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Evidence--Obtained by Unlawful Search--Admissibility to Discredit Defendant's Testimony

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verdict. The jury believes the evidence, yet wishes to reduce the punishment for the crime. Admittedly, this is a technical error, see *State v. Prater, supra*, but the appellate court should sustain the verdict, because the defendant has not been prejudiced. The argument that the appellate court is making itself the final arbiter of the facts in resolving the issue of prejudice may be answered. Although the jury either expressly or impliedly acquits the defendant of the higher crime by finding him guilty of the lower offense, there is no true acquittal. At best, a conditional acquittal occurs. That is, the evidence proving guilt of the consummated crime is rejected by the jury on condition, so to speak, that it may be used to sustain the verdict of guilty of the lesser crime.

In *Dunn v. United States*, 284 U.S. 390, 393 (1932), Mr. Justice Holmes stated that consistency in the verdict was not necessary, and quoted from *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925), which said, "The most that can be said in such cases is that . . . the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt."

The instant case does not involve the unwarranted finding of the substantive elements of an attempt to commit crime. By means of a verdict in improper form, the jury has simply reduced the penalty for the crime which the proof shows. The defendant has not been prejudiced and therefore should not be heard to complain.

R. L. DeP.

EVIDENCE—OBTAINED BY UNLAWFUL SEARCH—ADMISSIBILITY TO DISCREDIT DEFENDANT'S TESTIMONY.—*D*, at his trial on a charge for sales of narcotics, testified on direct examination that he had never sold or possessed narcotics. On cross-examination he reiterated these assertions. The government then introduced evidence that in connection with an earlier proceeding a heroin capsule had been found in his possession. Over *D*'s objection that the heroin capsule had been obtained through an unlawful search and seizure, the trial judge admitted this evidence. *Held*, on certiorari, affirming the lower court, that evidence so obtained is admissible to impeach *D*'s testimony given on direct examination. *Walder v. United States*, 74 Sup. Ct. 354 (1954).

The sole issue which was presented in this case was whether the defendant's assertion on direct examination that he had never possessed any narcotics, opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin un-

lawfully seized in connection with the earlier proceeding. The question is a novel one, as the Court commented, for a rather thorough examination discloses, with perhaps one exception, no other authoritative decision on the point. The Court relied upon a dictum in the case of *Agnello v. United States*, 269 U.S. 20 (1925), as the basis for its opinion. There, under facts similar to those in the principal case, except that *D* in his direct examination was not asked and did not testify concerning the unlawfully seized evidence, the Court said the evidence was inadmissible since *D* "did nothing to waive his constitutional protection or to justify cross-examination in respect to the evidence claimed to have been obtained by the search . . ." Does this language mean, as the Court here interpreted it, that had the defendant been asked or had he testified concerning the evidence, then it would have been admissible? What is the "constitutional protection" which the Court in the *Agnello* case referred to? No answer to the former question will be proffered here, but it is hoped that the subsequent discussion will answer the latter one.

A novel aspect of the scope of the doctrine of *Weeks v. United States*, 232 U.S. 383 (1913), is certainly presented by the question in the principal case. The rule there stated is to this effect: ". . . articles illegally seized by an officer without a search warrant from the accused's premises, and which would aid in establishing his guilt, will not be competent evidence. . . ." As a basis for its holding the Court said in effect that the government cannot violate the Fourth Amendment—"The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . . ."—and use the fruits of such unlawful conduct to secure a conviction. Thus a substantive rule of law became the crux of an exclusionary rule of evidence. In *Gouled v. United States*, 255 U.S. 298 (1920), it was said that "The admission of a paper so obtained [by an unlawful search and seizure] in evidence against and over the objection of the owner when indicted . . . compels him to be a witness against himself, in violation of the Fifth Amendment." In *Agnello v. United States*, *supra*, this statement is found, "when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search and seizure. . . ." From the decisions it is difficult to determine whether the evidence is held not to be admissible because to admit it would be a violation of the defendant's rights under the Fourth Amendment or of those under the Fifth Amendment. It is submitted that the rule in the *Weeks* case is

correct so long as it excluded only evidence which violates the self-incrimination clause. The Constitution proscribes unreasonable searches and seizures, but there the guarantee ends. The evidence obtained, if otherwise competent, should be admitted. To deprive the state of its use is against public policy. Even viewed historically, the purpose of the search and seizure clause was to restrain the legalization of unreasonable searches and seizures. There is no historical basis for the contention that evidence obtained in the course of illegal searches and seizures is inadmissible. 8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940). Can the exclusionary "federal rule" be justified even on Fifth Amendment grounds? In most instances it cannot. The evidence illegally seized is usually real evidence, and it is said that the Fifth Amendment can only be invoked to keep testimonial evidence out. *Ibid.*

It would appear from the holding in the principal case that the law is extending another helpful, but illogical, alternative to a defendant. Experience has shown that it is necessary that such alternatives be counterweighted to keep the advantage from becoming an unfair and unreasonable one. For example, the price which a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. *Michelson v. United States*, 335 U.S. 469 (1948). The *Weeks* doctrine protects the accused from an affirmative use of evidence unlawfully obtained. He does, however, under the rule of the principal case make himself vulnerable to its use when he, himself, denies its existence in his examination-in-chief; then it can be used to impeach him, but for that purpose only.

The case of *State v. Cook*, 69 W. Va. 717, 72 S.E. 1025 (1911), presents a situation which is quite similar to that of the principal one. It is provided in W. VA. CODE, c. 57, art. 2, § 3 (Michie, 1949) that "In a criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." The court in the *Cook* case said that the statute just cited does not preclude the state, on cross-examination of the prisoner, for the purpose of impeachment, from showing by him that he testified differently on a former trial of the same indictment. If it can be said that the rule in the *Cook* case is correct, and it would seem to be, then the rule of the principal case must also be correct. They both would seem to be based upon narrow constructions of exclusionary rules of evidence which the courts do not particularly like; they would

both seem to have the same goal, that being to place all the matter relevant to the case before the triers of facts unless the evidence is clearly excluded by some rule or principle of law.

Thus, it would seem that the principal case is correct. It is certainly a step in the right direction and it certainly is another example of how the courts often attempt to limit the scope of exclusionary rules of evidence such as the *Weeks* doctrine. One case which seems to be quite similar, at least on the facts, to the principal case is *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (1901). There it was said that a letter improperly taken from the defendant was inadmissible to impeach the writer, a witness for the defendant. This statement appears to be *contra* to the rule of the principal case. This case, however, has been overruled *sub silentio*: Vermont now repudiates the *Weeks* doctrine, *State v. Suitor*, 78 Vt. 391, 63 Atl. 182 (1906).

It is difficult to say just what the West Virginia court will do in the light of the decision in the principal case. In *State v. Wills*, 91 W. Va. 659, 114 S.E. 261 (1922), the doctrine of the *Weeks* case was adopted. The court, recognizing that there was a decided split among the states, said, "If we err, we would rather err on the side of liberty, and therefore we adopt as the better rule that laid down by the Supreme Court of the United States." *Id.* at 677, 114 S.E. at 266. The *Weeks* doctrine seems to be wrong since it is founded upon (1) a misapplication of a substantive rule of law and (2) an overextension of the protection of the Fifth Amendment. If the basic rule is wrong then certainly the rule in the principal case which deviates therefrom must be correct. This decision would seem to illustrate the fact that even the Supreme Court is not sure that the *Weeks* rule is on firm ground. When this is pointed out to the West Virginia court perhaps it will overrule the *Wills* case, *supra*, and adopt the orthodox rule.

C. F. S., Jr.

FUTURE INTERESTS—CONTRACT OF PURCHASE OR LEASE WITH OPTION.—*A* and *B* entered into a written agreement which by its own terms was denominated a "deed". Elsewhere in the instrument appeared the words "leased premises", "rent", "rental", "term", "grant", and "demise". Under this agreement *A* was to have possession and use of commercial realty, in return for which he was to