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Criminal Law-Search and Seizure-Consent

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ford, 56 Miss. 552; Humeston v. Cherry, 23 Hun 141; Morgan v. Kidder, 55 Vt. 367. In other jurisdictions, however, the rule has been adopted that a return of the payments made or notes given is a condition precedent to a recovery of the property. American Soda Fountain Co. v. Dean Drug Co., 136 Iowa 312, 111 N. W. 534; Ketchum v. Brennan, 53 Miss. 596; Shafer v. Rossell, 28 Utah 444, 79 P. 559; Segrist v. Crabtree, 131 U. S. 287. Of course, the right to retain the amounts paid may depend upon express stipulation; Singer Mfg. Co. v. Treadway, 4 Ill. App. 57; and on the other hand the contract may preclude a forfeiture of payment by stipulating that the vendor may recover the property and reasonable charges. Fairbanks v. Malloy, 16 Ill. App. 277. So too, it has been held that the seller may retain such amount as will compensate him for any deterioration of the goods in the hands of the buyer. Commercial Pub. Co. v. Campbell Printing Press, etc. Co., 111 Ga. 388, 36 S. E. 756. The settled rule in Indiana is, that in the absence of a forfeiture clause either express or implied, by virtue of which all prior payments are to be retained by the vendor as liquidated damages, upon retaking the property, he must account to the vendee for the payments made to him. Quality Clothes Shop v. Keeney, supra. Where a note is not included within the conditional terms of a contract of sale, but is given as the equivalent of cash for a preliminary payment, its consideration does not fail by reason of the recaption of the property by the vendor upon the vendee's default, and the vendor may still enforce it. Norman v. Meehan, 91 Wash. 158, 158 Pac. 78, Ann. Cas. 1917D, 462; Randall v. Chaney, supra. Here, however, the conditional provisions of the sale contract were inserted in the note, and no mistake is alleged or reformation sought. The note in suit being part of the original conditional agreement, and the consideration having failed therefor, the general rule prevails, and it follows that the vendor cannot recover on the note. K. J. M.

CRIMINAL LAW—SEARCH AND SEIZURE—CONSENT—Officers sent to search D.'s home for intoxicating liquor read search warrant to D.'s wife, who said "COME RIGHT IN. You are welcome to search here. You will not find anything." Search warrant invalid. HELD: Such language did not constitute an invitation to search, nor a waiver of D.'s constitutional right against unlawful search and seizure. State v. Connor, 167 N. E. 545. Case is in accord with Meno v. State, 197 Ind. 16, in holding that one acquiescing to search under a warrant is merely yielding to legal coercion, resistance to which is an offense against the state, and does not thereby consent to the search. Accord: State v. Owens, 259 S. W. 100 (Ky.); State v. Lock, 259 S. W. 116 (Mo.); Hampden v. State, 252 S. W. 1007 (Tenn).

Failure to object to officers' search held not consent in U. S. v. Olmstead, 7 Fed. (2nd) 760, and yielding to a show of force is not consent, Amos v. U. S., 255 U. S. 313; but see Gallendon v. U. S., 5 Fed. (2nd) 673, assent under a threat to procure a search warrant held good consent. Owner of property, in reply to a show of a search warrant said "All right. Go ahead. You won't find anything." Held to constitute waiver as a matter of law. State v. Utotila, 71 Mont. 351. Accord, Gray v. Commonwealth, 749 S. W. 769; Smith v. McDuffee, 72 Ore. 236; State v. Luna, 266 S. W. 755 (Mo.). Perhaps the best rule is, where there is a conflict of facts as to alleged waiver, to submit the question to the jury under proper instructions. People v. Forman, 188 N. W. 375 (Mich.).
Concerning the ability of wife to consent for husband (not decided in the principal case), cases holding squarely that wife cannot consent, Polowick v. Commonwealth, 199 Ky. 843; Veal v. Commonwealth, 199 Ky. 643; Carigano v. Commonwealth, 238 Pac. 507 (Okla.). An agent was not allowed to consent for his principal in Tri-State Coal and Coke Co., 253 Fed. 605. But a mother can consent for her son in Kentucky, Gray v. Commonwealth, supra, and consent by wife was upheld in Smith v. McDufee, supra, and State v. Luna, supra. Indiana will probably follow the Kentucky rule if the question is ever presented. J. S. G.

FOREIGN CORPORATIONS—JURISDICTION RESULTING FROM BUSINESS DONE WITHIN STATE—Respondent purchased a through coupon ticket at the office of the Louisville & Nashville Railroad Company in New Orleans, which entitled him to passage over the line of the Louisville & Nashville from New Orleans to Montgomery, Ala., over the Atlanta & West Point R. R. from Montgomery to Atlanta, Ga., and thence to Washington over the line of the Southern Railway Co., petitioner. The train was made up by the Louisville & Nashville in New Orleans and was operated under an agreement among the three carriers concerned, which was not offered in evidence. But it appeared that the cars composing the train were furnished by the three carriers on the basis of their respective mileage; that each furnished locomotive power and train crews over its own line; and that each, while in possession of the train, was in exclusive control of it.

Respondent took passage in New Orleans on a car of the Southern and proceeded in it on his journey until, while on the line of the Southern in Virginia, he was injured, due to alleged negligence of petitioner.

The Southern was a Virginia corporation, which had complied with the Louisiana statute by designating an agent to accept service of process within that state.

A tort action was brought by the respondent in the District Court for the Eastern District of Louisiana. Process against petitioner was accordingly served upon its agent in Louisiana. The Southern, appearing specially before answer, excepted to the jurisdiction on the ground that the cause of action, which was transitory, arose outside of Louisiana and not out of any business done within that state. The exception was overruled. Certiorari to the United States Supreme Court, October 15, 1928.

The Supreme Court (although reversing the decision of the District Court upon other grounds) upheld its position in overruling the petitioner's exception to its jurisdiction. The grounds for the Supreme Court's decision were (1) Petitioner was sufficiently present within the state of Louisiana for the purpose of being sued upon a cause of action arising within the state. (2) This cause of action was one connected with a contract for transportation, as evidenced by the ticket sold to respondent in New Orleans, by petitioner's agent, the Louisville and Nashville Ry. Co. "It was out of this action within the state that the present obligation of the Southern arose, although the alleged breach of it occurred elsewhere." Louisville & Nashville R. R. Co. v. Chatters; Southern Ry. Co. et al. v. Same, 49 Supreme Court Reporter, 329, April 15, 1929.

If the liability of a railway carrier of passengers for a negligent injury to a passenger may be considered to be of a dual nature, i.e., a liability in tort, and a liability for breach of the contract of carriage, then the position