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EVIDENCE—EVIDENCE ILLEGALLY OBTAINED BY PRIVATE PARTIES ADMISSIBLE IN CIVIL ACTION

Dr. Abraham M. Sackler and his wife were legally separated April 5, 1961.¹ About 3:30 A.M. on August 20, 1961, Dr. Sackler, together with private detectives, broke into his wife's separately maintained apartment seeking evidence for divorce.² They succeeded in photographing the wife with an alleged paramour in rather compromising circumstances. At the subsequent trial for divorce the defendant-wife moved to exclude and suppress the evidence obtained from the illegal forcible entry. The trial court granted the motion to suppress the evidence on constitutional grounds.³ By a divided court the Appellate Division reversed and remanded, holding that the evidence was admissible.⁴ In the jury trial which followed, a verdict of adultery was rendered and the husband received a judgment of absolute divorce. The Appellate Division affirmed.⁵ On appeal, *held*, judgment affirmed, two judges dissenting. The fourth and fourteenth amendments to the United States Constitution and similar state constitutional and statutory provisions do not bar the admission in a civil action of evidence illegally obtained by private individuals. *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

At common law evidence obtained by illegal search and seizure was admissible in both civil and criminal cases.⁶ Reliability or competency was not considered to be a problem with such evidence.⁷ The interests in favor of bringing a criminal to justice or correcting a civil wrong outweighed the individual's right to privacy,⁸ for which there were other remedies.⁹ Generally illegal conduct in

1. *Sackler v. Sackler*, 33 Misc. 2d 600, 601, 224 N.Y.S.2d 790, 794 (Sup. Ct. 1962).

2. Brief for Appellant, pp. 4-6. Although a key was used to gain entry, the key was concededly obtained illegally.

3. *Sackler v. Sackler*, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962) (Benjamin Brenner, J.), noted, 48 Cornell L.Q. 345 (1962), 46 Minn. L. Rev. 1119 (1962), 14 S.C.L.Q. 433 (1962), 13 Syracuse L. Rev. 606 (1962), 110 U. Pa. L. Rev. 1043 (1962), 8 Utah L. Rev. 84 (1962), 72 Yale L.J. 1062 (1963).

U.S. Const. amend. IV, N.Y. Const. art. I, § 12, and N.Y. Civ. Rights Law § 8 were relied on by the court. N.Y. Const. art. I, § 12 (1938) reads (in part): "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." U.S. Const. amend. IV is identical and N.Y. Civ. Rights Law § 8 is essentially the same.

4. *Sackler v. Sackler*, 16 A.D.2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962) (a 3-2 decision), *motion for leave to appeal denied*, 16 A.D.2d 950 (2d Dep't 1962), noted, 27 Albany L. Rev. 137 (1963), 63 Colum. L. Rev. 168 (1963), 31 Fordham L. Rev. 390 (1962).

5. *Sackler v. Sackler*, 19 A.D.2d 751, 242 N.Y.S.2d 715 (2d Dep't 1963).

6. 8 Wigmore, Evidence § 2183 (McNaughton rev. 1961) [hereinafter cited as Wigmore]; see, e.g., *Adams v. New York*, 192 U.S. 585 (1904) (criminal action); *Cluett v. Rosenthal*, 100 Mich. 193, 58 N.W. 1009 (1894) (civil action); see generally Annot., 50 A.L.R.2d 531, 543-55 (1956).

7. See *People v. Cahan*, 44 Cal. 2d 434, 443, 282 P.2d 905, 910 (1955) (Traynor, J.) (criminal action rejecting common law rule but summarizing arguments for it).

8. See, e.g., *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (Cardozo, J.), *cert. denied*, 270 U.S. 657 (1926).

9. *Id.* at 19, 150 N.E. at 586-87 (civil and criminal remedies).

obtaining evidence was considered a collateral issue, best decided at a separate proceeding; it was not meant to be sanctioned. As Dean Wigmore wrote: "The incidental illegality is by no means condoned. It is merely ignored in *this* litigation."¹⁰

One of the earliest statements that illegally obtained evidence violated the fourth amendment and should be excluded from a criminal trial came from the Supreme Court almost eighty years ago.¹¹ Eighteen years later, in 1904, the Court retreated from its earlier statement by holding that where the issue of illegal acquisition of evidence was raised during a trial it was only a collateral issue and no constitutional rights were violated by its admission.¹² In 1914, the Supreme Court created the exclusionary rule. It barred evidence illegally obtained by a federal agent from being used in a federal prosecution.¹³ Such abuse of the Constitution by law enforcement officers under color of federal law, stated the Court, "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."¹⁴ Seven years later in *Burdeau v. McDowell*,¹⁵ the Court limited the application of the exclusionary rule to evidence seized by agents of the federal government, and allowed the admission of evidence illegally obtained by private persons.

Although the exclusionary rule was not binding on the states, sixteen states did adopt it by 1949.¹⁶ In that year the Supreme Court held that the fourth and fourteenth amendments to the United States Constitution prohibited state law enforcement officers from invading an individual's right to privacy.¹⁷ The Court, however, refused to require the states to adopt the exclusionary rule. By 1960, a total of twenty-nine states had chosen to follow the exclusionary rule.¹⁸ In that year the Court, in *Elkins v. United States*, invalidated the so-called "silver platter" doctrine.¹⁹ This doctrine had allowed federal courts to admit evidence illegally obtained by the independent search of state police officers. Thus, *Elkins* ended a common practice of state agents aiding federal prosecutions. Although it had been previously established that evidence obtained through a federal agent's overt participation in an illegal search by state officers was to be excluded,²⁰ the *Elkins* Court wanted to end the possibility of secret

10. 8 Wigmore § 2183, at 7.

11. *Boyd v. United States*, 116 U.S. 616, 624-36 (1886) (dictum).

12. *Adams v. New York*, 192 U.S. 585 (1904).

13. *Weeks v. United States*, 232 U.S. 383 (1914) (illegal use of mail).

14. *Id.* at 392.

15. 256 U.S. 465 (1921). This was a petition for the return of illegally seized books which were to be used in a criminal prosecution.

16. *Wolf v. Colorado*, 338 U.S. 25, Appendix, Table I, at 38 (1949).

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

18. 8 Wigmore § 2183 n.1 (an excellent and exhaustive list of state cases and their holdings). See, e.g., *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) (Traynor, J.); see generally Annot., 50 A.L.R.2d 531 (1956).

19. *Elkins v. United States*, 364 U.S. 206 (1960).

20. See, e.g., *Lustig v. United States*, 338 U.S. 74 (1949).

participation by federal agents in such searches.²¹ This ruling, like the previous cases on exclusion, was based on "the Court's supervisory power over . . . the federal courts. . . ."²² *Elkins* was considered by some to undercut if not overrule the *Burdeau* decision which limited exclusion to violations by federal agents.²³ One year later, in *Mapp v. Ohio*,²⁴ the exclusionary rule was extended to the states. The Court held that the Constitution, not merely the Court's supervisory power, required this exclusion. The Court stated: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."²⁵ In light of this broad language and *Elkins'* threat to the *Burdeau* doctrine, a re-examination of the exclusionary rule's applicability to illegal private searches was inevitable.

In the *Burdeau* case the Supreme Court succinctly stated the basis for not excluding evidence illegally obtained by private parties: The "origin and history [of the fourth amendment] clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."²⁶ This authority for limiting the exclusionary rule to federal agents was accepted without question for over thirty years.²⁷ Subsequent to the overruling of the "silver platter" doctrine in *Elkins*, federal courts still followed *Burdeau*.²⁸ State courts have also continued to adhere to this rule. Relying on *Burdeau*, a recent case from California, a jurisdiction which adopted the exclusionary rule before *Mapp*,²⁹ admitted evidence in a shoplifting prosecution which was illegally seized by a private detective.³⁰ The United States Supreme Court denied certiorari in this

21. See *Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

22. *Id.* at 216.

23. See *Williams v. United States*, 282 F.2d 940 (6th Cir. 1960).

24. 367 U.S. 643 (1961); see *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961) in which New York accepted *Mapp*; see generally *Annotts.*, 84 A.L.R.2d 959 (1962); 6 L. Ed. 1544 (1962).

25. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

26. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); see *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); Lasson, *History and Development of the Fourth Amendment to the United States Constitution* (1937).

27. See, e.g., *Hall v. United States*, 41 F.2d 54 (9th Cir. 1930); *United States v. Jordan*, 79 F. Supp. 411 (E.D. Pa. 1948).

28. *United States v. Goldberg*, 330 F.2d 30 (3d Cir. 1964), *cert. denied*, 377 U.S. 953 (1964) (criminal tax case; evidence illegally seized by private persons admissible); *Knoll Associates, Inc. v. Dixon*, 232 F. Supp. 283 (S.D.N.Y. 1964) (injunction against antitrust prosecution; *Burdeau* is distinguishable from *Mapp* and *Elkins* which "deal with entirely different situations and principles." *Id.* at 286-87); *United States v. Frank*, 225 F. Supp. 573 (D.D.C. 1964) (criminal case).

29. See *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

30. *People v. Randazzo*, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (Dist. Ct. App. 1963), *cert. denied*, 277 U.S. 1000 (1964), 12 U.C.L.A.L. Rev. 232 (1964); *accord*, *Knotts v. State*, 243 Ind. 501, 187 N.E.2d 571 (1963) (shoplifting, "special police officers"); *Commonwealth v. Tanchyn*, 200 Pa. Super. 148, 188 A.2d 824, *cert. denied*, 375 U.S. 866 (1963) (drunken driving; blood sample by private doctor without consent of defendant); *People v. Trimarco*, 41 Misc. 2d 775, 245 N.Y.S.2d 795 (Sup. Ct. 1963) (alternative holding) (private airline security guard).

and two other similar cases.³¹ Thus, the Court does not appear ready to overrule *Burdeau*. Further, no reported case, other than the instant case at its first trial,³² can be found extending *Mapp* to private seizures. There has, however, been some tendency to exclude illegally obtained evidence in civil cases in which the government is a party.³³ Indications are that the exclusionary rule will be further extended in this latter area.³⁴

The majority opinion in the instant case by Chief Judge Desmond, quickly ruled out the applicability of *Mapp* to the instant problem. The origin and history of the fourth amendment were traced to show that it has nothing to do with non-governmental invasions of privacy. Therefore the common law rule of admitting "all competent, substantial, credible and relevant evidence"³⁵ still stands in the area of private search and seizure. Any extension of the exclusionary rule must come from the legislature as it already has in some areas.³⁶ The Chief Judge ended the opinion by a careful limitation: "the question we are discussing is not . . . whether evidence invalidly gotten by governmental people may be used in a civil litigation . . . or whether evidence wrongfully obtained by private individuals may be used by the State in a criminal prosecution."³⁷ Judge Van Voorhis by his dissent would exclude evidence illegally obtained by private parties. This opinion is based on the broad language of the *Mapp* decision that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."³⁸ He then reasoned that the private parties exception to the exclusionary rule of *Burdeau* was overruled by *Elkins* along with the "silver platter" doctrine.³⁹ Judge Bergan's dissent attacked the majority's distinction between government and private intrusions of privacy. A uniform rule of exclusion, he concluded, is needed to protect the rights secured by the fourth amendment.⁴⁰

Mapp's sweeping overthrow⁴¹ of the common law rule of admitting illegally obtained evidence required a re-evaluation of private searches and seizures in

31. *Randazzo v. California*, 377 U.S. 1000 (1964); *Goldberg v. United States* 377 U.S. 953 (1964); *Tanchyn v. Pennsylvania*, 375 U.S. 866 (1963).

32. *Sackler v. Sackler*, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962).

33. See *Lassoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962), 48 Iowa L. Rev. 710 (1963), a civil tax case which was commenced after dismissal of the government's criminal case [*United States v. Lassoff*, 147 F. Supp. 944 (E.D. Ky. 1957)] in which the same illegal evidence was excluded. See also, *United States v. Five Thousand Six Hundred Eight Dollars and Thirty Cents (\$5,608.30) in United States Coin and Currency*, 326 F.2d 359 (7th Cir. 1964); *United States v. Physic*, 175 F.2d 338 (2d Cir. 1949); *Chambers v. Rosetti*, 36 Misc. 2d 779, 226 N.Y.S.2d 27 (N.Y.C. City Ct. 1962), *rev'd on other grounds*, 40 Misc. 2d 620, 243 N.Y.S.2d 603 (Sup. Ct. App. Term 2d Dep't 1963) (all civil actions for forfeiture of alleged contraband); see generally 48 Iowa L. Rev. 710, 713-15 (1963).

34. See DeReuil, *Applicability of the Fourth Amendment in Civil Cases*, 1963 Duke L.J. 472.

35. Instant case at 44, 203 N.E.2d at 483, 255 N.Y.S.2d at 85.

36. N.Y. CPLR § 4506, N.Y. Pen. Law § 738 (eavesdropping).

37. Instant case at 44, 203 N.E.2d at 484, 255 N.Y.S.2d at 86.

38. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

39. Instant case at 45-46, 203 N.E.2d at 484, 255 N.Y.S.2d at 87-88.

40. *Id.* at 46-48, 203 N.E.2d at 485-86, 255 N.Y.S.2d at 88-89.

41. *Mapp v. Ohio*, 367 U.S. 643 (1961).

civil suits. In making this re-evaluation the Court of Appeals reached a proper result. There was no precedent for deciding otherwise. The Court may, however, have been too quick to assume that the history of the fourth amendment should set its rigid interpretation. This is not universally accepted. Professor Wechsler states:

[T]he . . . clauses of the Bill of Rights [should be] read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long past, with problems very different than our own. To read them in the former way is to leave room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene.⁴²

In light of this, the only real issue facing the court was whether the policy embodied in the fourth and fourteenth amendments makes it desirable to extend the exclusionary rule to private searches. To answer this question two conflicting values must be examined: the growing urgency of safeguarding an individual's right to privacy and an expressed legislative policy of granting civil redress to injured parties. Specifically, should the instant Court protect defendant-wife's right against illegal intrusion, or should it effectuate the legislative policy of granting a divorce on a showing of adultery?⁴³ There can be little question that modern society has put the individual's right to privacy in jeopardy. Witness the extensive investigations of one's private affairs for credit and employment and the development of advanced listening devices.⁴⁴ If there are no means for protecting the individual's right to privacy other than an extension of the exclusionary rule, it should be extended to private searches. One of the primary causes for the exclusionary rule against official searches was the total lack of other effective remedies against police invasion of privacy.⁴⁵ Law enforcement officers would not prosecute themselves and civil suits by victims of illegal searches were limited or nearly impossible. One private individual against another, however, is an entirely different situation. Both civil and criminal remedies are still available against private illegal searches. Until it can be shown that these remedies against private searches are as ineffective as those against police searches were, the courts should be reluctant to extend the exclusionary device.

The possibility of police harassment by the use of the fruits of their unlawful searches in civil cases such as forfeiture actions⁴⁶ is an area of potential abuse similar to the criminal law area which would appear to be allowed

42. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959). *But see* Hand, *The Bill of Rights* 65 (1958).

43. See N.Y. Dom. Rel. Law § 170.

44. See Brenton, *The Privacy Invaders* (1964).

45. See Murphy, J. dissenting in *Wolf v. Colorado*, 338 U.S. 25, 41-47 (1949); *People v. Cahan* 44 Cal. 2d 434, 448, 282 P.2d 905, 913 (1955) (Traynor, J.) ("successful criminal prosecutions against [police] officers are nonexistent").

46. *Cf.* cases cited in note 33 *supra*.

by the instant case. It should be noted, however, that the Court expressly limited its decision so as not to apply to the fruits of illegal searches by police in civil cases. The greatest possible abuse of private illegal searches may be the development of a private "silver platter" doctrine, that is, allowing evidence illegally obtained by unlawful private searches to be used in criminal prosecutions.⁴⁷ The present exclusionary rule could be completely circumvented by private detectives secretly cooperating with police officers. This is a danger similar to the collusion recognized by the Court in *Elkins*. If the exclusionary rule is to be extended to illegal private searches it should first be done in this criminal area. The instant case, however, can in no way be criticized as fostering such a doctrine since the Court expressly refused to pass judgment on the use of evidence obtained by illegal private searches in criminal prosecutions.

Let us assume that, to protect the right of privacy, it is desirable to exclude from civil suits evidence illegally obtained by private search. We must still consider its effect on the policy of granting civil redress to injured parties. In the instant situation the legislature has clearly expressed a policy that a divorce may be granted on a showing of adultery by one spouse.⁴⁸ Considering this policy alone, all competent and relevant evidence should be admitted to reach the truth in a particular suit. The legality of a plaintiff's evidence should be of no concern for the court, especially where the defendant can obtain remedies elsewhere. If the rigid exclusionary rule were extended to the instant situation, many plaintiffs would be denied civil redress because of minor technical illegalities in evidence. It might be argued that the civil and criminal remedies of a victim of an illegal search may not be as effective as proposed exclusion. But, considering the present status of New York divorce law, the exclusionary rule should not be automatically extended to cut off one of the few means available to a wronged party to prove the adultery of his spouse. Although this may have been an underlying factor in the instant court's decision, its holding is by no means limited to divorce actions. It is most probable that the Court would have reached the same result if it had been presented with a civil action other than divorce. Judicial extension of the exclusionary rule to such private searches would in no way be warranted. It is contrary to expressed legislative policy and too great a departure from the present law of evidence. If the exclusionary rule is to be applied to private searches in a civil suit, it should be done not by the courts but by the legislature which is in a far better position to ascertain specific areas of danger and to devise the proper mode of correcting them.

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47. Cf. cases cited in note 30 *supra*.

48. N.Y. Dom. Rel. Law § 170.