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Evidence: Adoption of the Exclusionary Rule in California

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the Unfair Practices Act. If, however, the inapplicability of the doctrine in these cases needs any justification, other than the provisions relied upon in the Business and Professions Code, perhaps it can best be rationalized by using the language of a California case[24] which construed the constitutionality of the Unfair Practices Act and stated:

> "That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority."

The court in the instant case very possibly could have arrived at the same decision based upon the applicable prior analogous exceptions which have been judicially recognized in California. Thus, the effect of these statutes is to remove any doubt existing regarding the discretionary power of the courts in these cases, and instead, make it *mandatory* for the trial judge to issue the injunction *notwithstanding* the plaintiff's unclean hands. It is submitted that these statutes are in accord with good public policy and existing equitable principles, based upon the analogous exceptions mentioned previously. *Charles William Luther.*

EVIDENCE: ADOPTION OF THE EXCLUSIONARY RULE IN CALIFORNIA. The decision of the California Supreme Court in *People v. Cahan*[1] has been the object of much concern in California. In this case, most of the evidence against 16 persons charged with conspiracy to engage in horse-race bookmaking was obtained by officers of the Los Angeles Police Department. Such evidence was obtained in violation of the United States and California Constitutions[2] and state and federal statutes.[3] After securing the permission of the chief of police to make microphone installations at two places occupied by the defendant, officers entered through a side window and placed a listening device under a chest of drawers. About a month later, a similar device was installed in another house and receiving equipment was set up in garages near both establishments. Such equipment was used for the purpose of recording and transcribing the conversations that came over the wires. In addition, there was a mass of evidence obtained through entries which were made by kicking down the front door and other searches and seizures made without search warrants. Such evidence was held to be inadmissible, thus reversing the lower court's findings. Heretofore, there had been an unbroken line of decisions adopting the non-exclusionary rule, a well-established rule of evidence in this state. The *Cahan* decision broke this line, thus placing California among those jurisdictions which adhere to the federal exclusionary rule.

Many cases, strongly resembling the *Cahan* case, have previously been before the California courts. They have consistently been decided by holding the non-exclusionary rule to be the law, not the exclusionary rule. Will an examination of cases decided by both rules provide an answer for the sudden reversal?

The adoption of the exclusionary rule is based upon the principle that some consideration extrinsic to the investigation of truth is regarded as more important

[24] Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 11 Cal.2d 634, 646, 82 P.2d 3, 10, 118 A.L.R. 486 (1938).

[1] —— Cal.2d ——, 282 P.2d 905 (1955).
[2] U. S. CONST. amend. IV; CALIF. CONST. Art. I, § 19.
[3] CALIF. PEN. CODE § 653h; 47 U.S.C. § 605 (1934).

and overpowering.[4] Thus this principle is extended by the decision in *Boyd v. U.S.*[5] to the use of evidence obtained by violation of the Fourth Amendment (as well as that of the Fifth Amendment). The United States Supreme Court was unable to perceive that the seizure of a man's private books and papers to be used in evidence against him was substantially different from compelling him to be a witness against himself. However, 19 years later in *Adams v. New York*,[6] the Supreme Court held that questions of admissibility are limited by the weight of authority, as well as reason, to cases involving violation of the Fifth Amendment. The court asserted that it does not stop to inquire as to the means by which the evidence was obtained. A feeble attempt was made here to reconcile this decision with the *Boyd* case by showing that the latter was settled primarily on the grounds of the Fifth Amendment. The effect of the *Adams* decision was short-lived when *Weeks v. United States*[7] was decided. Here the court was confronted with evidence obtained by entry without a warrant and a subsequent seizure of letters and private documents; this evidence was taken from the defendant who was under suspicion of illegally using the mails for gambling purposes. The court said if such evidence was allowed to be used, the protection of the Fourth Amendment would have no value and ought to be stricken from the Constitution, since the court and its officials are not to be aided by sacrificing constitutional principles. As distinguished from the *Adams* decision, the *Weeks* decision required the defendant, prior to the opening of his trial, to seek restitution of the property desired for use as evidence. However, such a distinction has not been strictly enforced and motions to return illegally obtained evidence have been granted subsequent to the opening of trial. Thus the expansive effect which results from the *Weeks* decision gives substance to the view that the Supreme Court's position is based upon the principle that protection under the Fourth Amendment—to the extent of excluding evidence obtained in violation of this amendment—will be maintained at an unyielding level.

It appears that the limitations which govern the exclusion of evidence have expanded beyond evidence obtained in violation of the Fourth and Fifth Amendments. Justification was found by the courts to render inadmissible, evidence obtained by federal officers who have intercepted interstate and intrastate communications by tapping telephone wires. The exclusion of intercepted interstate communications was based on an interpretation of the Federal Communications Act of 1934,[8] in *Nardone v. United States*.[9] Similarly, the *Weiss* case[10] decided that intercepted intrastate communications would be treated in the same manner as the *Nardone* case treated interstate communications. Despite the fact that the Supreme Court's decisions were claimed to have been founded by applying the applicable statute, such statute was open to various interpretations. It does not seem to be exaggerating when it is said that the interpretation that was applied here was extremely liberal and strangely conformant to the principle invoked in other exclusionary cases, especially the dissenting opinions in the *Olmstead* case.[11] In the *Olmstead* dissent, the need was stressed for a wider application of the exclusionary principle; it should extend farther

[4] 8 WIGMORE, EVIDENCE § 2175 (3d ed. 1940).
[5] 116 U.S. 616 (1885).
[6] 192 U.S. 585 (1904).
[7] 232 U.S. 383 (1913).
[8] 47 U.S.C. § 605 (1934).
[9] 302 U.S. 379 (1937).
[10] Weiss v. U. S., 308 U.S. 321 (1939).
[11] Olmstead v. U. S., 277 U.S. 438 (1927).

than to the mischief which gave it birth. Subsequent federal decisions have maintained the principle which prohibits the use of illegally obtained evidence.

Up to the time of the *Cahan* case, consonant decisions have admitted the use of illegally obtained evidence in California courts in accordance with the common-law rule. In 1909, in *People v. LeDoux*,[12] the California Supreme Court did not take cognizance of the mode in which evidence was produced when dealing with the question of admissibility. However, this decision was rendered before the Supreme Court of the United States handed down the *Weeks* decision. The test whether a conflicting rule would be adopted by the California Supreme Court was yet to be made. Subsequently, *People v. Mayen*[13] established California as one of the leading proponents of the non-exclusionary rule when they followed the *LeDoux* decision (notwithstanding the fact that *Weeks v. United States* had been decided in the interim). Reversing the decision of the lower court which was founded upon strict adherence to the rule laid down by the Supreme Court of the United States, the California Supreme Court said that the violation of the Fourth Amendment and the use of evidence obtained thereby were distinct transactions and had no necessary or inherent relation to each other. The evidence here was taken from the defendant's home by a detective without a proper search warrant, the warrant describing the property to be taken as personal goods and certain paraphernalia. Thus the admission of relevant evidence, even though obtained by an unreasonable search and seizure, may be made in a state court; the decision in *Wolf v. Colorado*[14] held that the Fourteenth Amendment did not forbid such admission by the state courts. Similarly, evidence obtained by wire-tapping has been held to be admissible.[15]

Many cases following the *Mayen* case have encountered the problem of admitting illegally obtained evidence. In all of these cases, the following issues have appeared numerous times:

1. Whether the court's attempt to enact the federal exclusionary rule is an unwarranted violation of the doctrine of separation of power, public policy demanding such changes to be made by the Legislature?

2. Whether adoption would imply that the guarantee of the Fourth Amendment is enforceable against the states through the due process clause?

3. Whether the exclusionary rule prohibiting the use of evidence gained by unreasonable search and seizure is an effective method of preventing abuses?

4. Whether the result of the exclusionary rule will introduce confusion and inconsistencies into the law of criminal procedure?

These issues which were provoked by the *Cahan* case have confronted the courts since the *Mayen* decision. It does not appear that new light has been shed upon the problem which says in effect that any reasonable person could not fail to see the desirability of resolving these issues in favor of adopting the exclusionary rule. The explanation of the sudden reversal is not to be found by a deeper insight into these issues. It appears that the answer to the *Cahan* case is a social policy choice, which decisions in conflicting opinions have brought out.

The choice to be made is between two socially desirable objects, both of which we cannot have. The object that criminals should be detected and to that end all available evidence should be used is conflicting with the object that the government

[12] 155 Cal. 535, 102 Pac. 517 (1909).

[13] 188 Cal. 237, 205 Pac. 435 (1922).

[14] 338 U.S. 25 (1949).

[15] People v. Kelley, 22 Cal.2d 169, 137 P.2d 72 (1952); People v. Vertleib, 22 Cal.2d 193, 137 P.2d 437 (1943); People v. Channell, 107 C.A.2d 192, 236 P.2d 654 (1951); People v. Sica, 112 C.A.2d 574, 247 P.2d 72 (1952).

should not foster and pay for crimes when they are the means by which the evidence is obtained. Justice Cardozo, a proponent of the non-exclusionary rule, recognizes the choice:

> "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."[16]

A choice was made by the *Cahan* decision.

As the decision points out, it has not yet been held that the federal exclusionary rule is a command of the Fourth or Fourteenth Amendments. The exclusionary rule is a judicially declared, self-imposed rule of evidence.

This self-imposed rule decided that a new choice must be made. The public policy question has been resolved. The California court no longer wished to participate in and condone the lawless activities of its officials. No doubt the decision in the *Cahan* case has been influenced by decisions which have had an embarrassing effect upon California.

In the widely known *Lisenba*[17] and *Rochin*[18] cases, the activities of state law enforcement officers have been thoroughly denounced by the United States Supreme Court. In the former case, the court asserted that: "officers of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless activities here took them close to the line."[19] In this case, the defendant was questioned continually for 48 hours, slapped and held by force without indictment or warrant of arrest. In the *Rochin* case, three deputy sheriffs forcibly entered the defendant's home, attempted to open his mouth to extract narcotic capsules which he swallowed, and forcibly extracted the contents of his stomach. The means by which the evidence was obtained was described by Justice Frankfurter as "conduct which shocks the conscience. . . . This course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities."[20] The *Cahan* opinion, in describing the current concern in the police state, refers directly to the *Rochin* case when it maintains that the step from lawless, though efficient law enforcement, to the stamping out of human rights is indeed short.

California continued to be embarrassed on a national scale by the United States Supreme Court in *Irvine v. California*.[21] Although the Supreme Court held that the admissibility of the evidence obtained by illegal means was a problem for the individual states, the justices were unanimous in condemning the police conduct as

> ". . . repulsive, . . . smacking of the police state, . . . frightening, . . . surveillance, . . . an invasion of privacy flagrantly, deliberately and persistently violative of the fundamental principle declared by the Fourth Amendment."[22]

Here the police had entered the defendant's home while he was absent and wired the hall, bedroom and closet until the purpose of enabling the officers to obtain evidence of gambling was accomplished.

The *Cahan* opinion reaches its conclusion because the California courts failed to cope with problems like the above. It seems that the effect of the *Cahan* decision

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[16] People v. Defore, 242 N.Y. 13, 18, 150 N.E. 585, 589 (1926).
[17] California v. Lisenba, 314 U.S. 219 (1941).
[18] Rochin v. California, 342 U.S. 165 (1952).
[19] 314 U.S. at 240.
[20] 342 U.S. at 165.
[21] 347 U.S. 128 (1954).
[22] *Id.* at 132.