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Notes on Recent Cases

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WATERS AND WATER COURSES — *Surface Waters — What Are — Obstruction — Rights and Liabilities* — Defendant owns property abutting that of plaintiffs' and lying at a lower level. Storm and surface water were accustomed to flow in two natural and well-defined channels, draining without flowing over or upon the property of either owner. Defendant constructed an irrigation ditch with earth embankments within a few feet of plaintiffs' property line. Two years later the county of Los Angeles graded and paved Whittier boulevard, which ran above and perpendicular to Vancouver avenue, about which street the property in question is located. There were constructed a large number of streets beyond Whittier boulevard and the grading and paving of said streets resulted in the filling up and closing of the natural drainage channels and water became greatly accelerated and were diverted into Whittier boulevard west of its natural channel with the result that it flowed to some extent onto the land of the plaintiffs', and, if not diverted, across the land of the defendant. Defendant's ditch caused the water to back up and to overflow plaintiffs' property, causing considerable damage thereto. *Held,* the owner of the dominant estate (plaintiffs here) has a legal and natural easement in the servient estate (defendant's estate) to discharge surface waters falling or accumulating on his land over the land of the servient owner in such manner as it would naturally flow from a higher to a lower level, and the owner of the lower estate is answerable in damages for any injury which may be caused to the upper estate by reason of obstructions which he has placed in the way of such natural flow, causing it to back up or remain on the land of the upper owner.—*Le Brun et ux. v. Richards* (D.C.A., California, 1930), 283 Pac. 323.

Various important questions were developed in the principal case before the court finally determined the rights and liabilities of the parties. Waters and water courses involve a multitude of technicalities, and the interpretation of one term is often the determining factor in a case of

this nature. First the court must determine whether or not the water in question may be included within those waters which are technically known as "surface waters." On this question it is generally held in California and in most jurisdictions that the term must be confined to waters falling on the land by precipitation or rising thereon in springs, and does not include all waters which may be on or moving across the surface of the land without being collected into a natural water course. *Horton v. Goodenough,* 184 Cal. 451, 194 Pac. 34. In its ordinary sense "surface waters" means water collected on the surface of the ground, *Ramsey v. Ketcham,* 73 Ind. App. 200, 127 N. E. 204, having no defined channel or belonging to a permanent body, but when such waters reach and become a part of a natural stream or permanent body like a lake, they lose their character as surface waters and are governed by a different rule. *In re Judicial Ditch No. 9 of Nobles County* (1922), 152 Minn. 544, 188 N.W. 321. Where a river overflowed by heavy rainfall, as it was accustomed to do from time immemorial, such waters were deemed flood waters and not surface waters. *Gobin v. Piety,* 72 Ind. App. 156, 125 N.E. 655. In some states it is the established doctrine that overflow water from rivers and streams is surface water. *Goll v. Chicago & A. Ry. Co.,* 271 Mo. 655, 197 S.W. 244; *Morton v. Hines,* 112 Wash. 612, 192 Pac. 1016. Generally, if the waters leave the main channel without returning they become surface waters; if they are still a part of the main channel or soon return to the main channel they are not held as such. Distinguish "surface waters" from "overflow water" in *Buchanan v. Seim,* 104 Neb. 444, 177 N.W. 751, where water accumulated in flood season within the drainage area of a natural stream and found an outlet in the ordinary channel of the stream when the flood subsided.

The court in the principal case followed the civil law rule, in holding that the upper proprietor has an easement to have water flow naturally from his land and that the lower proprietor may not obstruct such natural flow in a manner that would cause the water to back up on the tenement estate. However, it must be pointed that the rule is only applicable provided that the flow of the water was

neither accelerated, diverted, or concentrated by any act of the dominant tenement. Some of the more cited cases recently decided where the civil law rule was applied are: *Winchester v. Byers* (1929), 196 N. C. 383, 145 S. E. 774; *Mobile & O. R. Co. v. Red Feather Coal Co.,* (Ala., 1929) 119 So. 606; *McKiernann v. Grimm* (Ohio App., 1929), 165 N. E. 310; *John v. Chicago B. & O. R. Co.,* 202 Iowa 1282, 211 N. W. 842; *Sloss-Sheffield Steel & Iron Co., v. Nance* (Ala., 1927), 113 So. 50; *Besler v. Greenwood,* 202 Iowa 1330, 212 N. W. 120; *Vidrine v. Guillory,* 3 La App. 462; *Higgins v. Spear* (Tex. Civ. App., 1926), 283 S. W. 584, (Texas common law rule changed by Acts 34th Leg., 1st called Sess., c. 7); *Beechley v. Harms* (1928), 332 Ill. 185, 163 N. E. 387.

Jurisdictions following the common law rule regard surface waters as a "common enemy" and hold that land owners may protect their property by diverting the water, regardless of its effect on the property of others. Consequently, under this rule, the owner of the servient estate may divert surface waters even though the result is to back the water up on the dominant estate. *Evansville, Mt. C & N. Ry. Co. v. Scott,* 67 Ind. App. 121, 114 N. E. 649; *Belcastro v. Norris* (Mass., 1927), 158 N. E. 535; *Daly v. State* (N. Y. Ct. Cl., 1928), 228 N. Y. S. 738, 132 Misc. Rep. 92; *Tucker v. Hagan* (Mo. App., 1928), 300 S. W. 301; however, the injury to others must not be the result of diversion in a reckless manner, *Adair Drainage Dist. v. Quincy, O. & K. C. R. Co.,* 280 Mo. 244, 217 S. W. 70; *Kilts v. State,* 184 N. Y. S. 107, 113 Misc. Rep. 112.

Some states have held that the rights of both upper and lower owners are protected under the rule of law that permits one to use and enjoy his land and dispose of hostile surface waters thereupon, subject to the application of the principle "sic utere tuo ut alienum non laedas." *Henderson v. Hines,* 48 N. D. 152, 183 N. W. 531; *Raleigh Ct. Corp. v. Faucett,* 140 Va. 126, 124 S. E. 433. It was held in the case of *Olney Springs Drainage Dist. v. Auckland* (1928), 83 Colo. 510, 267 Pac. 605, that a landowner cannot drain water onto a neighbor's land without the consent of the latter.

Under the common law rule when the owner of the dominant tenement, in grading, or building, etc., causes surface water to flow upon the servient tenement, the damage that may be caused thereby is *damnum absque injuria,* but the lower tenant may protect himself by any reasonable means. *Gannon v. Hargadon,* 92 Mass. 106. In regard to reasonable means of fending of surface water, it has been held that if two ways are equally efficacious, and neither require unreasonably greater expense than the other, and one only will damage adjoining property, the other must be adopted. *Toler v. Bear Creek Drainage Dist.* (1926), 141 Miss. 851, 106 So. 88. And under the common law rule the dominant proprietor may not collect surface water and conduct it by artificial means to discharge it on the servient estate, and in increased volume. *Tucker v. Hagan* (Mo. App., 1928), 300 S. W. 301. Such use as this is adverse and therefore it has been held that the upper tenant may thereby acquire an easement after the statutory period, *White v. Chapin,* 96 Mass. 516, but without some adverse use the common law does not recognize the existence of an easement or servitude upon the servient estate.

It seems that the civil law rule is better suited to the needs of rural districts, inasmuch as it recognizes the right of the upper tenant to have the continuance of the normal drainage and the duty of the lower tenant to receive this normal flow of water. Whereas, the common law rule in regard to surface waters is found more adaptable in urban centers, particularly since it provides for no restrictions, in this connection, in the erection of buildings. However, under the qualifications of the civil law either rule permits the promotion of good husbandry.

J. P. GUADNOLA.

DIVORCE—*Provision in statute requiring plaintiff in divorce action to file affidavit of residence sworn to before clerk held mandatory and jurisdictional.* KLEPFER v. KLEPFER (*Ind.*). 169 *N.E.* 478.

Plaintiff in his action for a divorce against his wife, in the complaint charged her with cruel and inhuman treatment. With his complaint, he filed an affidavit to which he

had sworn before a notary public, stating therein his occupation, and his residence. The question in the case is whether or not this affidavit is in conformance with Section 1097 of Burn's Ann. Statutes 1926 which reads as follows: "the plaintiff shall, with his petition, file with the clerk of the court an affidavit, subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the state, and stating particularly the place, town, city, or township in which he has resided for the last two years past and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed." Because the plaintiff in this suit failed to follow the terms of the statute and filed an affidavit sworn before a notary, rather than one sworn to before the clerk of the court that was to try the case; the Supreme Court of Indiana reversed the decision of the lower court and held that there was no divorce granted.

The court held that this provision as regards the affidavit is mandatory and without such affidavit the court trying the case has no jurisdiction of the cause. Indiana cases affirming this doctrine are: *Smith v. Smith,* 185 Ind. 75; *Wills v. Wills,* 176 Ind. 631; *Canan v. Canan,* 88 Ind. App. 623; *Crowell v. Crowell,* 82 Ind. App. 281; *Foreman v. Foreman,* 76 Ind. App. 83; *Hoffman v. Hoffman,* 67 Ind. App. 230.

In the decision of *Payne v. Payne* (Ind.) 169 N.E. 475, a case decided one day before the main case reviewed here the Supreme Court held that the requirement as to affidavit of residence in divorce proceedings cannot be waived by the parties, citing as authority, *Foreman v. Foreman,* 76 Ind. App. 83; *Willis v. Willis,* 176 Ind. 631; and *Smith v. Smith,* 185 Ind. 75.

Indiana appears to be the only state that requires an affidavit to be filed with the complaint, but most states have by statute required that residence in the state be directly and unequivocally alleged in it, as residence in these states is a jurisdictional fact. Further, it is advisable in alleging residence to follow the language of the statute.

KENNETH KONOP.

LOTTERIES—*State of Wisconsin v. Thomas Peterson.* (Not yet reported).

The State of Wisconsin filed complaint in the circuit court for Dane county. The purpose of suit was the recovery of $750.00 which defendant had received from the sale of an automobile he won at a lottery. The state alleged that under the Wisconsin statutes the winnings at any lottery are forfeited to the state. It claimed that it could recover the proceeds of the sale of such a forfeited article. Defendant demurred to the complaint and the circuit court held that no cause was stated for only the property won at the lottery was forfeited. The state appealed to the Supreme Court. That court held that the policy of Wisconsin as expressly stated in the statutes is clearly against lotteries. Section 348.06 provides that "all sums of money or other valuable thing drawn or received by any person as a prize or share or part of a prize derived by or through any lottery or pretended lottery, contrary to the provisions of the preceding sections of this chapter shall be forfeited to this state and may be recovered by any proper action brought by the attorney general or any district attorney in the name and behalf of the state." The court said that under the statutes the defendant never had any title to the automobile, but it vested in the state. The forfeiture acted as a statutory transfer of title to the state at the time the offense was committed. (Here citing *United States v. Stowell,* 133 U. S. 16, 17, and referring to *United States v. Grundy,* 3 *Cranch* 337, *McConathy v. Deck,* 83 Pac. 135, and Note in 7 A. & E. Annotated Cases 899). Defendant in selling the state's property became indebted to the state for at least the sale price. The defendant's contention had been that the sole remedy of the state was against the automobile won. Though generally, in case of forfeitures, the recovery of the prize is sought the court said this is not the only remedy. The act, in requiring suit by the state to recover the winning, means to provide a hearing on the issue of whether or not the defendant won the property at a lottery, a condition to title resting in the state. The statute, being penal, should be strictly construed, but should also be interpreted to carry out the legislative intent. The court then declared that the legislative intent was to wipe out lotteries and the encour-

agement thereof. Also it was declared better that the state recover of the guilty party the fruits of his guilt, here the $750.00 than that action for the automobile be brought against an innocent purchaser, leaving the guilty party a winner still. Further it was stated that the action is not in rem proceeding, but one against the offender. The cause was remanded to the circuit court with instructions to overrule the demurrer to the state's complaint.

WILLIAM H. KONOP.

AUTOMOBILES.—*The right of way conferred on a driver of an approaching automobile from the right is not absolute.* MCHUGH *v.* MASON, 283 P. 184.

Auburn Avenue approaches Main Street from a northeasterly angle. The appellant while riding in a car on Auburn Avenue was struck at the intersection by the car of the appellee who was approaching on his left on Main Street.

The trial court found that the appellee was negligent, but that the driver of the car in which the appellant was riding was guilty of contributory negligence in not having looked for, and giving the right of way to, the car of the appellee.

According to the facts, it was found that the car of the appellant had just started and was traveling at a rate of 14 miles an hour, while the car of the appellee was traveling at an excessively high rate of speed. The driver of the appellant's car had looked out and seen no approaching traffic before he attempted to cross the intersection.

The Supreme Court found that:

"Such a right of way, as is conferred by statute is not an absolute right, but is a relative right only. (Wash.) *Breithaupt v. Martin.* 279 P. 568.

There must be some reasonable limitations on the right of way enjoyed by a machine approaching from the right. *Saad v. Langworthy.* 280 P. 568."

It was further found that the appellant had the right to assume that the appellee would not travel at a speed above

that allowed by law, unless he had actual notice that he was traveling at such a speed.

The fact that the appellee was not given the right of way is not conclusive that the driver of the appellant's car was guilty of contributory negligence. Such a question should have been left for the jury. The appellant's motion for a new trial is granted.

This decision overthrows a popular fallacy, that the right of way conferred upon the driver of a car is absolute. It might be best summed up as follows:

"The right of an automobile driver who has the right of way is not exclusive, but is relative and subject to the doctrine that the right must be so used as not to injure others." *Foley v. Taylor,* 209 P. 698.

Research has found that a number of states have preceded Washington in the rule; as may be attested by: *Jones v. Cook,* 96 W. Va. 60; *Paulsen v. Klinge,* 92 N. J. L. 99; *Grant v. Marshall,* 121 A. 664; *Glatz v. Kroger,* 168 Wis 635. A. J. BARLOW.

LANDLORD AND TENANT.—The rule that neither tenant nor his invitee may recover against landlord for injuries caused by defects is inapplicable to portions of premises over which landlord retains control.

The defendant owns several tenements and the sole means of approach is a passageway, which is reached from the street by a flight of stone steps. The plaintiff endeavored to show by evidence that one of the steps had been in a loose condition for a year and that the defendant had been warned of such defect, but had negligently permitted it to remain in a dangerous state, so that the plaintiff in using the passage way was severely injured when he attempted to ascend the steps and the top one being loose when he stepped on it "threw" him, thereby causing the injury complained of.

The tenant takes the premises as he finds them and that in the absence of warranty or deceit, neither the tenant nor his invitee may recover against the landlord for injuries

sustained by reasons of defects therein. *Town vs. Thompson,* 68 N. H. 317, *Clarke v. Stayle,* 76 N. H. 446, *Marston v. Andler,* 80 N. H. 564.

However, such a principle does not apply to those portions of the premises which the landlord furnishes for the common use of his tenants and over which he retains control. *Gobrecht v. Beckwith,* 82 N. H. 415, *Soad v. Papageorge,* 82 N. H. 294.

It is prevalent in the cases I have enumerated that the landlord has the duty to use ordinary care to keep such portions in safe condition, and is liable to the invitee of a tenant rightfully using the premises. *Gleason v. Boehm,* 58 N. J. Law 475, I. Tiffany, Landlord and Tenant, 189.

The landlord's duty under the exception to the rule is not limited to interior passageways, but extends also to approaches thereto which he has provided upon his land for like common use of tenants and of which he retains control. 2 Underhill, Landlord and Tenant 485, 25 A.L.R. 1285.

J. H. TUBERTY.

AUTOMOBILES—Key No. 164. Driver on rainy day owes duty to prospective street car passengers to have car under control to safely pass them. Reported in 124 Southern 780.

Murphy, the plaintiff, was standing on Florida Street in the city of Baton Rouge, at its intersection with Thirteenth Street, on the north side of the street car tracks on said street. There was space enough between the curbing on the north side of the street and the place where the plaintiff was standing, for the defendant's driver to have driven an automobile past the plaintiff without injuring him. It is clear that the plaintiff was standing out in open view of the defendant's driver, who was going east on Florida Street. An approaching street car was also in plain view of the defendant's driver, if he was looking in the direction he was going. He also saw that the plaintiff was standing at the place which was the ordinary car stop for the street car that was coming and, as it was raining, he must have known that the plaintiff was waiting there for the purpose of getting

aboard the coming street car, which was close at hand. Defendant's driver was driving too fast and it was impossible for him to get the car under control, and consequently he struck the plaintiff, injuring him.

The court held that it was the duty of the defendant's driver, approaching the plaintiff, with an unobstructed view and with a rain falling, to commence in ample time to get his automobile under control, so that he could either pass between the plaintiff and the curbing on the north side of the street without injuring him, if there was room to do so in safety, and if the room was not sufficient, to stop and not run over him. *Murphy v. Gladney's, Inc.* (Ct. of Appeal of Louisiana. First Circuit Dec. 3, 1929; 124 Southern 780.

The majority of the states have held in accord with the principal case. 73 A. 1105 (Pa.); 161 N. Y. S. 472. 149 N. W. 947 (Minn.); 110 A. 686 (Maine); 177 Ill. App. 530; 111 N. E. 447 (Ind.); 115 P. 1050 (Wash.); 68 Pa. Super. Ct. 345; 234 P. 113 (Col.); 229 S. W. 836 (Mo.); 103A. 109 (Pa.); 111 N. E. 457 (Ind.); 125 A. 82 (R. I.); 111 A. 625 (Conn.); 127 A. 500 (Md.); 124 N. E. 791 (Mass.); 124 P. 531 (Kan.); 119 N. W. 904 (Mich.); 110 A. 686 (Maine). ALVIN G. KOLSKI.

Witnesses—Defendant in civil action against whom criminal proceedings was pending, asserting constitutional right, couldn't be compelled to produce books. *Louisiana Strawberry Auction Co., Inc. v. Hendon.* Supreme Court of Louisiana, Nov. 4th, 1929. Reported in 124 So. 676.

The realtor was prosecuted as a criminal, and subsequently a civil suit was filed against him. In the civil action application was made to the court for a subpoena duces tecum, calling for the production, in court, of the defendant's books. In response to this motion, the realtor asserted his constitutional right to refuse to give evidence against himself, and therefore declined to produce his books, as long as the criminal prosecution stood against him. The court gave the accused a limited time to produce the books in court under the penalty of the law. The realtor applied to this court for writs of certiorari and prohibition. A temporary writ of prohibition was granted.

The court stated that under Article 475 of the Code of Practice, which provides, "If in the course of the suit either party discovers that his interest requires the introduction of titles and papers in the possession of the adverse party, or of a third person, the court shall on application, order the production of such books or papers; provided, however, that in no case shall a person be compelled to produce papers that will subject him to a criminal prosecution under the penal laws of the state," the realtor is entitled to the relief applied for and it is therefore ordered that the writ heretofore issued therein be perpetuated. Temporary writ of prohibition perpetuated.

The great weight of authority seems to follow the above holding. The following are some of the cases in accord. *McGinnis v. State* (1865) 24 Ind. 500; *State v. Pence* 89 N. E. 488, 173 Ind. 99; 311 Ill. 198 (1924) 142 N. E. 543; 200 U. S. 186; 21 Ky. Law Rep. 239, 51 S.W. 167; 94 Md. 375, 56 L.R.A. 322; 39 Texas Cr. R. 630, 47 S.W. 996.

"A corporation cannot resist upon the ground of the constitutional protection against self-incrimination, the compulsory production of its books and papers before the grand jury, under a subpoena duces tecum." *Wilson v. U. S.* 31 Sup. Ct. 538 (1911) 221 U. S. 361; 165 F. (N.Y.) 426; 218 Mo. 1, 116 S.W. 902.

A corporate officer cannot urge his constitutional privilege against self-incrimination to excuse his refusal to produce the corporate records in his custody before the grand jury under a subpoena duces tecum directed to him, because their contents may tend to incriminate him. 221 U.S. 394; 59 Wash. 655 (1910), 110 Pac. 547.

FRANCIS G. FEDDER.

Ralph H. Simpson Co. vs. Industrial Commission et al. 169 N.E. (Illinois) 225 Dec., 1929.

Providing under Workmen's Compensation Act by Louise Carr for the death of her husband, opposed by Ralph H. Sampson Co., employer. The Industrial Commission awarded Plt. $3,700 under Section 7, Paragraph 101, Smith Hurd Rev. St. 1929, c48, Sec. 144. The Circuit Court of

Cook County affirmed the Commissioner's judgment. The case was brought to the Supreme Court on a writ of error and was affirmed.

The facts show that Carr, while on the job strained his back. Carr remained on the job for several weeks, but his back continued to hurt. Carr then entered a hospital. X-ray pictures were taken which showed a lymphatic sarcomia. Carr died a short time later as a result of the lymphatic sarcomia.

This case is of interest because it clarifies the law relating to compensation proceedings.

In compensation proceedings the burden is on claimant to prove that accidental injury was sustained which arose out of and in course of employment, and that death of the employee was result of the injury. 329 Ill. 490, 160 N. E. 845; 326 Ill. 293, 157 N. E. 168.

The Supreme Court of Illinois pointed out that the finding of an Industrial Commission will not be disturbed by the Supreme Court, unless it is contrary to the manifest weight of evidence. 323 Ill. 80, 153 N. E. 699.

If the death is fairly chargeable to an accident suffered in the course of claimant's employment as an efficient cause, compensation may be awarded although the cause of death existed prior to accident, provided death was accelerated by the injury, but there must be a direct relationship between the accident and the subsequent death. 303 Ill. 455, 135 N.E. 789; 303 Ill. 410, 135 N.E. 754; 302 Id. 610, 135 N.E. 98; 301 Id. 418, 134 N.E. 174.

Under Workmen's Compensation Act the employer must have notice of accident within thirty days. Actual notice is sufficient. Thus in the case of *Omaha Boarding and Supply Co. vs. Industrial Commission* 306 Ill. 384, 138 N.E. 106, it was held that, where the president of the employer corporation visited the employee after the injury and before he returned to work and was present when the employee was examined by the doctor, proof of such facts showed employer had notice of the accident. In *Valier vs. Industrial Commission* (300 Ill. 69, 150 N.E. 651) it was

held that, when the manager of a mine was told by employee's son that the employee was injured and could not work, the employer had sufficient notice that a claim for compensation might be made. 247 Ill 498, 113 N.E. 976; 291 Id. 579, 126 N.E. 564; 291 Id. 616, 126 N.E. 616.

WILLIAM LEE O'MALLEY.