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Bills and Notes—Restrictive Indorsee—Right to Maintain Action; Criminal Law—Search and Seizure

L. T. N.

E. D. L.

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CONTRIBUTORS TO THIS ISSUE

DONWORTH, GEORGE, A.B. Georgetown, 1881; LL.D. Georgetown, 1928; appointed by President Taft U. S. District Judge for Western District of Washington, 1909, resigned 1912; counsel for Citizens' Washington State Community Income Tax Committee since 1925.

DUNIWAY, BEN C., B.A. Carleton College, 1928; LL.B. Stanford University, 1931; B.A. Oxford University, 1933; associate and partner, Cushing & Cushing, San Francisco, 1933-1942; Regional Attorney, Office of Price Administration, San Francisco, since 1942; co-author with C. G. Vernier of *American Family Laws*, Vol. 2.

MANDER, LINDEN A., M.A. University of Adelaide, 1920; lecturer in Economic History and Director of Adult Education, University of New Zealand, 1922-1927; Professor of Political Science, University of Washington since 1927.

SEERING, HAROLD A., B.A. University of Wisconsin, 1924; LL.B. University of Minnesota, 1929; practice of law, Seattle, 1929-1942; Chief Attorney, OPA Rent Division, 1942-1943; Regional Attorney, 12th Regional War Labor Board, May, 1943, to date.

WILLIAM J. YAKE

Lieut. William J. Yake, a former student in the University of Washington Law School, was killed in action over the European area on January 29th. An aerial navigator, he was stationed in England and at the time of his death was on a bombing mission over Germany.

At the time of his enlistment in 1941, Lieut. Yake had completed his second year in the Law School. He was the son of Mr. and Mrs. William Yake of Bellingham.

LUNSFORD DICKSON FRICKS, JR.

Major Lunsford Dickson Fricks, Jr., succumbed to a tropical malady on March 3, somewhere in the South Pacific, where he had served about eighteen months in the Marine Corps. Before going to the South Pacific, he had served nearly a year in Iceland and had attended the field artillery school at Fort Sill, Oklahoma.

Major Fricks received the Bachelor of Arts degree from Amherst and then entered the University of Virginia Law School, from which he transferred to the University of Washington Law School, graduating in 1933. He practiced law in Seattle until he entered the service.

RECENT CASES

BILLS AND NOTES—RESTRICTIVE INDORSEE—RIGHT TO MAINTAIN ACTION. A bank, as payee, restrictively indorsed a note to the plaintiff for collection. The maker died and the bank was dissolved for non-payment of license fees. The plaintiff then filed a claim against the estate of the maker, *based upon the note*. This action followed when the claim was rejected. *Held:* As plaintiff's restrictive indorser was precluded from suing by statute, the plaintiff could not sue. *Follett v. Clark*, 119 Wash. Dec. 573, . . . P. (2d) . . . (1943).

The court held that inasmuch as the bank had been dissolved and it could not sue on the note, REM. REV. STAT. § 3836-12, the restrictive indorsee was also precluded under 37(2) N. I. L., REM. REV. STAT. § 3428 (2) which provides:

> A restrictive indorsement confers upon the indorsee the right—2. To bring any action thereon that the indorser could bring;

Thus the court construes 37(2) N. I. L. as exclusive rather than permissive, (at least where there is no showing that the restrictive indorsee was other than a mere agent for collection). On the facts, the result appears to be required under the N. I. L.

Would the plaintiff have been permitted to show by evidence *aliunde* that he had actually given value for the note, and that notwithstanding the form of the indorsement, he was a purchaser for value rather than an agent? There are two cases on this point. The first is *Power v. Finnie*, 4 Call 411 (Va. 1797), which was decided before the enactment of the N. I. L. Although dictum, the court said that the presumption (of no consideration when the note is restrictively indorsed) might have been repelled by parol evidence.

Smith v. Bayer, 46 Ore. 143, 79 Pac. 497 (1905) was decided under the N. I. L. To defeat a defense of payment to the restrictive indorser, plaintiff (the restrictive indorsee), sought to show by parol evidence that, notwithstanding the form of indorsement he actually owned 2/7 of the note. The proof was held inadmissable although it does not appear that

the maker relied on the form of the indorsement in paying the indorser. The *Smith* case is criticized by Bigelow, *The Law of Bills, Notes, and Checks* (3d ed. 1928) p. 198 § 270, wherein he quotes Brannon's criticism (N. I. L. [4th ed.] p. 317).

L. T. N.

CRIMINAL LAW—SEARCH AND SEIZURE. *D* was arrested and confined for an alleged assault with a pistol. At the time *D* was arrested, *D* was at a hospital and did not have a pistol with him. The next day a policeman, without a search warrant, without *D's* consent, went to *D's* house to search for a pistol. A pistol was found and seized. In *D's* trial, the pistol was identified by the prosecutrix and admitted in evidence over objection of *D*. *D* was convicted. *D* appealed. *D* invoked REM REV STAT. § 2240-1. The section reads: "It shall be unlawful for any policeman or other police officer to enter and search any private dwelling-house or place of residence without authority of a search-warrant issued upon a complaint as by law provided." On a hearing *en banc* the court (two judges dissenting) affirmed the judgment of the lower court. However, of the entire court, only four judges believed that the search of *D's* home was lawful. The reason the court affirmed the conviction was that seven judges did not think *D's* case was prejudiced by the admission of the pistol in evidence. The five judges who held that the search of *D's* home was unlawful, and, thus, that it was error to admit the pistol in evidence, were of the opinion that: (1) it was not lawful to search *D's* home without a search warrant merely for the reason that *D* had been arrested for second degree assault prior to the search; (2) the search of *D's* home could in no way be considered incident to *D's* arrest. *D* petitioned for a rehearing. Petition was denied. *State v. McCollum*, 17 Wn. (2d) 85, 136 P. (2d) 165.

The significance of the instant case is that on the issue of the lawfulness of search and seizure, it appears to be in direct conflict with *State v. Much*, 156 Wash. 403, 287 Pac. 57. In the *Much* case, *D* was arrested and confined for an alleged murder. At the time *D* was arrested, *D* was not at home. Two days later policemen, without a search warrant, without *D's* consent, searched *D's* premises, and dug up certain money and letters in the yard. In *D's* trial, these articles were received in evidence. *D* was convicted. *D* appealed, contending that the search was a violation of his constitutional rights, and, thus, that it was error to admit the articles in evidence. On a hearing *en banc*, judgment was affirmed. The supreme court found that, under the Washington law, no statute authorizes the issuance of a search warrant for evidence of murder. The court held that the search of *D's* home was not unlawful because, under the authority of *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 S. Ct. 280, only "unreasonable" searches, without probable cause, are forbidden.

The *Much* case and the *McCollum* case are, on facts, substantially the same as far as the issue of search and seizure. There is no Washington statute authorizing the issuance of a search warrant for evidence of an assault either. Therefore, the court is faced with practically the same situation in both cases. However, of the five judges who were of the opinion that the search of McCollum's home was unlawful, only two expressly stated that the *Much* case should be overruled. These two (the dissent) argued at great length, and with extensive authority, for the strict application of REM. REV. STAT. § 2240-1 to cases such as the *McCollum* and

Much cases. The other three judges of the five who believed the search of McCollum's home was unlawful did not mention the *Much* case in their opinion. Because these five judges did not all state that the *Much* case should be overruled, it can not be definitely said that the *McCollum* case overrules the *Much* case, although that would certainly seem to be its effect.

Other Washington cases on the subject all seem to support the *Much* case, rather than the *McCollum* case. See *State v. Evans*, 145 Wash. 4, 258 Pac. 845, *State v. Beaupre*, 149 Wash. 675, 271 Pac. 26, and *State v. Estes*, 151 Wash. 51, 274 Pac. 1053. But see 3 WASH. LAW REV. 59 in criticism of the *Evans* case. In spite of this line of decisions, the holdings are certainly open to attack when this state has a statute such as REM. REV. STAT. § 2240-1, and a constitution which provides in Art. I, § 7 that: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The *Much* case and the Washington decisions that support it do not even mention REM. REV. STAT. § 2240-1 or Art. I, § 7 of the Washington Constitution.

As for the test suggested by *Carroll v. United States, supra*, that the lawfulness of the search be determined by whether it was reasonable or not, it is hard to believe that the Supreme Court of the United States would say that a search were reasonable if it were a violation of the express words of a statute. Even without a federal statute declaring that it was unlawful for an officer to enter and search a home without a search warrant, the United States Supreme Court held in *Agnello v. United States*, 269 U. S. 20, 70 L. ed. 145, 46 S. Ct. 4, 51 A. L. R. 409, (cited in the *McCollum* case), that the search of a man's home, without a search warrant, just after his arrest elsewhere, was unreasonable. So the Supreme Court of the United States would appear to support the *McCollum* case, rather than the *Much* case.

If a case similar to the *McCollum* case comes before the Washington Supreme Court again, it would not be surprising if the court expressly overrules the *Much* case and other Washington decisions so far as they might support the *Much* case. Meanwhile, it would seem to be safe to say that the *Much* case is, in effect, overruled, and that Washington will adhere to a stricter application of REM. REV. STAT. § 2240-1, in order to safeguard our constitutional immunity from invasion of our homes "without authority of law."

—E. D. L.