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Supreme Court Decisions

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Supreme Court Decisions

ATTACHMENTS—SUFFICIENCY OF AFFIDAVIT—USURY—"FINANCE CHARGES—*Gilbert vs. Hudgens*—No. 13307—*Decided May 15, 1933—Opinion by Mr. Justice Burke.*

Gilbert sued Hudgens in J. P. court on a promissory note for $103, payable at $10 per month and attached an automobile. The suit was dismissed at plaintiff's costs and appealed to county court. In county court, general findings for defendant and for dissolution of the attachment.

1. Where an affidavit for attachment alleges every ground specified in the attachment statute, it discloses on its face inconsistency, absurdity and invalidity, and attachment made thereunder is void.

2. Since there was no valid attachment, it is unnecessary to determine whether the attached property was exempt.

3. The burden of proving usury devolves upon him who alleges it.

4. Where a note provides for certain penalties in case of default in payments, such provisions do not make the contract usurious.

5. Parties are entitled, irrespective of usury statutes, to make such "spread" as they may agree upon between cash and credit price and the percentage of that "spread" is immaterial, and this is particularly applicable to credit sales of rapidly depreciating property, such as automobiles when the down payment is small and the purchaser takes possession.—*Judgment affirmed as to dissolution of attachment; otherwise, reversed, with instructions to enter judgment for plaintiff for balance due on note.*

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—PERMANENT DISABILITY—PETITION FOR REVIEW—*London Guarantee & Accident Co. vs. Sauer et al.*—No. 13236—*Decided May 15, 1933—Opinion by Mr. Justice Bouck.*

In 1917 an accident befell Sauer and employer's insurer paid compensation for 20 weeks for temporary disability. In 1932, Sauer asked the Industrial Commission for a hearing on permanent disability which he claimed resulted from the same accident. Sauer was unaware of his right to ask for permanent disability compensation until 1932. Commission awarded compensation for permanent disability. The award was affirmed by the District Court.

1. No matters not specified in the petition for review before the Industrial Commission can be inquired into by the District Court or Supreme Court.

2. The earliest disability for which compensation is either awarded or paid will arrest the running of the statute of limitations.

3. A later disability does not create a new right or cause of action. It is simply an element or rather a manifestation of the injury inflicted by the original accident. The actuality of that injury is established once for all in connection with the first disability proved or admitted.

4. Under the evidence in this case, there is no doubt that the permanent disability began well within the five years next after the accident.

5. The five years statute of limitations applies where the proved accident, as cause, is not followed by a proved disability, as result, within five years.

6. The casual connection, being once established, however, a disability directly resulting from the injury caused by the accident may be shown, whether it is actually disclosed early or late.

7. An objection that the claim was not properly proven cannot be urged where there was a payment of the original agreed compensation with the approval of the Commission. Voluntary payment under such condition is equivalent to an absolute award.—*Judgment affirmed.*

LIBEL—MOTION FOR DIRECTED VERDICT—SUFFICIENCY OF EVIDENCE—*Walker vs. Hunter*—No. 12802—*Decided May 8, 1933*—*Opinion by Mr. Justice Bouck.*

In an action for libel, upon the plaintiff resting, the court below, on defendants' motion, directed a verdict for the defendants and entered judgment in their favor.

1. Where the evidence is palpably insufficient, it is proper to direct the verdict.

2. It is essential to establish malice in a libel action where the circumstances surrounding the communication presumptively clothed the defendants with a qualified privilege.

3. Where assignments of error, based upon the admission and exclusion of evidence are made and it appears that even if the evidence that was excluded be received or that the evidence that was received over objections had been rejected, that the decision would have to be the same, no prejudicial error is shown.—*Judgment affirmed.*

RELEASE AND SATISFACTION—*Oman vs. Mishler*—No. 12882—*Decided May 8, 1933*—*Opinion by Mr. Justice Burke.*

Mrs. Mishler alleged that she and her husband were partners in in the sheep business, that her husband and Oman conspired to defraud her of her interest and that in furtherance of their plan, her husband conveyed to Oman all the partnership property. She prayed for cancellation and accounting. On trying to a jury, she had a verdict for $6,000. A release was introduced in evidence from Mrs. Mishler to Oman wherein, for an express consideration of $50, but for an actual

consideration of $15 only paid, she released Oman from all liability and agreed to dismiss the suit. Mrs. Mishler denied the signature.

1. The question here was the existence of the release and its good faith. Mrs. Mishler denied signing and that question was for the jury.

2. Even if the release was signed, the jurors might properly have disregarded it as wholly devoid of good for the entire record impeaches it.

3. Weight of evidence does not necessarily depend upon volume or number of witnesses.

4. Gross inadequacy of consideration for release may itself constitute evidence of fraud.

5. A consideration of $15 for the settlement of a $6,000 liability is about as grossly inadequate as will be found in the books.—*Judgment affirmed.*

PLEADING—BILL OF INTERPLEADER—EFFECT—JURISDICTION—*Midland Life Insurance Co. vs. First National Bank*—No. 12860—*Decided May 15, 1933*—*Opinion by Mr. Justice Campbell.*

Midland Life Insurance Company filed below what it designated as a bill of interpleader, alleging that it issued a $5,000 policy on life of Thaxton; that Thaxton, with consent of insurer, assigned the policy to First National Bank to secure $3,000 indebtedness; that later, with consent of First National Bank, policy was to be surrendered and new policy for $4,000 issued, but First National Bank retained original policy awaiting substitution of new policy. New policy for $4,000 was issued to insured, who, without knowledge of First National Bank, assigned new policy to Bent County Bank to secure another indebtedness. Insured died and this bill was filed against the two banks, requiring them to set up their claims under the policies. Court below held plaintiff not entitled to relief demanded.

1. There is a distinction between a bill of interpleader and a bill in the nature of a bill of interpleader, in that in the latter there are grounds of equitable jurisdiction other than the mere right to compel defendants to interplead.

2. A bill in the nature of a bill of interpleader will lie by party in interest to ascertain and establish his own rights where there are other conflicting rights between third persons.

3. But a bill seeking to determine complainant's liability to the respective defendants, no question being raised between them, is not strictly a bill of interpleader, and while the issues may be determined on a bill in the nature of a bill of interpleader, in the absence of objection, it must be treated as a bill in equity to determine complainant's own rights.

4. The present case is not a proper one for granting to plaintiff the relief demanded.

5. A plaintiff cannot have an order that the defendants interplead, when one important question to be tried is, whether, by reason of his own act, he is under a liability to each of them.

6. Where, in a bill in the nature of a bill of interpleader, the plaintiff asks for equitable relief and prays that the defendants be required to set forth whatever claims they have, the plaintiff cannot be heard to assert that the trial court committed error in deciding the issues which it asked to have determined, and in such case the court can grant affirmative relief to the defendants.—*Judgment affirmed.*

FIRE INSURANCE—ASSIGNMENT OF—TRANSFER OF PROPERTY WITHOUT NOTICE—*Zimbelman and Toll vs. Hartford Fire Ins. Co.*—No. 12732—*Decided April 24, 1933*—*Opinion by Mr. Justice Campbell.*

1. Where a policy of fire insurance provides that, in the event of the sale or transfer of the property insured without notice to the insurance company, the policy shall become void, and where a sale is made, no notice having been given, no recovery can be had upon a fire which occurred subsequent to the sale.

2. Toll, the original owner, sold a ranch to Zimbelman. Prior to the time of the sale, he had the barn insured against loss by fire. After the sale, the barn was destroyed but no notice was given to the company. Many contentions were made by the plaintiffs. There is no question of the validity of the provisions of the policy which require notice to the company in the event of a sale or transfer.—*Judgment affirmed.*

FORGERY—CONVICTION REVERSED FOR FAILURE OF EVIDENCE—*E. C. Sharer vs. The People of the State of Colorado*—No. 13224—*Decided April 24, 1933*—*Opinion by Mr. Justice Bouck.*

1. The appellant was convicted of forgery, on the strength of photostatic copies purporting to be of the face and the reverse side, respectively, of a single check. The original check was not before the court.

2. Examination of the two exhibits reveals that they bear different perforated dates, the perforation on the face of the check reading "Paid 3-26-27," and the perforation on the reverse side reading "Paid 3-19-27." Obviously the two could not constitute a single check.—*Judgment reversed.*

BANKS—STATUTORY LIABILITY OF OFFICERS AND DIRECTORS KNOWINGLY RECEIVING OR ASSENTING TO DEPOSITS WHILE BANK IS INSOLVENT—*George H. Goldsworthy vs. Charles A. Chase et al.*—No. 12794—*Decided April 24, 1933*—*Opinion by Mr. Justice Campbell.*

1. Action by depositor in behalf of himself and assignors against directors of the Bank of Telluride to recover deposits made during a thirty-day period of alleged insolvency prior to its failure. The action was based on section 2676 C. L. 1921, which provides for personal liability of officers, directors and employes of banks who knowingly

permit receipt of deposits when the bank is insolvent, and also provides that evidence that deposits were received or assented to by the defendants within thirty days of the bank's failure shall be received as prima facie evidence of knowledge of insolvency.

2. It is necessary and essential that the plaintiff prove insolvency, knowledge thereof on the part of the defendants at the time of the deposits, and knowledge of or assent to the receipt of the deposits.

3. A violation of the statute, to render the offender liable, must in effect be intentional.

4. The word "offense" appearing in a statute may include a crime or misdemeanor or a violation of a penal statute for which the penalty is merely a civil suit to recover the penalty.—*Judgment for defendants affirmed.*

CONTEMPT—WHAT CONSTITUTES—*Collins vs. The People*—No. 13201—*Decided April 24, 1933*—*Opinion by Mr. Justice Hilliard.*

1. Plaintiff in error in his capacity as an attorney and in connection with a habeas corpus alleged in the petition on information and belief "that the petitioner is unlawfully imprisoned, confined and restrained of his liberty," etc. The contempt proceeding was instituted by the District Attorney upon an information which charged that the plaintiff in error had knowingly made false statements in the petition. The Trial Court found him guilty of contempt. The Court said, "It should be manifest without the citation of authorities that an attorney who inserts in an application for a writ of habeas corpus the usual, customary and time honored allegation that petitioner is unlawfully restrained of his liberty, which is but the allegation of a legal conclusion, cannot be held guilty of contempt on that ground alone."—*Judgment reversed.*

NEGLIGENCE—DUTY OF OWNER OF PREMISES TO NOTIFY A LICENSEE OF DANGER KNOWN TO OWNER—*The Windsor Reservoir and Canal Co. vs. Elbridge H. Smith et al.*—No. 13214—*Decided May 1, 1933.*

1. On a portion of the defendant company's irrigation reservoir and outlet ditch was a "false-bank" composed of ice, covered by blown sand. Every year as the ice melted this bank weakened and finally gave way. John, seven-year-old son of the plaintiffs, was precipitated into the water and drowned. Plaintiffs recovered a verdict of $4,500 damages.

2. All issues of law have been passed on in the three previous appeals of this same case.

3. The usual, though not invariable, practice of the Supreme Court is to point out all serious errors whose notation is necessary to prevent repetition.

4. An owner of property who knows of a false bank and knows that a licensee is playing thereon may be required to notify the licensee of the danger.—*Judgment affirmed.*

SPECIFIC PERFORMANCE—ACTION FOR WILL NOT LIE TO COMPEL GRANTEE OF REAL PROPERTY TO PAY MORTGAGE DEBT ASSUMED BY HIM IN CONVEYANCE—*Harold S. Woodward, as Administrator, etc. vs. Molander*—No. 12935—*Decided May 1, 1933—Opinion by Mr. Justice Hilliard.*

1. Suit in equity by a grantor of real property to require an administrator of estate of deceased grantee to perform a contract of purchase, particularly to pay complainant the amount of a mortgage indebtedness originally incurred by the grantor but assumed by the grantee in the deed of conveyance.

2. A bill in equity for specific performance will not lie to compel a grantee of real property, who assumed a mortgage indebtedness in his deed of conveyance, to pay the indebtedness.—*Judgment reversed.*

WATER RIGHTS—JURISDICTION—JOINDER OF PARTIES APPROPRIATIONS—UNDERGROUND WATERS—CHANGE IN CONDITIONS—*Faden et al. vs. Hubbell et al.*—No. 12766—*Decided May 1, 1933—Opinion by Mr. Chief Justice Adams.*

1. The exclusive jurisdiction acquired by the district court of one county to adjudicate all water rights in its water district, under Sec. 1752 C. L. 1921, et seq., does not preclude the district court of another county in the same water district from assuming jurisdiction in an independent suit to protect water rights in regard to matters not adjudicated by the first mentioned court.

2. Where the main question relates to an indivisible system of water distribution directly affecting the rights of all parties, they are properly joined as plaintiff or defendants, respectively, regardless of the fact that they hold title to their water rights in severalty.

3. An appropriation is completed by application of water to beneficial use with reasonable diligence. Water used for the propagation of fish is devoted to a beneficial purpose.

4. Section 1637 C. L. 1921 does not entitle an owner of land to the underground waters first arising thereon if such waters are tributary to a river. In such a case the waters are a part of the river and are subject to appropriation like surface waters.

5. A junior appropriator has a vested right in a continuation of the conditions on the stream as they existed when he made his appropriation. The deepening of defendants' ditches, with the resultant lowering of the level of underground waters to plaintiffs' detriment, is an actionable wrong for which injunction is a proper remedy.

Mr. Justice Campbell, dissenting:

1. Since the waters in dispute are naturally tributary to the river, the only court having jurisdiction of the issues involved is the court which rendered the original adjudication decree.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—STATUTORY OFFICIALS—RIGHTS OF—MANDAMUS—*McNichols vs. The People ex rel Hershey*—No. 13265—*Decided May 1, 1933*—*Opinion by Mr. Justice Butler.*

1. Merely because a position created by statute was not filled for a number of years after the enactment of the statute does not preclude him from receiving compensation if appointed.

2. In 1907, the state statute was enacted vesting in the State Board of Health the power to appoint a local Registrar of Vital Statistics for each registered district. The act also provided that wherein any municipal officer at the time of the act was officiating as the Registrar of Births and Deaths under a local ordinance, such official "shall be continued as registrars in and for such cities." At the time of the passage of the act, a municipal officer, known as the Commissioner of Health, was acting as Registrar of Births and Deaths in Denver under an ordinance of 1875. In 1916, the Denver charter was amended and since that time, a municipal official, bearing the title of Manager of Health and Charity, officiated as Registrar supposedly acting under the ordinance of 1875. In 1929, the relator was appointed by the State Board of Health as Registrar of Vital Statistics for the Denver district. McNichols is the auditor and, as such, had refused to audit the relator's claim against the city.

The statute superseded the ordinance. "That the Board neglected to perform its duty in that regard (appointing a registrar of vital statistics) did not deprive the board of its statutory power, or relieve it of the necessity of performing a plain statutory duty."—*Judgment affirmed.*

WORKMEN'S COMPENSATION—NON-ACCIDENTAL DISABILITY—*Hennig vs. The Crested Butte Anthracite Mining Company*—No. 12814—*Decided May 1, 1933*—*Opinion by Mr. Justice Moore.*

A non-accidental disability is compensable under the Workmen's Compensation Act. Consequently, in an action by an employee against his employer for damages for personal injuries alleged to have been sustained through the malpractice of a physician employed by defendant, an answer states a good defense, which alleges that both parties were subject to the Workmen's Compensation Act and that on plaintiff's petition thereunder the Industrial Commission had awarded him compensation in full satisfaciton of all liability of defendant for said injuries.—*Judgment affirmed.*

TAX TITLES—ESSENTIALS OF—*Whitehead vs. Bennett*—No. 12777—*Decided May 1, 1933*—*Opinion by Mr. Justice Butler.*

1. Plaintiff was the grantee of a quit claim deed which the grantor had no right to give. Defendant was the owner of promissory notes secured by a trust deed. The suit was one to quiet title in the plaintiff. The complaint alleged payment of taxes for the required period of time.

The answer did not specifically deny this fact but stated that the defendant had not and could not obtain sufficient knowledge or information upon which to base a belief. To prove his allegation that the taxes had been paid for the proper time, i. e.: seven years next prior to the commencement of the suit, plaintiff produced and introduced all his tax receipts, which receipts showed that the first payment of taxes by the plaintiff was made less than seven years before the commencement of the suit. Payment of taxes for the required period must be shown.—*Judgment reversed.*

JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—GROUNDS FOR —*Beyer vs. Petersen*—No. 12885—*Decided May 1, 1933*—*Opinion by Mr. Justice Moore.*

1. When the affidavit supporting a motion to set aside a default judgment discloses that counsel was retained in the case but four days prior to the time in which the defendant should have made his appearance, that the attorney was busy with emergency matters and that appearance by the attorney was made eleven o'clock of the day that the default was taken, which was the day after the time within which defendant had to appear, and when the affidavit further shows that, immediately upon learning of the default, an answer presenting a prima facie meritorious defense was tendered and that the motion to set aside the default was presented immediately, the court erred in denying the defendant's motion to vacate the default in judgment.—*Judgment reversed.*

PRINCIPAL AND SURETY—SUFFICIENCY OF COMPLAINT—DEMURRER—*Woodward vs. Hollis*—No. 12872—*Decided May 29, 1933*—*Opinion by Mr. Justice Campbell.*

1. The lower court sustained a demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a good cause of action.

2. The complaint stated facts sufficient to constitute a cause of action which was equitable in its nature.

3. Section 21 of our code does not require that a surety shall first have a judgment rendered against him before taking steps against the principal to compel the latter to comply with his obligations.

4. A surety may recover as against his principal where the surety has neither paid the accommodation debt nor been held in judgment therefor.

5. After a debt has become due, a surety may resort to equity to compel the principal to pay the debt, that the surety may be exonerated from liability.—*Reversed and remanded.*

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