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In 1885 the Supreme Court of the United States ruled[1] that evidence obtained in violation of the Fourth Amendment[2] could not be used in a trial against a defendant from whom it was taken. Later this rule was repudiated in the case of *Adams v. New York*,[3] but, in 1914, in *Weeks v. United States*[4] the inadmissibility of such evidence was firmly established. From the time of the *Weeks* case the rule has been a subject of great interest to law enforcement officials, state tribunals,[5] and writers in the field of law. Recently two interesting and significant opinions concerning this field of law were handed down by the United States Supreme Court. These opinions are of special interest to lawyers and law enforcement officials in that they tend to shed light on how the federal courts will construe the law of searches and seizures in the future. The cases concerned in these opinions were *Davis v. United States*[6] and *Zap v. United States*.[7]

The *Davis* case found its setting in the gasoline rationing program administered under the Office of Price Administration. The government suspected the defendant, an operator of a filling station, of making illegal sales of gasoline. O.P.A. officials, accompanied by New York detectives, planned a trap. They purchased gasoline at the defendant's filling station without the required coupons. The attendant who made the sale was placed under arrest, and subsequently when the defendant appeared on the scene he was also arrested. Then the officers checked the amount of gasoline that the defendant had sold and counted the coupons in the banks at the side of each pump. Upon finding a shortage of coupons, the officers inquired about the shortage and were informed that the defendant had coupons to cover the shortage in his office on the station premises. The officials demanded that they be shown the coupons and the defendant refused. Upon the refusal, one officer tried the door to the defendant's office; and, when it was found to be locked, another officer went around to the rear of the office where he turned his flashlight in the window and appeared to be trying to force the window open. At this point the defendant consented to open the door. An inspection of the office revealed that the defendant had illegal gasoline ration coupons in his possession. The coupons thus discovered were taken by the officers; and,

[1] Boyd v. United States, 116 U.S. 616 (1885).

[2] 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, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

[3] 192 U.S. 585 (1903) (The court bases the opinion on authority which expressly upholds the common law rule and says that it will not inquire into the source of evidence).

[4] 232 U.S. 383 (1914) (The Adams case is distinguished on the ground that the preliminary motion disposes of the collateral issue and that the seizure was made by state officials; rule of exclusion reestablished).

[5] Since the Fourth Amendment of the Federal Constitution does not apply to the several states the decision of the United States Supreme Court did not apply to them. Though many of the state courts adopted the federal rule, a majority of the state courts still adhere to the common law rule. See notes, 88 A.L.R. 348, 134 A.L.R. 819, and 150 A.L.R. 566 where the different states are listed according to the rule they follow.

[6] ——U.S.——, 66 S. Ct. 1256 (1946).

[7] ——U.S.——, 66 S. Ct. 1277 (1946).

upon trial of the defendant for possession of illegal coupons, they were admitted into evidence against him. This was done after denial of the defendant's motion, prior to trial, for return of the coupons,[8] and the presentation of the coupons was allowed on the ground that the defendant consented to the search and seizure. In sustaining the trial court's conviction, the Circuit Court of Appeals held that the search of the defendant's office was reasonable as an incident of the arrest, but expressed doubt concerning the defendant's consent to the search and seizure.[9] Upon appeal to the Supreme Court the conviction was upheld by a five to three decision. The Court ruled that under the circumstances the trial court's finding of consent should not be disturbed, that where there is a seizure of public documents at a place of business during business hours, duress and coercion would not be so readily implied as where the search and seizure involved private papers and effects or were performed in a home instead of a place of business.[10]

The dissenting opinion severely questioned the majority's interpretation of the word consent and criticized the majority's distinction between public and private documents and between places of business and private residences. The dissent went on to add that the majority were destroying the protection afforded by the Fourth Amendment through a process of "devitalizing interpretation."

The *Zap* case, while concerning a similar question of law, presented a different set of facts. It involved an aeronautical engineer who was working under a contract to do experimental work for the Navy Department. The cost-plus contract contained a clause placing the contractor's books and records open to government inspection. The defendant had submitted a false claim for costs. During a routine inspection the check evidencing the fraud on the government was discovered. It was taken by the inspecting officers and used against the defendant when he was on trial. The inspection had been made partially during the defendant's absence, and when he returned he protested to the inspecting officials. When the officials requested the check it was delivered to them by one of the defendant's employees. Later a warrant was sworn out for the defendant's books and papers, but it was admittedly defective in that it failed to show the necessary and probable cause for belief that the defendant was guilty of a crime. The defendant, convicted

[8] The motion before trial for return of illegally seized evidence was supposed to eliminate the objection caused by raising a collateral issue during a trial. It had its inception in the Weeks case. See, *supra*, note 4 and Nardone v. United States, 308 U.S. 338 (1939).

[9] United States v. Davis, 151 F(2d) 140 (C.C.A. 2nd, 1945).

[10] Wilson v. United States, 221 U.S. 361 (1911) and Boyd v. United States, 116 U.S. 616 (1885) are cited by the court as distinguishing between public and private documents. In the first of these cases, the court established a rule that a person holding public documents has a duty which overrides his claim of privilege. The Boyd case, quoting from Commonwealth v. Dana, 2 Metc. (Mass.) 329 (1841) says that where certain articles, among which are books required to be kept for inspection by the law, are held by private individuals the right of the government exempts them from the doctrine of searches and seizures. In the Davis case, however, the court, while citing these two cases, sums up its remarks by saying, "Duress and coercion will not be so readily *implied* in the case of public documents . . . as where private property is concerned." Thus instead of totally excluding public property from the doctrine of searches and seizures, the Court seems to set up a presumption that duress and coercion are not used where public documents are involved. This being so it would seem that the defense could have presented evidence to rebut this presumption.

by the lower federal court, appealed on the ground that his constitutional rights had been invaded by the seizure and use of the check in evidence against him. The Supreme Court, in a five to three decision, upheld the conviction on the ground that the defendant had waived his constitutional rights respecting searches and seizures by entering into the contract containing the inspection clause.

The dissenting opinion agreed that the government had a right to inspect the defendant's books. It held, however, that a difference exists between the right to search and the right to seize. It maintained that the principle allowing seizure of criminally held articles discovered during a lawful search does not apply where, as in this case, the articles are lawfully held.

The rules set out in these two cases are notable because they represent a change in the criteria used by the Supreme Court to determine whether searches and seizures are reasonable. In doing this the court has been criticized for weakening the strict rule of inadmissibility which has previously been used to enforce the Fourth Amendment. To support its holding that there is a difference between private property and public property, the Court in the *Davis* case cites authorities for this distinction.[11] An examination of these authorities, however, reveals that the problem in one of them, the *Wilson* case, concerned the amenability of corporate records[12] to the self-incrimination clause of the Fifth Amendment. Another, *Boyd v. United States,* decided an unrelated question,[13] and the part of that opinion referred to by the majority to make the distinction is mere *obiter.* As a matter of fact, it is a quotation from *Commonwealth v. Dana,*[14] a case from a jurisdiction which does not pretend to follow the rule of inadmissibility used in the federal courts, and a case which is noted for expressly supporting the common law rule of admissibility. The Court refers to Wigmore as an authority for the difference between public and private property.[15] Wigmore makes the distinction, but it is noted that the distinction is made in relation to the Fifth Amendment, and the section of the treatise to which the majority refers deals with this subject. The authorities either are based on *obiter* or concern themselves with the problem of corporate and public articles as related to the privilege against self-incrimination. With them, the Court establishes a rule applicable to the Fourth Amendment. In previous cases the Supreme Court has held that the privilege of the Fourth Amendment extends to all property regardless of its

[11] Wilson v. United States, 221 U.S. 361 (1911); Boyd v. United States, 116 U.S. 616 (1885); Wigmore, Evidence (3rd ed. 1940) §2259c.

[12] The rule is that a corporation, being a creature of the state, cannot claim the privilege of the Fifth Amendment for its books and records. A similar rule has been held to apply to government property and records required to be kept by the government. This immunity has been applied, however, only to the Fifth Amendment. See United States v. Mulligan 268 Fed. 893 (D.C.N.D. N.Y. 1920) and Wigmore, Evidence (3rd ed. 1940) §2259b and §2259c.

[13] Boyd v. United States, 116 U.S. 616 (1885) (a case concerning a statute requiring a defendant to produce his private books and papers in court upon a motion by a government attorney or else the court would take the allegations of the attorney as confessed. While concerned mainly with the self-incrimination clause the court held that such a statute violated both the Fourth and Fifth Amendments).

[14] 2 Metc. (Mass.) 329 (1841).

[15] *Supra* note 6 at 1260.

nature,[16] and the court has even gone so far as to point out the difference between the immunity of public and corporate property to self-incrimination and the protection given to this property by the Fourth Amendment.[17] In the *Davis* case the majority opinion said that the fact that the search and seizure occurred at a place of business during business hours makes the case different from *Amos v. United States*.[18] It, however, does not cite authority for the distinction between places of business and private homes. The Court establishes a new criterion for search and seizure cases by adding a factor which previously was not taken into consideration to establish the legality of a search and seizure.[19] The ruling in the *Zap* case also makes a change in the court's previous stand. It overlooks the distinction which the court has made between legality of a search and legality of an accompanying seizure.[20] The cases which the Court cites to support its ruling hold that a seizure of property which is *illegally* held during a lawful search is permissible, but they do not decide the present case where articles which are lawfully held are seized during a legal search.[21]

In reality the rules in the *Davis* and *Zap* cases fit in with the general pattern of the Supreme Court's decisions. The effect of the rules is to restrict the rule of inadmissibility found in the *Weeks* case. This may seem novel to newcomers in the search and seizure field, but it is actually a continuation of the evolution that the basic rule in the *Weeks* case has experienced since its entry into American law. Since 1914, when the *Weeks* case was decided, the Court has placed many restrictions on the rule.[22] Whether the rules in the *Davis* and *Zap* cases and the previous restrictions on the rule of inadmissibility are beneficial or not is open to debate. The purpose of the restrictions on the basic rule seems to have been to relax the restraints on law enforcement and to thus enable a greater degree of cooperation between the courts and law enforce-

[16] Gouled v. United States, 255 U.S. 298 (1921) (The privilege under the Fourth Amendment remains whatever the character of the paper); Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis J., dissenting, said that unjustified search and seizure violates the Fourth Amendment regardless of the character of the paper).

[17] Silverthorn v. United States, 251 U.S. 385 (1920) ("The rights of a corporation against unlawful search and seizure are to be protected even if they be not protected by the Fifth Amendment from compulsory production of incriminating documents").

[18] 255 U.S. 313 (1920) (Seizure of illegal liquor after search upon being admitted to defendant's home and store by wife; held unreasonable).

[19] Silverthorn v. United States, 251 U.S. 385 (1920) (Documents seized in office; held illegal search and seizure); Gouled v. United States, 255 U.S. 298 (1921) (Articles taken from office; "The security and privacy of the home or office and papers of the owner" is guaranteed); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1930) (papers taken from defendant under false warrant at his office, during business hours; held unreasonable); United States v. Lefkowitz, 295 U.S. 452 (1932) (search and seizure of office, illegal).

[20] Gouled v. United States, 255 U.S. 298 (1921).

[21] In re Sana Laboratories, 115 F(2d) 717 (C.C.A. 3rd, 1940) (Right to inspect, evidence seized, articles suppressed); Paper v. United States, 53 F (2d) 184 (C.C.A. 2nd, 1931) (illegally held liquor seized during search for defendant with warrant for his arrest, admissible); United States v. Old Dominion Warehouse, 10 F(2d) 736 (C.C.A. 2nd, 1926) (Illegally held alcohol seized while lawfully on premises, seizure not unreasonable).

[22] Wigmore, Evidence (3rd ed. 1940) §2184a. The author lists the various exceptions to the rule of inadmissibility and makes a complete list of cases by states indicating the holding in each.

ment officials in the conviction of guilty persons. If we are to accept the basic rule of inadmissibility as a permanent fixture in the jurisdictions which have adopted it, the Court's action would seem to have merit. In view of the indirect way in which the Court has attacked and weakened the rule in the *Weeks* case, however, it seems that it would be appropriate for the Court to reconsider the rule and possibly discard it altogether. Aside from the fact that for a century after the adoption of the United States Constitution the courts of this country adhered to the common law rule which admitted evidence without regard to the manner in which it was obtained, there are some very good arguments for direct action in discarding the basic rule of inadmissibility altogether. The course that the Court has chosen to follow in the law of searches and seizures has resulted in unnecessary complication. It has also resulted in confusion among the lower courts due to their inability to foresee new exceptions which the Supreme Court might see fit to adopt. Furthermore the relevance and competency of the evidence is not affected by the manner in which it is procured. The rule of inadmissibility is a negative effort to protect people from wrongful invasion of their privacy by rendering evidence useless which is not seized in compliance with the Fourth Amendment. While this gives a certain amount of protection to law abiding citizens, it places a burden on society by releasing the guilty when their conviction is dependent upon the use of evidence thus obtained. Under present conditions, where we find criminals so ably equipped to evade the law in other respects,[23] the extra burden which the rule creates outweighs the benefit that it renders to society. It is submitted that there is ample reason for abandoning this negative form of protection and returning to the protection afforded by the common law or establishing another positive form of relief[24] to protect the innocent without placing such a burden upon the public.[25] At present a majority of the states adhere to the common law rule, and in recent years this rule has been adopted or reaffirmed by several states which have reviewed this question.[26]

In discussing the holdings in the *Davis* and *Zap* cases, the rules and reasoning behind them have been analyzed. There is, however, another feature found in the majority and minority opinions of both cases which deserves attention. In each of the cases the majority and minority repeat the historically inaccurate rule that admission into trial of evidence obtained in violation of the Fourth

[23] Knox, Self-incrimination (1925) 74 U. of Pa. L. Rev. 139.

[24] Etnick v. Carrington, 19 How. St. Tr. 1029 (1765); Paxton's Case, Quincy's Mass. Reports 51 (1761). The remedy in these cases was in an action in trespass against the offending officers. New Mexico v. Dillon, 34 N. M. 366, 281 Pac. 474 (1929) suggests the same remedy. Statutory provisions may exist for imprisoning or fining offending officers. This is not considered very expedient, however, as the action would have to be initiated by the state and in many cases by one superior to the offending officer.

[25] Much in the way of criticism of the rule of inadmissibility has been written. For thorough discussions see: Wigmore, Evidence (3rd ed. 1940) §2184 and §2184a; Harno, Evidence Obtained by Illegal Search and Seizure (1925) 19 Ill. L. Rev. 303.

[26] State v. Frue, 58 Ariz. 409, 120 P. (2d) 793 (1942); McIntyre v. State, 190 Ga. 872, 11 S. E. (2d) 5 (1940); New Mexico v. Dillon, 34 N.M. 366, 281 Pac. 474 (1929); People v. Richters Jewelers, 291 N.Y. 161, 51 N.E. (2d) 690 (1943); State v. Lindway, 131 Ohio St. 166, 2 N.E. (2d) 490 (1936).

Amendment destroys the accused person's rights under the self-incrimination clause of the Fifth Amendment.[27] This principle began in *Boyd v. United States*. It calls the Fifth Amendment to the aid of the Fourth Amendment to give the courts a further ground to exclude from trial testimony procured in violation of the Fourth Amendment. This doctrine in its inception also used the Fourth Amendment to aid the Fifth by calling any evidence which was self-incriminating a violation of the right against unreasonable searches and seizures. The latter, however, has been repudiated, and only the rule as stated in the *Davis* and *Zap* cases remains.[28] The rule was unnecessary and illogical in its inception. The Fourth and Fifth Amendments were included in the Constitution to guard against two separate evils. The Fourth resulted from the feeling against the general warrants and writs of assistance used by the British during the period preceding the American Revolution. The Fifth Amendment arose from ideals formed as a reaction to forced examinations of the accused and the Star Chamber practices.[29] From the wording of the Fifth Amendment it is seen that the principles of the self-incrimination clause were not meant to apply to a situation arising under the Fourth Amendment. The purpose of the Fifth Amendment is to protect witnesses from being compelled to testify against themselves in a criminal case. The amendment says no more. In other words protection is given to a person while he is acting in the capacity of a witness upon the stand, or while he is acting under a process which treats him *as a witness*. In the cases involving illegal searches and seizures the articles are not obtained under a process which treats the accused as a witness, nor does evidence thus obtained amount to a self-incrimination of the accused on the witness stand.[30] Therefore the statements made in the majority and minority opinions in the *Davis* and *Zap* cases regarding the interplay between these two amendments are just as incorrect as in the early cases in which they were uttered. In each of these cases the question was solely one concerning search and seizure and the ruling could have been made purely on the basis of the Fourth Amendment. In neither of the cases can it be said that the seizure and use of the evidence was treating the defendant as a witness under the meaning of the self-incrimination clause.

In spite of the criticism to which these cases lend themselves, it is well to sum up their meaning and to estimate the possible effect they will have on future search and seizure cases. As long as they stand unreversed among the opinions of the Supreme Court, they remain the law.[31] To law-enforcement officials the rule seems

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[27] *Supra* note 6 at 1258 and note 7 at 1279. The court makes the statement that, "The law of searches and seizures . . . is the product of the interplay of the Fourth and Fifth Amendments."

[28] Wigmore, Evidence (3rd ed. 1940) §2264.

[29] Corwin, The Supreme Court's Construction of the Self-incrimination Clause (1930) 29 Mich. L. Rev. 1 & 191.

[30] People v. Defore, 242 N.Y. 213, 150 N.E. 585 (1926); State v. Frye, 58 Ariz. 409, 120 P. (2d) 793 (1942); State v. Barela, 23 N.M. 395, 168 Pac. 545 (1917); Calhoun v. State, 144 Ga. 679, 87 S.E. 893 (1916); Wigmore, Evidence (3rd ed. 1940) §2264.

[31] Neuslin v. Dist. of Columbia, 115 F (2d) 690 (Ct. of App. D.C. 1940). In looking for future trends in this field it is interesting to note a holding by a member of the court who has taken his place on the bench since the Davis and Zap cases were decided. The opinion by the then Justice Vinson considers a search and seizure case and holds to the strict rule of inadmissibility followed by the federal courts.