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Abstracts of Recent Decisions

ABSTRACTS OF RECENT DECISIONS

ALIENS—EXCLUSION OF CHINESE—DEPORTATION TO COUNTRY "WHENCE HE CAME"—A Chinaman, coming into the United States from Canada as shown by overwhelming proof, there being no proof that he came first from China to the United States and thence to Canada returning into the United States will, if not entitled, under existing laws, to remain within the country, be deported not to China but to Canada, as that is in point of fact the "country whence he came" and the one to which the act directs him to be deported. The finding that such a person came from China, based on his presumed birth there, is not based on proof, but mere speculation, and the court, taking judicial notice that all Chinamen are not born in China, will deport such a person to Canada, where that is the only place from which an entry into this country is proved. *United States ex rel. Haum Pon vs. Sisson.* 230 Fed. 974.

BANKRUPTCY—LIEN ON STOCK—WAIVER—It was held that a corporation which has a lien on the stock of its members for debts due from the members has this lien for a debt due from a co-partnership one of whose members was a stockholder in the corporation. It was further held that the corporation has not waived this lien by proving up its claim as an unsecured creditor against the bankrupt co-partnership and receiving dividends on the claim, as the lien is not such security as is contemplated by the Federal Bankruptcy Act, but is mere collateral security. *Bank of Searcy vs. Merchants Grocery Co.* 185 S. W. Ark. 806.

CARRIERS—CONNECTING CARRIERS—CARMACK AMENDMENT—LIABILITY OF TERMINAL CARRIER UNDER THE BILL OF LADING—FORM OF ACTION—A milling company shipped flour with draft attached to one B, located on a connecting line, and the connecting or terminal carrier delivered the flour to B. without requiring payment. B. returned the flour because it was damaged and the terminal railroad sold it as perishable property. The shipper sued in trover and secured judgment. The plaintiff in error set up two defenses: That the shipper's remedy was against the initial carrier exclusively and that under the stipulation in the bill of lading providing a limited time for the filing of claims for loss and damage the action was barred. Held, that the connecting carrier is not relieved from liability by the Carmack Amendment and that the bill of lading required to be issued by the initial carrier fixes and limits the liability of all participating carriers. Further, that the terms of the contract in the bill of lading cover all cases where delivery is not made as required and that the stipulations are binding and their effect cannot be escaped by any change in the form of action brought. *Georgia F. & A. Ry. Co. vs. Blisk Milling Co.*, 36 S. Ct. 542.

CARRIERS—REGULATION—CHARGES—An ordinance passed by a village council, granting a franchise to an interurban railway to construct a line through the village, contained the following provision: "Should the village of Pleasant Ridge be annexed to the city of Cincinnati, the fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents." The company accepted the franchise and constructed, maintained and operated its line thereunder. The village was later annexed to the city. *Held*, the acceptance of the franchise by the company constituted a binding contract between the parties. The terms of the franchise are binding so long as the company retains it and operates its road thereunder. *Interurban Ry. & Terminal Co. vs. City of Cincinnati.* 112 N. E. 186. (Ohio.)

A street railway operating a line through a village under a franchise from such village, providing for a certain rate per mile between certain points, is bound by such stipulation, even though the points specified are beyond the limits of the village. *Vining vs. Detroit, etc., Ry.* 133 Mich. 539.

CITIZENS—EXPATRIATION—STATUTORY PRESUMPTION—Where A., who had become a naturalized citizen of the United States returned to his native country, Sweden, and there lived for a period of ten years, the presumption under Act of March 2nd, 1907, Sec. 2, that a naturalized citizen residing for two years in the foreign state from which he came, intended to expatriate himself, applies. This presumption is rebuttable but the mere fact that such person returns to the United States is not sufficient to rebut it, and, therefore, *habeas corpus* would not lie against a commissioner holding said A. on his return from Sweden as an alien of a prohibited class. A similar presumption is raised by the treaty obligations between the United States and Sweden. *United States vs. Howe*, 231 Fed. 546.

CORPORATIONS—RECEIVERS—LIENS—EMPLOYES—RIGHT TO PRIORITY OF PAYMENT—A statute of New York (Consol. Law c 31) Para. 89, which provided that upon the appointment of a receiver of a domestic corporation other than a moneyed corporation, the wages of the employes shall be preferred to every other debt or claim does not give such a claim priority over the lien of a mortgage on the property, for the statutes which disturb vested rights will not be so construed unless their language clearly shows such intention. *Schmidtman vs. Atlantic Phosphate and Oil Corporation*, 230 Fed. 769.

In New Jersey, Missouri and Utah, statutes of practically the same wording as in the New York statute have been adopted and it has been held in all three of these states that employes do not have a prior right over liens created by mortgages. *Hinkle vs. Camden Safe D. Co.*, 47 N. J. Eq. 333; *Wright vs. Wynokie Iron Co.*, 47 N. J. Eq. 29; *Fitzgerald vs. Meyer*, 65 Mo. App. 665; *Salt Lake Co. vs. Ibex M. & S. Co.*, 15 Utah 445.

The opposite view was taken in Indiana, Kentucky and Washington, but in these states the statute specifically states that the lien for wages shall be prior to the mortgage lien. *McDaniel vs. Osborn*, 166 Ind. I; *Warren vs. Sohn*, 112 Ind. 213; *Graham vs. Magann Fawke Co.*, 118 Ky. 192; *Sitton vs. Dubois*, 14 Wash. 624.

COURTS—JURISDICTION—CONVERSION IN FOREIGN COUNTRY—In an action for the conversion of cattle brought in the Texas Courts it appeared on the face of the petition that the conversion occurred in Mexico. There was no proof of any cause of action under the Mexican law. The defendant moved to dismiss. Held, that the court would take judicial notice of the anarchy in Mexico and the suspension of law and give judgment under the law of Texas. *Mendolia vs. Gonzales*, 185 S. W. (Texas) 389.

COURTS—PROBATE COURTS—JURISDICTION—COLLATERAL ATTACK—Under the Arkansas statute (Kirby's digest Sec. 3801) authorizing the guardian or curator to invest funds derived from the sale of real estate in other real estate, the guardian was ordered by the court to invest general funds in real property. When he sought credit for funds so invested the objection was raised that the court had no jurisdiction to make the order. Held; that the order of the Probate Court might be attacked collaterally and the objections sustained. *Beakley vs. Ford*, 185 S. W. (Ark.) 796.

EVIDENCE—COMPETENCY OF WITNESS—Where the plaintiff had taken the deposition of a party before the trial on the issues, he is precluded from objecting to the witness's competency when offered as a witness by the opposing side. *Alexander vs. Sovereign Camp of Woodmen of the World*, 186 S. W. 2. Supporting this view, *Borgess Inv. Co. vs. Vette*, 142 Mo. 560; *Rice vs. Waddill*, 186 Mo. 99.

It was also found that the matter was not called to the attention of the trial court in the motion for new trial. It has been held that the objection that a court admitted irrelevant and incompetent evidence is not sufficient to preserve an objection to the competency of a witness to testify. *Howard vs. Hurst, Admin'r*, 163 Mo. 641.

INTOXICATING LIQUORS—LOCAL OPTION—JUDGMENT OF COUNTY COMMISSIONERS—COLLATERAL ATTACK—In a local option election those opposing the sale of liquor were defeated by a vote of 268 to 270. A protest was filed with

the county commissioners on the ground that four of the votes counted for the liquor interests were void and that if they had been excluded the result of the election would have been different. The commissioners, after hearing the evidence declared the election void and ordered a new election which resulted in the defeat of the liquor interests. Several persons applied to the commissioners for licenses to sell liquor. Their applications were refused. The petitioners then appealed on the ground that the commissioners had no authority to declare the first election void, but should have determined what the correct result of the election had been. The Supreme Court so held, but refused to grant judgment on the ground that the decision of the commission was not subject to collateral attack. *Galvin vs. Taylor*, 112 N. E. (Ind.) 513.

JUDGMENT—JUDGMENT IN REM—NONRESIDENCE OF DEFENDANT—EFFECT OF SPECIAL APPEARANCE—A.'s property was attached in a foreign jurisdiction without service on him therein. A. filed a special appearance undertaking to submit himself to the jurisdiction of the court only so far as was necessary to protect his goods in the hands of the alleged trustee. The lower court held that a defendant could not appear, answer to the merits, and defend the case for the purpose of protecting his interests and at the same time repudiate the jurisdiction of the court. Held, that by general law, in spite of Rev. Laws Mass. c. 173, para. 118, (providing that after a defendant has appeared and answered to the merits, no defects of process of service may effect the jurisdiction), the defendant did not waive his special appearance and submit himself to the jurisdiction of the court. *Cheshire National Bank vs. Jaynes*, 112 N. E. (Mass.) 500.

NEGLIGENCE—TITLE GUARANTY—FRAUD BY SELLER—An abstract company made and certified an abstract which was incorrect and, by means of which the purchaser was defrauded by the vendors of certain lands. In a suit for negligence it was held that the Company's negligence was the sole cause of the loss sustained by the buyer, it being sufficient if the negligence concurred with the seller's fraud. *Decatur Land etc. Co. vs. Rutland*, 185 S. W. (Texas) 1064.

QUIETING TITLE—POSSESSION—LACHES—STATUTE OF LIMITATIONS—An action to quiet title may be brought by a party not in actual possession of the land in question. The mere fact that he is not of possession and has allowed another to take possession does not constitute such laches as will preclude him from bringing an action to quiet title unless it appears that he has sat by and allowed the party in possession to make improvements on the land. The statute of limitations does not apply to a right to remove a cloud from title. "We apprehend that it was never the intention to enact a statute of limitations in this state preventing an owner from removing or cancelling an instrument or record which casts a cloud upon the title." Sufficient adverse possession is the only means of preventing the clearing up of title. *Stearns Coal & Lumber Co. vs. Patton*, 184 S. W. (Tenn.) 855.

RESTRAINT OF TRADE—SUIT FOR DISSOLUTION OF ALLEGED COMBINATION—In a suit under the Anti-Trust act of 1890 it was shown that the organization and early methods of the defendant were intended and calculated to restrain competition in the manufacture and sale of cans and were in violation of the Sherman Anti-Trust Act, but that by change of methods and conditions no monopoly or attempt at monopoly had continued. Held, that while the size and power of the defendant corporation made it potentially an instrument to restrain trade or monopolize a part of the commerce among the several states, there being no present violation of the statute, public policy would not be served by ordering dissolution. *United States vs. American Can Co.*, 230 Fed. 859.

SALES—DELAY IN DELIVERY—DAMAGES—A. sold B. 1500 tons of chalk, C. O. D., to be forwarded in two shipments, the first in June or July, the second in November, December or January. The first shipment was a year late, and B. was forced by the requirements of his business to purchase 295 tons at the market price which was greater by $1242.60 than the contract price for the same amount of the chalk. B. accepted the chalk when it did arrive and sued for the $1242.60 above mentioned. The market price did not vary throughout the

transaction stated. Held, that the buyer was not entitled to damages because the market price had not changed and he might have recouped his loss by a sale of 295 tons of the chalk on its arrival. *West Coast Kalsomine Co. vs. Lund*, 230 Fed. 855.

STREET RAILROADS—NEGLIGENT COLLISION WITH VEHICLE—INSTRUCTION—In an action for damage to an automobile whose engine stalled while it was close to a street car track and which was struck by a car before the driver had time to crank it up, it was error to instruct the jury, that if in the exercise of reasonable care by a proper lookout, the motorman was convinced that the automobile was far enough away from the track that he could run by it without hitting it, he was not negligent. The test should be whether a reasonably prudent motorman would be convinced, not whether this particular motorman was convinced. *Hertz vs. Connecticut Co.*, 112 N. E. 166, (New York.)

VENDOR'S LIEN—ASSUMPTION BY PURCHASER—A. conveyed land to B. who gave a vendor's lien note in part payment. B. retained 229 acres and conveyed the remainder of the land to C., who conveyed the same to D., each agreeing in turn to pay the entire amount of the note. The note was not paid at maturity and all of the land covered by the note was sold to satisfy it. B. sued C. and D. jointly for the value of the 229 acres and obtained judgment. From this judgment D. appealed setting up lack of privity between himself and B. Held; That B. was entitled to subrogation to the rights of C. *Bollinger vs. Baylor*, 185 S. W. (Texas) 1021.

VENDOR'S LIEN—LOSS OF RIGHT TO RESCIND BY SALE OF NOTE—A. sold land to B. on condition and took a vendor's lien note in part payment. A. sold the note to C. and B. having disappeared and failed to make any payments for 20 years, A. declared the sale rescinded, and conveyed all his interest to C., holder of the note. C. paid all of the back taxes on the land, but never went into possession. The heirs of B. brought an action in the form of trespass to try title. Held, that by the sale of the note to C., A.'s right to rescind passed with the note to C., and he having failed to exercise his right of rescission, the heirs of B. should recover. *Wolls vs. Cruse*, 185 S. W. (Texas) 1033.

WILLS—CONTINGENT REMAINDER—MERGER—Under a will creating a devise to A. for life with "remainder in fee to the children of A. or the survivor or survivors of them," but if he should die without issue surviving him then to his wife and the testatrix's nephews and niece with provision for representation in case of such latter's death with also a residuary devise to such nephews and neice, it was held that the will by its terms construed in the light of the textatrix's intention created a life estate and a contingent remainder with a double aspect. The court construed the words "survivor or survivors of them" as describing the class which was to take i. e., the surviving children of the life tenant. This construction would render the remainder contingent instead of merely causing the words to operate as a condition subsequent defeating an already vested remainder in the children. It was also held that a conveyance of the above life estate and the reversion (in the nephews and niece) to the same person, would defeat the above contingent remainder and give the grantee of such conveyance a fee simple absolute as the estate so conveyed to him would merge. *Smith vs. Chester*, 112 N. E. (Ill.,) 325.

WILLS—TESTAMENTARY TRUSTS—LIFE ESTATE WITH POWER TO SELL—RULE IN SHELLEY'S CASE—The testator left certain lands in trust for the use of G. and J. who were to take equal and undivided interests. On the death of each the trust was to determine as to him and the property to descend to his heirs at law. The trustee was given the power to sell the land, give good title, and apply the proceeds, at any time during the continuance of a life estate, on obtaining the consent of the beneficiary. On the death of J. his heirs filed a bill in the lower court alleging that by his death the trust terminated as to his interest and that his undivided interest was held in trust for his heirs. To a decree ordering a sale G., the holder of the other alleged life estate, sued out a writ of error on the ground that the decree erroneously found that he had only a life estate in the land set off to the trustee in severalty, claiming that by reason of the

rule in Shelley's case he held an equitable fee simple estate; the trustee holding the fee simple because of his powers. Held, (three judges dissenting), that the express devise of the trust estate to the trustee, coupled with the power to sell, gave the trustee a fee simple estate in the land, in spite of the fact that it was expressly stipulated that the trust should determine and cease on the death of the beneficiary. *Nowlan vs. Nowlan*, 112 N. E. 259, (Ill.) See *contra Hamlin vs. United States Express Co.*, 107 Ill., 443. A limitation over after a life estate with power to sell the fee, will control the operation of the power and prevent it from enlarging the life estate. *Kirkpatrick vs. Kirkpatrick*, 197 Ill., 144, 64 N. E. 267.