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Supreme Court Decisions

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INSURANCE—CASH SURRENDER OF POLICY—AGENCY—ELECTION—RELEASE—WHEN OBLIGATION TO PAY BECOMES FIXED—*Manhattan Life Insurance Company vs. Allison*—No. 13680—*District Court of Denver, Hon. Otto Bock, Judge*—*Reversed.*

FACTS: Plaintiff in error prosecutes writ of error to reverse a judgment procured against it by Laura C. Allison on a policy of insurance, issued by the company on the life of Lewis C. Allison, in which she was named as beneficiary. Policy provided a cash surrender value for any given period or date after the policy had been in force two full years, except when the payment of any premium has been in default longer than three months. Insured sent a letter, addressed to the insurance company, to its duly authorized agent in Denver, advising that he elected to cash his policies as of a certain date, and upon request, he parted with possession of the policies with the full understanding that in doing so, he was surrendering them for the amount of cash the company had contracted to pay. The letter containing the policies was received at the Denver office in the first mail on the morning of August 3, and the policies and request were on that day mailed to the home office of the company. The insured died about 1 o'clock p. m., August 3rd.

HELD: 1. That it was not necessary for the insured to sign a proper release to complete the election, for the company may require or waive this at the time of payment.

2. That when the insured parted with possession of the policies, he had completed an election to cash in the policies, which the company had no legal right to reject, since it was under an absolute obligation to pay.

3. Insured need not wait until a premium is in default before he makes an election. En Banc.

Opinion by Mr. Justice Holland. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke dissenting.

Messrs. Benedict and Phelps, attorneys for plaintiff in error. Mr. Lowell White, attorney for defendant in error.

EXEMPT PROPERTY—CONSTABLES—STATUTES—METHOD OF COMPUTING DAMAGES—CREDITS—AUTOMOBILES—*Penrose et al. vs. Stevens*—No. 13812—*District Court of Chaffee County, Hon. James L. Cooper, Judge*—*Affirmed.*

FACTS: The defendants, Penrose et al., prosecute writ of error to reverse judgment in favor of Stevens, who shall herein be referred to as the plaintiff. Plaintiff was the owner of a Ford truck which he used

to carry on his business of trucking and hauling. In the year 1932 the defendants obtained a judgment against him in the Justice Court. About two years later the defendants caused execution to issue and placed the same in the hands of Penrose, who was then constable, with instructions that he levy upon the truck. Plaintiff set up his claim as owner, and that the truck was exempt from levy and execution and a written notice was served upon the defendants. The constable sold the truck for $175, and a balance of $64.70 was turned over to plaintiff. Plaintiff brought this action to recover triple damages under Sec. 5921, C. L. '21, basing his complaint upon the sale of property alleged to be exempt by reason of the truck being a "tool or implement," and not exceeding $200 in value, under Sec. 5912, C. L. '21.

HELD: 1. An automobile may or may not be exempt, according to the facts. Where an automobile is used in carrying on a trade or business and is meant to be used for the benefit of the head of the family, and does not exceed in value the sum of $200 it is exempt.

2. A credit should not first be deducted from the value found and the balance then trebled, but the credit should be deducted from the treble damages. In Department.

Opinion by Mr. Justice Holland, Chief Justice Burke and Mr. Justice Knous concur.

Mr. Wallace Schoolfield, attorney for plaintiff in error. Mr. Thomas A. Nevins, attorney for defendant in error.

ASSESSORS — ASSESSMENTS — SALE FOR TAXES — TREASURER'S DEEDS — REVIEW OF ASSESSMENTS — STATUTES — RECORD TITLE—*Reed, et al. vs. Zaitz*—No. 13920—*District Court of Lake County, Hon. William H. Luby, Judge—Affirmed.*

FACTS: To a decree and judgment in favor of plaintiff, defendants assign error. Defendants claim that the treasurer's deeds, the basis of plaintiff's title, are void for the reason that the assessor did not assess the premises owned by the defendant Reed as a unit and therefore the property was not subject to a sale for non-payment of taxes. The question involved is whether Reed can now attack the irregularity of the assessment of the property described in the tax deeds and thereby question plaintiff's title, under Sec. 7256, C. L. 1921.

HELD: 1. When an owner of property fails to make a statutory return of the property to the assessor and to file the schedule, the assessor may do so, the assessment being based upon the official plat and the record ownership.

2. A review of the assessment was available to the owner of the property, but it should be invoked before the county has been deprived of the use of the taxes for the period involved and before the purchaser at a tax sale is protected by Sec. 7256, C. L. 1921: "The legality of

the deed is established when the owner fails to make corrections of an assessment returned by the assessor." In Department.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

Messrs. Joseph W. Clarke and Paul W. Crawford, attorneys for plaintiff in error. Mr. Quentin D. Bonner, attorney for defendant in error.

ORAL CONTRACT—CONFLICTING TESTIMONY—LANDLORD AND TENANT—STATUTES—FINDINGS OF FACT—SUPREME COURT—UNLAWFUL DETAINER—PROCEDURE—*Beman et al. vs. The Rocky Ford National Bank*—No. 13792—*District Court of Otero County, Hon. John H. Voorhees, Judge—Affirmed in part and Reversed in part.*

FACTS: To secure a pre-existing indebtedness the plaintiff in error Beman gave to defendant in error a deed of trust, being a second lien thereon. Defendant in error foreclosed; the redemption period expired November 13, 1933, but plaintiff in error continued in possession until July 14, 1934, when defendant in error instituted unlawful detainer proceedings. Defendant in error contends that the parties entered into an oral agreement whereby the premises were rented to plaintiffs in error on a month-to-month basis, with the right in the defendant in error to terminate the tenancy at the end of any monthly rental period. Defendant in error further alleges that two checks given by plaintiff in error were held by the former to cover rent due from the latter. Plaintiffs in error contend that they agreed orally with defendant in error that it would convey to them any and all interest it had in the premises, in consideration of which they were to pay the defendant in error the balance due on the promissory note. That they had given the two checks under the above arrangement, and had later tendered the additional sum of $1,700.

HELD: 1. In cases of conflicting evidence, the Supreme Court has repeatedly held that it is bound by the findings of the trial court on disputed matters of fact, and therefore the relationship was that of landlord and tenant.

2. This case does not come under the exception that the Supreme Court will not follow the trial court where the trial court is manifestly against the weight of the evidence and an affirmance of such findings would result in a miscarriage of justice.

3. The action was not prematurely brought.

4. In an action for unlawful detainer, the judgment cannot go beyond an adjudication of the rights of possession as between the parties, and the trial court was without authority to dispose of the money and checks of the plaintiffs in error in the hands of the defendant in error.

5. Had the instant proceedings been brought under subdivision 4, Section 6369, C. L. '21, the court could have disposed of the money. In Department.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Holland concur.

Mr. Charles L. Sabin and Mr. Clyde T. Davis, attorneys for plaintiff in error. Mr. Perry E. Williams and Mr. E. C. Glenn, attorneys for defendant in error.

STATUTES—CONSTRUCTION OF—CREDITORS—INTERVENTION BY—COURTS—ATTORNEYS' AGREEMENTS—ASSIGNMENTS OF ERROR—SUPREME COURT RULE—*Hartner vs. Perry Davis and Blotz-Henneman Seed Company*—No. 13877—*District Court of Elbert County, Honorable John C. Young, Judge—Affirmed.*

FACTS: The only question here involved is the construction of Section 99, Code of 1921, which relates to the time within which a creditor, seeking to avail himself of the benefits conferred by this section, must file his intervention proceedings. Plaintiff in error contends that intervention filed any time before final judgment in the original proceedings is entitled to consideration and to the same remedies against the attachment defendant as the original plaintiff.

HELD: 1. It is a cardinal rule of statutory construction that in case of ambiguity in any part of a section of a statute, that the intent of the legislature is to be determined from the entire body of the statute.

2. Creditors must file their intervention proceedings within thirty days after the levy has been made under the writ of attachment in the original proceeding.

3. A County Court may certify a case commenced there, to the District Court, when the amount of the claim of any intervenor is in excess of $2,000.

4. The question of whether or not Davis' original attorney's agreement with the former attorney of the plaintiff in error with reference to the deferring of taking default judgment until notice be given the other which was not given in the original case, has no bearing on this case, since the time within which the petition for intervention must be filed is fixed by statute and not by the time of taking judgment in the original proceedings.

5. An assignment of error to the effect "that the judgment was contrary to the law and the evidence," is not in compliance with Supreme Court Rule 32, which requires that each error shall be particularly specified. In Department.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Holland concur.

Mr. Benjamin C. Hilliard, Jr., attorney for plaintiff in error. Messrs. David P. Stricker and Thomas M. Burgess, attorneys for defendants in error.

PROMISSORY NOTE—MAKERS AND ENDORSERS OF—AGENCY—DEPARTURE—NOTICE OF DISHONOR—PROCEDURE—COURTS—*Bieser vs. Irwin et al.*—No. 13743—*District Court of Routt County, Hon. Charles S. Herrick, Judge—Reversed and remanded.*

FACTS: Action brought by the plaintiff, as receiver of the First National Bank of Steamboat Springs, Colorado, against defendants on a promissory note signed by Strange and Harwig as makers and allegedly signed by defendants as endorsers on the back before delivery. The lower court found for all the defendants except Strange, against whom a judgment was rendered. Plaintiff prosecutes error, insisting that all of the defendants were jointly liable on the note and judgment should have been accordingly entered against them all. The defendants were all members of the Odd Fellows Lodge, interested in financing a lodge building, and all were consulted on all matters concerning it.

HELD: 1. Where the plaintiff, after ruling on the demurrer, amended his complaint charging the defendants, Strange and Harwig, as principals instead of endorsers, as were the others, such amendment did not constitute a departure because the action sued on was a promissory note, and the amendment was merely one to conform with the proof.

2. Strange was defendant's agent within Section 3914, C. L. 1921.

3. Endorsers before delivery are makers and no notice of dishonor is necessary and all are jointly liable.

4. Ordinarily the Supreme Court will not disturb a judgment of the lower court based upon disputed testimony; however, where there is sufficient information that comes up in the record in the nature of exhibits upon which the court can determine for itself whether or not a particular legal situation exists, the Supreme Court is not bound by the findings of the lower court. In Department.

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

Mr. Addison M. Gooding, attorney for plaintiff in error. Mr. Joseph K. Bozard, attorney for defendant in error.

NOTICE—PUBLICATION OF—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—SURETY—INTEREST—REDEMPTION—BONDS—SCHOOL DISTRICT—*State of Colorado vs. Schaeffer et al. For the use of School District Number 6*—No. 13821—*District Court of Conejos County, Hon. John L. Palmer, Judge—Affirmed.*

FACTS: Plaintiff, a school district, brought this action to recover damages from two treasurers of Conejos County and their surety for an alleged breach of duty by such treasurers. Plaintiff alleged they made a call for the redemption of a 1913 bond issue, and that defendants paid

interest coupons on the bonds after the alleged call. Notice of the call was published in accordance with Section 8801, C. L. '21, which is "An act to provide for the payment of school orders by the County Treasurer, as soon as there is money on hand for the payment of the same." Plaintiff contends that this language is broad enough to include "bonds," and therefore the call for redemption was sufficient.

HELD: 1. Statutes relating to publication of notice in legal proceedings must be strictly followed.

2. Section 8321 makes specific provision for publication of notice in connection with redemption of bonds such as constitute the subject matter in this case; therefore, plaintiff's contention is wrong.

3. Bondholders have a right to interest if improper or no notice of call is made.

4. Negligence on the part of the defendant will not authorize a recovery where it appears that the contributory negligence of the plaintiff was the proximate cause of the injury complained of.

5. Discharge of the principal is a discharge of the surety. In Department.

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

Mr. William J. Christensen, attorney for plaintiff in error. Messrs. Ralph L. Carr, Jean S. Breitenstein and John G. Reid, attorneys for defendant in error.

GENERAL ATTORNEY — EXTRADITION — AGENCY — CRIMINAL AND CIVIL PROCEEDINGS—*Commercial Standard Insurance Company vs. Rinn and Connell*—No. 1385—*District Court of Boulder County, Hon. Frederick W. Clark, Judge*—*Affirmed.*

FACTS: Plaintiffs Rinn and Connell, a law firm, sued in the County Court for $500 as reasonable attorney's fee for successfully resisting an extradition, and had judgment thereon.

HELD: 1. What a general agent does by his office force he does by himself.

2. A general attorney may employ local counsel in local matters.

3. Where an attorney represented a company in all suits arising out of a collision, which reasonably involved work in different states, he is properly termed a general agent, and it is within the scope of his duties to hire attorneys to resist an extradition even though it is primarily related to a criminal proceeding, because it might have a vital bearing on the civil suits. In Department.

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

W .A. Alexander and Cecil M. Draper, attorneys for plaintiff in error. Rinn and Connell, attorneys for defendants in error.

CONTRACT—PLEADINGS—EQUITY—PRIVILEGE IN PERPETUITY—TOWNS—ORDINANCE—TIME—ACTIONS—PUBLIC UTILITIES—*Town of Estes Park vs. Mills*—No. 13924—*District Court of Larimer County, Hon. Frederic W. Clark, Judge—Affirmed.*

FACTS: Action brought by the town to collect from Mills an annual charge for his alleged share of the maintenance of a sewage disposal plant, or for an order requiring him to disconnect from the sewage system. Mills' hotel is located outside the corporate limits of the town. He donated nine hundred dollars ($900.00) to the building of a sewage disposal plant by the town, at which time it was believed by him and the town officials that there would be no maintenance charges therewith, which costs were negligible until 1932, when the plant became inadequate and had to be reconstructed. The town passed an ordinance in 1933 levying a charge against users toward the cost of maintenance. The town admitted in its complaint and by evidence that there was no contract. In the town's replication it offered to return the nine hundred dollars ($900.00) upon Mills disconnecting his system from the town system.

HELD: 1. The unused capacity of a town sewer system may be contracted away for the use of another if limited in time to such a period as the capacity of the sewer system was not otherwise used, or required for use, by the town.

2. The town cannot grant a privilege in perpetuity to use the sewage system, because of the contingency of the necessary full use by the town.

3. The relief prayed for could only be granted in an action on a contract either express or implied; the complaint does not state a cause of action upon which a recovery can be had, because no contract was therein set forth.

4. Town cannot obtain relief under its complaint by an offer of equity tendered in its replication. In Department.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

Mr. Ab H. Romans and Mr. Hatfield Chilson, attorneys for plaintiff in error. Mr. Fred W. Stover and Mr. Herbert A. Alpert, attorneys for defendant in error.

PARTNERSHIP—WILLS—TRIAL COURT—RECORD—APPEAL—UNIFORM PARTNERSHIP ACT—EVIDENCE—*Walter et al. vs. Drogmund*—No. 13873—*District Court of Lake County, Hon. William H. Luby, Judge—Affirmed.*

FACTS: Action brought by the defendant in error, Drogmund, against Walker and others, heirs at law of Thomas Henry Walker, for a decree of partnership in her favor. She had judgment in the court below and the heirs, plaintiffs in error, bring action. Defendant in error

and the deceased, Walker, lived together from 1907 until the death of the deceased in 1932. Witnesses testified that in 1913 the defendant in error and the deceased entered into a partnership agreement which provided that upon the death of one, the survivor should get the whole. The contract could not be found and an affidavit of lost instrument was filed. Plaintiffs in error introduced a will drawn by deceased in 1909 which merely gave the defendant in error certain designated property.

HELD: 1. Where a partnership is established, the attempt of a decedent partner to dispose of the property by will is a nullity.

2. The record upon appeal is viewed in the light most favorable to the successful party.

3. The trial court should determine the existence of a partnership under the provisions of the Uniform Partnership Act. In Department.

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

Mr. Addison M. Gooding, attorney for plaintiffs in error. Mr. Quentin D. Bonner, attorney for defendant in error.

DISBARMENT—CRIMES—COURTS—EVIDENCE—NATIONAL BANKRUPTCY ACT—CONVICTION—*State of Colorado vs. Brayton*—No. 13718—*Original Proceedings in Disbarment—Matter referred to the Pueblo District Court for Hearings and Findings.*

FACTS: The respondent Brayton, a member of the Colorado bar, was indicted with "conspiracy to violate the National Bankruptcy Act," and the Federal Court adjudged him guilty and sentenced him to serve a term in the United States Southwestern Reformatory. Brayton, answering, admitted the judgment and sentence, but denied he was guilty and set forth his connection with the matter out of which the Federal prosecution arose, such explanation being reasonable and consistent with innocence.

HELD: 1. "Conspiracy to violate National Bankruptcy Act" is not a crime cognizable in the Colorado state courts, and such conviction of itself does not warrant summary action under Sec. 7144, C. L. '21, which provides for disbarment upon conviction of a felony.

2. If Brayton is to be disbarred, it must be because he was, in fact, guilty of improper conduct, and not because of his conviction alone, and therefore he should be accorded the privilege of submitting evidence on the issue presented by the allegations of the petition and his answer thereto. En Banc.

Opinion by Mr. Justice Hilliard.

Mr. Paul P. Prosser, Attorney General, Mr. Walter F. Scherer, Assistant Attorney General, attorneys for petitioner. Mr. Homer E. Brayton, pro se; Mr. Benjamin F. Koperlik, Messrs. Langdon and Barbrick, Mr. Thomas L. Bartley, attorneys for respondent.

CONTRACTS—WATER RIGHTS—PRESCRIPTION—ADVERSE—POSSESSION—TESTIMONY—RULES OF THE COURT—*Bowen et al. vs. Shearer et al.*—No. 13774—*District Court of Routt County, Hon. Charles E. Herrick, Judge—Affirmed.*

FACTS: Parties appear here in the same order as in the trial court, hence reference shall be made to them as plaintiffs and defendants. Plaintiffs sued to establish their right to divert and use, from two ditches owned by defendants, water to irrigate their land, such ditches crossing plaintiffs' land. The case is one of disputed facts, and if plaintiffs' evidence is believed, they and their predecessors used this water continually from 1889 to 1928, under a contract entered into, but which cannot be found, between the owners of the ditch and the plaintiffs' predecessors. If defendants are believed, little, if any, use was made of the ditch, and that if use was made, it was intermittent, surreptitious and wrongful.

HELD: 1. In the case of disputed facts on conflicting evidence, under the well established rule the judgment must stand.

2. Plaintiffs failed to establish title by prescription because in the evidence an essential element of such title is wanting, i. e., claim of right.

3. Since plaintiffs' use was without knowledge of the contract, if there was one, they could predicate no right thereon, hence they were mere licensees and their use could never ripen into title the adverse to defendants. In Department.

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

Mr. Joseph K. Bozard, attorney for plaintiffs in error. Mr. C. R. Monson, attorney for defendants in error.

PLEADING—DEMURRER—FAILURE TO ELECT—FAILURE TO ENTER FINAL JUDGMENT—EFFECT OF—*Siebers et al. vs. The Labor Finance Corporation*—No. 13894—*Decided February 1, 1937—Opinion by Mr. Justice Holland.*

Labor Finance Corporation obtained judgment below on a note executed by five defendants and secured by an investment certificate of plaintiff owned by Siebers alone. Defense was that note was void under 1913 Money Lenders Act and the 1917 Loan Shark Act and that interest was excessive. Demurrers were sustained to all defenses except general denial. Defendants given ten days to elect their future course. No election was made to stand upon the pleadings. No motion for final judgment was made by defendants of dismissal of second, third and fourth defenses.

1. Where only error urged is that the court erred in sustaining the demurrers, such error will not be reviewed in the absence of entry of a final judgment below.

2. Failure to have final judgment entered is an abandonment of the defenses.—*Judgment affirmed.*