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The Mere Evidence Rule in California: People v. Thayer (Cal. 1966)

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respects, but who negligently allowed his license to lapse, was denied compensation because of such lapse. The judicial interpretation of section 7031 appears reasonable and just, and future litigants may expect that the courts will continue to find substantial compliance in fact situations similar to \textit{Latipac}, where the previously mentioned elements are present. However, it is evident that the Legislature has persisted in wording sections 7031 and 7068.1 in such a manner that they bespeak strict compliance. The analysis of the problem presented in \textit{Latipac} leads to the conclusion that some legislative action should be taken to clarify and perhaps revise sections 7031 and 7068.1 in accordance with current judicial interpretation.

\textit{Paul E. Principe}

\textbf{THE "MERE EVIDENCE" RULE IN CALIFORNIA: PEOPLE \textit{v. THAYER}}
\textit{(CAL. 1966)}

The recent California Supreme Court decision of \textit{People \textit{v. Thayer}}\textsuperscript{1} affirms California law\textsuperscript{2} describing the scope of evidence seizable under a valid search warrant. The decision appears, however, to be in conflict with constitutional limitations promulgated under the federal "Mere Evidence" Rule.

\textbf{FACTS}

Defendant physician Thayer and his office assistant Magruder were convicted of violating the California Penal Code\textsuperscript{3} by submitting false and fraudulent claims to the Bureau of Public Assistance. For each patient receiving aid from the county, there was submitted a medical care statement which certified services performed and amounts due. At trial prosecution sought to prove that the bureau

\begin{itemize}
\item \textsuperscript{1} 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1966).
\item \textsuperscript{2} \textbf{CAL. PENAL CODE} § 1524 provides in part, "A search warrant may be issued upon any of the following grounds: . . . 2. When the property or things were used as the means of committing a felony. . . . 4. When the property or things to be seized . . . constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony." Although the majority of the states limit by statute the permissible scope of searches so as to exclude mere evidence, New York amended its search warrant statute (\textbf{N.Y. CRIM. PROC.} § 792) in 1962 to include property constituting evidence of a crime.
\item \textsuperscript{3} \textbf{CAL. PENAL CODE} § 72 provides that "Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer . . ., authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher or writing, is guilty of a felony."
\end{itemize}
was billed for services never performed and for services also billed to others. Prosecution introduced into evidence the fraudulent medical care statements mailed to the bureau and corresponding non-matching records reflecting actual medical care taken from Thayer's files under a search warrant. Defendants unsuccessfully argued that this was an unreasonable search and seizure in violation of their privilege against self-incrimination under the fourth, fifth, and fourteenth amendments and that the records could not be seized under a warrant because they were merely evidence of crime and not contraband, instruments of crime, or fruits of crime.

"MERE EVIDENCE" RULE

The "Mere Evidence" Rule states that objects of evidentiary value only may not be seized by federal officers in the execution of a search, and when such subjects are seized, they must be suppressed as evidence. The relatively new federal doctrine excluding evidence seized in violation of the search and seizure laws, relied upon by Dr. Thayer, was promulgated in Boyd v. United States. The "Mere Evidence" Rule, as expounded in Gouled v. United States, was substantially derived from Boyd and defines one ramification of what is "excludable evidence" in federal courts. Gouled held that mere evidence as distinguished from contraband, instruments of crime, or fruits of a crime could not be seized under a search warrant on both constitutional and evidentiary grounds.

Mere evidence has come to mean a man's correspondence, the record of his business and his private papers and writings. The federal courts have undergone considerable struggle to winnow out which books and records are mere evidence and which are instru-

4 People v. Thayer, 63 Cal. 2d at 636, 408 P.2d at 109, 47 Cal. Rptr. at 781. Defendants' employees testified that they used the seized records in preparing the fraudulent statements and that they were instructed to show at least four visits on each statement whether or not there had been that many.

5 Gouled v. United States, 255 U.S. 298, 312 (1921).

6 116 U.S. 616 (1886). The Supreme Court reversed a trial court ruling compelling a defendant to produce a self-incriminating invoice pursuant to a statute. The court stated that even though there was no search, "compulsory production of private books and papers . . . is equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the fourth amendment."

7 255 U.S. at 308, describing the following as under these categories: "stolen or forfeited property, or property liable for duties and concealed to avoid payment . . . , excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling . . . ."

8 Id. at 304, but note that no constitutional language is cited.

mentality of a crime, an exception to the rule. The rule does not apply to records and related memoranda which are required by law to be kept. If this were applicable under a California statute, the prosecution’s burden of proof would have been eased considerably in Thayer. The rule has not been entirely limited to private papers and records but has been extended to include other evidentiary matters.

The original distinction of evidentiary as opposed to non-evidentiary material was based upon property rights. Objects in which no legal property interests inhere (e.g., a counterfeiter’s plates or a backwoodsman’s moonshine liquor) are subject to search and seizure. On the other hand, those chattels in which a vested property right exists (as in Dr. Thayer’s case, private records) may neither be searched for nor seized. The distinction loses its clarity on a borderline item such as an assassin’s rifle. Common law resolved the problem by saying it was forfeited to the king. This underlying common law emphasis of the sanctity of property interests has either shifted to personal rights which are the real basis for the exclusionary rules of evidence or has been disregarded altogether.

Chief Justice Traynor admits that Dr. Thayer’s records would fall under the instrumentality exception to the “Mere Evidence” Rule but shuns this rationale as “anacronistic” saying that it “gives rise to technical rules that are entirely unrelated to the real issues of

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10 United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) where defendant sought to suppress certain ledgers and bills concerned with the operation of an unlawful liquor business and the court held that they were instrumentality used in committing the offense; accord, Sayers v. United States, 2 F.2d 146 (9th Cir. 1924) (liquor and record of savings and beer purchases); United States v. Boyette, 229 F.2d 92 (4th Cir. 1962) (earnings records of prostitutes); United States v. Rabanowitz, 339 U.S. 56 (1950) (altered draft cards). Contra, Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933) and United States v. Poller, 43 F.2d 911 (2d Cir. 1930), where records related to the operation of an unlawful liquor business were held to be purely evidentiary.


12 Shapiro v. United States, 335 U.S. 1 (1948).

13 Gouled v. United States, 255 U.S. at 309, where it was stated, “There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure . . . ."

14 Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958), where defendant was charged with committing a perverted act with a young boy and the prosecution’s evidence of a handkerchief which allegedly bore some tangible evidence of the offense was suppressed as merely evidentiary.

15 Davis v. United States, 328 U.S. 582 (1946).

16 Boyd v. United States, 116 U.S. at 622.

17 1 BLACKSTONE, COMMENTARIES § 300-02 (21st ed. 1857), which states that any personal chattel which, having moved ad mortem or been the immediate cause of death of any reasonable creature, was forfeited to the king for pious uses. Later this principle was extended to all chattels employed in an offense against the king.

18 People v. Thayer, 63 Cal. 2d at 638, 408 P.2d at 109, 47 Cal. Rptr. at 781.
individual privacy and law enforcement that are involved." This view is heartily supported by the writers. In balancing the two conflicting policies of privacy and effective law enforcement, the later seems to control. Dr. Thayer's records cannot be favorably compared to a personal diary or other similarly private writing since they were used daily by the office assistant Magruder and were common knowledge to the other office employees. The records were actually part of the means of committing the crime and it could be argued that they were quasi-public in that taxpayers subsidized a large portion of Dr. Thayer's business. Shapiro v. United States held that records are seizable when there is a "sufficient relation between the activity sought to be regulated and the public concern." It is submitted that there is such a sufficient relation in Thayer.

In a given factual situation incident to a search and seizure, the forth and fifth amendments to the federal Constitution may apply. Boyd asserts that both amendments buttress the "Mere Evidence" Rule which Dr. Thayer relies upon. However, the search and seizure involved here does not appear to violate the fourth or fifth amendments.

The fourth amendment provides for "The right of the people to be secure... against unreasonable searches and seizures." The search for and seizure of Thayer's records was deemed reasonable because conducted pursuant to a valid search warrant specifically describing the items to be seized and because there existed probable cause to justify its issuance. When these requirements are met, "it is impossible to understand why the admissibility of seized items should depend upon whether they are merely evidentiary or evidentiary plus something else."

The fifth amendment declares that "no person... shall be compelled in any criminal case to be a witness against himself." Chief Justice Traynor rebuts the Gouled holding that the seizure of writings of evidentiary value only violates the fifth amendment.

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19 Ibid.
21 335 U.S. 1 (1948).
22 Id. at 32.
23 116 U.S. at 630.
24 U.S. CONST. amend. IV. (Emphasis added.)
25 People v. Thayer, 63 Cal. 2d at 637, 408 P.2d at 109, 47 Cal. Rptr. at 781.
26 U.S. CONST. amend. V.
He states, (1) the "Mere Evidence" Rule "is not limited to self-incriminating writings,"27 (2) "the papers are no less self-incriminating when they can be classified as contraband, instruments of crime, or fruits of crime,"28 and (3) "when such writings are obtained by seizure, instead of subpoena, the defendant does not impliedly admit their genuineness."29 It would be illogical to allow Thayer's records to be immune from seizure on the sole supporting crutch of the "Mere Evidence" Rule's doubtful claim of substantiation by the fifth amendment. The records are certainly incriminating, but it is submitted that the Shapiro public records exception to the fifth amendment controls. This is not to say that some areas (e.g., private writings and diaries) which incidently qualify as mere evidence would not also be considered self-incriminating under the fifth amendment.

Thayer goes further by holding that these misapplications of the "Mere Evidence" Rule to the amendments are also coupled with the United States Supreme Court's tendency not to treat the rule as a fundamental constitutional standard.30 The rule has been severely limited by the decisions based upon the instrumentality exception.31 No specific constitutional language has ever been proffered to support the rule.32

FEDERAL INTERVENTION

Until recently, how Thayer would stand under the pressure of Mapp v. Ohio33 if considered as a constitutional standard, was an open question. Prior to Mapp there was no difficulty for each state applied its own exclusionary standards and the general rule was that the Federal Rules of Criminal Procedure and federal case law were based upon the supervisory power of the United States Supreme Court over the administration of justice in federal courts and not binding upon the states. So the "Mere Evidence" Rule did not apply to the states.34 The Mapp holding changed significantly the role of the United States Supreme Court by saying that all evidence obtained by seizures in violation of constitutional standards is, by that same authority, inadmissible in a state court.35 Ker v. Cali-

27 People v. Thayer, 63 Cal. 2d at 638, 408 P.2d at 110, 47 Cal. Rptr. at 782.
28 Ibid.
29 Ibid.
30 Id. at 640, 408 P.2d at 111, 47 Cal. Rptr. at 783.
31 Ibid.
32 Id. at 639, 408 P.2d at 110, 47 Cal. Rptr. at 782.
35 Mapp v. Ohio, 367 U.S. at 660.
modified this holding by saying that the states must comply with the general standards of reasonableness in a search and seizure as set forth in *Mapp*, but that this reasonableness is a substantive determination to be made by the trial court "from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this court in applying that Amendment."

Allowing the states this discretion in addition to the very limited application of the "Mere Evidence" Rule by the federal courts in the first instance makes it highly unlikely that this and other meandering procedural and evidentiary views of the federal courts will be applied to the states.

**CONCLUSION**

California will not be coerced into accepting the "Mere Evidence" Rule as one of these fundamental criteria established by the United States Supreme Court and bottomed in the constitutional amendments. The rule, based upon common law distinctions, is inaccurate and too broad to demand sanctification *in toto* under the Constitution or to require uniform application by the states as is now generally required of obscenity and confession standards.

But *Thayer* must not be construed as destroying all possible applications of the "Mere Evidence" Rule under different legal classifications, including the rights of privacy and individual liberty. Certainly a California statute prohibiting the use of a certain type of birth control device for valid health reasons and allowing state officials to enforce this law by a detailed plan for search and seizure of evidentiary matters in the sanctuary of the marital bedroom would never stand as admissible. Neither would a statute stand

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86 374 U.S. at 23. Although *Ker* is based upon statutory interpretation it appears to be the Court's general rationale for this area. A later case, *Aguilar v. Texas*, 378 U.S. 108 (1964), emphasized that the states must submit to the Court in denying that a magistrate can merely affirm a police officer's suspicions when issuing a warrant. This was a weak case because the action of the judge was obviously outside the state's latitude of reasonableness.

87 *Id.* at 31-35.

88 *Traynor, Mapp v. Ohio at Large in the 50 States*, 1962 *Duke L.J.* 319, 329 (1962), stated, "Even were they a well-developed nucleus, federal rules differentiating the unreasonable from the reasonable in the searches and seizures of federal officials might prove inappropriate on the local scene. It would be all the more inappropriate to apply indiscriminately to the local scene the present conflicting federal rules, many of which are underdeveloped or over-refined. It is idle to seek in the conglomeration a pattern of consistent interpretation of the fourth amendment. It is not just that the cases are conflicting. They are turbid with the wash of the fourth amendment itself, of statutes specifying their authority to arrest, of the Supreme Court's monitoring of the federal administration of criminal justice. Who can tell with certainty why a search or seizure was held unreasonable? . . . Where is the lead that state courts can follow?"
which authorized a search and seizure for evidence of a membership list of a lawful group of individuals who associate themselves to achieve lawful ends but wish to keep their membership private.

The “Mere Evidence” Rule is a tired rule and its prohibitions are overly wide in scope. But Chief Justice Traynor abrogated only the old rationale of the doctrine and its obstructions to the state’s interpretation of the fourth amendment under the appropriate constitutional guidelines. A generous portion of the “Mere Evidence” Rule still stands but under different labels.

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