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Supreme Court Decisions

OIL AND GAS—PERFORMANCE OF CONTRACT—LACHES—ESTOPPEL —*Fitzwater vs. Norcross et al.*—No. 13,281—*Decided Nov. 5, 1934—Opinion by Mr. Justice Burke.*

In 1926 plaintiff and one other owned certain oil and gas leases and contracted with defendant for drilling same. The leases provided forfeiture for non-fulfillment of drilling. The court below sustained motion for non-suit.

1. The plaintiff failed to establish a breached contract.
2. Where the plaintiff remained inactive while defendants expended large sums of money and did a large amount of work in reliance upon the leases and contracts, such action or failure to act constitutes laches.
3. The plaintiff was estopped both under the pleadings and the evidence.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—PROCEEDINGS FOR REVIEW—*Pollard vs. Industrial Commission*—No. 13,616—*Decided Nov. 19, 1934 —Opinion by Mr. Justice Butler.*

Pollard prosecutes writ of error to reverse a judgment affirming an award of the Industrial Commission refusing to reopen a case on its own motion.

1. Under the Industrial Act where claimant neglects to apply within ten days for a review of referee's findings and award, the claimant loses his right to a review.
2. The power given to the commission to review an award on its own motion is discretionary. Such action of the commission will not be interfered with except upon the showing of fraud or a clear abuse of discretion.—*Judgment affirmed.*

WATERS—IRRIGATION—SHORTAGE OF WATER—*Johnston vs. Wanamaker Ditch Co.*—No. 13,624—*Decided Nov. 13, 1934—Opinion by Mr. Justice Burke.*

Johnston, claiming the right to run water through a ditch on payment of $2.50 annually, sued to recover alleged excess charges of $200.00 and sought an injunction restraining the company and directing it to deliver his water on payment of the sum named. The court below held that he must pay $1.50 per statutory inch for such delivery, which charge was fixed by the county commissioners, and that he was bound by the rules and regulations of the company. Johnston prosecutes error.

1. Johnston is entitled to run his water through the ditch and

has no contract concerning compensation therefor and therefore he must clearly pay his pro rata share of the upkeep of the ditch.

2. Johnston owns ten inches of water and is entitled to have it delivered through the ditch. He has no preferential rights. He can get only his percentage of such proportion of the priority that is available and in times of shortage the water owners must be served by resorting to rotation and sectionizing.

3. When necessity demands, a resort to these expedients is as applicable to Johnston as to other owners.—*Judgment affirmed.*

JUSTICES OF THE PEACE—APPEAL FROM INTERLOCUTORY ORDER—CERTIORARI—*Hendricks vs. Gates*—No. 13,626—*Decided Nov. 19, 1934*—*Opinion by Mr. Justice Butler.*

One Youtsey brought suit before Hendricks, a justice of the peace. A third continuance of the trial was granted and the defendants thereupon applied and were granted a writ of certiorari by the County Court and the County Court held that the justice had abused his discretion and rendered judgment directing the justice of the peace to dismiss the action.

1. The order of the justice of the peace granting a continuance was an interlocutory order and, hence the proceedings in the County Court were premature.

2. It is only a final judgment of a lower court that can be reviewed on certiorari.—*Judgment reversed.*

WATER RIGHTS—CARRIER DITCHES—POWER TO FIX RATES FOR CARRIAGE OF WATER—NO REVERSAL OF TRIAL COURT ON CONFLICTING EVIDENCE—RES ADJUDICATA—*The Northern Colorado Irrigation Company vs. The Board of County Commissioners of Arapahoe County et al.*—No. 12,363—*Decided Nov. 19, 1934*—*Opinion by Mr. Justice Campbell.*

1. A contract between a carrier ditch company and its water consumers, as to the rate to be charged by the company for carriage of water through its ditch, is not binding on either party since the constitution and statutes of Colorado have lodged the rate-making power in the Board of County Commissioners of the county in which the carrier ditch is located. The provisions of the constitution and statutes must be read into the contract.

2. The trial court, having set aside a rate fixed by the Board of County Commissioners as confiscatory, itself fixed a higher rate. The rate so fixed by the trial court will not be set aside by the Supreme Court as confiscatory; such finding was based on conflicting evidence,

CONSTITUTIONAL LAW—MONEY LENDERS' ACT—*Gronert vs. The People*—No. 13567—*Decided October 22, 1934*—*Opinion by Mr. Justice Butler.*

Gronert was convicted of violating the money lenders' act (Sess. L. 1919, Ch. 159, C. L. Ch. 63). He seeks a reversal of the sentence.

1. Section 17 of Article 5 of the Colorado Constitution provides:

> "* * * No bill shall be so altered or amended on its passage through either house as to change its original purpose."

The purpose of the bill as introduced was to license the business of making small loans at a greater rate of interest than twelve per cent per annum, and to regulate such business. However, a radical change was made in Section 13 in its passage through the Legislature. The result was that what the bill originally permitted was by statute made a crime and such a change of purpose comes within the inhibition of Section 17 of Article 5, supra.

2. The change referred to above also brings the statute into conflict with Section 21 of Article 5 of the Colorado Constitution. In testing the statute by this part of the Constitution, we find that the purpose of the statute in its entirety being not only wholly outside the scope of the title but actually in contradiction of the purpose expressed therein. Therefore, the entire statute violates Section 21 of Article 5 of the Constitution of the State of Colorado, supra.—*Judgment reversed with directions to dismiss.*

CRIMINAL LAW—ARSON—CIRCUMSTANTIAL EVIDENCE—RULE OF PROOF—VALUE OF PROPERTY DESTROYED—INSURANCE CARRIED—INSTRUCTIONS—*Militello vs. The People*—No. 13381—*Decided October 29, 1934*—*Opinion by Mr. Justice Burke.*

1. In prosecutions for arson, where circumstantial evidence is used, the rule as to proof of corpus delicti and intent is the same as in prosecutions for other crimes where reliance is made on direct evidence, and the test is the exclusion of every reasonable hypothesis other than the guilt of the defendant.

2. Circumstantial evidence is the weaving of a fabric of known facts which, often infinitesimal or immaterial, or even prejudicial when considered alone, become important only as they are tied to others, and when so tied lead to inevitable conclusions as to facts in issue. Specific evidence considered and held admissible.

3. It is not proper to show the cost of replacement of the property destroyed. Ordinarily, the test of profit to the defendant, resulting from the fire, is the value of the property, especially when such value is to be contrasted with the amount of insurance carried on the property.

4. Defendant is charged with the crime of arson when he is charged with acts which are defined by statute to constitute arson.

5. It is not error to refuse an instruction tendered by defendant when the subject matter thereof is sufficiently covered by instructions given.—*Judgment affirmed.*

APPEAL AND ERROR—NO WRIT OF ERROR WITHOUT FINAL JUDGMENT—*The Crews-Beggs Dry Goods Company v. Bayle*—No. 13601—*Decided October 29, 1934—Opinion by Mr. Justice Hilliard.*

Even though a verdict has been received in the trial court, and a motion for new trial filed and overruled, if no final judgment has been entered there is no basis for an application for supersedeas and a writ of error has no function.—*Writ of error dismissed.*

CONTRACTS—STATEMENTS AS TO MATTERS COVERED—PERSONS DEALING AT ARM'S LENGTH—AGENCY—*The Protective Finance Corporation vs. The National Surety Company*—No. 13040—*Decided October 29, 1934—Opinion by Mr. Justice Hilliard.*

1. Persons dealing at arm's length in negotiating a written contract between them are bound by the provisions of the contract itself, and neither party may profit by statements made by the other party, prior to the execution of the contract, as to what was covered thereby.

2. Before the prior representations of an agent will be considered, his authority to make changes in the contract must be shown.

3. Representations of an agent examined and held not to purport to alter the contract.—*Judgment affirmed.*

CHATTEL MORTGAGES—SALE TO MORTGAGEE FOR INADEQUATE PRICE — ACCOUNTING — INSTRUCTIONS — *The International Harvester Company vs. The Lawrence Investment Company*—No. 13591—*Decided October 29, 1934—Opinion by Mr. Justice Bouck.*

1. Where mortgaged chattels are sold at private foreclosure sale and bid in by the mortgagee for an inadequate price, the resulting damage to the mortgagor may be recovered in an action for an accounting.

2. An instruction as to the measure of damages, to which no objection was made, states the law of the case by which both sides are bound.—*Judgment affirmed.*

CRIMINAL LAW—MURDER—INSANITY OF DEFENDANT—POWER OF COURT TO SET ASIDE VERDICT OF GUILTY—*Graham vs. The People*—No. 13572—*Decided October 29, 1934—Opinion by Mr. Justice Butler.*

The trial court, being convinced of the insanity of a defendant charged with murder in the first degree, is not compelled to pronounce

sentence of death as fixed by the jury, but has the power, and is under the clear duty as well, to set aside the verdict of guilty and to grant a new trial.—*Judgment reversed and cause remanded for a new trial.*

CONSTITUTIONAL LAW—MATTERS OF LOCAL CONCERN— *City and County of Denver vs. Henry*—No. 13574—*Decided November 26, 1934*—*Opinion by Mr. Justice Burke.*

Plaintiff sues city for injuries sustained by collision between a city truck and Henry automobile. City as one of its defenses alleged contributory negligence on the part of Henry, the same being based upon the state statute to the effect that the vehicle first entering the intersection has the right of way. This defense was stricken on the theory that the right of way was governed by the city ordinance to the effect that the vehicle approaching the intersection from the right has the right of way.

1. Article 20, section of the Colorado Constitution, vests in all "home rule" cities all powers necessary, requisite and proper for the government and administration of its local and municipal affairs, and the full right of self-government in both local and municipal affairs, and further provides that statutes applicable shall continue in effect except insofar as superseded by charters or ordinances. The defendant herein is a "home rule" city.

2. Traffic rules and regulations tested from a practical standpoint are a pure matter of local concern. Therefore, tested by the above section of the Constitution, the city ordinance controlled this case and the defense was properly stricken.—*Judgment affirmed.*

PRACTICE AND PROCEDURE — WITHDRAWAL OF DEFENSE — EVIDENCE—IMPEACHMENT OF WITNESSES—CLOSING ARGUMENT OF COUNSEL—*Prell vs. Gormley, etc.*—No. 13417—*Decided November 26, 1934*—*Opinion by Mr. Justice Bouck.*

1. Before the taking of evidence is concluded a defendant may withdraw a defense and the jury may be instructed to disregard all evidence concerning it. Thereafter the evidence relative to such defense becomes wholly irrelevant.

2. Should plaintiff then adduce testimony in contradiction of such evidence, for the ostensible purpose of showing the credibility of defendant's witnesses, such attempted impeachment on questions which no longer have anything to do with the case is improper and constitutes prejudicial error.

3. A closing argument for plaintiff, wherein the improper rebuttal testimony offered in contradiction of the eliminated evidence is commented upon as impeaching the entire testimony of defendant's witnesses, likewise constitutes prejudicial error.—*Judgment reversed.*

MOTOR VEHICLES—COLLISION—RIGHT OF WAY—PERMANENCY OF INJURIES — INSTRUCTIONS — PROXIMATE CAUSE — SPECIAL FINDINGS—*Brown vs. Maier*—No. 13600—*Decided November 26, 1934—Opinion by Mr. Justice Burke.*

1. The right of way at a Denver street intersection is controlled by the city ordinance, not by the state statute. (Following Denver vs. Henry, No. 13574, decided same day.)

2. Testimony by a physician as to the permanent nature of injuries is proper.

3. An assignment based on an objection to improper testimony is without merit where it appears that the same witness had previously given the same testimony without objection.

4. Requested instructions, presenting the defense of proximate cause, but which omit the word "sole," are properly refused.

5. An instruction for special findings is discretionary. No abuse appearing, its refusal is not error.—*Judgment reversed.*

CHATTEL MORTGAGES—EXTENSION AFFIDAVIT—AGENT—*Pring vs. Brown*—No. 13364—*Decided Dec. 10, 1934—Opinion by Mr. Justice Butler.*

In an action of replevin, Pring sought to recover from Brown as sheriff the possession of certain cattle. Judgment went against him and he seeks a reversal thereof.

1. An affidavit for extension of a chattel mortgage may be made by a duly authorized agent of the mortgagee or assignee.

2. Section 5093 C. L. as amended requires mortgagee or assignee to file the extension affidavit but does not require such mortgagee or assignee to make the affidavit himself.—*Judgment reversed.*

CITIES AND TOWNS—DISCONNECTION OF TERRITORY—EFFECT OF PLATTING INTO BLOCKS—*Weaver et al. vs. The Town of Littleton*—No. 13310—*Decided November 26, 1934—Opinion by Mr. Justice Burke.*

1. An action for the disconnection of territory from an incorporated town, brought under Ch. 170, L. 1925, Colorado, which provides for disconnection only when "no part of such area has been platted into lots or blocks as a part of or an addition to said town," should be dismissed for failure of proof, where it appears that the land involved is within the corporate limits of the town and that it has been platted into blocks, with the adjacent streets dedicated to the use of the public.

2. Fact that such addition was platted prior to the incorporation of the town does not change the rule; and it is immaterial that the streets so dedicated are not continuances of other streets in the town, or that some of such streets have not been used or improved by the town. —*Judgment affirmed.*

WILLS—REALTY SUBJECT TO LAW OF SITUS—EQUITABLE CONVERSION—*In Re Pence's Estate*—No. 13317—*Decided November 26, 1934—Opinion by Mr. Justice Holland.*

1. Real property in Colorado is subject to the laws of Colorado alone as to descent; and the construction of a foreign will affecting such property must be governed by the laws of Colorado.

2. The doctrine of equitable conversion of realty into personalty cannot be invoked unless it becomes necessary in order to execute the plain provision of the will.—*Judgment affirmed.*

AUTOMOBILES—NEGLIGENCE—INJURY TO PERSON WHO HAS LEFT DEFENDANT'S AUTOMOBILE—DIRECTED VERDICT—*Webster vs. Nelson, et al.*—No. 13428—*Decided December 3, 1934—Opinion by Mr. Justice Campbell.*

Where it appears that one of the defendants, Mrs. Webster, had driven plaintiff, Mrs. Nelson, in Mrs. Webster's automobile to a point on the highway opposite Mrs. Nelson's home, and that Mrs. Nelson had then left the Webster car, had walked around the rear of it and was proceeding across the road toward her house when she was struck by another car, such facts show no negligence on the part of Mrs. Webster, and, in a suit against her and the driver of the other car, the court should have directed a verdict in her favor.—*Judgment reversed and cause remanded with instructions.*

AUTOMOBILES—RENTAL AGREEMENT—CONTRACT OF INSURANCE AGAINST LIABILITY—EFFECT THEREOF—*Universal Indemnity Ins. Co. vs. Tenery et al.*—No. 13285—*Decided December 10, 1934—Opinion by Mr. Justice Holland.*

Callahan rented an automobile from the Hertz Driv-ur-self System, Inc., signing a rental agreement therefor, and later in the evening, while under the influence of liquor, negligently and carelessly collided with a car driven by Tenery and Tenery sued Callahan and the Hertz Driv-ur-self System for compensatory and exemplary damages, and the action was dismissed as against Hertz System on the ground that they had procured liability insurance under Chapter 122 of the Session Laws of Colorado for 1931.

Judgment by default was entered against Callahan and garnishment proceedings were had against the insurance carrier.

1. Under a carrier's insurance policy issued to a rental car service company, the insurance carrier insures the driver of the rented vehicle against liability.

2. The rental agreement between the driver of a car who rents the same and the owner of the car is not a part of the contract of insur-

ance and any provisions in such rental agreement evading liability are non-effective.

3. Under such contract of insurance the insurance carrier is only liable for actual damages and not for exemplary damages.

4. Where after an accident injured party makes a demand upon the renter and also the insurance carrier for damages, and there is a denial of liability of the insurance carrier on account of the drunkenness of the renter and where the insurance company entered appearance defending on a traverse in pursuance of a garnishment issued against the insurance carrier it thereby stood solely upon the questions of liability under the terms of the insurance policy and submitted to the jurisdiction of the court and thereby waived its right to raise the question that the insurer could not be bound by a judgment in a case to which there was not an original party.—*Judgment affirmed but modified.*

WATERS—POLLUTION OF STREAM—RESPECTIVE RIGHTS OF UPPER AND LOWER PROPRIETORS—*Wilmore et al. vs. Chain O'Mines et al.*—No. 13244—*Decided December 17, 1934—Opinion by Mr. Justice Holland.*

Wilmore and others were plaintiffs below and sought to enjoin the pollution of the waters of Clear Creek by defendants. Plaintiffs are farmers who claim that domestic use of their lands was injured by the polluted waters. Defendants were a mining company discharging tailings from their mills into Clear Creek.

Court below found generally in favor of plaintiffs for injunctive relief but allowed defendants to discharge a limited amount of tailings and slime per day into Clear Creek and required plaintiffs to pay their own costs. However, the Court below expressly retained jurisdiction for the purpose of later considering the modification of the injunctive order.

1. Water of a natural stream may not be polluted by a mining company discharging tailings and slime to the damage of a lower proprietor using the stream for domestic purposes.

2. The property of another may not be taken because it would be either inconvenient or expensive to the one committing the nuisance to restrain or prevent its continuance.

3. Under such conditions a final decree permitting a partial pollution by discharge of a limited amount of tailings and slime into a stream will not be permitted. The final injunction should have been permanent against any and all pollution.

4. Under such circumstances costs should not be awarded against plaintiffs.—*Judgment affirmed in part, reversed in part.*

Mr. Justice Butler and Mr. Justice Bouck dissent.

Editor's Query: Where the lower Court issues a permanent injunction but retains jurisdiction for modification thereof, is this such a final order that writ of error will lie?

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