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Supreme Court Decisions

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MUNICIPAL CORPORATIONS—WARRANTS—*Town of Morrison, et al. vs. Burke*—No. 14395—*Decided October 17, 1938—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed.* EN BANC.

FACTS: Suit brought on a warrant of the town of Morrison. The town's principal defense is that there was no compliance with sections 199 and 200, Chapter 163, 1935 C. S. A., pertaining to the method and extent of appropriations for necessary expenses and liabilities.

HELD: The burden of sustaining an affirmative defense is on the defendant town urging it.

2. The presumption is that public officials conduct their affairs in a legal manner, and that presumption exists as to the validity of the warrant; the evidence submitted by the town to show that the authority for the issuance of the original warrant was never given is not convincing.

3. If the officer has properly received moneys, but has improperly and wrongfully paid them out, he cannot in the eyes of the law answer that they are not in his possession.

4. Where it is once determined that the town treasurer is conclusively presumed to have sufficient money, Section 219, Chapter 163, Vol. 4, 1935 C. S. A., imposes a clear legal duty on him to pay the warrant.

5. "Section 342 of the Code provides: 'The writ of mandamus may be issued * * * to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station * * *.'"

Opinion by Mr. Justice Bakke.

CRIMINAL LAW—LARCENY—*Frink vs. People*—No. 14410—*Decided October 17, 1938—District Court of Alamosa County—Hon. John I. Palmer, Judge—Judgment affirmed as to guilt, but reversed and remanded as to sentence.* EN BANC.

HELD: 1. Where defendant is found guilty of larceny of an unbranded colt, upon which the jury placed a valuation of $5.00, and sentenced to serve a period of from two to four years in the penitentiary, the court erred in its sentence, for it should have been based upon a verdict of petit larceny, since the value of the colt was not more than $20.00.

2. Larceny of livestock under either Section 33, Chapter 160, Vol. 4, C. L., Sec. 3149 or Sec. 93 of Chapter 48, Vol. 2, 1935 C. S. A. is a felony, subjecting anyone convicted thereof to sentence to the penitentiary; and that for the purpose of prosecution under either, they are in *pari materia,* and no allegation and proof of value is necessary.

3. But such provisions are not exclusive of the general larceny statute (Sec. 85, Chapter 48, Vol. 2, 1935 C. S. A.) and where the Dis-

trict Attorney injects the question of value and introduces evidence in relation thereto, he has elected to try it as petit larceny.

Opinion by Mr. Justice Bakke.

CRIMINAL LAW—GAMBLING—INTENT—JOINT TRIAL—EVIDENCE —*Wilson, et al. vs. People*—No. 14381—*Decided October 17, 1938*—*District Court of Arapahoe County*—*Hon. S. W. Johnson, Judge*—*Affirmed.* EN BANC.

HELD: 1. A count in an information is sufficient where it alleges that the defendants were in the habit and practice of gambling for a livelihood, and it is immaterial whether or not it is alleged that they were without a fixed residence. Gambling for a livelihood is a violation of the statute irrespective of the question of residence.

2. There is no merit in the contention that defendants may not be tried jointly for engaging in gambling for a livelihood. So engaging is not necessarily for a personal or individual purpose; although intent, in crimes where that is an ingredient, is personal and individual.

3. Evidence examined and found sufficient to support count that defendants had played at a game.

4. Betting on horse racing constitutes a "game" within the meaning of the statute.

5. The action of playing a game with the aim of gain is the gist of the offense and it is immaterial whether the defendants played against each other or with each other against others.

6. It is the general rule that where the means by which a crime may be committed are set forth in the statute in the disjunctive, they should be alleged in the information in the conjunctive; but the rule is not applicable here because it is clear that the purpose of the statute is to interdict the playing of a game for gain, and the words "money or other property of value" comprehend nothing more than the playing of a game for property of all kinds.

7. It was not error for the trial court to permit the jury to take to their jury room, over objection of defendants, a bushel basket full of papers found in the defendants' room at the time of the arrest. The reasons assigned for the rule at common law, permitting the jury to take to the jury room papers under seal and not those unsealed, had ceased when Colorado became a political entity, and, therefore, was not a part of the common law which was incorporated into our system of criminal jurisprudence.

8. It was not error for the trial court to admit the testimony of one to a former arrest of one of the defendants and as to his plea of guilty of conducting a gambling house when arrested under circumstances similar to those in the instant case. Gambling for a livelihood was one of the charges; and from the very nature of that offense it is a continuing one and may and usually does involve many separate acts.

9. There are certain things such as transactions on stock exchanges, matters on which men act in weighty affairs of life, that are so

generally accepted that one having knowledge of them derived through the ordinarily relied upon avenues of information may testify concerning them.

10. "While the jury could draw no inference of guilt from" the failure of defendants to take the stand, "if the record discloses, as this one does, facts consistent with guilt without explanation or denial by those who knew best what they were doing—defendants themselves—they cannot complain of an adverse verdict and judgment" supported by sufficient competent evidence.

Opinion by Mr. Justice Young. Mr. Justice Hilliard and Mr. Justice Bouck dissent.

CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION—STATE CONTRACTS—*Smith-Brooks Printing Co., et al. vs. Young, et al.*—No. 14433—*Decided November 18, 1938—District Court of Denver—Hon. Henry S. Lindsley, Judge—Affirmed.* EN BANC.

HELD: 1. "When words having different but well recognized shades of meaning are used in a statute they should be given that shade of meaning that makes the statute reasonable and brings it within the constitutional powers of the legislature to enact it."

2. The general assembly may not delegate the power to make a law, but it may delegate power to determine some fact or a state of things upon which the law, as prescribed, depends.

3. The laws of this State require that while prior general compliance with prevailing standards of working hours and conditions in the conduct of its private business is not a condition precedent to the right to bid on state printing, compliance with such standard in carrying out the contract is requisite to a lawful and full performance of any such contract entered into with the State.

4. The legislature may authorize the Industrial Commission to determine what the prevailing wages, hours of work and working conditions in the printing business are, and the words "fixed and prescribed by the industrial commission," are construed to mean "found and determined by the industrial commission."

5. The State has the right to determine and set the rules under which one seeking to do work for it must operate.

6. It is not necessary that the same rules and regulations be made to apply to all industries for while a state has the power to prescribe regulation for more than one industry, this does not invalidate its regulation of one to the exclusion of another non-competitive industry.

7. Section 7, Chapter 214, S. L. 1937 (Sec. 72, Chapter 130, 1935 C. S. A.—1937 Supplement) is in harmony with and not repugnant to section 29 of Article V of the Constitution.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke dissenting in part. Mr. Justice Holland not participating.

NEGLIGENCE—SIDEWALKS—DUTY TO KEEP SAFE—CITY—GOVERNMENTAL CAPACITY — DAMAGES — NEW TRIAL—EVIDENCE—*Belcaro Realty Inv. Co., et al. vs. Norton*—No. 14178—*Decided November 7, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.* EN BANC.

FACTS: This is an action for $30,000 damages grounded on negligence, brought by Norton against the Belcaro Inv. Co. and the City and County of Denver. Defendants seek reversal of a judgment against them in the sum of $6,250.00.

Mrs. Norton was standing at the curb waiting for a bus. Directly behind her was a rectangular depression some four feet in size and five inches deep with an elm tree in the center. It had been the desire of the City to preserve this elm tree. As Mrs. Norton stepped back from the curb line away from the approaching bus, she stepped into this depression, lost her balance and fell against the projecting edge of the walk, thereby sustaining permanent injuries. The Realty company was the owner of the abutting property.

HELD: 1. Both the owner of the abutting lot and the City are under a common obligation to keep safe the sidewalk in front of such lot. If the plaintiff is injured by their failure in this respect, which failure would be a common neglect of duty, the plaintiff would have his election to sue the defendants jointly or severally.

2. It is within the power of the jury to decide whether or not a City was acting in a governmental capacity, and evidence to the effect that the City was pursuing a policy to make it a "City beautiful" is admissible.

3. It is only when the reason for setting aside the verdict relates solely to damages disassociated from every other contributing, related or vitiating cause that the new trial should be limited to the question of the amount of damages.

Opinion by Mr. Justice Bakke.

Mr. Chief Justice Burke and Mr. Justice Holland not participating. Mr. Justice Bouck dissents.

LEASE AND OPTIONS—EVIDENCE—ABILITY TO PAY—*Cline vs. Estate of Heron*—No. 14312—*Decided November 7, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.* EN BANC.

FACTS: Plaintiff in error, who was plaintiff below, sued for an accounting, and specific performance of a contract to purchase certain lands and a house, under an alleged option in a lease. Judgment was entered in favor of the defendants on their cross complaint, and for damages in the sum of $3,200.00. This case involves the construction of paragraph eight of a lease, to wit: "Lessee shall have the right and option to purchase said property on or before July 10, 1936, by paying to the lessor in cash an amount representing the actual cash investment of the lessor, including principal, accrued interest and taxes or other items paid by the lessor, including interest on above at the rate

of 5% per annum; lessee to receive as credits monies paid to lessor as rents from this property, provided he exercises his rights under this option. Said option must be fully complied with as to all properties herein described, a partial purchase not being permissible hereunder." The lease was extended to August 15, 1937. On August 12, 1937, Cline sent "Notice of exercise of option" to Mrs. Heron, executrix of the estate of the original lessor.

HELD: 1. Extension of the lease to August 15, 1937, also extended the option to the same date.

2. The finding of the trial Court that plaintiff had failed to comply with the terms of the option, was supported by sufficient competent evidence, and will not be set aside.

3. It is obvious from the language used that the giving of credits was to be a condition subsequent. Therefore, a major issue was plaintiff's ability to pay at the expiration date.

Opinion by Mr. Justice Bakke. Mr. Justice Holland did not participate.

ESTATES—ADMINISTRATORS—COMPROMISE AGREEMENTS—SETTING ASIDE OF—EVIDENCE—*Estate of Shultz vs. Hyssong, et al.*—No. 14303—*Decided November 7, 1938—County Court of El Paso County—Hon. Hubert Glover, Judge—Affirmed.* EN BANC.

FACTS: Plaintiff in error, WIliam R. Shultz, as administrator of the estate of his deceased son Glenn, is here asking the Court to reverse a judgment rendered by the County Court of El Paso County whreby it refused to set aside the compromise of a claim against the estate. Glenn Shultz died intestate on February 10, 1936, leaving as his sole surviving heirs, his mother, and his father, the said William R. Shultz. In 1932, Glenn had caused to be incorporated the Glenn Shultz Auto Supply Company. Its stock was issued as follows: to Glenn Shultz, 9,998 shares; to Ray Mervine, 19,501; and to Harry Hyssong, 120,501. All this stock was claimed by the administrator as the property of the intestate. A contract was agreed upon by William R. Shultz, as administrator, by Mervine and Hyssong, by the attorneys of all three, and by the attorney for Glenn's mother. Thereunder Mervine and Hyssong would receive the stock standing in Glenn Shultz's name upon payment of $12,500. The contract was submitted to the County Court for approval and was duly approved. Subsequently, the administrator filed a petition seeking to have the contract set aside, the ground alleged being that the contract had been executed while the petitioner was "sick and enfeebled in body and mind, and not understanding the terms, conditions and provisions thereof, and not being represented by counsel to explain the entire effect thereof." The Court dismissed the petition.

HELD: 1. Even if the order approving the contract was made without testimony and if evidence were required, the stipulation between the parties would be deemed its equivalent.

2. Shultz cannot avail himself of any technical defect whereof he may have been guilty.

3. Shultz cannot raise the question that the contract was contrary to the statutes of Colorado, because he brought about the situation of which he complains.

4. Shultz cannot now personally profit by any dereliction of his as administrator, when his own contract thus affects only the rights of himself and those of his consenting coheir.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Holland not participating.

TRUSTS—SPENDTHRIFT TRUSTS—*Newell vs. Tubbs, et al.*—No. 14418—*Decided November 21, 1938*—*District Court of Denver —Hon. Henry S. Lindsley, Judge*—*Affirmed.* IN DEPARTMENT.

FACTS: B died testate providing in his will, among other provisions, as follows: "All the rest, residue and remainder of my estate shall be converted into cash and invested in income producing securities approved by law for savings banks and for investment of the funds of estates, the said income to be proportionately used for the education of my great-grandchildren, the principal to be divided among said great-grandchildren, share and share alike, when the youngest great-grandchild, now living, shall have attained the age of twenty-one years." N, one of the great-granchildren of B, was one of the beneficiaries under the trust. He assigned his interest, for valuable consideration, in 1934, to T and S. Later in 1934, N and his wife executed and delivered to T and S a further formal release in which they acknowledged that their attorney had fully explained all of their right and liabilities arising out of the transaction.

N now brings suit seeking a decree annulling and cancelling the assignment and for an accounting, claiming the trust to be a spendthrift trust, and therefore, not assignable.

HELD: 1. The language used did not create a spendthrift trust. It is only by the use of language similar in meaning and legal import to that contained in the document under consideration in the recent case of Snyder v. O'Connor, 102 Colo. 567, 81 P. (2nd) 773, that such a trust may be established.

2. " 'A spendthrift trust is the trust created with provisions in the trust instrument to the effect that the beneficiary shall not alienate the equitable interests or that it shall be free from its creditors.' "

3. "Clear and unequivocal language is necessary to create such a trust or, in the absence of such language, the intention to create must clearly appear from the language of the entire instrument."

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

CONTRACTS — AGENCY — GRATUITY — WITNESS — EVIDENCE — INSTRUCTIONS—*Cohen Sons, Inc., vs. Dowd*—No. 14294—*Decided November 21, 1938—District Court of Conejos County —Hon. John I. Palmer, Judge—Affirmed.* IN DEPARTMENT.

FACTS: Plaintiff sued defendant for $3,000.00 on a promissory note. The defendant in his answer set up a counterclaim, based upon the alleged breach of a contract between the parties and asking $3,000.00 damages. The contract was one wherein plaintiff was to act as agent for defendant in the sale of vegetables grown by defendant. By the contract, plaintiff loaned defendant $1,500.00 to be repaid, without interest, at the rate of $100.00 out of the proceeds of each and every car of vegetables sold by plaintiff for defendant. The defendant contended that the contract was breached by plaintiff's agent, R, in giving him false information, from day to day, concerning the markets, which plaintiff knew to be false, and that such information was given for the purpose of persuading defendant to act thereon in order that plaintiff might collect commissions on the sales of vegetables purchased by defendant. The jury found the issues for the defendant and offset the amount of the note by the amount of the damages.

HELD: 1. " 'An agent, engaged in an employment which requires special or professional skill, will be liable for losses due to his failure to possess and exercise such skill, where the agent professes and holds himself out as possessing the same, and this is true notwithstanding the agency is gratuitous.' " The cross-complaint states a cause of action.

2. "Plaintiff's contention that the cause of action fails is further refuted by its admission that 'possibly part of the testimony of the defendant' was competent, i. e., fit and appropriate to establish the proof of the issue. There would be no need of proof of any issue if there was no cause of action."

3. Evidence examined and found to sustain the preponderance required in favor of the counterclaim. "It is not unusual in civil cases that the testimony of a single creditable witness is sufficient to prove a fact in issue."

4. An instruction which leaves to the jury the question of the construction of the contract as to scope and authority, might be vulnerable to objection; but where it is tempered and limited by appropriate language in another instruction to the effect that "the plaintiff entered into the agreement with the defendant as stated in defendant's exhibit 'A', the tenor whereof you will be able to observe," there is no error in giving the former.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

ATTACHMENTS—LEVY—REDELIVERY BOND—INTERVENING CREDITORS—*Higgins, et al. vs. Business Men's Collection Bureau*—No. 14424—*Decided November 7, 1938*—*County Court of Pueblo County*—*Hon. Hubert Glover, Judge*—*Reversed.* IN DEPARTMENT.

FACTS: Judgment was entered against the plaintiffs in error for $200.00 on a redelivery bond given by the defendant, Higgins, in an attachment suit pending before a Justice of the Peace. The suit had been commenced by the defendant in error, as plaintiff. The demand was settled out of Court and the attachment proceedings were dismissed as to said plaintiff. There had, however, been an intervention by another creditor who recovered a $300.00 judgment, which was later assigned to the present defendant in error, the latter being also the first attaching creditor, whose original demand had been settled. The intervening creditor made no additional attachment levy. The question involved is whether the intervening creditor's assignee had a right to sue, as it did, on the undertaking given to it as the original.

HELD: 1. Any subsequent attachment must be actually levied before a lien thereunder can attach.

2. Inasmuch as the intervener's claim was asserted without levying an attachment in aid thereof, and consequently, no redelivery undertaking was given to it in connection with that claim, the assignee is without remedy—as the assignor itself would have been—except as the judgment which was assigned can be satisfied by means of an execution properly issued in the usual course.

Opinion by Mr. Justice Bouck.

Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Knous concur.

MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICTS—BONDS—PAYMENT OF PRINCIPAL AND INTEREST—*Eisiminger vs. Elliott, etc.*—No. 14321—*Decided November 21, 1938*—*District Court of Otero County*—*Hon. Harry Leddy, Judge*—*Reversed.* EN BANC.

FACTS: City of Rocky Ford established improvement District and issued and sold bonds. As the property holders paid their assessments, the City Treasurer deposited part of the fund in one account out of which he paid interest on the bond, and deposited part of the funds in another account out of which he paid the principal, redeeming the bonds numerically as the funds permitted. Plaintiff, holder of interest coupons on the bonds seeks to compel treasurer to pay the coupons out of both accounts on the theory that the obligation for principal and interest is one and that there is no statute requiring or permitting the establishment of two accounts.

HELD: 1. The bond is the sealed promise of the municipality to pay both principal and interest.

2. The "payment of all bonds" as prescribed by the statute and ordinance, must be construed as demanding a coincidental discharge of interest as well as principal and must be given the same effect as if the words "and interest" had been inserted immediately after the word "bonds."

3. All the monies of the district received either as principal assessments or interest thereon should be kept in one fund.

4. The City may call in for redemption, the outstanding bonds only when no interest, *matured and due,* on the outstanding bonds is in default.

5. "If at a time when no such default exists, there is in the funds of the district sufficient money to discharge the principal of a bond or bonds, the City Treasurer may, if he deems it prudent, call a bond or bonds without consideration of the interest accruing, but not yet due on the outstanding bonds of the issue, and to this extent anticipate revenue to meet the interest payment due on the next interest paying date."

6. "Where, however, defaults of matured interest have occurred, exercise of the discretion conferred by statute with respect to redemption of bonds, must be deferred until the defaulted payments have been liquidated."

Opinion by Mr. Justice Knous.

CRIMINAL LAW—LARCENY—INSTRUCTIONS—*Ruland vs. People*—No. 14429—*Decided November 21, 1938*—*District Court of Weld County*—*Hon. Frederic W. Clark, Judge*—*Reversed.* EN BANC.

FACTS: R and others were charged with the larceny of certain horses. The Court instructed the jury that the possession of stolen property recently after the commission of a theft or larceny may be a criminating circumstance tending to show that the persons in whose possession it was found are guilty of the offense of larceny, unless the jury is satisfied from the evidence that the defendants came into the possession of the property honestly. The trial Court, during the trial, stated that there was no evidence showing the stolen property to have been in R's possession.

HELD: 1. While the trial Court's statement as to the evidence is not conclusive, it is persuasive.

2. Where it appears that there is no evidence of "possession of stolen property recently after the commission of a theft or larceny," as contemplated by the instruction, the giving of such an instruction was prejudicial to the rights of the defendant.

Opinion by Mr. Justice Bakke. Mr. Justice Holland did not participate.

WRIT OF ERROR—RECEIVER—*Cline vs. Estate of Heron*—No. 14413—*Decided November 7, 1938*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Writ of Error Dismissed.* EN BANC.

FACTS: This was an ancillary proceeding to Cline vs. Estate of Heron, No. 14412. It involved the alleged impropriety of the appointment of a receiver during pendency of the case. Receiver appointed to preserve and protect a valuable crop of wheat.

HELD: 1. Even if the appointment had not been suspended, it would have become functus officio with the disposition of the main case.

Opinion by Mr. Justice Bakke. Mr. Justice Holland not participating.

BILLS AND NOTES—WIFE'S LIABILITIES FOR FAMILY EXPENSES—STATUTE OF LIMITATIONS—*Wall vs. Crawford, etc.*—No. 14402—*Decided August 8, 1938*—*District Court of Routt County*—*Hon. Charles E. Herrick, Judge*—*Affirmed.* IN DEPARTMENT.

FACTS: Suit brought on promissory note given by W, as maker, and B as accommodation endorser in 1920 for a team of horses. B had to pay the note and sued W and W's wife on theory that the team of horses was a family expense. In an attachment, certain funds coming to Mrs. W as an heir were garnisheed. She seeks reversal of judgment on the principal ground that the action is barred by the six-year statute of limitations.

HELD: 1. Where the note was extended from time to time from 1920 to 1924, when the Ws moved to California, and B, the accommodation endorser, was called upon to pay it, B's representative could sue W and his wife although more than 6 years had elapsed because Sec. 27, Ch. 102, C. L. 6417 states that the statute shall not begin to run "until he comes into the State * * *."

2. This so-called "absconding" statute applies in this case although it became effective in 1921, and the original note was executed in 1920, because of the renewal of the note subsequent to the passage of the act.

3. The contention of defendant that the time of the liability cannot be extended by the renewal notes given by her husband, on the theory that a joint debtor cannot arrest the running of the statute against his co-debtor by giving a new note without his consent, is not tenable, inasmuch as her liability for family expenses accrues under Sec. 10, Ch. 83, p. 565, Vol. 3, 1935 C. S. A., and when her husband gave new notes, he could not and did not discharge her statutory liability.

4. "Since no cause of action accrues on a note until maturity, no liability on the transaction had been incurred by plaintiff in error at the time the absconding statute was passed, and, consequently, she became subject to its provisions."

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.