Important Late Decisions

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Recommended Citation
Chicago-Kent Law Review, Important Late Decisions, 8 Chi.-Kent L. Rev. 64 (1930).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol8/iss3/4

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IMPORTANT LATE DECISIONS

Evidence—Dying Declaration—Effect of Religious Belief Upon Competency of Witness.

Defendant having been convicted of murder, upon appeal to the Supreme Court of Alabama, in the case of Marshall v. State, the question was presented whether the fact that the deceased was an infidel would disqualify her as a witness and would therefore prevent the use of her dying declaration in evidence. The court, in a valuable historical discussion of the rules relating to the competency of witnesses, cites Coke’s definition of an infidel as comprising only Jews and heathens, and holds that the fact that one was an infidel would not at common law disqualify him as a witness. The court states the common law rule as follows: that the witness should believe merely in the existence of an Omnipotent Supreme Being as the rewarder of truth and the avenger of falsehood. In the absence of evidence that the witness did not believe in such a Supreme Being, the mere fact of infidelity was held not to disqualify. Marshall v. State, 121 Southern Reporter 72.

Wills and Administration—Ancillary Administration—Power to Appoint Over the Estate of a Non Resident—Effect of Decision of Foreign Probate Court.

Enrico Caruso, the well known operatic star, made a contract with the Victor Talking Machine Company, a New Jersey Corporation, whereby the Company agreed to pay a royalty of 10% on all sales of the Caruso singing records for an indefinite period of time.

Caruso was a native of Italy, born in Naples and died there in August, 1921. He was at all times a citizen of Italy, and that was his domicile at the time of his death. He left him surviving his wife, Dorothy Park Benjamin Caruso, and a daughter Gloria, also two illegitimate sons born and resident in Italy. These illegitimates had been acknowledged by Caruso as his offspring, but on account of the laws of Italy they were not entitled to inheritance because their mother was at the time of their birth married to another man.
Caruso executed a holographic will by which he bequeathed his entire estate to the said illegitimate children and to his brother as his universal heirs, bequeathing to his wife that portion of his estate which, under the Italian law, she would have been entitled to receive by reason of her marriage; the will also provided for support of his stepmother until her death.

Mrs. Caruso and daughter were residents of the United States and have continually resided here since the death of the husband. An ancillary administrator was appointed by the New Jersey Court to take over and distribute the royalties to be paid by the Victor Talking Machine Company and a partial ad interim decree of distribution was made.

Under the Italian law, the birth of Gloria rendered the will made by Caruso, a nullity, and by virtue of the provisions of the Civil Code, a family council was constituted. A family agreement was reached and entered into by all parties in interest except Mrs. Caruso, and this agreement was submitted for approval to the Naples Tribunal which provided, among other things, for the distribution of the royalties to be paid by the Victor Talking Machine Company. It was decreed by the Court of Errors and Appeals of New Jersey, in the case of Caruso v. Caruso, 148 Atl. Rep., page 882, that the Naples Tribunal, being the Court of the decedent's domicile, had full power to make distribution of all of the decedent's estate, including that which had its situs in the United States, and that its decision was final and bound all of the heirs of the estate, and under the facts as above stated. The New Jersey Probate Court had no power to appoint an ancillary administrator to make any distribution of assets nor did it have power to make distribution of moneys received by it in the State of New Jersey. It was also held that the New Jersey Court had no power to appoint a special guardian for the daughter Gloria nor to authorize the payment of any money to her, and the decrees of the lower court were reversed and the proceedings ordered dismissed.
Agency—Attorney—Agency Coupled With Interest—Death of Principal.

Appellee railroad Company of Canada issued several hundred shares of its stock to a German corporation. The war broke out and these shares were declared to be vested in the Canadian alien property custodian. The actual shares had gone to Germany. By the Treaty of Versailles, England retained and liquidated all alien property within the Dominions. The shares were declared forfeit to the government of Canada. Germany acted to sequester such outstanding shares, but they were smuggled into the United States where one Braun bought them up and entered into an agreement with Lewis, an Illinois attorney, by which Lewis agreed to collect on the shares for a 50% fee. Braun then died. His widow refused to be a party of the proceedings. Lewis instituted suit against the railway company. Lewis insists that he may sue in his own name.

Held, that it is quite apparent that appellant is not claiming this right by virtue of being executor, administrator, guardian, or a party with whom, or in whose name, a contract has been made for the benefit of another. He must, therefore, qualify either as a real party in interest, as a trustee of an express trust, or as a party expressly authorized by statute. Whatever interest appellant has is derived from the two agreements entered into. The first agreement merely authorizes Lewis to act as Braun’s attorney and representative in the matter of the shares of stock belonging to Braun. To accomplish these purposes Braun authorizes Lewis to take any steps and any course in Braun’s name, and to make any demands in his name, which in Lewis’s judgment is best. The second agreement states the matter of fees and payment for services. Mrs. Braun merely signed an O. K. thereto. This language is certainly not sufficient to create a present interest in Lewis in the stock or dividends. He was to get no part of the stock in his name, for, according to the agreement, it was all to be transferred, and certificates issued, to Braun; likewise, the agreement gave him no present interest in the dividends, for it explicitly states that they are to be collected for Braun.
There is a vast difference between a mere agency and an agency coupled with an interest. Likewise, there is a great difference in interests with which the agency may be coupled. It is very clear that appellant, by virtue of the agreement, falls into the class of agency which is an agency with bare power, and may be revoked at will, and is always revoked by the death of the principal. Appellant, in fact, was nothing more than a custodian of the certificates at any time. Appellant had no right to maintain this action in his own name, or jointly with Mary A. Braun, or with her as administratrix of the estate of her deceased husband. Lewis v. Canadian Pacific Ry. Co. & ano. U. S. C. C. A. 7th Cir. (Ill.) Decided March 29, 1930.

Bailment—Storage of Furniture—Liability for Loss.

Plaintiff owned a valuable bedroom set and stored it with defendant storage company. It was stipulated that the set should be packed and crated to protect it from damage. Defendant failed to crate the set until sixty days after the storage period had begun. It then sent the set out to be crated, and the crating plant burned at that time, destroying the set.

Held, that in the very nature of things it was not contemplated that the wrapping and crating should be done some sixty days after the furniture was delivered, and within some ten days of the time when it was called for, for that would have defeated, or largely defeated, the very purpose of having the furniture wrapped and crated. In these circumstances, defendant removed the furniture from the place agreed upon for its storage at a time when it had no authority whatever to do so, and thereby actively violated its contract. The law is that the warehouseman must comply with the contract of storage. If he has contracted to store goods in a specified warehouse, or in a particular place, and stores them in a different place, it is at his own risk, and he is liable for any injury which occurs, even without his own negligence. Defendant issued to plaintiff an itemized receipt, which contains the following: ‘‘Our responsibility for any one piece or package is limited to the sum of fifty dollars.’’ Plaintiff’s attention was not called to this provision in
the receipt. Since the contract was complete when this receipt was delivered, and since plaintiff's attention was not called to the clause, it cannot be considered that she consented to such a change in her contract, and is not bound by the clause. *Williams v. Gallagher Transfer & Storage Co., Ltd.* Supreme Ct. La. Decided March 31, 1930.

**Rights in Land—Easements.**

A deed containing no recitals as to particular easements etc. but referring to plat or subdivision wherein such are shown, makes such particulars as much a part of the deed as if they had been recited therein. The easement of an alley acquired thus is by grant, and to constitute an abandonment of such easement there must be in addition to nonuser circumstances showing intention of dominant owner to abandon use of the easement.

In order that the owner of the servient estate may acquire title to the portion of the alley adjoining his property by adverse possession for the statutory period, clear positive and unequivocal evidence must be introduced.

Adverse possession must continue for the full statutory period of twenty years, and if such continuity of adverse possession is broken before statutory period has elapsed, benefit of previous adverse possession is lost and adverse complainant must commence possession de novo.

Defendants whose adverse possession of alley had continued for a long time but was interrupted by use of alley by other adjacent property owner, did not acquire title to alley by adverse possession.

Mere delay of owner of dominant estate in asserting right does not bar enforcement of right in equity unless statutory period of twenty years has elapsed, but in addition to delay there must be something in conduct of complainant making it inequitable for him to assert title.

Obstruction of alley complained of occurring in the fall and a bill to enjoin obstruction filed in following spring will not be considered as laches for failure of complainant to start suit at an earlier date. *Yunikes et al v. Webb et al.* 170 N. E. 709. Supreme Court of Illinois, April 4, 1930.
RIGHTS IN LAND—BUILDING LINE RESTRICTIONS.

A building line restriction long acquiesced in except for slight violations does not necessarily operate as abandonment of it altogether where material and beneficial part remains. A complainant is not precluded by her own slight violation of the restriction from maintaining a suit enjoining defendant from erecting a building on a lot adjoining plaintiff's lot, which erection would be a substantial violation of the restriction.

Failure of complainant to protest violations of the restriction on other streets which could not be seen from her property does not preclude right to protest and enjoin a violation which seriously affects her property.

Claim of acquiescence as barring a property owner from enjoining the violation of restrictions by others should be measured in its force by the relation of the asserted violation to the individual property of the complainant.

The rule that equity will refuse to intervene in plaintiff's behalf, where the character and environment of property has so changed as to make it unfit or unprofitable for use if the restriction be enforced, does not apply where the character and condition of the property on the street or in the neighborhood has not changed even though such changes have taken place in other portions of the subdivision. O'Neill v. Wolf, 170 N. E. 669. Supreme Court of Illinois. April 2, 1930.

FEDERAL EQUITY RULES—MULTIFARIOUSNESS AND DISTINCTION BETWEEN JOINT AND SEVERAL ACTIONS.

The bill alleged that complainant leased one of several stores owned by the lessor to be occupied as a men's haberdashery, with the written agreement that no other of said stores should be leased for said purpose to any other tenant; that thereafter the lessor did lease another of said stores for said purpose to a competitor of complainant. The bill joined as defendants the lessor and the competing tenant, praying against the former that the permission to compete be enjoined, and against the latter, that the continuance of said competing be en-
joined. Defendants moved to dismiss on several grounds, one of which is misjoinder. The Chancellor held, that although "mere multifariousness is no longer an objection to a bill," under modern Federal Equity Rules "a joint action can be supported only on the basis of a joint liability;" that, "the distinctions between joint and several actions are just as clearly preserved;" that, "a plaintiff with a several right of action in himself and a joint right of action held by him and another could not join the two in one bill, nor could a defendant, who was severally liable, be joined with another defendant who was likewise severally liable, as if they two were jointly liable;" also that the liability of the defendants in the present case was several and that the joinder was, therefore, improper. Leave was given to amend the bill in this and other respects. Benjamin et al. v. Stanley Co. of America et al. 37 (2nd) Fed. Rep. 904.

Mortgages—Effect of Redemption.

The decision of the Appellate Court in the case of Hack v. Snow, 252 Ill. App. 51, caused considerable excitement and even anxiety among members of the bar, as an affirmance by the Supreme Court would have unsettled the law in this state as to the effect of a redemption by the mortgagor, or by his grantee, upon the rights of junior lienors.

The facts of the case are not complicated. A judgment creditor, whose lien was junior to that of a mortgage which was being foreclosed, failed to bid at the foreclosure sale, although he had appeared in the proceedings and had made proof of his judgment. The mortgagor bid in the property for the amount of the mortgage indebtedness, the master issued to him a certificate of sale, and within one year parties who had acquired the equity of redemption subsequent to the sale redeemed by making payment to the master. Thereafter the judgment creditor caused an execution to be issued and levied on the property, and the same was about to be sold to satisfy the execution, when the complainant filed her bill to enjoin the sale.

The Superior and Appellate courts decided in favor of the plaintiff, but the Supreme Court held that the sale
under the foreclosure did not change the character of the estate which the owner of the right of redemption has in the land. The certificate of sale was rendered null and void by the redemption and the premises were thereby freed of the lien of the mortgage, the only lien of which payment had been ordered by the decree. The lien of the judgment creditor was still effective and he was entitled to have the property sold in satisfaction thereof. His lien could only have been extinguished by the issuance of a Master's deed pursuant to the certificate of sale, after the expiration of the period of redemption. *Hack v. Snow*, 338 Ill. 28.

**EQUITY PLEADING—EFFECT OF LATE FILING OF DEFENSIVE PLEADING WITHOUT LEAVE.**

Defendant in error filed her bill in chancery to set aside a bailiff's sale of real estate on execution and to quiet title to certain real estate as against plaintiff in error who was purchaser at bailiff's sale. Summons was returnable on the third Monday in April, being April 15th. An answer was filed by the defendant, plaintiff in error, on the next day, no extension of time to plead having been requested. The following June 3rd, an order of default was entered against him and on July 31st, a final decree pro confesso against him. Plaintiff in error assigned as error the entering of said order and decree while his answer was on file. The court held that in affirming the decree that "the general rule is when the time for pleading has expired and the party has filed a pleading without leave of court and without consent of the adverse party, filing thereof is an irregularity, which, if not waived, renders the pleading liable, at the discretion of the court, to be stricken on motion, or disregarded, or treated as a nullity." The court cited: *Farmer v. Fowler*, 288 Ill. 494, 123 N. E. 550; *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 95 N. E. 462; *Flanders v. Whittaker*, 13 Ill. 707. *Farmer v. Fowler, supra*, is also a chancery case. Here the time for pleading is extended, but after the expiration of the period of such extension and without further leave the defensive pleading in question was
filed. The court held that it was properly treated as a
nullity by the complainant and the chancellor. *Balulis
v. Hooper*, 338 Ill. 21, 169 N. E. 821.

**Rights in Land—Covenants.**

A deed, conveying one of two adjoining lots owned by
the grantor, contained a covenant that no dwelling house
should be erected on the lot not conveyed unless so built
that the best rooms of the house should face or front on
the lot conveyed. The title to both lots having become
merged in a single owner, it was held that the merger of
title rendered ineffective the previous restrict covenant.
*Spector v. Traster*, 70 N. E. 567.

**Rights in Land—Underground Waters.**

The owner of a farm, on which was a spring, which
for many years had furnished an abundant supply of
water for domestic purposes, brought action for damages
for the stoppage of the flow of water in the spring by
reason of the sinking of a well on a farm at a point one-
half mile distance from the spring. Held that all under-
ground waters are presumed to be percolating, and to
overcome the presumption the existence of a defined sub-
terranean stream must be shown as known or readily
ascertainable. One who claims rights in a flowing stream
has the burden of showing its existence. *Logan Gas Co.

**Rights in Land—Eminent Domain.**

This was an action for damages to a farm resulting
from the building of an electric transmission line. Held
that the jury improperly took into consideration merely
speculative damages, or remotely contingent damages
such as the unsightliness of towers, the possibility that
wires may fall and cause damage, the possible injury
from fire or lightning, injury to crops from falling
towers, or damages resulting from teams or tractors
colliding with the towers. In fixing damages to land
taken under the power of eminent domain, the damage to
land not taken in condemnation proceeding is the depre-
ciation in the market value. Such damage must be direct
and proximate, and not such as may be conceived by the

**Negligence—Automobile Driver's Negligence Not Imputed to Passenger.**

W. H. Bailey, with three others, as invited guests of the defendant driver, while riding over the Lincoln Highway from the city of Mansfield to an amusement park about four miles distant, was injured by an overturn of the car. When near the park, on the crest of an incline, the left rear tire blew out, and the driver fearing a collision with a car parked a short distance ahead, gave his car a short turn to the right causing the rear to swing in a short arc and upsetting the car. The defendant was driving at 40 to 50 miles an hour, of which plaintiff had made no complaint. Plaintiff charges defendant with negligence by reason of excessive speed and improper handling of the car after the blowout. Defendant claims that the accident was solely the result of the blowout, that plaintiff did not object to the speed of the car, and was a licensee, and assumed the risk, and especially that the parties were engaged in a joint enterprise, and that, if the defendant was negligent, such was imputed to the plaintiff, and hence there could be no recovery.

The court restated that the doctrine of imputed negligence does not ordinarily apply in Ohio, recognizing the exception to the rule in case of joint enterprise. The defendant assumes that the exception to the rule is herein applicable in that the parties were all members of the same orchestra, riding in the same car to the place where it was to furnish music, and that plaintiff attempted to exercise control over the car's operation after the tire-burst, by his exclamation, "Hold her in the road." The court says that before the rule of imputed negligence can be invoked, it must be shown that the parties are engaged in a joint enterprise, and that they are jointly operating or controlling the movements of the car in which they are riding, with a right of mutual control; that the evidence here shows no such right or exercise of control over the car's operation by plaintiff. The fact of mutual
interest of the occupants in the purpose of their trip, cannot alone create joint enterprise, as understood in law. In considering the case, the court recognizes a further restriction upon the rule, which precludes the defendant from his claim, in that the exception to the rule does not apply and may not be invoked in an action by one member of the enterprise against another, for the reason that one cannot invoke his own negligence to defeat his associate’s claim for injuries due to such negligence, as such would also be the permitting of one to take advantage of his own wrong. The court recognized the general rule as stated in 1 Berry on Automobiles (6th ed.) page 692, that “a person invited to ride in an automobile is a licensee, and the duty of the person extending such invitation is to use ordinary care not to increase the danger of the guest or to create a new danger. * * * The guest or passenger may assume that the driver will obey the law, and that he will not voluntarily and improperly increase the common risks of travel by automobile.”

Defendant’s reliance upon the fact of the tire-burst as an efficient intervening cause, was thus disposed of by the court: “However, it is the law that, where an injury is the combined result of the negligence of the defendant and an accident, for which neither the plaintiff nor the defendant is responsible, the defendant is liable unless the injury would have happened if he had not been negligent. In other words, if the negligence of the defendant was the efficient and proximate cause of the injury, and the plaintiff in no way contributed thereto, then the defendant is liable. And the question of proximate cause and efficient intervening cause is likewise for the jury and not the court. See Thompson on Negligence, vol. 1, page 68. * * * It is surely a good law that, if the injury resulting from the wrongful act could have been foreseen by a prudent person, the perpetrator will be held accountable therefor; for, when once a chain of events has been started, due to the negligence of the operation of an automobile, the one in control may be held responsible for all possible mishaps which are properly the proximate result of the unlawful act.” Bailer v. Parker et al. 170 N. E. 607 (Ohio).