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Constitutional Law - Due Process of Law - Rules of Evidence - Admissibility of Illegally Seized Evidence

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ity view of the state's lawyers with respect to legislation affecting the administration of justice and the practice of law.

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—RULES OF EVIDENCE—ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE—Defendant's home was forcibly entered by several police officers who conducted a complete search of the home without a search warrant. The defendant was convicted of having in her possession obscene materials[1] which were discovered in the illegal search. The Supreme Court of Ohio upheld the validity of the conviction.[2] Upon appeal the United States Supreme Court *held,* three justices dissenting, that evidence obtained by unconstitutional search was inadmissible in state prosecution. Thus conviction was vitiated under the Fourteenth Amendment and the landmark case of *Wolf v. Colorado*[3] which had stood inviolate for 12 years was overruled.

The dissent maintained that the majority in overruling Wolf, instead of passing upon the constitutionality of section 2905.34 of the Ohio Revised Code, chose the more difficult and less appropriate of the two constitutional questions involved. *Mapp v. Ohio,* 367 U. S. 643 (1961).

Illegally seized evidence, formerly admissible in state courts, has now been declared inadmissible because of its unconstitutional nature. The first specific reference made to evidence as being unconstitutional arose in *Boyd v. United States in 1886.*[4] In 1914 the Supreme Court adopted the federal exclusionary rule[5] with respect to evidence illegally obtained. The Supreme Court in *Wolf v. Colorado*[6] 1949 declared that the right of privacy under the Fourth Amendment was enforceable against the states through the Due Process Clause of the Fourteenth Amendment. However the court decided that the Weeks exclusionary rule would not be imposed upon

1. Ohio Rev. Code § 2905.34 (1953) provides in part that "no person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book . . . (or) picture. . ."

2. State v. Mapp. 170 Ohio St. 427, 430, 166 N.E.2d 387, 390 (1960). The Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of books and pictures unlawfully seized during an unlawful search of defendant's home."

3. 338 U.S. 25 (1949).

4. 116 U.S. 616 (1886). Claimant was compelled to produce an incriminatory invoice upon which conviction was based—held, unconstitutional as being within the prohibition of the Fifth Amendment.

5. Weeks v. United States, 232 U.S. 383 (1914). In a federal prosecution the fourth Amendment barred the use of evidence secured through an illegal search and seizure. The Weeks rule is codified in Fed. R. Crim. P. 41 (e).

6. 338 U.S. 25 (1949).

the states as "an essential ingredient of that right"[7] unless the conduct were so brutal as to shock the public conscience.[8]

The basis for the development of the federal exclusionary rule is two-fold. It has a deterring effect upon officials dispatched to invade individual privacy and it prevents the judiciary from being employed as an instrument for the lawless enforcement of the criminal law.[9]

Some limitations to the exclusionary rule which appear likely to continue in effect are: The illegal search and seizure must constitute an injury against the defendant or his property[10] without his consent;[11] a defendant who voluntarily testifies and admits possession or ownership of the articles seized can no longer object to their introduction on the ground that they have been obtained by an unlawful search and seizure;[12] a motion to suppress evidence obtained by unreasonable search and seizure must be timely asserted.[13]

The decision reached in this case will require a great deal of legislation or judicial alignment. Prior to the instant case, 29 states[14] had adopted, some by decision[15] and some by statute[16] or constitutional amendment,[17] the federal exclusionary rule. North Dakota[18] together with some 20 other states has follow-

7. **Id.** at 29.
8. Rochin v. California, 343 U.S. 165, 175 (1952).
9. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
10. Safarik v. United States, 62 F.2d 892 (8th Cir. 1933).
11. Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937).
12. State v. Park, 322 Mo. 69, 16 S.W.2d 30 (1929); Burks v. State, 194 Tenn. 675, 254 S.W.2d 970 (1953).
13. Weeks v. United States, 232 U.S. 383 (1914).
14. 8 WIGMORE EVIDENCE § 2183 (McNaugton rev. 1961). 20 states have adopted the federal exclusionary rule with no significant exceptions; Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Washington. West Virginia and Wyoming. 9 other states have adopted the rule with various exceptions; Alabama, Maryland, Michigan, Nevada, New York, Oregon, Pennsylvania, South Dakota and Wisconsin.
15. State **ex rel.** King v. District Court, 70 Mont. 191, 224 Pac. 862 (1924) (illegal search warrant; evidence so obtained excluded); Ledbetter v. State, 185 Tenn. 619, 207 S.W.2d 336 (1948) (conviction based on illegally obtained evidence reversed).
16. Tex. Code Crim. P. art. 727 (a) (2 Vernon's Statutes 434 1948). No evidence obtained by an officer or other person in violation of any provisions of the Constitution or law of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
17. Mich. Comp. L. art. 2 § 10 (1948). "The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation: Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state."
18. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925) (evidence seized under an invalid warrant admitted); **see** State v. Pauley, 49 N.D. 488, 192 N.W. 91 (1923) (search without a warrant; evidence so obtained admitted).

ed the common-law rule of admissibility of illegally seized evidence.

It is the writer's belief that a rule somewhat more flexible than that which is stated in the principal case should be adopted. In determining whether illegally obtained evidence should be admissible, an individual's constitutional right of privacy should be weighed against the protection of society against crime. The courts should then have the freedom to protect that interest which would suffer the greater harm.

Despite the writer's views, it appears that North Dakota would best serve the interests of uniformity if the legislature were to formally adopt the federal exclusionary rule.

DENNIS L. THOMTE

DAMAGES—MENTAL SUFFERING—RECOVERY OF DAMAGES FOR MENTAL ANGUISH CAUSED BY BREACH OF CONTRACT—Plaintiff, a recently married woman, brought this action for damages resulting from defendant's failure to deliver a gown and a veil in time for her wedding and also for her mental anguish, humiliation, and embarrassment. In reversing judgment for the plaintiff, the Supreme Court of Oklahoma *held,* three judges dissenting, that the plaintiff could not recover for mental anguish, humiliation, and embarrassment in the absence of physical injury. *Seidenbach's Inc. v. Williams,* 361 P. 2d (Okla. 1961).

It has been said that damages for mental anguish have been awarded in two classes of cases.[1] The first class proceeding on a tort theory is where both anguish and bodily injury result.[2] The second class of cases allows recovery for mental anguish which was caused by an infraction of a legal right though physical injury is nonexistent.[3] A further restriction enunciated is that the infraction must be wilful or malicious.[4] The act or omission causing mental disturbance may be tortious or from a breach of contract. The carrier[5] and innkeeper[6] cases are good examples of businesses which can be made defend-

1. See 5 CORBIN, CONTRACTS §1076 (1951).
2. Baltimore and Ohio R. Co. v. McBride, 36 F.2d 841 (6th Cir. 1930); Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597 (1916).
3. Larson v. Chase, 47 Minn. 310, 50 N.W. 239 (1891).
4. Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 N.W. 353 (1907) (dictum); Texas and P. R. Co. v. Gott, 20 Tex. Civ. App. 235, 50 S.W. 193 (1899) (dictum); Brown v. Railway Co., 54 Wis. 342, 11 N.W. 356 (1882) (dictum).
5. Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 N.W. 353 (1907).
6. Boyce v. Greeley Sq. Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920) (dictum); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908) (dictum).