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Constitutional Law--Unreasonable Searches and Seizures-- Admissibility of Evidence

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National Bank v. Ariss, 68 Wash. 448, 123 Pac. 593. *Daynes v. Lindsly*, 128 La. 259, 54 So. 791. Another view is that the section imposes *prima facie* liability and that extrinsic evidence is admissible to show a contrary understanding. *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738. *G. C. Riordan & Company v. Thornsbury*, 178 Ky. 324, 198 S. W. 920. These contrary holdings are not surprising, since the language is not very explicit. "In fact, it may be argued that the statute left untouched the question of whether extrinsic evidence of mutual understanding and intention might not change the liability." 27 *Yale L. J.* 686. Under such circumstances the courts which had admitted such evidence before the statute have admitted it under the statute by various interpretations of the language.

If the agent cannot be held on the note, can an action be maintained against the principal, even though his name does not appear on the note? It is clear that the principal cannot be held directly on the note, as this would be flying squarely into the teeth of §18 of the Negotiable Instruments Law. *Logan v. Parson*, 79 Oreg. 381, 155 Pac. 365. In the principal case, however, the action of assumpsit was not on the note directly, but on the debt as evidenced by the note. There is much authority supporting this distinction. *Wood v. Key*, 256 S. W. 314 (Tex. Civ. App.) *In re Metropolitan Bank & T. Company*, 1 Oh. App. 409.

It is well to note that the syllabus in the Southeastern advance sheets states that an action of assumpsit on the note may be maintained against the principal while the headnote of the West Virginia court states that the holder may maintain assumpsit on the debt as evidenced by the note.

BYRON B. RANDOLPH.

CONSTITUTIONAL LAW—UNREASONABLE SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE.—Defendants were in the business of selling and transporting liquor. Federal prohibition officers tapped wires from their residences and from the chief office. The taps from the house lines were made in the streets near the house. The taps from the chief office were made in the basement of an office building. By so intercepting conversations of the defendants they obtained the evidence which convicted defendants of conspiracy. Wire-tapping is illegal in the state (Washington) where the act occurred. The Supreme Court of the United States in a five-four decision held that the evidence so intercepted did not constitute "unlawful search or seizure" and was admissible. *Olmstead et al. v. United States*, 48 Sup. Ct. Rep. 564.

Justice Taft in delivering the opinion of the court held that

wire-tapping did not violate the constitutional safeguard contained in the Fourth Amendment: "The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated." The chief justice recognizes the applicability of the Fourth Amendment to mailed letters, but draws a distinction between them and telephone messages. He notes the case of *Ex Parte Jackson*, 96 U. S. 723, 733, 24 L. Ed. 877, in making that distinction. That case held: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection wherever they might be. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution." It would seem then that a message written on paper is protected from the intrusion of governmental authority, while the same message if transmitted by wire is not. Is this distinction predicated on a difference? When the Fourth Amendment was adopted the telephone was unknown and unprophesied. Justice Brandies, in his dissenting opinion in the case under discussion said: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." And in *Weems v. United States*, 217 U. S. 349, 373, 30 Sup. Ct. 544, 551, 54 L. Ed. 793, the court said: "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken . . . the future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made." Should not then the impossibility of the specific inclusion of the telephone message in the Fourth Amendment excuse its exclusion, if all the reasons for protection of the sealed letter apply to it? Judge Rudkin in comparing the telephone message and the sealed letter below, said: "True, the one is visible, the one invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference." In a letter, it is not the paper itself, nor the sealing that makes inviolate its privacy. It is the substance, the thought of the author, the message itself, that is given protection. Is that same substance, thought, and message to be excluded from protection merely because it is oral, and because its privacy is delved by the ear, and not by the eye? Justice Bradley, in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct.

524 said, in reference to the rights protected by the Fourth Amendment: "They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his door nor the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property." Justice Taft further said that the Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Post Office and the relation between the government and those who pay to secure protection. Why the government should be bound by the Fourth Amendment when it is itself the agent of transmission and not be bound when the agent of transmission is a public service authorized by it, as in the case of the telephone, is not shown.

The Supreme Court in holding that this was not an "unreasonable search and seizure" placed a literal construction on the Fourth Amendment, and limited that amendment's application to evils existing at the time of its adoption. But since the evidence was held not to be obtained in violation of the Constitution, the court in holding it admissible is following the established federal rule. 34 VA. L. QUART. 149-150; *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652; *Gould v. United States*, 255 U. S. 298, 65 L. Ed. 647, 41 Sup. Ct. Rep. 261

Justice Holmes expresses no opinion as to whether or not the evidence was obtained in violation of the Fourth Amendment. He bases his dissent on the ground that the procurement of the evidence by the violation of the state statute (one making wire-tapping illegal) is sufficient to exclude it regardless of the Fourth Amendment. Such a view is an extension of the federal rule mentioned, *supra*. "I think it is a less evil that some criminals should escape than that the government should play an ignoble part", argued the learned justice.

If the underlying question were only the protection of society from criminals the solution would be simple. But the question encompasses the right of the whole people, innocent as well as guilty, from encroachment upon their personal liberty privacy and security by government officers. It would seem that the real problem underlying the holding and the dissent is the difference of view as to which of the two ends is more desirable: the protection of privacy at the cost of the loss of the conviction of some lawbreakers, or the conviction of lawbreakers at the price of loss of privacy.

—ANNE SLIFKIN.