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Article 9

Searches and Seizures

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find in 126 Wis. 270____" * * * that necessity must be so clear and absolute that without the easement the grantee cannot in any reasonable sense be said to have acquired that which is expressly granted; such indeed as render inconceivable that the parties could have dealt in the matter without both intending to confer the easement." Quite clearly, then, Wisconsin is not among the states which enforces the doctrine of a "reasonable" necessity.

Under such clearly defined policy, the court could see no use of reading into the words, "Commencing at a point * * * so that an alley might be established" any express grant of this strip as an alley and especially when it is considered that at the time of the grant both the lot sold and the strip now involved were completely submerged.

No evidence was presented which would show that this strip had been dedicated to a public use. Apparently no plat of this area was ever filed to indicate any intention to make a dedication, nor had there ever been any acceptance by the city either by way of ordinance or otherwise upon which to base a claim of dedication.

Likewise, because the question of estoppel was not pleaded, the court would not consider whether the long continued user, or Elmore's permitting Detry to fill in this strip so as to make it passable, misled Detry into the mistaken idea that he had a right to this strip as an alley. The pleadings did not set forth facts which would establish an easement by prescription, dedication or grant, and the defendant must discontinue his user of this way.

LAWRENCE WALSH.

Criminal Law: Searches and Seizures

In Warner et al. v. Gregory et al, ____ Wis. ____, 233 N.W. 631, an order directing trustees for the benefit of creditors to permit the district attorney to examine the books in the trustees' possession for use in a criminal investigation against the assignors, a copartnership was held not to violate the 4th Amendment to the U. S. constitution, protecting the citizens from unreasonable search and seizure, nor the 5th Amendment, providing that no person shall be witness against himself.

This protection, guaranteed by the fourth and fifth amendments, have been construed to apply to private papers, books and documents of an individual as well as safeguarding his home from unreasonable search and himself from incrimination. Gouled v. U. S. 255 U.S. 298; Boyd v. U. S. 116 U.S. 616; Johnson v. U. S. 47 L.R.A. (n.s.) 263.

The protection thus guaranteed is fully recognized by the Federal Bankruptcy Act, Sec. 7, No. 9, Chap. 3, which, though it provides that it is the duty of the bankrupt to "submit to an examination concerning

the conductng of hs business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate" declares that *"no testimony given by him (the bankrupt) shall be offered in evidence against him in any criminal proceeding.*

In the present case, the assignors (plaintiffs) sought to prevent the District Attorney of Dane County from making a criminal investigation of their books, now in the hands of trustees, on the grounds that such examination would be unreasonable in the light of the fourth amendment, and the results of such investigation might be incriminating, thus in essence, forcing the accused to testify against himself and thereby contravening the fifth amendment.

In Dier v. Banton 262 U.S. 147, precisely the same situation is presented, and in reply to the above contentions, Chief Justice Taft lays down the distinction which is basic in Warner v. Gregory. "The right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him, ceases as soon as his possession and control over the pass from him by order directing their delivery into the hand of the receiver and into the custody of the court." Thus "a party is privileged from producing the evidence, but not from its production." Johnson v. United States, 228 U.S. 457. Since the books were in the hands of the trustees, the appellants were not dealt with personally. "No compulsion is to be applied or used to affect their volition in the matter; nothing is to be taken from their possession; their persons are not to be subjected to any procedure; no question is asked that they are obliged to answer." Justice Fairchild, in Warner v. Gregory.

In State v. Straut, 94 Minn. 384, there was a voluntary bankruptcy, and the bankrupt's books and papers were turned over to the trustee without objection, and it was held that the bankrupts constitutional privilege against self incrimination was not infringed upon by the production by the trustee of such books before the grand jury. *It may be noted that the fact that the bankruptcy proceedings were voluntary probably would not differentiate the case from those in which the proceedings were involuntary* (Re Harris 55 L. ed. U.S. 732) .

The contrary doctrine is expressed in Blum et al. v. State, 94 Md. 375, wherein the court held that the "fact that books of account kept by persons in the conduct of their business have been voluntarily turned over by them to receivers appointed in a proceeding instituted by consent will not render the books admissible in evidence against them in a criminal prosecution without their consent, the books not

being turned over to the receivers for any such purpose." (See note: 47 L.R.A. [n.s.] 265.)

The ruling in Blum v. State, supra, finds support in Hazlett's Estate, 8 Pa. Dist. R. 201, wherein, in holding that the books of one being prosecuted for fraudulently receiving bank deposits while insolvent, which were in the hands of assignees for the benefit of creditors, could not be used in aid of the prosecution over the protest of such assignees, the court said that *the books were still the property of the assignor, and that assignees occupying a representative capacity towards the assignors, ought not to be compelled to produce his books where he himself would not be compelled to do so.*

The views expressed by the courts in Blum v. State, supra, and Hazlett's Estate, supra, represent the minority view, the Wisconsin court holding with the majority in Warner v. Gregory when it declares that *the relationship existing between the assignors and the trustees, is not of such a personal and confidential nature, that an order compelling the trustees to hand over the books to the District Attorney for criminal investigation infringes upon the copartners' (assignors) constitutional rights.*

It has generally been held that a "subpoena duces tecum, 'an order to produce documents, is not in violation of the security from unreasonable search and seizure expressed by Amendment four. Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201; Wheeler v. U. S. 478. However, the bankrupt is not without protection of the 4th and 5th Amendments. Chief Justice Taft, in Dier v. Banton, supra, further clarifies the distinction which is the basis of the Wisconsin holding. "It may be that the allegation of bankruptcy will not be maintained, and, in that case, the alleged bankrupt will be entitled to a return of his property including his books and papers; *and when they are returned, he may refuse to produce them and stand on his constitutional rights. But while they are in the course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them secured under the fourth and fifth amendments does not inure to his protection* * * * "

This distinction is exemplified in Greenbaum v. U. S., 280 Fed. 474, wherein a bankrupt, who has been discharged by confirmation of a composition of creditors, so as to become revested with title to his property, including his books, could not, in prosecution against him for fraudulently concealing assets, be required to produce the books to be used as evidence in the criminal prosecution.

If the relationship between assignor and trustee in Warner v. Gregory, was held not to be personal and confidential, In re Jefferson, 96 Fed. 826, upheld the wife's right to be silent in matters pertaining

to her husband's bankruptcy. "To compel the wife of a bankrupt under examination as a witness in bankruptcy proceeding to disclose confidential communications made to her by her husband in regard to his property or income, would be contrary to the fourth amendment to the constitution of the United States prohibiting unreasonable search and seizure."

GEORGE J. LAIKIN.

Negligence: Liability of Manufacturers, Wholesalers

A seven and one-half year old plaintiff was given a Fourth of July "sparkler" by one Howell, who, however, warned her that the "sparkler" wire would become red hot. Howell had purchased the "sparklers" from Weimann Mask & Novelty Co., wholesalers, who had secured them from Rutter & Lechler, manufacturers; all were joined as defendants in an action for damages resulting from the "sparkler" wire coming in contact with plaintiff's dress, igniting it, and injuring the plaintiff. Conceded that the sparks from such fireworks are harmless, but that the wire become red hot; it is not claimed that the particular "sparkler" was defective or different from ordinary product. There was a nonsuit in favor of wholesaler and fanufacturer; upon trial Howell was found by the jury to have exercised ordinary care under the circumstances. Judgment for the defendant. HELD: In the absence of negligent preparation for market or of defective construction or of concealed defects, such "sparkler" is not an inherently dangerous instrument. Judgment affirmed. Beznor v. Howell et al., 233 N.W. 758. Dec. 9, 1930.

In the decision two cases were cited in which "sparklers" were directly considered:

Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N.W. 502 * * * A seven year old plaintiff was burned by "Clark Electric Sparkler Sucker." The Minnesota court held that although "The law requires of him who deals in articles inherently dangerous in the use for which they are intended to refrain from placing the same in the hands of a child of tender years," nonetheless, "we do not think the article sold in the instant case so inherently dangerous as to render the seller liable, without proof of knowledge on his part of some oncealed danger, not apparent from mere inspection."

Henry v. Crook, 202 App. Div. 19, 195 N.Y.S. 642 * * * The jury found that the defendant was negligent in offering the "sparkler for sale for use by children. In sustaining this verdict the court quoted the legal principle, " * * * Such manufacturer is liable to one with whom it has no contractual relation, if such article was put out in a defective condition, which defect ought to have been discovered or