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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.)

AUTOMOBILES—LIABILITY OF DRIVER FOR THE DEATH OF PASSENGER—DOCTRINE OF RES IPSA LOQUITUR—*Clune v. Mercereau*—No. 12491—

Facts.—Action for death of plaintiff's husband, alleged to have been caused by defendant's negligence in operating his automobile. The only evidence as to how the accident occurred was that of the defendant brought out on cross examination under the statute. He testified that the deceased and he were on a hunting trip; that the defendant was driving his own car and ascending a very steep grade in intermediate gear; that the car slackened in speed and would not make the grade and that he attempted to shift in low gear, but the car started to go backwards, and he applied his brakes, but they would not hold the car; and the road seemed to cave, and precipitated the car over the bank; that it was a wet, slippery road; that after the car left the road, he attempted to hold it straight, hoping to run it into the river, but it was overturned and the plaintiff's husband was killed. Plaintiff was nonsuited.

Held.—The evidence fails to disclose the negligence charged. Assuming, but not deciding, that the doctrine of res ipsa loquitur applies in cases not involving common carriers, it is not applicable to the instant case because the accident is just as reasonably attributable to other causes as to negligence.—*Affirmed.*

MUNICIPAL CORPORATIONS—STORM SEWERS—APPORTIONMENT OF COST ON AREA BASIS—*Ross, et al. v. City and County of Denver*—No. 12542.

Facts.—Ross, and others, owners of lots in Park Hill Storm Sewer District sought to enjoin the defendant city and its officers in the matter of the establishment of a storm sewer district. A general demurrer was sustained to the plaintiffs' amended petition, upon which the plaintiffs elected to stand, and the lower court dismissed the action.

The petition alleged that the plaintiffs are the owners of more than 6500 lots in the proposed sewer district; that the apportionment of the costs thereof on an area basis instead of on the basis of the benefits received by the lots is a taking of their property without due process of law, and that on this area basis the costs assessed against the lots will be in some instances more than the market value of the lots, and that in many instances the lots will not be benefited in any manner. That protests against the assessment were overruled by the City Council without a hearing.

Held.—1. Assessments for local improvements apportioned on the area

basis, insofar as it exceeds the benefits is violative of the constitutional provision against the taking of private property without just compensation.

2. A failure to grant a full hearing before a body clothed with sufficient power to grant proper relief is violative of the due process of law provision of the constitution.—*Reversed.*

WATERS—CO-OWNERSHIP OF DITCH—TENANTS IN COMMON—LIABILITY FOR WATER—*The Wanamaker Ditch Company v. Pettit et al.*—No. 12261.

Facts.—Plaintiff in error, who was plaintiff below, owns the Wanamaker Ditch, from which for many years the defendants have taken water for irrigation. The defendants claim they are the owners of an interest in the ditch and have the right to take their water without charge except for their proportionate share of the expenses of upkeep. The plaintiff's position is that defendants are subject to the same charges for delivery of water as strangers.

The defendants purchased the real estate prior to the incorporation of the plaintiff from one Williams, who was a half owner in the Wanamaker Ditch, and, at the same time, Williams conveyed a pro rata water right in the ditch to the defendants. After the corporation was formed, the defendants refused to accept stock in the corporation in place of their pro rata interest in the ditch.

Held.—1. The defendants are co-owners in the ditch. They bought the land to which the water belonged. Their grantor was one of the owners of the ditch and he sold them whatever in the way of irrigation water belonged to the land transferred.

2. Williams' guarantee to the defendants of a maximum annual pro rata upkeep of $7.50 is not a covenant running with the land, but the plaintiff by ratifying and adopting it, is bound thereby.—*Affirmed.*

MINORS — DEPENDENCY — UNLAWFUL COMMITTMENT—IRREGULAR PROCEEDINGS—*Ziemer v. Wheeler*—No. 12850.

Facts.—Wheeler filed complaint in the County Court, requesting that the eleven children of Ziemer be declared dependent and neglected children and, as such, committed to the State Home for Dependent Children. Citation was issued requiring Ziemer and his wife to appear at a hearing the second day thereafter, but the citation was not served nor was there a statutory waiver. The complaint was not signed. The children were not at the hearing, nor was anybody there to represent them. No witnesses were sworn, nor was any evidence taken; and thereupon the order of committment was entered.

Held.—Because the citation was not served in time, nor was there a statutory waiver of service, nor were the parents advised regarding the nature of the proceedings, nor the effect of the order as provided in Section 605 C. L. 1921, the Court was without jurisdiction, and its entire proceedings and decree and order were void.—*Reversed with instructions to dismiss the proceedings.*

BILLS AND NOTES—ESTOPPEL TO DENY PAYMENT—*The Colorado National Bank vs. David, et al.*—No. 12442.

Facts.—The Colorado National Bank sued to foreclose a deed of trust to the Public Trustee of the City and County of Denver, executed by Michael and Mary David, and to cancel a release of said deed of trust from the Public Trustee, and to recover personal judgment against Michael David, Mary David, and B. E. Van Arsdale, for the principal and interest due on said note. David and wife executed the deed of Trust securing a $3,000.00 note, payable three years after date, to one Siener. Siener put up the note and deed of trust as collateral security to the Colorado National Bank, but the Bank never notified the makers that they were holding the note and deed of trust and they permitted Siener to collect the interest and hold himself out as the owner. A new loan was procured to pay off the original loan and the money was paid to Siener, who produced and surrendered a forged note, but who represented himself to be the owner of the note, and Siener executed a request for a release of the original mortgage, and it was released without the knowledge of the Colorado National Bank. Judgment below for the defendants.

Held.—1. Payment of the original note to Siener, the ostensible owner of the note constituted payment under the facts in this case.

2. The Colorado National Bank is estopped from denying payment by its acts in failing to notify the makers of the note that it had acquired the note and deed of trust, and by permitting Siener to hold himself out as the owner of the note and permitting him to collect the interest on it, and the release of the deed of trust was valid as against the Colorado National Bank, even though the Bank was the actual owner of the note and deed of trust. —*Affirmed.*

MUNICIPAL CORPORATIONS, TORTS OF—GOVERNMENTAL FUNCTIONS—*City and County of Denver v. Forster*—No. 12301.

Facts.—Plaintiff intestate sustained personal injuries when she stumbled and fell over the metal button used by the city to block off its "safety zones". Plaintiff below alleged negligence which was denied by the defendant. Held in the court below for the plaintiff, defendant alleged error.

Held.—It is unnecessary to decide upon the negligence or lack of negligence of the city in establishing these safety zones. "The construction and maintenance of the streets of a municipality has been often held by this court to be a corporate matter for which liability may in proper cases be imposed by the making and enforcing of 'ordinances, regulating the use of streets, brings into exercise governmental and not corporate powers, and for any act or omission of duty in regard to the enforcement of such ordinances, there is no liability in the absence of a statute imposing one'."—*Reversed and remanded, with instructions to dismiss the complaint.*

NEGOTIATION INSTRUMENTS — GUARANTY — SUBROGATION — *Cobbey v. Peterson*—No. 12411.

Facts.—Plaintiff guaranteed the note of one Schmid to the defendant

Cobbey. Defendant, in a prior suit, and by means of executions, secured full settlement of the note from the plaintiff. Before actual satisfaction of the final judgment which defendant had secured against the plaintiff, defendant sold the note to another, who subsequently secured satisfaction from the maker. After judgment had been satisfied, plaintiff demanded the note from the defendant on the grounds that he desired to be subrogated. The defendant had, however, placed it beyond his power to produce the note, and plaintiff instituted this action.

Held for the plaintiff in the court below, defendant alleges error.

Held.—Defendant's contention that subrogation is improper because the claim was reduced to judgment is unsound. "The rule is * * * that where the ends of justice requires, the judgment does not annihilate the debt, and that the doctrine of merger will be carried no further than the ends of justice demand."—*Affirmed.*