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Notes on Recent Cases

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NOTES ON RECENT CASES

BILLS AND NOTES—Holder in Due Course.—"Regularity."—The plaintiff took several notes which were drawn by the defendant corporation by its treasurer who named himself therein as payee. Said treasurer indorsed the note to the plaintiff in payment of a pre-existing personal obligation. Plaintiff as holder brought an action against the corporation as maker. *Held,* a holder, who takes a note signed by a corporation by its treasurer in payment of a personal obligation of the latter, cannot claim immunity as an innocent holder, as the very form of the paper itself is sufficient to put him on his guard in view of Sections 52, 57, and 58 of the Negotiable Instrument Law. That the instrument was "regular" on its face cannot be predicated where the payee is in a trust or quasi trust capacity to the maker. *Gillman v. Bailey Carriage Co.* (Me. 1925) 131 Atl. 138. A bona fide holder of a promissory note executed by an officer in the name of the corporation and payable to the officer executing it, as an individual, in legal contemplation, cannot exist. *Luden v. Lumber Co.* (Ga.) 91 S. E. 102; L. R. A. 1917 C., 485. W. L. T.

CONSTITUTIONAL LAW—Unreasonable Searches and Seizures.—The Fourth Amendment to the Constitution of the United States, provides: "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." *United States v. Crosby,* Federal Case No. 14,893 holds that the Fourth Amendment quoted above does not apply to state governments, but is a limitation exclusively on the power of the Federal Government. However, most of the State Constitutions in the United States embody this clause so that this inhibition is applicable to state governments as well as to the federal.

The question of unreasonable searches and seizures is thoroughly discussed by the recent case of *Carroll, et al. v. U. S.,* decided by the United States Supreme Court in 1925. In that case two Federal and one state prohibition officers were patrolling a high-

way between Detroit and Grand Rapids. Having previously learned that Carroll and Kiro, defendants, were "bootleggers", they stopped Carroll's car and searched it, believing the car contained liquor. They found, under the upholstery, sixty-eight quarts of bonded whiskey and gin. Carroll and Kiro were convicted of transporting liquor and assailed the conviction on the ground that the trial court admitted in evidence, one quart of whiskey and one of gin thus found, in violation of the Fourth Amendment. The National Prohibition Act provides, in effect, that it is unlawful to possess any liquor, and that a search-warrant may issue and the liquor destroyed. The act further provides that no warrant shall issue to search any private dwelling, unless it is used for the unlawful sale of liquor, or unless it is in part used for some business purpose. "Private dwellings" includes a room, or rooms, occupied not transiently, but solely as residence in an apartment house, hotel, or boarding house. The Statute under which the seizure was made provides that when any officer of the law finds any person transporting liquor in violation of the law, in any vehicle, or water, or aircraft, it shall be the duty of the officer to seize the liquor, take possession of the vehicle, or craft, and arrest the person. It further provides that the liquor shall then be destroyed; and, unless good cause be shows, the property seized be auctioned and the proceeds paid into the United States Treasury. An act of Congress, supplemental to the National Prohibition Act, provides that officers searching any private dwelling, without warrant or maliciously and without warrant, search any other building or property, shall be guilty of a misdemeanor and subject to a fine or imprisonment or both. Thus Congress left the officers, without warrant, free to search automobiles, etc., without liability.

The question therefore presents itself in this form: Was the search and seizure in this case consistent with the Fourth Amendment? The court said that the above Amendment does not denounce all searches and seizures, but merely unreasonable ones. In *Boyd v. U. S.*, 116 U. S. 61, 6, the court held that an act of Congress, authorizing the courts of the United States, in revenue cases, to require the defendant to produce private books and papers, on penalty of having allegations made against him

taken as confessed, constituted an unreasonable search and seizure even upon warrant.

The court said the true rule is: That if the search is made without warrant, but upon probable cause, i. e., upon belief that the car contains liquors, the search and seizure are valid. *Lytle v. U. S.*, 5 Fed. (2nd) 622, held that the search of an automobile by a prohibition agent was not unreasonable, where he believed, on reasonable grounds, that it was being used for illegal transportation of liquor.

The court did not go to the extent, however, of saying that an officer can stop every car traveling the highways. The measure of legality is that the officer shall have reasonable or probable cause for believing the auto contains contraband liquor. This, the court said, gives the owner, in absence of probable cause, a right to have his car restored and the right to protection from the use of liquor as evidence against him and subjects the officer to damages.

Mr. Justice McReynolds, in his dissenting opinion said that the character of "bootlegging" should not close our eyes to violation of constitutional rights following an attempt to destroy it by unwarranted methods. *U. S. v. Harris,* 177 U. S. 305, holds that criminal statutes should be construed strictly and in harmony with the common law. The Volstead Act contains no grant of authority to arrest upon suspicion and without warrant for the first offense. 177 U. S. 529 is authority for the proposition that an officer at common law is not authorized to make an arrest without warrant for a mere misdemeanor not committed in his presence. Justice McReynolds thought from the evidence in this case that it was highly improbable that the officers in this case had reasonable grounds to believe that the defendants were transporting liquor. Mindful of the rule that criminal statutes are to be construed strictly, he makes the point that the statute in discussion provides that whenever officers *shall discover* any person in the act of transporting liquor, they shall seize the liquor and arrest the person. The statute says nothing about suspicion. In *Miles v. State,* 235 Pac. 260, the court held that the forcible search of a person without warrant, on mere suspicion that he has liquor in his possession is "unreasonable" and in violation of the Constitution. He admits that the Fourth Amendment denounces only un-

reasonable seizures, but here he reasons since the seizure followed an unlawful arrest, it therefore became unlawful. He cites *Weeks v. U. S.*, 58 Law Ed. 652, in which the defendant was arrested without warrant and his house searched and evidence therein found, used against him on trial for violation of the statute against the use of the mails for lotteries. The court held that immunity from unreasonable searches and seizures was denied the accused and his constitutional right violated.

When Congress intended that seizures and arrests might be made on suspicion it has been careful to say so. The "Act to Regulate Collection of Duties on Imports and Tonnage", March, 1789, "Act to provide more effectually for collection of duties imposed by law on goods, wares, or merchandise imported into the United States and tonnage of ships or vessels", August 4, 1790—These definitely empower officers to seize on suspicion and radically differ from the Volstead Act.

Justice McReynolds holds that the search and seizure in this case were unreasonable and therefore in violation of the defendant's constitutional rights. WILLIAM R. BARR.

DEDICATION.—Use of Land Dedicated for Special Purpose.—A tract of land was dedicated by the owner to the public for use as a "landing" on the river. Upon this site the city erected a city hall which burned down in 1923 while undergoing repairs. The city proceeded to rebuild upon the property in question whereupon, a suit by the state's attorney on the relation of four taxpayers, was instituted to enjoin the proposed reconstruction. *Held,* the *owner,* dedicating land may impose conditions on its use as he sees fit and the land cannot be applied to other uses. The city therefore had no authority to appropriate the ground so dedicated as a landing, and in the suit it was proper to grant an injunction to prevent the city from erecting a city hall thereon, without showing proof of special injury to the taxpayers. *Streuber ex rel. Hasket et al. v. City of Alton* (Ill. 1925) 149 N. E. 577. A municipality has no right to construct a city hall and jail on land dedicated as a "plaza" by which the dedicator intended that the land be used as a public square. *Kelly v. Town of Hayward,* (Calif.)219 Pac. 749. Where land is dedicated for a particular purpose it can be used for that purpose only. *McPike v. Ill. Ter. Ry.* (Ill.) 137 N. E. 235. The effect of a dedication to a public use is not to de-

prive the owner of title, but he can afterward use the property for any purpose not inconsistent with the use to which it was dedicated *Seaboard Air Line Ry. v. Greenfield,* (Ga.) 128 S. E. 430. Where land has been dedicated to a definite purpose by grant or devise, it cannot, without the consent of the grantor or devisor, or his successor in interest, be used for any other purpose. *Mahoney v. Board of Education,* (Calif.) 107 Pac. 584; *Kennard v. Eyermann* (Mo.) 182 S. W. 737; *Home Laundry Co. v Louisville,* (Ky.) 182 S. W. 645. Nor has a city the right to change the use for which it was dedicated for a more advantageous purpose, in the absence of an assertion of the right of eminent domain. *Codman v. Crocker,* (Mass.) 89 N. 3. 177; *Poole v. Rehoboth* (Del. Ch.) 80 Atl. 683.

W. L. T.

EQUITY.—Specific Performance of a Contract with Stipulation for Liquidated Damages.—The following clause providing for liquidated damages was written into a contract for the the sale of land, "It is further understood and agreed that each of the parties makes this agreement only upon the express agreement and understanding that in the event of default of one party in performing the terms of this contract the defaulting party shall be bound to pay unto the other party the sum of $2000, as liquidated damages, and not as a penalty, to cover all damages for said breach." The vendee brought a bill seeking to compel defendant, vendor, to specifically perform and the latter contended that the clause made the contract expressly alternative and provided a bar to specific performance. *Held,* the mere presence of a stipulation for liquidated damages for breach of a contract of this nature does not make the contract an alternative one because the primary object of this class of contracts is deemed to be performance, and it is not to be presumed that stipulated damages for non-performance is intended to defeat that primary object, in the absence of terms in the contract, or its relation to the subject matter, which adequately disclose the contrary to have been the intent of the contracting parties. *Nolan v. Kirchner* (N. J. Ch. 1925) 131 Atl. 104. That a provision for a penalty or liquidated damages is no bar to specific performance of affirmative contracts is generally conceded. Ames Cas. Equity, Part 1, Ch. 2, P. 125 n. Nor is it a bar to an injunction. However, a few states consider the remedy at law ade-

quate and decline to give relief. See Ames, *supra.* The better rule is that in the principal case. W. L. T.

INSURANCE—Not Regarded as Commerce.—Transacting an insurance business is not engaging in "Commerce" within any proper meaning of that term as used in the Constitution of the United States. *Lunceford v. Commercial Travelers Mutual Acc. Ass'n of America.* (N. C.) 129 S. E. 805.

In *Paul v. Virginia,* 8 *Wall.* 168, 19 L. Ed. 357, Mr. Justice Fields, upholding a Virginia statute requiring foreign fire insurance companies to take out licenses before doing business in the state, set forth the law as follows: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire entered into between corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. They do not constitute a part of the commerce between the states."

In *Hooper v. People of State of California,* 155 U. S. 648, 39 L. Ed. 297, Mr. Justice White asserts, that "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea' ". And in *N. Y. Life Ins. Co. v. Cravens,* 178 U. S., 389, 20 Sup. Ct. 962, Justice McKenna, affirming this holding, adds "or against the uncertainty of man's mortality."

CULLEN BROWN.

TRESPASS.—Firing Shotgun Over Premises of Another.—Plaintiff alleged that the defendant while hunting game stood on the land of another and repeatedly discharged a shot gun at fowl in flight over plaintiff's premises, "thereby preventing him

from the quiet. undisturbed, peaceful enjoyment of his dwelling house, ranch, and property, to his damage of ten dollars." *Held,* the defendant, by standing on adjacent land and firing a shot gun over plaintiff's premises was guilty of trespass. *Herrin v. Sutherland,* (Mont. 1925) 241 Pac. 328. Calloway, C. J. quoting from Sir Frederick Pollock's tenth edition of his work on "Torts", p. 363, said, "As regards shooting, it would be strange if we could object to shots being fired point blank across our land, *only in* the event of an actual injury being caused." There has been much inconsistency among the English decisions, but in this country the courts generally follow the definition given by Blackstone that land in its legal signification has an indefinite extent upwards as well as downwards. Before the day of airplanes the definition was accepted as a sound maxim, but since commerce took to the air a serious doubt has been cast upon the strict application of the maxim as a practical doctrine. No one would question the rule that where a person sets in motion a body which falls on the land of another it is trespass, as decided in a fairly recent case—*Whittaker v. Stanzvick* (Minn.) 111 N. W. 295. In the absence of a statute the common law rule would prevail. An analogous situation as that presented in the principal case seems to apply to the flight of airplanes through the column of air above the land of another. Application of the common law rule might retard the progress of commercial aviation, so it would seem that a duty rests upon the legislatures to solve the problem. Massachusetts took the initiative and passed a a statute to remedy the situation several years ago. A careful survey of the proposition appears in 32 HARV. L. REV. 569, where it is pointed out that three theories have been advanced to cope with the perplexing question. One suggestion is that the air above the land be construed as the property of the land owner subject to a right of usage by the public similar to the right to pass over navigable streams privately owned. Another idea advanced would secure to the landowner the right of user, but gives to the aviator a right of passage without committing an actionable wrong so long as he does not cause actual damage. The other solution offered limits, "the scope of possible trespass by that of effective possession," so that one traveling at such an altitude that he would not disturb the space *effectively* possessed by the landowner cannot be deemed a trespasser. W. L. T.