Vanderbilt Law Review

Volume 5
Issue 3 *Issue 3 - April 1952*

Article 12

4-1952

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THE ADMISSIBILITY OF EVIDENCE PROCURED THROUGH ILLEGAL SEARCHES AND SEIZURES IN BRITISH COMMONWEALTH JURISDICTIONS

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I.

The question whether illegality in the means of procuring evidence is a bar to its admissibility has received little consideration in the English authorities. There is little authority in the reports, while most text-writers do not deal with the problem at all. Halsbury, who considers it briefly, states a rule that if property or documents have been wrongfully seized, the seizures will be excused if they are in fact material evidence of a crime committed by any person.[1] The principal authority cited in support is *Elias v. Pasmore*.[2] Archbold states a similar rule,[3] but Phipson, who twice cites *Elias v. Pasmore*, does not deal directly with the point.[4] Of the Scottish writers, Macdonald states that the fact that articles or documents may have been irregularly or even unlawfully taken from the accused person or from the custody of someone else is not a good objection to their admissibility in evidence,[5] while Lewis is of opinion that proof of illegal seizure is no bar to the admissibility of evidence.[6] In America, Wigmore stated in categorical terms that illegality in the method of obtaining evidence did not affect its admissibility at common law, and he strongly attacked what he regarded as an aberration on the part of certain American courts in departing from this rule.[7] In *Wolf v. Colorado*,[8] a recent decision of the Supreme Court of the United States, Frankfurter, J., in the course of delivering the majority opinion stated that "of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible."[9] The learned judge appended to

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1. 13 HALSBURY, LAWS OF ENGLAND 640 (2d ed., Hailsham, 1934).

2. [1934] 2 K.B. 164.

3. ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 1163 (32d ed., Butler & Garsia, 1949).

4. PHIPSON, EVIDENCE 6, 255 (8th ed. 1942).

5. MACDONALD, CRIMINAL LAW OF SCOTLAND 326 (5th ed., Walker & Stevenson, 1948).

6. LEWIS, EVIDENCE 292 (1925).

7. 8 WIGMORE, EVIDENCE 4 *et seq.* (3d ed. 1940). See also, Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11 (1925).

8. 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

9. 338 U.S. at 30.

his opinion a list of the authorities on which he based this conclusion. This list was not intended to be exhaustive and since *Wolf v. Colorado* there have been some important new decisions. In two recent Scottish cases, *Lawrie v. Muir*[10] and *McGovern v. H. M. Advocate*[11] in which the question was elaborately discussed, it was held on the facts that evidence obtained by illegal searches was inadmissible. In this essay it is proposed to examine the authorities in the United Kingdom and Commonwealth jurisdictions with a view to determining so far as may be possible, the rules relating to the admissibility of such evidence.

II.

Before doing so, it is instructive to review briefly the course of American authority on this question. There the question has been complicated and given special prominence by the interpretation of the Fourth Amendment to the Constitution, which provides that the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and that 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. Although the Fourth Amendment in terms only declares the illegality of such searches and seizures, it was held by the Supreme Court of the United States in *Weeks v. United States*[12] that evidence procured through illegal searches and seizures was, as a corollary, rendered inadmissible. However, it has recently been held by the same Court in *Wolf v. Colorado*[13] that the doctrine of the *Weeks* case has obligatory application only to cases arising under federal law, so that the admission by a state court of evidence procured through an unlawful search in a prosecution under state law was not unconstitutional. Some states however have followed the doctrine of *Weeks v. United States,* which in Wigmore's pungent phrase "evoked a contagion of sentimentality."[14] In delivering the opinion of the Court in *Wolf v. Colorado,* Frankfurter, J., made a survey of American state practice. The results show that prior to the *Weeks* case (1914), 27 states had considered this question. Twenty-six of these were opposed to the *Weeks* doctrine, while one supported it. Since *Weeks v. United States,* the matter has been considered in 47 states, 17 of which had followed it, while thirty had rejected it.[15] In summary, the present position in the United States is that the Supreme Court has held that the

10. [1950] Scots L.T. 37.
11. [1950] Scots L.T. 133.
12. 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914).
13. 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).
14. 8 WIGMORE, EVIDENCE 32 (3d ed. 1940).
15. Wolf v. Colorado, 338 U.S. 25, 29, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).

Fourth Amendment involves the exclusion of evidence procured through unlawful searches and seizures in federal cases, but has held that there is no constitutional obligation on the states to exclude such evidence. The states by a very substantial majority have declined to follow the federal lead on this matter. Other decisions of the Supreme Court have dealt with analogous problems. In *Olmstead v. United States*[16] a majority in the Supreme Court held that the doctrine of the *Weeks* case did not compel the exclusion of evidence obtained through the tapping of wires off the defendant's premises. It was held that the Fourth Amendment applied only to the search of material things, such as the person, papers or effects. There was a powerful dissent in which Holmes and Brandeis, JJ., joined. In subsequent cases, following the enactment of the Federal Communications Act, which, so far as material, prohibited the unauthorized tapping and disclosure of such communications, it was held by the Supreme Court in *Nardone v. United States (1)*[17] and *Weiss v. United States*[18] that this statute applied to the interception of interstate and intrastate messages respectively by the law enforcing agents of the government and forbade the reception in evidence in federal courts of messages intercepted in violation of the Act. This was carried a stage further in *Nardone v. United States (2),*[19] where the Court held that the prohibition extended to evidence obtained through the use of such intercepted messages. However in *Goldman v. United States,*[20] federal agents in a room adjoining that in which the defendants were present attached a detectaphone to the partition wall and overheard conversations which were held by the majority in the Supreme Court to be admissible in evidence. The majority held that no trespass had been committed and refused to overrule *Olmstead v. United States.*

The American cases have called forth a considerable volume of discussion on the ground and merits of the rule of exclusion, and upon its scope. In *Weeks v. United States,* Day, J., delivering the opinion of the Court put it that:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[21]

A very clear statement of principle in favour of a broad interpretation of the ambit of the Fourth Amendment and of an extended interpretation of the

16. 277 U.S. 438, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928).
17. 302 U.S. 379, 58 Sup. Ct. 275, 82 L. Ed. 314 (1937).
18. 308 U.S. 321, 60 Sup. Ct. 269, 84 L. Ed. 298 (1939).
19. 308 U.S. 338, 60 Sup. Ct. 266, 84 L. Ed. 307 (1939).
20. 316 U.S. 129, 62 Sup. Ct. 993, 86 L. Ed. 1322 (1942).
21. 232 U.S. 383, 393, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914).

doctrine of *Weeks v. United States* appears in the dissenting judgment of Holmes, J., in *Olmstead v. United States:*

> "we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end to all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[22]

The contrary approach is clearly stated in a judgment of a state court which has declined to follow the *Weeks* doctrine.

> "When evidence tending to prove guilt is before a court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these consttiutional guaranties are above the right of the community to protection from crime. The complexities and conveniences of modern life make increasingly difficult the detection of crime. The burden ought not to be added to hy giving to our constitutional guaranties a construction at variance with that which has prevailed for over a century at least."[23]

On the one side is expressed a view which lays stress on the paramount importance in a democratic community of control over police methods and activities. It is felt that the most satisfactory assurance of respect for the law is afforded by denying to the police the right to use evidence which has been illegally obtained. It is better that guilty men should go free than that the prosecution should be able to avail itself of such evidence. The other view does not lead to the conclusion that the police should go unpunished for their illegal acts; it simply argues that it is not desirable to allow the guilty to escape by rejecting evidence illegally procured. On this view, the result should be that the police-violator of the law should be criminally punished and/or made civilly liable for his illegal act, but that what is discovered in consequence of the illegal act should if relevant be admissible in evidence. This argument is reinforced by reference to the great difficulties often encountered in obtaining evidence against suspected persons, a difficulty which is greatly increased by the adoption of the *Weeks* doctrine.

Wigmore was an emphatic supporter of admissibility. He attacked the decision in the *Weeks* case as

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22. 277 U.S. 438, 470, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928).

23. State v. Reynolds, 101 Conn. 224, 125 Atl. 636, 639 (1924), per Wheeler, J. See also Cardozo, J., in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

"making Justice inefficient and . . . coddling the law-evading classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer."[24]

This was in harmony with his general principle that logically relevant evidence should be admitted unless there was a powerful policy reason to the contrary. In this case, there was no such reason, as the illegal actor could be penalized by criminal or civil sanctions, without excluding the evidence. Wigmore's approach was also consistent with his interpretation of the confession rule. The ground on which he justified the exclusion of improperly induced confessions was that they might be untrue, and therefore did not fit into a pattern of logical relevancy. On the other hand, evidence procured through illegal searches and seizures involved no such risk. The appropriate analogy was to the rules relating to the admissibility in evidence of property discovered in consequence of inadmissible confessions. It is interesting to note that this analogy was indicated in a Canadian case on illegal searches more than sixty years ago. In *R. v. Doyle* [25] it was held that evidence obtained by the execution of an illegal warrant was admissible. Wilson, C. J., said: "I think the evidence is admissible so long as the fact so wrongly discovered is a fact—apart from the manner in which it was discovered—admissible against the party."[26] The learned Chief Justice embarked on a lengthy discussion of the confession rule. Following the analysis subsequently elaborated by Wigmore, he said that the reason why improperly induced confessions were excluded was because they could not be depended upon to be true, whereas property discovered in consequence of inadmissible confessions was admitted as evidence because it was a fact, citing *R. v. Warickshall.*[27] Evidence discovered by illegal means was likewise a fact and admissible for that reason.[28]

The arguments for and against the admission of the evidence under discussion have been considered at some length here because they have been given fuller expression in the American cases than in cases arising within the British Commonwealth. In these jurisdictions, the decision has often—though there are significant exceptions—been reached with very little discussion. Frequently when the evidence has been held admissible, the underlying assumption appears to have been, as in *R. v. Doyle,* that the

24. 8 WIGMORE, EVIDENCE 36-37 (3d ed. 1940).

25. 12 Ont. R. 347 (1886).

26. *Id.* at 353.

27. 1 Leach 263, 168 Eng. Rep. 234 (C.C. 1783).

28. See also on the relationship between the confession rule and the rule under discussion, Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 COL. L. REV. 11 (1925).

evidence was a fact and therefore trustworthy. Considerations such as those which were present to the mind of Holmes, J., in *Olmstead v. United States* appear to have received little attention.

III.

The fact that this question has received scant attention from English writers is no doubt due to the fact that the question has apparently arisen very infrequently. Much of the authority is only authority by analogy. Questions of illegality and admissibility have arisen in a series of cases not involving unlawful searches and seizures, and in these cases the expressed objection to admissibility has been the illegality in the means of procuring the evidence. A group of old cases were actions for malicious prosecution in which it was alleged that the copy of the original indictment which was required to be produced in the subsequent civil proceedings had been obtained without the fiat of the appropriate authority, and that as the production was a wrongful act the copy was inadmissible in evidence. In *Jordan v. Lewis*,[29] in answer to this argument it was said that "This being a copy of the indictment, the Court could not refuse receiving it in evidence; nor could the Court take notice in what manner it was obtained." This was followed in *Legatt v. Tollervey*[30] by Lord Ellenborough, C.J., who said that the fact that the copy had been surreptitiously obtained could not affect the validity of the proof. *Jordan v. Lewis* was also followed by Lord Tenterden, C.J., in *Caddy v. Barlow*.[31]

In *R. v. Derrington*,[32] a letter written by the prisoner was offered in evidence by the prosecution. The prisoner after committal to gaol gave a letter to the turnkey on the latter's promise to put it in the post. The turnkey gave the letter to magistrates who sent it to the prosecutor. It was argued that as the letter had been procured by a gross breach of trust, it was inadmissible in evidence. The point was urged that if the prosecutor had obtained a confession by leading the prisoner to believe that it was better for him to confess, evidence of the confession would have been rejected, and that the present set of facts fell within a precisely analogous category. Garrow, B., rejected this argument and held the evidence admissible. The learned judge observed that he himself had once unsuccessfully raised the same argument before Gould, J.

In *Stockfleth v. De Tastet*,[33] in a civil action, it was argued that evidence of the examination of De Tastet which had been improperly obtained under

29. 14 East 306n, 104 Eng. Rep. 618n (K.B. 1728).
30. 14 East 302, 307, 104 Eng. Rep. 617 (K.B. 1811).
31. 1 Man. & Ry. 275 (K.B. 1827).
32. 2 Car. & P. 418, 172 Eng. Rep. 189 (N.P. 1826).
33. 4 Camp. 10, 171 Eng. Rep. 4 (N.P. 1814).

a Commission of Bankrupt with a view to being used against him in these subsequent civil proceedings was not admissible because it had been improperly obtained. Lord Ellenborough, C.J., remarked that this impropriety might be a ground for punishing those who had abused the authority of the Great Seal. But in the absence of proof of improper pressures, "I cannot refuse to receive in evidence an examination signed by one of the defendants, however it may have been obtained. . . . What is proved to have been written or signed by any of the defendants, I must admit as evidence against them without considering how it was obtained."[34] In *R. v. Granatelli*[35] it was again unsuccessfully argued that evidence of the contents of a document could not be given, as possession had been improperly obtained. The argument was rejected in a sentence and no reasons were reported.

In *Phelps v. Prew*[36] Crompton, J., stated his opinion on this point in unequivocal language:

> "I at present entertain a very decided opinion . . . that the person who has had an instrument read at the trial cannot be deprived of the benefit of that evidence on the ground that the instrument was improperly obtained from a third person, whether that was the default of the Judge, the witness or the party himself."[37]

All these authorities are of considerable antiquity. While none is directly concerned with illegal searches and seizures, the reasoning appears to be applicable to such cases. In more recent times, the authority on which Halsbury and Archbold base their statements of the English rule is a decision of Horridge, J., in *Elias v. Pasmore*.[38] In this case the plaintiffs claimed damages for trespass to premises, damages for seizure of documents and restitution of these documents. The police had entered premises of which the plaintiffs were lessees, in order to arrest Hannington and while there seized and carried away, inter alia, documents found on the premises which were afterwards used at the trial of Elias. Horridge, J., cited authority for the proposition that there was a right to search a person on arrest,[39] but this did not of itself authorize the seizure and removal of documents and property found on premises occupied by anyone other than the person arrested. *Dillon v. O'Brien*,[40] an Irish case, authorized the seizure and detention of property found in the possession of a person lawfully

34. 4 Camp. at 11-12.
35. 7 St. Tr. (N.S.) 979, 987 (1849).
36. 3 El. & Bl. 430, 118 Eng. Rep. 1203 (Q.B. 1854).
37. 3 El. & Bl. at 441.
38. [1934] 2 K.B. 165.
39. "This right also seems to be clearly established by the footnote to *Bessell v. Wilson* in the report in the *Law Times* [20 L.T. (O.S.) 233 (1853); but *cf.* report of case in 1 El. & Bl. 489, 492n, 118 Eng. Rep. 520n], where Lord Campbell clearly lays down that this right exists. . . ." [1934] 2 K.B. at 169.
40. 20 L.R. Ir. 300, 316, 16 Cox C.C. 245 (1887).

arrested, which would form material evidence on his prosecution for that crime. The learned judge also referred to a dictum of Lord Chelmsford in *Pringle v. Bremer & Stirling*,[41] a Scottish appeal,

> "But supposing that in a search which might have been improper originally, there were matters discovered which shewed the complicity of the pursuer in a crime, then I think the officers, I can hardly say would have been justified, but would have been excused by the result of their search."

In that case a warrant had been obtained to search a house for certain property and in the course of the search other property was discovered pointing to complicity in another alleged crime. Horridge, J., stated that although this Scottish authority was not binding on him, it supported the conclusion that though a seizure might originally be wrongful, if what was discovered turned out to be material to a prosecution against anyone, the seizure would be excused.

On his review of the authorities, Horridge, J., concluded that:

> "It therefore seems to me that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by any one, and that so far as the documents in this case fall into this category, the seizure of them is excused."[42]

Although this case was not directly concerned with an objection to the admissibility of evidence, it cannot be seriously doubted that it is authority for the proposition that evidence produced through an illegal search or seizure is nevertheless admissible in evidence if relevant. It follows the earlier English authority which consistently held that illegality in the means of obtaining evidence was no ground for its exclusion. In these English cases, there is little discussion of the principle upon which such evidence is admitted; though it is clear that the underlying principle is that the evidence is a fact *(i.e.,* true) and relevant to the question before the court. The reference by Horridge, J., to the interests of the State suggests a similar approach to that adopted by the American courts which reject the *Weeks* doctrine: namely that it is better that criminals be punished on relevant evidence than that they be allowed to slip through the hands of the law because of some illegality in the method of procuring the evidence.

Elias v. Pasmore has not escaped criticism. Professor Wade has observed[43] that it is noteworthy that Horridge, J., made no reference in his judgment to *Entick v. Carrington*[44] which had been cited to him by counsel.

41. 5 Macph. (H.L.) 55, 60 (1867).
42. [1934] 2 K.B. at 173.
43. Wade, *Police Search*, 50 L.Q. REV. 354 (1934).
44. 19 St. Tr. 1029 (1765).

Although that case does not cover precisely the same set of facts, the general ground upon which Horridge, J., rested his decision, namely State interest, was categorically repudiated by Lord Camden in *Entick v. Carrington*. As Wade puts it, the decision in *Elias v. Pasmore* permits "using the arrest of A to discover evidence against B, in relation to whom no charge is pending and is akin to the very mischief which *Entick v. Carrington* checked on the part of the Secretary of State."[45] Wade further points out that *Pringle v. Bremer & Stirling* is questionable authority for the proposition which Horridge, J., purported to derive from it, that the seizure of property which may properly be used in the prosecution of *anyone* is excused. In *Pringle* the property which was seized consisted of documents found on the premises of the prisoner which were being searched for pieces of wood. The property belonged to the prisoner not to "anyone." The speeches in that case do not justify the breadth of Horridge, J.'s proposition.

However so long as *Elias v. Pasmore* stands, it is in line with the earlier stream of English authority in holding that evidence is admissible despite proof of illegality in the means of obtaining it. In none of the cases has any distinction been drawn depending upon the source from which the illegally obtained evidence is derived. Whether obtained by the police or by private persons, the rule appears to be that evidence is admissible if relevant. However it should be noted that there is only one modern case bearing on the point under discussion, and that this specific question has not yet directly arisen for consideration in an appellate court.

IV.

The Scottish cases provide a much richer field of investigation on the specific problem of illegal searches and seizures. In the reported cases down to 1949, the courts held that evidence so obtained was admissible, although there were individual expressions of dissent and doubt. In two important cases decided in 1949 and early 1950, there was a remarkable shift of opinion which in the light of the earlier authority can only be regarded as a new statement of the law.

In *Rattray v. Rattray*,[46] a suit for divorce, the husband sought to introduce in evidence a letter from the wife-defender to the co-defender. This letter had been posted by the wife, and the husband had obtained it illegally by stealing it from the post office. The husband had been criminally punished for this illegal seizure. The objection to the admissibility of the evidence was in the first instance raised not by the parties but by Lord

45. Wade, *Police Search*, 50 L.Q. Rev. 354, 359 (1934).
46. 25 Rettie 315 (1897).

Young in the Inner House. The court by a majority (Lords Trayner, Moncrieff and Macdonald; Lord Young dissenting) held the evidence admissible. Lord Trayner laid considerable emphasis on the distinction between ordinary crimes and the statutory offence of stealing a post letter, which he was not prepared to call a crime *stricto sensu*. Evidence obtained through the commission of such an act, whatever the general rule relating to evidence obtained by what the learned judge regarded as crimes properly so called, was admissible. This curious distinction has been the subject of critical comment and disapproval in later cases.[47] However Lord Trayner also observed that good policy led to the admission of almost all relevant evidence. He was sceptical of the suggestion that admission of the evidence would tend to encourage crime, as the person offering the illegally obtained evidence could do so at the cost of going to prison for his wrongful act in obtaining it in this way. But the judgment is rendered the less persuasive by Lord Trayner's refusal to state a general rule with regard to evidence obtained by crimes properly so called. Lord Moncrieff, on the other hand, while stating general agreement with Lord Trayner, expressed a more general opinion in favour of the admissibility of evidence obtained through a criminal seizure. As the learned judge said: "I know of no case and we have been referred to none, where the Court have refused to look at a document which instructed crime simply because it has been obtained without legal warrant."[48]

Lord Moncrieff also pointed out that the question had not been raised by the parties, but from the Bench, and that this was a further ground for refusing to exclude the evidence. Lord Macdonald concurred in language suggestive of hesitation and doubt. Lord Young based his dissent squarely upon the proposition that evidence obtained through a criminal act was inadmissible: "I think that the Court is bound to take notice of the statute law enacting the pursuer's conduct was a crime . . . and to reject as evidence anything obtained by a violation of the law, and still held by the person who did that act."[49]

In *Crook v. Duncan*[50] the prisoner was prosecuted for being in unlawful possession of salmon roe. It was argued that the police had obtained possession of salmon roe from the prisoner by an illegal search and seizure. Lord Macdonald, in whose judgment Lords Trayner and Moncrieff concurred, declined to consider whether the police conduct was legal or illegal. It sufficed to say that the evidence was admissible.

47. See, *e.g.*, Lord Moncrieff in Maccoll v. Maccoll, [1946] Scots L.T. 312, where the learned judge spoke of Lord Traynor's distinction as one "which I find subtle rather than convincing." In Lawrie v. Muir, [1950] Scots L.T. 37, 39, Lord Cooper termed it "a distinction which I find unconvincing."

48. 25 Rettie at 321.

49. *Id.* at 320.

50. 1 Fraser J.C. 50 (1899).

In *Hodgson v. Macpherson,*[51] the prisoner argued that evidence which had been obtained by an illegal search was inadmissible. Lord Kinnear held that the search was not illegal, but stated that even if it had been illegal, the results were nevertheless admissible in evidence. In *Adair v. M'Garry,*[52] finger prints were taken after the prisoner had been arrested, without a magistrate's warrant and without asking the prisoner's consent. There was a question whether the prints had been illegally taken. The Lord Justice General Clyde, Lords Alness and Sands, held that the taking was lawful. Lord Morison agreed but said further: "I am also unable to hold that, if finger prints have been obtained without a warrant where a warrant should have been obtained, they are thereby inadmissible as evidence."[53] Lord Hunter dissented, holding that the finger prints had been illegally obtained. The language used by the learned judge clearly indicated general opposition to the admissibility of evidence illegally obtained. "In a country where a system of criminal jurisprudence prevails which protects the individual against unfair extraction of evidence from him, one would naturally expect that the obtaining and use of such evidence by the police would be regulated by provisions which would protect the individual against any unfair use thereof. Otherwise a policeman armed with an uncontrolled right of forcibly taking the finger print impressions of suspected persons might make a use of the right not dissimilar to the use of a thumbscrew. . . . I am unable to agree to an expression of judicial opinion approving a police practice which I consider fundamentally objectionable and contrary to the common law doctrine of personal liberty."[54]

In *H. M. Advocate v. McGuigan,*[55] a tent, which was the home of the prisoner who was charged with murder, rape and theft, was searched without a warrant, and the admission in evidence of articles discovered thereby was opposed on the ground of the illegality of the search. The Lord Justice Clerk, Lord Aitchison, held in the circumstances that the police had acted lawfully. He then said, "Even if I thought otherwise, and that the police had acted irregularly, it would not in the least follow that the evidence proposed to be led would be inadmissible. An irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible."[56] The word *necessarily* in this dictum might be thought to suggest that there might be circumstances (not applying in the instant case) in which illegally obtained evidence would not be admissible. This apparent qualification in Lord Aitchison's judgment

51. [1913] S.C.(J.) 68.
52. [1933] J.C. 72.
53. *Id.* at 90.
54. *Id.* at 86-87.
55. [1936] J.C. 16.
56. *Id.* at 18.

was strongly relied upon by Lord Cooper in *Lawrie v. Muir*[57] in support of his view that the evidence obtained by an illegal search in that case was inadmissible. In *Maccoll v. Maccoll*,[58] a divorce action, an objection was raised to the admissibility of a photostatic copy of a letter from the defender to her paramour. The letter had been obtained by the pursuer by what Lord Moncrieff held to constitute criminal conduct. Lord Moncrieff relied principally on *Rattray v. Rattray*, and said that although it might be possible to distinguish the earlier case on the facts, he did not consider that there was sufficient justification for doing so. Although he followed *Rattray v. Rattray* and held the evidence admissible, Lord Moncrieff made it abundantly clear that he did so only because he felt himself constrained by long established authority. Had he been a member of the Court in *Rattray v. Rattray*, Lord Moncrieff said that he was "very strongly of opinion"[59] that he would have dissented with Lord Young, and upon the same grounds.

Up to this point in the line of Scottish authority, it emerges clearly that in no case was evidence excluded on the ground it was the product of an illegal search or seizure. *Rattray v. Rattray*, *Crook v. Duncan*, and *Maccoll v. Maccoll* were direct authority in favour of the admissibility of such evidence. In *Hodgson v. Macpherson* and *Adair v. M'Garry* there were strong dicta favourable to the admissibility of such evidence. In *H. M. Advocate v. McGuigan*, Lord Aitchison's dictum supporting admissibility was qualified by the word *necessarily* which made uncertain the extent to which the learned judge was prepared to hold admissible evidence so obtained. In *Rattray v. Rattray*, Lord Young was opposed to admissibility, as was Lord Hunter in *Adair v. McGarry*, while Lord Moncrieff in *Maccoll v. Maccoll* expressed himself to be very clearly opposed on principle to the admission of such evidence, although he held himself bound by authority to admit it. It is perhaps of interest to note that Frankfurter, J., who reviewed the practice of Commonwealth jurisdiction in his opinion in *Wolf v. Colorado*[60] cited only one of these Scottish cases, *Hodgson v. Macpherson*, which contained only a dictum of Lord Kinnear on the point, and omitted to mention both the clear authority in favour of admissibility, and the uncertain import of Lord Aitchison's dictum in *H. M. Advocate v. McGuigan*.

This summary of the course of authority from *Rattray v. Rattray* to *Maccoll v. Maccoll* serves to show how sudden was the swing of opinion in the Scottish courts in *Lawrie v. Muir*[61] and *McGovern v. H. M. Advocate*.[62]

57. [1950] Scots. L.T. 37.
58. [1946] Scots L.T. 312.
59. *Id.* at 313.
60. 338 U.S. 25, 39, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).
61. [1950] Scots L.T. 37.
62. [1950] Scots L.T. 133.

In both cases, the matter was fully and carefully considered, in *Lawrie v. Muir* by a bench of seven judges, and in *McGovern v. H. M. Advocate* by a bench of four. In *Lawrie v. Muir,* the defendant was convicted of using milk bottles, the property of other persons, without their consent. It appeared that two inspectors employed by the Scottish Milk Bottle Exchange, Ltd. called at her shop. The company which employed the inspectors had been formed primarily to collect and restore bottles to their true owners. The company was approved by the Scottish Milk Marketing Board, and all contracts between that Board and producers and distributors of milk contained a stipulation that the company's inspectors might inspect the premises of any producer or distributor in contractual relations with the Board in order to examine bottles in their possession. In this case, the inspectors produced their warrant cards (issued by the Scottish Board) to the defendant who had no contract with the Board, and would therefore have been in a position without breach of contract to refuse to allow them to make the inspection. She did not do so, and the inspectors, believing that they had a right to inspect, found the bottles. The defendant raised an objection to the admissibility of the evidence of the search, but was convicted on this evidence, and a case was stated to the High Court of Justiciary upon the question of admissibility.

After full argument, the court held the evidence inadmissible. The Lord Justice General Cooper, who delivered the unanimous judgment of the court, carefully reviewed the Scottish authorities already discussed. He also cited the dicta in the House of Lords in *Pringle v. Bremer and Freman,* the judgment of Horridge, J., in *Elias v. Pasmore,* and the opinion of the Scots and English text-writers. Lord Cooper then said:

> "It seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."[63]

It was desirable to have flexible rules, and not to permit any technical irregularity to lead inexorably to the exclusion of the evidence. Lord Cooper considered that a satisfactory formula might be found in Lord Aitchison's dictum in *H. M. Advocate v. McGuigan* that irregularity in the obtaining

63. *Id.* at 39-40.

of evidence did not *necessarily* make that evidence inadmissible. In applying this test, the nature of the irregularity and the circumstances in which it was committed were relevant considerations. Another consideration was whether the irregularity was deliberately perpetrated to obtain evidence by an "unfair trick."[64] Lord Cooper said that the distinction drawn by Lord Trayner in *Rattray v. Rattray* between statutory offences and common law crimes had no bearing on this issue. Applying these general principles to the facts of the instant case, the learned judge said that it lay on the borderline, and was unsuitable as a test case. Nevertheless the balance was tipped against admissibility by the fact that the inspectors who had made the illegal search were not policemen possessing a "large residuum of common law discretionary powers,"[65] but employees of a company whose powers derived from certain contractual relations which did not concern this defendant. The evidence was accordingly held inadmissible.

Lawrie v. Muir was followed in *McGovern v. H. M. Advocate.* The prisoner had been asked by the police to attend a police station and to identify a bicycle found near premises on which a safe had been forced open with explosives. The suspicions of the police were aroused by the prisoner's demeanour, but before arresting and charging him they scraped his finger nails for the purpose of making a chemical analysis. He was then arrested and charged, and the chemical analysis revealed the presence of nitroglycerine which was the substance used to force open the safe. This was the challenged evidence. Lord Cooper again delivered the judgment of the Court and held the evidence inadmissible. It was found that the evidence derived from the analysis of the contents of the finger nails had been improperly obtained, as there was no right to search without warrant and before arrest. Relying on *Lawrie v. Muir* for the proposition that irregularity in the method of obtaining evidence did not *necessarily* exclude it, and purporting to follow the principles enunciated in that case, the court concluded that the admission of this illegally procured evidence must have substantially prejudiced the prisoner in the minds of the jury. Accordingly, though with some regret, as the matter had not been properly raised in the court below, it was held that the conviction must be quashed. In the concluding sentences of his judgment. Lord Cooper said that "unless the principles under which police investigations are carried out are adhered to with reasonable strictness, the anchor of the entire system for the protection of the public will very soon begin to drag."[66]

To date, these two decisions contain the fullest discussion on this point in any Commonwealth jurisdiction. They are the more remarkable

64. *Id.* at 40.
65. *Ibid.*
66. *Id.* at 135.

in that they are based on authority which, so far as it lays down a positive ruling, is opposed to the result reached, although it is true that there had been dissents, doubts and qualifications in the earlier Scottish cases, and that the dictum of Lord Aitchison in *H. M. Advocate v. McGuigan* left the matter somewhat uncertain. But the general principles which Lord Cooper in *Lawrie v. Muir* purported to derive from the authorities are not readily apparent from them, and it is submitted with respect that there was rather more justification for drawing from the rule which Macdonald and Lewis stated in their books. The court in *Lawrie v. Muir* appears to have been influenced by the fact that the illegal search was made not by police but by privately employed inspectors. It seems a fair conclusion from the hesitation in the concluding paragraphs of that judgment to assume that the irregularity would probably have been excused had the unathorized search been made by the police. But in *McGovern v. H. M. Advocate* the illegal search was made by police, and the evidence was excluded. It may be that the court was influenced by the fact that the prisoner was detained at a police station for a period of several hours before arrest. But the general terms of Lord Cooper's statement in *McGovern* that it is contrary to principle to allow the police to produce evidence by resort to illegal searches and seizures suggests a hardening of judicial opposition to the admission of such evidence.

The most recent Scottish decision on this point, *Fairley v. The Fishmongers of the City of London*,[67] reveals however that irregularity in search or seizure will not exclude evidence obtained thereby in every case. Although *Lawrie v. Muir* was pressed upon the Court, (Lord Justice General Cooper, Lords Carmont and Keith), it was held, on the facts, that the evidence was admissible although obtained by an irregular search. The facts were that an inspector employed by the respondents formed the opinion that the appellant was in unlawful possession of salmon in contravention of the Salmon Fisheries (Scotland) Act 1868. He reported this to the Ministry of Food which at the relevant time had an interest and duty to investigate suspected infringements of the laws relating to salmon. An enforcement officer of the Ministry of Food with his official warrant was detailed to accompany and assist the respondent's inspector in a search of local cold stores. Salmon belonging to the appellant was subsequently found in a cold store and was removed by the respondent's inspector who did not apply for a search warrant under the Act of 1868, although there was little doubt that he would have secured one had he applied for it. The Sheriff-Substitute rejected an argument based on *Lawrie v. Muir* that as the evidence was procured by an illegal search it was inadmissible. He stated that the inspector had acted under a mistaken belief as to his powers,

67. [1951] Scots L.T. 54.

in an endeavour in the public interest to vindicate the law in relation to an offence which constituted a considerable evil and which was difficult to detect. The position of the inspectors in *Lawrie v. Muir* was very special as they had nothing but a contractual right to inspect certain premises, and no such right to inspect the defendant's premises. The instant case was distinguishable having regard to the nature of the offence and to the statutory powers of which the inspector might have made use. Evidence had been obtained irregularly which could easily have been lawfully obtained. The appellant had suffered no real prejudice and there was no substantial unfairness in admitting the evidence. At the request of the appellant the Sheriff-Substitute stated a case for the High Court of Justiciary which unanimously approved his decision. Lord Cooper drew attention to the fact that the procedure by which the incriminating evidence was obtained was not strictly in accordance with any statutory or other authority, but could "find nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to securing the admission of evidence obtained by an unfair trick."[68]

The Scottish cases show that the courts will have regard to the circumstances of each case in determining the admissibility of evidence procured by illegal searches and seizures. Such evidence will not necessarily be admissible or inadmissible. From the cases it appears that relevant questions will include: what is the nature of the offence? In *Lawrie v. Muir,* the charge was the illegal use of milk bottles belonging to another, while in the *Fairley* case it was the illegal possession of salmon. The judgment of the Sheriff-Substitute which was approved in the latter case made a point of the distinction between these charges. It may be that cases will raise questions of some nicety on this point upon which it is profitless to speculate here. Another question may be: do the circumstances call for such swift action as will excuse an illegal search? It may be this test serves to distinguish such a case as *H. M. Advocate v. McGuigan* from *H. M. Advocate v. McGovern.* Could the illegality have been easily cured? In *Lawrie v. Muir,* the power of the inspectors was only contractual, and the accused was not a party to such a contract; whereas in *Fairley,* it appears that the inspector might have obtained a warrant with ease. Was the evidence deliberately obtained by an unfair trick? Certainly this test would not serve to distinguish *Lawrie v. Muir* from *Fairley.*

These various questions all serve to raise what appears from the recent cases to be the central issue: having regard to all the circumstances of the case, ought the Court to regard the impropriety of the conduct of those

68. *Id.* at 58.

guilty of the illegal search or seizure, and/or the unfairness to the accused of having such evidence produced against him as outweighing the importance of securing convictions against those whom the evidence shows to have been guilty of a breach of the law? This in substance is the test formulated by Lord Cooper in *Lawrie v. Muir*. The answers to these questions may often be difficult for the courts and hard to reconcile. That difficulty lies at the root of the problem. But it is of prime importance to note that the Scottish courts have definitely rejected the view propounded in general terms by Horridge, J., in *Elias v. Pasmore* that the interests of state require the *general* admission of material evidence obtained by illegal searches and seizures.

V.

The Indian and Burmese authorities are not numerous and support the admissibility of evidence obtained through illegal searches and seizures. They may be briefly summarized. In *Emperor v. Allahdad Khan*,[69] the prisoner's house was searched without a warrant and drugs were found. The prisoner was convicted on this evidence. This conviction was quashed on appeal on the ground that the illegality of the search vitiated the whole proceedings. On further appeal the conviction was restored. Griffin and Chamier, JJ., held that whether the search was legal or not, it had produced evidence which pointed to the commission of a crime, and was therefore admissible. This case was followed by Sulaiman, J., in *Emperor v. Ali Ahmad Khan*,[70] who said that "any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction."[71] There was a more elaborate discussion of the problem in *Chwa Hum Htive v. King-Emperor*.[72] This was also a case of the discovery of drugs on a search which was alleged to be irregular. Baguley, J., pointed to some conflicting authority in other courts. He observed that the irregularity in the search was a mere technicality but stated in general terms that evidence procured as a result of the commission of irregularities were nevertheless admissible. The learned judge made a brief statement of principle, observing that "it must be remembered that the acquittal of guilty accused is just as much a miscarriage of justice as the conviction of an innocent person."[73] It may be observed that these cases appear to have been decided on the basis that the evidence, whatever the mode of obtaining it, was relevant and therefore admissible.

69. I.L.R. 35 All. 358 (1913).
70. I.L.R. 46 All. 86 (1923).
71. *Id.* at 87.
72. I.L.R. 11 Rang. 107 (1926).
73. *Id.* at 109.

VI.

The Canadian cases also follow a virtually consistent pattern in favour of admissibility. In only one case, *R. v. Ollassoff*,[74] was a conviction quashed which had been obtained on evidence procured through an allegedly illegal search, and that case was subsequently overruled in *R. v. Kostachuk*.[75]

The Canadian cases are almost entirely concerned with searches for intoxicating liquor found in the unlawful possessions of the persons charged. In *R. v. Doyle*,[76] to which reference has already been made,[77] Wilson, C. J., in a careful judgment, held such evidence admissible. He examined the relationship between the confession doctrine and this problem, and stated that evidence discovered as the result of an illegal search was admitted because it was a relevant *fact*. In *R. v. Honan*,[78] Meredith, J. A., admitted the evidence, stating that "the question is not, by what means was the evidence procured; but is, whether the things proved were evidence. . . ."[79] This means, clearly enough, whether the evidence was relevant to the charge. In *R. v. Gibson*,[80] Walsh, J., said that his first impression was that evidence so obtained was inadmissible, but that he had changed his mind. The learned judge cited *R. v. Honan*, and oddly enough (if the report be accurate) *Weeks v. United States*, which was authority against him. In *R. v. Moore*,[81] it was held that the illegality of a search warrant did not vitiate a conviction based on evidence discovered on the unlawful search. This case was followed in *R. v. Nelson*.[82] *R. v. Ollassoff*[83] is, as we have noted, out of line, and the court there quashed a conviction based on evidence procured in what it held to be an illegal search. In *R. v. Kostachuk*,[84] it was held that the search in *R. v. Ollassoff* was in fact lawful. Further in *R. v. Kostachuk* Haultain, C. J. S., said clearly that the illegality of the search was not relevant to the admissibility of the evidence. "The legality of the search was not in issue, the only question to be decided was whether the accused was guilty or not of the charge as laid."[85] In *R. v. Durousse*l,[86] the defendant was charged with unlawful possession of a still which was dis-

74. [1929] 3 W.W.R. 707, [1930] 1 D.L.R. 830, 52 C.C.C. 249 (Sask.).
75. 24 Sask. R. 485, [1930] 2 W.W.R. 464, 54 C.C.C. 189 (C.A.).
76. 12 Ont. R. 347 (1886).
77. See *supra*, p. 523.
78. 26 Ont. L.R. 484, 16 D.L.R. 276, 20 C.C.C. 10 (1912).
79. 26 Ont. L.R. at 489.
80. [1919] 1 W.W.R. 614, 30 C.C.C. 308 (Alta.)
81. 17 Alta. L.R. 503, [1922] 1 W.W.R. 629, 63 D.L.R. 472, 37 C.C.C. 72 (C.A.).
82. [1922] 2 W.W.R. 381, 69 D.L.R. 180, 37 C.C.C. 270 (Alta.).
83. [1929] 3 W.W.R. 707, [1930] 1 D.L.R. 830, 52 C.C.C. 249 (Sask.).
84. 24 Sask, R. 485, [1930] 2 W.W.R. 464, 54 C.C.C. 189 (C.A.).
85. [1930] 2 W.W.R. at 466.
86. 41 Man. R. 15, [1933] 1 W.W.R. 278, [1933] 2 D.L.R. 446, 59 C.C.C. 263.

covered in the course of an allegedly illegal search. Dennistoun, J. A., discussed several of the earlier authorities and concluded that the legality of the search was "clearly"[87] not relevant to the question of the admissibility of the evidence discovered thereby.

These cases state the law in four provincial jurisdictions: Alberta, Manitoba, Ontario and Saskatchewan. They state a clear rule that evidence procured through illegal searches and seizures is admissible. The single principle on which they proceed is clear: the evidence is admissible because it is relevant, and that relevance cannot be affected by proof of illegality in the means of obtaining it.

VII.

In his review of Commonwealth authority supporting the admissibility of evidence procured through illegal searches and seizures, Frankfurter, J., in *Wolf v. Colorado*[88] cited the South Australian case of *Miller v. Noblet.*[89] That is not a very clear ease. Police acting under instructions to detect breaches of the Licensing Acts searched the appellant and another man without proper authority and found bottles of beer on the latter. The appellant was charged with assault in attempting to wrest possession of these bottles from the police. It was held that he was rightfully convicted. Richards, J., pointed out that the police had no right to search these men as they had not been arrested. The learned judge then said that the person from whom the bottles had originally been taken would probably have been entitled to demand their return, had he made timely application. However it was not this person who had attempted to recover them but the appellant, who, on the evidence, had no right to them. As against the appellant the police were entitled to retain the bottles "and I think that in the circumstances it was (their) duty to do so for evidentiary purposes, at any rate until its return was demanded by a person who had a better right to it."[90]

This decision appears to support the following propositions: (1) evidence obtained by an illegal search of A is admissible against B: this produces a result in accord with *Elias v. Pasmore;* (2) evidence obtained by an illegal search of A can probably be recovered by A, and if its return is demanded, presumably is not admissible against him: this suggests a parallel to the pretrial motion to suppress or return evidence procured through illegal searches and seizures, which is referred to in *Weeks v. United States*[91] and

87. [1933] 1 W.W.R. at 281.
88. 338 U.S. 25, 39, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949).
89. [1927] S.A.L.R. 385.
90. *Id.* at 392.
91. 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914). For additional discussion see MCCORMICK, CASES ON EVIDENCE 392 (2d ed. 1948).

subsequent American authority as a condition precedent to an objection to admissibility; (3) presumably, if no demand is made for the return of the evidence by A, it may be used in evidence against him.[92]

Frankfurter, J., made no mention of another Australian case, *Levine v. O'Keefe*,[93] a decision of the Supreme Court of Victoria. This was a motion to strike out paragraphs in statement of defence to a claim for wrongful seizure. The offending paragraphs stated that the defendant, as a member of the police force, was charged with the duty of investigating crimes alleged to have been committed by the plaintiff, or by the plaintiff together with another person. It was alleged that the plaintiff had concealed on his premises goods belonging to another person to enable a fraud to be perpetrated on Lloyd's underwriters. Defendant argued that in the course of bona fide investigations in connection with a suspected crime, the police might seize property in the possession of the suspect, even though no arrest had been made, so that evidence might be preserved and furnished to a court. The Supreme Court of Victoria, upholding Cussen, J., rejected this argument which was frankly based on considerations of public convenience. There were only two cases in which a seizure was justified: (1) where property was seized while in the possession of a person at the time of his arrest for felony or misdemeanour; (2) where property was seized under a lawful search warrant. As the instant case did not fall under either head, the paragraphs in the statement of defence must be struck out.

The precise scope of this authority is not quite clear. It is certainly authority for the proposition that the police cannot defend an action for wrongful seizure on the ground that they have thereby obtained relevant evidence of a criminal charge against the plaintiff. It appears therefore that this decision[94] is not in accord with the broad rule stated in Halsbury[95] that if property or documents have been wrongfully seized, the seizure will be excused if they are in fact material evidence of a crime committed by any person. Halsbury based this rule on the general proposition stated by Horridge, J., in *Elias v. Pasmore,* and it is submitted that *Levine v. O'Keefe* is not in perfect accord with the later English decision, or at least with the wide proposition stated by Horridge, J. Whether *Levine v. O'Keefe* is authority for any proposition relating to the admissibility of evidence illegally seized if no timely demand is made for its suppression or return is a matter of conjecture, as the question did not arise in that case. It may be

92. The authority on which this third proposition is based is the dictum from the judgment of Richards, J., in Miller v. Noblet, [1927] S.A.L.R. 385, just discussed.

93. [1929] V.L.R. 302, [1930] V.L.R. 70.

94. See letter from E. H. Coghill, 8 AUST. L.J. 60 (1934).

95. 13 HALSBURY, LAWS OF ENGLAND 640 (2d ed., Hailsham, 1934).

noted once more that there is American authority for the proposition that failure to make such a motion may preclude the raising of the defence that evidence has been procured by illegal search or seizure,[96] and it is possible that a similar doctrine would be followed in Victoria. But this is guesswork, and there is no profit in pursuing the question in the absence of authority. No very clear general rules therefore emerge from these Australian cases on the admissibility of evidence discovered as a result of illegal searches and seizures, but it may be said there is no clear justification for stating a general rule of admissibility on the simple ground of relevancy.

VIII.

No reference was made by Frankfurter, J., to the South African decisions. This is surprising as there is modern authority directly in point. In *R. v. Maleleke*[97] it was held that evidence obtained by compelling the prisoner to compare his foot with footprints at the scene of the crime was inadmissible. The Attorney-General argued that the admissibility of evidence was not affected by illegality in the method of obtaining it. Curlewis, J. P., rejected this argument, and treated the case as covered by the privilege against self-crimination. This is contrary to Wigmore's strongly expressed opinion that the privilege against self-crimination only protects a person in his capacity as a witness; so that in a case like *R. v. Maleleke* where the evidence was not obtained from the prisoner as a witness, the privilege had no application.[98] Curlewis, J. P., also referred to earlier South African authority, *Coleman v. R.*[99] and *Goorpurshad v. R.*[100] of which the former by implication and the latter expressly supported the proposition that finger-print evidence taken from accused persons under compulsion was inadmissible. Krause, J., concurred in the result, and stated a proposition of very wide implication. "The acceptance of the contention of the Attorney-General would be tantamount to adopting the obnoxious principle that the means justify the end, and that the Crown could avail itself of and connive at the commission of one crime to prove another."[101] This is clearly broad enough to support a rule that evidence obtained by illegal searches and seizures is inadmissible.

However, in *R. v. Mabuya,*[102] the court declined to support so broad a principle. The prisoner contended that a search of his house was illegal for

96. See McCormick, Cases on Evidence 393 (2d ed. 1948).
97. [1925] T.P.D. 491.
98. 8 Wigmore, Evidence 363 (3d ed. 1940).
99. [1907] T.S. 535.
100. 35 Natal L.R. 87 (1914).
101. [1925] T.P.D. at 536.
102. [1927] C.P.D. 181.

want of a search warrant, and that evidence of what was discovered thereby was inadmissible. Gardiner, J. P., stated that he was not sure that the search was illegal, but even assuming that it was that the evidence was admissible. He distinguished *R. v. Maleleke* as a case in which the evidence had been obtained from the accused by compulsion, so that cases in regard to finger prints, marks on the body, etc., were inapplicable. Gardiner, J. P., said: "This is evidence of something that the police found, not upon the accused, but in his house, and I cannot see that the facts that the police may have been trespassers can render this evidence inadmissible. . . . I cannot see any public policy which prevents this evidence being admitted."[103] The learned judge said that the only authority supporting a rule of exclusion came from the United States, and depended upon "the sanctity which the Americans attach to their Constitution."[104] In *R. v. Brown*,[105] Gardiner, J. P., once more explained *R. v. Maleleke* as a case of self-crimination. In *R. v. Sulski*,[106] the appellant was convicted of a statutory offence. At the close of the Crown case, the prosecutor applied for an order to compel the production of books by the appellant. The application was granted, and in convicting, the magistrates relied heavily on these books. The court quashed the conviction on the grounds that there was no legal authority for the order for production of the books and that their production might have prejudiced the defence. In *R. v. Uys and Uys*,[107] Schreiner, J., said that the grounds of the decision in *R. v. Sulski* were not quite clear and it did not appear that the Crown had argued that even if the evidence was irregularly obtained, it was none the less admissible. Schreiner, J., suggested that the true ground may have been that the order for production, contrary to the terms of the appropriate statute, constituted such an irregularity that it was felt that the conviction should not stand. But the learned judge said that it could not in the circumstances be treated as an authority on the law relating to the admissibility of illegally obtained evidence. With respect, the explanation of the case suggested by Schreiner, J., is not easy to follow, for the irregularity on which the conviction was based was the illegally obtained evidence. It may be that a more satisfactory explanation would be to treat the case as following *R. v. Maleleke*, that is as a case in which a person is compelled to do an act which on the South African cases violates the privilege against self-crimination. In *R. v. Maleleke*, the prisoner was compelled to make a footprint, while in *R. v. Sulski* the accused was compelled to produce his books.

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103. *Id.* at 181-82.
104. *Id.* at 182.
105. [1935] C.P.D. 286, 288.
106. [1935] T.P.D. 292.
107. [1940] T.P.D. 405, 408.

In the most recent South African case on this point, *R. v. Uys and Uys,*[108] property was discovered on the appellants' premises in a search which the court assumed to have been illegal. The court held the evidence admissible after Schreiner, J., reviewed the earlier authorities. The learned judge interpreted *R. v. Maleleke* as authority for the principle that evidence obtained from the accused person by compulsion was not admissible. Schreiner, J., said that it was not necessary to decide "whether exclusion on the ground of compulsion should be limited to cases where the accused has been forced physically or by threats to create against himself evidence which could otherwise not have been brought into existence or whether it extends also to cases where the accused has only been forced to produce or submit to a search for evidence against him which already exists in the form of documents and the like."[109] While in *R. v. Mabuya* it appeared that the search had been strongly resisted, in the instant case there was no evidence of any objection or unwillingness to submit to search, and the mere fact that the search was conducted by a police officer did not import such an element of implied pressure as to amount of coercion. The evidence was accordingly admissible.

Though this case supports the admissibility of evidence procured through illegal searches and seizures, the reservations in the judgment somewhat confine its authority. It appears difficult, once Wigmore's limitation of the protection of self-crimination privilege to witness is abandoned, to see any meaningful difference between the cases in which a man is compelled to give his finger prints, to submit to medical examination, to submit his books for examination or to stand by while police illegally ransack his house for evidence. Also, with respect, it is doubtful whether Schreiner, J., was justified in holding that the fact that police make a search does not constitute such an element of implied pressure as to amount to coercion. The analogy of the Judges' Rules in confession cases might very reasonably suggest a strong element of coercion in this case. If this be so, it is difficult to give a precise formulation to the rule which emerges from the South African authority.

It is tentatively submitted that the South African authorities may be summarized as follows: (1) Evidence procured by unlawfully compelling a prisoner to give or compare foot prints, etc. is inadmissible against him, *R. v. Maleleke,* and it may be that the same principle applies to an illegal compulsion to produce books, *R. v. Sulski.* (2) Evidence procured by an illegal search, even though the search is resisted, is admissible, because the evidence is relevant, *R. v. Mabuya;* but *R. v. Uys and Uys* leaves open the question of admissibility where there is evidence of compulsion. (3) Evidence

108. *Ibid.*
109. *Id.* at 407.

procured through an illegal search is admissible if the search is not opposed or submitted to under compulsion by the party against whom it is tendered, *R. v. Uys and Uys;* this case also holds that the mere fact that the illegal search is made by the police does not of itself constitute coercion.

IX.

This survey of Commonwealth authority reveals that there is no uniform rule on the admissibility of evidence procured through illegal searches and seizures. Apart from the English cases, which do not deal directly with the point, only the Canadian and Indian cases state a clear, uniform and simple rule of admissibility based squarely upon the relevance of the evidence itself. Among the most recent cases in Commonwealth jurisdiction, and, it may be added the only cases in which the conflicting arguments on the admissibility of such evidence have been at all fully discussed, are the Scottish decisions in *Lawrie v. Muir* and *McGovern v. H. M. Advocate,* in which the evidence was held inadmissible. While no general rule of inadmissibility was laid down in these two cases, it is difficult to escape the conclusion that there is a strong tendency in that direction. The purport of the two Australian cases is uncertain and no clear rule can be drawn from them. As for the South African cases, a distinction has been drawn between cases of compulsion applied to the individual himself as in obtaining finger prints, etc., and other cases of searches and seizures. As for the finger-print cases, it is interesting to note that in Scotland in *Adair v. M'Garry,* while the majority held the obtaining of the prints to be legal, Lord Morison stated that even if they had been illegally obtained the evidence was admissible because relevant. Lord Sands denied that the case fell within the purview of the privilege against self-crimination. Lord Hunter, dissenting, used language suggestive of this privilege, and also of a general principle of exclusion of evidence obtained by illegal means. In the South African case of *R. v. Maleleke,* the evidence of the footprints was held primarily to violate the privilege against self-crimination, though Krause, J., did use language not dissimilar to that of Lord Hunter. Apart from *R. v. Malelcke,* the South African courts have admitted evidence procured through illegal searches and seizures, though as we have seen the question of admissibility has been left open in cases where submission to search or seizure has been procured by compulsion or threats.

So far as the English authority goes, it points to the admissibility of such evidence simply because it is relevant. But as we have noted, there is no precise authority on the point, although Halsbury[110] and Wigmore[111] have

110. 13 HALSBURY, LAWS OF ENGLAND 640 (2d ed., Hailsham, 1934).
111. 8 WIGMORE, EVIDENCE 4 *et seq.* (3d ed. 1940).

reasonable justification on the cases for stating a general rule of admissibility. However, in view of the fact that there is no conclusive authority, at least in the appellate courts, certain considerations arising from other rules of English law may be relevant. The rules relating to confessions cannot, in our submission, be explained exclusively in terms of the risk of falsity in improperly induced statements. The Judges' Rules, and decisions preceding and subsequent to their formulation, set out principles which are much more satisfactorily explained in terms of insistence on certain standards of police practice. Confessions which are obtained in disregard of these provisions run the risk of exclusion primarily for this reason, and if considerations of truth or falsity move the courts at all in these cases, it is submitted that they are of secondary importance. This point is reinforced by the most recent decision of the Court of Criminal Appeal on the admissibility in evidence of property procured as a result of an inducement which would have rendered inadmissible a simple confession *(i.e.,* one not supported by the discovery of property). Until *R. v. Barker,*[112] the English decisions uniformly held that facts discovered in consequence of inadmissible confessions were themselves admissible.[113] The principle of admissibility, which was as old as the confession rule itself,[114] was that the evidence was a fact, a relevant fact, and must therefore be admissible. This, also, it should be noted, is the ground on which evidence procured through illegal searches and seizures has been held admissible. However in *R. v. Barker,* where the appellant produced books and papers as a result of an inducement which would have rendered a simple confession inadmissible, the Court of Criminal Appeal held the evidence inadmissible.

The Court acknowledged the existence of a body of authority in which evidence discovered through an otherwise inadmissible confession had itself been held admissible. The Court stated that it did not wish to cast any doubt on these cases, but held that they were not applicable to the present case, where the inducement related *specifically* to the production of the property which was the evidence in dispute. Now the older cases proceeded on the basis outlined above, that whatever the consideration which applied to the confessions, the property discovered in consequence was a *fact* and must therefore be admissible. Now precisely the same considerations applied to the books and papers in the *Barker* case. Put simply, there is no satisfactory ground for distinguishing the case from the earlier decisions. In fact, it appears that it can only be sensibly explained as a departure from the earlier cases, despite the statement of the Court of Criminal Appeal to the

112. [1941] 2 K.B. 381, [1941] 3 All E.R. 33.

113. This is with the exception of R. v. Cason, 14 Ann. Tax Cas. 471 (1935), decided by Judge Dodson sitting as a commissioner. The case was followed in R. v. Barker.

114. See R. v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (C.C. 1783).

contrary. In effect, the exclusion of the evidence in *R. v. Barker* can only be justified on the footing that it had been obtained by an unfair trick.

It would be strange if the rules with respect to the admissibility of confessions should develop in this way, while the cognate problem of the admissibility of evidence procured by illegal searches and seizures should be summarily disposed of in the manner indicated by Horridge, J., in *Elias v. Pasmore*. The confession and illegal search and seizure problems have much in common. On Wigmore's view which he followed through consistently in dealing with both problems, the sole criterion of admissibility should be the danger of admitting false evidence. Since evidence procured by illegal searches and seizures could not be false, Wigmore attacked the doctrine of *Weeks v. United States* as a sentimental aberration. It is obvious that Wigmore would also attack the decision of the English Court of Appeal in *R. v. Barker* as there could in that case have been no danger of falsity in the confession. But in the confession rules there is a requirement of conformity to fair police practices as a criterion of admissibility, which may exclude a confession however likely to be true. *Pace* Wigmore, it is submitted that this is a desirable result. *Pace* Wigmore also, and for the same reasons, the doctrine of *Weeks v. United States*—even apart from the specific constitutional provision which it purports to interpret—produces a good result. We have learned too much of the dangers of the police state in totalitarian states. It is utopian to suggest that the solution is to punish police violators of fair standards, but to admit the evidence they discover through such violations. Judges have pointed out time and again, especially in the American cases, that it generally requires a policeman to prosecute a policeman, and it is asking rather too much of human nature to expect such prosecutions in such cases as these. The conclusion which is submitted is that the criterion of admissibility of evidence procured through illegal searches and seizures should be as stated by the Scottish court in *Lawrie v. Muir*. The law must strive to balance the interests of the citizen to be protected from illegal invasions of his liberties by the authorities and the interests of the State to bring to justice persons guilty of criminal conduct. An attempt to reconcile these two interests which may come into conflict will mean that sometimes such evidence will be admitted, and sometimes rejected. It may very well be that different courts will reach different conclusions on similar facts. But an approach to the problem along these lines is much more in harmony with the spirit of British institutions than the simple doctrine of *raison d'etat* propounded in *Elias v. Pasmore*.