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court which in the *Mitchell* case had interpreted the *McNabb* case decision of the Supreme Court as requiring a nullification of an otherwise voluntary confession whenever illegal detention was involved. In the *Boone* case, the defendant was arrested about 9 o'clock on a Saturday morning, placed in a police showup about 11 o'clock, at which time he was identified by his robbery victim, and then for about twenty minutes he was questioned by the arresting officer. He was also again questioned about 5 o'clock that afternoon for twenty or twenty-five minutes, and later, between 9 and 10 p.m. the defendant requested to talk to the arresting officer and confessed his guilt on that occasion. The next day (Sunday), at about 1 p.m., the defendant surrendered to the same officer the money proceeds of the robbery, which the defendant had concealed in his shoe. Defendant was not arraigned until Tuesday morning. At his trial he denied making the confession. He was convicted and upon appeal his counsel contended that the illegal detention rendered the otherwise voluntary confession inadmissible in evidence. The Court of Appeals, in sustaining the trial court's ruling in admitting the confession, said: "Counsel's interpretation of the McNabb case accords with the view taken by us of that case in our later decision in the Mitchell case. But on appeal to the Supreme Court our view was rejected and the Supreme Court itself interpreted its language in the McNabb case wholly contrary to the position now taken by counsel for appellant in this case. In the Mitchell case the Supreme Court said, as it had said in the McNabb case, that inexcusable detention for the purpose of extracting evidence from the accused is both wrong and unlawful, but pointed out that while this is true, detention, standing alone, does not affect the admissibilty of the confession except where it appears that the disclosure is induced by it. In short, that unlawful detention, without more, does not require rejection of a confession otherwise admissible and that is this case."[8]

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Recent Decisions on the Right of Federal Law Enforcement Officers to Search without Warrant

Search of a Fixed Residence

On the crucial question of what latitude to allow federal agents in searching private living quarters or places of business without having obtained beforehand a search warrant with all its attendant constitutional safeguards,[1] the United States Supreme Court seems irreconcilably divided. In the last few years the Court, led by the justices who favor a narrower construction of the demands of the Fourth Amendment, has rendered several important decisions which look toward a contraction of the broad scope of constitutional immunity which had been hewn out by an earlier Court during the two decades following the First

[8] For a detailed discussion of the delayed arraignment (McNabb case) rule, see Inbau, *op. cit. supra* note 3 at pp. 162-169.

[1] 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 upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched and the persons or things to be seized.*" (Emphasis supplied by the author.)

World War. The gist of these decisions was that if an arrest was validly made on, or closely by, the premises to be searched, the officers, if in good faith seeking the "fruits or instrumentalities" of the crime charged, could search among the papers and effects of the accused and seize any matter which would have been the proper object of a search warrant.[2] The vigorous objections of the then minority justices to the alleged inroads being made on the citizen's right of privacy rose to a high pitch in the *Harris* case, where a divided Court approved the seizure of altered draft cards as "reasonably incident" to an arrest for check forgery after a five hour search of the defendant's apartment.[3]

The opinion in the *Johnson* case, handed down in February of this year, appears to reflect a marked return to the philosophy of the pre-World War II decisions, and it is to be noted that the dissenting justices of the decisions alluded to above are now on the majority side.[4] Superficially the case is distinguishable from those involving the scope and nature of a search incident to an arrest, for the Court holds that a valid arrest never took place and thus is not constrained to discuss these decisions. The facts briefly were these: Narcotic agents, on the basis of opium fumes issuing from a transom of a hotel room and without having previously acquired a search warrant, forced their way into the room under color of authority, arrested the defendant, and subsequently uncovered and seized a quantity of opium and a pipe. On the basis of this evidence the Government obtained a conviction and an affirmance in the Circuit Court of Appeals.[5] The Supreme Court in an opinion by Mr. Justice Jackson reversed, holding both the arrest and search unlawful. The rule of police conduct to be gained from the opinion is strikingly like that which was imposed on federal officials in the Prohibition Era decisions[6] and is broad enough if liberally interpreted to have invalidated the searches condoned by the other faction of the Court in the preceding search and seizure cases in which they held the upper hand.[7] It is simply that unless there is a reasonable probability of material change in the situation of the suspect during the time necessary to secure a search warrant, the federal officers must present their evidence to a "disinterested magistrate" and have him resolve the conflicting interests involved. Though the evidence of criminal activity which was possessed by the officers prior to search was sufficient "probable cause"

[2] Davis v. United States, 328 U.S. 582 (1945) (search of gas station for illegally held ration coupons after arrest of owner without warrant; upheld in five to three decision); Zap v. United States, 328 U.S. 624 (1945) (seizure of cancelled check in office of war contractor by F.B.I. men auditing the books of defendant; no warrant; conviction affirmed). Note (1947) 37 J. Crim. L. & Criminology 413.

[3] Harris v. United States, 331 U.S. 145 (1947); extensively discussed in a recent issue of this journal, note (1947) 38 J. Crim. L. & Criminology 244.

[4] Johnson v. United States, — U.S. —, 68 S. Ct. 367 (1948). Chief Justice Vinson and Justices Black, Reed, and Burton registered their dissents without filing a dissenting opinion.

[5] 162 F. (2d) 562 (C. C. A. 9th, 1947). The Circuit Court of Appeals held that the tracing of the smell of opium to defendant's room by the three officers gave them probable cause for the arrest, and that the search was a reasonable incident thereto. "We venture to say that the smell of opium fumes may in some circumstances be second only to the well-known maxim that 'Seeing is believing.' " *Id.* at 563.

[6] Taylor v. United States, 286 U.S. 1 (1932) (search of defendant's garage on the basis of alcoholic odors issuing therefrom; held illegal); *see* United States v. Leftkowitz, 285 U.S. 452, 464 (1932).

[7] It is precisely the same rule that Mr. Justice Jackson urged unsuccessfully in Harris v. United States, 331 U.S. 145, 195 (1947), *supra* note 3.

to support a warrant, it was not, and presumably no amount could be, sufficient to justify the invasion of individual privacy without a warrant. Although the four dissenting justices wrote no opinions it seems plain that they disagreed with the majority over the legality of the arrest. Their contention would doubtless be that after the defendant opened the door under command, "reasonable cause" existed for believing the occupant guilty of a felony.[8] But according to the majority of the Court it will not do "to justify the arrest by the search (which began with the initial intrusion) and at the same time justify the search by the arrest.[9]"

Search of an Automobile

The search without warrant of an automobile has always been thought to stand on a different footing from that of a fixed residence or place of business. Because of the mobile nature of the vehicle it was considered unreasonable to require enforcement officers to bother going to the magistrate first. If probable cause existed that the vehicle to be searched contained contraband, the officers were generally allowed by the courts to stop the vehicle, search it, and if forbidden matter were in fact uncovered, the vehicle could be lawfully seized and the driver arrested on the basis of the discovery.[10] This rule of necessity was ushered in during the Prohibition Era when the automobile was the chief instrumentality for wholesale violations of the Liquor Law, and Congress had given this summary form of search its express sanction in the Stanley Amendment.[11] The recent case of *United States v. Di Re*.[12] however, cast some doubt on the power of federal officers to search an automobile without express Congressional authorization. Di Re was prosecuted for the possession of counterfeit gasoline coupons in violation of emergency price control legislation, which, unlike the prohibition statutes, contained no authorization for search of a vehicle without a warrant. Remarking that the power to search an automobile without a warrant was held to be constitutionally permissible in the earlier cases under the prohibition acts because of the strong presumption of validity which attaches to Congressional legislation, Mr. Justice Jackson in the *Di Re* case pointed out that Congress in no other statutes had recognized this power in enforcement officials. Whether an officer would have power to stop and search an automobile in absence of statutory authority was not, however, decided in the *Di Re* case; for the Court held that even if the officers had grounds for searching the automobile in which Di Re was riding, they

[8] This is the law of the state (Washington) where the arrest took place. State v. Robbins, 25 Wash. (2d) 110, 169 P. (2d) 246 (1946). State law determines the validity of arrests without warrant. United States v. Di Re, — U.S. —, 68 S. Ct. 222 (1948), *infra* note 12.

[9] *But cf.* McDonald v. United States, No. 9524 (App. D.C., 1948) (officers observed defendant engaging in a misdemeanor by peering through transom of his room; sight held not to be a "search" within meaning of the constitution; court said that while conduct of officers was "not gentlemanly" it did not constitute a denial of defendant's constitutional rights).

[10] Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1930). *But cf.* state cases collected in note (1947) 38 J. Crm. L. & Criminology 239.

[11] 41 Stat. 315 (1919), 27 U.S.C.A. §40 (1927).

[12] — U.S. —, 68 S. Ct. 222 (1948), Chief Justice Vinson and Justice Black dissenting.

could not incidentally search the persons of the passengers in the car[13] A subsidiary point decided in the case is the re-affirmation of the rule that state law is determinative of the validity of the arrest by federal officers.

The point mooted but not decided in the *Di Re* case—whether an automobile may be stopped and searched without a warrant where there is a suspected violation of a federal statute which does not expressly authorize this practice—was the precise point in issue in a case recently determined in the Seventh Circuit Court of Appeals.[14] The seizure therein was of liquor being transported in violation of the Internal Revenue Code, which likewise contains no express provisions covering the search of automobiles, and the action was one for forfeiture of the "offending" automobile.[15] The court, while aware of the shadow which the Supreme Court had cast upon the constitutionality of the practice, upheld the search and seizure without warrant after it had ascertained that probable cause existed prior to the search. The decision is based largely on dicta in the prohibition cases[16] and a 1938 decision of doubtful authority where elements of waiver were present.[17] It seems likely that the case will be appealed to the Supreme Court.

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[13] This upon the analogy that one executing a warrant to search a house may not incidentally search the persons of the occupants if they are not under arrest. *Cf.* Marron v. United States, 275 U.S. 192 (1927).

[14] United States v. One 1946 Plymouth Sedan Automobile, Etc., No. 9352 (C.C.A. 7th, 1948).

[15] 53 Stat. 410 (1939), 26 U.S.C.A. §3321 (b) (1) (3) (1940).

[16] Case cited *supra* note 10.

[17] Scher v. United States, 305 U.S. 251 (1938). (driver of automobile not only admitted probable guilt but invited the officer to examine contents of the trunk).