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Colorado Supreme Court Decisions

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(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 the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

CRIMINAL LAW—INTOXICATING LIQUORS—*Sufficiency of Evidence Giannetti v. the People*—No. 12843—*Decided May 18, 1931.*

Facts.—Giannetti was convicted of operating a still intended for the manufacture of intoxicating liquors. Giannetti contends that the conviction was unsupported by the evidence and the law.

Held.—The evidence was sufficient to sustain the verdict.

Judgment affirmed.

TAXATION—EQUALIZATION—COLORADO TAX COMMISSION—*The Board of County Commissioners of the County of Boulder v. Union Pacific Railroad Company*—No. 12507—*Decided May 18, 1931.*

Facts.—The Colorado Tax Commission, original assessor of public utilities in this state, fixed the valuation for taxation of Plaintiff's railroad property. The State Board of Equalization, at its October, 1927, meeting increased this amount. Plaintiff paid on the increased valuation and brought this action to recover the excess. Judgment below entered for plaintiff. The Board of Equalization in this case made a flat increase in the total assessment for taxes of a single taxpayer.

Held.—Under Section 15, Article 10 of our constitution as amended November 13, 1914, the State Board of Equalization is not authorized to raise the individual assessment of any taxpayer, or the valuation of any item of property. Such section as amended makes no specific reference to personal or individual assessment or specific item of property. The language used is "The duty of the said Board of Equalization shall be to adjust, equalize, raise or lower the valuation of real and personal property *of the several counties of the State* and the valuation of any *item or items of the various classes of such property.*"

Judgment affirmed.

PATENTS—CONTRACTS—ASSIGNMENT — CONSTRUCTION — *Seidensticker v. Bean, et al.*—No. 12494—*Decided May 18, 1931.*

Facts.—Seidensticker brought suit in the Court below claiming that by virtue of an assignment, he was entitled to one-fifth interest in certain patents. The assignment covered a one-fifth interest in patents for signalling device for motor vehicles, including future patents for automobile signals. The defendant later secured patents on certain headlights and spotlights for automobiles. The Court below held that the plaintiff had no interest therein under the assignment.

Held.—1. The assignment was for a one-fifth interest in a patent to signalling device for motor vehicles and for a one-fifth interest in future patents for automobile signals.

2. The patents that plaintiff seeks an interest in were for automatically controlled spotlight, double focusing reflector, automobile headlight, and supporting means.

3. The assignment was not broad enough to cover an interest in such patents.

4. After the assignment, defendant transferred to others his rights in the automobile signals and in the patents therefor, and received between $3,000.00 and $5,000.00 and Bean must account to Seidensticker for his proportionate share of the profits in any or all moneys so advanced.

Judgment affirmed as to construction of the Court below on the assignment, but reversed and remanded for an accounting on the signal devices.

PAUPERS—MINORS—LIABILITY OF COUNTY FOR MEDICAL SERVICES—LIABILITY OF MINORS' ESTATE—*Cherrington v. Board of County Commissioners of Otero County*—No. 12828—*Decided May 18, 1931.*

Facts.—The Board of County Commissioners sued Virginia Cherrington, a minor, for hospital, surgical, and medical treatment given her as an adjudged indigent minor, and attached the minor's interest as an heir to a certain estate. The Court below sustained the attachment and entered judgment for the Board of County Commissioners, to review which the defendant prosecutes this writ claiming, (1) that the treatment of the minor was not authorized by Statute; (2) that the treatment was not necessary to the health of defendant; (3) that the claim is barred by the Statute of Limitations.

Held.—1. The medical services were for the removal of a harelip and the medical services were authorized by Section 8907, Compiled Laws of 1921.

2. The operation was necessary and was exceedingly beneficial to the minor.

3. Assuming, but not deciding, that the Statute of Limitations operates against a county, nevertheless, the provision of Section 8907 subsequently adopted, which provides "if at any time the said pauper * * * shall acquire or come into possession of property, moneys, or credits, in his or her own right, he or she shall be answerable to such county for the expenses of furnishing such relief" specifically removes the bar of the Statute of Limitations.

Judgment affirmed.

CRIMINAL LAW—RAPE—EVIDENCE OF ACTS BEYOND STATUTE OF LIMITATIONS—*Abbott v. the People*—No. 12834—*Decided May 18, 1931.*

Facts.—Abbott was charged, tried, and convicted of statutory rape and sentenced to a term in the penitentiary. He prosecutes error. The only ground thereof to be considered was that during the course of the trial the victim was permitted to testify to similar occurrences between herself and de-

fendant, occurring more than three years prior to the date of the offense, on which he was tried.

Held.—In statutory rape cases, the admission for any purpose of evidence of another similar offense against the prosecuting witness by the defendant, and antedating the statute of Limitations is reversible error.

Judgment reversed and cause remanded for new trial.

Mr. Chief Justice Adams and Mr. Justice Butler dissenting.

TAX TITLE—EJECTMENT—NECESSITY OF TENDER OF TAXES—*Pendleton v. Mosca Irrigation District*—No. 12840—*Decided May 25, 1931.*

Facts.—Plaintiff brought action in ejectment, claiming ownership in fee and the right of possession by virtue of tax deeds. Defendant below refused to deposit with the Clerk a sufficient amount to pay taxes, interest, expenses, and penalties, as provided by Section 1999 Compiled Laws, 1921, defendant claiming that he was only a tenant and not the owner, that this section did not apply. Judgment for plaintiff.

Held.—1. Irrespective of all defects and irregularities in tax deeds, or the proceedings leading up to their issuance, the tax title will be sustained unless the defendant shall first deposit with the Clerk of the Court a sufficient amount to pay the taxes, interest, expenses, and penalties, including subsequent taxes and interest.

2. The objection of non-tender of taxes can be raised by a tenant as well as by the owner.

3. The objection that there was no proof of taxes paid and nothing in the record to disclose what the defendant should tender is untenable where the defendant refuses to make any tender at all.

4. While the general rule is that the defendant may introduce any evidence in ejectment, which defeats the right to possession to the plaintiff, this rule is not applicable in ejectment suits, which are controlled by Section 1999, supra, as tender of the tax is requisite to support the objections to the sufficiency of the deeds.—*Affirmed.*

SCHOOL DISTRICTS—APPORTIONMENT OF FUNDS—NON-RESIDENT PUPILS—*Craig as State Superintendent of Public Instruction v. The People*—No. 12746—*Decided May 25, 1931.*

Facts.—The People on the relation of the School Directors of Union High School District Number 3 of Adams County, brought suit in mandamus against the Superintendent of Public Instruction, seeking to require her to apportion the public school income fund upon the basis of the school population in Adams County without deduction for pupils attending High School in Jefferson County and in the City and County of Denver. The District Court ordered the alternative writ made permanent.

Held.—1. The public school fund of the State and the interest derived therefrom is state property.

2. This action only involves the apportionment of the public school fund by the superintendent of public instruction and does not concern the apportionment, distribution, or expenditure of county or school funds raised by taxation.

3. The act of apportionment sought to be prohibited in this action merely allocates to the public high school district providing education to a non-resident pupil a sum to reimburse it for the reasonable cost thereof and is not unconstitutional.—*Reversed.*

SCHOOL DISTRICTS—MANDAMUS—MAINTAINING PUBLIC SCHOOL IN DISTRICT—*Duncan, et al. v. The People*—No. 12808—*Decided May 25, 1931.*

Facts.—By writ of mandamus the Court below ordered the proper officials of an organized school district to maintain public school in the district. The Board challenges the right of the complainants to maintain the action without having alleged and proved that unsuccessful appeals had been taken and prosecuted to the County Superintendent and to the State Board of Education; and further that school facilities, which were provided for the children in another district, meet the requirements of the constitution.

Held.—1. The constitution provides that one or more public schools shall be maintained in each school district within the state. See Section 2, Article IX; the Board's arrangement for school accommodations for children in another district does not satisfy the constitutional mandate and the parents are entitled to appropriate relief.

2. While the discretion granted by statute to the school board can be reviewed only by appeal to the county superintendent, yet where it acts without jurisdiction, or has exceeded its powers and by some act in an official capacity has attempted to do, or has done, that which it has not the right to do, the courts have jurisdiction to set aside the unauthorized act.—*Affirmed.*

INJUNCTION BONDS—LIABILITY FOR DAMAGES—*Duncan et al v. The Commercial Bank of Las Animas*—No. 12339—*Decided June 1, 1931.*

Facts.—Action on temporary injunction bond. Judgment for plaintiff.

Held.—Where the injunctive relief is merely ancillary to the main cause of action the damages are limited to the extent caused by the ancillary action, but where it is impossible to dissolve the injunction until trial of the case upon its merits, all expenses connected with such trial are proper elements of damage.—*Affirmed.*

AUTOMOBILES — COLLISION — CONTRIBUTORY NEGLIGENCE — *Sprague vs. Herbel*—No. 12435—*Decided June 1, 1931.*

Facts.—Herbel recovered judgment against Sprague for damages to his automobile. Son of plaintiff was driving the car at night, along public highway, at speed of thirty-five miles per hour, was blinded by lights of approaching car, slackened his speed to thirty miles, when he first saw a truck standing

in the road about 12 feet ahead of him with no lights on truck and crashed into the truck.

Held.—The driver of plaintiff's car was guilty of contributory negligence as a matter of law. When a motorist finds his vision temporarily obscured by the lights of approaching cars, so that he cannot see ahead of him, he should, in the exercise of ordinary care, either slacken his speed so as to have his car under such control that he may stop it immediately, if necessary, or stop altogether until he can find some remedy for such condition or until it has disappeared.—*Reversed and remanded.*

INSTRUCTIONS—NECESSITY OF OBJECTING IN LOWER COURT—*The Colorado Utilities Corporation vs. Casady*—No. 12381—*Decided June 1, 1931.*

Facts.—Plaintiff recovered judgment and error relied upon was certain instructions given to the jury.

Held.—On review, only objections specifically made before they are given to the jury will be considered. The purpose of this rule is to give the trial court the opportunity of correcting the instruction.—*Affirmed.*

NEGLIGENCE—PROXIMATE CAUSE—NOTICE OF DEFECT—CONTRIBUTORY NEGLIGENCE—MINORS—*The Colorado Utilities Corporation vs. Casady, an infant, etc.*—No. 12380—*Decided June 1, 1931.*

Facts.—Casady, a minor, recovered judgment below for damages in personal injury case. A pole, carrying three wires transmitting 14,000 volts of electricity along a public highway, became loosened on account of wet and soft ground which permitted the pole to lean over the highway so that the wires were within a few inches of the ground. There was evidence that the pole was not properly set in the ground originally and that it was not sufficiently anchored and that the defendant had actual notice of the wet condition of the ground and of the leaning of the pole toward the highway for a sufficient length of time before the accident to have corrected it. The plaintiff was a child, 10 years of age, rightfully in the highway.

Held.—1. The jury was justified in its finding that defendant knew of the dangerous condition in sufficient time to enable it to remedy the condition before the accident, and that, in failing to do so, it was guilty of negligence.

2. Minors are required to exercise only such care to avoid danger as might fairly and reasonably be expected from persons of their age. The question of the child's contributory negligence was properly submitted to the jury.—*Affirmed.*

CORPORATIONS—LIABILITY OF DIRECTORS AND OFFICERS—*Buckman et al vs. The H. A. Marr Grocery Company*—No. 12865—*Decided June 1, 1931.*

Facts.—Action against directors and officers for goods sold and delivered to the corporation, on account of failure of corporation to file annual report.

The annual report was tendered to Secretary of State within sixty days after January 1st but was not accompanied by sufficient fees and corporation was advised thereof but the proper fees were not paid until June 16th when the report was filed. Judgment for plaintiff.

Held.—No corporation in default of its annual license tax is permitted to file its report with the Secretary of State. The annual report not being filed within sixty days after January 1, 1930, the officers and directors became personally liable for the corporate debts contracted during the preceding year. —*Affirmed.*

WATERS—APPEAL AND ERROR—SUCCESSIVE APPEALS—*The Trinchera Ranch Company vs. The Trinchera Irrigation District*—No. 12388—*Decided June 1, 1931.*

Facts.—The Supreme Court set aside a decree of the District Court which granted to the irrigation district permission to change 13 different points of diversion of its irrigation ditches that take water from three streams and directed that if a further hearing below was desired additional evidence could be introduced, but if petitioner did not elect to introduce additional evidence, the lower court was directed to find the issues for the protestants.

Upon further hearing below, the district produced further evidence but the protestants declined to introduce further evidence on the ground that the additional evidence was of no probative force. The Court below found for petitioner irrigation district.

Held.—The additional evidence introduced at second hearing does not justify a decree authorizing the changes sought.—*Reversed.*

REAL PROPERTY—INSTRUMENTS ENTITLED TO BE RECORDED—*Austin vs. Stephen et al*—No. 12508—*Decided June 1, 1931.*

Facts.—Austin had title to certain lots. She and Stephen entered into contract whereby Stephen was to furnish plans and superintend erection of apartment house for Austin and on completion thereof, property was to be sold and after Austin had first been repaid the cost of lots and apartment house, balance was to be equally divided between them and in the event it was not sold but rented, income was to be first applied to repay Austin and thereafter income to be equally divided.

Austin brought suit to quiet title against contract after it was recorded, on the ground that the instrument was not entitled to be recorded. Judgment for defendant.

Held.—A joint adventurer who pays his share of the purchase price of real estate bought for the purpose of the enterprise, acquires thereby a vested equitable interest in the land itself. This contract affected the title to real property and was properly entitled to be recorded.—*Affirmed.*

MERCHANTABLE TITLE—SPECIFIC PERFORMANCE—REGISTRATION OF TITLE UNDER TORRENS SYSTEM—*Gerbig v. Spelts*—No. 12626—*Decided June 8, 1931.*

Facts.—Gerbig sued Spelts for specific performance upon a contract for sale of land. Under the contract, title was to be merchantable. Plaintiff alleged that he is ready, able and willing to perform the contract, but that the title was not merchantable, and his prayer was in the alternative that the defendant be required to perfect the title and convey the premises to plaintiff and to account to the plaintiff for growing crops thereon, or that plaintiff recover back the payment made. Judgment for defendant.

Held.—1. The general rule is that a stranger may not maintain an action to question the registration proceedings of the title, but where the enforcement violates his rights, the stranger is affected by the judgment and may be relieved against it.

2. No estate less than in fee simple can be registered, unless the estate in fee simple to the same land is registered.

3. Where the decree in registration of title is prematurely made, it is not void but only voidable.

4. It is not even voidable unless the action to set it aside is brought within ninety days after the entry of the order or decree.

5. In this case, the judgment of registration was conclusive.—*Affirmed.*

BILLS AND NOTES—PAYMENT—*Kitts, as administratrix, v. Hill*—No. 12430—*Decided June 8, 1931.*

Facts.—Action by Kitts, as administratrix of the estate of her deceased husband, against Hill to recover judgment on his promissory note. The defense in legal effect is payment, and the case was submitted upon that issue without objection. Verdict for plaintiff for a portion of amount claimed. Defendant filed a motion for a new trial upon the ground that the uncontradicted evidence of the case clearly established payment. The trial court sustained the motion, set aside the verdict and granted a new trial. Thereupon, instead of having a new trial, the plaintiff elected to stand upon the case as formerly made and to proceed no further in the lower court.

Held.—1. Although the procedure in the court below was most unusual, the proceedings can be reviewed only upon the assumption that the lower court's dismissal of the action after he had granted a new trial and after the plaintiff had elected to stand on the former record was, in effect, a third trial based upon the findings of fact of the Judge as the trier of facts and upon the evidence, which was produced at the second trial.

2. The trial judge reached a correct conclusion upon his findings upon the evidence produced and in the judgment rendered in defendant's favor.

3. The statute, section 5344, C. L. 1921, which prohibits the foreclosure of any security constituting a lien or encumbrance upon any property owned by a deceased at the date of his death, otherwise than by suit or by consent of the County Court is not applicable to this action.

4. The witnesses were not incompetent to testify because there was no evidence that they were directly interested in the event of the suit.—*Affirmed.*

TAXATION—SALE FOR NON-PAYMENT—RAILWAY PROPERTY—LIABILITY FOR ILLEGAL SALE—*House v. The Board of County Commissioners of Larimer County*—No. 12500—*Decided June 8, 1931.*

Facts.—House sued the Board of County Commissioners to recover $2,712.55, paid by him to the Treasurer of Larimer County. The complaint charged that the town of Berthoud wrongfully levied a special improvement paving tax against a portion of the right-of-way of the Colorado and Southern Railway Company, and in default of the payment of same, the County Treasurer wrongfully sold the railway property to the plaintiff for the sum sued for. A demurrer for want of facts was sustained. Plaintiff elected to stand on his complaint and action was dismissed by the court and judgment entered for the defendant.

Held.—1. The proportionate amount of assessments which a railway company is required to pay for the cost of a special improvement for grading and paving is an assessment against the railway company and not its specific property within the improvement district.

2. The procedure upon default in payment of such an assessment by a railway company is the same as in default of the payment of its general taxes.

3. The collection of a special assessment here involved could only be made from the sale of the franchise and entire property of the railway company, or its personal property. The real property of the railway company clearly being indivisible cannot be sold in separate parcels.

4. The town of Berthoud had no right to assess the specific property of the railway company for the improvement tax in question, and the Treasurer of Larimer County had no authority to advertise and sell the same.—*Reversed.*

MUNICIPAL CORPORATIONS—ELECTRIC LIGHT PLANT—SALE—FAILURE TO SUBMIT TERMS OF CONTRACT TO VOTERS—*Missemer et al. v. Town of Hugo, et al.*—No. 12486—*Decided June 15, 1931.*

Facts.—The town of Hugo and other towns contracted to sell their electric light plants to the utilities company. To enjoin the consummation of that agreement, plaintiffs, as taxpayers appearing for themselves and others, brought this action. Demurrer sustained. They stood upon the complaint and judgment was entered against the plaintiffs. The complaint alleged that exhibit A attached thereto is a copy of the contract of sale; that the only notice ever given the electors stated the price to be paid, but did not state or give any notice of the other terms of the contract, and hence that at the election, which authorized the sale that a majority of the electors did not know the real terms of the sale and voted in ignorance thereof. Defendants contend that an examination of the contract disclosed that the only terms of the sale were cash and hence all requisite information was furnished the electors.

Held.—1. The contract for acquisition of the light plants embodied a lease and an option to purchase and obligation on the utilities company to make certain extensions, the lease was for twenty-five years, the utilities company was to have the exclusive right and option to purchase; the town was obliged to continue as a consumer of current for pumping water so long as it obtained its municipal supply in that way, and obliged to light its streets by current supplied by the company, and stipulated rates and minimum rates, and there was a schedule of prices for current for every conceivable purpose fixed by the contract. All of these matters were a part of the terms of sale. As none of the above terms of sale except the cash purchase price was given in the notice of election at which sale was ratified by the qualified electors and as notice thereof to the electors and approval by them were indispensable under the stutute, the complaint stated a cause of action.—*Reversed.*

NEW TRIAL—PREJUDICIAL REMARKS IN PRESENCE OF JURY—MISCONDUCT OF ATTORNEY—*Labbe Manufacturing Company v. Samples*—No. 12337—*Decided June 15, 1931.*

Facts.—Action for damages by reason of alleged fraudulent representations in sale of capital stock of defendant company. The individual defendants were officers and directors of the company. The plaintiff asked for body execution against the defendants. Judgment below for plaintiff for $4,190.00 on four of the causes of action, and the judgment ordered an execution against the body of Labbe. The attorney for the plaintiff stated in the presence of the jury that he wanted to dismiss one of the causes of action because he understood that the defendants had settled since the suit was started; and in the examination of jurors, he again stated that one of these claims was settled and would be dismissed, and also in the opening statement said that judgment would not be asked on another claim because the plaintiff was informed that he had sold his stock to some of the officers of the company or to the company itself. These remarks were promptly objected to and defendant requested that the jury be dismissed and a new panel drawn, which was not done, but the Court instructed the jury to disregard the statements.

Held.—The Court's direction to the jury and its mild caution to counsel were insufficient to adequately protect the rights of the defendants. The defendants were charged with fraud and it was sought to have them imprisoned under body executions. The statements of counsel were likely, if not actually intended, to convey to the jury the impression that a guilty conscience, and that only, caused the defendants to settle with the Raymonds and to purchase peace from Burns by buying his stock, but that the defendants had been unable to make satisfactory settlements with their other victims, whose claims were included in the suit. The offense was committed three times. The testimony is in sharp conflict and the statements of the attorney were sufficient to turn the scales in favor of the plaintiff. There are cases where the mischief done by improper statements of counsel may be undone and rendered harmless, by a reprimand from the Court followed by a direction to

the jury to disregard the statements, but this case is not one of them. The court should have discharged the jury.—*Reversed.*

Mr. Chief Justice Adams, Mr. Justice Campbell, and Mr. Justice Alter dissent.

ABSTRACT OF RECORD—TRAVERSE OF ATTACHMENT—*Mitchell v. Northwestern Lumber and Shingle Company*—No. 12366—*Decided June 15, 1931.*

Facts.—The transcript of the record consisted of over 500 folios, but the abstract of record filed by plaintiff in error consisted of six printed pages, in which the evidence was not abstracted nor the rulings of the Court fully enough set forth to support any of the matters argued in the brief.

Held.—1. The abstract of record should be at least full enough to support the matters argued in the brief. Where it is wholly impossible to determine from the abstract of record any of the matters elaborately discussed in the brief, the errors assigned are not properly before the Court.

2. A traverse should be in the past tense and at least deny the facts existed at the time the affidavit in attachment was filed. Otherwise, no issue is created.—*Affirmed.*

INTOXICATING LIQUORS—SALE TO HUSBAND—LIABILITY TO WIFE FOR DAMAGES—*Henderson v. The People's Pharmacy Company et al.*—No. 12692—*Decided June 15, 1931.*

Facts.—Bendina Henderson sued the People's Pharmacy Company and William Rogers, who owned practically its entire capital stock, to recover damages caused, as she alleged, by the intoxication of her husband. The action was brought under Section 3719 of the Compiled Laws of 1921. The evidence showed that the husband, between September 1925 and October 1927 purchased several hundred bottles of Jamaica Ginger and Extract of Oats from the defendants; that his purchases increased in quantity; that he drank at least four or five bottles a week; that he was repeatedly drunk; that he was usually drunk Saturday afternoons and nights from the effects; that his wife complained to the defendants of his condition, and instructed them to sell him no more; that the defendants knew, or ought to have known, that he was buying it for its intoxicating effects and not as a medicine. Judgment for defendants.

Held.—Defendants' claim that Rogers and his clerks did not know that Henderson used these drinks as a beverage is incredible. The finding of a trial court is not necessarily binding on a court or review when it clearly appears from the whole record that such finding is wrong.—*Judgment reversed and cause remanded with instructions to try the issue of damages only.*

FAILURE TO PROSECUTE ERROR WITHIN ONE YEAR—*Dickson et al. v. Horn*—No. 12848—*Decided June 15, 1931.*

Facts.—Horn recovered judgment in foreclosure of deed of trust on February 17, 1930, and at the same time an order was entered dispensing

with the filing of a motion for a new trial. Later several orders were entered amending the judgment nunc pro tunc, the last order of amendment being April 28, 1930 and again an order was entered dispensing with the necessity of a motion for a new trial and the usual 60 days allowed for bill of exceptions. Notwithstanding order dispensing with motion, defendant filed a motion for a new trial, which was not disposed of until March 7, 1931. The motion was stricken, and defendants were allowed sixty days thereafter to prepare and tender bill of exceptions, which was limited to the action of the Court on its motion to strike. The entire record was not docketed in the Supreme Court until April 7, 1931.

Held.—The bill of exceptions not having been prepared and tendered within the time fixed and allowed by the court, nor within the time limited by any proper extension thereof, and timely objections thereto having been made, it cannot be considered by this court. The defendant failed to sue out the writ of error within one year.—*Motion to dismiss the writ of error granted.*

EVIDENCE—CONDITIONAL ACCEPTANCE—SELF-SERVING DECLARATION—*William E. Russell Coal Co. v. Vesta Mines, Inc.*—No. 12443—*Decided June 15, 1931.*

Facts.—Action for breach of warranty arising out of the sale of a second-hand box-car loading machine. The plaintiff here seeks to review a judgment of non-suit, contending that the admission of certain exhibit erroneously excluded would prove its case. Prior to the sale and delivery the plaintiff was given a 15-day option to purchase the machinery and within the 15-day period, the plaintiff mailed to the defendant the excluded exhibit, which was a letter advising that they were exercising the option to purchase upon the guarantee of the defendant that the machinery would be in first class running order.

Held.—The court was in error in excluding this exhibit on the ground that it was a self serving declaration. The original option contained no guarantee. The exhibit, purporting to exercise the option, was a conditional acceptance. The act of the defendant in delivering the machinery constituted an acceptance of the plaintiff's counter proposition as contained in the exhibit. The exhibit was admissible to show that the original offer was not accepted unqualifiedly.—*Reversed.*