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Recent Decisions

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RECENT DECISIONS.

EVIDENCE—CRIMINAL LAW—COMPETENCY OF EVIDENCE OF ANOTHER CRIME.—The indictment charged the defendant with having assaulted the complainant by striking him with a bottle. The defence was an alibi. The People were permitted to introduce testimony over the objection and exception of defendant, tending to prove that he had visited the complainant's place of business about two weeks prior to the time of the assault, with a large number of other persons, accompanied by a "walking delegate," the latter warning complainant against working for a non-union shop, and on this occasion defendant destroyed about $50 worth of garments belonging to complainant. *Held,* that the defence of an alibi raised in the most direct manner an issue as to the identity of the person who assaulted complainant, and that the previous occurrence had a tendency to show the existence of a motive, and hence that the evidence was admissible as tending to establish a motive, a common scheme or plan, and the identity

of the person charged with the crime specified in the indictment. (*The People* v. *Thau,* 219 N. Y., 39.)

The trial court had rendered judgment upon a verdict convicting defendant of assault. Upon appeal judgment was reversed on the ground that it was error to admit evidence of the earlier occurrence, the Court being of the opinion that "there was no question of identity in the case; that the evidence was not admissible as bearing upon the motive with which the assault was committed, and that the two occurrences were so dissimilar that the proof had no tendency to establish a common intent." (168 App. Div., 842.)

The well settled rule that evidence of other crimes is inadmissible unless such evidence is relevant to the issue or issues on trial, (*People* v. *Shea,* 147 N. Y., 78), is not invaded by this case. Any fact which tends to establish either (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, embracing two or more schemes so related to each other that proof of one tends to establish the others, or (5) the identity of the person charged with the commission of the crime on trial, is relevant to the issues on trial. (*People* v. *Molineux,* 168 N. Y., 264.)

So far as the difference of opinion between the New York courts as to defendant's guilt in the case under discussion is concerned, they unquestionably are as one regarding the law covering the admissibility of the disputed evidence, and appear to be at variance merely in their interpretation of the facts. It would seem that the evidence of the earlier occurrence DOES tend to establish the essentials necessary to make it competent to prove the crime charged, and was therefore properly received. The Court, however, refused to extend the policy administered in the Molineux case (*supra,*) and in this respect we likewise accord with it. It is submitted that the principal case is sound on both principle and authority.

WILLS—POWER OF APPOINTMENT—EFFECT OF RESIDUARY CLAUSE—PRESUMPTION OF INTENT UNDER THE NEW YORK REAL PROPERTY LAW AND PERSONAL PROPERTY LAW.—A testator gave his property in trust to apply the net income thereof to his son for life. It further provided that the latter might, by will, dispose of one-third of the fund "to or among my then living lineal descendants and his wife him surviving or any or either of them and in such manner and proportion as to him shall seem proper." C, the son,

married and thereafter died, leaving no issue. He bequeathed the property over which he had the power of appointment to his wife as long as she remained a widow, with power to appoint by will the principal to certain named organizations. The residue and remainder of his estate he gave to his wife. After her death a dispute arose as to whether the provisions of C's will was a valid exercise of the power contained in his father's will. *Held,* that this clause was only valid to the extent that it appointed an estate to his wife during widowhood; that the remaining provisions, giving her the power of appointing the principal to certain organizations, were void, and that such principal passed by the residuary clause to his wife. (*McLean* v. *McLean,* 160 N. Y. Suppl., 949.)

Under section 176 of the Real Property Law, "real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the powers appears, either expressly or by necessary implication;" and by section 18 of the Personal Property Law the same rule is applied to personal property. An attempted appointment is to be construed precisely as if it had been a devise or bequest of the donee's own property. (*Austin* v. *Oakes,* 117 N. Y., 577.) Ordinarily, a residuary clause carries with it all property of the testator not otherwise disposed of, unless the language of the will itself prohibits such a construction. (*In re Bonnett,* 113 N. Y., 522; *Albany Hospital* v. *Albany Guardian Society,* 214 N. Y., 435, 446.) The intent not to execute a power of appointment cannot be implied unless it so clearly appears that it cannot be avoided. (*Lockwood* v. *Mildeberger,* 159 N. Y., 181.) What C would have meant or intended to do with the remainder, had he supposed that the attempted power to his wife was invalid, must be supplied by legal presumption following the ordinary rule of construction when applied to a will of the testator's own property. (*Riker* v. *Cornwall,* 113 N. Y., 115; *Langley* v. *Westchester Trust Company,* 180 N. Y., 326.)

This is a case of novel impression, in New York State at least. There does not seem to be any decision where it has been held that a general residuary clause will carry with it property covered by an attempted execution of a power of appointment held to be void. However, the statutes quoted are clear on the point. In the construction of a similar English statute, it has been held that a general residuary clause operates to pass property embraced within a void execution of a power of appointment. (*Freme* v. *Clement, L. R.,* 18 Ch. Div., 499; *In re Hunt, L. R.,* 31 Ch. Div.,

308.) In the absence of judicial precedent, the application of the statutes to the facts and the resulting decision seem to be justified and sound.

EVIDENCE—DECLARATION BEARING UPON INTERNAL PHYSICAL CONDITION—ADMISSIBILITY.—Where, in an action upon an insurance policy, plaintiff offers to prove that the insured had complained to the witness of pain in specific portions of his body.

Held, the evidence was admissible as establishing the then internal physical condition of the insured (*Tromblee* vs. *North American Acc. Ins. Co.,* 158 N. Y. Supp. 1014).

Evidence that plaintiff emitted groans, grunts or sighs, where established by the testimony of a third party, is not hearsay, and is admissible as an evidential fact. (*Caldwell* vs. *Murphy,* 11 N. Y. 416; *Hagenlocher* v. *C. I. & B. R. R. Co.,* 99 N. Y. 137.) Prior to the time when parties were competent as witnesses in their own behalf, statements made by plaintiff to third parties bearing on his or her then internal physical condition were held admissible as a matter of necessity. (*Werely* v. *Persons,* 28 N. Y. 344.)

By a misinterpretation of the language of Bigelow, C. J., in *Barker* v. *Merriam,* (11 All. 322), defining the Massachusetts rule that statements of PAST internal physical condition are admissible when made to a physician for the purpose of obtaining professional treatment, the holding of the New York courts, as laid down in *Werely* v. *Persons* (*supra*) was limited to the extent, that statements bearing on PRESENT internal physical condition were made inadmissible unless made to a physician for the purpose of obtaining treatment. (*Allen* v. *Reed,* 45 N. Y. 578; *Rocher B. C. & N. R. R. Co.,* 105 N. Y. 294.) These decisions rest on the principle (1) that if the plaintiff is living, he is competent to testify as to his own pain and suffering, and hence there is no need of allowing an exception to the Hearsay Rule in favor of testimony of third parties as to statements made by plaintiff bearing upon his then internal physical condition; (2) that if plaintiff is dead, evidence as to his pain and suffering is irrelevant in an action based on his death as a new and distinct cause of action.

Whether this reasoning be sound or not, (*Wigmore on Evidence,* Vol. 3 # 1719,) the rule in this State, as to the admissibility, through testimony of a third party, of statements bearing on the present internal physical condition of declarant, is clear. It would seem, therefore, that the ruling in the principal case is a

positive departure from the limitation of precedent, and a reversion to the early New York doctrine. (*Caldwell* v. *Murphy, supra.*)

It is submitted that on the facts of the principal case, the evidence was properly admitted.

CONDITIONAL SALE—FORECLOSURE OF LIEN—EFFECT THEREOF. —In an action to foreclose a lien under Sec. 139 of the Municipal Court Act on an agreement in form of lease which provided for payment in installments of the agreed value of certain articles, as rental, and the right to purchase them for one dollar on completion of rental payments, *Held,* on appeal, that the instrument though called a lease was in fact a conditional sale and that plaintiff's election to foreclose invested defendant with title to the goods together with the right to such defences to the action as the facts warranted. (*Bramhall-Deane Co.* v. *McDonald,* 172 App. Div. 780.)

A contract of conditional sale may take such form as the parties choose to give it, "but the legal aspect must depend not upon the name which the parties have applied to the contract, nor upon the form of the instrument, but upon the intention as evidenced by the entire contract." (35 Cyc. 654, and cases cited.) Where, therefore, the written contract is substantially a contract of conditional sale, the courts so regard it, notwithstanding the instrument may term itself a "contract of hiring" (*Jacob* v. *Haefelien,* 66 N. Y. Supp. 1007; similarly held in New Jersey, see *Lauter Co.* v. *Isenreath,* 72 Atl. Rep. 56) or a "lease" (*Gardner* v. *Town of Cameron,* 155 App. Div. 750, affd. 215 N. Y. 682) or that the installments of the purchase price to be paid are denominated as "rent" (*Equitable Gen'l. Providing Co.* v. *Eisentrager,* 34 Misc. 179; *Campbell Printing Press, etc., Co.* v. *Oltrogge,* 13 Daly 247; *Hoffman* v. *White Sewing Mach. Co.,* 108 N. Y. Supp. 253; *Ostrander* v. *Bricka,* 154 N. Y. Supp. 786). On the construction of the contract in the principal case as one of conditional sale, the holding is in sound accord with the New York decisions to the effect that where the stipulated rental payments of an agreement aggregate the value of the leased property and are to be substituted for it a sale is at law shown to have been intended.

Section 139 of the Municipal Court Act (laws of 1910, c. 542, in force until August 31, 1915; corresponding Secs. 70 and 73, Municipal Court Code, Laws of 1915, c. 279) prohibited in the Municipal Court any action arising on a contract of conditional

sale of personal property except an action to foreclose a lien. Hence a conditional vendor not availing himself of his remedy under Art. 4, Personal Property Law (Consol. Laws, c. 41) to re-take the property, nor bringing an action of conversion in the proper court, can bring an action to foreclose a lien, but an election so to do is binding upon him and conversion will not thereafter lie (*Kirk* v. *Crystal,* 118 App. Div. 32, affd. 193 N. Y. 622), nor can he asserting his own title have a lien upon his own goods (*Nelson* v. *Gibson,* 143 App. Div. 894) for it is the well settled law of New York that a conditional vendor cannot have both the property and the purchase price (see *White* v. *A. W. Gray's Sons,* 96 App. Div. 154, and cases there cited), and where foreclosure of a lien is elected, defendant (the conditional vendee), is vested both with title and the right to such defenses to the action as the facts warrant (viz., the vendor's breach of warranty, is in the principal case).

CORPORATIONS—OBLIGATION TO PAY FOR UNISSUED STOCK DELIVERED AT REQUEST OF THIRD PARTY.—Defendant, by a written contract with one M, agreed that he would subscribe for stock in plaintiff corporation. Pursuant thereto, a certificate of stock was delivered to him. The corporation later sued on the agreement. *Held,* the contract being between M and defendant, the corporation could not take advantage of the contract, there being no obligation between M and the corporation. (*Sanders* v. *Proctor,* 172 App. Div. 713.)

Accepting and holding a certificate of stock is sufficient to constitute one a stockholder, and he becomes liable for the price of the shares. (*Cook on Corporations,* vol 1, sec. 52, p. 252; 10 Cyc. 381; *Upton* v. *Tribilcock,* 91 U. S. 45; *Chubb* v. *Upton,* 95 U. S. 665.) It is equivalent to a subscription or agreement to take the stock. (*Barron* v. *Burrill,* 86 Me. 72; *Clevenger* v. *Moore,* 71 N. J. L. 148; *H. & N. H. R. R.* v. *Kennedy,* 2 Conn. Rep. 509.) The early New York cases also followed this doctrine, although the question as to the liability of defendant to pay for stock delivered at the request of a third party, does not seem to have ever been adjudicated. (*Rensselaer* v. *Westel,* 21 Barb. 56; *Seymour* v. *Sturgess,* 26 N. Y. 134.) A decided change was brought about by section 53 of the New York Stock Corporation Law, however: "At the time of subscribing every subscriber whose subscription is payable in money shall pay to the directors ten per centum upon

the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment."

Whatever the law may have been in New York prior to the statute, it is now well settled that no subscription for stock is valid unless the ten per cent. is paid to the directors in cash. The Court in the principal case based its decision upon the absence of obligation between M and the corporation which was necessary to bring the case within *Lawrence* v. *Fox* (20 N. Y. 268). Non-performance of the above-stated requirement would seem to have been sufficient ground for the dismissal of the complaint, obviating the need of adverting to the sole beneficiary doctrine to sustain the decision, which was manifestly sound in the conclusion reached.

REAL PROPERTY—TITLE TO STREETS—VAULT SPACES UNDER STREETS.—Plaintiffs sought to enjoin defendants perpetually from interfering with vault spaces beneath their premises on Cortlandt Street in New York City, basing their claim on alleged ownership of the soil, in fee, under a Dutch grant in 1644, before the street existed as such. The City Council laid out the street in 1733, and a statute permitted the widening of it by five feet on each side in 1784. Plaintiffs or their predecessors in title built the vaults in 1859, without the municipal permission or the payment which were then required by ordinance. Defendants discovered the vaults in 1912 and demanded that plaintiffs obtain a permit and make the required payments, claiming that the City obtained the fee to the five feet of additional width under the authorizing statute of 1784. *Held,* that the right of the City to compel the obtaining of such a permit and the payment of the sums demanded exists, irrespective of the ownership of the fee, as an element in the authorized regulation and supervision of the streets. (*Appleton* v. *City of New York,* 219 N. Y. 150.)

The right of sovereignty of the Dutch government under the Roman-Dutch civil law, by which the title to a public street was in the sovereign, (*Dunham* v. *Williams,* 37 N. Y. 251,) did not pass to the British Crown upon the surrender of the town to that power, but all fee titles remained securely vested in their private owners. (Capitulation Articles of 1664.) Thereafter, when the City Council dedicated the property in question to use as a public street, the fee remained in the owners. (*Barclay* v. *Howell's* Lessee, 6 Peters, 498.) When the street was subsequently widened, nothing was said in the authorizing statute, (Laws of

1784,) prescribing the taking of the fee to the land appropriated. Where the language and intent of a statute do not otherwise require, the fee remains in the owner. (*Mott* v. *Eno,* 181 N. Y. 346.) But, owners of the bed of a street have no right to construct vaults therein without permission of the municipal authorities. The City has the duty of supervision and inspection of the streets. (*Ryan* v. *Franklin,* 199 N. Y. 347.) The right of the public authorities to exact a payment or fee for a permission or privilege of exercising a private possession or advantage in a public street * * * is undoubted. (*Deshong* v. *City of New York,* 176 N. Y. 475; *City of New York* v. *Rice,* 198 N. Y. 124.)

There can be no doubt, in view of the cited authorities, that the defendant's contention as to the ownership of the fee, is erroneous. However, having in mind the modern tendency of the courts to strengthen the hands of municipalities in their efforts to regulate or supervise private ownerships which come in contact or conflict with public purposes, it is submitted that the holding in the principal case is entirely in accord therewith, and is a decision dictated by the doctrine of public policy.

NAVIGABLE WATERS—RIGHT OF STATE TO GRANT FEE NOT SUBJECT TO PUBLIC EASEMENT.—Plaintiffs seek injunction for the removal of permanent structures between high and low water marks at Coney Island. Defendant Huber, an upland owner, shows an unqualified grant to three hundred feet of shore from the State. *Held,* a grant of public lands under navigable waters containing no restrictions is not subject to any easement in favor of the public. (*People* v. *Steeplechase Park, et al.,* 218 N. Y. 459.)

At common law the *jus privatum,* or right of private property to the soil under navigable waters, was presumptively in the Crown. But the *jus privatum* was subject to the *jus publicum,* or trusteeship of the Crown for the public. (*Bardes* v. *Herman,* 144 N. Y. Supp. 1098; *Arnold* v. *Mundy,* 6 N. J. Law 1; Fowler's Real Property Law of the State of New York, p. 100.) The Crown could not alienate the *jus publicum.* (*Attorney General* v. *Richards,* 2 Anst. 603; *People* v. *Vanderbilt,* 26 N. Y. 287, 293; Farnham, Water and Water Rights, Vol. 1, pp. 100-102.)

It does not appear that the higher courts of this State have ever before passed on the exact question involved in the principal case, but there are many cases containing conflicting dicta. Those relied upon by the Court involve grants to promote navigation,

commerce and public purposes, the right to make which is not disputed. (*People* v. *N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Langdon* v. *Mayor &c.*, 93 *id.* 129; *Saunders* v. *N. Y. C. & H. R. R. R. Co.*, 144 *id.* 74; *Coxe* v. *State of New York*, 144 *id.* 396; *Matter of Long Sault Devclopment Co.*, 212 *id.* 1; *People* v. *D. & H. Co.*, 213 *id.* 194.)

On the other hand in the same and other New York cases the doctrine of the right of the public against the individual and against adverse legislation as to navigable waters, and lands under such waters, has been repeatedly upheld. (*People* v. *N. Y. & S. I. F. Co., supra; Bedlow* v. *N. Y. Floating Dry Dock Co.*, 112 N. Y. 263, 274; *Coxe* v. *State of N. Y., supra; Matter of Long Sault Development Co., supra.*) In other States, on facts almost similar to those in the principal case, courts have reached an opposite conclusion, and have decided that the title to the soil underneath the water can be in a private owner, (*Treat* v. *Lord*, 42 Me. 552; *Little Rock, M. R. & T. R. Co.* v. *Brooks*, 39 Ark. 403; *Packer* v. *Ryder*, 144 Mass. 440; *Forestier* v. *Johnson*, 127 Pac. Rep. 156; *Illinois C. R. Co.* v. *Illinois*, 144 U. S. 387.) With this doctrine the text writers seem to be in accord. (Farnham—Water and Water Rights, p. 229; Fowler's Real Property Law, p. 100; Angell, Tide Waters, p. 64; Gould, Law of Waters, p. 75, Ed. of 1883.)

In the principal case, three judges held that the State controls the *jus publicum* as well as the *jus privatum*. One judge recognized the right of the public to unobstructed navigation, but said that there was "no substantial interference with navigation". Three judges, dissenting, held that there should be "an implied reservation of public rights", which seems to be supported by the weight of authority. A rule based on "substantial interference" could probably be supported by some of the previous decisions and the text writers, but the principle laid down by the judges in the prevailing opinion appears to be an innovation in the New York law of lands under navigable waters.

NEGLIGENCE—PROXIMATE CAUSE.—Defendant in violation of law stored an open chest of nitroglycerin caps on public land. The caps were packed in tin boxes labeled "Blasting caps, handle with care." The tin boxes were packed in unmarked wooden boxes. Two boys, of the ages of twelve and thirteen, carried off one of the wooden boxes, emptied the contents of most of the tin

boxes into it, and hid their spoils about one-half mile distant. The next day they carried off the box, and the decedent, a boy aged eight, ran after them. There was an explosion and the three boys were killed. In an action to recover for the death of the plaintiff's intestate, *held,* that his death was not the proximate result of the open chest in the highway, but that the purpose of the boys in stealing the caps, the period of time which intervened between the theft and the explosion and the change of place, constituted a series of new and unexpected causes which had to intervene before said explosives could bring death to the intestate. Defendant being liable for only the proximate consequences of his wrong, the complaint was dismissed. (*Perry* v. *Rochester Lime Co.,* 219 N. Y. 60.)

Although the defendant's violation of a statute or ordinance and the plaintiff's injuries consequent thereupon be shown, the former will not be liable merely because his act constituted a violation of a state or municipal law, but only if such act proximately caused the injuries complained of. (21 Cyc. 480 and cases cited.) The wrong-doer must answer for only those consequences of his wrongful act, which, as a reasonably prudent man he ought to have foreseen. (*Hall* v. *N. Y. Tel. Co.,* 214 N. Y. 49; *Atchison & T. & S. F. Ry.* v. *Calhoun,* 213 U. S. 1, 7; *McDowell* v. *Great Western Ry.* 1903, 2 K. B. 331, 337.)

The defendant owed to the children who frequented and played on the public place whereon the explosive was stored, a duty to guard them against perils, reasonably forseeable (*Travell* v. *Baunerman,* 174 N. Y. 47; *Walsh* v. *Fitchburg R. R. Co.,* 145 *id.* 301.) It was contended, however, that such duty was not now called into play, since the acts of the two boys in stealing the wooden box, removing the caps, carrying them away, hiding them, and then killing the plaintiff's intestate the following day, were not a proximate result of the open chest being left in the highway, and were not within the range of reasonable expectation. "The remoteness of the relation" says Cardozo, J., speaking for the Court, "controls our judgment and distinguishes the case at hand from others where liability has been enforced". This holding is in entire accord with a very recent Massachusetts decision, (*Moran* v. *Inhabitants of Watertown,* 217 Mass. 185,) wherein, under similar facts, the Court held that the dynamite was not the proximate cause of the injury. (See also *Jacobs* v. *N. Y. N. H. & H. R. R. Co.,* 212 Mass. 97; *Afflick* v. *Bates,* 21 R. I. 281.) It is submitted that the trend displayed by the principal case and the case in 217 Mass. *supra,*