicial stability by holding that the fourth amendment protection against unreasonable search and seizure does not apply when the violation is by a private individual. The Supreme Court, however, made no such distinction in the *Mapp* case and it seems incongruous to suppose that the Court simultaneously broadened the coverage of the fourth amendment by applying it to the states and restricted it by excluding private individuals from its prohibitions. It is difficult to see why the constitutionality of an act should be determined by who commits the act rather than by the act itself.

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19. N.Y. DOM. REL. LAW § 170.
20. See Sackler v. Sackler, 33 Misc. 2d 600, 224 N.Y.S.2d 790, 796 (1962). Judge Benjamin Brenner of the Supreme Court of Kings County, New York, granted defendent's motion to supress the evidence. "The divorce laws of the State of New York, confined as they are to the single cause of adultery are outmoded and archaic. They promote all manner of sordid arrangements both in and out of the state. They promote perjurous testimony. Hence, they foster disrespect for the law which the courts are powerless to halt. The continued disclosure of evidence of adultery procured in violation of fundamental civil liberties thus works a double harm upon the integrity of the judicial process."