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Edward S. Corwin
Princeton University

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EDWARD S. CORWIN*

THE Fourth Amendment of the Constitution reads as follows: "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 person or things to be seized."[1] The so-called "self-incrimination clause" of Amendment V reads as follows: "No person * * * shall be compelled in any criminal case to be a witness against himself."

Hard upon the centenary of the Constitution the Supreme Court informed the country that these two provisions, which had hitherto produced no cases before that tribunal, were intended to be read together, with the result that today they jointly support a highly important body of constitutional law—important especially in the field of national criminal law. Which of the two members of this jural partnership is the more important, it would be difficult to say; nor is the attempt to do so here made. The procedure of the present study in centering attention primarily on the self-incrimination

*McCormick Professor of Jurisprudence, Princeton University.

[1] "The Fourth Amendment was aimed particularly at "general warrants," which were finally overthrown in England in the cases of Wilkes and Entick. See COOLEY, CONST. LIM. (7th ed.), 426, 428; Wilkes' Case, 19 St. Trials 1405; Entick v. Carrington, *ibid.*, 1030. The closest analogue to the "general warrant" in the pre-Revolutionary history of this country is to be seen in the "writ of assistance," for the history of which see Quincy, Reports (Mass.), 51 and app. p. 395.

clause rather than on Amendment IV merely parallels the similar procedure of the leading cases.

I

Considered in the light to be shed by grammar and the dictionary, the words of the self-incrimination clause appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant. This reading is, moreover, strongly confirmed when we consider the clause in conjunction with similar clauses from the early state constitutions.

The earliest statement of the principle against self-incrimination to be found in an American constitution is that in section 8 of the Virginia Declaration of Rights of 1776. It reads thus: "That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation * * *; nor can he be compelled to give evidence against himself." The mental picture called up is clearly that of a prosecution actually under way against the party entitled to claim the protection of the clause. In both the North Carolina and Pennsylvania Declarations of the same year the language used is closely similar, except that for the word "man" is substituted the word "person"; while in the Massachusetts Declaration of Rights of 1789, as well as the New Hampshire constitution of 1784, the term employed is "subject."

In the Pennsylvania constitution of 1790, the intention of such provisions is, if possible, made even more explicit by the use of the phrase, "the accused" to designate the beneficiary of the privilege—a phraseology which also occurs in the Kentucky constitution of 1792, the Tennessee constitution of 1796, the Ohio constitution of 1802, the Louisiana constitution of 1812, the Mississippi constitution of 1817, the Connecticut constitution of 1818, the Maine constitution of 1819, the Missouri constitution of 1820, and which in fact remains today the standard form of the clause in state constitutions; and while the Fifth Amendment reverts to the term "person," the person thought of is manifestly one under formal accusation.[2]

[2]The foregoing constitutional provisions can be readily located in THORPE'S AM. CHARTERS, CONSTS., etc. See also F. J. STIMSON, FEDERAL AND STATE CONSTS., sec. 136.

Judicial application of the self-incrimination clause of Amendment V has, however, drawn singularly little upon the sources of illumination just mentioned. Its dependence has been upon the English common law as this stood at the time of the establishment of our government. In this, as in other instances, the formal phraseology of the Constitution has been utilized by the court to lift certain doctrines of the common law beyond the reach of ordinary legislative power, though at the same time remoulding them itself with considerable freedom.

The self-incrimination clause of Amendment V is a particular rendition of the "maxim" *"Nemo tenetur prodere* (or *accusare*) *seipsum*—nobody is bound to accuse himself." The source of the maxim itself is more doubtful. That it owed nothing to any *text* of the canon law can be stated with confidence, though the contrary has been sometimes asserted.[3] Rather, it first came into gen-

[3]It is so asserted, e.g., in the Solicitor General's brief in Ballmann v. Fagin, 200 U. S. 186, 190. In his article on the maxim in 5 HARV. L. REV. 71, at p. 83, Professor Wigmore makes an equivalent statement: "The fact is that the maxim *nemo tenetur* was an old and established one in ecclesiastical practice." In support of this assertion, Professor Wigmore cites STRYPE'S WHITGIFT, app., pp. 136-7, where is given an "Opinion of Nine most learned Doctors of the Civil Law," defending the oath *ex officio* procedure of the English ecclesiastical courts at that date—about 1590. The salient passage of the opinion runs as follows: *"Licet nemo tenetur seipsum prodere; tamen proditus per famam, tenetur seipsum ostendere, utrum possit suam innocentiam ostendere et seipsum purgare."* As given in this context, however, the maxim, it seems clear, does not purport to be a recital of a rule of canon law. Rather the passage quoted would seem to be an effort to square ecclesiastical practice with an idea which was already (see infra) beginning to be urged against it with telling effect.

I am assured by Fr. Louis Motry of the Catholic University, who is a recognized authority in the field, that no *text* of canon law contains the words of the maxim and this assurance is confirmed by a careful examination of GRAVINA'S INSTITUTIONES CANONICAE, PITHOU'S CORPUS JURIS CANONICI, and CANCE'S LE CODE DE DROIT CANONIQUE (3 vols., Paris, 1920). Modern *authors,* on the other hand, sometimes use the words of the maxim, in which connection Fr. Motry cites 4 LEGA, DE JUDICIIS ECCL. 295 (Rome, 1901). Moreover, the Canon Law has always recognized the general principle that a man should not be required to accuse himself *in the first instance.* Thus the sixth of the eleven "rules of law" attributed to Gregory IX (see the 5th book of his Decretals) provides: *"Tormenta, indiciis non praecedentibus, inferenda non sunt* (torture ought not to be resorted to until some evidence has been forthcoming)." To the same general effect, too, is the answer returned to Questio V, Decreti II Pars., Causa VI, in PITHOU'S CORPUS: *"Si*

eral notice in England, as we shall see in a moment, as a protest against characteristic procedures of that law. Neither, on the other hand, did it spring in the first instance from the common law. Far down into the seventeenth century the first step against an accused person in England was his forced examination, which might or might not be under oath, before a justice of the peace; and almost the first step in his subsequent trial was the reading of results of this examination, while the most important feature of the trial was the direct questioning of the accused, both by the prosecution and by the court itself. It is true that the accused was not now under oath, unless the court had chosen to concede him it as a favor; but

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in probatione deficit accusator, an reus sit cogendus ad probationem suae innocentiae." The question is answered "no," on the basis of the authority of Gregory, but with this important reservation: "*Hoc autem servandum est, quando reum publica fama non vexat. Tunc enim auctoritate ejusdem Gregorii propter scandalum removandum, famam suam reum purgare oportet.*" Pertinent, too, in this connection are two provisions of the CODEX JURIS CANONICI, to which Fr. Motry refers, and which at first glance seem to approximate in purpose fairly closely to the constitutional clause against self-incrimination. These are canon 1743 (Par. 1), which reads as follows: "*Judici legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso;* and canon 1744, the words of which are *Jusjurandum de veritate dicenda in causis criminalibus nequit judex accusato deferre.*" The date of the former canon Fr. Motry is unable to furnish; the latter however, was established by Benedict XIII in the Provincial Council of Rome in 1725. It is therefore important to note that as late as 1749, Conset could write, with reference to the oath *ex officio* procedure, as follows: "If the fame of it [a charge] is proved or confessed, the defendant ought to answer to the positions [charges], although they be criminal, or, if he doth refuse, he is to be pronounced *pro confesso,* after being admonished to answer." PRACTICE OF SPIRITUAL COURTS, p. 384; WIGMORE, *loc. cit.,* p. 83. The above quoted canons, were not, therefore, it seems, regarded as late as 1749 as having invalidated the oath procedure. It should be added that, in English ecclesiastical practice at least, the existence of a rumor (*fama*) was sufficiently established by the testimony of two persons. Dr. Hunt's Case, Cro. El. 262.

Summing up, we may say: (1) that the specific maxim *nemo tenetur* finds no place in any *text* of canon law; (2) that canon law recognition of the general principle that a person ought not to be forced to accuse himself was always attenuated by the qualification that one accused by a sufficiently authenicated rumor could be legitimately required to clear his reputation or have the charge taken as confessed. That some moralist or canonist may, in urging this principle, whether with or without the qualification mentioned, have coined the maxim *nemo tenetur* before Coke brought it into notice (see infra) as an argument against the oath procedure of the English ecclesiastical courts, is of course quite possible.

the verdict of the jury was apt to be reached largely, if not altogether, on the impressions conveyed by such an examination.[4] The practice of the Star Chamber from 1487 was still more drastic. That year the Chamber, which already had a conceded jurisdiction to fine and imprison for nearly all offenses, was vested with authority to compel defendants to testify under oath; and in the exercise of the power thus given torture was employed not infrequently.[5] Nor indeed, at that date, was torture altogether unknown to the ordinary courts as a means of eliciting testimony from an accused, albeit according to Coke the practice was always contrary to the common law.[6]

The immediate occasion for the appearance of the maxim *"nemo tenetur"* was the contest which developed towards the close of the sixteenth century between the common law courts and the Court of High Commission over the penal jurisdiction claimed by the latter. From the ecclesiastical courts of the middle ages the High Commission claimed to have inherited the right to administer within the field of its jurisdiction the so-called "oath *ex officio*." This was an oath which bishops, or those who were deputed by them, were authorized to administer to clerymen, or even to laymen, whom rumor had brought under suspicion respecting some matter either of faith or morals, for the purpose of enabling them to clear themselves. Persons taking the oath were sworn to tell the whole truth

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[4] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 216-25, 324-37, 345-57; the same author on "the Practice of Interrogating Persons Accused of Crime," in 1 JURIDICAL SOC. PAPERS, 456 ff. Examination of prisoners before justices of the peace was directed by 1 & 2 Ph. and M. c. 13 and 2 & 3 Ph. and M. c. 10; also by 7 Geo. IV, c. 64. In 1655 the judges directed that the examination should be without oath. STARKIE ON EVIDENCE (2d ed.), p. 29.

[5] 1 STEPHEN, *op. cit.* 166-83, 337-45.

[6] 1 *ibid.*, 222: 3 INST., 35. For an instance of torture see LYON AND BLOCK'S EDWARD COKE, ORACLE OF THE LAW (Boston, 1929), pp. 192-3. The victim was Edward Peacham, a Puritan clergyman. His bishop having made charges against him, Peacham was first brought before the High Commission; then later, on a charge of high treason, before the Privy Council. Bacon, then attorney-general, was present at his ensuing examination upon this charge, and reported it thus: "Upon these interrogatories, Peacham was examined before torture, between torture, and after torture; nothing could be drawn from him, he still persisting in his obstinate and inexcusable denials and former answers."

in answer to the questions about to be put them, and a refusal to take the oath or to answer under it was taken as confession of the offense charged.[7] The handle which such a procedure lent to the High Commission's power to fine and imprison for "heresies * * * offenses * * * and enormities"[8] is manifest; and once the latter was challenged the former was bound to be also.

The oath first came under serious attack the last quarter of the sixteenth century, in the interest of Puritan non-conforming clergymen, who were rapidly becoming its usual victims.[9] In 1589 the same cause enlisted the important support of Sir Edward Coke. This year Coke as attorney for a client who had been haled before an ecclesiastical ordinary on a charge of incontinency obtained a prohibition from the King's Bench against the oath procedure. Coke's argument was that the oath *ex officio* could be employed only in causes testamentary and matrimonial, "because *nemo tenetur prodere seipsum.*"[10] Inasmuch as this is the earliest actual statement of the

[7]For the oath *ex officio* and the procedure based on it, see 4 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (2d ed.: 1923), sec. 2250; R. G. USHER, RISE AND FALL OF THE HIGH COMMISSION, *passim* (see index); 12 REP. 26; 2 INST. 657; Gravina, INST. CAN. *lib.* III, tit. X. (*de juramento calumniae*) tit. XI. (*de probationibus*). The oath procedure was devised by Innocent III to combat heresy. In a canon issued in 1199 it was provided: *"Licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, fama publica deferente, voluisti plenius inquirere veritatem."* 4 WIGMORE, 798 n. 23. This is the source of the *Inquisitio*; the practice of putting the party under oath to tell the truth in answer to all questions about to be put him was added in 1205, in the Decretals of that year. WIGMORE, *loc. cit.* For the introduction of this procedure into England see *ibid.;* also 12 Rep. 28, 29.

[8]1 Eliz. c. 1; cf. 4 INST. 324, esp'ly 332-4, for denial of the Commission's penal jurisdiction.

[9]USHER, *op. cit.*, 125-30, 141-51, 170-5, 182, 320, 328; See also STRYPE'S WHITGIFT, 340.

[10]Cullier v. Cullier, Cro. El. 201; Moor, 906. As Chief Justice of the King's Bench Coke repeats the maxim in his judgment in the case of Sir Wm. Boyer, Pl. against the High Commission (1613), 2 Bulstr. 182-3: "They would have examined him upon oath; as touching this, the Rule of Law is, *Nemo tenetur seipsum prodere;* they may there examine upon oath if he be a Parson, or an Ecclesiastical man, but not a lay person." In Dighton and Holt's Case, (1615), 3 Bulstr. 48; Cro. Jac. 388 he takes a similar line, but without repeating the maxim. "Because this examination is made to make them accuse themselves of the breach of a penal law, which is against the law; for they ought to proceed against them by witnesses, and not enforce them to take an oath to accuse themselves." In both these cases, as well as in his opinion in 12 Rep. 26 on the Oath *ex officio,* Coke refers to Leigh's Case,

maxim known to be extant, Bentham conjectures that it was of Coke's own invention.[11] The surmise is not lacking in plausibility, as Coke delighted in nothing more than to give his ideas a Latin phrasing for the purpose of investing them with the apparent sanction of antiquity. At the same time, he rarely created out of whole cloth; nor was he necessarily doing so on this occasion, as the data furnished in note 3, above, showed. There is, in fact, pauseworthy authority for the statement that the notion that an accused should not be forced to testify against himself had found recognition and enforcement, at least in some measure, in the procedure of the ancient Roman courts.[12]

But Coke's most weighty assault upon the oath *ex officio* was delivered without reference to the maxim. This occurred in 1607, the year following his elevation to the Chief Justiceship of the Common Pleas, when in answering a question propounded by the House of Commons, Coke and Popham, chief justice of the King's Bench, formally laid down the doctrine that the oath could be legally exacted of laymen only in cases affecting wills and marriages, while even as to ecclesiastics it could not be exacted regarding any matter punishable at common law. For said they, "it standeth not with the right order of justice nor good equity that any person should be convict and put to the loss of his life, good name, or goods, un-

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which he says was decided in the tenth year of Elizabeth's reign, and was reported by Lord Dyer, but not printed. See also COKE'S LITTLETON, 158 b: "If the cause of the challenge touch the dishonor or discredit of the juror he shall not be examined upon his oath," citing 49 Eliz. 3. 1, 2. Other early cases in which Coke did not participate, but which reflects the view point of the above are Clifford v. Huntley (1610), 1 Rolle's Abr., Prohibition (J) 6, where it was held that a prohibition would lie to prevent the exaction in an ecclesiastical court of an answer on oath which might show forfeiture of an obligation; Bradston's Case (1614), *ibid.*, Prohibition (J). 1, where a similar result was reached; Spendlow v. Smith (1616?), Hob. 84, of like import; and Jenner's Case (1620), Rolle's Abr., Prohibition (J) 5, also to the same general effect.

[11] 5 RATIONALE OF JUDICIAL EVIDENCE, 221-9; see also *ibid.*, 250-66, 455, 462.

[12] "One author on Canonical Procedure (ROBERTI, DE PROCESSIBUS) in writing on the subject states that it was *jus commune* in the Roman law courts not to force the guilty one to give any information concerning his own crime. He refers to a practice or custom but adds no sources." Fr. Motry to the present writer.

less it were by due accusation, and witnesses, or by presentment, verdict, confession, or process, of outlawry."[13]

These words, which Coke, although citing them to a statute of Henry VIII,[14] asserts to be merely declaratory of the common law, make abundantly clear the nature of the issue between the common law judges and the Court of High Commission. This issue arose, or at least drew its substance, from the conspicuous difference between, on the one hand, the *accusatorial* method of the common law, which centers in the grand jury, and on the other hand, the *inquisitorial* method of the canon law, in which accusation might be by rumor (*fama*), provided the existence of the rumor was authenticated by two witnesses. It was not, therefore, concerned primarily, if it was concerned at all, with the rights of persons under accusation by a proper mode of procedure. It dealt with the preliminary question of what were the necessary incidents of such a procedure; and the answer of Coke and his confreres to this question was naturally that of the common law itself.

First obtaining general currency in consequence of the fight of the common law courts upon the penal jurisdiction of the Court of High Commission, the phrase *"nemo tenetur"* began to assume something of its modern (which may also be its ancient) connotation in connection with Lilburne's trial before the Star Chamber in 1637.[15] Basing his claim upon the law of God as shown in Christ's and St. Paul's trials, on "the law of the land," and the Petition of Right, Lilburne refused to take an oath to be "ensnared by answering things concerning other men"; but he significantly added that if "he had been proceeded against by a bill" (that is, of indictment), he would have answered. That is to say, as a *witness* concerning the conduct of others he was protected from incriminating himself, although had he been regularly *accused* he would have had to testify. All of which is strictly harmonious with Coke's employment of the maxim.

But the rest of the story is also instructive. For his contumacy Lilburne was sentenced to be whipped, and in April, 1638, sentence was executed. Three years later, though before the Star Chamber

[13] 12 Rep. 26-29; to same effect, 2 INST. 657.

[14] 25 Hen. 8, c. 14.

[15] 3 How. St. Tr. 1315; see also narrative in WIGMORE, *op. cit.*, sec. 2250.

had been abolished, the House of Commons voted the sentence illegal. Then on February 13th, 1646, the House of Lords consented to hear a petition by Lilburne's attorney Bradshaw against the sentence, wherein the unqualified doctrine was urged that it "was contrary to the laws of God, nature and this kingdom, for any man to be his own accuser." The House, thereupon, ordered the sentence to be totally vacated as "illegal and most unjust, against the liberty of the subject, and law of the land, and Magna Charta;" and some months later Lilburne was voted £3,000 reparation.

Lilburne's trial, together with this aftermath, has, therefore, a two-fold bearing upon the development of the modern doctrine against self-incrimination: first, in the wide advertisement which it afforded the maxim as a constituent element of "law of the land," deemed to have been consecrated by Magna Charta; and secondly, in substantially obliterating the distinction which had existed, certainly in Coke's mind, between the status in relation to the maxim of a regularly *accused defendant* and that of other persons.

From this time forth judicial recognition and development of the maxim proceeded with great rapidity, so much so indeed that long before the Constitution of the United States was adopted, or even before American independence was thought of, the privilege against self-incrimination had received an extension in the English cases which in some respects is broader than its application by the United States Supreme Court today.[16]

It is requisite at this point to draw attention to the difference which exists nowadays between the privilege of an *accused* to refuse to take the stand at all in the proceedings against himself, and the privilege of a *witness* to decline to answer specific questions which "tend to incriminate" him. Of the cases just referred to the great majority were criminal proceedings in which the persons invoking the protection of the doctrine against self-incrimination were

[16]The development was aided by legislation. By 13 Car. II, c. 12 (1662), it was provided that "no one shall administer to any person whatsoever the oath usually called *ex officio*, or any other oath, whereby such persons may be charged or compelled to confess any criminal matter." This enactment explains why the question of self-incrimination did not from this time on come up in the ecclesiastical courts.

witnesses testifying under oath.[17] Protection seems to have been readily granted them upon their own claim, its pertinence being usually quite evident. The scope given the privilege of witnesses in these early cases was, moreover, very broad, extending not only to questions tending to incriminate the witness but also to questions tending to disgrace him.[18]

At first the case of accused persons not under oath, though still subject to the informal questioning of the prosecution and the court, seems to have been assimilated more or less to that of ordinary witnesses. In the trial of the regicide Scroop, in 1660, the Lord Chief Baron, having asked the defendant whether he "sat upon sentence day"—that is, the day when Charles I was condemned to die—hastened to add: "You are not bound to answer me; but if you will not, we must prove it."[19] In the trial of Penn and Mead for riotous assembly a few years later, Mead appealed to the doctrine in the following words: "It is a maxim in your own law, *'nemo tenetur accusare seipsum,'* which if it be not true Latin, I am sure is true English, 'that no man is bound to accuse himself,' " to which his interrogator answered by denying that he had tried to "ensnare" the defendant.[20]

Following, however, the Revolution of 1688, English criminal procedure underwent a marked alteration, and the questioning of accused defendants soon ceased entirely. But while this change undoubtedly testifies to the growing influence of the maxim against self-incrimination, the manner in which it was effected was by extension from civil to criminal cases of the rule that a party is not a

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[17]See esp'ly Scroop's Trial, 5 Howell St. Tr. 1034, at p. 1039 (1660); Penn's and Mead's Trial, 6 *ibid.* 651, at p. 658 (1676); Reading's Trial, 7 *ibid.* 259, at p. 296 (1679); Whitehead's Trial, 7 *ibid.* 311, at p. 361 (1679); Earl of Stafford's Trial, 7 *ibid.* 1293, at p. 1214 (1680); Rosewell's Trial, 10 *ibid.* 147, at p. 169 (1680); Sir Jno. Freind's Trial, 13 *ibid.* 1, at pp. 16-18. Many of these references occur in 4 WIGMORE, 815 n. See also, 16 How. St. Tr. 767: 17 *ibid.* 1342; Salk. 153; 2 Mod. 118; 3 Taunt. 424; 5 Carr. and P. 213; 3 Camp. 210; 2 Hawkins, Pleas of the Crown, c. 46; 1 MACNALLY, EVIDENCE, 256-8.

[18]See esp'ly the Lord Chief Justice in 13 How. St. Tr. 1, 16-18; also Salk. 153. Priddle's Case, 1 Leach's Cr. Law (old ed.) 382; and King v. Edwards, 4 Term Rep. 440 (1792) reject this broad doctrine.

[19]5 How. St. Tr. 1034, 1039.

[20]6 *ibid.* 651, 657.

competent witness on account of interest (*'nemo debet esse testis in propriâ causâ"*).[21] The result was that henceforth the mouth of an accused, and his wife's as well, was closed whether *for* or *against* himself; and it is in this form that the immunity of accused persons passed to the American colonies balanced, that is, by the corresponding disability. Not until 1878, following a similar reform in several of the states, was the right to testify in their own behalf, under oath, accorded defendants in the national courts.[22]

But not only was an accused protected from all judicial questioning under the common law as this country inherited it, his papers which might contain incriminating matter were immune from judicial process. This principle was laid down as early as 1704, in *Regina v. Mead*;[23] and in 1765 it received the sanction of the two greatest legal lights of England, Lord Mansfield in *Rex v. Dixon*[24] and Lord Camden in *Entick v. Carrington*.[25] Meantime, in other cases it had been carried beyond even present day American doctrine. In *Rex v. Purnell* (1748),[26] for instance, the court refused to permit the prosecution to inspect the statutes and archives of the University of Oxford, of which defendant was vice-chancellor. The doctrine of the United States Supreme Court is that an officer of a corporation is not to be shielded from the forced production of the

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[21] 1 STEPHEN, *op. cit.* 439-42; 1 JURIDICAL SOC. PAPERS, 456 ff.

[22] 20 Stat. 30 (Act of Mar. 16, 1878, c. 37): "That in the trial of all indictments * * * and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts, and courts-martial * * * the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." The provision was construed in Wilson v. United States, 149 U. S. 60. For a general review of legislation on the same subject, see 1 GREENLEAF, EVIDENCE (15th ed.), 467-8; 3 *ibid.*, 54-67. See also, COOLEY'S CONS'L LIMS. (2d ed.) 317 n., 394.

[23] 2 Ld. Raymond 927.

[24] 3 Burr. 1687.

[25] 19 How. St. Tr. 1029.

[26] 1 Wils. 239. To this same effect is Rex v. Cornelius, 2 Strange 1219 (1744), where the court refused a rule asked for by the prosecutor, to inspect the books of a corporation, saying: "It is in effect obliging a defendant indicted for a misdemeanor to furnish evidence against himself." See also Rex v. Worsenham, 1 Ld. Raymond 705; Rex v. Mead, supra; and Rex v. Granatelli, 7 St. Tr. (N. S.) 979, where the same principle is recognized.

papers thereof, inasmuch as he holds them not in a private but in a representative capacity.[27]

Finally, a series of rulings in the Court of Chancery before 1700 had clearly foreshadowed the extension of the privilege to both parties and witnesses in civil proceedings as to disclosures calculated to furnish evidence against them in possible future criminal proceedings.[28]

Comparing now the common law regarding self-incrimination with the prevalent type of constitutional provision on the same subject, at the time of the adoption of Amendment V, the question naturally arises: Why the narrow scope of the latter? The answer is simple. In the early state constitutions, as in the Fifth Amendment, immunity from self-incrimination is listed merely as *one* of a whole parcel of privileges which were in the main of interest to accused persons and to no others. That is to say, the problem being dealt with was the improvement of the lot of accused persons, a concentration of interest which was due to the tradition of the harshness of the common law in this respect, as illustrated by the trials of the Throckmortons and of Udall in the sixteenth century, the conduct of "Bloody" Jeffries on the Western Assizes the century following, and the terrible severity of the English penal code in the eighteenth century. At the same time, since the constitutional provisions mentioned above did not overrule the common law in excluding an accused from the witness stand, their stipulation for his immunity taken by itself became pointless. If only, therefore, to save the framers of these provisions from the charge of having loaded them with a meaningless tautology, their language had to be given other than its literal significance, and the common law was at hand to supply this in rich measure.[29]

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[27]See infra.

[28]Penrice v. Parker, Finch 75 (1673); Bird v. Hardwick, 1 Vern. 109 (1682); Afr. Co. v. Parish, 2 *ibid.* 244 (1691). See also Boyd v. United States, 116 U. S. 616, at p. 631. One reason why the question was late in arising in the law courts was that at common law there was ordinarily no process against papers, as is pointed out by Lord Camden in his opinion in Entick v. Carrington. In Chetwind v. Marnell, Excr., 1 Bos. and P. 271 (1798), however, we find Chief Justice Eyre refusing, in an action on a bond, to order the production of the instrument on the ground that it might be a means of convicting the party of a capital felony.

[29]Both Boyd v. United States, supra, and Counselman v. Hitchcock, 142 U. S. 547, are replete with invocations of the common law.

II

Turning to the history of the clause in American constitutional law, we at once find the earlier distinction between accused persons and all others yielding in importance to that between *oral testimony* and *the evidence supplied by documents or things.* In this connection the United States Supreme Court has rendered two outstanding decisions, that in *Boyd v. United States,* and that in *Counselman v. Hitchcock.*[30] In the former it appropriated to the Constitution the safeguards which are thrown by the common law about incriminating documents, and in the latter it definitely brought within the Constitution the protection which is afforded by the common law to witnesses giving oral testimony; and in both instances it projected into new territory the rules which it thus assimilated to the Constitution.

Boyd v. United States, the earlier of the two cases, was decided in 1886, nearly one hundred years after the adoption of the Constitution. The reason for this long interval of apparent disuse of the self-incrimination clause is to be found, without question, in the state of the common law as just reviewed, and the injunction which the federal courts were under from Congress to base their procedure on that law. During the vast portion of this period accused persons on trial in the federal courts were excluded from taking the stand at all, while the test which was applied to the immunities claimed by witnesses—not only in the federal courts but in the state courts as well—was the direct test of the common law.

But in *Boyd v. United States* a specific provision of an act of Congress was involved, with the result that recourse against it to the common law, unsupported by the Constitution, would have been futile. The question presented itself, therefore, whether the Constitution afforded such support. The provision referred to enacted that in forfeiture proceedings brought under the revenue laws, the court might issue a notice to defendants requiring the production in court of relevant books and papers on pain of having taken for confessed the allegations of the government as to their contents. In the lower federal courts even more drastic provisions had been sustained as against objections based on the self-incrimination clause

[30]See notes immediately preceding.

of Amendment V, on the ground that forfeiture proceedings, being *in rem,* were not "criminal prosecutions"; and that even if they were, the clause was meant to cover only oral testimony given under oath, not evidence afforded by books and papers.[31] In *Boyd v. United States* the Supreme Court overruled both these contentions.

The question whether the self-incrimination clause applied to what was virtually forced production in court by a person of his own private papers to be used in evidence against himself, the court answered unanimously in the affirmative. A majority of the court, however, felt it requisite to go further than this and speaking through Justice Bradley, held that a judicial order of the kind involved in the case was also an "unreasonable search and seizure" within the sense of the Fourth Amendment.

In support of this line of reasoning Justice Bradley relied largely upon Lord Camden's celebrated opinion in *Entick v. Carrington,* in which, in condemning "general warrants" as contrary to the common law, Lord Camden pointed out the facility which they afforded agents of government in the search for documentary evidence—at that moment, on account of the persecution of Wilkes, a burning issue in England. "The great end for which men entered into society," said Lord Camden, "was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. * * * Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection. * * * It is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil actions. * * * In the criminal law such a proceeding was never heard of. * * * It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon

[31]See esp'ly In re Strouse, 1 Sawy. 605 (Fed. Cas. No. 13,548); Stockwell v. United States, 3 Clifford 284 (Fed. Cas. No. 13,466); United States v. Hughes, 12 Blatch. 553 (Fed. Cas. No. 15,417); United States v. Three Tons of Coal, 6 Bliss. 379 (Fed. Cas. No. 16,515). Some of these and others are discussed in 116 U. S., at pp. 635-8.

the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

Reciting this language, Justice Bradley found the prohibition of the Fifth Amendment against self-incrimination to be auxiliary to a broader objective common to both the Fourth and Fifth Amendments, to wit, *"the personal security of the citizen," in his privacy.* Acts of the national government violative of this should accordingly be brought when possible to the simultaneous test of both Amendments.

For some years this opinion encountered the strongly urged criticism that the greater part of it had been gratuitous. Indeed, there was a time when the court itself seemed inclined to repudiate the somewhat recondite doctrine of the mutuality of the two Amendments and to rest the decision in the *Boyd* case exclusively upon Amendment V.[32]

But in *Weeks v. United States,*[33] decided in 1914, the court may be seen veering back toward its earlier position. In that case, while leaving in abeyance the question whether the Fourth and Fifth Amendments "nearly run together," it held that the federal courts were under a direct mandate from the former Amendment, whose provisions would otherwise be without effective sanction, to prevent the use of evidence which had been seized by federal agents in violation thereof; and in such recent cases as *Gouled v. United States,*[34] *Carroll v. United States,*[35] and *Agnello v. United States,*[36] the court makes it fully apparent that it today regards the *Boyd* case as law of the land for all of its more important implications.

Coming then to consider what is the operation of the two Amendments upon one another in current constitutional law, we can at least venture the assertion that the following propositions have today the court's adherence: *first,* a person may not be required by

[32] Cf. Adams v. New York, 192 U. S. 585 (1904); Hale v. Henkel, 201 U. S. 43 (1906); WIGMORE, secs. 2184 and 2264; Heywood v. United States, 268 Fed. 795 (1920).

[33] 232 U. S. 383.

[34] 255 U. S. 298.

[35] 267 U. S. 132.

[36] 269 U. S. 20.

a federal court to produce his own papers or effects, there to be used as evidence against himself; *secondly,* a search warrant may not validly issue from a federal court for the purpose of enabling a federal agent to search a person's premises for papers or things which are solely of evidential value against such person; *thirdly,* papers or things which have been seized by an agent of the national government in violation of a person's rights under the Fourth Amendment may not, under the Fifth Amendment, be validly received in any federal court as evidence against such person; *fourthly,* an accused may obtain the exclusion of evidence falling under the ban of any of the above rules by seasonable application to the trial court.

Except for its extension to chattels in general, the first rule is adequately supported by the self-incrimination clause alone, when interpreted in the light of the common law. The third rule, on the contrary, is the direct outgrowth of the characterization in the *Boyd* case of the judicial order there involved, which was the equivalent of a *subpoena duces tecum,* as "an unreasonable search and seizure." It is because such a search warrant would be, in the first place, an invasion of the privacy deemed to be protected by the Fourth Amendment that it would, in the second place, fall under the condemnation of the Fifth Amendment. But it is in connection with the second of the above rules that the reciprocity of the two Amendments, as well as the direct effect of Lord Camden's opinion, appears most strikingly. Considered *separately* neither Amendment would seem to forbid such a search warrant, but read *in conjunction* they are held in some undemonstrated fashion to do so. The fourth rule evidently only implements the others.

Further consideration of the first rule: Most of the cases have arisen in connection with the first and third of the above rules. The principle which is mainly restrictive of the first is the principle that the immunity conferred by the self-incrimination clause is a purely personal one, from which the court deduces the further limitation that the papers and effects which it covers must be the private property of the person claiming its protection, or must at least be in his possession, and in a purely private capacity.[37]

[37]In addition to the cases cited in the succeeding notes, see Schenck v. United States, 249 U. S. 47.

It follows that the clause may not be pleaded by an officer or agent of a corporation in behalf of the corporation;[38] nor even in his own behalf as respects papers or effects of the corporation which he holds in a representative capacity.[39] It follows also that the owner is not protected against the forced production of papers by a third party into whose hands they have passed.[40] Furthermore, the papers and effects in relation to which the protection of the clause is invoked must be *private* as regards their evidential worth, a characterization which does not apply to papers and articles already in the custody of a court of the United States in consequence of their having been there used by the owner himself as evidence in an earlier proceeding.[41] Nor does the rule apply to the surrender by a bankrupt of his books and papers even though they may contain incriminating matter. "The books and papers of a bankrupt," the court has said, "are a part of the bankrupt's estate. * * * To

[38]Hale v. Henkel, supra; Essgee Co. of China v. United States, 262 U. S. 151.

[39]Wilson v. United States, 221 U. S. 361, is the leading case. "An officer of a corporation is protected by the self-incrimination provision of the Fifth Amendment against compulsory production of his private books and papers, but this privilege does not extend to books of the corporation in his possession. An officer of a corporation can not refuse to produce documents of a corporation on the ground that they would incriminate simply because he himself wrote or signed them, and this even if indictments are pending against him. Physical custody of incriminating documents does not protect the custodian against their compulsory production. The privilege which exists as to private papers can not be maintained." Headnote *ibid.* Justice McKenna dissented on the basis of the English cases, some of which were discussed supra. This marked departure from the common law as it existed in 1789 may be due in part to the connection which exists between the Fourth and Fifth Amendments. If the prohibition against self-incrimination be alone considered, the English doctrine is certainly much more logical than that of Wilson v. United States. The emphasis, on the other hand, which the Fourth Amendment lends to the security of private papers furnishes a different point of view and outlook, one from which the holding in the case at bar becomes a not illogical outcome of the mergence of the two Amendments. Reiterative of the doctrine of Wilson v. United States are Wheeler v. United States, 226 U. S. 478; and Essgee Co. v. United States, note 38 supra.

[40]Burdeau v. McDowell, 256 U. S. 465. Here was sustained the right of the United States to use as evidence papers which had been stolen from defendant and then turned over to officers of the government. This also is the English rule. Reg. v. Ringlake, 11 Cox 499; WIGMORE, sec. 2270.

[41]247 U. S. 7.

permit him to retain possession because surrender might involve disclosure of a crime would destroy a property right."[42]

Further consideration of the second rule: This rule today rests immediately upon *Gouled v. United States*,[43] decided early in 1921. Gouled had been convicted of conspiracy to defraud the United States and of misuse of the mails in connection with his scheme. Part of the evidence against him was supplied by certain papers which were taken from his office under two search warrants issued in conformity with an act of Congress.[44] In reviewing his conviction the circuit court of appeals certified the following question to the Supreme Court: "Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted [for an offense against the United States] * * * when taken * * * from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?" It also asked whether the admission in evidence of such papers against such person on his subsequent trial was violative of the Fifth Amendment. The court answered both questions in the affirmative, it being "impossible to say on the record before us that the government had any interest in it [them?] other than as evidence against the accused."[45]

While under the facts of the case this particular statement of the rule limits it to papers, the court clearly regards it as extending to chattels generally, provided the other qualifications of the rule are met; namely, first, that the things involved were seized on the premises of the persons against whom they are subsequently offered in evidence; secondly, that they were solely of evidential value to the government. The rule, therefore, does not apply to things which are legal contraband, like liquors, narcotics, gambling implements, counterfeit coin, and stolen or forfeited goods. To such things the protection of the law does not extend; they are often properly seizable by agents of the government without a search warrant, and when so seized they may be used as evidence against the persons from whom taken.[46]

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[42]McCarthy v. Arndstein, 266 U. S. 34, 41.

[43]Cited note 34 supra.

[44]40 Stat. 217, 218 (Act of June 15, 1917, c. 30).

[45]255 U. S. at pp. 309-11.

[46] So recognized in Boyd v. United States, 116 U. S. at pp. 623-4.

The question accordingly presents itself whether there is any general criterion of contraband articles? Referring in the *Gouled* case to a certain executed contract, the court concedes that it "might be an important agency or instrumentality in the bribing of a public servant and perpetrating frauds upon the government, so that it [the government], would have a legitimate and important interest in seizing such a paper in order to prevent further frauds." On the other hand, in the later case of *Marron v. United States*[47] the court sustained the right of governmental agents, in making a permitted arrest under the National Prohibition Act, to seize a ledger and bills for gas, electricity, water and telephone, and inferentially their right to offer these in evidence against the persons arrested. The ledger, said the court, was "a part of the outfit or equipment actually used to commit the offense," and the bills "were convenient, if not in fact necessary for the keeping of accounts."[48]

The final form of the second rule would, therefore, appear to be as follows: a search warrant may not validly issue from a federal court to enable a federal agent to search a person's premises for papers or articles which are solely of evidential value against such person; but this category does not include papers and articles which were instruments of the offense charged or which are capable of other mischievous use.

It is not without interest to observe that under this statement of the rule the invoice whose forced production gave rise to the *Boyd* case would today be subject to seizure under a proper search warrant, as the immediate instrument of the fraud upon the revenues there alleged. In brief, the precise holding in the *Boyd* case is today bad law.

Further consideration of the third rule:[49] The principal question to present itself under this rule is, When may searches and seizures be validly made under the Fourth Amendment without a search warrant? While it is not in connection solely with a search for evidence that this question may arise, in point of fact it has ordinarily so arisen ever since the *Boyd* case, and recently it has most fre-

[47]Note 45 supra.

[48]275 U. S. 192, 199.

[49]The Gouled, Agnello, and Marron cases contain the best statements of this rule. See notes 34, 36, and 48 supra.

quently arisen in connection with efforts to enforce National Prohibition.

Two groups of cases present themselves, the first of which clusters about *Adams v. New York*.[50] In this case plaintiff in error contended on the basis of *Boyd v. United States,* that the introduction in evidence against himself of private papers which had been taken from his possession in the course of a valid search under warrant for gambling instruments forced him to incriminate himself contrary to the Fifth and Fourteenth Amendments. The court, waiving the question whether protection against self-incrimination is a part of that "due process of law" which by the Fourteenth Amendment is required of the states, construed the *Boyd* decision as applying only in cases of direct testimonial compulsion upon an accused; and also ruled, in reliance on *Commonwealth v. Dana,*[51] a Massachusetts case decided in 1841, that a trial court is not obliged to inquire into the means whereby agents of government have obtained otherwise competent evidence.

In both these respects the *Adams* case must be today regarded as having been substantially overruled. The case is still, nevertheless, authority for the proposition that the implements or fruits of a suspected crime may be seized in connection with the valid arrest of the supposed criminal, and so may be subsequently introduced in evidence against him; and as we saw above, the term "implements of the crime" has been held to extend in some instances to books and papers. But private letters and diaries having no other relation to the crime than as records of it obviously would not fall within the term. If such papers may ever be validly used against the offender from whose possession they were taken they must have been found on his person at the time of his arrest.[52]

The leading case of the second group just referred to is *Carroll v. United States*.[53] Carroll and another had been convicted of transporting liquor contrary to the National Prohibition Act, partly through the admission in evidence against them of some of the liq-

[50]See note 32 supra.

[51]2 Met. 329.

[52]For federal and state cases bearing on the subject, see O. L. CORNELIUS, THE LAW OF SEARCH AND SEIZURE (1926) sec. 36 and notes. Cf. the Agnello and Marron cases; also COOLEY, CONST'L LIMS. (7th ed.) 432.

[53]See note 35 supra.

uor in question, which had been taken from their automobile by federal officers operating without a search warrant. To the objection that this was an "unreasonable search and seizure" the court answered that in such a case the Fourth Amendment does not require a search warrant, but only that the officers making the search should have "probable cause," that is to say, "belief reasonably arising out of circumstances known to" them, "that the automobile or other vehicle contains that which by law is subject to seizure and destruction." Speaking for the court, Chief Justice Taft pointed out that Congress, while providing in the National Prohibition Act that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose," had advisedly excluded a similar provision to govern searches of vehicles. He showed further that earlier Congressional legislation abounded in similar provisions, "recognizing a necessary difference between a search of a store, dwelling house, or other structure, in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Finally, he asserted, on the basis of an extensive review of the facts which were known to the federal officers when they searched Carroll's car, that these facts and circumstances were such as to constitute the required "probable cause."

Two clear implications of the doctrine here laid down should not be missed. In the first place, the fact upon which a "probable cause" justifying a search for contraband articles is based must be known to the officers undertaking the search *before* they commence it. In the words of a subsequent case: "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light."[54] Again contraband articles may not, any more than articles in which complete property rights exist, be offered in evidence against an accused from whom they were obtained in violation of his rights under the Fourth Amendment. Thus, the third rule stated above,

[54]Byars v. United States, 273 U. S. 28, 29.

in contrast to the second, applies equally in the case of contraband articles and in that of "effects" to which the full protection of the law extends.[55]

An important question which the *Carroll* case leaves open, and one on which there has been considerable speculation, is whether a dwelling-house may ever be searched without a warrant. In the later *Agnello* case the court says: "'The search of a private dwelling without a warrant is, in itself unreasonable and abhorrent to our laws.'"[56] Yet the same case admits an exception to this statement in its recognition of the right of officials to seize the proofs or implements of a crime in connection with the arrest of an offender taken in the act.[57] A distinction should, it appears, be noted in this connection between a *search* and a *seizure*. To require an officer who saw contraband openly displayed in the window of a dwelling house to obtain a warrant before venturing to effect a *seizure* of the same would be absurd, and would moreover be contradictory of the common law rule just alluded to as governing arrests.[58] A *search*, on the contrary, of itself, confesses an uncertainty still needing to be cleared up. The correct answer to our question would, therefore, seem to be this: Where search of a purely private dwelling, one not used for business purposes of any sort, is justified by "probable cause" only, this must be first passed upon by a magistrate in connection with an application for a search warrant, within the terms of the Fourth Amendment.

But does the same rule apply to all immobile structures? The language of the Chief Justice in the *Carroll* case suggests an affirmative answer; but it is contradicted by the weight of authority, by the very provision which Chief Justice Taft himself quotes from the National Prohibition Act, and indeed by the wording of the Fourth Amendment. As is pointed out by the court in *Hester v. United States*,[59] where a trespass by officers upon open fields was held not to fall with the Amendment, the Amendment reflects the special concern of the common law for the security of the dwelling,

[55]See note 49 supra. Also, Amos v. United States, 255 U. S. 313.

[56]269 U. S. at p. 32.

[57]*Ibid.* p. 30.

[58]United States v. Daison, 288 Fed. 199, and the cases there collected support this view.

[59]265 U. S. 57, 58.

a concern which was early summed up in the maxim that "every man's house is his castle."[60]

The following cases of seizure by United States agents operating without search warrants have been held violative of the Fourth Amendment, with the result that the things seized were not under the Fifth Amendment receivable in evidence against the party whose rights were invaded by the seizure: the obtaining by stealth of letters from the home of an accused during his absence;[61] the removal of liquors in similar circumstances;[62] the seizure of narcotics at the home of one of several conspirators, following their arrest at the home of another some distance away;[63] the procurement through stealth from the office of a suspect of a paper having evidential value only.[64] And a search warrant calling for the seizure of one thing will not authorize the seizure of something else;[65] nor is a warrant resting merely on affiant's "belief" based on the "probable cause" which is required by the Constitution.[66]

Two cases of a somewhat special type are *ex parte Jackson*[67] and *Olmstead v. United States*.[68] In the former the court held the protection of the Fourth Amendment to extend to letters and sealed packages in the custody of the national government for the purpose of forwarding them as mail. "Whilst in the mail," said the court, "they can only be opened and examined under like warrant * * * as is required when papers are subjected to search in one's own household."[69]

Relying on this piece of judicial legislation, plaintiffs in error in the *Olmstead* case, who had been engaged in bootlegging on a

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[60]The distinction made in the National Prohibition Act between private dwellings "occupied as such" and those "in part used for some business purpose" (Oct. 28, 1919, c. 85. Title II, sec. 25) is to be found in substance in the statutes of most of the states. CORNELIUS, *op. cit.*, p. 342. See also 4 BL. COMM. 223, 225, 226; COOLEY, *op. cit.* (2d. ed.) 22, 299; and note 56 supra.

[61]Weeks v. United States, supra.

[62]Amos v. United States, supra.

[63]Agnello v. United States, supra.

[64]Gouled v. United States, supra.

[65]Marron v. United States, supra.

[66]Byars v. United States, supra.

[67]96 U. S. 727.

[68]277 U. S. 438.

[69]96 U. S. at p. 733.

large scale, protested against the use as evidence against them of information which had been obtained by agents of the national government through tapping their telephone wires off their premises and "listening in" on their conversations. A narrowly divided court held that the *Jackson* case was distinguishable and that the Fourth Amendment did not apply.

The position of the minority on the constitutional issue is indicated in the following passage from Justice Butler's opinion. After stressing the importance nowadays of the telephone as a means of communication, often confidential, he said: "This Court has always construed the Constitution in the light of the principles upon which it was founded. The operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like or equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decision since *McCulloch v. Maryland*. That is the principle directly applied in the *Boyd* case."[70]

Against Justice Butler's broad constructionism, the Chief Justice speaking for the majority, pitted narrow construction. "The Amendment itself," said he, "shows that the search is to be of material things * * * the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized." He added that, while "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence, * * * the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment."[71]

While in view of the actual course that interpretation of the Amendment has generally taken in recent decades, these words leave something to be desired in the way of candor, yet the overwhelming difficulties that today confront government in the detection of

[70] 277 U. S. at pp. 487-8. Holmes, J., dissenting, refused to commit himself on the constitutional issue.

[71] *Ibid.* at p. 464.

crime serve readily to vindicate them on the score of policy in a case in which the court had a clear choice of alternatives.

The question finally presents itself, When is a search one *by the national government,* with the result that it falls within the purview of the Fourth Amendment? In the case of *Burdeau v. McDowell*[72] the court held that the United States might retain for use as evidence in the criminal prosecution of their owner, incriminating documents which had been turned over to it by private persons who had stolen them, there having been no participation or guilty knowledge of the theft on the part of government officials. In the later *Byars* and *Gambino* cases,[73] on the other hand, evidence which had been obtained through wrongful search and seizure by state officers acting in coöperation with federal officers was ruled to be inadmissible. The test, therefore, is whether there was actual participation by an officer or agent of the national government in the enterprise whereby the evidence was first obtained from the one against whom it was subsequently offered, a question of fact, but one for the court.[74]

Nor does the Fourth Amendment regulate solely searches and seizures by the *executive* agents of the national government; it also controls, as is indicated by the *Boyd* case, the courts directly in their efforts to obtain evidence through the *subpoena duces tecum* or equivalent process.

In the cases illustrating this point, corporations were generally the defendant parties. For while a corporation cannot claim the immunity created by the self-incrimination clause, which confers only a personal immunity upon the agents through whom the corporation must necessarily give testimony, the corporation itself is entitled to immunity under the Fourth Amendment from unreasonable searches and seizures. Consequently it was not contempt for an officer of a corporation to refuse to produce the books and papers thereof in response to a subpoena which was based on knowledge obtained through an original illegal seizure of the books and papers

[72]See note 40 supra.

[73]273 U. S. 28; 275 U. S. 310.

[74]The cases just cited show, too, that the court will go into this question with some care.

in question.[75] Also, a *subpoena duces tecum* requiring the production of practically all the books and papers of a corporation was held void, no such sweeping examination of the corporation's books and papers having been definitely authorized under any act of Congress.[76] Indeed, nothing "short of the most explicit language" will induce the court to attribute to Congress an intention to authorize a federal agency to compel a company to produce all of its books and papers in the mere hope of thus finding something against the company. Not only would such a search, say the court, violate "the first principles of justice"; it would also transgress "the analogies of the law," which require that a party calling for documents first show some ground for believing that they contain relevant evidence.[77]

That, nevertheless, Congress possesses broad visitorial powers over all corporations engaged in interstate commerce has been repeatedly admitted, as well as that such powers may be delegated to administrative bodies, like the Interstate Commerce Commission and the Federal Trade Commission.[78]

Further consideration of the fourth rule above: In the *Adams* case[79] the court, following the early Massachusetts case of *Commonwealth v. Dana,*[80] held that an accused was not entitled after the commencement of his trial to raise the question whether some of the evidence against him had been obtained in violation of his rights under the Fourth Amendment. In the *Weeks* case,[81] however, it ruled that where the accused had petitioned the trial court before his trial came on for the return of books and papers which had been taken from him contrary to the Fourth Amendment, the petition was seasonable and should have been granted, and that the admission in evidence against the accused of such books and papers constituted reversible error. Finally, in the *Gouled* and *Amos* cases[82] the ruling in the *Adams* case becomes confined practically to cases in which the accused has been evidently negligent in the assertion

[75]Silverthorne Lumber Co. v. United States, 251 U. S. 385.
[76]Hale v. Henkel, note 32 supra.
[77]Fed. Trade Com's'n v. Am. Tobac. Co., 264 U. S. 298.
[78]Cases just cited; also I. C. C. v. Baird, 194 U. S. 25.
[79]Note 32 supra.
[80]Note 51 supra.
[81]Note 33 supra.
[82]Notes 34 and 55 supra.

of his rights. "A rule of practice," it is said in the former case, "must not be allowed for any technical reason to prevail over a constitutional right."[83]

The court accordingly held that "where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers," it is the duty of the trial court, on objection raised by the accused, to decide the constitutional issue presented and this even though the court had earlier rejected a motion to return the papers. In the *Amos* case a substantially similar ruling was made with reference to liquor illegally seized.

(To be continued)

[83]255 U. S. at p. 313.