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Chapter 22: Evidence

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CHAPTER 22

Evidence

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§22.1. Exclusion of evidence because of illegal search and seizure.

The constitutional provision that evidence obtained as a result of an illegal search and seizure is inadmissible in evidence was applied by the Supreme Judicial Court during the 1964 Survey year less rigidly than in the past. In Commonwealth v. LaBossiere the Court affirmed the defendant's burglary conviction where the principal evidence against him was recovered from a car he was in after it had been stopped for a motor vehicle violation. The officer discovered the stolen goods by looking inside the car with the aid of a flashlight, but he did not enter the car at that time. The Court distinguished this police conduct, which it declared was not a search, from that in Commonwealth v. McCleery, where the officer actually entered the car after he discovered the evidence. By making trespass a necessary element of a search in the constitutional sense, the Court has removed from Fourth Amendment prohibition many kinds of police action involving prying into an individual's affairs which could possibly be as repugnant to our sense of privacy as acts which do involve physical trespass. However, this decision does provide a standard which can be readily administered in the lower courts and does allow the introduction of more evidence than would be admissible under a broader definition of search.

In the LaBossiere case the Court condemned the practice of submitting to the jury any issue concerning the admissibility of evidence which allegedly resulted from an illegal search and seizure. However, since the judge had already ruled on the same issue by denying a motion to suppress, it appeared that he thought the evidence admissible, and any error was therefore harmless. Since the defense counsel had failed to object to the submission of this issue to the jury, the Court refused to reverse as a result of the error.

Commonwealth v. Palladino seems to liberalize the previously rigid application of the rule excluding the fruits of an illegal arrest. The

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defendant, who was convicted on a larceny indictment, argued that the statements he had made to the police after his arrest were inadmissible, as fruits of an illegal arrest, since he had been arrested in Somerville by a Winchester police officer who did not have probable cause to believe he had committed a felony. The Court held that, even assuming the arrest was illegal, statements made one hour later at the police station were admissible because they were not "come at by exploitation" but "by means sufficiently distinguishable to be purged of the primary taint." This standard, which follows that laid down by the United States Supreme Court, allows the admission of evidence which would be inadmissible under the strict "but for" principle of causation which the Court seemed to follow in earlier cases.5

Commonwealth v. Lehan6 also reflected this trend away from the rigid application of Mapp both in dealing with the validity of a statute permitting a threshold inquiry and detention without arrest by a police officer and also in application of the fruits doctrine. Late one night when two police officers, one of whom had previously known the defendant, spotted him walking down the street carrying two large boxes, they stopped him to inquire about the contents of the boxes and the purpose of the trip. He explained that he was leaving his wife, moving to a room, and taking a hairdryer, silverware, and presents with him. Suspicious, the officers at this point verified the contents of the cartons and then requested the defendant to accompany them to his home to verify the story. When Mrs. Lehan failed to corroborate, they arrested Lehan, searched him, and later verified that the articles in his possession were stolen. The Court, threading its way through contrary federal precedents like a broken field runner, upheld the constitutionality of a statute permitting police officers to make an initial inquiry into the activities of people abroad in the night without making an arrest.

To reach this result the Court distinguished Henry v. United States,7 which seemed to hold that officers could not stop an automobile on suspicion unless they had probable cause to believe the occupants had committed a crime, by observing that in the Henry case the government had unnecessarily conceded that an arrest had been made at the time of the initial detention. Moreover, later federal cases failed to construe Henry as holding that all threshold detentions and inquiries are forbidden. The Supreme Judicial Court also relied upon Ker v. California,8 which distinguished between rules that are applicable only to the federal courts and rules having a constitutional basis which

5 Compare Commonwealth v. Spofford, 543 Mass. 703, 708, 180 N.E.2d 673, 677 (1962), where the Court, in excluding evidence under the fruits doctrine, said that a police station was "no environment to make a free choice even where the record is barren of evidence of threats, duress, coercion or promises made by the police officers."


§22.1 EVIDENCE

are thus also applicable to the state courts. *Ker* also permitted the states to adopt "workable rules which meet the practical demands of effective criminal investigation and law enforcement." Finally, the Court was influenced by the fact that if a threshold inquiry were unconstitutional, many defendants, whose rights of privacy had been invaded in only the slightest degree, would be able to escape conviction.

Once the Court found the threshold inquiry valid under the circumstances of this case, it proceeded to find that the search of the defendant's cartons at the time of the initial detention, prior to his arrest, was invalid, being neither incidental to an arrest in search for weapons, nor pursuant to a valid warrant, and reversed the conviction upon this ground. However, again applying the fruits doctrine in a restrictive manner, the Court looked at all the legitimately acquired evidence and concluded that it was sufficient to justify an arrest, even though the officers in making the arrest may have, in fact, been relying upon the illegally obtained evidence to a large extent. Again, the Court seemed to require convincing proof that further evidence had been obtained by exploitation of the original search before applying the fruits doctrine.

The importance of a search warrant is vividly illustrated by two cases in which the state police made arrests for illegal bookmaking. In *Commonwealth v. Mekalian* officers caught the defendant in the act, arrested him, seized the racing sheets, and, upon searching him, found $105, which the defendant admitted was the profits from the illegal activity. The Supreme Court allowed a motion to suppress all the evidence seized; the arrest was illegal even though the offense had been committed in the officers' presence, since it was only a misdemeanor and not a breach of the peace.

On the other hand, in *Commonwealth v. McDermott* the police moved more slowly. For two days Trooper Neilsen kept a lunchroom under surveillance and observed bookie operations carried on by the defendant. He and a fellow officer then obtained a search and arrest warrant, commonly called a bookie warrant. Neilsen then proceeded to the premises, observed further bookie operations, and pointed out the defendant to the officer making the arrest, who had made none of the observations necessary to obtain the warrant or make the arrest. The Court, however, held that since the knowledge of one officer in a cooperative effort was the knowledge of all, the arrests and convictions were valid.

In summary, the general attitude shown by the Supreme Judicial Court in the area of unreasonable search and seizure has brought about an effective accommodation between the interests of individual privacy and effective law enforcement. The limitation of the application of the fruits doctrine to only those cases in which there was exploitation

9 346 Mass. 496, 194 N.E.2d 390 (1963), noted in §11.2 supra.
of illegally seized evidence, the validation of the right of the police to make threshold inquiries, and increasing sophistication on the part of the police have contributed to this accommodation. Technicalities in the law, particularly those concerning the right to arrest and searches made incident to arrest, will continue to provide substantial litigation in this field for many years to come.

§22.2. Right to counsel: Admissions. In 1964 the United States Supreme Court, in the cases of Massiah v. United States¹ and Escobedo v. Illinois² extended the constitutional protection of the right to counsel by holding that unless that right had been specifically waived, after defendant had been advised of it, statements made in the absence of counsel were inadmissible in evidence if made after the investigation had shifted from the investigatory phase to the accusatory phase. The Supreme Judicial Court first applied this doctrine in Commonwealth v. McCarthy.³ Many of the difficult problems raised by the United States Supreme Court concerning the point at which the right to counsel exists were not present here, because the statement made to the police in the absence of counsel, which had been retained for defendant by his mother, was made after he had been indicted.

In reversing the conviction and ordering a new trial, the Court was not concerned that there was other evidence from which the jury might have convicted the defendant because it found "a reasonable possibility that the confession might have contributed" to it. The doctrine of harmless error was not applicable.

The Escobedo and Massiah cases have wrought changes in the law of criminal evidence as profound as those brought about by the Mapp case in 1960, but the precise scope of the rules of those cases and their effects upon state law must be made clear by the United States Supreme Court in future cases. In the meantime, the courts of the Commonwealth will have the difficult task of applying their broad principles to a wide variety of statements made by the defendant and of reaching results that are both fair to the accused and productive of orderly administration of justice.

§22.3. Legislation. The legislature in 1964 updated the statute¹ requiring parties to personal injury cases to furnish the adverse parties with a copy of any statement signed by them within ten days or lose the use of it in court proceedings. Recognizing the widespread use of recording devices by investigators who customarily obtain such statements, the legislature required the party recording such a statement to furnish a verbatim written transcription within ten days of demand or lose the right to use the statement in a courtroom.² Thus, the legislature took another small step forward toward requiring ade-
quate pretrial discovery. The oral discovery bill, which would have opened the door wide, was, however, resoundingly defeated.

§22.4. Land damage evidence. The substantial number of land damage cases tried in the Commonwealth in 1964 produced two significant opinions pertaining to the law of evidence.

Consolini v. Commonwealth,1 concerning the taking of a gravel bed, for the most part emphasized the discretion vested in the trial judge on questions of relevancy but also showed how that discretion can be abused. The Supreme Judicial Court upheld the trial judge in excluding evidence of a royalty agreement in effect at the time of the taking, even though such an agreement is analogous to a lease and is likely to be indicative of the amount of return the owner was receiving for his land. The trial judge's exclusion of the value of the gravel in place was likewise upheld, despite the fact that this was evidence of one of the principal elements making up the value of the land and that, presented in this form, it would not tend to confuse a jury the way evidence of the fair market value of the severed mineral would.

The trial judge allowed an expert to testify for the Commonwealth, although the expert, who had an extensive real estate background, had appraised only one other gravel bed. Again, the Court held that the qualification of an expert was within the sound discretion of the trial judge.

Discretion has its limits, however. The trial judge refused to admit evidence of two practically contemporaneous sales of contiguous parcels of land also operated as gravel pits, on the ground that while the parcel taken constituted eleven acres, the two sales offered were of parcels of one-fifth of an acre and forty acres. The Supreme Court held that the judge had committed reversible error and granted the petitioner a new trial.

Proof of the value of mineral-bearing land can sometimes be extremely difficult. In this case, the trial court, in its discretion, excluded much evidence that might have been helpful. One of the best indicia of value is the selling price of similar land. It would seem that the Supreme Judicial Court properly held that the trial judge had abused his discretion in refusing to admit evidence of the sales of contiguous parcels.

Valley Paper Co. v. Holyoke Housing Authority2 presented another unusual eminent domain case. The taking authority took from the Valley Paper Company a parcel of land which was separated by a canal from the land on which its main plant stood. The company had a right to bridge the canal. The petitioner attempted to prove damages by showing that the land taken had unique values as a possible area for expansion so that its loss resulted in consequential damage to the factory, which was not taken. The Supreme Judicial Court held that under certain circumstances the taking of a parcel of land

§22.4. 1 346 Mass. 501, 194 N.E.2d 407 (1963), also noted in §14.26 supra.
which is, or potentially will be, used jointly with a noncontiguous parcel does require the Court to consider the severance damage to the noncontiguous parcel and went on to say that this was possibly such a case. However, the Court upheld the trial judge's exclusion of evidence of damage to the parcel not taken on the ground that no proper basis had been laid for treating the two parcels as a unit; the offer of proof did not include evidence of possible expansion onto the land taken in the foreseeable future. On this narrow ground the trial judge's ruling was sustained, emphasizing again the necessity of laying a proper foundation for evidence if it is desired to appeal its exclusion.