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Supreme Court Decisions

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Negligence; Personal Injuries; Automobiles; Physical Facts; Evidence; Joint Negligence; Joinder of Parties. Nos. 14553, 14554, 14555. Decided April 22, 1940—Alden et al. v. Ownbey; Alden et al. v. Berg; Alden et al. v. Stenborn. District Court, Boulder County. Hon. Claude C. Coffin, Judge. Affirmed. In Department.

HELD: 1. Evidence considered and found to be such that the jury was not required to indulge in arbitrary deductions from physical law and facts.

2. " 'So frequently do unlooked-for results attend the meeting of interacting forces that courts should not indulge in arbitrary deductions from physical law and fact except where they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.' "

3. " '* * * If the combination of the negligent acts of two or more persons gives force and direction to events necessarily resulting in an occasion for paying damages, they are jointly and severally liable, and the injured person may recover from either or all. * * * Ordinarily the comparative culpability of the two will not affect the joint and several liabilities of either.' "

4. "It is never proper to permit a party to prove that a witness for the adverse party made statements previous to the trial at variance with his testimony on the witness stand, without first having called the attention of the witness to the particular contradictory statements, as well as the time and place it is claimed such were made, in order to afford him an opportunity to deny or explain the same and give the particulars of the conversations and circumstances under which the purported statement was made."

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Young concur.

Negligence; Automobiles; Instructions; Corporations; Liability. No. 14628. Decided April 22, 1940. Jackson, etc. v. Wilhelm. District Court, Denver. Hon. George F. Dunklee, Judge. Reversed in Part, Affirmed in Part. In Department.

HELD: 1. Where driver of a truck, weighing, with cargo, 33,000 pounds, and which is 8 feet in width, 34 feet long, and 11 feet high, has been driving same for 80 miles on slippery, icy road under unusual con-

ditions, it was his duty to exercise unusual care, having in mind the weight of the truck and cargo.

2. Evidence considered and found to be sufficient to warrant finding of the jury that the driver of the truck did not employ such care and caution as a reasonably prudent person would have exercised under all the circumstances.

3. "On motion for directed verdict, or on review, the evidence is to be considered in the light most favorable to plaintiff."

4. Where more than one inference as to negligence may be drawn from the evidence, the facts become solely a question for the jury.

5. The trial court committed no error in refusing to give an instruction which omitted the necessary element that the driver must employ such care as a reasonably prudent and careful person would exercise under all the circumstances present.

6. "The principle that the fiction of corporate entity will be disregarded by the courts, when the ends of justice require it, now meets with approval in most jurisdictions."

7. Where J personally owned truck causing accident and owned business under which it was being operated at time of accident, and where about six weeks later a corporation is organized to which all of J's property involved in the business is transferred, and where it appears that its capitalization is $10,000—200 shares at $50.00 per share—of which J owned 60 shares and a third party, who had no prior connection with the business, invested therein and became the owner of some stock, there is no authority that would impose corporate liability for the accident.

8. A different situation would arise if the contention were made that the transfer to the corporation was effected for the purpose of defrauding creditors.

9. There is no requirement that since the case was tried against the owner J, the driver, and the corporation, the judgment be reversed as to all defendants merely because the judgment is reversed as to the corporation.

Opinion by Mr. Justice Bock. Mr. Justice Knous and Mr. Justice Burke concur.

Water Rights. No. 14445. Decided April 22, 1940—Trinchera Irrigation District v. First National Bank. District Court, Costilla County. Hon. John I. Palmer, Judge. Affirmed. En Banc.

HELD: 1. There is no statute fixing the minimum or maximum duty of water; and the question is left to the determination of the courts. Each court is to consider the question with reference to the territory to be irrigated, climatic conditions, soil conditions, etc.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck dissents.

Annual Convention—Colorado Springs, September 27-28, 1940

Water Rights; Injunction; Appeal and Error. No. 14659. Decided April 22, 1940—Blanchard et al. v. Holland et al. District Court, Garfield County. Hon. John R. Clark, Judge. Reversed. In Dept.

HELD: 1. It is the general rule that injunctive relief may not be granted when there is involved the necessity of an adjudication of property rights in water and an easement to convey whatever might be so adjudicated to the plaintiffs.

2. Injunctive relief should not be granted except in a clear case and to prevent irreparable damage.

3. But where there is sufficient allegation of title to the water by purchase and a contract right to said water, the trial court erred in granting a motion for non-suit.

4. "Where, as here, a landowner discloses by his evidence a record ownership of water necessary for use on said land, and by evidence, received and offered, a user thereof by himself and predecessors in title under such original conveyance is shown, it would be a strange situation if defendants by a mere assertion of ownership, or of plaintiffs' loss of ownership by virtue of statutes of limitation, could prevent the latter from proving their rights by testimony and having their existence determined for the purpose of securing the protection of injunctive relief."

5. "In equity that which can be made certain should be so considered."

6. Where the evidence clearly shows plaintiffs to have ditch easements for conveying water to irrigate their land, equity has jurisdiction to protect such easements, even though it may be necessary to introduce testimony to show its extent or location.

7. Where a court acquires jurisdiction to restrain interference with plaintiffs' use of water, it might properly retain jurisdiction and determine all the rights of the parties.

8. An assignment of error based on the sustaining of the motion for non-suit involves solely a question of law, and in order to have the judgment based thereon reviewed it is neither necessary to file a motion for new trial nor to secure an order dispensing with such motion. Such a case is an exception to Supreme Court Rule 8.

Opinion by Mr. Justice Young. Mr. Justice Bouck and Mr. Justice Knous concur.

Damages; Motor Vehicles; Horses; Highways; Negligence. No. 14649. Decided May 27, 1940. Rivers v. Pierce. County Court, Larimer County. Hon. Arthur E. March, Judge. Affirmed. In Department.

HELD: 1. Where owner of horses is driving herd along paved highway from village to pasture and one is struck and killed by an

automobile and it appears that driver of horses did nothing to get the horse off the shoulder of the road when they saw the car coming, owner of horse could not recover.

2. "While a motorist is required to exercise reasonable care to avoid a collision with domestic animals on a highway, he is not an insurer against injury to such animals, and if injury occurs which is unavoidable, he is not liable."

3. Owner of horse must establish negligence of driver of car.

Opinion by Mr. Justice Bakke. Mr. Justice Knous and Mr. Justice Burke concur.

Replevin; Chattel Mortgage; Pleading; Damages for Detention; Nominal Damages; Default. No. 14775. Decided May 27, 1940. Barslund, et al. v. Anderson. District Court, Montrose. Hon. George W. Bruce, Judge. Affirmed in Part and Reversed in Part. En Banc.

HELD: 1. Replevin is a possessory action. Under defaulted chattel mortgage, plaintiff is entitled to possession of goods.

2. Whether plaintiff holds property as owner or for purpose of private or public sale is not involved in a replevin action.

3. Under code, in replevin action, court must find value of property and if finding is for plaintiff, he is to have judgment for possession and an alternative money judgment in case delivery can not be had.

4. Since such findings are for benefit of plaintiff, defendant can not complain of court's failure to enter alternative judgment.

5. Court could not give judgment by default to plaintiff for possession of goods worth $300.00 and judgment for $300.00 for the detention of same without having such damages properly pleaded in the complaint. The judgment for damages must be limited to such extent and amount as the well-pleaded facts in the complaint would justify.

6. Nominal damages may be awarded without proof of actual injury.

7. The showing made by defendants as to surprise, inadvertence, or excusable neglect was not sufficient to entitle them to have the judgment by default set aside. Defendants are entitled to have set aside that part of judgment for special damages because of the absence of allegations of special damages, and this appears on the face of the record.

Appeal and Error. No. 14514. Decided June 17, 1940. Ginsberg, et al. v. Bennett, et al. District Court, Denver. Hon. George F. Dunklee, Judge. Affirmed. En Banc.

HELD: 1. Where Supreme Court considers a controversy on an accounting and remands the case for further proceedings to determine the propriety of the inclusion of certain items of expense in the account submitted by the defendant, and where at such further hearing a new statement is submitted, the accuracy of which is not questioned, and where no new material further evidence is offered, and where every question raised now was presented in plaintiffs' original briefs and motion for rehearing in the first appeal, no further consideration to them will be given.

2. It is not permissible to resubmit questions previously decided in a former proceeding in error, since the opinion therein and the judgment entered in conformity therewith constitute "the law of the case," which must control.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Bouck not participating.

Mental Incompetents; Trusts; Wills; Evidence; Assignments; Consideration. No. 14543. Decided June 3, 1940. Foster, etc. v. Kragh, et al. District Court, Weld County. Hon. Claude C. Coffin, Judge. Reversed. En Banc.

HELD: 1. The assignment of a time certificate of deposit, by owner while she was mentally incompetent, is invalid, although assignment took place prior to adjudication.

2. Where owner makes an assignment of such a certificate, in consideration of the execution of a will establishing a life estate for her benefit, and there is no evidence that trustee named in the will ever assumed the trust relationship, there is a failure of consideration for said assignment.

3. It was error for the Court to admit in evidence a copy of a will without a showing that it was properly attested, proved or shown to be admitted for probate in any Court.

4. Where it appears that the trustee under the will, without undertaking the responsibilities of the trust relationship, attempted, in every way, to obtain the proceeds of the certificate and other property for his own use and benefit, the law entitles the conservator of estate of the incompetent (owner of certificate) to the funds on the ground of failure of consideration.

Opinion by Mr. Justice Bock. Mr. Chief Justice Hilliard and Mr. Justice Bouck not participating.

Annual Convention—Colorado Springs, September 27-28, 1940