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Recent Decisions

John Ruberto

Joseph V. Stodola

Kenneth J. Konop

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substituted in lieu thereof. This bill may decrease revenue, but it surely will work substantial justice to all parties concerned.

The greatest calamity of this session, as of the session in 1929, was the veto by Harry G. Leslie, Governor, of the Registration of Voters bill. It was vetoed on the theory that it was too cumbersome and expensive, especially in rural districts. The necessity for a registration law was admitted by practically everyone, and neither the House nor the Senate could figure out any better or more economical way of accomplishment than that provided by the proposed law. The Governor, apparently, knew less than anyone about it, since he had had two years in which to advise his party chieftains. But he proceeded to veto the bill. Its failure to be signed is a substantial loss to every county in the state that is large in population, or that borders on or abuts another state.

The difficulty in the present system of legislative work in Indiana arises from many sources. Principal among them is the fact that it is almost humanly impossible to act intelligently on 900 proposed laws in but 61 days time. Secondly, the members of the legislature are poorly paid. They are forced to leave a business for 60 days, or attempt to function at the same time in two different places. Curiously enough, the item that impressed me as being a serious defect in the House of Representatives has nothing to do with laws or legislators. It involves the acoustics and sounding of the room itself. Many an intelligent argument for or against a bill was never heard three seats away from the speaker. Many communities thought they had sent a "slicker" to the legislature, whereas they never were really represented on the floor of the House, except in voting. The moral of that may be, vote for a legislator with a loud voice, or then, again, it may be that Indiana ought to spend a few dollars improving the acoustics of the House of Representatives.

*Walter E. Stanton.**

Gary, Indiana

RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION—PROSPECTIVE—LIABILITY OF PURCHASER OR SALES AGENTS.—The prospective purchaser having selected an automobile and agreed on the price to be paid on installments, thereafter left the automobile in the seller's garage. The latter testified that the agreement was that he was to purchase the car if after the price was fully paid he found it satisfactory. While using the car on errands of his own under this arrangement, with set of markers used by the seller on demonstration cars, he ran into the plaintiff's decedent. *Held,* Dealer not liable for negligence of one operating with permission to test whether satisfactory or not, before purchasing. *Murphy v. Mace,* 152 Atl. 582 (Conn. 1930).

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*LL. B., Notre Dame, 1930. State Representative, Lake County, 1931-1932.

When the seller of a motor vehicle gives instructions in its operation to the purchaser the seller not the purchaser is responsible for the negligent acts of the driver giving the instructions. Likewise an automobile dealer is liable for injuries caused by the negligence of one whom he employs to instruct customers in driving while using the dealer's car. *Opcello v. Mead,* 135 Atl. 488 (Md. 1926). For any negligence of the instructor in control of the car the defendant who employed him to perform the instructions and who provided the car for the purpose would be liable. *International Co. v. Clark,* 147 Md. 34, 127 Atl. 647 (1925); *Louis v. Johnson,* 146 Md. 115 (1924). In *Doyn v. Massoline Motor Car Co.,* 98 N. J. L. 540, 120 Atl. 204 (1923), a salesman in the course of his demonstration injured a pedestrian. The defendant corporation was held liable for his negligent operation regardless of whether the salesman or the purchaser was driving the car. It was said by the Supreme Court of Oregon, in *Holmboe v. Morgan,* 69 Oregon 395, 138 Pac. 1086 (1914), that a salesman who is demonstrating an automobile to a purchaser and teaching him how to run it, as an implied consideration of the sale, was not relieved of control because he permitted the purchaser to drive the car, but was in charge of it and should have taken control if he thought they were in a locality where the car should be in the hands of an expert. Where a dealer's employee invited another to help him sell a car and the employee was driving in a negligent manner as a result of which the third person was killed, it was held that the dealer was liable for his employee's negligence on the theory that the salesman was acting within the scope of his authority as an agent of the dealer. *Curran v. Anthony,* 247 Pac. 236 (Cal. App. 1926). A later case considered whether or not this was a "joint enterprise." The court held that a "joint enterprise" involves a community of interests in objects of undertaking and equal rights to direct and govern movements. *Bryant v. Pacific Electric Ry. Co.,* 174 Cal. 737, 164 Pac. 385 (1917). See Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence* (1931) 6 Notre Dame L. 172. Further, it was argued that the salesman was an independent contractor. The court held that an independent contractor is one who, in rendering services, exercises an independent employment or occupation and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished. *Barton v. Studebaker Corporation,* 46 Cal. App. 707, 189 Pac. 1025 (1920); *Green v. Souly,* 145 Cal. 96, 78 Pac. 337 (1904). The court in *Coonse v. Bechold,* 125 N. E. 416 (1919), held that the mere fact that a seller of an automobile retains title until price is paid, with the right to retake possession on default, does not establish the relation of employer and employee so as to render the seller liable for the buyer's negligence while operating it as a taxicab. The owner of a motor car who has placed it into the possession of a garage keeper either as a prospective buyer, or a factor, or a sales agent, is not liable for negligence of said garage keeper while driving the car for demonstration there being no relation of master and servant or any other relationship justifying the imputation of the driver's negligence. *Emery v. McGombs,* 180 App. Div. 225 (N. Y. 1917). A prospective purchaser, permitted by the defendant's salesman to drive the automobile for the purpose of showing it to his wife, was not the defendant's agent while so driving. *Cruse-Crawford Mfg. Co. v. Rucher,* 123 So. 897 (Ala. 1929). The doctrine that a demonstrator is the agent of the dealer cannot be applied when the salesman in his demonstration entrusts the car to the prospective purchaser for his own purpose unless with knowledge of his unfitness. 2 BLASHFIELD ENCY. OF AUTOMOBILE LAW, p. 1323; *Goodrich v. Musgrave Co.,* 154 Iowa 637, 135 N. W. 58 (1912). The relationship of the salesman and the prospective buyer was that of a bailment. The doctrine is that an owner of a car is generally not liable for the consequences of the negligence of a bailee while so operating the car. *Bevelle v. Taylor,* 202 Ala. 305, 80 So. 370 (1918); *Gardner v. Solomon,* 200 Ala. 115, L. R. A. 1917F 380 (1917); *Parker v. Wilson,* 179 Ala. 361, 43 L. R. A. (N. S.) 87 (1912); 2 BLASHFIELD ENCY. OF AUTOMOBILE LAW, pp. 1320-1322; 2 BERRY ON AUTOMOBILES (6th ed.) p. 1200. Where a truck driver was furnished to operate a demonstrating truck by making delivery of goods, he is generally held to be the servant of the owner of the truck so that the owner is liable for any damage resulting from his negligence, even though an employee of the purchaser accompanied the truck to direct the driver as to where to stop. *McGuire v. Auto Car Sales Co.,* 134 N. Y. S. 702 (N. Y. 1912). Where the chauffeur's employment was to demonstrate the car if he surrenders the actual driving to another he is considered as acting within the scope of his authority. *Wooding v. Thom,* 148 App. Div. 21 (N. Y. 1911). A dealer has been held liable because of chauffeur's negligence although the accident was brought about by a defective condition of the car. *Burham v. Central Auto Exchange,* 67 Atl. 429 (R. I. 1907). A commission agent's authority is usually a limited one and if a car is delivered to him it is considered as being within his own control. *Goodrich v. Musgrave Fence and Auto Co.,* 154 Iowa 637 (1912).

John Ruberto.

COVENANTS—RESTRICTIVE—AS TO THE NATURE OF THE OCCUPANCY—NEGROES AND OTHERS.—This is an injunction suit involving the following facts. A number of lot owners mutually agreed that they would not permit their property to be used or occupied by persons of either the negro, African, or Asiatic race. That the transfer or sale of said property shall be subject to the covenants agreed upon, and that the said covenant shall run with the land. The agreement was recorded. The defendants are negroes who purchased with notice of the restrictions. *Held,* the defendants are bound by the restricting covenant, and being members of the negro race, they are not entitled to occupy the premises so restricted. *Littlejohns v. Henderson,* 295 Pac. 95 (Cal. 1931).

". . . the plat of land containing the restriction was of record. It was also a part of defendant's deed. He knew or should have known all about it. He did not have to buy the land, and he should not have bought it unless willing to observe the restrictions contained." *Parmalee v. Morris,* 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180 (1922). "The concrete question before us is: May the right to occupy—and necessarily incident thereto the right to purchase and sell property—be prohibited by a law, state or municipal, solely because of the color of the proposed occupant?" *Buchanan v. Warley,* 245 U. S. 16, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201 (Ky. 1917); *Liberty Annex Corporation v. City of Dallas,* 289 S. W. 1067; affirmed in 295 S. W. 591 (Texas 1927). Under the constitution a negro has the right to acquire, own, and occupy property but that does not give him the power to compel a conveyance to him of any particular private property. *Corrigan v. Buckley,* 55 App. D. C. 30, 299 Fed. 899 (D. C. 1924); *Torrey v. Wolfes,* 56 App. D. C. 4, 6 F. (2d) 702 (D. C. 1925). "A person owning a body of land, and selling a portion thereof, may, for the benefit of his remaining land, impose upon the land granted any restrictions, not against public policy, that he sees fit, and a court of equity will enforce them." 7 R. C. L. 1114. A restriction in deed of occupancy and ownership to white persons is valid. *Chandler v. Ziegler,* 291 Pac. 822 (Colo. 1930); *Schulte v. Starks,* 238 Mich. 102, 213 N. W. 102 (1927); *Parmalee v. Morris, supra; Queensborough Land Co. v. Cazeaux,* 136 La. 724, 67 So. 641, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248 (1915); *Koehler v. Rowland,* 275 Mo. 573, 205 S. W. 217, 9 A. L. R. 107 (1918). Whether a particular covenant runs with the land is determined by the intention in the light of surrounding circumstances of the parties and the subject of the grant. *DeSanno v. Earle,* 273 Pa. 265, 117 Atl. 200 (1922). ". . . if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it, and it makes no difference, whether the covenant is or is not one which in law 'runs with the land.'" POMEROY'S EQUITY JURISPRUDENCE (4th Ed.) Vol. 2, § 689. "In accordance with the rules stated, restrictive covenants will be enforced in equity as covenants running with the land." 7 R. C. L. 1114.

Joseph V. Stodola.

PRINCIPAL AND SURETY—SURETY CAN BE SUED BEFORE SUING PRINCIPAL—ROMAN LAW—COMMON LAW—STATUTORY LAW.—In this case the plaintiff brought suit in assumpsit against the United States Fidelity and Guaranty Company of Maryland, surety on the official bond of Dallas Auvill, sheriff of Barbour County, West Virginia. There was no statute in West Virginia requiring that the principal be sued before suit could be brought against the surety. In this action no suit had been commenced nor had any judgment been taken against the principal, Dallas Auvill. The lower court held that the principal should have been sued first but the Appellate court *held,* that the surety at common law may be sued without first suing the principal. *Downer v. United States Fidelity and Guaranty Co. of Maryland,* 46 Fed. (2d) 733 (C. C. of A. 3d, 1931).

It is a well settled principle of law today that the plaintiff may issue the surety without first suing the principal. In 32 Cyc. 91 (e) the rule is stated as follows: "Ordinarily in the absence of a statute, the creditor or obligee cannot be required to resort to the principal before proceedng against the surety, as where both principal and surety are equally bound, and the creditor cannot be compelled in such cases to resort to other remedies before coming on the surety, or, in the absence of statute, to attempt by execution to exhaust his remedy against the principal before proceeding against the surety. The surety's remedy is to pay the debt and pursue the principal for reimbursement . . . . It follows that, in the absence of statute, forbearance to proceed against the principal will not affect the right of the creditor to pursue the surety, whatever may be the consequences of the delay, such as the subsequent insolvency of the principal or the fact that the remedy against the principal may be lost by lapse of time." This principle is true whether the damages be liquidated or unliquidated. *Janes v. Scott,* 59 Pa. 178, 98 Am. Dec. 328 (1868). The theory in support of the general rule is that a judgment against the the principal could not be used for any purpose against his sureties. Not being parties to the suit, they could neither defend it nor take it up for review, and it could not be used to fix liability upon them. To bind the surety in any way by the judgment against the principal would amount to depriving the surety of his day in court. *Douglass v. Howland,* 24 Wend. (N. Y.) 35 (1840); *McKellar v. Bowell,* 11 N. C. (4 Hawks) 34 (1825); *State v. Leeds,* 31 N. J. Law, 185 (1865). This preliminary discussion has been more or less for the purpose of restating the law as it is today in regard to this suretyship question. Now we will confine ourselves to the evolution of this rule and pay some attention to statutory provisions which change it.

The early Roman law gave the surety the right to compel the plaintiff to resort first to the principal to collect his debt before suing the surety. Gradually this rule was departed from, but Justinian re-established it, so that even today it continues as the prevailing rule in some of the European nations. The rule never secured a footing in England and the common law rule as developed by the courts of that country has been that the plaintiff may sue the surety without first suing the principal, and the surety must pay and seek reimbursement from the principal.

Some states have statutes, however, which change the common law rule and give preference to the old Roman law. In Georgia, under the Code (§ 2154), delay in entering judgment against a principal until he becomes insolvent discharges his surety. *Hayes v. Little,* 52 Ga. 555 (1874). In Louisiana the Revised Civil Code (art. 3066) provides that suit shall not be instituted against a surety on an appeal bond, or on the bond of an administrator, tutor, curator, executor, or syndic, until steps have been taken to enforce payment against the principal; but the sureties for a surviving partner as liquidator may be sued without execution having been issued against the principal. *Macready v. Schenck,* 41 La. Ann. 456, 6 So. 517 (1889). In Texas the Revised Statutes [art. 1204 (1895)] provide that a surety may be sued without suing the principal, if the latter is a non-resident or is dead. Art. 3814 provides that when the principal and surety are sued together, the surety may have the property of the principal first sold; but if the sureties have given a trust deed with the principal, and the latter is dead, the trust deed can be foreclosed against the sureties without postponement to foreclosure of a trust deed given by the principal alone.

Planters', etc., Nat. Bank v. Robertson, 86 S. W. 643 (Texas Civ. App. 1905). To entitle a surety to the privilege given by statute of not being sued first, he must have contracted as such. *Ennis v. Crump,* 6 Tex. 85 (1851). The Texas Revised Statutes (§ 1842, 1897) state that the creditor must ordinarily obtain a judgment against the principal before proceeding against the surety. *Snyder v. Slaughter,* 208 S. W. 974 (Tex. Civ. App. 1919). In Indiana and Kentucky there are statutes also restricting the rights of the creditor to sue the surety before first suing the principal. These statutes, however, do not apply to all cases where this relation exists but only to certain specific cases.

Kenneth J. Konop.

BOOK REVIEWS

CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE. By Adolf A. Berle, Jr. St. Paul: West Publishing Company. 1930.

About a year ago I read with considerable interest and profit Professor Berle's Studies in the Law of Corporation Finance. Here was a little text (less than two hundred pages long) which aided me far more in the particular corporate problem at hand than a number of the voluminous treatises on the subject of corporations. Many lawyers have told me of similar experiences. And it seems to me that Professor Berle's case-book should have the same unusual value for the student that his text has had for the lawyer.

I do not pretend to know the ideal curricular requirements for the law student. I do believe that far too many men come from law school with only the haziest idea of the relation of theory to practice. This may partially explain why it is generally accepted that it requires about five years for the young lawyer to get his feet on the ground. The average organizers of corporations have little idea of just what corporate framework will be most advantageous for their purposes. They expect counsel to advise them of more than what they can do; they expect counsel to guide them in what they should do.

It seems to me that up to now nearly all courses in corporation have been devoted to a demonstration of rights under given factual situations. A knowledge of these rights is of course essential. But something more is required in fairness to the student; namely, that at least his intellectual curiosity should be aroused as to the most desirable form of corporate structure or financing in relation to a given set of facts. The intelligent study and use of Professor Berle's case-book will do this and more. It will give the student a fund of knowledge seldom acquired by the general practitioner in a decade for practically every problem arising with the development and growth of modern corporations is presented. Many cases will be of particular interest because their history is still fresh in the student's mind. I feel certain that this case-book will meet with the unqualified approval of both the professor and the student.

Aaron H. Huguenard.

University of Notre Dame, College of Law.

CORPORATE DIRECTORS. By Howard Hilton Spellman. New York: Prentice-Hall, Inc., 1931.

It is my sincere belief that the average lawyer's overhead is far out of proportion to his income. In the consideration of overhead I include the cost and upkeep of library. Law book publishers have done little to assist the lawyer in keeping down his library account. They have constantly brought out books and most of these books are of such excellence that it has taken small effort to sell them to the lawyer. The question of paying for them is another matter.

The more comprehensive legal treatises are quite expensive. Their value is