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Suretyship, Insurance and Torts

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addition to her statutory widow's allowance of $2000, might be allowed a homestead exemption on real estate which was occupied by her as a home. The case of *Wallace v. First National Bank,*[7] decides that a widow may have both a widow's allowance and a homestead exemption. The court also held that the widow could occupy the home under her homestead during the period of administration. Attention is called to 1951 Session Laws, ch. 214, p. 522, where the exemption is raised from $2,000 to $5,000.

Although the court, in *Mitchell v. Espinosa supra,* and in the case of *Johnson v. McLaughlin,*[8] evidenced a continuation of a reasonable interpretation of the validity of tax deeds, *Siler v. Investment Securities Co.*[9] indicates that a Treasurer's Deed may be attacked where the Treasurer did not send notices to the proper address of the fee title owner even though there was a current address in his office to which tax notices on other property had been sent.

In *Rochester v. Richards,*[10] the court discusses at some length whether the word "and" or the word "or" will be supplied in place of a comma between the name of the legatee and the following words which were descriptive of the interest the legatee took. The case would seem to indicate that a comma should never be used where words of limitation are intended as in the following phrase: "to Joe Doakes, his heirs and assigns," but rather the phrase should read: Joe Doakes and his heirs and assigns." Likewise, if a substitution is intended, the phrase should substitute the word "or" instead of a comma—"to Joe Doakes *or* his heirs or assigns."

SURETYSHIP, INSURANCE AND TORTS

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SURETYSHIP

Our Court has considered three cases on this subject, two of them, *Massachusetts Bonding Co. v. Central Finance* [1] and *Mass. Bonding Co. v. Bank of Aurora,*[2] involving the relatively new motor vehicle bonds. In the first of these cases, the attorneys who had entered an appearance for both the bonding company and the defaulting dealer permitted a judgment by default to be entered against the dealer, and thereafter attempted to defend as to the bonding company by showing that there was no evidence of fraud. The Court held that the default judgment against the dealer resulted in an automatic judgment against the bonding company, being conclusive proof of the fraud necessary to recover on the bond.

In the second case, where the fraudulent transactions occurred prior to the effective date of the bond but renewal notes and chattel mortgages were taken thereafter, the Court denied recovery, hold-

[7] 246 P. 2d 894, 1951-2 C. B. A. Adv. Sh. (June 16, 1952).
[8] 242 P. 2d 812, 1951-2 C. B. A. Adv. Sh. (March 17, 1952).
[9] 244 P. 2d 877, 1951-2 C. B. A. Adv. Sh. (May 5, 1952).
[10] 246 P. 2d 906, 1951-2 C. B. A. Adv. Sh. (July 7, 1952).
[1] 237 P. 2d 1079, 1951-2 C. B. A. Adv. Sh. (Oct. 15, 1951).
[2] 238 P. 2d 872, 1951-2 C. B. A. Adv. Sh. (Nov. 26, 1951).

ing in effect that no new consideration was advanced by the bank during the time when the bond was in effect.

The third case of *Fifer . Mass. Bonding Co.*[3] involved a cost bond in a divorce decree wh. n included attorney fees. Even though the statute does not authorize such a bond, the Court held that it had authority to order such a bond, and having executed the same, the bonding company had no right to refuse to pay in accordance with its terms.

INSURANCE

In the case of *Mutual Insurance v. Daniels,*[4] our Court had occasion to consider as a question of first impression a life insurance contract which contained both the standard aviation clause and the statutory incontestability clause, and more particularly the question as to whether the first was voided by the second in a case of death of the insured while piloting a military plane. The Court ruled that the incontestability clause cannot enlarge the scope of the insuror's promise, but merely prohibits the company from contesting the validity of the policy at its inception. As a result, the aviation clause was entitled to full weight and recovery was denied.

In *Employers' Mutual v. Nicholas,*[5] the Court considered a standard P.U.C. rider on a liability policy, which waives description of the motor vehicle, but obliges the insured to reimburse the company for losses not specifically covered by the policy which are paid by the company as a result of this rider. In a suit for reimbursement by the insurance company, recovery was denied on the theory that the insurance company had settled the case without consulting the insured as to the amount of the settlement.

TORTS

The past year has been significant in that the Court has in many instances drawn a line and said we will no longer stretch legal theories out of sympathy for seriously injured litigants. For instance, in *Klatka v. Barker,*[6] a guest statute case, it was attempted to show that the deceased, a member of the Haxtun band, was not a guest because the driver of his car was a public spirited citizen and was receiving benefit from the fact that he was transporting a part of the band, and thus bringing glory to the town of Haxtun. Recovery was denied with a statement that the benefit conferred must be sufficiently real, tangible and substantial to serve as an inducing cause for the transportation. Reliance was also placed on the terms of the Colorado statute, which requires *payment* as distinguished from other statutes which merely require *compensation.*

Similarly, in *Greenwood v. Kier,*[7] our Court refused to further extend the family car doctrine to a situation where a corporation owned the truck, the wife owned stock in the corporation and per-

[3] 238 P. 2d 1122, 1951-2 C. B. A. Adv. Sh. (Dec. 10, 1951).
[4] 244 P. 2d 1064, 1951-2 C. B. A. Adv. Sh. (May 5, 1952).
[5] 238 P. 2d 1120, 1951-2 C. B. A. Adv. Sh. (Dec. 10, 1951).
[6] 239 P. 2d 607, 1951-2 C. B. A. Adv. Sh. (Dec. 24, 1951).
[7] 243 P. 2d 417, 1951-2 C. B. A. Adv. Sh. (March 31, 1952).

mitted her husband to use the truck to go deer hunting. In a suit against the wife, recovery was denied. Even though it was shown that the husband was not employed, the Court found that this fact did not rebut the presumption that he was the head of the family.

In the interesting case of *Whiteside v. Harvey*,[8] our Court has adopted the theory of constructive identity in a situation where the Defendant had entrusted his truck to an employee to pick up a load of potatoes. The employee, having played cards late at night, asked his father to drive while he slept. Although the Court repeats that nominally an employer is not liable for the acts of one whom the employee permits to drive without authority, in this case the employer was held liable, since the father became the *alter-ego* of his son; even though the son was asleep at the time of the accident, the negligence of his father was imputed to him under this theory of constructive identity.

The case of *Field v. Sisters of Mercy*[9] is mentioned only because here the Supreme Court finally permitted a summary judgment to stick. By admissions in the pleadings and depositions, it appeared that the patient whom the Plaintiff was attempting to visit in Mercy Hospital was not actually in that hospital. Accordingly, the Plaintiff became merely a licensee and was not entitled to recover when she tripped over a suitcase in a darkened hall.

In *Scott v. Greeley Joslin*,[10] the Court finally found a situation where it could apply the doctrine of *res ipsa loquitur*. Here a customer was injured by a falling electric fan in a dressing room. Although there was no showing as to why the fan fell, the Court reviewed all of the circumstances which it could conceive as causing the fan to fall and concluded that each must have been because of the Defendant's negligence.

In *Grand Junction v. Lashmett*,[11] a child's dress was ignited by an open flare left by an excavation. The Court found that the placing of such an open flare was not negligence as a matter of law, since the utility of such a warning light out-weighed the danger which was involved. Even in this situation, the Court repeated that negligence must be proved and cannot be presumed.

In *Carr v. Mile High Kennel*,[12] a customer at the dog track, walking down the stairs, was injured by other customers playing leap frog. Once again, recovery was denied because no affirmative evidence of negligence was produced. The Court once again found that the track was not an insuror of its customers' safety and could not be expected to anticipate that its customers would be playing leap-frog on the stairway.

In *McBride v. Woods*,[13] a judgment was reversed because the Court had given an instruction defining unavoidable accident. In this case, the Defendant had been backing out of a parking place

[8] 239 P. 2d 989, 1951-2 C. B. A. Adv. Sh. (Dec. 17, 1951).
[9] 245 P. 2d 1167, 1951-2 C. B. A. Adv. Sh. (June 16, 1952).
[10] 243 P. 2d 394, 1951-2 C. B. A. Adv. Sh. (April 7, 1952).
[11] 1951-2 C. B. A. Adv. Sh. 489 (Aug. 29, 1952).
[12] 242 P. 2d 238, 1951-2 C. B. A. Adv. Sh. (March 10, 1952).
[13] 238 P. 2d 183, 1951-2 C. B. A. Adv. Sh. (Oct. 15, 1951).

into a cross-walk, and under these circumstances, the Court held that it could not have been unavoidable since the act of backing a car into a cross-walk is such a hazardous undertaking that there was a duty on the driver to make certain no pedestrian was there.

We cannot conclude this subject of torts without calling attention to our Supreme Court's final complete capitulation to the mechanical world in which we live. In *Winterberg v. Thomas*,[14] the ultimate question to be determined was whether the Plaintiff had gone through a green light or a red light. Although the Plaintiff testified that he went through a green light, although his testimony was substantiated by another witness, and although there was testimony that the Defendant at one time had admitted that the Plaintiff had the green light, and finally despite the fact that the jury in its verdict believed this testimony and found for the Plaintiff, our Court nevertheless reversed the verdict, stating that the court should have taken the case away from the jury because a city engineer of Denver had testified as a mathematical fact that the light must have been red.

TAXATION, PUBLIC UTILITIES AND LOCAL GOV'T

STANLEY L. DREXLER

Our Court last year decided 22 cases dealing with these subjects. In view of this fecundity, the probable prolixity of my colleagues, the scope of this program and the limitations of time, I claim immunity from being held in contempt for treating 16 of these decisions as unworthy of mention.

TAXATION

Of the six remaining cases, the one most likely to achieve immortality—at least among my brethern of the tax bar—is *Cass v. Dameron*.[1] I am told by representatives of the Department of Justice, which represents the taxpayer pursuant to the Soldiers' and Sailors' Civil Relief Act, that by the time these remarks are spoken a petition for *certiorari* will have been filed by the Attorney General of the United States in the United States Supreme Court.

Claiborne Dameron, domiciled in Louisiana, in 1948 was a major in the United States Air Force, stationed at Lowry Field Air base. He and his family lived in an apartment in Denver. There he had household goods of an assessed value of $460. On this he paid under protest to Roy W. Cass Manager of Revenue and Ex-Officio Treasurer of the City and County of Denver, a tax of $23.31. He filed suit to recover this tax and had judgment in the District Court. Mr. Cass appealed. The Supreme Court reversed.

As I read the applicable provision of the Soldiers' and Sailors' Civil Relief Act, Major Dameron's personal property, tangible or intangible, not used in a commercial enterprise, is denied a situs for State or local taxation outside of Louisiana. As the Court reads

[14] 246 P. 2d 1058, 1951-2 C. B. A. Adv. Sh. (July 7, 1952).

[1] 244 P. 2d 1082, 1951-2 C. B. A. Adv. Sh. (May 12, 1952).