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granting the wife's remedy involves a multiplicity of actions and thereby places an additional burden on the already overloaded dockets of the courts.

Perhaps the best statement supporting the wife's right to sue and rejecting the outdated family unity theory is in the Michigan case of *Buckingham v. Buckingham*,[50] in which the court said that "[the wife] is in no sense the slave of her husband, and is so far the master of her own will that she has liberty to remain with her husband, or go from him, as she pleases; and he has no legal remedy to compel her to return."[51] If other courts would follow Michigan's example and finally and completely liberate the modern married woman's property rights from the semi-slavery concept of the common law, a step in the right direction would be taken, as the legislatures intended by passing the Married Woman's Property Acts.

It is submitted that the erring wife should be allowed to sue her husband in ejectment for the possession of her solely owned property under all circumstances. The only courts that have denied her this right are those which strictly construe their narrowly worded Married Woman's Property Acts, basing such strict construction on the family unity theory. However, this position is presently untenable due to the modern tendency to construe Married Woman's Property Acts liberally and to the many fallacies of the family unity theory. Therefore, it is concluded that the Delaware Supreme Court in *Owens v. Owens* has adopted the best view with respect to this problem.

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ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN A CIVIL CASE

The rule excluding evidence obtained by an illegal search and seizure has been applied almost exclusively in criminal prosecutions since its introduction into American law. An unusual twist was recently given to the rule when the Supreme Court of Michigan applied it in a civil action.

In *Lebel v. Swincicki*,[1] a civil case for wrongful death, the plaintiff tried to establish the drunkenness of the defendant to support his allegation of the defendant's negligence. The evidence presented

[50]81 Mich. 89, 45 N.W. 504 (1890).
[51]Id. at 505.

[1]354 Mich. 427, 93 N.W.2d 281 (1958).

on this point included the testimony of a state toxicologist concerning the analysis of blood[2] taken from the person of the unconscious defendant shortly after the accident.[3] The evidence was admitted over the defendant's objection, and judgment was subsequently entered for the plaintiff. On appeal the Supreme Court of Michigan held that "the taking of blood for purposes of analysis from the person of one who is unconscious at the time constitutes a violation of his rights, and that testimony based on the analysis of such blood should not be admitted in evidence."[4] However, the court decided that the conclusiveness of other evidence of the defendant's negligence precluded reversal.

The development of the law concerning the admissibility of evidence obtained by an illegal search or seizure has been fairly recent. The common law rule was that admissibility was not affected by the illegality of the means by which evidence was obtained.[5] The exclusive legal remedy of a person wronged by an illegal search and seizure was a civil action for damages against the trespasser or wrongdoer.[6] It was felt that there was no reason to exclude the evidence so long as it was relevant and material. The court would not interrupt the progress of a trial to consider the collateral issue of the illegality of the means by which the evidence was obtained.[7] A number of jurisdictions still adhere to this traditional rule.[8]

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[2]The blood sample was taken from the unconscious defendant by a nurse at the direction of a physician although there was no evidence that the sample was taken in connection with the treatment of defendant's injuries. The sample was then placed in a vial and delivered to a state policeman who sent it to the state crime detection laboratory where it was analyzed by the toxicologist who testified in the case. Ibid.

[3]Literature on blood tests for intoxication is extensive. See generally Holcomb, Alcohol in Relation to Traffic Accidents, 111 A.M.A.J. 1076 (1938); Ladd and Gibson, Legal Medical Aspects of Blood Tests, 29 Va. L. Rev. 749 (1943); Ladd and Gibson, The Medico-Legal Aspects of the Blood Test to Determine Intoxication, 24 Iowa L. Rev. 191 (1939); Newman, Proof of Alcoholic Intoxication, 34 Ky. L.J. 250 (1946); Rabinowitch, Medico Legal Aspects of Chemical Tests of Alcoholic Intoxication, 39 J. Crim. L.&C. 225 (1948); 19 Texas L. Rev. 463 (1941). See also McCormick, Evidence § 176 (1954) [hereinafter cited as McCormick].

[4]93 N.W.2d at 287.

[5]See Annot., 50 A.L.R.2d 531 (1956); McCormick § 137; 8 Wigmore, Evidence §§ 2183-2184b (3d ed. 1940) [hereinafter cited as Wigmore].

[6]"If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done." Commonwealth v. Dana, 2 Met. 329, 337 (Mass. 1841) quoted in Adams v. New York, 192 U.S. 585, 595, (1904).

[7]"When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question." Ibid.

[8]The common law rule of admissibility is still followed without qualification in 24 states: Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisi-

The common law doctrine was not seriously challenged by the courts until *Boyd v. United States*[9] was decided in 1886. In that case the United States Supreme Court stated that the fourth amendment prohibition against illegal searches and seizures[10] was related to the fifth amendment protection against self-incrimination[11] so as to exclude from evidence documents obtained by an illegal search. This decision was followed by the Supreme Court until 1904 when *Adams v. New York*[12] virtually repudiated the *Boyd* case by limiting its application to legislative enactments and court procedures which permitted illegal searches and seizures, but not to the admissibility of evidence even though wrongfully obtained.

The law remained undisturbed on the subject until *Weeks v. United States*[13] was decided in 1914 in which the so-called federal, or exclusionary, rule was adopted by the Supreme Court. The Court said that evidence obtained through an illegal search and seizure was inadmissible against an accused in a criminal prosecution in a federal court when a timely objection to the use of such evidence had been made. Judge Learned Hand, in a later case,[14] expressed the reason for the adoption of this rule:

> "[E]xclusion is the only practical way of enforcing the constitutional privilege. In earlier times the action of trespass against the offending official may have been protection enough; but that is true no longer. Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be suppressed."[15]

The *Weeks* decision does not of itself apply to the states,[16] but in

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ana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Utah, Vermont, Virginia. See Annot., 50 A.L.R.2d 531, 543 (1956).

[9]116 U.S. 616 (1886).

[10]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."

[11]U.S. Const. amend. V: "nor shall be compelled in any criminal case to be a witness against himself."

[12]192 U.S. 585 (1904).

[13]232 U.S. 383 (1914).

[14]United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).

[15]Id. at 499.

[16]"As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures.... What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." 232 U.S. at 398.

Rochin v. California[17] the Supreme Court held that the *Weeks* rule could be applied to the states through the fourteenth amendment[18] in cases which are so barbarous as to *shock the judicial conscience.*[19] Even so, as the Court said in *Wolf v. Colorado,*[20] a violation of the fourth amendment by state officials does not entitle the accused to rely on the fourteenth amendment.[21] The *Weeks* rule, however, is followed by the courts of the federal system and has also been adopted as a rule of evidence in twenty-four states.[22]

Most states adopting the *Weeks* rule have done so on the same theories advanced by the Supreme Court. In all of these states it has been applied exclusively in criminal prosecutions and generally only when the party seeking to introduce the evidence or his agent was guilty of the illegal seizure.[23] Michigan adopted the exclusionary rule in 1919 in *People v. Marxhausen.*[24] This decision was based on a section of the Michigan Constitution[25] that is very similar to the fourth amendment of the United States Constitution[26] upon which the *Weeks* case was based.

Heretofore, Michigan, like all the other states following the exclusionary rule, had limited its application to criminal prosecutions

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[17]342 U.S. 165 (1952), noted in 9 Wash. & Lee L. Rev. 192 (1952).

[18]U.S. Const. amend. XIV, § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[19]342 U.S. at 172.

[20]338 U.S. 25 (1949).

[21]Ibid. The Court considered the specific protection provided in the fourth amendment to be so basic as to be included in the general concept of due process of law, but said the fourteenth amendment would apply to the states only in order to give the defendant his remedy at law against the offending officials. The Court would not go so far as to impose upon the states the federal exclusionary rule.

[22]The Weeks rule has been adopted by 24 states: Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, Wyoming. Alabama and Maryland have statutes that exclude illegally obtained evidence in some cases but allow it in others. See Annot., 50 A.L.R.2d 531 (1956). See also Wolf v. Colorado, 338 U.S. 25, app. 33 (1949).

[23]People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935); Gilliam v. Commonwealth, 263 Ky. 342, 92 S.W.2d 346 (1936); State ex rel. Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928); Annot., 50 A.L.R.2d 531 (1956). However, the validity of this long-established rule has recently been questioned in the federal courts in the case of Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958). See also Parsons, State-Federal Crossfire in Search and Seizure and Self-Incrimination, 42 Cornell L.Q. 346 (1957).

[24]204 Mich. 559, 171 N.W. 557 (1919).

[25]Michigan Const. art. 2, § 10: "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." With the exception of New Jersey and Iowa every state has a similar provision. See Annot., 50 A.L.R.2d 531 (1956).

[26]See note 10 supra.

in which prosecuting officials had obtained evidence in an illegal manner.[27] Therefore, the *Lebel* case apparently represents a considerable departure from the usual application of the *Weeks* rule in two respects: first, the rule was applied in civil litigation; secondly, the evidence was excluded even though the party offering it was innocent of any improper actions. The wisdom of these extensions is open to question.

The *Weeks* rule by its very nature obstructs the truth by excluding logically relevant and material testimony.[28] For this reason it has been felt that the rule should be strictly and sparingly applied by the courts.[29] Under the common law there was a strong policy that all logically relevant evidence should be admissible. There are two principal reasons for the deviation from that traditional rule: (1) to police the law enforcement agencies by excluding evidence illegally obtained, and (2) to protect fully the civil rights of a defendant from any infringement.

It is apparent that the first basis is not applicable in the *Lebel* case. Since the wrongdoer was neither a party to the case nor an agent of the party offering the evidence, the exclusion of the evidence does not constitute a sanction against the offending party.[30] Therefore, the protection of the offended party's constitutional rights is

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[27]E.g., People v. Bissonette, 327 Mich. 349, 42 N.W.2d 113 (1950); People v. Stein, 265 Mich. 610, 251 N.W. 788 (1933); People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919).

[28]Wigmore refers to the Weeks rule as one of: "those rules which rest on no purpose of improving the search after truth, but on the willingness to yield to requirements of Extrinsic Policy." 8 Wigmore § 2175. See also McCormick § 74.

[29]"Owing perhaps to the plain impracticability of pushing the Federal rule to its logical extreme in all aspects, the Federal Courts have set strict limits to it in its later development." 8 Wigmore § 2184a. Both Wigmore and McCormick have stated that the rule for the exclusion of evidence illegally obtained should be classified as a rule of privilege rather than a rule of exclusion. The rationale behind this classification is that the rule does not exclude evidence because of the unreliability of such evidence but because of the illegality of means by which it was obtained. Therefore, as in the case with all privileges, the rule should be applied very strictly and sparingly.

[30]The possible result of this rule may be compared with an example used by Wigmore in parable form. "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 of teaching people like Titus to behave, and incidently 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 else who broke something else." 8 Wigmore § 2184.

the only remaining basis upon which exclusion of such evidence may be justified. The Michigan Supreme Court felt that the circumstances in the *Lebel* case were analogous to cases in which a defendant is compelled to submit to a physical examination while on the witness stand and therefore is a violation of a constitutional privilege.[31] This analogy appears questionable because there is no element of compulsion in *Lebel;* the plaintiff merely sought to introduce evidence obtained by a third party while the defendant was unconscious.[32] However, it is not contended that there can be no violation of constitutional rights in a civil case. But it should be borne in mind that the *Weeks* doctrine, which was designed to prevent violations of civil rights, obstructs the quest for truth—the ultimate goal of any trial. Therefore, it has always been recognized that the rule should be applied only when the ends of justice are thereby served. To apply the rule in a civil case, especially when the evidence was not obtained by unreasonable or barbaric methods, seems inequitable. While the constitutional rights of the defendant may be protected by this extension, the innocent plaintiff's right to just compensation for his injuries is thereby prejudiced. This result was not reached in the *Lebel* case because other conclusive evidence precluded reversal, but to allow the extension to be applied when the plaintiff's case depends on the excluded evidence will result in this injustice.

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[31]93 N.W.2d at 285-87, citing People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928); Cluett v. Rosenthal, 100 Mich. 193, 58 N.W. 1009 (1894); Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 184 So. 426 (1938); Haynes v. Haynes, 43 N.Y.S.2d 315 (Sup. Ct. 1943).

[32]"In other words, it is not merely any and every compulsion that is the kernel of the privilege, [against self-incrimination] in history and in the constitutional definitions, but testimonial compulsion." 8 Wigmore § 2263. See also State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953).