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Supreme Court Decisions

Dicta Editorial Board

• Supreme Court Decisions •

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of a filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

CONSTITUTIONAL LAW—MOTOR VEHICLE ACT—APPLICATION TO RENTED DRIVERLESS CARS—*The Driverless Car Co., et al. vs. Armstrong as Secretary of State*—No. 13078—*Decided September 19, 1932—Opinion by Mr. Justice Butler.*

The plaintiff and others engaged in the business of renting driverless cars sought to restrain the Secretary of State from enforcing against them certain provisions of the Motor Vehicle Act, as follows:

(a) That section which provides that " if the owner rents or intends to rent the vehicle without a driver, it shall not be registered unless and until the owner shall agree to carry insurance, or . . . unless the owner shall demonstrate his financial ability to respond in damages for injury or death; or unless the owner shall furnish a surety bond."

(b) The section requiring the owner of a driverless car to carry public liability insurance.

(c) The section providing "that there shall issue for every passenger motor vehicle, rented without a driver, the same type of number plates as that issued for private passenger vehicles."

Held.—1. The act is not unconstitutional on the ground that the subjects treated in the act are not expressed in the title. The act is entitled "An act relating to motor and other vehicles, providing a penalty for the violation thereof and repealing all acts and parts of acts in conflict therewith." The title to the act is sufficiently broad to cover the provisions challenged in this suit.

2. The act is not unconstitutional on the ground of its being a special law where a general law can be made applicable. This law is general and uniform in its operation.

3. The act does not deny any person the equal protection of the laws. There is no unreasonable classification. The question of classification is primarily for the Legislature. The legislature did not act unreasonably in imposing upon the owners of driverless car owners alone the requirements found in the challenged provisions of the act. The legislature may well have believed that one who has no pecuniary interest in the automobile he drives has less inducement to drive carefully upon the public thorofares and is more likely to become a menace to person and property than one who has such pecuniary interest.

4. The act is not an unreasonable interference with a purely private business; on the contrary, they rest upon the unquestioned power of the state

in the interests of public safety to prescribe terms under which the public highways can be used for a gainful business.

5. The act does not operate to deprive plaintiffs of property without due process of law.

6. The act does not offend against any other provisions of the Constitution, State or Federal, in so far as the parts of the act challenged in this suit are concerned.—*Judgment affirmed.*

ESTOPPEL—FORECLOSURE SALES—EVIDENCE — EXPERT WITNESSES — NATURE OF PROPERTY—*Moul vs. Thompson et al.*—No. 12644—*Decided September 19, 1932—Opinion by Mr. Justice Burke.*

1. One who claims ownership of personal property, adverse to the interests of the mortgagor and mortgagee of a chattel mortgage describing such property, but who stands silently by while the property is being sold on foreclosure of the mortgage and who sees the purchaser at such sale invest his money in the property, will be estopped from later asserting his claim as against the purchaser.

2. Testimony of the purchaser, that such property formed a part of the basis of his bid, is admissible to support his plea of estoppel.

3. Testimony of expert witnesses as to custom in the sale of property of this type, and as to what property, in their opinion, was included in a bill of sale, is proper to enable the court to determine how the parties to a document of doubtful meaning probably understood its terms.

4. Finding, based on conflicting evidence, that blowers, tanks, piping, wiring, etc., are personalty, sustained.—*Judgment affirmed.*

SERVICE OF SUMMONS BY PUBLICATION TO UNKNOWN PERSONS—JURISDICTION — APPEARANCE — ACTION BARRED AFTER APPEARANCE — WHAT CONSTITUTES—*Cole vs. Fiese et al.*—No. 12749—*Decided Sept. 26, 1932—Opinion by Mr. Justice Hilliard.*

In an action of foreclosure, wherein a trust deed was foreclosed, plaintiff was not served personally but by publication and not mentioned except as an "Unknown Person" but later, after the decree of foreclosure was entered, filed his motion to set aside said decree, then abandoned said motion, and filed a new action of foreclosure, HELD, that plaintiff submitted to the jurisdiction of the Court, by filing his motion, and he should have pursued his motion, since he failed to do this he is now precluded from a recovery on his new action.—*Judgment affirmed.*

PERSONAL INJURIES—INSURANCE—EVIDENCE OF—*Phelps vs. Loustalet, et al.*—No. 12675—*Decided September 26, 1932—Opinion by Mr. Justice Moore.*

I.

In an action involving personal injuries sustained by the plaintiff where there was some conflict in the evidence concerning the cause of the damage,

it was error to permit the plaintiff to testify that he told one of the defendants, "Jay, I guess I will have to sue you, and he says go ahead that is why I carry insurance."

II.

Under such circumstances, the admonition and instruction by the Court to the jury to disregard the testimony of the plaintiff was insufficient. The error could not be cured.—*Judgment reversed.*

CHATTEL MORTGAGES — CONDITIONAL SALES CONTRACTS — DIFFERENCE BETWEEN—EFFECT OF—*The Illinois Building Company vs. Patterson, et al.*—No. 12372—*Decided September 26, 1932—Opinion by Mr. Justice Alter.*

I.

Plaintiff, Patterson, claims office furniture and fixtures sold by him to Investors Bond and Mortgage Company. Defendant was the landlord for Investors Bond and Mortgage Company, on a lease which provided that the landlord should have a valid first lien for all unpaid rentals. The plaintiff had sold the furniture and fixtures to the mortgage company under a purported "lease of goods". The lease of goods was not acknowledged but was recorded. The office lease was unrecorded and unacknowledged. Upon the failure of the mortgage company to pay the rent and to complete the payments due under the lease of goods, this controversy arose as an action for replevin.

II.

Where plaintiff takes the position that a purported lease of goods constitutes a conditional sales contract, he must comply with the Chattel Mortgage Act.

III.

Since Coors versus Regan, 44 Colorado 126, conditional sales, as against third persons having no notice thereof and who are injuriously affected thereby, are treated as absolute sales.

IV.

Conditional sales contracts intended to have the effect of mortgages or liens must comply with the Chattel Mortgage Act and be acknowledged and recorded.—*Judgment reversed.*

Justices Butler, Moore and Hilliard dissent.
Dissenting opinion by Mr. Justice Butler.

I.

There is a distinction between a chattel mortgage and a conditional sales contract. Under a conditional sales contract there is no absolute obligation to pay the purchase price. The contrary is true under a chattel mortgage. The confusion "arose by reason of the loose and inaccurate use by this Court of the term "conditional sale." Before the Coor versus Regan case, the distinction was properly recognized. The cases cited to support the decision in Coors versus Regan are not in point.

II.

Plaintiff was not estopped from asserting his title because of the fact that the bond and mortgage company was put in possession of the furniture. So too, the mortgage company could not transfer to the building company or encumber a title that it did not have. The building company merely stands in the position of the mortgage company.

III.

"If it is desirable to require the recording of conditional sale contracts, such as the one involved in this proceeding, it would be better to accomplish the purpose by act of the Legislature. * * *"

IV.

Chronologically, the lease of the office was first made by the mortgage company. Subsequently, the mortgage company made its agreement with the plaintiff. To hold that the office lease is now a lien on the furniture is to hold that such a lease gives a mortgage or lien on after-acquired property.—*Judgment of the County Court should be affirmed.*

CONTRACTS—ASSIGNMENT OF PROCEEDS OF SALE DISTINGUISHED FROM ASSIGNMENT OF THE PROPERTY ITSELF—*Fowler State Bank vs. Elder*—No. 13167—*Decided September 26, 1932—Opinion by Mr. Justice Moore.*

Fowler State Bank sued Taylor and attached certain beans which were sold by sheriff and proceeds retained awaiting determination of the action. Elder intervened, claiming ownership as assignee of Taylor. The beans were grown by Taylor on land leased from Elder, under a contract with a Seed Company, whereby the Seed Company furnished the seed and were to be paid in kind out of the crop grown; or if the seed did not reach a certain test, payment in cash plus threshing costs. Taylor then assigned to Elder a certain portion of the proceeds of beans as and when sold. Judgment for intervenor.

Held.—1. There was no assignment of the beans from Taylor to intervenor. All that was assigned was the proceeds of sale.

2. Such assignment was ineffective against the attaching bank.

3. An assignment of proceeds to be derived from sale of property does not carry an assignment of the property itself or against third parties without notice.—*Judgment reversed.*

CONTRACTS—GRUBSTAKE CONTRACTS—RIGHTS AND DUTIES OF PARTIES—*Bradley vs. Andrews*—No. 12707—*Decided October 3, 1932—Opinion by Mr. Justice Butler.*

I.

While it is a settled rule that the party supplying the money is entitled to his share of all profits on claims or oil locations made during the life of the contract, it is also true, as in this case, that, where the person who is supplying the money fails and refuses to continue so that the other party does

not have the necessary money for expenses, then the latter may terminate the contract.

II.

The party supplying funds under a grubstake contract, having been fully apprised of all facts and information in the hands of the other party, cannot complain if, after he has failed to provide necessary funds and the other party has advised him that the contract is terminated, a third person provides the necessary funds and valuable locations are made. It is unfair to give one who has failed to comply with the contract any benefits which might arise after the contract has been terminated.—*Judgment reversed.*

CARRIERS—NEGLIGENCE—RES IPSA LOQUITUR—*The Yellow Cab Company vs. Hodgson, et al.*—No. 12677—*Decided October 3, 1932—Opinion by Mr. Justice Alter.*

I.

In a complaint alleging negligence against two parties, one an individual and the other a public carrier, when the complaint contains an allegation that the specific acts of negligence are not within the knowledge of the plaintiff, it is error to attempt to apply the doctrine of res ipsa loquitur as against either of the defendants.

II.

Where plaintiff was a paying passenger in a cab and the defendants are the cab company and another party who collided with the cab in which the plaintiff was riding, no presumption of negligence arises as against either defendant.

III.

"Where either one of two defendants wholly independent of each other may be responsible for the injury complained of, the rule of res ipsa loquitur cannot be applied." The doctrine does not dispense with the general rule requiring the plaintiff to prove that the defendants' negligence was the proximate cause of the plaintiff's injury.

IV.

Where the evidence clearly establishes the fact that the injury may have resulted from the concurrent negligence of two or more persons or causes, not both under the management and control of either of the defendants, the doctrine of res ipsa loquitur does not apply.—*Judgment reversed.*

LIBEL—CRIMINAL—MALICE—MITIGATION—SUFFICIENCY OF INFORMATION—*Bearman v. The People*—No. 13,055—*Decided October 31, 1932—Opinion by Mr. Justice Butler.*

Bearman was found guilty of criminal libel and was sentenced to imprisonment in the Penitentiary. He seeks a reversal of the judgment.

1. A defendant, in a prosecution for criminal libel, is not entitled to introduce evidence showing absence of malice on his part where the publication is libelous per se, except, where the publication is one of qualified privilege.

2. A communication made bona fide upon a subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty; although it contains incriminatory matter, which, without this privilege would be slanderous and actionable.

3. The privilege is lost if the defendant, in regard to the persons to whom the publication is made, goes beyond the limits which his own protection or his duty requires.

4. The information is not duplicitous in that in one count it charges that Bearman libeled several persons; nor is it duplicitous because Bearman charged Dr. Bronfin with several and distinct acts of misconduct committed by him at different times.

5. It was not error in admitting in evidence the letter sent out by defendant because it contained libelous matters that were not set out in the indictment.—*Judgment affirmed.*

BANKS AND BANKING—DIRECTORS' LIABILITY—ARISES WHEN—*Swenson vs. McFerson, et al*—No. 13,105—*Decided November 7, 1932—Opinion by Mr. Justice Burke.*

1. When a person becomes a director of a Bank not having complied with the statutory requirements, he makes himself liable for the stockholders' statutory liability just as though he did own the stock.

2. Defendant Swenson was the administratrix of the estate of her deceased husband. While the estate was in the process of probate, defendant's name was brought up to become a director in the Bank. The estate owned ten shares of the bank stock. The eligibility of the defendant to act as a director was questioned, the president assured those present that he would "take care of it". Thereafter, the defendant signed the minutes of directors' meetings as a director and otherwise acted in that capacity. The president assigned to the defendant five shares of his own stock. He, however, retained possession of the stock. At the time of becoming a director, she took an oath that she was the owner of five shares even though she did not actually own stock. As long as she had held herself out to the public as being an owner, a judgment against her on the stockholders' liability is good.—*Judgment affirmed.*

TORT—PERSONAL INJURY—CHANGE OF VENUE—INSTRUCTIONS—EXCESSIVE VERDICT—*Robbins v. McAlister*—No. 12,687—*Decided November 14, 1932—Opinion by Mr. Chief Justice Adams.*

McAlister recovered judgment for personal injuries sustained in an automobile collision in the sum of $3,215.46 actual damages and punitive damages in the sum of $100.00. Defendant appealed.

1. In an action for tort, the county where the defendant resides and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed are equally proper places for trial; and

if the action is commenced in any one of these counties, the place of trial cannot be changed on the ground that the county designated is not the proper county.

2. The question of residence is compounded of fact and intention. It includes a location with an intent to remain there as a place of fixed, present domicile.

3. On the question of residence of the plaintiff, whether or not he is a qualified elector is immaterial. Where punitive damages are asked for, this does not constitute this an action to recover penalty which must be tried where the cause arose. This was an action to recover compensatory damages and punitive damages were only an incident to and not the basis of the cause of action.

5. Instructions approved.

6. The verdict was not excessive, nor was it the result of passion or prejudice.—*Judgment affirmed.*

INJUNCTIONS—LIE WHEN—QUO WARRANTO—CORPORATIONS—DIRECTORS—RIGHT TO OFFICE—*Wolford, et al vs. Bankers Security Life Co. et al*—No. 13,193—*Decided November 14, 1932—Opinion by Mr. Justice Butler.*

1. Plaintiff's complaint alleged that defendants were wrongfully retaining their offices as directors of the Bankers Security Life Company; the plaintiffs allege their right to the offices and seek an injunction, charging the defendants to vacate the office, turn over the company property and to restrain them from interfering with the officers and directors of the company. A demurrer to the complaint was overruled. The defendants stood on the demurrer and allege error, the main contention being that in as much as the legal remedy of quo warranto was adequate, the action for injunction will not lie.

2. Under circumstances as outlined above, where the real purpose of the proceeding is to determine the title to the office of director and where there is no paramount equity involved, quo warranto is the proper remedy.

3. The contention that an office in a private corporation is a franchise is untenable.

4. Where a plain and adequate remedy at law is to be had, an injunction will be denied.—*Judgment reversed with directions.*

NON-SUIT—PRIMA FACIE CASE—FRAUD—FICTITIOUS BONDS—INDIVIDUAL LIABILITY OF CORPORATE OFFICER—*Snowden v. Taggart*—No. 12,801—*Decided November 14, 1932—Opinion by Mr. Chief Justice Adams.*

1. A non-suit is improper where the plaintiff has established a prima facie case.

2. Bonds of a foreign corporation, issued in direct violation of the statutes of the foreign jurisdiction, are void ab initio.

3. One who causes fictitious bearer bonds of a corporation to be issued or circulated thereby commits a tort upon a remote purchaser of the bonds, who buys them relying on the fraudulent representations made in the bonds.

4. Where a corporate officer is a tort feasor he will be liable individually for his wrongdoing regardless of the liability which may attach to the corporation itself for the tort.—*Judgment reversed and cause remanded.*

WATER RIGHTS—INCREASE IN NATURAL FLOW OF STREAM—WHO IS ENTITLED TO—BURDEN OF PROOF—*The Leadville Mining Development Co. vs. Anderson, et al.*—No. 12773—*Decided November 21, 1932—Opinion by Mr. Justice Butler.*

1. It is well settled that, where a person by his own efforts has increased the flow of water in a natural stream, he is entitled to the use of the water to the extent of the increase.

2. To become entitled to the use of an increased flow in the water, a party must prove that the water thus added to the stream was the result of his efforts and that, if not interfered with but left to flow in accordance with natural laws, it would not have reached the stream. This he must prove by clear and satisfactory evidence.

3. Plaintiff owned and operated an irrigation tunnel. The tunnel passed through a porphyry dike, at which point there was a considerable increase in the flow of water. Plaintiff contended that the porphyry dike was impervious to the water and that, without the penetration of the dike by the plaintiff, said water would never have reached the river. Plaintiff's expert witnesses testified that probably a small amount of the water had formerly penetrated the dike and had reached the river. The trial court held that the plaintiff had failed to sustain the burden of proving that, prior to the penetration of the dike, the same waters did not formerly arrive at the same river through seepage and so forth. Examination of the record does not permit the findings of the trial court to be disturbed.—*Judgment affirmed.*

PLEADING AND PRACTICE—EXCEPTIONS—ERRORS—REVIEW ON COURT'S OWN MOTION—IMPLIED CONTRACT—LEGAL CONCLUSION—FACTS SUFFICIENT—*Fitzsimmons v. Olinger Mortuary Association*—No. 12703—*Decided November 28, 1932—Opinion by Mr. Justice Burke.*

1. Sections 66 and 422, Code of Civil Procedure, do away with the necessity of objecting or excepting to an order entered upon a written motion to strike.

2. Failure to argue an assignment of error does not foreclose consideration. A reviewing court, on its own motion, may correct an error apparent on the face of the record, such as the improper granting of a motion to strike.

3. If the nature of a man's profession or business is such as to imply the guarantee of certain conduct, the assurance that he will follow that line of conduct is implied in all contracts made with him for his services. This is

true of a mortician and requires of him a decent respect for the feelings of persons employing his services.

4. An allegation that an act was done in a "reckless, willful and wanton" manner will not be stricken as constituting a mere legal conclusion.

5. A complaint which alleged an oral contract for the services of a mortician, including an express or implied agreement that the mortician would not unnecessarily inflict mental suffering upon the employer by undue publicity or notoriety, and which set out as a breach thereof the fact that the mortician caused widespread publication to be given to a photograph showing the body of a deceased person being transferred from an airplane to a hearse, stated a good cause of action for violation of a contract and for damages for mental suffering therefrom.—*Judgment reversed and cause remanded.*

Mr. Justice Hilliard and Mr. Justice Campbell, dissenting:

1. There is no justification for the action of a reviewing court in restoring to a complaint matter stricken therefrom, where the plaintiff admits the irrelevancy of the matter stricken and does not urge a review of the ruling on the motion to strike.

CONTRACTS — CONSTRUCTION — ORAL MODIFICATION — AMENDMENT TO JUDGMENT—*Thompson, etc. v. Sweet*—No. 12717—*Decided November 28, 1932—Opinion by Mr. Justice Burke.*

1. Document construed and held to be a contract of purchase and sale, and not an option to purchase. Such expressions as "seller", "buyer", "as part payment", referred to as aids in construction.

2. Fact that the buyer resold to a third person and arranged with the seller for delivery to the third person is proper evidence of the construction placed on the document by the buyer.

3. All material oral modifications of a written contract, either preceding or coincident with its execution and delivery, are presumed in law to be merged into the writing.

4. Amendment of the judgment against a partnership, after approval of the bill of exceptions and expiration of the term, so as to include a joint and several judgment against the individual partners, was mere correction of a clerical error.—*Judgment affirmed.*

WILLS—CONSTRUCTION OF—GENERAL AND SPECIFIC BEQUESTS OF STOCK *Annie Bond vs. Wm. L. Evans, Executor Will of Henry M. Fickinger, deceased*—No. 12,756—*Decided December 19, 1932—Opinion by Mr. Chief Justice Adams.*

1. A paragraph of the will read as follows: "Fifth: Fifteen (15) shares New York Central Railroad Stock to Mrs. Annie Bond . . ." At the time of the execution of the will testator owned fifteen shares of such stock evidenced by one certificate. At the time of his death he owned these shares and also one more, evidenced by a separate certificate.

2. This was a general, not a specific, bequest, and the stock owned by testator at time of his death, together with all dividends accruing thereon, belonged to the estate, and not to the legatee.

3. A bequest of a stated sum or number of shares of a designated corporation without further explanation and without more particularly referring to and indicating the identical shares intended to be bequeathed is not a specific legacy, but will be construed as a general legacy.—*Judgment affirmed.*

ADMINISTRATORS AND EXECUTORS—SUIT TO SET ASIDE GIFT—BURDEN OF PROOF—TIME FOR OBJECTIONS—ADMISSIBILITY OF TESTIMONY—*Norris v. Bradshaw*—No. 12,710—*Decided December 19, 1932—Opinion by Mr. Justice Butler.*

1. Where a purported gift from donor to his son-in-law would leave an insufficient amount in the donor's estate to pay the widow's allowance and it appears the gift was made so as to defeat such allowance, the donee has the burden of proving the honesty and good faith of the transaction.

2. If a witness is competent to testify to matters which happened after decedent's death, an objection to his testimony concerning matters happening prior to decedent's death, which objection was made after the witness was sworn, was in apt time. Milsap v. Stone, 2 Colo. 137, overruled in this respect.

3. In equity proceedings an assignment of error based on admission of alleged inadmissible evidence will be considered only where there is not sufficient unobjectionable evidence to sustain the decree.

4. Fact that a gift to defendant was intended for the benefit of defendant and his wife would make the wife directly interested in the suit by the donor's administratrix to set the gift aside and the wife's testimony concerning the transaction is not admissible.

5. Sec. 6556 C. L. 1921 does not justify admission of defendant's testimony concerning a conversation between himself and a person since deceased, held in presence of defendant's wife, who was an heir of the decedent, where the wife's interest is hostile to the decedent's estate.—*Judgment reversed and cause remanded.*

NEGLIGENCE — ORDINANCES — CONSTITUTIONAL LAW — DELEGATION OF POWER—*Staley vs. Vaughn*—No. 12,759—*Decided December 19, 1932—Opinion by Mr. Justice Moore.*

Vaughn was driving an automobile on East 14th Ave., in Denver, which is designated and marked as a "Stop-street" pursuant to City Ordinance authorizing the manager of safety to designate "thru" streets or "Stop" streets. Staley was approaching 14th Ave., on Franklin St., and failed to stop his car before entering 14th Ave., and crashed into the Vaughn car. Vaughn recovered judgment, and Staley brings error claiming the ordinance unconstitutional.

The City Council undoubtedly has power under the Charter to regulate vehicular traffic, and in pursuance of that power to designate "Stop streets". The designation of certain streets as "Stop streets", is purely an administerial act and may be delegated to the manager of safety. We believe that this ordinance does not violate the constitution, but on the contrary we believe it to be wise, necessary and proper legislation.—*Judgment affirmed. En banc.*

HAPPY NEW YEAR

This greeting is as old as the memory of man, but the message it carries to our friends is filled with new courage and optimism and the spirit of progress.

The calendar of the past has been discarded that the youthful New Year of 1933 may hang another in its place. The history of our country and the observation and experience of this organization assures us that the record to be written on its pages will be essentially one of advancement. In the furtherance of this aim and in accordance with its policies, the efforts of this company will be devoted in the utmost in the coming year towards cooperation in everything pertaining to community enterprise and growth.

Our greetings for the New Year, extended in a most personal way through those of our employees who may be numbered among your neighbors and friends, are greetings of sincerity and hearty good cheer, filled with the hope that the New Year will be generous to you in its gifts of health, happiness and prosperity.

Public Service Company of Colorado