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Supreme Court Decisions

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INSURANCE—FRATERNAL—FAILURE TO PAY ASSESSMENT—WAIVER —PRESUMPTIONS—*Neighbors of Woodcraft vs. Hildebrandt*—No. 13713—*Decided February 10, 1936—Opinion by Mr. Justice Holland.*

Hildebrandt brought suit to recover upon a fraternal benefit certificate in which he was named the beneficiary, which was issued to his wife. At the close of all the evidence both parties moved for a directed verdict, whereupon the court discharged the jury and found the issues joined in favor of plaintiff.

1. Where the insurer over a period of time accepts payments of assessments that are delinquent, such custom and practice is sufficient to establish a presumption of waiver by the insured as to prompt payment of the assessments.

2. Such presumption of waiver of prompt payment is rebuttable.

3. Where the presumption of waiver arises, the burden is upon the insurer to overcome the presumption.

4. Where the evidence shows that the insured did not rely upon the custom of waiver of prompt payment and had abandoned her policy, such presumption is overcome by the affirmative acts of the insured.

5. Evidence of insurer shows a compliance with Section 76 of Insurer's Constitution, requiring the notification by the grand clerk to any member of the association who was delinquent.

6. In this case the contract of insurance, or certificate, being that of a fraternal benevolent society, is the implied embodiment of the insured's application for membership, the charter and by-laws of the society, and the statutes under which it is organized.—*Judgment reversed.*

AUTOMOBILES—LIABILITY POLICY—DUTY OF INSURED AS TO CO-OPERATION—SHAM ANSWER—FRAUD—COLLUSION—*Bagley vs. Lumbermen's Mutual Casualty Company*—No. 13279—*Decided February 10, 1936—Opinion by Mr. Justice Butler.*

Bagley sued Lumbermen's Mutual Casualty Company on an automobile liability policy. An automobile driven by Bagley collided with another automobile and Bagley, his wife, his daughter Sylvia, and one Dora Rogoff, all occupants of the Bagley automobile, were injured. Sylvia, the daughter, sued her father for damages and recovered judgment for $10,000, whereupon Bagley sued the casualty company for $5,000, the amount of the policy. The case was tried to the court without jury. The court rendered judgment for the defendant.

1. Fraud is never presumed, but must be established by evidence that is sufficient to overcome the presumption of good faith.

2. There is no contention that Bagley deliberately caused the accident, pursuant to a plan to collect money from the insurance carrier. The automobile driven by Bagley was on the wrong side of the road and there the collision occurred. His daughter was injured. Bagley refused to verify the answer drawn by the defendant's attorney; but his refusal was justified, for if he had verified that answer, he would have committed perjury.

3. When a person takes out liability insurance, he does not make the insurance company the keeper of his conscience, or become a mere puppet in its hands; nor is he relieved from his obligation not to swear falsely. Bagley offered to verify an answer so drawn as to state the truth, but his offer was refused.

4. There was no fraud perpetrated or attempted. There was no fraudulent collusion with his daughter or her attorneys; no assumption of liability within the meaning of the policy and no interference with the legal procedure within the meaning of the policy. Bagley did not prevent the defendant from raising any honest issue in the damage suit.

5. There was no collusion between the father and daughter, nor was there a failure to cooperate with the insurance carrier.—*Judgment reversed.*

PERJURY—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE—*Papas vs. The People*—No. 13835—*Decided February 10, 1936*—*Opinion by Mr. Justice Young.*

Papas was tried and convicted of perjury in the District Court of Pueblo County and sentenced to the penitentiary for a term not less than one year nor more than 18 months.

1. Helen Lombardi was charged in the district court of Pueblo County with having committed the crime of aggravated robbery in that county. One of her defenses was an alibi. Papas testified for the defendant that she was in Denver working in his restaurant on the day the robbery was alleged to have been committed in Pueblo County. He was asked on cross-examination if he had not stated in substance to three officers in Denver that Helen Lombardi was not in his restaurant all day on the day of the commission of the crime. He denied that he had made such statements to them. All of the officers testified that he did make such statements.

2. If Papas knowingly falsely testified under oath that he did not so state to the officers, he falsely swore to a fact material to the issue under investigation, namely, his credibility as a witness in the trial of Helen Lombardi. Nor did the materiality of such statement depend upon whether Helen Lombardi was or was not in fact in Denver at the time she was charged with committing a crime in Pueblo.

3. The point in question was his credibility and previous state-

ments inconsistent with his testimony on the trial were material and admissible for consideration by the jury in determining what weight, if any, should be given to his testimony.

4. To be material to the issue, the matter need not be on the primary issue raised by the plea or involved in the case.

5. A witness may be guilty of perjury, not only by swearing corruptly and falsely to the fact which is immediately in issue, but also to any material circumstance which legitimately tends to prove or disprove such fact; or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact.

6. Information examined and held to be sufficient.

7. The evidence supports the conviction.—*Judgment affirmed.*

Mr. Justice Holland and Mr. Justice Hilliard dissent.

WATERS AND WATER RIGHTS—MISJOINDER—DEMURRER—SUFFICIENCY OF COMPLAINT—*The Reorganized Catlin Consolidated Canal Company, et al. vs. The Sunnyside Park Ditch Company, et al.*—No. 13656—*Decided January 27, 1936—Opinion by Mr. Justice Holland.*

The plaintiffs, for different ditch companies operating separate canals, sought to enjoin the defendants from diverting water from the Arkansas River and its tributaries, claiming that such diversion was an invasion of their decreed priorities of right to the use of such water. Demurrer to the complaint was sustained and the complaint dismissed upon plaintiff's election to stand upon their complaint as amended.

1. Generally, parties with separate and distinct claims held in severalty, cannot join in seeking injunctive relief, but there is some flexibility of this rule aimed generally at the prevention of multifarious litigation.

2. Where it appears that the plaintiffs seek the same character of relief against defendants who have a general, common defense, and whose acts are alleged to be performed by more than one of them and the acts of the defendants would injure the plaintiffs in the same manner by interfering with a common, but similar, right of plaintiffs and where the defendants each have a community of interest, which ultimately affects all of the plaintiffs and the defendants, such interest being directly connected with the subject-matter of the controversy, such several plaintiffs may join in an action against such several defendants.

3. To avoid misjoinder it is not necessary that each defendant or each plaintiff be immediately interested in the whole subject of litigation, but it is sufficient if all the matters in the complaint have a relation to the other matters therein contained, provided the object of the complaint is single and that it presents a right general to all the plaintiffs, which is alleged to have been invaded by all the defendants.

4. It is not necessary, in order that all plaintiffs may join all their causes of action against all the defendants, in an equity suit, that the complaint allege concert of action on the part of the defendants or that an alleged design or common plan be followed by unity of action. —*Judgment reversed.*

MECHANIC'S LIEN—WAGES—CONTINUANCE—JURY TRIAL—CROSS COMPLAINT—No. 13870—*The Tiger Placers Company vs. Fisher—Decided January 20, 1936—Opinion by Mr. Justice Hilliard.*

This was a suit for wages and foreclosure of mechanic's lien. Judgment was given as prayed and error is assigned. Fisher, employed by The Tiger Placers Company, alleged that a certain sum was due him for labor performed in aid of which he filed statement of lien, seeking to charge therewith a dredge boat and other property of the company. As assignee of ten like claims he made similar allegations.

1. The court did not abuse its discretion in refusing continuance.

2. Where the complaint is in equity and the cross complaint is filed for damages, neither party was entitled to trial by jury. The complaint fixes the nature of the suit and by what arm of the court it should be tried.

3. A dredge boat is subject to a lien for wages.

4. Where laborers are working directly for the owner of the property, time for filing lien statements does not commence to run until the completion of the work on which they are engaged.

5. Where the lien statement consists in part of expense and in part for wages, the expense can be regarded as compensation under the lien act.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—TAXATION—WARRANTS ISSUED IN EXCESS OF ANTICIPATED FUND—No. 13639—*Georgetown vs. Bank of Idaho Springs—Decided January 20, 1936—Opinion by Mr. Justice Holland.*

The bank, as assignee of one hundred eighty-six of the town's warrants, brought this suit to recover money judgment against the town and judgment was entered in favor of the bank for $6,320.24, the full amount prayed for. The warrants were issued for debts incurred by the town during the fiscal year, between April 1, 1928, and March 31, 1929. The complaint alleged that the town diverted the funds created for the payment of the indebtedness evidenced by the warrants to other purposes to the damage of the bank in the amount of the warrants. The defense was a denial of the diversion and upon the contention that the warrants were invalid, because of lack of power of the town to incur the indebtedness for which they were issued.

1. The contention of the town that the proper action was mandamus and not for a general judgment cannot be asserted in the Supreme Court, where it did not take this position in the lower court by filing its answer on the merits on other grounds and going to trial thereon without questioning the form of the action.

2. If, as alleged, the funds have been diverted to other uses, then the money is not there and any attempt by mandamus to compel payment of these warrants therefrom would be futile. The fund for specific payment must first be available and there must exist a refusal to pay before mandamus will lie.

3. Where it appears that for the year in question that the levy made by the town based upon the value of the assessable property would have produced $5,870.57 if collected in full of which a part was for special levies, leaving $4,279.79 applicable to general town expense for the fiscal year and the town issued warrants payable out of the general fund for $6,646.75 and the full levy was not collected. Out of the amounts collected $2,027.25 was paid on warrants, leaving a deficiency on outstanding warrants of $4,619.50, the amount sued for herein. Such warrants issued in excess of the anticipated revenue from the antecedent tax levy were invalid unless authorized at an election.

4. The town had the right to issue its warrants against the general fund that had existence in fact or law, but not in excess thereof without the voter's authorization. To issue warrants in excess of revenues without such authorization would be the creation of a debt such as is prohibited by Section 8, Article II of the State Constitution.

5. In this case, $2,252.54 of the amount of warrants issued all represents valid obligations of the town, because that amount would not be beyond the anticipated revenue from the antecedent tax levy. The last mentioned amount is the difference between the amount possible of collection and the amount actually collected. This expected amount against which valid warrants could be issued was a fund having existence in law and if collected would have existence in fact. For payment of these valid warrants a special or additional levy could be made if not beyond the limitation imposed by the town charter as amended by Chapter 94 of the Session Laws of 1919, or if the limitation has not been reached or the taxing power fully exhausted during the preceding years, then the reserve or accumulated power may be exercised in one year by order of court, even though it exceeds the yearly limitation.

6. To recover the above amount, now determined to be a valid obligation, mandamus to compel a tax levy for its payment is the proper remedy. The bank is not now entitled to a money judgment, because there has been no diversion of funds. The fund did not come into existence in fact and could not be diverted.

7. Even though the town operated under an original special charter, such charter, with reference to levying taxes, is governed by the act of the legislature, Chapter 94 of the Session Laws of 1919, entitled "An Act to Amend the Charter of Georgetown" and thereafter the town was required to levy taxes in the same manner as provided by the

general laws of the State of Colorado and are subject to the constitution of limitations in such matters.

8. The purpose of this limitation is to keep the state substantially on a cash basis, to prohibit the pledging of future fixed revenues, to forbid the contracting of debts which must be paid therefrom and to make certain that one general assembly shall not paralyze the next by devouring the available revenues of both.

9. The balance of the amount of the warrants issued is in excess of the fund anticipated at the time the warrants were issued and is therefore a prohibited debt within the meaning of Section 8, Article 11 of the Colorado Constitution.—*Judgment reversed.*

Mr. Justice Butler, Mr. Justice Bouck and Mr. Justice Young dissent.

INSURANCE—LIFE—SUICIDE CLAUSE—BURDEN OF PROOF—SUBMISSION TO JURY—*The Prudential Insurance Company of America vs. Cline, as Executor*—No. 13578—*Decided January 27, 1936—Opinion by Mr. Justice Butler.*

The insurance company insured the life of Agnes L. Bjorkman for $1,000 for the benefit of her husband. The insured died within one year from the issuance of the policy. Suit was brought by the husband, the beneficiary. The defense was that the insured committed suicide within the year. The policy provided, "if within one year from the date hereof the Insured, whether sane or insane, shall die by suicide, the liability of the Company shall not exceed the amount of the premiums paid on this policy." The amount of premiums paid was tendered back. While the case was pending in the Supreme Court, the beneficiary died and his executor was substituted.

1. The court below instructed, "Suicide must be proven, and if you can reconcile the facts of this case upon any reasonable hypothesis, based upon the evidence, that death of the insured was not caused by suicide, it is your duty to do so." The correctness of the instruction is not challenged.

2. If the evidence is such as to exclude all reasonable hypotheses other than that of suicide, then it was the duty of the trial court to take the case from the jury.

3. The general and natural presumption is against suicide.

4. Evidence examined and held that the trial court did not err in refusing the defendant's request to take the case from the jury and direct the verdict for the defendant. The case was for the jury and their finding, approved as it was by the trial court, should not and will not be disturbed.—*Judgment affirmed.*

Mr. Justice Bouck dissents.

DIVORCE—ENTRY OF FINAL DECREE—ENTRY AT REQUEST OF LOSING PARTY—*Kastner vs. Kastner*—No. 13738—*Decided February 24, 1936—Opinion by Mr. Justice Hilliard.*

The court below, after the expiration of one year from the entry of findings, entered a final decree of divorce at the instance of the losing party.

1. Under Chapter 71, Session Laws, 1933, where the successful party to a divorce action has not applied for a final decree of divorce within one year after the findings are entered, the unsuccessful party is permitted to apply for a final decree.

2. The constitutionality of the 1933 enactment is not questioned and the court below had the power to enter the final decree.—*Judgment affirmed.*

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF CONFESSION OF CO-DEFENDENT—*Miller vs. The People*—No. 13663—*Decided February 24, 1936—Opinion by Mr. Justice Holland.*

Miller was convicted of larceny and was sentenced to the penitentiary for five to eight years. The information included two other defendants. Miller was granted a separate trial on the ground that one of the defendants had made a confession certain parts of which had no bearing on the guilt or innocence of Miller, but would be prejudicial if tried together. Hammel, one of the other defendants, was first tried and convicted. The court below admitted the confession of the co-defendant, all of which was made out of the presence of Miller.

1. The court erred in admitting the oral confession of Hammel, one of the defendants, implicating Miller as an accessory before the fact which was made out of the presence of Miller. This defendant had no opportunity of cross-examining Hammel, his co-defendant, whereby his credibility might have been impeached and the jury was deprived not only of its means of determining the motive or attitude of Hammel but also of the opportunity to observe his conduct on the witness stand.

2. While statements, confessions and admissions of guilt made by one of several persons jointly indicted and tried for the same offense are admissible against the person making them, they are not admissible against his co-defendants unless made in their presence and assented to by them.

3. Where the defendant was an accessory before the fact, only such parts of the confessions, statements or admissions as would tend to prove the guilt of the principal could be admitted and not the parts as would implicate this defendant as an accessory when made out of his presence and after the commission of the crime.—*Judgment reversed.*

TAXATION—PERSONAL PROPERTY OF CHARITABLE INSTITUTIONS—EXEMPTIONS—*Koenig, as Treasurer, et al. vs. Jewish Consumptives' Relief Society*—No. 13664—*Decided February 24, 1936*—*Opinion by Mr. Justice Burke.*

The Jewish Consumptives' Relief Society brought injunction to prohibit the county from taxing its dairy equipment and livestock so devoted. A demurrer to the complaint was overruled. The county elected to stand and to review the judgment thereupon entered, it prosecutes this writ.

1. Tax exemptions are provided for in Article X of our Constitution. Section 3 thereof exempts "personal property" to the value of $200 to the head of a family. Section 4 exempts public property, "real and personal." Section 5 (so far as here applicable) exempts "Lots, with buildings thereon, if said buildings are used solely and exclusively * * * for strictly charitable purposes, * * *" and Section 6 reads: "All laws exempting from taxation, property other than that hereinbefore mentioned shall be void."

2. The Constitution does not exempt livestock used solely and exclusively for charitable purposes. It only exempts lots with the buildings thereon.—*Judgment reversed.*

Mr. Chief Justice Campbell not participating, Mr. Justice Holland dissenting.

WORKMEN'S COMPENSATION—FINDINGS OF COMMISSION—CONCLUSIVENESS—INTERPRETATION OF—*Di Greggorio vs. The Monroe Coal Company, et al.*—No. 13889—*Decided February 24, 1936*—*Opinion by Mr. Justice Burke.*

Claimant was employed by the coal company whose insurance, under the act, was carried with the insurance company. He claimed disability due to an accident. At the hearing the Commission found "from the medical testimony" that his disability was due to sub-acute appendicitis and was neither caused nor aggravated by the accident. There was a further finding that "This accident occurred on February 25, 1935, claimant left work as a result thereof the same day."

1. Such finding is not a finding of disability caused by the accident such as to oblige cessation of labor. Claimant may well have quit work as a result of the accident, althought the accident caused no disability whatever. That the Commission did not intend by the language quoted to find that the accident caused disability is clearly disclosed by the rest of the findings and the award.

2. Beyond this the record presents a simple case of a finding of fact by the Commission on conflicting evidence and such finding will not be disturbed.—*Judgment affirmed.*

BILLS AND NOTES—CONDITIONAL DELIVERY—CONFLICTING TESTIMONY—INSTRUCTIONS—*Clemenson vs. Bruen*—No. 13903—*Decided February 24, 1936—Opinion by Mr. Justice Holland.*

At a jury trial of a suit brought by Bruen on a promissory note, judgment was entered on the verdict against Clemenson, the maker, who assigns error.

1. Where the defendant alleged and testified that the note that he executed was delivered conditionally and the plaintiff denied the conditional delivery and testified that there was no conditional delivery, there was such a conflict in the evidence as required the case to be submitted to the jury.

2. There is sufficient evidence to sustain the verdict.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—FINDINGS OF THE COMMISSION—RETROACTIVE AWARD—*Roeder, etc., vs. Industrial Commission, et al.*—No. 13770—*Decided December 16, 1935—Opinion by Mr. Justice Hilliard.*

1. While the claimant's contention, at the latest hearing, was not so clear as to remove all doubt, nevertheless, under well established rules, the finding of the Commission has such a record basis so that the same will not be disturbed.

2. The entire evidence presented at the hearing had to do with the claimant's then present condition, and there is no evidence whatsoever as to the claimant's condition in the past. Therefore, the Commission's retroactive award is without basis in the record, and the award should have been made as of the date of the hearing.—*Judgment reversed with orders to amend the award as indicated.*

CRIMINAL LAW—INFORMATION—DUPLICITY—*Hummel vs. The People*—No. 13856—*Decided December 16, 1935—Opinion by Mr. Justice Butler.*

Defendant was convicted of petty larceny on each of six counts, each count being a separate, independent and unrelated offense. Defendant filed a motion to quash the information on the ground that it was bad for duplicity, which motion was overruled. She is now seeking reversal of the judgment.

1. The information should have been quashed, as it was bad for duplicity and, in failing to so dispose of the case, the court committed reversible error.

2. The suggestion that the error was not prejudicial to the defendant is without force.—*Judgment is reversed, cause remanded with direction to quash the information.*

CRIMINAL LAW—INDICTMENTS—MOTION TO QUASH—CONSPIRACY TO COMMIT BRIBERY—*People vs. Wettengel, et al.*—No. 13696—*Decided December 16, 1935*—*Opinion by Mr. Justice Hilliard.*

Wettengel and others were indicted for a conspiracy to commit the crime of bribery. The indictment charged that Wettengel was to receive the bribe and Blackwell and Utter were to give the bribe. Motion to quash the indictment was granted in the lower court.

1. There is not, in the law, any such crime as conspiracy to commit bribery where the conspiracy is charged to and included both the prospective giver and the prospective receiver.—*Judgment affirmed.*

Mr. Chief Justice Butler, Mr. Justice Bouck and Mr. Justice Young dissent.

FORECLOSURE OF DEEDS OF TRUST—COLLATERAL SECURITY—*James vs. Ferguson, et al.*—No. 13540—*Decided December 9, 1935*—*Opinion by Mr. Justice Holland.*

A deed of trust was given on certain lands and water rights by the owner, who was also the owner of supplemental water rights represented by certificates of stock in two reservoir companies. This stock was pledged as collateral security with the deed of trust which was subsequently foreclosed on all land and water rights specifically described therein, the bid being for the full amount due. The trustee's deed described the land and conveyed all "appurtenances thereunto belonging."

QUESTION: Who owned the water certificates pledged as collateral security?

HELD: The ownership of the collateral security passed with the foreclosure to the purchaser at the sale and the trustee's deed included such water stock as appurtenances to the land. These water rights were necessary to give the land the value necessary to secure the amount of the loan. This is especially true of the water certificates in this case, as they describe the land to which they attach.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DECISION OF COMMISSION ON CONFLICTING EVIDENCE—OCCUPATIONAL DISEASE—*Schriber-Hartman Decorating Company vs. Barton*—No. 13820—*Decided December 9, 1935*—*Opinion by Mr. Justice Young.*

The claimant was engaged for a period of several weeks in painting the baseboards of a certain building. His knees developed a condition known as "housemaid's knee." The Commission denied compensation, holding that the condition was the result of long continued kneeling

necessary in the work which the claimant did, and that it was an occupational disease. The District Court made an award to the claimant. There being evidence to support the findings of the Commission, it was binding upon the District Court, and the finding by the Commission determined by necessary inference that the condition from which claimant suffered was not caused by accident.—*Judgment reversed.*

PLEADING—VARIANCE OF PROOF—*The New Mexico Lumber Manufacturing Company vs. United States Fidelity and Guaranty Company*—No. 13609—*Decided December 9, 1935*—*Opinion by Mr. Justice Burke.*

The sheriff seized under execution certain horses in possession of a trust company. Trust company demanded possession, which was refused by the sheriff, and thereupon suit was brought against defendant, as surety on the sheriff's bond. The trust company was a trustee under a bond issue, and after default took possession, but the horses were not included in the trust deed. Plaintiff proved an oral pledge of the horses as additional security for the amount due under the trust deed. The complaint did not specifically set up the oral pledge, and there was a fatal variance between pleading and proof.

2. The personal property was located on realty covered by the trust deed, and notice of the company's possession was posted and notice referred to the deed of trust as authority for that possession but contained no reference to the oral pledge. This was a fraud on bona fide creditors or innocent purchasers.—*Judgment affirmed.*

WATERS—MANDAMUS—RIGHT OF SENIOR RESERVOIR FOR STORAGE—RIGHT OF JUNIOR DITCHES FOR DIRECT IRRIGATION—DEMURRER—*The People on relation of the Park Reservoir Company vs. Hinderlider, et al.*—No. 13235—*Decided February 3, 1936*—*Opinion by Mr. Justice Burke.*

Parties are in the same position as they are in the Court below. Plaintiff has a decree for storage water for irrigation of date October 1, 1888. When spring floods had subsided the stream does not furnish sufficient water for direct irrigation for lands under ditches taking therefrom. The priorities of some of these antedate that of plaintiff, others are subsequent. The total capacity of all exceeds the creek flow. Defendants, water officials, refused plaintiff the right to store when the ditches needed the water for direct irrigation, irrespective of the dates of their priorities. Plaintiff brought mandamus. Defendants demurred for want of facts and for want of parties. Demurrer sustained.

1. A senior reservoir may take, for storage, its full appropriation when a portion of the water is needed by junior ditches for direct irrigation.

2. Mandamus was the proper remedy. Where the rights of all parties have been established by decrees entered in general adjudication proceedings and the remedy sought by mandamus is simply the enforcement of such judgments by water officials charged therewith, other water users on the stream need not be made parties.—*Judgment reversed with directions.*

Mr. Justice Butler specially concurring.

TRESPASS—ELEMENTS NECESSARY TO CONSTITUTE A CRIME—WILFULNESS OR INTENT TO DO AN UNLAWFUL ACT—*Jones vs. The People*—No. 13861—*Decided February 3, 1936—Opinion by Mr. Justice Holland.*

Upon an information charging Jones with trespass, he was tried and found guilty in the Court below and a fine of $50 imposed.

1. A mere negligent trespass on the lands of another is insufficient to constitute the crime of trespass.

2. The negligence must be accompanied by a wilful act or that the trespass involved and intent to do an unlawful act injurious to another's property.

3. Or the evidence must show that the negligent act was prompted by hostility, revenge or design. Before a criminal offense in cases of this character can be established, it must appear that the object of the act was actual mischief or an intended trespass.

4. In this case the act and injury were incidental to negligence. —*Judgment reversed.*

MUNICIPAL CORPORATIONS—NUISANCE—CONTROL OVER BEYOND CITY LIMITS—*St. Bernard Poultry Farm, Inc., et al. vs. City of Aurora*—No. 13719—*Decided February 3, 1936—Opinion by Mr. Justice Holland.*

Plaintiffs in error, applied to the City of Aurora for a permit to construct, establish and operate a fox farm on lands of the poultry farm then within the city limits. Application was denied but notwithstanding denial the poultry farm proceeded with preparations and the City of Aurora applied for and was granted an injunction which was later made permanent. Thereafter, the lands in question were disconnected from the city and thereafter the poultry farm filed a petition to vacate the injunction, because the land was no longer within the city limits and because the city had no jurisdiction. The Court denied the application.

1. It is not necessary to determine the validity of the original injunction, because the plaintiff had the power to declare what shall be a nuisance and abate any such within its corporate limits but power is not conferred upon it to declare and define what shall constitute a nuisance within a mile beyond its boundaries.

2. Where the showing to vacate and dissolve the injunction demonstrated that the injunctive order then included premises beyond the city limits, the Court should have sustained the petition and dissolved the injunction.—*Judgment reversed.*

WORKMEN'S COMPENSATION—FAILURE TO GIVE NOTICE—EXCEPTION TO RULE WHERE COMPENSATION PAID—*Morrow vs. Industrial Commission of Colorado, et al.*—No. 13815—*Decided March 2, 1936*—*Opinion by Mr. Justice Bouck.*

Claimant, a school teacher, sustained a compensable injury October 2, 1925, while coaching pupils in their basketball play. She has been bedridden ever since. No notice of claim was filed by her with the Industrial Commission until September 28, 1933, almost eight years after the injury. Her father was principal of the school and after her injury, with the knowledge of the board, employed a substitute teacher for $100 a month. Claimant's salary had been $125 a month and she was paid the difference of $25. The commission denied her claim, which was affirmed by the District Court.

1. The claimant was required to file a notice claiming compensation with the Industrial Commission within six months after the injury, but there is an exception to this rule in that this limitation does not apply to any claimant to whom compensation has been paid.

2. It was the duty of the school board, as the employer, to give notice of the injury to the Industrial Commission within ten days after the injury. This the school board failed to do.

3. The claimant had no knowledge from any source that it was necessary for her to give notice of claim.

4. The $25 that was paid to the claimant after she was injured and could perform no part of her contract as a teacher brings this case within the exception that no notice need be filed by the claimant within six months where compensation has been paid.

5. The original opinion, which read for affirmance, is withdrawn and the present opinion is substituted therefor.—*Judgment reversed.*

Mr. Justice Holland dissents.
