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Police Science Legal Abstracts and Notes

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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Does a Defendant Have a Right to Examine Evidence in the Possession of the Police—Admissibility in Evidence of Scientific Techniques—In a prosecution of a father for first degree murder of his mentally defective infant son, by electrocution, the Supreme Court of Massachusetts in the case of *Commonwealth v. Noxon*, 66 N.E. 2d 814 (1946), affirmed the judgment and the sentence of death of the trial court (which sentence was later commuted to life imprisonment). On appeal to the supreme court many assignments of error were made by the accused and the court considered and overruled all of them, only a few of which will be mentioned here. The trial court in the exercise of its discretion denied the defendant's motions, made before the indictment and before the trial, for permission for his attorneys and experts to examine evidence in the possession of the police. This included personal property of the defendant, tissue removed from the body of the baby and microscopic slides of the same, and various photographs made by the police. The Supreme Court upheld the trial court in its discretion in denying the motions to examine the evidence, as the motions were not for a bill of particulars but were rather an attempt to compel the Commonwealth to disclose, in part at least, the evidence upon which it relied. It was within the trial judge's discretion to grant or deny the motions and there is no rule of law which requires the Commonwealth to permit such examination or which gives a defendant the right to ask for it.

The Supreme Court also sustained the trial court's ruling in admitting the following evidence: (a) testimony of an expert on electro-thermal burns; (b) insulation from pipes in the garage to show that none of the protective covering of the extension cord, from which the infant had received the fatal shock, had rubbed off on the insulated pipes while hanging in the garage as claimed by the defendant; (c) like models of original extension cord prepared by the manufacturer—the defendant having admitted destroying the original extension cord; (d) a spectrograph plate of control skin taken from the infant's arm and an analysis of skin taken from an experimental animal; (e) a copper print test made by a state chemist for the presence of copper on the back of the metal tray, on which the infant was resting when electrocuted—there being evidence that the ground essential to the transmission of electricity through the body of the baby could have been created by placing an exposed ground wire of a nearby radio in contact with the tray.

Searches and Seizures—Distinction Between Seizures of "Private" and "Public" Property—Waiver of Constitutional Rights—Evidence Subject to Seizure Upon Otherwise Legal Search—Two important decisions with regard to illegal searches and seizures, were rendered recently by the United States Supreme Court in *Davis v. United States*, 66 S. Ct. 1256 (1946), and *Zap v. United States*, 66 S. Ct. 1277 (1946).

In the first case (*Davis v. United States*) the accused, a gasoline station operator, was convicted of unlawfully having in his possession gasoline ration coupons. Objection was made in the trial court by the

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accused to an alleged illegal search of the premises and the seizure of the coupons by federal agents who made the search and seizure without a search warrant. The United States District Court found that the accused had voluntarily consented to the search. The Circuit Court of Appeals in affirming the finding, expressed some doubt as to this consent being voluntary, but held that the seized coupons were properly introduced into evidence because the search and seizure, being incidental to the arrest, were reasonable regardless of consent. The United States Supreme Court affirmed that judgment (by 5 to 3 decision) without reaching the question whether, but for that consent, the search and seizure incidental to the arrest was reasonable. The Court said that there is a difference between property to which the government is entitled to possession and private property to which it is not. The court was of the opinion that any owner of property who seeks to take it from one who is unlawfully in possession has greater leeway, since the claim of ownership will justify even a trespass and authorize steps otherwise unlawful. The Court held that the search and seizure in the instant case did not violate the Fourth and Fifth Amendments as the question here did not involve the search and seizure of private papers, since the gasoline ration coupons remained at all times the property of the government, subject to inspection and recall by it. In other words, a custodian of public property does not have the same immunity from search and seizure as the owner of private property.

The court added a word of caution in its opinion, stating that it was not suggesting that officers seeking to reclaim government property may proceed lawlessly and without restraint. In this case they appeared on the premises during business hours, and had ocular evidence that a misdemeanor had been committed. The search was of the office adjacent to the gasoline pumps where the accused transacted his business, there was no general exploratory search, and only contraband coupons were demanded and taken. The gasoline station was a place of business, not a private residence, and the officer's claim to the property was one of right. In such cases permissible limits of persuasion are not so narrow as where private papers are sought. When the custodian is persuaded by argument that it is his duty to surrender such property and he hands it over, duress and coercion will not be so readily implied as where private papers are involved.

In the second case (*Zap v. United States*) the accused had a cost-plus contract with the Navy Department to do experimental work on airplane wings and to conduct test flights. His contract granted to the government the right to inspect his books, for the purpose of determining the accuracy of his charges. To falsify his records, the accused arranged with a test pilot to make certain test flights and paid him \$2500. Prior to the test flights he had the pilot endorse a blank check, later filled in the pilot's name as payee and \$4000 as the amount of the check, posted the check in his book of accounts and presented to the Navy Department a voucher for the work under the contract. Government agents made an inspection of the books of the accused, during regular hours at his place of business, with the assistance of employees of the accused. In the course of the investigation, the agents discovered the check in question and the accused, learning of the investigation, protested to the agents against the examination of his book and the seizure of the check. At the trial the check was admitted in evidence over the objection of the defendant that the search and seizure of the check was illegal. The trial court convicted

the defendant for the crime of presenting false claims against the United States.

The United States Supreme Court, in affirming (by 5 to 3 decision) the conviction in the *Zap* case, cited the first of these two cases, *Davis v. United States*, and said that the rights of the Fourth and Fifth Amendments may be waived, and when the accused, in order to obtain the government's business specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy, even though he later protested against the examination and seizure of the check. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The government agents were lawfully on the premises during regular hours at the place of business, and no force or threat of force was employed; therefore they obtained access to the documents by lawful means. Even if it be assumed that the taking of the check was unlawful, the Fourth and Fifth Amendments would not make inadmissible in evidence the *knowledge* which had been legally obtained, and would not preclude the agents from testifying concerning those facts. Consequently, it was within the sound discretion of the District Court to admit the check in evidence.

The dissenting opinion in each of the above cases stated that the constitutional prohibition is directed not only at illegal searches, but likewise condemns invalid seizures; that the legality of the search does not automatically legalize every accompanying seizure; and that to hold otherwise is to overlook the requirement that a search warrant shall particularly describe the things to be seized and does not permit general searches and the seizure of one thing under a warrant issued for something else.

In reference to the first case (*Davis v. United States*), the dissent said that to hold the search legal is to hold that a search which could not be justified under a search warrant is lawful without it. The crime was only a misdemeanor, and no arrest can be made for a misdemeanor without a warrant unless it be committed in the presence of the arresting officers. Prior to the search, the officers had no basis for stating that the accused, in their presence, had committed the crime of possessing coupons illegally. The dissent then pointed out that the essence of the difference in the constitutional protection afforded the possessors of private and public papers, is that, under appropriate circumstances, wholly private papers are not subject even to testimonial compulsion, whereas other papers, once they have been legally obtained, are available as evidence. The character of the papers does not eliminate the restrictions of the Fourth Amendment and subject the person in possession of such documents, against his protest, to searches and seizures otherwise unwarranted. Further, the dissent contends, an even more fundamental issue lurks in the court's opinion if the phrase about the locus of the search and seizure as "a place of business, not a private residence" is intended to carry relevant legal implication, for if this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices, it constitutes a sudden and drastic break with the whole history of the Fourth Amendment and its application by the court.

In reference to the second case (*Zap v. United States*), the dissent pointed out that if materials—the very possession or concealment of