

Recent Cases Noted

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RECENT CASES NOTED

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—DUTY OF THE STATE TO FURNISH EQUAL EDUCATIONAL FACILITIES TO NEGROES.—Lloyd Gaines, a negro citizen of Missouri, was denied admission to the Law School of the University of Missouri, a public institution, solely on the ground of his color. Petitioner sued out a writ of mandamus to compel the curators of the University to admit him. *Held*, the judgment of the Supreme Court of Missouri denying the mandamus, reversed. *Missouri ex rel. Gaines v. Canada*, 59 Sup. Ct. 232 (1938). Although a state is under no obligation to provide a law school education or any sort of education for its citizens, if it does so undertake, it must afford its citizens equal rights thereto, regardless of race, creed or color. (*Gong Lum v. Rice*, 275 U. S. 78, 48 Sup. Ct. 91 (1927); *Ward v. Flood*, 48 Cal. 36 (1874)). Whether a statutory provision, as appeared herein, providing for the establishment of "scholarships" for negroes whereby they may procure their education in out-of-state universities was a denial of the equal protection of the laws, was left open in the case of *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936). The instant case decided the question in the affirmative.

CONSTITUTIONAL LAW—IMMUNITY OF FEDERAL EMPLOYEES FROM STATE TAXATION.—The question involved is the constitutionality of the New York State income tax as applied to the income of a federal employee. The New York courts held such tax an unconstitutional burden upon the functions of the Federal Government on the authority of *Rogers v. Graves*, 299 U. S. 401, 57 Sup. Ct. 269 (1937) which case held that New York could not tax the income of an employee of the Panama Railroad Company, wholly owned by the United States. On *certiorari*, *held*, reversed. (Butler and McReynolds, JJ., dissenting.) The immunity is not one to be implied from the Constitution because, if allowed, it would impose an unlawful restriction on the taxing power which the Constitution has reserved to state governments. *New York ex rel. O'Keefe v. Graves* (Reported in N. Y. Times, Mar. 27, 1939).

By the instant decision the Supreme Court has directly reversed all those prior cases which held that such taxation imposed an unconstitutional burden on the Federal Government. These overruled cases (*Rogers v. Graves*, *supra*, *Dobbins v. Commissioners*, 16 Pet. 435 (U. S. 1842), were based on the erroneous conception that the immunity of a government or its instrumentality (*McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819)) extends to the salaries of its officers and employees. The extensions of such immunity (see *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171 (1922) where it was held that income derived by a lessee from lands leased to him by the

government was exempt from state taxation) were halted by the cases of *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 Sup. Ct. 172 (1926), *James v. Dravo Co.*, 302 U. S. 134, 58 Sup. Ct. 208 (1937), and *Helvering v. Producers Corp.*, 303 U. S. 376, 58 Sup. Ct. 623 (1937). In the last case cited, the court held that the implied immunity, as a principle of constitutional construction, should be narrowly restricted inasmuch as such immunity tended to restrict the sovereign power of the state to tax. In its re-examination of the question involved in the instant case, the court found that such a tax did not interfere with the functions of the Federal Government, and since such was the supposed reason for the rule allowing immunity, the rule must fall.

In strong *dicta* appearing throughout the opinion of Justice Stone, speaking for the majority, and in the concurring opinion of Justice Frankfurter, the Court intimates that a federal income tax on the salaries of state employees would likewise be upheld. In this event the leading case of *Collector v. Day*, 11 Wall. 113 (U. S. 1870), would be overruled.

CORPORATIONS—RIGHT TO APPEAR IN PERSON.—Plaintiff corporation prosecuted an action against defendant and signed the summons in its corporate name. Defendant appeared specially to set aside the summons on the ground that such action constituted an unlawful practice of law. *Held*, defendant's motion denied. The corporation is a "person" under Section 37 of the General Construction Law and since a person may prosecute and defend an action in his own name (*O'Brien v. Lasher*, 206 App. Div. 623 (2d Dept. 1923)) the corporation is likewise so authorized. *Victor & Co. v. Sleiminger*, 255 App. Div. 673, 9 N. Y. S. (2d) 323 (4th Dept. 1939). Prior to this decision the weight of authority in this state and elsewhere was that a corporation could not appear in person (*Osborn v. Bank*, 9 Wheat. 738 (U. S. 1824), *Brandstein v. White Lamps, Inc.*, 20 F. Supp. 369 (S. D. N. Y. 1937), *Mortgage Commission v. Great Neck Improvement Co.*, 162 Misc. 416, 295 N. Y. Supp. 107 (1937), *Bindery v. Eastern States Co.*, 166 Misc. 904, 3 N. Y. S. (2d) 419 (1938), *Whalen v. Pritzert*, 167 Misc. 471, 3 N. Y. S. (2d) 418 (1937)). The court in the instant case disregards all those vital arguments against permitting a corporation to sue in its own name (see (1937) 12 ST. JOHN'S L. REV. 148) and holds that Section 236 of the N. Y. Civil Practice Act ("A party who is of full age may prosecute or defend a civil action in person * * * unless he has been judicially declared to be incompetent * * *") and gives the corporation the same rights that a natural person has. The decision is based in part upon the fact that Section 280 of the N. Y. Penal Law makes it "unlawful for any corporation * * * to practice or appear as an attorney-at-law for any person other than itself" which leaves the in-

ference that it is legal for a corporation to act as attorney *for itself*. But it is submitted that Section 4 of Article 10 of the State Constitution giving corporations the right to sue and be sued cannot be extended logically to give them the right to appear in person. Section 236 of the Civil Practice Act applies only to natural persons because only they can be "of full age" or be declared "incompetent".

LIMITATIONS OF ACTIONS—EFFECT OF GRANTING PROVISIONAL REMEDY.—Action by the receiver of the First National Bank of Detroit to compel defendant, a stockholder, to pay an assessment levied pursuant to statutory liability. Under the three-year period of limitation assumed by the court (plaintiff contended it was six years because the action is based on an implied contract to pay assessments; see *Barbour v. Thomas*, 86 F. (2d) 510 (C. C. A. 6th, 1936)) the statute would have barred the action on May 16, 1936. On May 13, 1936, the plaintiff procured a writ of attachment; service by publication on the non-resident defendant was authorized on May 22, 1936, and completed on July 9, 1936 (N. Y. RULES OF CIV. PRAC. 51). Defendant argues that no action was "commenced" until service of the summons by publication was "complete". *Held*, the granting of the provisional remedy on May 13, 1936 gave the court jurisdiction over the action. *Schram v. Keane*, 279 N. Y. 227, 18 N. E. (2d) 136 (1938). The jurisdiction so acquired by the court is conditional and liable to be divested (N. Y. CIV. PRAC. ACT § 825) unless personal service is thereafter made within thirty days or service by publication is commenced within the same period (N. Y. CIV. PRAC. ACT § 905). Where there is a failure to comply with the condition, the action falls; where there is compliance, the granting of the provisional remedy marks the commencement of the action. Herein service by publication was commenced in time and completed according to Section 51 of the Rules of Civil Practice. Although the court states that there is no authoritative decision upon the question in this state, the cases of *Import Chemical Co. v. Foster*, 172 App. Div. 406, 158 N. Y. Supp. 409 (1st Dept. 1916), and *Logan v. Greenwich Trust Co.*, 144 App. Div. 372, 129 N. Y. Supp. 577 (1st Dept. 1911), *aff'd*, 203 N. Y. 611, 96 N. E. 1120 (1911) directly touched upon the point and held that an action is commenced by the granting of a provisional remedy.

TORTS—CONTRIBUTION BETWEEN JOINT TORT-FEASORS—§211-a OF CIVIL PRACTICE ACT.—Plaintiff was injured by a flower pot which fell off a party wall jointly maintained by defendant-owners. Parcel 1 was owned by *A* and *B*; parcel 2 was owned by *C*. Judgment was rendered against all three, and was paid by *A*. *A* brought this ac-

tion against *C* to recover one-half the judgment. *C* contended that since Section 211-a of the N. Y. Civil Practice Act provides for contribution in *pro rata* shares, his share of the damages should only be one-third. *Held*, judgment for one-half the amount paid by *A*. *Wold v. Grozalsky*, 277 N. Y. 364, 14 N. E. (2d) 437 (1938). Although it is true that the *pro rata* share is determined by dividing the amount by the number of persons involved in the action, such method of determination is employed only where the act involved is an active one—thus, where negligence is involved, it must be active negligence. Herein, the only reason why the action was brought against three defendants was because one of the houses was owned by two persons. There is a clear distinction between a direct participation in a wrong, and a participation because of one's ownership of property. In the latter case the negligence is merely passive in nature. This distinction was recognized in *Martindale v. Griffin*, 233 App. Div. 510, 253 N. Y. Supp. 578 (4th Dept. 1931) where it was held that although a judgment in an action for negligence was rendered against three defendants, two (the owner and the driver of a car) were liable only for one-half the judgment. To apply the method of division urged by *C* would be to work an injustice and to disregard the fact that the rule allowing contribution is founded upon principles of natural justice and equity.

TORTS—LIABILITY OF UNEMANCIPATED CHILDREN—PUBLIC POLICY.—Plaintiff brought an action against defendant, his sister, for personal injuries sustained because of her negligent operation of an automobile owned by her father. Both children are unemancipated and live with their parents. Defendant contends that the action is not maintainable on the ground of public policy, since it would tend to disrupt the family relationship. A further defense interposed by the insurance company was that to permit such actions would be to encourage fraud. On appeal from a judgment in favor of the plaintiff, *held*, affirmed. The maintenance of such an action is neither forbidden by public policy nor by statutes. *Rozell v. Rozell*, 256 App. Div. 61, 8 N. Y. S. (2d) 901 (3d Dept. 1939). Accord: *Munsert v. Farmers Mutual Ins. Co.*, 281 N. W. 671 (Wis. 1938).

Although it is well settled that an unemancipated infant cannot sue his parent for an unintentional tort (*Sorrentino v. Sorrentino*, 248 N. Y. 626, 162 N. E. 55 (1928)) such disability does not attach in a suit against his unemancipated infant sister. In such a case, culpability is not distinguishable from liability. (Cf. *Shubert v. Shubert*, 249 N. Y. 253, 164 N. E. 42 (1928)). The recent amending of Section 57 of the N. Y. Domestic Relations Law by Laws of 1937, c. 669, which permits personal tort actions between spouses, indicates

a legislative policy and intent to reverse the common law rule disallowing tort actions among members of one family. The court makes the further point that the reason for the common law rule disallowing such actions does not exist in the instant case inasmuch as the insurance company is the defendant. It is submitted, however, that the argument made by the court concerning the insurance company is a superficial one; future holdings will probably be the same whether or not an insurance company is involved.