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Supreme Court Decisions

Dicta Editorial Board

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CONFLICT OF LAWS—CONDITIONAL SALES CONTRACTS EXECUTED IN FOREIGN STATES—ENFORCEMENT IN COLORADO AGAINST ATTACHNG CREDITOR WITHOUT NOTICE—*Commercial Credit Company vs. Higbee*—No. 12845—*Decided March 20, 1933—Opinion by Mr. Justice Campbell.*

1. Plaintiff in Error intervened in an attachment suit involving an automobile, the petition of intervention alleging that the defendant had purchased the automobile in California under a conditional sale contract reserving title in the vendor, prohibiting the purchaser from encumbering or permitting attachments to be levied against the property, and prohibiting removal of the car from the state or California without written consent of the vendor. The demurrer of the original plaintiff to the petition of intervention was sustained.

2. The courts of Colorado will not recognize the rights of a vendor of an automobile or his grantee under a valid conditional sales contract executed in California as against the rights of an attaching creditor in Colorado who levies upon the automobile which has been removed to Colorado without the permission or consent of the vendor or his grantee.

3. Such a contract, although valid in the state where executed, cannot be enforced against interested parties without notice in Colorado, because such action would be contrary to public policy and would result in detriment to the interests of a citizen of Colorado.

4. Secret liens reserved to the vendor of chattels in other states will not be recognized against interested persons without notice in Colorado.

5. The secret character of an unrecorded contract for conditional sale of personalty, reserving title in the vendor, is against public policy and contrary to the express provisions of the Statute of Frauds and Perjuries in Colorado.—*Judgment affirmed.*

AUTOMOBILES—CERTIFICATE OF TITLE—DUTY OF PURCHASER OF NEW CAR—*The Colorado State Bank vs. Riede*—No. 12866—*Decided March 27,1933—Opinion by Mr. Justice Moore.*

1. Plaintiff brought replevin for automobile. Directed verdict for defendant. Defendant purchased a new automobile and received dealer's bill of sale, which he recorded on October 7, 1930. Seller, on October 1, 1930, representing himself to be the owner, secured a loan of $1,000 from plaintiff and gave chattel mortgage on automobile, which was recorded October 2, 1930.

2. Upon the execution and delivery of a dealer's bill of sale for a new automobile and delivery of car, the transfer is complete and title passes to the purchaser.

3. Section 3, Chap. 137, Session Laws of 1927, with reference to certificate of title does not apply to cases of dealers selling new automobiles.

4. Where purchaser of new car purchases same in good faith and receives bill of sale, a subsequent mortgagee cannot defeat the title of the purchaser.—*Judgment affirmed.*

PERSONAL INJURIES—EXEMPLARY DAMAGES—RELATION TO COMPENSATORY DAMAGES—USE OF SPRING GUN TO PROTECT PROPERTY—*Starkey vs. Dameron*—No. 13118—*Decided March 27, 1933—Opinion by Mr. Justice Burke.*

1. Plaintiff recovered judgment of $100 compensatory damages and $2,000 exemplary damages for injuries sustained by discharge of spring gun attached to gasoline pump outside of filling station, which was an automatic pump, plaintiff claiming he had deposited his money in pump and when it did not deliver, he attempted to get his money out when he was injured by a spring gun which defendant had attached to prevent theft of gasoline.

2. The installation of a spring gun to protect property against theft is improper except in a domicil. The installation thereof in or about buildings not a domicil, renders one liable for injuries sustained by explosion thereof.

3. Exemplary damages awarded must have some reasonable relation to compensatory damages. Where exemplary damages are awarded in a sum twenty times the compensatory damages awarded, the award will not be upheld.

Judgment reversed with directions that if plaintiff will consent to modification of exemplary to an amount not exceeding compensatory judgment awarded, judgment affirmed, otherwise new trial ordered as to exemplary damages only.

CRIMINAL LAW—LARCENY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—INSTRUCTIONS—*Miller vs. The People*—No. 13231—*Decided April 3, 1933—Opinion by Mr. Justice Butler.*

Archie Miller was convicted of larceny of a calf. He seeks reversal of the sentence.

1. Application for a new trial based upon newly discovered evidence is addressed to the sound discretion of the trial court, and, unless there has been an abuse of that discretion, an appellate court will not interfere with the action of the trial court.

2. Newly discovered evidence going only to impeach the credit or character of a witness is not sufficient ground for a new trial, except it is clear that such impeachment would have resulted in a different verdict.

3. The contentions that Miller's arrest and conviction were brought about by a frameup is devoid of merit.

4. The ground that counsel appointed by the court presented the case inefficiently at the trial is without merit.

5. It is not reversible error to fail to give a cautionary instruction on accomplices where there was ample corroboration.

6. The instructions given were fair.

7. The contention that defendant was given a longer term of imprisonment than the statute permits on the theory that he was only an accessory after the fact is not tenable as the evidence showed that the defendant was a principal and was punishable as such.—*Judgment affirmed.—Mr. Justice Bouck and Mr. Justice Hilliard dissent.*

DEEDS — REFORMATION — PRORATION OF MORTGAGE LIABILITY WHERE SEPARATE PARCELS COVERED BY MORTGAGE ARE CONVEYED—*Hooper vs. The Capitol Life Insurance Co.*—No. 12700 —*Decided April 3, 1933*—*Opinion by Mr. Justice Butler.*

Hooper owned five lots upon which there were two apartment buildings subject to $14,000 mortgage to Capitol Life Insurance Company. Thereafter Hooper conveyed to James one of the apartment buildings in exchange for a farm. The deed covenanted that the property was free from encumbrance except the $14,000 mortgage, which the grantee assumed. James thereafter borrowed from Gallup and gave a trust deed on the apartment building that he had purchased. The insurance company sued to foreclose the Hooper mortgage. James sought reformation of the deed by cross complaint on the ground that the assumption clause was placed in the deed without his knowledge and contrary to the agreement of the parties. It appeared that the apartment building was worth $15,000 and that the farm received in exchange was worth $40,000 subject to $11,000 encumbrance, and that the value of the other apartment building, retained by Hooper, was $25,000. The court below reformed the deed and decreed that as between Hooper and James, the property deeded to James should bear three-eighths and the property retained by Hooper would bear five-eighths of the total mortgage debt.

1. To justify the reformation of the deed, the proof must be clear, unequivocal and indubitable; a mere preponderance of the evidence is not sufficient.

2. In this case, if it was true, as Hooper contends it is, that James assumed and agreed to pay the entire encumbrance on both the properties that James acquired and the property retained by Hooper, namely, a total of $14,000, he would be receiving for his $29,000 equity in the farm only $1,000, which would mean a clear loss of $28,000. It is highly improbable that anyone in his right mind would make such an agreement. In view of this and other evidence, it is clear that the written agreement for exchange of properties expressed the real intent of the parties and that the assumption of mortgage clause was inserted in the deed without the consent or knowledge of James.

3. The fact that a person accepts or signs an instrument without reading the same is not of itself a conclusive barrier to a suit for reformation. A grantee is not conclusively bound by an assumption clause in a deed. He may show the real contract between the parties,

though in contradiction of the assumption clause, and parol evidence is admissible therefor.

4. Where an estate, subject to a mortgage, is conveyed by the mortgagor in parcels at different times, and the mortgage debt is not mentioned in a deed, such debt should be satisfied, first, out of that portion of the estate retained by the mortgagor and then out of the parcels aliened, in the inverse order of alienation.—*Judgment affirmed.*

TAXATION—DISTRAINT WARRANTS—DUTY OF SHERIFF TO SERVE —*J. W. Goldsmith vs. A. M. McAnally*—No. 12915—*Decided April 3, 1933—Opinion by Mr. Justice Moore.*

County Treasurer sought by mandamus to compel county sheriff to serve a distraint warrant for the purpose of collecting delinquent personal property taxes. The lower court held that sheriff was under no legal duty to serve a distraint warrant and sustained the demurrer and entered judgment of dismissal.

1. Under the statutes of Colorado, the sheriff is required to serve all process, writs and orders, issued or made by lawful authority.

2. Under the statutes of Colorado, the county treasurer is authorized to issue distraint warrant for collection of personal taxes, and it is the duty of the sheriff to serve the distraint warrant.

3. A treasurer's distraint warrant is analogous to an execution.

4. A distraint warrant is a non-judicial process, precept or order, made by lawful authority, and it is the duty of the sheriff to serve and execute the same.—*Judgment reversed.*

CONSPIRACY — STATUTE OF LIMITATIONS — DEMONSTRATION IN COURTROOM—EXCESSIVE VERDICT—*Clark et al. vs. Machette*—No. 12466—*Decided April 3, 1933—Opinion by Mr. Justice Campbell.*

Plaintiff below recovered judgment for $2,500 against defendants on eight different causes of action, in substance charging conspiracy to injure plaintiff by unlawful searches, unlawful removal of her property, unlawful arrest, and unfounded charges of insanity.

1. Neither the 3-year nor the 1-year statute of limitations applied in this conspiracy case, although charged in eight different counts, some of which was charged as occuring at the beginning of 1932, the complaint stated in reality but one cause of action, namely, an executed conspiracy which resulted in injury to the plaintiff.

2. Where the court rebukes spectators at a trial for demonstration, but the record does not disclose just what the demonstration was and the defendants, at the time, make no suggestion to the court as to the possibility of the remarks having a prejudicial effect on the defendants, there was no error.

3. The verdict for $2,500 under the evidence was not excessive.

4. Judgment should be set aside as to defendant, Sam Goldhammer, as the evidence discloses he had no part in the conspiracy.—*Judgment affirmed in part and set aside in part.*

FIRE INSURANCE—LEASE WITH OPTION TO BUY—LOSS—LESSEE ENTITLED TO INSURANCE—*Dolan vs. Spencer*—No. 13286—*Decided April 3, 1933—Opinion by Mr. Justice Burke.*

Spencer owned land with improvements subject to $7,000 mortgage. Spencer leased the property to Dolan for three years with option to purchase, providing that if Dolan paid taxes and interest on the mortgage and by November 1, 1932, paid $1,000 and interest, he was to have a warranty deed subject to the mortgage. The improvements were worth $11,000 and were insured for $7,000. While contract was in effect, improvements were destroyed by fire, and Dolan demanded rebuilding, which was not done, and Spencer collected the insurance. Dolan brought action against Spencer to recover for the loss. Demurrer to complaint sustained, and judgment entered for Spencer.

1. The general rule is that under the facts above that the insurance stands in lieu of the burned property and that the insurance money goes to the purchaser.—*Judgment reversed.*

VERDICT — CONSISTENCY — BILL OF PARTICULARS — *The Rocky Mountain Fuel Co. vs. Belk*—No. 12621—*Decided April 10, 1933—Opinion by Mr. Justice Burke.*

Belk brought suit to recover $5,615.73 for services as detective. Belk filed bill of particulars on order of court. Cause tried to a jury. Jury found for Belk for $3,600. The evidence was sufficient to support a verdict either for the entire amount or for the sum admitted and tendered by the defendant, but no possible view of the evidence can reconcile the evidence with the verdict for the sum of $3,600.

1. A verdict must be consistent with some legitimate theory of the testimony, and where it is not, it should be set aside.

2. Neither the court nor the jury has any right to find for the plaintiff in contradiction of his bill of particulars.—*Judgment reversed.*

WATERS—CHANGE IN POINT OF DIVERSION—*The San Luis Valley Irrigation District et al. vs. Knowlton*—No. 12673—*Decided April 10, 1933—Opinion by Mr. Justice Campbell.*

Knowlton brought action to change the point of diversion of his irrigating ditch. The court below found that no substantial injurious effect to the vested right of other water users in the district would result from the change in point of diversion petitioned for and granted the petition.

1. Where the vested rights of other water users in a district will not be injured by the change of point of diversion of an irrigating ditch, it is proper to change the point of diversion.

2. The fact that the court below found that no substantial injurious effect to the vested rights of other water users would result from such change cannot be urged on appeal where the court in another part of its findings and decree declared that the changes asked for will not injuriously affect the vested rights of other appropriators.—*Judgment affirmed.*

COMMON LAW TRUST—CONSTRUCTION—COMMISSIONS TO TRUSTEES—*Todd vs. Ford et al. and Wright, as Administrator, vs. Ford et al.*—Nos. 12407 and 12408—*Decided April 10, 1933—Opinion by Mr. Justice Hilliard.*

Certain certificate holders of a common law trust recovered judgment below against the trustees of the common law trust for an accounting. Accounting had and judgments in severalty were given against defendants below.

1. A declaration of trust, which is mentioned in certificates issued to certificate holders is binding upon the certificate holders or unit holders.

2. Where no fraud or overreaching is shown the rights and liabilities of all the parties to the trust, including unit holders and trustees alike, must rest on the provisions of the declaration of trust.

3. Where the declaration of trust provides that trustees actively engaged in administering the trust shall be reasonably compensated, they are entitled to charge reasonable commissions for the sale of certificates or units in the trust.—*Judgment reversed.*

REPLEVIN—STOCK CERTIFICATES—JOINDER OF OFFICER WITH CORPORATON—*Blackmer and The D. F. Blackmer Furniture & Carpet Co. vs. Blackmer*—No. 12929—*Decided April 10, 1933—Opinion by Mr. Justice Bouck.*

Mrs. Blackmer recovered judgment in replevin against the corporation and its president for certain certificates of capital stock.

1. Where the evidence concerning the ownership of certificates of stock is conflicting, the weight and credibility thereof is for the lower court to determine.

2. There is no inconsistency in joining both a corporation and its president as defendants in a replevin action as they both may be wrongfully withholding certificates of stock in their joint possession and the evidence that such possession was so held by both the defendants was clearly established.

3. By pleading over, any erroneous rulings on motions or demurrer, except as they relate to the objection of insufficiency of the facts to constitute a cause of action, are waived.—*Judgment affirmed.*

SEPARATE MAINTENANCE—*Blackmer vs. Blackmer*—No. 13107—*Decided April 10, 1933—Opinion by Mr. Justice Bouck.*

Blackmer brought a suit for divorce in the court below. Answer and cross complaint, praying for separate maintenance by defendant; jury found for defendant on cross complaint, and judgment entered thereon.

1. Where the evidence is conflicting and the record fails to show that the presiding judge misconceived or misapplied the law, no prejudicial error is apparent. The judgment will be affirmed.—*Judgment affirmed.*

EXECUTORS AND ADMINISTRATORS—CLAIM FOR SERVICES TO DECEDENT—VALIDITY—*Mitchell vs. Sheets*—No. 12858—*Decided April 17, 1933—Opinion by Mr. Justice Moore.*

Clara Sheets, granddaughter of decedent, recovered a judgment against the estate in the County Court based upon a claim for services rendered as housekeeper and nurse for nine years prior to his death. On appeal to the District Court, claim was allowed, and writ of error prosecuted.

Decedent was aged, and at his request, his granddaughter came from another state and acted as housekeeper and nurse for a period of nearly nine years, upon a verbal agreement that if she would take care of him, he would bear all her expenses and pay her well.

1. A defense to such a claim that the claimant was a member of the family, and her services were rendered gratuitously, is an insufficient defense on the face of an express agreement for reimbursement for services.—*Judgment affirmed.*

CRIMINAL LAW—INSANITY—EFFECT OF PLEA—*Ingles vs. The People*—No. 13135—*Decided April 17 1933—Opinion by Mr. Justice Butler.*

Ingles was charged with murder, pleaded not guilty by reason of insanity at the time of the alleged commission of the crime, was convicted of murder in the first degree and sentenced to death, and on writ of error, judgment was reversed, and on new trial, defendant pleaded not guilty and was again convicted of murder in the first degree and sentenced to death. At the second trial, defendant sought to introduce evidence tending to show that at the time of the homicide, he was insane. The court sustained the state's objection holding that under the Act of 1927 concerning pleas of insanity in criminal cases, such evidence was not admissible, the defendant having withdrawn his former plea of not guilty on the ground of insanity and substituted the general plea of not guilty.

1. A statute providing that insanity shall not be a defense to a criminal charge would be unconstitutional.

2. The purpose of the Act of 1927, Chapter 90, is to require the defense of insanity to be tried only under a special plea. This defense cannot be introduced under the plea of not guilty.

3. However, evidence of defendant's mental condition at the time of the homicide is admissible under a plea of not guilty for the purpose of reducing the grade of the crime from murder in the first degree to murder in the second degree, and for the further reason that the jury, having a discretion in first degree murder affixing the penalty of death or imprisonment for life, such evidence is competent to go to the jury in determining which penalty the jury shall inflict.

4. Where the state introduces evidence of a confession, such evidence is admissible for the purpose of showing all the circumstances surrounding the making of the confession.—*Mr. Justice Bouck specially concurs.—Judgment reversed.*

TAXATON—SUIT FOR RECOVERY OF ENTIRE TAX PAID—EXCESSIVE TAXATON—*Miller et al. vs. Board of County Commissioners et al.* —No. 12755—*Decided April 17, 1933*—*Opinion by Mr. Justice Burke.*

Plaintiffs below brought this action under Section 7447 Compiled Laws, 1921, to recover certain taxes paid under protest on the ground that the taxes were illegal in assessment and levy and deprived the taxing authorities of jurisdiction. Judgment for defendants below.

1. Where the assessor increased valuation of property without notice and without hearing, taxpayers' relief is confined to the tax based upon the valuation "which the assessor added to the schedule."

2. But if a taxpayer is so deprived by his own neglect, he can claim nothing.

3. There are two prerequisites to a suit under Section 7447 supra, that is, that the tax be paid and that it be erroneous or illegal.

4. Here the tax was neither erroneous nor illegal; if incorrect for any reason, it was simply that it was excessive.

5. There is neither pleading nor proof in the instant suit that the tax is either erroneous or illegal.

6. A taxpayer who seeks relief against an alleged overassessment may have it only by affirmatively and clearly showing that it is manifestly excessive, fraudulent or oppressive.

7. Where a taxpayer expressly repudiates any claim to a refund of the excessive tax and makes no demand save for a repayment of the entire amount, and where it appears that the tax is neither erroneous nor illegal, they are not entitled to relief.—*Judgment affirmed.*

STATUTE OF FRAUDS—ORAL CONTRACT—EASEMENT—*French vs. Mitchell*—No. 13284—*Decided April 17, 1933*—*Opinion by Mr. Justice Bouck.*

Mitchell instituted suit against French to enforce specific performance of a contract for an easement for a right of way over lands. The contract was oral. Mitchell claims it was taken out of the statute of frauds by part performance. Judgment below for defendants.

1. The right of a party who has done acts in part execution of a verbal contract for an easement or right of way over land to call upon a court of equity to enforce it is subject to the restriction that his position is such that an action at law for damages will not afford adequate relief.

2. The acts relied upon must appear to have been done in pursuance of the verbal contract alleged.

3. It must be such an act done, as appears to the court would not have been done, unless, on account of the agreement.

4. Where one seeks to enforce a verbal agreement for a right of way across lands and it appears that it was not a way of necessity, there being other means of ingress and egress, and it further appearing that the only part performance of such verbal contract consisted of the plaintiff building a line fence at a trivial expense, is not sufficient to

take case out of the statute of frauds, and particularly is this true where the buliding of such fence was primarily and originally intended for the natural protection and adornment of the plaintiffs' property.

5. In order to take a verbal contract for an easement out of the statute of frauds, the relation of the parties must be such that the loss of improvements resulting from a failure to complete the agreement would be an actual sacrifice on the part of the party seeking to enforce it.

6. Where a complaint is grounded on a specific performance of a verbal agreement for an easement and the trial court adopts that theory, it cannot be asserted that the action is an injunction suit in the appellate court.—*Judgment reversed.*

ATTORNEYS—LIEN FOR SERVICES—PRIORITY BETWEEN THE ATTORNEY'S LIEN AND GARNISHMENT—EXTENT OF LIEN—*Collins vs. Thuringer*—No. 12815—*Decided April 20, 1933*—*Opinion by Mr. Justice Butler.*

First in point of time, W. R. Cline obtained judgment in the district court against Edith Thuringer. Later, the same court rendered judgment in favor of Edith Thuringer and against Charles W. Thuringer. W. Penn Collins acted as Edith Thuringer's attorney in the latter case. The day after rendition of the latter judgment, Cline took out execution and caused garnishment summons to be served on Charles W. Thuringer, who answered that he was indebted to Edith Thuringer on the prior judgment and the court rendered judgment against garnishee; and subsequent to judgment against garnishee, Collins filed statement claiming attorney's lien not only for services in the latter case, but including services in other matters. The court below decreed garnishment judgment of Cline senior to the attorney's lien of Collins.

1. An attorney who obtains a judgment for his client has a lien on the judgment for his fee in obtaining the same.

2. As between attorney and client, such lien is valid without notice.

3. If a judgment debtor, without notice that the attorney intends to enforce his lien, should make a bona fide settlement of the judgment, or if an innocent third person, without such notice, should purchase the judgment or acquire an interest therein, the attorney's lien would be lost.

4. When the garnishment summons was served in the instant case, such judgment was inferior to the attorney's lien.

5. A garnishment proceeding cannot displace prior valid and bona fide existing rights and claims against the debt or property involved.

6. An attorney's lien under Section 6010 and 6011, Compiled Laws of 1921, is limited to a lien upon the judgment to secure the payment of attorney's fees earned in matters concerning the judgment and not for services rendered on other matters disconnected therewith.—*Judgment reversed.*

PLEADING—SUFFICIENCY OF COMPLAINT—CHATTEL MORTGAGE—LEASE—*The D. F. Blackmer Furniture Company vs. Bingham*—No. 13288—*Decided April 24, 1933—Opinion by Mr. Justice Burke.*

1. In consideration of a landlord's forbearance to assert his rent lien on the furniture of a tenant, the furniture company warranted to the landlord that it held a valid chattel mortgage which constituted a prior lien on the furniture, and that if such warranty proved false it would pay the landlord's claim. In an action against the company on such warranty a complaint was defective which did not allege all the facts necessary to show that such chattel mortgage was not a valid prior lien at the time of the warranty.

2. Where the lease was originally made by a lessor other than the plaintiff, the complaint must allege how plaintiff acquired an interest therein so as to show that plaintiff had a right which he gave up in consideration of defendant's warranty.—*Judgment reversed with directions.*

CORPORATIONS—RECEIVER—REMOVAL OF—ESTOPPEL—LACHES—FRAUD—*Thompson et al. vs. Beck*—No. 12713—*Decided April 24, 1933—Opinion by Mr. Justice Hilliard.*

1. Participation and acquiescence by stockholders in plans for reorganization of a corporation in receivership estops them from later objecting to the actions of the receiver in carrying out such plans.

2. Rule XVIII of the Supreme Court affords a ready method of review of action taken to secure the receiver's discharge. Stockholders, who for years had opportunity to resort to such method, are guilty of laches for failure to do so.

3. Fraud must be pleaded with definiteness and certainty, and proved as pleaded. Inferences and conclusions of the pleader cannot be substituted for allegations of fact.

4. Where the appointment of a receiver was intended to afford a speedy determination of the corporate affairs, continuance of the receivership for eight years disapproved.—*Judgment affirmed.*

BAR ASSOCIATION

The secretary of the Bar Association was very busy and rather cross. The telephone rang.

"Well, what is it?" he snapped.

"Is this the city gas works?" said a woman's soft voice.

"No, madam," roared the secretary, "this is the San Francisco Bar Association."

"Ah," she answered in the sweetest of tones, "I didn't miss it so far, after all, did I?"

Charles Mathews, who in his younger days knew what it was to be very much worried with debts, once met a friend who asked him if he could spare him 10s. to help bury a bailiff. "Certainly," replied Mathews, "here's a sovereign, bury two."

DUELLING

A southern Missouri man recently was tried on a charge of assault. The State brought into court, as the weapons used, a rail, an axe, a pair of tongs, a saw, and a rifle. The defendant's counsel exhibited, as the other man's weapons, a scythe blade, a pitchfork, a pistol, and a hoe. The jury's verdict is said to have been: "Resolved, That we, the jury, would have given a dollar to have seen the fight."

EVIDENCE

"You look sweet enough to kiss," says the impressed man.

"So many gentlemen tell me that," coyly answers the fair girl.

"Ah! That should make you happy."

"But they merely say that," she replies. "They merely tell me the facts in the case and never prove their statements."

Lawyer: "How do you know that this man was given to talking to himself when he was alone?"

Witness: "Shure, haven't Oi been wid him time and time again when he did it?"