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The Admissibility of Evidence Procured by Illegal Search: Scotland

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is, with few exceptions,¹⁰ charged with his donor's cost for purposes of computing gain.¹¹ On the other hand in determining loss he takes either his donor's cost or the fair market value of the property at the date of the gift, whichever is lower.¹²

There may, of course, be times when it is desirable to preserve the donor's cost, in which case sound planning will suggest a lifetime will—substitute (other than a revocable trust) rather than a testamentary gift. But usually, modest estates consist of one or a few substantial assets which have been held for many years and generally such assets have shared in the increased values of practically all types of property that the last twenty years have witnessed.¹³ Sound planning for modest estates does not necessarily dictate a will but it does require a careful consideration of cost basis problems.

THE ADMISSIBILITY OF EVIDENCE PROCURED BY ILLEGAL SEARCH: SCOTLAND

ZELMAN COWEN*

In a recent issue of this review, the present writer reviewed developments in the law relating to the admissibility of evidence procured by illegal searches and seizures in British Commonwealth jurisdictions.¹ There it was pointed out that in recent years the question has been most elaborately reviewed in the Scottish Courts. In *Lawrie v. Muir*² a bench of seven judges considered the principles governing this matter. They referred to the balance to be maintained between the interests of the state in bringing the guilty to justice and the interests of individuals in being protected against illegal or irregular invasions of their liberty by the authorities. The conclusion drawn

reserved powers to reallocate income or otherwise alter, amend or terminate, and gifts of joint interests in property, while regarded as part of the taxable estate of a donor under the federal estate tax law, are nevertheless treated as lifetime gifts under the federal income tax law. To obtain a new basis at death the property must have been acquired by "bequest, devise, or inheritance," or fall within one of the few statutory exceptions described in note 8 *supra*.

10. See note 8 *supra*.

11. INT. REV. CODE § 113(a)(2).

12. INT. REV. CODE § 113(a)(2). It is possible under this section to have neither gain nor loss. Thus if the cost basis for gain is \$50 and for loss is \$25 and the property is sold for \$35, there will be neither gain nor loss.

13. Because of the tax deferring privileges of new INT. REV. CODE § 112(n) relating to the sale of a residence and the prompt purchase of another residence low cost basis residence properties may be expected to become even more common than they are today.

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1. *The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523 (1952).

2. [1950] Scots L.T. 37.

from these considerations was that such evidence was not necessarily inadmissible, but that the court should determine each case on its merits. Applying these principles to the case in hand, the court in *Lawrie v. Muir* ruled the evidence inadmissible. So too in *M'Govern v. H. M. Advocate*³ these principles were applied to exclude evidence. However in *Fairley v. Fishmongers of London*⁴ it was held that the irregularities of search and seizure did not justify the exclusion of the evidence.

In a fourth case, *H. M. Advocate v. Turnbull*,⁵ the illegally seized evidence has been held inadmissible. A warrant was granted to search for documents in the possession of an accountant. The documents in question related to the affairs of a particular client in respect of whose income tax returns the accountant was suspected of fraud. The officers executing the warrant also seized documents dealing with the affairs of other clients. Subsequently as a result of the information so obtained the accountant was charged on several counts of fraud. The Court sustained the objection that the documents, other than those relating to the client in respect of whose papers the original warrant had been granted, were obtained by an illegal search and seizure and were not admissible in evidence.

In so holding, the judge, Lord Guthrie, reviewed the earlier decisions. His reasons for excluding the evidence are quoted at length⁶ as providing an interesting application of the principles evolved:

"In the present case there were, first, no circumstances of urgency. Second, the retention and use over a period of six months of the documents bearing to relate [*sic*] to other matters than that mentioned in the petition show that the actions complained of were deliberate. The police officers did not accidentally stumble upon evidence of a plainly incriminating character in the course of a search for a different purpose. If the documents are incriminating, their incriminating character is only exposed by careful consideration of their contents. Third, if information was in the hands of the criminal authorities implicating the accused in other crimes, these could have been mentioned in the petition containing the warrant under which the search was authorized. If they had no such information, the examination of private papers in the hope of finding incriminating material was interference with the rights of a citizen. Therefore to hold that evidence so obtained was admissible would, as I have said, tend to nullify the protection afforded to a citizen by the requirements of a magistrate's warrant, and would offer a positive inducement to the authorities to proceed by irregular methods. Fourth, when I consider the matter in light of the principle of fairness to the accused, it appears to me that the evidence so irregularly and deliberately obtained is intended to be the basis of a comparison between the figures actually submitted to the Inspector of Taxes and the information in the possession of the accused. If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible."

3. [1950] Scots L.T. 133.

4. [1951] Scots L.T. 54.

5. [1951] Scots L.T. 409.

6. *Id.* at 411-12.