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Note and Comment

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NOTE AND COMMENT

THE MORTGAGES IN POSSESSION IN NEW YORK AND IN MICHIGAN.—It is interesting to observe how tenaciously the old common law of mortgages has persisted in the state of New York, the very cradle of the modern lien theory of the mortgage. As early as 1802 Chancellor KENT began the importation into that state of Lord MANSFIELD'S Civil Law doctrines of mortgage. *Johnson* v. *Hart*, 3 Johns. Cas. 322. In 1814, in the case of *Runyan* v. *Mersereau*, 11 Johns. 534, the lien theory definitely triumphed over the old law. In other cases, both before and since the statute of 1828 denying ejectment to the mortgagee, the details of mortgage law were worked over to harmonize with the central theory.

Yet at all times there was a discordant element in the cases dealing with the mortgagee in possession. This became most obvious in the case of *Phyfe* v. *Riley*, 15 Wend. 248, decided by the Supreme Court in 1836. It was there held that to an action of ejectment it was a complete defense to show that defendant was an assignee of a mortgage past due. Three distinct arguments are advanced in the opinion: one of policy, that litigation and expense are saved by permitting the mortgagee in possession to retain possession until redeemed, instead of allowing him to be turned out by an action of ejectment and so putting him to an action of foreclosure; an argument as to the technical nature of a mortgage, that the mortgagee "is still considered as having the

legal estate after condition broken"; and lastly the argument from authority, with citation of earlier New York cases upon the mortgagee's right of possession. The argument of policy leaves us at best upon debatable ground. The argument that the mortgagee had a legal title after default was out of harmony with the later cases. And the argument from the authorities was an appeal to decisions which were subject to reconsideration in the light of the admittedly revolutionary theory of the mortgage at this time prevailing. We may accept the ruling that the statute denying ejectment did not necessarily alter the substantive rights of the mortgagee, for there are several instances in which our law recognizes a right although there is no direct action available for its enforcement, *e. g.*, in the case of contracts unenforceable under the Statute of Frauds or the Statute of Limitations. The difficulty was that there had been a judicial amendment of the law of mortgages, which made the recognition of a right of possession in the mortgagee an anachronism. This doctrine, however, found favor in the courts of New York (and elsewhere, of course, but that is another story) so that by 1875 the anomaly was imbedded in a dozen or more decisions and dicta.

In *Phyfe* v. *Riley* we are not told how the defendant got into possession, and the only indication that the court attached any importance to that matter lies in the observation that "if the mortgagee, after forfeiture, obtains possession *in some legal mode*," there is no reason for depriving him of it. "Legal mode" was, of course, a question-begging expression, but it is quite clear that it was not intended to limit the mortgagee to an entry under circumstances, such as consent of the owner, which would legalize an entry by an entire stranger. At the same time, obvious considerations of public policy prohibited the legalization of an entry by force, perhaps by fraud as well. Thus the state of the law was fairly summed up by DENIO, J., in *Pell* v. *Ulmar*, 18 N. Y. 139, in the dictum that, "if the mortgagee obtains possession *without force* he is entitled" to hold it. Perhaps the most important application of this doctrine was to the case of one who took possession under a defective foreclosure. Thus in *Fox* v. *Lipe*, 24 Wend. 164, where ejectment was brought against a mortgagee who had entered under a statutory foreclosure, it was held to be unnecessary to decide whether the foreclosure was valid or void. And in *Townshend* v. *Thomson*, 139 N. Y. 152, it was said, "A purchaser at a mortgage foreclosure sale, defective and void as against the owner of the equity of redemption because he was not made a party to the foreclosure action, becomes a mortgagee in possession."

The last citation brings us down to 1893. In the meantime, however, a counter tendency had begun to show itself. In the case of *Howell* v. *Leavitt*, 95 N. Y. 617, decided by the Court of Appeals in 1884, a mortgagee foreclosed by action without making the owners of the equity of redemption parties, purchased on the foreclosure sale, and, with the aid of a writ of assistance, put out the party in possession, who was a tenant of the owners of the equity, and so got into possession. The owners of the equity brought ejectment and were successful. Emphasis was put upon the forcible method of gaining possession, but Justice FINCH, with characteristic force, showed the true nature of the previously accepted doctrine of the mortgagee in possession as

an isolated survival of an outworn creed. This case was followed, in 1908, by *Barson* v. *Mulligan,* 191 N. Y. 306, in which it was held that one who went into possession as lessee of a life tenant was not, by the purchase of an outstanding mortgage, entitled to retain the possession after the death of the life tenant, without the consent of the then owners. Emphasis was put upon the defendant's covenant to surrender possession at the termination of the lease and upon the fact that she never asserted any right of possession under the mortgage, but the court again criticized adversely the old doctrine of the mortgagee in possession.

The old doctrine was certainly shaken, but it was still possible to argue that it remained the law of New York. The two cases last considered might, upon their facts, stand with it in perfect harmony. The former was within the long recognized exception as to possession forcibly obtained; the latter might be regarded as a case of possession fraudulently obtained and be classed with *Russell* v. *Ely,* 2 Black (U. S.) 575, where the leasehold was in a third person who, without the consent of his lessor, delivered possession to the mortgagee after the expiration of his lease.

But a further blow has now been struck at the old doctrine. In the case of *Hermann* v. *Cabinet Land Co.,* 217 N. Y. 526, 112 N. E. 476, decided by the Court of Appeals in April, 1916, the facts were like those of *Howell* v. *Leavitt,* supra, except that the purchaser at the foreclosure sale appeared to have taken possession without the use of force, so that the case came squarely within the older authorities. The court, however, declined to distinguish the case from that of *Howell* v. *Leavitt,* disposed of *Townshend* v. *Thomson* by resting it upon acquiescence of the owner, again condemned the doctrine of the older cases, and declared that in order to establish the rights of a mortgagee in possession, one must show entry *with the consent of the owner,* or "otherwise lawful," the latter expression now clearly meaning, in the light of all that is said in this case and that of *Barson* v. *Mulligan,* an entry which would be lawful without aid of the mortgage, for "it is plain that the mortgagee has no means of getting possession that a stranger has not." (*Barson* v. *Mulligan.*) The New York courts have arrived at last at the logical position which the Supreme Court of Michigan took when first presented with this problem forty years ago. *Newton* v. *McKay,* 30 Mich. 380.

The lien theory of the mortgage might now seem to have completely triumphed in New York, and the problem of the mortgagee in possession to have been finally solved. It is submitted, however, that some ground remains to be cleared. It is the theory of the latest cases that the mortgagee has, by virtue of his mortgage alone, no greater right to enter than a stranger—he may enter only with the consent of the owner, or under other circumstances (if any there be) which would authorize entry by a stranger. But suppose he enters with the consent of the owner, what is his right then? If his mortgage gave him no more right to enter than a stranger's, does his mortgage give his entry with the consent of the owner any greater effect than a similar entry by the stranger? If not, is he more than a tenant at will? The Supreme Court of Michigan has never gone further than to say that he cannot be turned out without notice. *Byers* v. *Byers,* 65 Mich. 598. The Court of Ap-

peals of New York has held, as late as the case of *Townshend* v. *Thomson*, (now interpreted as resting on acquiescence,) that the mortgagee in possession can defend his possession until his mortgage is paid. That case has not as yet been questioned as to this point, but it will be sooner or later and the courts will have to decide whether they will follow the logic of the lien theory further, or cling to this fragment of the older law.

E. N. D.

DOWER IN AN ESTATE IN FEE SUBJECT TO AN EXECUTORY DEVISE.—For the first time the question whether a wife has dower in an estate held by her husband in fee subject to an executory devise has arisen in Rhode Island. *Sheffield* v. *Cooke*, 98 Atl. 161. One J. J. C., seised in fee, devised lands to his son, H. W. C., his heirs and assigns forever, "if, however, * * * my younger daughter A. E. C. survive my said son and his descendants," then all lands over to X. H. W. C. married, had two children who are living, and died, his wife A. H. R. C. surviving. A. E. C. is still alive and H. W. C.'s wife is claiming dower. While it is evident that since H. W. C.'s descendants are still living the contingency on the happening of which the fee in H. W. C. would be terminated has not occurred, yet as it was necessary for the court to decide whether any dower set off to A. H. R. C. would be terminated if the executory limitation should take effect, the question was squarely raised. The court decided it in accordance with the weight of authority, that the happening of the contingency and the limitation of the estate of the husband over to X would have no effect on the dower rights of the wife.

It might be thought that because dower and curtesy are at least dependent upon an estate in the husband or wife, as the case may be—if they are not even incidents of that estate—that any termination of such estate would destroy or terminate the dower or curtesy. But a long time ago some decisions were made which are hard to explain other than as exceptions to the above seemingly logical statement. By these decisions it was settled that curtesy or dower persists in a fee simple estate which has escheated for want of heirs, or in a fee tail estate which has reverted to the grantor because of failure of the specified sort of heirs. *Paine's Case* (*Sammes* v. *Paine*), 8 Coke 34a, 77 Eng. Rep. 524; 2 COKE, LITTLETON, (Butler and Hargrave's edition), 241a, note. Why these cases were decided as they were is rather hard to say. Reasons have been given, such as COKE'S "for that it is *taciie* implied in the gift." But, as BRIGHT queries, if the estate itself has been defeated by the death of the holder without heirs why should a mere incident of that estate, a something attached to it *tacite*, by implication, survive? Probably because the early judges desired to protect dower and curtesy, and after having done so, sought to explain their action by principles "rather to be guessed at than demonstrated." 2 BRIGHT, HUSBAND & WIFE, 467.

However if the estate granted to the husband was subject to a condition subsequent, for breach of which the grantor entered, then by legal legerdemain the grantee's estate was considered as void *ab initio* and, of course, the dower attached to such estate perished. PARK, DOWER, 70; 4 KENT, COMM. (12th ed.) 49.

KENT distinguishes between these two cases (4 KENT, COMM. (12th ed.) 34,) in that where a donor enters for a breach of condition he destroys the estate he had granted, whereas when an estate escheats or reverts it merely shifts, and whatever incidents were attached to it persist. This is not a distinction without a difference and arises logically if it be granted that COKE correctly stated the law when he said that to every estate granted there was *tacite* granted also the right to have dower attach to that estate though the heirs to whom the estate was granted fail, and that PARK correctly stated the legal theory that the entry of a grantor for condition broken avoids the estate.

So when we come to the question whether dower should persist in an estate in fee subject to an executory devise, but one thing need bother us: does such a limitation shift the estate, or does it, like an entry for condition broken, avoid the estate? The courts have not openly answered this question, and the majority of them have been content to follow *Buckworth* v. *Thirkell,* 3 Bos. & Pul. 652, 127 Eng. Rep. 351, note. This case decided that a husband was entitled to curtesy in an estate held by his wife in fee simple, subject to an executory devise. The courts apparently in following *Buckworth* v. *Thirkell* have often failed to understand the mooted questions they were so lightly passing over. Lord MANSFIELD, in rendering his opinion in *Buckworth* v. *Thirkell,* proceeded on the theory that an executory devise was merely a limitation, in the sense that a fee tail estate is limited, rather than a condition; that, consequently, the rule which earlier cases had made applicable to limited estates was applicable here, *i. e.,* that dower was not barred. PARK contends that an executory limitation is really a conditional limitation to which the contrary rule should apply. As a reason for this belief he cites the fact that the devisee of an estate in fee subject to an executory limitation over could not prevent the operation of the limitation, whereas the devisee of an estate tail could bar the entail, and, moreover "the distinguishing feature of all devises in fee subject to an executory devise is, that after the whole fee is first devised, it is made *defeasible* by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates on condition." PARK, DOWER, 83. Other writers have agreed with PARK: 4 KENT, COMM. (12th ed.) 50; 2 BRIGHT, HUSBAND AND WIFE, 467. Some few cases have been content to follow these text writers rather than the case of *Buckworth* v. *Thirkell*: *Weller* v. *Weller,* 28 Barbour (N. Y.) 588; *Hatfield* v. *Sneden,* 42 Barbour (N. Y.) 615; *Edwards* v. *Bibb,* 54 Ala. 475. But the vast weight of authority is in accord with *Buckworth* v. *Thirkell. Moody* v. *King,* 2 Bing. 447; *Evans* v. *Evans,* 9 Barr (9 Pa.) 190; *Northcut* v. *Whipp,* 12 B. Mon. (Ky.) 65; *Millege* v. *Lamar,* 4 Desaus. (S. C.) 617. In support of these cases which have allowed dower or curtesy in such an estate, propably all the reasons of policy, which made COKE and his associates anxious to preserve rather than to defeat dower and curtesy, still exist. Besides this, there is that sanction which comes from any law, logical or illogical, that is venerable if not venerated. Probably it breeds less confusion to have another jurisdiction sanction and adopt a rule which most of

its neighbors have long sworn by, if the rule is not vicious, than to have it declare and uphold a rule possibly more logically in accord with some of the antique land laws. H. J. C.

WHAT CONSTITUTES "BEING ON DUTY" UNDER THE HOURS OF SERVICE ACT.—The Federal HOURS OF SERVICE ACT of 1907 (34 Stat. at L. 1415, Comp. St. 1913, §§ 8677-8680) provides, in part, that it shall be "unlawful for any carrier * * * to require or permit any employe * * * to be or remain on duty for a longer period than sixteen consecutive hours;" with the further proviso in § 2: "Provided that no operator, train dispatcher, or other employe, who, by the use of telephone or telegraph dispatches, receives or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day * * *." A proviso is also stated, excusing such overtime service in case of "emergency, unavoidable accident, or act of God." In the recent case of *Oregon Short Line R. Co.* v. *United States*, 234 Fed. 584, the Circuit Court of Appeals for the Ninth Circuit held that the defendant company was liable to the penalties imposed by this Act, even though the company had expressly forbidden and prohibited its telegraph operator to work more than nine hours, and he, in violation of said instructions, put in three hours overtime without the company's knowledge, and not as an operator, but at clerical work; that Congress had originally inserted the word "knowingly" before the word "permitted," but had later stricken it out, thereby showing the intention that the act should cover exactly such a case as that before the court; that the defendant was charged with knowledge of the acts of its servants; and that under any other view the manifest purpose of the statute would be defeated, as convictions would under such circumstances be practically impossible.

As the Circuit Court of Appeals points out, the purpose of the HOURS OF SERVICE ACT is not penal, but remedial—to protect not only the employes of the railroads, but to protect also the safety of the public; and the courts have kept this purpose in view in their interpretation of the ACT and in their definition of its terms, as will appear from an examination of the cases that have arisen under the ACT.

Thus the carrier cannot avoid the provision against requiring or permitting an employe from remaining on duty for a "longer period than nine hours in any twenty-four-hour period" by dividing the hours of service into two periods, if the aggregate hours of service each day of twenty-four hours exceed nine hours. *U. S.* v. *St. Louis Southwestern Ry. Co. of Texas*, 189 Fed. 954. As to the possibility of breaking up the period of service, THORNTON summarizes the authority as follows: "The time can be divided, provided such break is bona fide and customary; the term "period" does not mean a cycle, or something continuous, as Congress had no intention of overriding such well known customs." THORNTON, FEDERAL EMPLOYER'S LIABILITY AND SAFETY APPLIANCES ACTS, (2 ed. § 246. In *U. S.* v. *Northern Pacific R. Co.*, 213 Fed. 539, it was held that a lay-off of a train crew for one and one-half hours by

a superior while the train was held to permit superior trains to meet and pass, did not break the continuity of the service, but must be counted in the reckoning of sixteen hours. This decision was due to the fact that the necessity of such delay is not within the term "emergency," and also that such a lay-off was not bona fide. On the other hand, a lay-off of three hours at noon by an authorized superior was held to be bona fide, as it was customary, and gave the employee a real opportunity for rest and recuperation. The court furthermore said that this interpretation would not open the way to the abuse of working a man, say one hour in every three, thus giving him no real opportunity for rest and recuperation, as such cases would be covered by the provision that "all employes have at least eight consecutive hours off duty in each day, counting from some point in the next day." *Atchison, T. and S. F. Ry. Co.* v. *U. S.*, 117 Fed. 114. So also in *Southern Pacific Co.* v. *U. S.*, 222 Fed. 46, 137 C. C. A. 584, it was held that such a lay-off is bona fide, even during delay of a train, if it gives time for a substantial and opportune period of rest. The period of service cannot be broken by the crew itself, but only by order of a superior, as shown by the case of *Denver & R. G. Ry. Co.* v. *U. S.*, 233 Fed. 62, in which the crew, after a derailment, retired to a farm house for food and rest, leaving the engine in charge of a watchman, until the arrival of the derrick, there being no superior present to release them. The period of rest was consequently counted in as part of the sixteen-hour period of service.

As regards the phrase "office continuously operated night and day," it has been held that an office required to be kept open for business from 6:30 a. m. to 10:30 p. m. is such an office, and no employe shall be permitted to work therein over nine hours per day. *U. S.* v. *Southern Pacific Co.*, supra.

An employe is held to be "on duty" even though inactive, where he is under orders, and liable to be called at any moment, or where he is at his post in obedience to the rules of his superior whether actually at work, or simply awaiting orders. *Missouri, K. & T. Ry. Co.* v. *U. S.*, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed., *U. S.* v. *Chicago & P. S. Ry. Co.*, 195 Fed. 783.

It is also settled that the words "other employe" in § 2—"Provided that no operator, train dispatcher, or other employe who, by the use of telephone or telegraph dispatches, receives or delivers orders pertaining to or affecting train movements—etc." do not include train conductors. *U. S.* v. *Florida East Coast Ry. Co.*, 222 Fed. 46, 137 C. C. A. 571.

And now as to what causes of train delay are held to constitute "emergencies, unavoidable accidents, or acts of God." It is held that while the terms do not include the ordinary accidents incidental to good railroading, a derailment is not incidental to good railroading, and the crew of a derailed train may be required to remain on duty for more than sixteen hours, and the company not be liable. *U. S.* v. *Northern Pacific Co.*, 215 Fed. 64. Furthermore, it makes no difference whether the derailment was the result of the defendant's negligence or not. The question is not how the accident was brought about, but, having occurred, how can the public best be protected, and the company is intended to be left free to meet the emergencies as the best interests of the public demand. So, too, the unforeseeable insub-

ordination of a fellow employe, or his death, or illness, may constitute an "emergency" within the meaning of § 2, however, justifying the retention of an operator overtime; and this regardless of the lack of justification for such insubordination. *U. S.* v. *Denver & R. G. Co.*, 220 Fed. 293, 136 C. C. A. 275; *U. S.* v. *Southern Pacific Co.*, 209 Fed. 562, 126 C. C. A. 384. In case of accident, the company is not deprived of the benefit of the proviso unless the accident was one which could have been foreseen and prevented by the exercise of the high degree of diligence demanded. Examples of such causes, deemed not sufficient to excuse the defendant, are: side-tracking for late train; running out of steam; hot box; unusually heavy movement of grain; high wind or storm causing delay, but not obstructions or breaks in the track. *U. S.* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828, 121 C. C. A. 136; *Great Northern Ry.* v. *U. S.*, 218 Fed. 302, 134 C. C. A. 98. In case of wreck, if the crew is kept on duty wholly because of the derailment, the defendant is excused for the overtime service, but if they could have been relieved after the wreck by the exercise of due diligence, and were not, the benefit of the proviso is withdrawn from the company. *San Pedro L. A. & S. L. Ry. Co.* v. *U. S.*, 220 Fed. 737, 136 C. C. A. 43. In another instance, the dispatcher knew of a wreck on the line, but relied on a message from the wrecked train that the track would be cleared in thirty minutes, and sent out a waiting train. Due to delay in clearing the track, the crew of the latter train was kept on duty more than sixteen hours, and it was held that the over-time service was caused, not by the derailment, but by the order of the dispatcher, and that the latter should have waited for more trustworthy information, remarking that the "duty of the carrier to comply with the statute must be placed above its zeal to hasten transportation." H. R. H.

ADMISSIBILITY OF ARTICLES TAKEN FROM THE ACCUSED OR HIS PREMISES WITHOUT A SEARCH WARRANT.—In *Flagg* v. *United States*, 233 Fed. 481, an indictment for fraudulent use of the United States mails, the Circuit Court of Appeals for the Second Circuit held that incriminatory articles, papers, etc., taken from the defendant's place of business by municipal policemen, without a search-warrant, could not be used as evidence against him, because such action was violative of the Fourth and Fifth Amendments of the Federal Constitution.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The Fifth Amendment provides inter alia, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

The defendant was arrested by the municipal patrolmen without a warrant and taken to the post office building where he was arrested under a warrant charging a violation of a criminal code protecting the use of the mails. At

the same time the patrolmen arrested the accused without a search warrant they took his papers and books from his office to the post office. But no search warrant was even then sworn out against them. At the trial these papers were used as evidence and because of such use the Circuit Court of Appeals reversed the decision.

The weight of authority is overwhelming against the instant case. With a few recent exceptions every state has an unbroken chain of decisions admitting evidence illegally obtained. *Shields* v. *State,* 104 Ala. 35; *Gindrat* v. *People,* 138 Ill. 103, 27 N. E. 1085; *Seibert* v. *People,* 143 Ill. 571, 32 N. E. 431; *State* v. *Burroughs,* 72 Me. 479; *Commonwealth* v. *Tibbetts,* 157 Mass. 519, 32 N. E. 910; *State* v. *Kaub,* 15 Mo. App. 433. The English doctrine is with these cases. *R.* v. *Granatelli,* 7 State Trials N. S. 979; *Phelps* v. *Prew,* 3 E. & B. 430, 441.

Mr. WIGMORE (§ 2264) holds that illegal seizure does not violate the Fourth Amendment because historically considered our constitution makers incorporated it to secure the people against searches and seizures authorized by "general warrants" for the discovery of persons suspected of treasonable designs or political intrigues; such warrants—so frequently issued in England just prior to our Revolution—were finally abolished by the heroic fight of Wilkes and the wisdom of Lord Camden, *Entick* v. *Carrington,* 19 How. St. Tr. 1029. He contends that this provision was never intended to protect a party arrested upon reasonable suspicion of guilt, but that it was intended to protect the public from "general warrants" only.

He further contends that books, papers and evidentiary articles illegally seized are competent as evidence and their admission does not violate the Fifth Amendment, because a man being compelled to testify against himself is one thing, and his property and papers testifying against him is an entirely different thing. His property is a mute but effective witness as much as any other competent witness whose testimony may have been secured by illegal means. The accused and his property are two distinct witnesses.

Continuing (§ 2264) Mr. WIGMORE argues that the admission of evidence illegally obtained would never "have suffered any judicial doubt but for a modern opinion in which * * * the seeds of a dangerous heresy were sown." *Boyd* v. *United States,* 116 U. S. 616. The case decides that it does not require actual entry of premises and search for and seizure of papers to constitute an "unreasonable search and seizure" within the meaning of the Fourth Amendment, that a compulsory production by the defendant of private papers is a violation of said amendment and evidence obtained therefrom is inadmissible if obtained without a search warrant. The decision of this case goes further in protecting the accused than the facts of the instant case call for.

In *Weeks* v. *United States,* 232 U. S. 383, the facts are approximately the same as in the instant case, holding that where no search warrant has been duly issued in accordance with the Fourth Amendment all evidence obtained by such illegal search is inadmissible.

COOLEY, CONSTITUTIONAL LIMITATIONS, (6 ed.) 370, goes so far as to say that a search warrant should not even be allowed for the purpose of obtaining evidence, except in a few special cases where the subject of the crime is

concealed, and the public or complainant has an interest in its return or destruction. The power to search private books and papers should be authorized in extreme cases only. He says "the maxim that 'every man's house is his castle' is made a part of constitutional law in the clauses prohibiting searches and seizures and has always been looked upon as of high value to the citizen." LIEBER, CIVIL LIBERTY AND SELF GOVERNMENT, 62, says "No man's house can be forcibly entered or he or his goods be carried away except in cases of felony, and then the sheriff must be furnished with a warrant."

Mr. Justice BRADLEY—speaking in the *Boyd* case—is quoted in the *Weeks* case, and the instant case as follows: "The principles laid down in this opinion affect the very essence of constitutional liberty and security * * * they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

According to these cases the effect of the Fourth Amendment is to put the courts and officers under limitations which are provided in the Fourth Amendment, that without a search warrant a man's private matters may not be searched, and that they may be searched under a search warrant only when the requirements of the Constitution are all present, to-wit: a reasonable search, upon probable cause, supported by oath, with a particular description of the place or person to be searched.

But granting that an illegal search and seizure is itself unlawful, the question still remains, does this illegal taking so vitiate and disqualify the evidence of crime thus obtained as to make it inadmissible as evidence? If so, upon what theory? The instant case holds that the Fourth and Fifth Amendments are so closely related in spirit and purpose that evidence obtained by a violation of the Fourth Amendment and offered on trial, constitutes a violation of the Fifth Amendment, because in effect it compels a man to incriminate himself, and hence is inadmissible.

The courts holding the contrary doctrine hold there is not so close a relation between the two amendments that the evidence by its illegal procurement becomes violative of the Fifth Amendment.

The court in *Weeks* v. *United States*, 232 U. S. 383, 395, in quoting from *People* v. *Adams*, 176 N. Y. 351, says, "the underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence." Many cases sustaining the above quoted theory may be found in a note to *State* v. *Turner*, 82 Kan. 787, in 136 Am. St. Rep. 129 at page 135.

It is left for future decisions to indicate what influence *Weeks* v. *United States* and the instant case, in following *Boyd* v. *United States*, will have upon the old rule admitting illegally-obtained evidence to assist in convicting for crime.

G. C. C.