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Supreme Court Decisions

Dicta Editorial Board

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STATUTE OF FRAUDS—DEBT OF ANOTHER—ORIGINAL PROMISE—CONSIDERATION—*Miller vs. Hanna-Logan, Inc.*—No. 13369—*Decided September 10, 1934—Opinion by Mr. Justice Butler.*

Miller promised plaintiff that, if plaintiff would forbear repossessing a truck sold to one Ashenbrenner, and would allow said truck to continue to be used on a certain farm, Miller would pay the balance of Ashenbrenner's note for the purchase price of the truck. Miller was financially interested in the operations of said farm.

1. Miller's promise was an original one, and was not within the Statute of Frauds.

2. Plaintiff's forbearance was a sufficient consideration for Miller's promise to pay.—*Judgment affirmed.*

CRIMINAL LAW—BANKING CODE—FALSE STATEMENT OF BANK OFFICERS—*Ernest H. Drinkgern and Arthur H. Schnell vs. The People of the State of Colorado*—No. 13067—*Decided September 10, 1934—Opinion by Mr. Justice Bouck.*

Drinkgern and Schnell were convicted under the Colorado Banking Code on an information charging that as officers of the Farmers State Bank of Brighton they falsely and feloniously made a written statement to the banking commissioner that twenty-two $500 bonds of The Brighton Improvement Company were of the market value of $11,000.

1. The court, in reversing the conviction, said that in order to prove the falsity of the statement, the district attorney went far afield, and the trial court admitted a mass of testimony that was only remotely, if at all, relevant.

2. The only testimony on the market value of the bonds was that the twenty-two $500 bonds had a market value of $11,000, and that there was no admissible testimony that the market value was less. —*Judgment reversed.*

AUTOMOBILE COLLISION—NEGLIGENCE—FAMILY CAR DOCTRINE—TESTIMONY ON INSURANCE—*Margaret Boltz vs. Grace Bonner* —No. 13203—*Decided September 10, 1934—Opinion by Mr. Justice Bouck.*

Margaret S. Boltz, plaintiff in error, was the losing defendant at the trial in three separate suits tried together wherein it was found that the negligence of Wilma Boltz, daughter of Margaret, concurring

with others, caused the injuries for which damages were awarded. Margaret Boltz alone sought reversal on writ of error.

Three questions were raised: 1. Was the car owned by Margaret a family car, thus imposing liability on Margaret for the negligence of her daughter, Wilma; 2. Was testimony touching on an insurance policy involving others not appearing in the Supreme Court, erroneously admitted; and 3. Was Wilma negligent.

Affirming the judgment of damages in all cases against Margaret the court held:

1. Margaret's own testimony "Well, I permitted her to use it (the automobile) when she asked me for it, and when it suited me to let her have it . . . for her own pleasure" amply sustained the point that the automobile was a family car.

2. The inquiry concerning insurance between those not parties to this record was not error of which Margaret could complain, and

3. On substantial conflict in testimony the trial court found negligence on Wilma's part, and this concluded the appellate court.

WASTE WATER—POINTS FOR DISCHARGE—COMMISSIONER TO RECOMMEND NUMBER AND LOCATION—*Pettit, et al. vs. Waline*—No. 13209—*Decided September 10, 1934—Opinion by Mr. Justice Butler.*

1. In an injunction suit to prevent discharge of waste water from defendant's lands into a lateral ditch, it is within the issues for the court to limit the number of the points for discharge of such waste water.

2. It is proper for the court to appoint a commissioner to recommend the number and location of the points for discharge, and, upon failure of a party to object in the trial court to the commissioner's report, such party cannot urge in the appellate court that the commissioner was not sworn as a witness.

3. The decree fixing the points for discharge being based on condition then existing, the decree should save the rights of defendants to apply for a change of location of said points whenever different conditions make such change necessary.—*Decree modified, and as modified, affirmed.*

MUNICIPAL CORPORATIONS—ZONING ORDINANCES—TEST IS REASONABLENESS—*The City of Colorado Springs vs. Miller*—No. 13058—*Decided September 10, 1934—Opinion by Mr. Justice Holland.*

The local authorities are the primary judges of the reasonableness of a zoning ordinance. Unless they unmistakably exceed a reasonable exercise of their authority, the courts should not interfere. The ordinance was not unreasonable as it related to the property herein involved. —*Judgment affirmed.*

NEGLIGENCE—AUTOMOBILES—EVIDENCE—*Beauregard Ross vs. Val C. Sherman and Elizabeth Sherman*—No. 13119—*Decided September 10, 1934.*

FACTS.—The defendants, Sherman and his wife, obtained a non-suit in a case brought by Ross, a pedestrian, for damages resulting from defendants' car striking plaintiff while plaintiff was crossing a street at intersection. Sherman's wife was driving the car and she noticed defendant crossing street. She honked her horn once and slackened speed to about five miles an hour. Defendant saw Mrs. Sherman when she was in the center of the intersection. At that time Mrs. Sherman came to a standstill; both parties became confused; Mrs. Sherman started the car and struck plaintiff.

HELD.—Whether or not defendant was guilty of negligence was a question of fact for the jury to determine. In granting a non-suit the court erred. A moment's wait on part of the defendant would have averted the accident. It was a clear question of whether the driver was exercising due care, which must be determined by the jury.

The court approved the trial court ruling in excluding certain X-ray plates offered in evidence. For lack of the requisite preliminary knowledge of necessary facts on part of the witness.—*Reversed.*

WORKMAN'S COMPENSATION—STATUTE OF LIMITATIONS FOR FILING CLAIM—COMPENSATION INJURY—*Frank vs. Industrial Commission et al.*—No. 13573—*Decided September 24, 1934*—*Opinion by Mr. Justice Bouck.*

Frank was denied compensation under the Workman's Compensation Act as an employee of the Black Diamond Fuel Co., both by the Commission and by the Court below. The claim was for a ruptured appendix with resulting peritonitis. Claimant testified that he was lifting a mine car in the company's coal mine, and as a result of such lifting, appendix was ruptured. The accident occurred October 11, 1932, but no notice of claim was filed with the Commission until August 4, 1933.

1. The testimony of the claimant that the injury arose out of and in the course of his employment was not refused. Hence, the Commission erred in denying compensation.

2. The statute provides that the rights to compensation shall be barred unless within six months after the injury notice claiming compensation shall be filed with the Commission, but where the employer furnished medical services to the claimant this was the equivalent of paying compensation and comes within the exception of the statute that the bar shall not apply to claimant unless compensation has been paid.

3. Where the employer adopts a medical plan to furnish medical and kindred services to its employees it is the equivalent of payment to the employee.—*Judgment reversed.*

SURETYSHIP AND LIABILITY UNDER INDEMNITY CONTRACTS—*Gardner Bros. and Glenn Construction Company, a Corporation, vs. American Surety Company of New York, a Corporation*—No. 13160—*Decided September 10, 1934.*

FACTS.—Plaintiff contracted with the state to construct a certain highway at plaintiff's own cost and expense. Plaintiff entered into a contract with one Biscup for a supply of gravel under certain conditions. Defendant executed the bond which would indemnify plaintiff for any loss occassioned by Biscup in not fulfilling his contract with plaintiff. After the work had progressed Biscup was not living up to the contract in not supplying the quality of gravel agreed on. Plaintiff notified defendant of the acts of Biscup. Defendant assured plaintiff that Biscup would do the work specified in the contract. After the completion of the principal contract plaintiff was forced to pay numerous debts which Biscup had incurred in fulfilling the contract between Biscup and plaintiff. Plaintiff is now suing defendant for these sums so paid. Defendant filed a motion to strike and a motion to dismiss. The trial court treated these motions as a general demurrer, which was sustained.

HELD.—An indemnity or security contract, like written instruments, generally is to have a reasonable interpretation or construction. Defendant is entitled to have its contract construed according to the plain meaning of its terms. Biscup complied with his contract to furnish gravel and that was as far as defendant assumed to indemnify the plaintiff. The acts of defendant in having Biscup comply with his contract would not put a new form on defendant's obligation. Biscup having complied with his contract with plaintiff, the defendant's liability ceases. The court approves the sustaining of the demurrer.—*Affirmed.*

WILLS—CONSTRUCTION—GIFTS IN LIFETIME OF TESTATOR—*Hart vs. Hart*—No. 13223—*Decided September 24, 1934—Opinion by Mr. Justice Bouck.*

Testator's son resided on a farm belonging to the testator. The testator's will devised the farm to the son, and further provided that, if testator disposed of the farm in his lifetime, the son should receive its equivalent in money. Testator traded the farm for other property consisting of a store building, a stock in trade, and a residence. Title to the store building was taken in testator's name. A bill of sale to the stock was taken in the son's name and was delivered to him by the testator. Title to the residence was taken in the son's name without his knowledge and the deed was never delivered to him. Testator permitted the son to operate the store business in his own name. Upon testator's death, the executor and the son fixed the value of the farm as equivalent to the value of all of the property taken by the testator in

exchange. Under these facts it was held that the stock in trade and the residence were not gifts to the son but must be accounted for as property of the estate, and that the son could not retain them in addition to receiving their equivalent in money.—*Judgment reversed with directions.*

CRIMINAL LAW—RAPE—*Schreiner vs. The People*—No. 13581—*Decided September 24, 1934*—*Opinion by Mr. Justice Butler.*

Henry Schreiner was convicted of statutory rape and was sentenced to imprisonment in the penitentiary. He seeks a reversal.

1. In an information for rape upon an unmarried female under the age of 18 years it is not nencessary to allege that the girl was not the wife of the defendant. An unmarried girl could not possibly be the wife of the defendant.

2. Upon defendant's motion to require the People to elect on what particular act of intercourse the People would rely for conviction, where there was evidence of several acts, it is in the discretion of the Court to sustain such motion either before the introduction of evidence or at the close of the People's case or during the progress of the trial, and where such motion is sustained, it is immaterial at what stage of the proceedings it occurs.

3. The Court has power to admit in rebuttal, evidence that would be admissible in chief. This is the rule unless such admission has been abused.

4. Evidence of a witness on rebuttal, where his name was not endorsed upon the information, is admissible.—*Judgment affirmed.*

WILLS—CAPACITY TO CONTEST—STEPCHILD HAS NO CAPACITY TO CONTEST WILL—*Estate of McCardle et al. vs. Donahue*—No. 13354—*Decided June 25, 1934*—*Opinion by Mr. Justice Hilliard.*

Judgment of dismissal of caveat to a will. Error is assigned. The caveat was filed by a stepchild of the testator.

1. The purpose of a proceeding to contest a will is to divest the legatees and devisees of rights in the estate of the testator, and vest the property in his heirs-at-law, or in the beneficiaries named in another will.

2. Where the person filing the caveat is a stepchild she had no such interest in the estate as would entitle her to file a caveat where there is no allegation of the existence of another will.

3. Persons contesting a will must show legal interest in the estate.

4. A stepdaughter who is of age has no such interest.

5. Query—Would a minor stepchild have such interest that she could maintain a caveat where the decedent stood in loco parentis to such minor child.—*Judgment affirmed.*

TRADE NAMES—UNFAIR COMPETITION—PLEADING—ILLEGAL CUSTOM—DAMAGES—MISLEADING PUBLIC—COMPETITION—*Colorado National Company vs. The Colorado National Bank of Denver*—No. 13089—*Decided September 24, 1934—Opinion by Mr. Chief Justice Adams.*

1. In an action to enjoin the use of a trade name, it is proper for the complaint to allege a custom of United States banks to operate affiliated companies under similar names, even though such practice is illegal, where defendant's choice of a name, in conjunction with such custom, would result in unfair competition by making it appear that the defendant was a corporation affiliated with the plaintiff.

2. The action being one to prevent future injury or damage, it is sufficient for the complaint to allege that defendant's use of its trade name would infringe upon the good will attached to the plaintiff's name and would mislead the public.

3. The controlling test is whether or not defendant's selection of a name is likely to deceive the ordinary customer and lead him to believe that he is dealing with the plaintiff, when he is actually dealing with the defendant. Consequently, injunction will not be denied merely because the businesses of the two concerns are not competitive.—*Judgment affirmed.*

NEGRO — DISCRIMINATION AGAINST — REFUSAL TO SERVE IN RESTAURANT—*Crosswaith vs. Bergin*—No. 13053—*Decided June 25, 1934—Opinion by Mr. Justice Bouck.*

The plaintiff in error, Crosswaith, a negro, sued before a Justice of the Peace to recover from Bergin $300 for alleged violation of Sections 4128 and 4129 Compiled Laws of 1921. He was nonsuited and appealed to the County Court where he was again nonsuited.

Bergin was the cashier and in charge of a restaurant and Crosswaith, a negro, entered the restaurant and ordered food and was refused service.

1. Sections 4128 and 4129 Compiled Laws of 1921, provide, among other things, that all persons in the State of Colorado shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances, theatres and all other places of public accommodation and amusement, and for refusal to give such privileges the person who so refuses forfeits not less than $50 or more than $500 to the person aggrieved thereby.

2. The above statutes are constitutional.

3. Under the evidence there was the kind of discrimination against which the law is aimed, and the plaintiff is entitled to recover.

4. As for pecuniary damage no proof of it is necessary.—*Judgment reversed.*

REPLEVIN—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—APPLICATION FOR REHEARING AFTER MOTION FOR NEW TRIAL DISPOSED OF—*Whiting vs. Williams*—No. 13531—*Decided June 25, 1934—Opinion by Mr. Justice Bouck.*

Williams instituted replevin suit in the County Court.

Judgment was rendered against her there and she appealed to the District Court where again verdict and judgment went against her. She asked reversal.

Mrs. Whiting and her husband purchased a farm in Boulder County, together with the farming machinery and leased the farm and executed a promissory note for $800 secured by a chattel mortgage on the implements and, also, an automobile and motor truck that she owned. Williams, the plaintiff in error, before maturity purchased the note and when note was not paid instituted replevin and the defense was made that fraudulent representations were made in procuring the note and that Williams was not a bona fide purchaser for value.

1. Where a motion for new trial is filed on the ground of newly discovered evidence on the ground that the plaintiff's, and his witnesses', testimony was wilfully false and such motion is denied by the lower Court, the trial Court's decision on this question of fact is binding upon this Court, where the evidence is not convincing that any such willful false testimony was given.

2. The practice of filing an application for a rehearing of a motion for a new trial after that motion has been fully disposed of and final judgment entered and appellate orders entered, is not approved.—*Judgment affirmed.*

AUTOMOBILES—COLLISION—RIGHT OF WAY—DAMAGES—*Lorenzini vs. Rucker*—No. 13273—*Decided June 25, 1934—Opinion by Mr. Justice Butler.*

Eugene Rucker obtained a judgment in an action brought against Lorenzini for the death of Rucker's wife through alleged negligence on the part of the latter in operating a truck which caused a collision between a truck and an automobile driven by Mrs. Rucker. Lorenzini seeks a reversal of the judgment.

1. The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection.

2. Where the evidence shows that the car being driven by Mrs. Rucker had already entered the intersection of two country roads, and where the driver of a truck colliding with it testifies that the automobile was right square in front of him, as he was approaching the intersection and he thereafter struck the automobile with his truck, striking the rear of the automobile after it was nearly past the intersection, such evidence is sufficient to support the finding that the defendant was negligent and that his negligence was the proximate cause of the collision and the resulting death of Mrs. Rucker.—*Judgment affirmed.*

CRIMINAL LAW—MINOR—LIST OF JURORS—ACCEPTING MINOR'S PLEA OF GUILTY TO MURDER—DYING DECLARATION—INSTRUCTIONS — EVIDENCE OF OTHER OFFENSES — *Reppin, an Infant vs. The People*—No. 13445—*Decided June 18, 1934*—*Opinion by Mr. Justice Butler.*

Reppin, a minor, brings here for review a death sentence in a homicide case.

1. While Section 7067 of the Compiled Laws provides that every person charged with murder or other felonious crime shall be furnished, previous to his arraignment, with a list of the jurors, where the record in the court below is silent as to whether such list is furnished and no objection is made in the trial court on account of the failure to so furnish, it will be presumed that the trial court proceeded regularly, and the defendant waived the irregularity if it existed by not objecting in the court below.

2. Where a minor—18 years old—pleads guilty to homicide on advice of counsel appointed for him, after the court fully explained the effects and consequences of such a plea, and where it appears that he was not mentally defective but understood not only the nature of the crime committed but also the nature and consequences of a plea of guilty, the court did not err in accepting the plea of guilty.

3. To make a dying declaration admissible it is not necessary that the declarant should have stated at the time that it was made under a sense of impending death. The consciousness of impending death may be inferred from the character of the wound and the physical condition of the declarant and from the nature and circumstances of the case.

4. Where the murder was admitted to have been committed in the perpetration of robbery, it constituted murder in the first degree and an instruction limiting the jury to determine what punishment should be inflicted under murder in the first degree was proper, as second degree murder was not in the case.

5. The trial upon a plea of guilty, where the killing was murder in the first degree, is to ascertain whether the penalty should be fixed as death or imprisonment for life, and in this case where the sole question for the jury to determine was whether the penalty should be fixed at death or imprisonment for life, evidence is not admissible which shows or tends to show that the accused had committed a crime or crimes wholly independent of the offense for which he is on trial, unless such independent evidence bears upon the question of intent, and if any evidence of commission of independent crimes is admitted it is error for the court to admit it without cautioning the jury that it was admitted solely for the purpose of bearing on the question of intent.—*Judgment reversed. Mr. Justice Holland, Mr. Justice Bouck and Mr. Justice Hilliard concur specially. Mr. Chief Justice Adams, Mr. Justice Campbell and Mr. Justice Burke dissent.*

WE JUST TELL THEM; WE DON'T EXPLAIN THEM

"Would you mind telling us from what literary source springs the word 'irregardless' on page 284 of September 'DICTA'. The late Volney T. Hoggatt was a frequent user; it is suggested that he originally coined the word in his 'Ornery and Worthless Men's Club.'

(Signed) GARWOOD AND GARWOOD."
