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# Recent Important Decisions

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# RECENT IMPORTANT DECISIONS

BILLS AND NOTES—DISHONOR BY NONPAYMENT—MARGINAL MEMORANDA FOR PARTIAL PAYMENTS.—Suit by the holder on the following note:

"$100.00. Hampden, N. D., Sept. 2, 1909.

"On or before Sept. 2, 1910, after date, I promise to pay to the order of the Sageng Threshing Machine Company, of Minneapolis, Minn., one hundred dollars.

"Value received, with interest at 6 per cent.

"[Signed] ALBERT BENSON.

"$25 will be paid Nov. 1st, 1909.

"$25 will be paid Jan. 1st, 1910."

On the back was the indorsement: "April 15, 1910. Pd. $30" The plaintiff purchased the note in June, 1910. *Held,* that plaintiff was entitled to offer evidence that he was a holder in due course, and that the fact that the payments referred to in the marginal notations had not been made in full did not make the plaintiff a purchaser of overdue paper. Robinson and Grace, JJ., dissenting. *Union State Bank of Minneapolis* v. *Benson* (N. Dak., 1917), 165 N. W. 509.

It is to be observed that the prevailing opinion in the instant case does not expressly hold that the marginal memoranda are not part of the instrument. Instead, the court argues that the memoranda are not sufficiently positive in terms to show an intention by the parties to allow the payee or holder to compel payment of the instalments at the times indicated. In other words, the notations are deemed merely to indicate a likelihood that the payments will be made at a certain time. Nevertheless, in view of the direct statement in the notations that "$25 *will be paid* November 1st, 1909," and that "$25 *will be paid* Jan. 1st, 1910," the decision amounts to a holding that such notations are not a part of the instrument to the extent of controlling or affecting provisions expressed in the body thereof. The rule is well settled that an agreement or memorandum placed on the back of a note before signing or at the time of delivery is to be considered a part of the note, even though the effect may be to destroy its negotiability. *Kurth* v. *Farmers' & Merchants' State Bank* (Kan. 1908), 94 Pac. 798; *Bay* v. *Shrader,* 50 Miss. 326; *Kalamazoo National Bank* v. *Clark,* 52 Mo. App. 593; *Herrick* v. *Edwards,* 106 Mo. App. 633; *Swaisland* v. *Davidson,* 3 Ont. Rep. 320; *Heaton* v. *Ainley,* 108 Ia. 112; *Grimison* v. *Russell,* 14 Neb. 521. Some courts have applied the same rule where the memorandum was unsigned. *Seymour* v. *Farquhar,* 93 Ala. 292; *Blake* v. *Coleman, 22* Wis. 415. And it has been held that a stipulation printed across the margin of the body of the note that the note is to be discounted if paid before maturity is effective as a part of the instrument. *National Bank of Commerce* v. *Feeney,* 12 S. Dak. 156. The authorities hold quite generally that marginal figures in the corner of a note are not a part thereof. *Washington County State Bank* v. *Central Bank & Trust*

*Co.* (Tex. Civ. App.), 168 S. W. 456; *Bell* v. *Birmingham* (Ala. App.), 62 So. 971; *Williamson* v. *Smith,* 1 Cold. (Tenn.) 1, 78 Am. Dec. 478; *Poorman* v. *Mills,* 39 Cal. 345. It should be noted, however, that in none of the cases here cited, nor in any other which the writer has found, was the sweeping statement of the doctrine as to marginal figures at all necessary to the decision, since in each case the only point actually to be decided was that the marginal figures are controlled by the written words in the body of the instrument. Furthermore, the reason supporting the doctrine that marginal figures form no part of the instrument is not clear, in view of the extensive use of such figures, and especially in view of the provision in section 17 of the Negotiable Instruments Law permitting a reference to the figures in case of ambiguity or uncertainty. With reference to marginal memoranda below the signatures there is a sharp conflict of authority. In support of the view that such memoranda constitute a part of the note, see *Benedict* v. *Cowden,* 49 N. Y. 396 (with an especially good discussion by Mr. Justice Allen); *Van Zandt* v. *Hopkins,* 151 Ill. 248; *Black* v. *Epstein,* 93 Mo. App. 459; *National Bank of Commerce* v. *Feeney, supra; Specht* v. *Beindorf,* 56 Neb. 553 (though it is not clear in this case whether the provision was written into the note above or below the signature). In support of the apparent holding of the instant case that such memoranda do not constitute a part of the note, see *Fisk* v. *McNeal,* 23 Neb. 726; *Danforth* v. *Sterman* (Ia.), 145 N. W. 485; *Becker* v. *Hofsommer,* 186 Ill. App. 553. On the whole, it would seem that the cases taking the latter view are forced to indulge in technical distinctions that lead to confusion without offering a better method of getting at the real intention of the parties. If memoranda on the back of the note at the time of execution are to be considered a part of it, it is hard to see why the same interpretation should not apply to memoranda on the face of the instrument.

COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—PERSONS SUBJECT—"INTERSTATE COMMERCE".—Plaintiff was employed by an interurban electric railway, operated wholly within the state, which received freight shipped to and from other states and transported it under through bills of lading. He was a member of a crew engaged in bonding, or cleaning the ends of the rails and connecting them by wiring, and was injured in boarding a car on which the crew rode. *Held,* that he was engaged in "interstate commerce" within the EMPLOYERS' LIABILITY ACT, April 22, 1908, c. 149, 35 Stat. 65, (U. S. Comp. St. 1913, secs. 8657-8665). *Cholerton* v. *Detroit, J. & C. Ry.* (Mich., 1917), 165 N. W. 606.

There is great conflict and contradiction among the authorities upon the question of when an employee of a common carrier is or is not working under the provisions of the federal act above referred to. It has frequently been held that, a carrier which is a link in a through line of road by which freight is carried into other states is engaged in the business of "interstate commerce," though its lines may be wholly within one state. *In re Charge to Grand Jury,* 62 Fed. 828; *U. S.* v. *Standard Oil Co.,* 155 Fed. 305; *Houston Direct Navigation Co.* v. *Ins. Co. of North America,* 89 Tex. 1; *Norfolk & W. R. R. Co.* v. *Commonwealth,* 114 Pa. 256. It has also been held that

the work of keeping the instrumentalities used by the carrier in the conduct of interstate commerce (its cars, engines, appliances, machinery, roadbed, track, and other equipment,) in a proper state of repair, while thus used, is so closely related to such commerce as to be in practice and in legal contemplation a part of it; that, whatever work is a part of the interstate commerce in which the carrier is engaged is interstate commerce under the statute, and the work of repairing and maintaining the instrumentalities engaged in interstate commerce is such work; that the fact that the instrumentality may be used in both interstate and intrastate commerce does not prevent the employment of those engaged in its repair, or in keeping it in suitable condition for use, from being an employment in interstate commerce. *Pedersen* v. *Del. etc. R. Co.*, 229 U. S. 146; *Zikos* v. *Oregon R. & Nav. Co.*, 179 Fed. 893; *Eng.* v. *So. Pac. Co.*, 210 Fed. 92; *Montgomery* v. *So. Pac. Co.*, 64 Or. 597; *Holmberg* v. *Lake Shore, etc. Ry. Co.*, 188 Mich. 605. It was on the basis of such reasoning as the above that the court in the instant case came to the conclusion that, being an adjunct to interstate commerce, a means effectuating the passage thereof, the plaintiff was engaged in "interstate commerce" within the meaning of the EMPLOYERS' LIABILITY ACT. See extended notes in 47 L. R. A. (N. S.) 52, *et seq.* and L. R. A. 1915 C, 60, *et seq.*

CONSTITUTIONAL LAW—"BONE DRY" ACT.—Plaintiff was arrested and held in custody solely because charged with having in his possession a bottle of whiskey, for his own use and benefit, within a prohibition district in the state of Idaho, in violation of an Idaho statute (Session Laws of Idaho, 1915, ch. 11), providing that no person shall have in his possession in a prohibition district intoxicating liquors or alcohol, except for sacramental, scientific, or mechanical purposes, or for compounding or preparing medicine. Plaintiff sued out a writ of *habeas corpus*, which was quashed in the State Supreme Court. Plaintiff then brought this appeal. *Held*, that the judgment of the court below should be affirmed. *Crane* v. *Campbell*, 38 Sup. Ct. Rep. 98.

It was contended by the plaintiff in the instant case that the Idaho statute, in so far as it undertook to render criminal the mere possession of whiskey for personal use, conflicted with the "privileges and immunities" and "due process of law" clauses of the 14th Amendment to the U. S. Constitution. The court held that, since it had been decided that a State has the power absolutely to prohibit the manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders, and the power to adopt the measures reasonably appropriate or needful to render the exercise of that power effectiv, it could not be said that, considering the notorious difficulties always attendant upon efforts to suppress the liquor traffic, the inhibition of the possession of liquor was so arbitrary and unreasonable, or so without proper relation to the legitimate legislative purpose, as to be an improper exercise of the police power of the state. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Mass.*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen*, 137 U. S. 86; *Booth* v. *Illinois*, 184 U. S. 425; *New York ex rel.*

*Silz* v. *Hesterberg*, 211 U. S. 31; *Murphy* v. *California*, 225 U. S. 623. The step taken by the court in its decision in the instant case was to be anticipated, in view of the recent decisions interpreting the WEBB-KENYON ACT.

ESPIONAGE ACT—POST OFFICE—NON-MAILABLE MATTER—SEDITIOUS PUBLICATIONS.—On an appeal from an interlocutory order granting a temporary injunction commanding the defendant, postmaster of the city of New York, to transmit the plaintiff's publication, "The Masses", through the mails, *held*, that it could not be said that the defendant was not warranted in excluding the journal under the authority of the ESPIONAGE ACT OF JUNE 15, 1917. *Masses Pub. Co.* v. *Patten*, 246 Fed. 24 (Cir. Ct. App., Nov. 2, 1917).

This decision of the Circuit Court of Appeals has the effect of reversing the decision of the District Court, granting a preliminary injunction, 16 MICH. L. REV. 131. The court in the instant case held the act to be constitutional, a proper exercise of the police power of the government; that, by it, Congress authorized and directed the Postmaster General not to transmit certain matter by mail, and to determine whether a particular publication is non-mailable under the terms of the law, thus requiring him to use judgment and discretion in so determining, and making his decision conclusive before the courts, save where there appears to be a clear abuse of discretion; and that no such abuse of discretion appeared in the instant case. The Circuit Court expressly repudiated the decision of the District Court, to the effect that any action other than a *direct* advocacy of resistance to the existing law is not a violation of the ESPIONAGE ACT, holding that "if the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade resistance, it is immaterial that the duty to resist is not mentioned, or the interests of the persons addressed in resistance are not suggested".

EVIDENCE — COMPETENCY OF WITNESSES — CRIMINAL TRIALS IN FEDERAL COURTS.—Upon the trial of defendants in the United States District Court for the Eastern District of New York for conspiring to buy and receive certain checks and letters stolen from duly authorized depositories of United States mail matter, objection was made to the competency of a witness for the Government who had been jointly indicted with defendants. The objection was based on the ground that this witness had previously pleaded guilty to the crime of forgery in one of the New York state courts and had served a sentence therefor, and, by the common law as administered in New York at the time of the enactment of the Federal Judiciary Act, these facts would have rendered the witness incompetent. The objection was overruled and the witness allowed to testify. *Held*, this ruling was correct. *Rosen et al.* v. *United States* (1918), 38 Sup. Ct. 148.

In *United States* v. *Reid et al.*, 12 How. 361, a case which came up from a Federal court in Virginia and upon which appellants in the instant case rely, the defendant attempted to call as a witness one who had been jointly indicted with him for a murder committed on the high seas. The court, in rejecting the testimony, held that the rules of evidence in force in the respective states when the United States Judiciary Act was passed were to gov-

ern the procedure in criminal trials in those courts, and that by the laws in force in Virginia at that time co-defendants were not competent witnesses. Practically the same doctrine was applied in *Logan* v. *United States,* 144 U. S. 263, in which case the court held that the laws of Texas in force when that state was admitted to the Union must determine the admissibility of evidence in criminal proceedings by the United States government within that jurisdiction. While some doubt was cast upon the authority of these cases by the decision in *Benson* v. *United States,* 146 U. S. 325, the precise point was not involved. In the instant case, however, the same situation was presented to the court as appeared in the *Reid Case.* Guided by the modern conviction that the truth is more likely to be arrived at by hearing the testimony of all persons of suitable understanding, leaving the credibility and weight of such testimony to the court or jury, than by excluding the witnesses as incompetent, Mr. Justice CLARKE felt justified in repudiating the doctrine of the *Reid Case,* and concluded "that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here."

HABEAS CORPUS—CUSTODY OF CHILD—VISITING.—By deed executed in accordance with the statute, a father transferred his parental authority and custody over his three-year-old daughter to her grand-aunt, who formally adopted her. Upon the death of the child's mother, her grandmother brought suit for the custody of this child and also for that of her sister and two brothers, making the father and grand-aunt defendants. The court decreed that the three-year-old child should be left in the care and custody of her adoptive parents but required them to allow the child to visit one day in each month in the home of her grandmother, to whom the control of the other children was awarded. The defendant appealed on the gruond that the court had no authority to require these visits. *Held,* the court had such authority. *Kirby et ux.* v. *Morris* (Tex., 1917), 198 S. W. 995.

Appellants did not question the power of the court to award the custody *in toto* of the child as its best interests dictated, but objected to the limitation imposed upon their authority requiring visits to the child's grandmother. Similar limitations seem to be of rather common occurrence in divorce decrees, and, in fact, the court will rarely fail to order that the parents shall have access to their children at all reasonable times and places. CHURCH, HABEAS CORPUS, 449; *Wand* v. *Wand,* 14 Cal. 513; *Knoll* v. *Knoll,* 114 La. 703; *People* v. *Winston,* 65 App. Div. 231. Whether such provisions are made primarily with reference to the child's welfare, or in recognition of parental rights, may be an open question. The court in the instant case, basing their authority to issue this decree on the recognized power of courts to issue similar decrees in divorce proceedings, seem to assume that visiting is ordered in the interests of the children. A contrary conclusion is indicated by the case of *In re Succession of Reiss,* 46 La. Ann. 347, in which it was held that the court had no power to require a father to send his children to visit their grandmother, although it would seem to have been for their best interests.

LANDLORD AND TENANT—CROPPING CONTRACT—COMPENSATION.—Plaintiff and defendant entered into an oral contract by which the defendant was to furnish seed, machinery and land and plaintiff was to farm and irrigate the land and to receive one-half of all that was raised. Defendant prevented full performance. *Held,* not a contract of employment but in the nature of a joint adventure, and plaintiff could not recover wages for the period of actual work. *Pace* v. *Beckett* (Col., 1917), 169 Pac. 142.

The legal relation created by such a situation is a question on which the courts are not agreed. The decisions differ widely as to whether an agreement to cultivate land for a share of the crop involves the application of the rules of master and servant, or whether it is to be regarded as a joint adventure in the nature of a partnership, or whether it operates as a lease of the premises concerned. One hired to work land and receive as compensation part of the produce is a cropper, not a tenant; he has no interest in the land but receives his share as the price of his labor. *Adams* v. *McKesson,* 53 Pa. St. 81. The same conclusion is reached in *Warner* v. *Hoisington,* 42 Vt. 94. In *James* v. *James,* 151 Wis. 78, the court said that the agreement partakes of the nature of a joint adventure entitling the parties to a chance in the profits derivable therefrom. In *Trinity & B. V. Ry. Co.* v. *Doke* (Texas), 152 S. W. 1174, it was held, that the relation was that of landlord and tenant, the landlord's share is treated as rent and in the absence of a stipulation to the contrary, he has no title to the crop until after division. In *Minneapolis Iron Store Co.* v. *Branum,* 36 N. D. 355, it was held that such a contract creates the relation of landlord and tenant and not that of master and servant. This case overruled *Angell* v. *Egger,* 6 N. D. 391. In some cases as *Steel* v. *Frick,* 56 Pa. 172, the court lays hold of certain words, "to farm, let, etc.," as evidencing a lease. The test, however, is the intention of the parties, and the instrument is to be read as a whole. *Strangeway* v. *Eisenman,* 68 Minn. 395.

OFFICERS—RECOVERY OF SALARY BY DE JURE EMPLOYEE.—Relator asked pay "for the time he was illegally laid off as a grain helper", after the only money appropriated for that office had already been paid *bona fide* to the *de facto* occupant during that time. *Held,* that relator could not recover his pay from the city. *People ex rel. Sartison* v. *Schmidt* (Ill. 1917), 117 N. E. 1037.

This is the first case in Illinois to decide definitely "that payment made in good faith to a *de facto* officer constitutes a bar against the city to a claim for the same salary made by the officer *de jure*". *Bullis* v. *Chicago,* 235 Ill. 472; *Kenyon* v. *Chicago,* 135 Ill. App. 227. The prevailing view sanctions the decision and the reasoning by which it was obtained. *Dolan* v. *Mayor,* 68 N. Y. 274; *Wayne County* v. *Benoit,* 20 Mich. 176. *Contra, Rink* v. *Philadelphia,* 15 Wkly. Notes Cas. 345, affirmed 2 Atl. 505; *Andrews* v. *Portland,* 79 Me. 484; *Hogan* v. *Hamilton County,* 132 Tenn. 554. See notes in 19 L. R. A. (N. S.) 794; 24 L. R. A. (N. S.) 475; 14 MICH. L. REV. 261, 609. "The interest of the community requires that public offices be filled and the duties of the officers be discharged, and, since in order to secure such serv-

ice, the officer performing it must ordinarily be paid, payment in good faith to the officer discharging the duties of the office is justified." The grain helper in this case is assimilated to a public officer under good authority and the conclusion follows inevitably. *Higgins* v. *Mayor,* 131 N. Y. 128; *O'Hara* v *City of New York,* 28 Misc. Rep. 258, 46 App. Div. 518, 167 N. Y. 567; *Van Valkenburgh* v. *Mayor, etc.,* 49 App. Div. (N. Y.) 208; *Martin* v. *City of New York,* 176 N. Y. 371. The employment of this analogy, however, seems useless: by keeping the mere employee whose position does not rise to the dignity of an office distinct from the office holder the identical result will be reached, for a class that receives money without performing any service therefor is the exception, not the general rule. Instead of forcing the "mere employees" into the class of officers for the purpose of applying an exception to the common rule as to officers, it would seem simpler and much less dangerous to recognize the differences between the two. The two classes have to be distinguished in other respects. A *de jure* officer may recover the compensation of the *de facto* officer, but the *de jure* employee may not. *Jones* v. *Dusman,* 246 Pa. 513; *Kidder* v. *Wilson,* 90 Ver. 147. A *de jure* officer is entitled to the full amount of his salary without any deduction for the amount he earned or might have earned while not discharging his official duties. *Fitzsimmons* v. *Brooklyn,* 102 N. Y. 536; *Andrews* v. *Portland,* 79 Me. 484. Where the position is not strictly an office, however, the rule is different. *Sutliffe* v. *New York,* 132 App. Div. (N. Y.) 831; CONSTANTINEAU, PUBLIC OFFICERS, Sec. 222.

WILLS—ADEMPTION.—Testator having power to appoint £10,000 among his younger children, made his will when he had four such children, appointing it all to them equally; but whether he said £2,500 to each, or equally to the *four,* or merely in equal shares, does not appear from the report, it being reported differently in different parts of the statement. Later when he had five younger children he made an appointment by deed to one of his daughters on her marriage of £2,000 "in full discharge" of her share. *Held,* that such appointment was an ademption only *pro tanto,* and that she was still entitled to £500 out of the residue of £8,000 leaving only £7,500 for the other four younger children. *Moore's Rents* (Land Commission, 1917), [1917], 1 Ir. R. 244, 51 Ir. Law Times 106.

If the court held that a legacy for a certain amount could not be adeemed by payment of a smaller amount, clearly proved to have been intended by the testator at the time to be in full satisfaction, it is not supported by the decision in *Pym* v. *Lockyer,* 5 M. & Cr. 29, relied on, and is in conflict with the general doctrine that ademption is purely a matter of intention of the testator. Moreover, £2,000 in cash may have been actually worth more than £2,500 at the death of the testator.