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Banks and Banking, Insurance, Torts

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BANKS AND BANKING

Carrol v. Bank [1] was the only case regarding banking law decided, wherein it was held that a bank is not liable for damages in refusing to allow a depositor to draw against the proceeds of a deposited check until such check has been cleared.

INSURANCE

In the case of *Insurance Company v. Heller* [2] the Court states that the provisions of an insurance policy which are written in plain and unambiguous language and do not contravene some principle of public policy will be strictly construed against the insured, regardless of how disadvantageous such construction might be to the insured.

In the case of *Reed Auto Sales v. Empire Delivery Service,* [3] it was held that under a loss payable clause, both the mortgagor and the mortgagee may join as real parties in interest when the amount of the loss is equal to or in excess of the amount of the mortgage, but that the mortgagee is the real party in interest when the amount of loss does not exceed the amount of the mortgage.

In the case of *Insurance Company v. Mitchell,* [4] it was held that an insurance company is not estopped from denying liability under the terms of a policy, after first securing a non-waiver agreement from the insured, even though such company enters an appearance for the insured and actively participates in the trial which ends in a verdict for the plaintiffs.

The case of *Traders Insurance Co. v. Pioneer Mutual* [5] involved a garage owner's liability policy which provided that any insurance provided therein with respect to the automobile owned by the insured, should conform to the provisions of the motor vehicle financial responsibility law with respect to any such liability arising from the use of such automobile. The Court ruled that coverage under such policy, the accident occurring where one was driving the automobile owned by the insured and with his permission, attached since that provision placed the policy within the terms of c. 16, § 56, Colo. Stat. Ann. (1935). The effect of this decision was to greatly broaden the coverage under garage owners' liability policies which heretofore had enjoyed restricted coverage.

TORTS

Three cases have been decided within the past year relating

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[1] 126 Colo. 377, 249 P. 2d 540 (1952).
[2] .....Colo....., 253 P. 2d 966, C.B.A. Adv. Sh. (Feb. 21, 1953).
[3] .....Colo....., 254 P. 2d 1018, C.B.A. Adv. Sh. (Mar. 21, 1953).
[4] .....Colo....., 259 P. 2d 862, C.B.A. Adv. Sh. (July 25, 1953).
[5] .....Colo....., 258 P. 2d 776, C.B.A. Adv. Sh. (June 6, 1953).

to the Colorado Guest Statute. The first case, *Havis v. Iacovetto,*[6] raised the question of whether a passenger for hire, while engaging in an unlawful activity (a professional gambler) is prevented from avoiding the provisions of the Guest Rider Statute. The Supreme Court held in this case that recovery by the professional gambler was not barred even though his activities were unlawful so long as his participation in such unlawful activity had no casual connection with the injury complained of.

In both the case of *Clark v. Hicks* [7] and *Dameron v. West,*[8] the Court clearly set forth what requirements must be met in order to satisfy the provisions of the Colorado Guest Rider Statute. The Court states that even though a driver has no intent of injuring his passenger, if he was conscious of his conduct and from the knowledge of surrounding circumstances and existing conditions, knew or should have known that to continue his course of conduct would naturally and probably result in injury, then the requirements of the Statute have been met.

In the case of *Rosa v. The Union Pacific Railroad,*[9] the trial court's entry of summary judgment for the defendant based upon the pleadings and deposition of the plaintiff was reversed. The plaintiff's deposition virtually admitted contributory negligence but the pleadings injected the question of last clear chance. The Court held that a sufficient question of fact was raised by the pleadings so as to preclude the entry of summary judgment.

Three cases have been decided on the application of the doctrine of *last clear chance;* the first of them, *Werner v. Schrader,*[10] setting forth an excellent discussion on the application of this doctrine in Colorado. The Court definitely states that the application of the doctrine presupposes negligence on the part of both the plaintiff and defendant, and also presumes that after such negligence has occurred, the defendant could and the plaintiff could not, by use of means available, avert the accident. The Court states further that contemporaneous negligence by both parties until the moment of the accident prevents the application of the doctrine, and in *Comer v. Dodd,*[11] the Court states that in order for the doctrine of *last clear chance* to apply, the evidence must clearly show that the defendant's action were the proximate cause of the injury. In *Patch v. Boman,*[12] the Court refused to apply the doctrine in the light of evidence that shows clearly that the plaintiff's conduct was the sole proximate cause of the injury.

Four interesting cases were decided with regard to the liability of property owners to persons coming on to their property.

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[6] 126 Colo. 407, 250 P. 2d 128 (1952).
[7] .....Colo....., 252 P. 2d 1067, C.B.A. Adv. Sh. (Jan. 31, 1953).
[8] 126 Colo. 435, 250 P. 2d 592 (1952).
[9] .....Colo....., 252 P. 2d 825, C.B.A. Adv. Sh. (Jan. 3, 1953).
[10] .....Colo....., 258 P. 2d 766, C.B.A. Adv. Sh. (June 6, 1953).
[11] .....Colo....., 253 P. 2d 300, C.B.A. Adv. Sh. (Feb. 21, 1953).
[12] ....., 257 P. 2d 418, C.B.A. Adv. Sh. (May 9, 1953).

in *Security Building Co. v. Lewis*,[13] the Court states that the property owner, with regard to liability toward a tenant, is not an insurer but rather merely owes a duty toward such tenant of ordinary care and that such duty runs to the safe condition of the premises and not to the duty of discovery of any defects. In the case of *Atkinson v. Ives*,[14] it is pointed out that a property owner owes a duty toward a licensee to refrain from wilfully and intentionally injuring and to use reasonable care after being aware of his presence on the premises. The Court goes further to state with regard to an invitee, that such property owner must not negligently allow conditions to exist that would imperil the invitee's safety, but that such liability cannot attach unless the property owner has knowledge of the conditions that caused the injury. Likewise, in the case of *The Denver Dry Good Company v. Pender*,[15] it was stated that the property owner is not bound to foresee or guard against casualties on the premises that are not expected in the ordinary course of events or which might result from some unusual or peculiar act of the plaintiff, and that some notice or knowledge of the particular defect must first be shown before liability can be established. In the case of *Cordon v. Clotsworthy*,[16] it was held that an employer owes a duty to the employee to exercise ordinary care in seeing that a reasonably safe place is provided to work, but an employer is not an insurer of the safety of the employee and that any negligence asserted cannot rest upon surmise, speculation or conjecture but must be grounded upon substantial evidence.

In the case of *City of Denver v. Dugdale*,[17] the Court held that the City of Denver was not chargeable with constructive notice of a slippery condition on its sidewalk which had lasted for a period of two days and was caused by natural causes. The Court draws a distinction between a natural accumulation of ice and snow and an accumulation which is put there by artificial means.

In the case of *Sawyer v. Blanchard*,[18] it was held that separate verdicts against the taxi-cab company and the taxi-cab driver are not proper and that there can be no separate liability since liability in such case is necessarily joint due to the negligence of the driver.

In *Spillane v. Wright*,[19] the evidence showed that the three defendants were jointly prosecuting a common undertaking and each had apparent authority to act for all and that each had done some small part in the joint undertaking. The Court ruled that it was proper to instruct the jury that if any one of the defendants was negligent, such negligence would constitute negligence

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[13] .....Colo....., 255 P. 2d 405, C.B.A. Adv. Sh. (Mar. 7, 1953).
[14] .....Colo....., 255 P. 2d 749, C.B.A. Adv. Sh. (Mar. 14, 1953).
[15] .....Colo....., C.B.A. Adv. Sh. (Sept. 26, 1953).
[16] .....Colo....., 257 P. 2d 410, C.B.A. Adv. Sh. (Apr. 25, 1953).
[17] .....Colo....., 256 P. 2d 898, C.B.A. Adv. Sh. (April 4, 1953).
[18] 126 Colo. 485, 251 P. 2d 434 (1952).
[19] .....Colo....., 259 P. 2d 1078, C.B.A. Adv. Sh. (July 4, 1953).

on the part of any and all defendants.

In the case of *Wetzel v. Bates,*[20] the Court again follows the rule that in order to have negligence, it must be shown that the defendant was under a duty and that his actions did not measure up to the requirements and standards of that duty. And in *McBrayer v. Zordell,*[21] the Court states that if injury could have been due to several causes, any one of which might have been the sole proximate cause, it must be shown as between these causes that it was the defendant's negligence that caused the injury complained of.

In the case of *Gossard v. Watson,*[22] the plaintiff was operating a pick-up truck following a vehicle operated by the defendant. Another one of the defendant's trucks was following plaintiff. Defendant's lead vehicle stopped, and plaintiff alleged that his pick-up truck was pushed from the rear into the on-coming lane of traffic where a collision occurred with another of defendant's trucks. Defendant alleged that the plaintiff was following too closely in violation of the statute,[23] and such violation constituted contributory negligence. The Supreme Court held that a pick-up truck is not a "motor truck" within the meaning said statute and further, that violation of the statute is not negligence *per se* but that such violation must be shown to be the proximate cause of the collision. The Court further pointed out the extreme danger of reciting isolated sections of statutes in the instructions without explanation or consideration of the facts as shown by the evidence.

In *Scott v. Matzuda,*[24] it is stated that a trial court abuses its discretion by granting a new trial when the record discloses evidence sufficient to support the finding of the jury. And in *Schell v. Kullhem,*[25] the Court again states that every presumption favors the correctness of the jury verdict and that the findings of such jury will not be disturbed and reviewed in the absence of a clear showing of passion or prejudice.

In the case of *Herdt v. Darbin,*[26] the Court states that an instruction on unavoidable accident is not warranted where the facts are such that a collision between two cars could have been foreseen, anticipated or avoided.

In *Kelty v. Swinney,*[27] dismissal of an action under the Wrongful Death Statute was upheld, the Court holding that negligence must be shown in order to recover under the Wrongful Death Statute.

In the case of *Postma v. Smith,*[28] the Court distinguishes be-

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[20] .....Colo....., 259 P. 2d 291, C.B.A. Adv. Sh. (July 4, 1953).
[21] .....Colo....., 257 P. 2d 962, C.B.A. Adv. Sh. (May 9, 1953).
[22] .....Colo....., C.B.A. Adv. Sh. (Sept. 26, 1953).
[23] Colorado Session Laws, 1945, c. 80.
[24] .....Colo....., 255 P. 2d 403, C.B.A. Adv. Sh. (Mar. 28, 1953).
[25] .....Colo....., 259 P. 2d 861, C.B.A. Adv. Sh. (April 25, 1953).
[26] 126 Colo. 355, 249 P. 2d 822 (1952).
[27] .....Colo....., 253 P. 2d 965 C.B.A. Adv. Sh. (Feb. 21, 1953).
[28] .....Colo....., C.B.A. Adv. Sh. (July 25, 1953).

tween a situation where (1) medical treatment is performed as contracted for but in a negligent manner and where (2) medical treatment other than that contracted for is performed; the Court stating that in the former case it is a matter of mal-practice under the two-year statute of limitations and that in the latter case it is a matter of assault and battery under the one-year statute of limitations. Thus, where the plaintiff engaged the defendant to perform

The case of *Spears v. Maier* [29] involved an alleged libel where the defendant, a medical doctor, made out and signed a death certificate for a person who had formerly been a patient of plaintiff's santatorium, stating that she had died from criminal neglect at plaintiff's sanatorium. Action was brought three and one-half years later, and the defendant pleaded the three-year statute of limitations. The question presented was whether or not the fact that the death certificate was a matter of public record constituted a continuous publication of the alleged libel so as to take the case out of the statute of limitations. The Court held that the fact that many people read a libel is evidence as to the *extent of damage* therefrom, but *does not* in itself *establish publication* as to each reader. The Court held that to rule otherwise would effectively nullify the statute of limitations. In addition, the Court states that doctors of medicine are not *ipso facto* incompetent witnesses as to any fact regarding the standards of chiropractic medicine, but rather, the question of competency should be raised with regard to the evidence introduced.

Franzen v. Zimmerman [30] in following the precedent of Giggy v. Gallagher Transportation Co., 101 Colo. 258, 73 P. 2d 1100, states that a wife may not bring action for loss of consortium due to the injury of her husband.

Manion v. Stephens [31] involves the case of a mysterious disappearance of a certain number of plaintiff's turkeys and a similar appearance of approximately the same number of turkeys in the defendant's flock. Action was brought for civil conversion. The Supreme Court held that the motive with which a defendant acts and whether with or without ill-will or malice is immaterial in an action for conversion, and that the action for conversion will lie even though the act or acts upon which the action is based are done in good faith, sincerely, innocently, inadvertently or by mistake.

[29] C.B.A. Adv. Sh. (Sept. 26, 1953).
[30] 256 P. 2d 897, C.B.A. Adv. Sh. (April 25, 1953).
[31] C.B.A. Adv. Sh. (Sept. 26, 1953).

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