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ADMISSION OF ILLEGALLY OBTAINED EVIDENCE

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The common law is well settled that evidence otherwise admissible will not be excluded from a trial because it was illegally acquired.[1] Within the last half century this rule has often been questioned in California with respect to evidence obtained in derogation of the accused's constitutional rights.[2] The favorite objections of counsel to such evidence are (1) that it was obtained by an unreasonable search and seizure in violation of the California Constitution;[3] (2) that it violates the privilege against self-incrimination,[4] and (3) that its admission is a violation of the due process clause.[5] However, except in cases involving due process the California courts have rejected these objections. In so holding they have adopted the common law rule, the reason for which Professor Wigmore has aptly stated as follows:

> "A judge does not hold court in a street-car to do summary justice upon a fellow passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation to investigate and punish all offenses which incidentally cross the path of that litigation."[6]

Evidence Obtained by an Unreasonable Search and Seizure.

Both the United States and California constitutions guarantee the right to be free from unreasonable searches and seizures.[7] The federal courts exclude evidence obtained in violation of this provision[8] provided the party making the objection is the owner[9] of the property illegally seized, he has

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[1] 1 GREENLEAF, EVIDENCE § 254 (3d ed. 1899) "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admission if they are pertinent to the issue. The courts will not take notice how they were obtained, whether lawfully or unlawfully, nor will it frame an issue to determine that question"; WIGMORE, POCKET CODE OF EVIDENCE, Rule 197 (1910): "An evidential fact, otherwise admissible, is not excluded: (1) Because it had been obtained by means of some violation of Law, (2) nor because its existence is attended with some violation of Law."

[2] Weeks v. United States, 332 U.S. 383, 392 (1914). "The tendency of those who execute the criminal laws of this country to obtain convictions by means of unlawful seizures and enforced confessions . . should find no sanction in the judgment of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

[3] CALIF. CONST. Art. I, § 19.

[4] CALIF. CONST. Art. I, § 3.

[5] U. S. CONST. AMEND. XIV, § 1.

[6] WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

[7] See note 3 *supra*; U. S. CONST. AMEND. IV. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

[8] Amos v. United States, 255 U.S. 313 (1920); Weeks v. United States, *supra* note 2; Boyd v. United States, 116 U.S. 616 (1895).

[9] Brooks v. United States, 8 F.2d 593 (9th Cir. 1925); United States v. Murray, 17 F.2d 276 (N.D. Cal. 1927).

made a timely motion for the return of his property[10] and the evidence was seized by federal officers.[11] Before the turn of the century the California courts adopted the common law rule that illegality in obtaining evidence does not affect its admissibility,[12] but it was not until 1922 that the California Supreme Court considered the conflict between the common law and the federal rule.

In *People* v. *Mayen*[13] the defendant had been found guilty of grand larceny. Certain evidence introduced at the trial was Mayen's property which had been seized by police officers under a defective search warrant. Shortly before the trial Mayen had made an appropriate motion for the return of his property, but his motion and objection to its use as evidence were denied. The District Court of Appeal[14] reversed the conviction holding that there had been an unreasonable search and seizure and the timely motion for return of the property entitled him to its exclusion as evidence. By holding that evidence obtained in violation of article I, section 19, was inadmissible, the court elected to apply a rule of evidence analogous to that employed by the federal courts.

The California Supreme Court reversed the the District Court of Appeal, holding that illegally obtained evidence should be admitted. The fact that it had been procured in violation of the Constitution was held not to affect its probative value so as to justify exclusion. The court pointed out that there were adequate remedies, both civil and criminal,[15] to redress a violation of Mayen's rights without injecting the issue of the officers' wrongdoing into a litigation concerning an unrelated matter. Any remedial action, it said, should be separate and distinct from the trial to which the evidence is relevant.

For twenty years thereafter the California courts applied this rule to situations involving searches and seizures without warrants, under defective

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[10]Rochin v. United States, 78 F.2d 966 (9th Cir. 1935), Bell v. United States, 9 F.2d 820 (9th Cir. 1925)

[11]Symons v. United States, 178 F.2d 615 (9th Cir. 1950), Herine v. United States, 276 Fed. 806 (9th Cir. 1921), Gambrio v. United States, 275 U.S. 310 (1927) (where a state officer seizes evidence on behalf of federal officers, it is inadmissible in a federal court), 11 CALIF. L. REV. 246 (1927)

[12]People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (1909), People v. Allen, 113 Cal. 264, 45 Pac. 372 (1896), People v. Warren, 12 Cal.App. 730, 108 Pac. 725 (1910), People v. Swaile, 12 Cal.App. 192, 107 Pac. 134 (1909)

[13]188 Cal. 237, 205 Pac. 435 (1922) See Grant, *Searches and Seizures in California*, 15 So. CALIF. L. REV. 139 (1942), (detailed discussion and criticism of the case.)

[14]49 Cal.App. 314, 193, Pac. 173 (1920).

[15]CALIF. PEN. CODE § 146 (1953) "Officer Acting Without Regular Process, Every Public officer who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property without a regular process or other lawful authority therefore, is guilty of a misdemeanor", see 38 CALIF. L. REV. 498, 502 (1950), (Discussion of Criminal and Civil Remedies for an Unreasonable Search and Seizure in California)

warrants and to trespasses to the accused's property.[16] In 1942 the Supreme Court re-examined its position on the admissibility question in *People* v. *Gonzales*.[17] Here the defendants Gonzales and Chierotti had been marketing a "money making machine." One of these machines had been seized in the defendant's home by police officers who had no search warrant and was admitted as evidence at the trial for grand theft. The defendants sought reversal on the ground of article I, section 19. The court reaffirmed the rule that the procurement of evidence by an unreasonable search and seizure and its admissibility in evidence are separate and unrelated questions.

In a dissenting opinion, Justice Carter presented a strong plea for adopting the exclusionary rule in California. He argued that the effectiveness of any constitutional right is dependent upon the existence of adequate remedies to enforce that right, and that the prohibition of unlawful acts by agents of government is one of the major objectives of the provisions relating to unreasonable searches and seizures. Further, he said, the only effective way to prevent these acts is to render the fruits of the wrongdoing useless in a court of law. He concluded that the majority's holding rendered article I, section 19, a "bare abstraction" and failing to provide an adequate remedy the court was depriving its citizens of their rights.

To the proponents of the common law and the California rule there are three reasons for rejecting the exclusionary rule. First, it is an attempt to try an offense without the normal process and complaint against the wrongdoer. Second, it is a remedy which does not punish the wrongdoer but gratuitously aids another to whose guilt or innocence the violation of the Constitution is immaterial. Finally, it is a remedy that interferes with the administration of justice by burdening the courts with an issue wholly independent of the question before the court.[18] The arguments for this conclusion are marshalled by Professor Wigmore, to whom the federal rule is "misguided sentimentality." He satirizes what he believes to be the manifest folly of the rule as follows:

> "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and

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[16]Henscher v. State Bar of California, 4 Cal.2d 399, 49 P.2d 832 (1935), *Ex Parte* Polizzoto, 188 Cal. 410, 205 Pac. 676 (1922); People v. Richardson, 83 Cal.App. 302, 256 Pac. 616 (1927), *cert. denied*, 276 U.S. 615 (1927); People v. Eiseman, 78 Cal.App. 223, 248 Pac. 716 (1926), *cert. denied*, 273 U.S. 663 (1926).

[17]20 Cal.2d 165, 124 P.2d 44 (1942), *cert. denied*, 317 U.S. 657 (1942).

[18]Recent California cases have continued to follow this view. See People v. Allen, 115 Cal.App.2d 745, 252 P.2d 968 (1953); People v. Garcia, 97 Cal.App.2d 733, 218 P.2d 837 (1950); People v. Harmon, 89 Cal.App.2d 55, 200 P.2d 32 (1948), People v. Jackson, 80 Cal.App.2d 386, 181 P.2d 889 (1947).

> of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it but to let off somebody who broke something else."[19]

The Privilege Against Self-Incrimination.

It is well settled in California that a person has a right to refuse to give evidence, under oath, which might tend to incriminate him.[20] It is equally well settled that the admission of evidence obtained from the possession of the accused by an unreasonable search is not a violation of the privilege against self-incrimination.[21] However, recent cases have raised the question whether the privilege applies when the evidence was obtained by a trespass to the person of the accused.

People v. *One 1941 Mercury Sedan*[22] was an action by the state forfeiture of an automobile used to transport narcotics. Police officers apprehended the defendant while he was in possession of narcotics, but before they could seize the narcotics he swallowed them. The defendant was taken to a hospital where the narcotics were recovered with a stomach pump. The state offered the narcotics as evidence, and the defendant objected that their admission would violate his privilege against self-incrimination. This objection was sustained and the trial court gave judgment for the defendant.

The District Court of Appeals reversed the trial court holding the privilege did not apply to this evidence. The court pointed out that the privilege was designed as a protection against inquisitorial proceedings where a person could be required to give evidence *under oath.* The essential element is that the probative value of the evidence must depend upon oath of the accused. Where the evidence elicited consists of a physical object, probative value is not involved and the privilege is therefore inapplicable.[23]

In cases involving the admissibility of the result of a blood test, where the blood was taken without the consent of the accused, the California courts have uniformly held that the evidence is not within the scope of the privilege. In *People* v. *Tucker*[24] the District Court of Appeals applied this rule, and in *People* v. *Heussler*[25] the California Supreme Court reached a similar conclusion. Thus the California courts have refused to apply the broad interpreta-

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[19]8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940)

[20]CALIF. CONST. Art. I, § 3; CALIF. PEN. CODE § 1323 (1953) "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself ", CALIF. CODE CIV. PROC. § 2065: "A witness . . need not give an answer which will have a tendency to subject him to punishment for a felony. "

[21]People v. Mayen, *supra* note 13.

[22]74 Cal.App.2d 199, 168 P.2d 443 (1946)

[23]8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940)

[24]88 Cal.App.2d 333, 198 P.2d 941 (1949); see also 22 So. CALIF. L. REV. 483 (1949)

[25]41 A.C. 256, 260 P.2d 8 (1953)

tion of the privilege advocated by some authorities, that the accused should never be required to be a party to the obtaining of incriminating evidence.[26]

Due Process: The Rochin Case.

In *Wolf* v. *Colorado*[27] the United States Supreme Court held although an unreasonable search and seizure by state officers was a violation of the due process clause, that admission in a state court of evidence thereby obtained was not repugnant to the Fourteenth Amendment. The basic distinction made was that while the state can not affirmatively invade the right which is a part of due process, once that right has been violated the question of admissibility becomes one of enforcement of the right rather than a second violation of the Constitution. The Court held that the issue of whether the exclusionary rule applied by the federal courts was a proper remedy was open to "the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."[28]

Three years later in *Rochin* v. *California*[29] the Supreme Court held that the admission of evidence obtained in such an arbitrary manner as to "shock the conscience" was a violation of the due process clause. In this case police officers, suspecting Rochin of illegally possessing narcotics, raided his home without a search warrant. When they entered his house there were two capsules on a table, but before they could be seized, Rochin swallowed them. The officers sought to prevent this by forcing open his mouth, but were unsuccessful. Thereupon they took him to a hospital where he was given a solution which caused him to regurgitate the capsules, which were found to be morphine. Since Rochin was not cooperative, the police applied considerable force. On the strength of the evidence thus obtained Rochin was convicted. The District Court of Appeal,[30] in affirming Rochin's conviction, applied the California rule stated in the *Mayen* and *Gonzales* cases. It said that although the officers had committed an unreasonable search and seizure, a false imprisonment and an assault and battery, the morphine so acquired was ad missible.

The United States Supreme Court reversed Rochin's conviction holding that the admission of this evidence was a violation of the due process clause. While the Court recognized that state courts have the primary responsibility for administering justice within their own jurisdictions, it held that the Fourteenth Amendment gave it a collateral power of review to prevent the state courts and law enforcement agencies from transgressing the "canons of de-

[26]See the dissenting opinion of Schauer, J., in People v. Rochin, 225 P.2d 913 (1951). Compare MODEL CODE OF EVIDENCE, Rule 205 (1952): "No person has a privilege . . to refuse . . (b) to furnish or permit the taking of body fluid or substances for analysis."

[27]338 U.S. 25 (1949).

[28]*Id.* at 28.

[29]342 U.S. 165 (1952).

[30]See note 26 *supra.*

cency and fairness" implicit in the due process clause.[31] The Court reviewed the record of the chain of events leading up to the introduction of the evidence and conviction of Rochin, and said:

> " We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness of private sentimentalism about combatting crime too energetically *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the defendant, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—This course of proceedings by agents of governments to obtain evidence is bound to offend even hardened sensibilities. *They are methods too close to the rack and screw to permit of constitutional differentiation.*"[32] (Emphasis added.)

The Court made an analogy between this type of evidence and evidence consisting of a coerced confession, the admission of which the Court had held in an earlier decision,[33] is a violation of due process. The use of these types of evidence, the Court held, was repugnant to the community's sense of decency and justice. It said:

> "It would be a stultification of responsibility . to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract by force what is in his stomach."[34]

To extract a precise rule from this case is impossible. The Court pointed out that by its very nature due process could not be reduced to a mechanical certainty, but rather it is "derived from considerations that are found in the whole nature of our judicial process."[35] It considers due process as a concept constantly changing and evolving within the environment of present-day society. The Court did not deny the power of the state courts to admit evidence obtained through an infringement of the accused's constitutional rights as had been held in the *Wolf* case. However, the Court did limit this power by declaring a judicial veto where it becomes apparent that the agents of the state have so exceeded the bounds of fair play and justice as to shock "even the most hardened sensibilities."

In *People* v. *Kendall*[36] the defendant objected on the basis of the *Rochin* case to the admission of evidence seized in his office by officers who had a warrant to search only his home. The California District Court of Appeal affirmed a conviction obtained by admitting the evidence. The court said:

> "The rationale of the Rochin case was placed squarely upon the ground that the evidence supporting the defendant's conviction was secured by methods so brutally shocking as to offend the due process clause. "[37]

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[31] *Id.* at 170.
[32] *Id.* at 172.
[33] Brown v. Massachusetts, 297 U.S. 278 (1935)
[34] *Id.* at 173.
[35] *Id.* at 170
[36] 111 Cal.App.2d 204, 244 P.2d 418 (1952), *cert. denied*, 344 U.S. 880 (1952).
[37] *Id.* at 215, 244 P.2d at 425.

People v. *Harper*[38] also involved an unreasonable search and seizure with the added fact that following his arrest Harper and the police officers engaged in an altercation during which Harper was struck several times. The District Court of Appeal held that this fact was immaterial in determining whether the *Rochin* case applied, since the affray and the procurement of the evidence were separate, unrelated transactions. It is interesting to speculate on the attitude of the court had the force been applied in obtaining the evidence. Would this have been "brutal and shocking"?

The *Rochin* case has been cited in cases involving evidence procured by wire tapping and wire recorders. In *People* v. *Sica*[39] and *People* v. *Irvine*[40] the District Court of Appeal relied on the *Kendall* case in refusing to apply the *Rochin* case. It held that the lack of any "brutal and shocking" conduct was fatal to the defendant's argument. Thus, the California courts have limited the application of the *Rochin* case to situations involving actual physical violence in procuring the evidence rather than extending it to apply to circumstances, not involving physical contact but where the methods of detection appear to be unjust and dangerous. For example, the use of wire recorders or wire tapping is considered by many to pose an intolerable threat to personal liberties, but under this interpretation the *Rochin* case cannot be applied.

The importance of the brutality requirement is clearly illustrated in *People* v. *Heussler*,[41] a case involving facts similar to those in the *Rochin* case. There one of the questions at the trial was the sobriety of the defendant at the time of the accident. The prosecution introduced evidence of a blood test to show intoxication. Mrs. Heussler objected to the admission of the evidence on the ground that the blood had been taken from her person while she was unconscious in order to give her a transfusion. The trial court overruled the objection but the District Court of Appeal reversed,[42] holding the evidence inadmissible on the basis of the *Rochin* case. However, the California Supreme Court refused to follow the extension of the *Rochin* case to these facts. In reversing the District Court of Appeal it said:

> "Contrary to Mrs. Heussler's contention the Rochin opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor. Instead the entire course of conduct was examined and found to be brutal and shocking. . . . The taking of a blood test when accomplished in a medically approved manner, does not smack of brutality."[43]

[38] 115 Cal.App.2d 776, 252 P.2d 950 (1953).

[39] 112 Cal.App.2d 574, 247 P.2d 72 (1952). See People v. Channell, 107 Cal.App.2d 192, 236 P.2d 654 (1951) (Evidence taken by wire tapping in violation of Federal Communications Act is held admissible in a California court though not in a federal court).

[40] 111 Cal.App.2d 460, 248 P.2d 502 (1952), *cert. granted*, 345 U.S. 903 (1952).

[41] See note 25 *supra*.

[42] 248 P.2d 434 (1952).

[43] 41 A.C. 256, 263, 260 P.2d 8, 12 (1953).

Justice Carter dissented on the ground that the court required conduct that was "brutal and shocking" before applying the *Rochin* case. He said that the degree of actual force was not the essence; instead the fact of taking the blood from an unconscious person, to be used against her at a trial, in itself violated a fundamental right of such magnitude as to bring it within the *Rochin* case.

Irvine v. *California*,[44] decided by the United States Supreme Court on February 8, 1954, when examined with reference to the *Wolf*, the *Rochin* and the *Heussler* cases, gives a clearer perspective to the role of due process as a bar to the admission of illegally obtained evidence. Irvine, a resident of Long Beach, was suspected of violating the gambling laws of California. In order to confirm their suspicions the police obtained a key to Irvine's house, and, while he and his wife were absent, entered the house on four occasions. While there, they set up microphones in various parts of the house and used them to pick up conversations by the suspect. Subsequently Irvine was arrested, tried and convicted of bookmaking on evidence so obtained. The District Court [45] sustained the conviction and rejected the contention that the *Rochin* case should apply to exclude the evidence.

The Supreme Court of the United States affirmed the conviction in a five to four decision. The majority relied upon *Wolf* v. *Colorado*[46] as declarative of the general rule that the admission of evidence in a state court, though a violation of the federal rule, was not repugnant to the due process clause. The Court then considered the *Rochin* case and held that it did not apply. It said.

> " [the Rochin case] presented an element totally lacking here—coercion . . applied by a physical assault upon his person to compel submission to the use of the stomach pump. . . This was the feature which led to a result in *Rochin* contrary to that in *Wolf*. However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather, a trespass to property, plus eavesdropping."[47]

The Court expressly rejected the broad interpretation of the *Rochin* case proposed by counsel for Irvine, *viz.* that wherever the act of obtaining evidence for the state shocked the minds of the judges to a sufficient degree, a conviction thereby obtained should be reversed. "A distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional grounds."[48]

Justice Frankfurter, the author of the majority opinions in the *Wolf* and *Rochin* cases, wrote a dissenting opinion. He argues that the majority

[44]74 Sup.Ct. 381 (1951)
[45]See note 40 *supra.*
[46]See note 27, *supra.*
[47]*Id.* at 383.
[48]*Id.* at 384.

had overlooked the essence of due process by attempting to reduce it to a formula based on the facts of the *Rochin* case. "Surely the court does not propose to announce a new absolute, namely that even the most reprehensible means of securing a conviction will not taint the verdict so long as the body of the accused was not touched by state officials. . . . "[49] To Justice Frankfurter it is not the form but the substance of the wrongdoing that is the determining factor. No matter how they are carried out the issue is whether the acts of the police in obtaining the evidence offend "civilized standards of decency and fairness." These standards, he said, can not be captured at any given point of time, but are to be set down by the judgment of the court with reference to the facts and surrounding circumstances of each case. "The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment."[50] Justice Frankfurter then stated that the facts justified the application of the *Rochin* rule. He concluded: "There is lacking here physical violence, even to the restricted extent employed in the *Rochin* case. We have here, however, a more powerful and offensive control over . . . Irvine's life than a single, limited trespass."[51]

Summary.

The law in California is well settled that any illegality in the procurement of evidence is immaterial to its admissibility unless the presence of certain conduct brings it within the "brutal and shocking" rule of the *Rochin* case. However, this rule has been so narrowly restricted by the California courts that it has made no substantial change in the previously accepted law. In view of the consistency of California decisions from 1896 to 1954 any major alterations in this law should be made by the legislature and not the courts. With this in mind Justice Carter of the California Supreme Court has proposed that the California legislature enact the following statute:

> "No evidence obtained in violation of Article I, Section 19 of the Constitution or any law of the State of California shall ever be introduced or admitted or used for any purpose whatsoever in any court of this state."[52]

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[49] *Id.* at 390.
[50] *Id.* at 391.
[51] See note 49 *supra.*
[52] People v. Rochin, *supra* note 26.