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Supreme Court Decisions

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WILLS—CONSTRUCTION—LIFE AND REMAINDER ESTATES—*Odescalchi vs. Martin*—No. 13415—*Decided January 7, 1935—Opinion by Mr. Justice Butler.*

The trial court construed a will in favor of plaintiff. The will directed the payment of certain income to plaintiff during her life, upon her death to another, and upon the latter's death to defendant until she attained the age of twenty-five. It further provided that when defendant attained the age of twenty-five the trustees were to pay the corpus of the estate to her. The defendant has attained the age of twenty-five and claims the corpus of the estate.

It is unreasonable to suppose that the testator intended to limit plaintiff's life estate by the bequest to defendant. The two provisions may be harmonized by a determination that defendant's interest is a remainder subject to the life estate of the plaintiff.—*Judgment affirmed.*

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF BORROWING MEMBER WHERE ASSOCIATION IS DECLARED INSOLVENT BUT IS LATER DECLARED SOLVENT—*Long vs. The Railway Savings and Bldg. Association*—No. 13621—*Schroder et al. vs. Same,* —No. 13622—*Decided December 17, 1934—Opinion by Mr. Justice Campbell.*

These cases were consolidated. This was a test case against defendant, the Building and Loan Association, for which a receiver was appointed, and its purpose was to determine the proper mode of settlement by the Building and Loan Association with its borrowing shareholders.

1. Where insolvency of a Building and Loan Association occurs but before actual foreclosure, the Building and Loan Association becomes solvent, the rights of the borrowing members should be determined upon the theory that applies to the rights and liabilities of solvent associations of this character.—*Judgment affirmed.*

INSURANCE AGENCY — APPELLATE PROCEDURE — VACATION OF JUDGMENT—*Koin vs. Mutual Benefit Health and Accident Ass'n.* —No. 13395—*Decided January 7, 1935—Opinion by Mr. Justice Hilliard.*

Plaintiff obtained a health and accident policy in defendant company. At some time thereafter, he became totally disabled which was the result of an injury received several years prior to the issuance of the policy. Plaintiff sued and obtained a default judgment. This judg-

ment was later vacated on motion and the defendant entered a defense of fraudulent misrepresentation. There was a finding for the defendant and the plaintiff appealed and now, for the first time, insists that the defendant is estopped to set up this defense because of the fact that the agent knew of the true state of facts. The evidence shows more or less of a collusion between the agent and the plaintiff.

1. As a general rule, notice to an agent is notice to the principal but when the third party and the agent fraudulently collude to defraud the principal, then the agent becomes the agent of the third party and not the principal.

2. The court will not review matters on appeal which were not pleaded nor advanced in the trial court.

3. The trial court has a wide discretion in setting aside a default judgment and its action will in no way be interfered with in the absence of an abuse of discretion.—*Judgment affirmed.*

AUTOMOBILES—COLLISION—RIGHT OF WAY— BURDEN OF PROOF —*Brickey vs. Herring*—No. 13251—*Decided January 14, 1935* —*Opinion by Mr. Justice Holland.*

Plaintiff recovered damages from automobile collision.

1. It is not a question as to whether the negligence of the driver is to be imputed to the guest or occupant, but if the driver of the car in which plaintiff was riding caused the accident there is no reason why a third party should be held responsible for it.

2. Where there is not sufficient evidence to establish negligence on the part of the defendant the Court should determine as a matter of law the question of negiligence.

3. Under the Denver ordinance then existing the car on the right had the right of way and the primary duty of avoiding an accident rested with the driver on the left.

4. There is no evidence to sustain the burden resting upon plaintiff to show that the defendant on the right so wrongfully, negligently or unlawfully operated her car as to deceive a careful and prudent driver on the left and who, observing the ordinances and rules of the road, could proceed under the warranted assumption that he had the right of way as a relative right with due regard to the safety of himself and to others using the streets.

5. The evidence clearly supports the conclusion that defendant was unlawfully deprived of the right of way.—*Judgment reversed with instructions to dismiss.*

BANKS — STOCKHOLDERS' DOUBLE LIABILITY — OWNERSHIP OF STOCK—*McFerson vs. Anderson*—No. 13590—*Decided January 7, 1935—Opinion by Mr. Justice Bouck.*

In an action brought by the State Bank Commissioner to recover from defendant his statutory liability as the owner of stock in a state bank, judgment below was for defendant.

1. One who sells his stock and accepts a promissory note of the purchaser, which note is then pledged to the seller as collateral security, and which provides for repayment only from the proceeds of a sale of the stock, is not the legal nor equitable owner of the stock within the meaning of the statute.

2. The evidence is not so clear as to enable the court to term the transfer colorable.

3. The former opinion of the court is withdrawn.—*Judgment affirmed.*

INSTRUCTIONS—ALTERATIONS BY COURT—SUBJECT SHOULD BE FULLY COVERED—*Huffman vs. People*—No. 13607—*Decided December 17, 1934*—*Opinion by Mr. Justice Holland.*

Huffman tried for murder in the first degree and found guilty, with life imprisonment. Defense was, self-defense, accident and a mental condition resulting from blows upon the head received during an encounter with the deceased so that defendant did not fully realize his acts. There was evidence of a fight between defendant and deceased and that defendant received blows upon the head, and expert testimony shows that such blows would cause defendant to be unable to form a premeditated design. Defendant tendered instructions covering his theories of defense, but these were refused and defendant's instruction number 12 was altered by the Court, striking out the words, "was accidental," which instruction was submitted to the jury without being rewritten. Held:

1. That the Court erred in refusing instructions tendered by the defendant covering defense; that it is well settled that however improbable or unreasonable testimony may seem, defendant is entitled to instructions, upon the hypothesis that the same may be true.

2. The Court erred in altering instruction number 12 and submitting it without the same being rewritten as it virtually struck down the defense of accident.—*Case reversed and remanded for a new trial.*

TRIAL—CONTRADICTORY INTRUCTIONS—*Glenn vs. Halberg*—No. 13278—*Decided January 7, 1935*—*Opinion by Mr. Justice Campbell.*

Halberg, the plaintiff in the Trial Court, while walking across a street in Trinidad was struck by a car operated by Glenn. The plaintiff contended that he was struck while on a cross walk for pedestrians, which the defendant denied. A city ordinance required pedestrians to cross the streets at street intersections and gave vehicles the right of way over pedestrians at all points on a street except at street intersections. The Court gave two instructions, which were in conflict as to whether or not the plaintiff was struck while on a pedestrian cross walk. Plaintiff below had judgment.

1. There is such inconsistency and repugnancy between the instructions that the jury necessarily must have been misled.—*Judgment reversed.*

CONTRACTS—TERMINATION—OFFER AND ASSENT BY CONDUCT—*Linder vs. The Midland Oil Refining Company*—No. 13643—*Decided January 7, 1935—Opinion by Mr. Justice Butler.*

Linder was employed as a tank wagon driver for the Midland Company at $15.00 per week and $10.00 per week in stock. Soon thereafter the Midland Company offered a new arrangement under which Linder was to purchase gasoline at a stated price and redistribute it to his trade at retail price. The Midland Company sued to recover a balance due on the account, and Linder counterclaimed for his salary, denying acceptance of the new agreement. The company had judgment.

1. The first contract was determinable at the will of either party.

2. The company terminated the original agreement and offered a different arrangement. Linder accepted by conduct. An offer and an assent thereto manifested by conduct constitute a contract.—*Judgment affirmed.*

MORTGAGES AND TRUST DEEDS—FORECLOSURE THROUGH COURT—JUDGMENT FOR ALL OUTSTANDING BONDS—ORDER PERMITTING TRUSTEE TO BID AND APPLY JUDGMENT—PROVISIONS OF TRUST DEED FOR PUBLIC SALE FOR CASH—EQUITABLE PRINCIPLES—*Statute Cosmopolitan Hotel, Inc., et al., vs. The Colorado National Bank of Denver*—No. 13589—*Decided December 17, 1934—Opinion by Mr. Justice Hilliard.*

A deed of trust secured numerous outstanding bonds, held by various owners. It provided that its security was for the common and equal use of all of the bondholders, and that each bondholder was entitled to payment ratably with all other bondholders; also that, in event of default, it should be lawful for the trustee to sell and dispose of the property described therein at public auction for the highest and best price the same would bring in cash. Default occurred and the trustee took possession of the property and then proceeded to foreclose through Court, obtaining judgment in the full amount of all unpaid bonds. The trial court permitted the trustee to bid at the foreclosure sale and, in payment of its bid, to employ the said judgment based on all of the outstanding bonds. The order of the trial court fixed a minimum or "upset" price and provided that the trustee might bid only in the event that there was no other bid equal to or in excess of such upset price. No other bids were made and the trustee took title to the property in its name as trustee. A minority of the bondholders object to such sale and contend that under the provisions of the deed of trust the foreclosure sale was required to be for cash and that it was a violation of their

contract rights for the trial court to involve them in joint ownership of property against their will.

1. The terms of the foreclosure sale must be in accord with the deed of trust. The trial court cannot be moved by a majority of the bondholders, or nearly all of them, or all save one, to a plan other than that stated in the deed of trust. The rights of bondholders are measured by their bonds and the trust deed securing the same, and, absent any provision therein authorizing the trustee to bid for and on behalf of the bondholders, there was no power in the courts to confer such power upon the trustee. Sale of the property, so far as the beneficiaries are concerned, is yet to be made.

2. Fact that the holdings of the protesting bondholders are small can make no change in the rule, nor the fact that one of the plaintiffs in error bought his bonds while the foreclosure was pending and at much below their face value.—*Judgment reversed and cause remanded.*

Mr. Justice Bouck, dissenting:

1. The provision in the deed of trust, for sale by the trustee at public auction for cash, is not involved here, for the reason that the trustee did not resort to the power of sale so provided. Instead, the trustee pursued the time honored method of foreclosure in equity. The sale was not by the trustee but was a judicial sale by the court through its regular officer, the sheriff. Foreclosure by ministerial sale under a power being thus out of the case, the foreclosure is wholly in equity, and the established principles of equity jurisdiction should prevail. With the non-appearance of cash bidders the legitimate function of chancery came properly into play, in order that the property might be conserved —according to the stated purpose of the mortgage—"for the common and equal use, benefit and security of all" who held the bonds. Equitable principles have been properly applied and the judgment should be affirmed.

2. The Colorado public trustee act, Compiled Laws, 1921, Sec. 5044 et seq., would seem to forbid any method of foreclosure other than in equity where, as here, the public trustee is not named as trustee. —*Mr. Justice Campbell concurs in said dissent.*

CONTRACTS—MISTAKE OF LAW—LACHES—*Bowles vs. State Board of Land Commissioners*—No. 13361—*Decided January 7, 1935* —*Opinion by Mr. Justice Campbell.*

FACTS: Plaintiff was assignee of a contract to buy lands by Certificate of Sale issued by the State Board of Land Commissioners, in which the State reserved all mineral rights and rights of ingress and egress. After $3,500.00 had been paid, the land was abandoned by plaintiff. In 1914 the Commission, on failure of further payments, declared the Certificate of Sale cancelled and the payments forfeited under the contract. In 1927 plaintiff objected. He sues to recover the

$3,500.00 paid under the contract, on the ground that the reservation of mineral rights was void and invalidated the contract.

HELD: 1. Rights which might have been acquired by plaintiff had he not abandoned the property do not control here. He abandoned it voluntarily, years before this reservation was decided to be void by this Court. The Certificate of Sale had been cancelled and the payments forfeited.

2. The demand for refund made in 1927 was on the ground of mistake as to the law applying to the reservation. A mere mistake of law will not affect the enforceability of a contract. The mistake, to have that effect, must be as to the existing state of facts, not as to the law applicable.

CHATTEL MORTGAGES—CONSENT TO SALE BY MORTGAGEE UPON CONDITION—WAIVER—PROCEEDS OF SALE—*Jeter Arnold, et al., vs. The First National Bank of Cripple Creek*—No. 13365—*Decided December 21, 1934—Opinion by Mr. Justice Campbell.*

The Bank brought suit against Arnold, Harriman & Company and one Jardon for the conversion of sheep by the defendant company. Jardon sold the sheep to the defendant company, and at the time of the sale the Bank had a valid chattel mortgage upon the property, of which all the defendants had knowledge. The Bank consented to the sale upon the express condition that the entire proceeds should be given the plaintiff mortgagee to be applied upon the mortgage debt.

1. The Appellate Court will not interfere with the findings of the Trial Court where there is evidence to support the findings.

2. The lien of the Bank was not waived.

3. When a mortgagee's consent to a sale by the mortgagor is given on condition, the condition must be performed in order to render the consent a waiver of the mortgage lien as between the parties, or as against a purchaser who was a party to the condition or had knowledge thereof, as where consent is given on condition that the proceeds of the sale be applied on the mortgage debt.—*Judgment affirmed.*

HUSBAND AND WIFE—SEPARATE MAINTENANCE SUIT—LIS PENDENS — PRIORITY OF CREDITOR — *Tinglof vs. Askerlund* — No. 13320 — *Decided December 17, 1934 — Opinion by Mr. Chief Justice Adams.*

Tinglof brought a proceeding in Court below to have a transcript of judgment obtained by a general creditor against defendant's husband adjudged to have priority over a decree in a separate maintenance suit, in which certain real estate was awarded to the wife in lieu of support money from her husband. A demurrer to the petition was sustained and both stood on the demurrer and judgment was entered of dismissal.

1. The doctrine of lis pendens, in a separate maintenance suit, applies.

2. In a separate maintenance suit, independent of statute, Courts of equity have the power to grant alimony to a wife.

3. Where a wife institutes a separate maintenance suit against her husband she has, as against a creditor of the husband, an unadjudicated equitable interest in his property and has a right to file a notice of lis pendens, and when a judgment is subsequently entered for her share, the Court has power to adjudge that such judgment becomes effective as of the date that she filed her notice of lis pendens.—*Judgment affirmed.*

DIVORCE—PRACTICE—CHANGE OF VENUE—CONTEMPT—NECESSITY FOR AFFIDAVIT—*Jensen vs. Jensen—Decided December 21, 1934*—No. 13388—*Opinion by Mr. Justice Adams.*

The husband, defendant below in a divorce action, seeks reversal of an order committing him to jail for refusal to testify upon a contempt citation. The citation resulted from his failure to pay temporary alimony as ordered.

1. The practice of coercing alimony payments by contempt citations is disapproved, the proper remedy for the punishment of the husband being provided by Sec. 5566-5574, Compiled Laws Colorado, 1921.

2. The motion for change of venue or of judge should have been granted. During the pendency of the case, and in the absence of the husband and his counsel, the wife on two occasions interviewed the judge concerning the merits of the case, one of the interviews being pursuant to a letter written by the wife to the judge. The contempt citation involved issued on the Court's own motion, and without affidavit, as a result of the last of these interviews. Thus, there existed a possibility of bias or prejudice on the part of the judge, which should have furnished the reason for the relinquishment of jurisdiction when requested.

3. In the absence of the affidavit provided for by Sec. 356-357, Code 1921, the Court was without jurisdiction to issue the citation, to order the husband to testify, or to punish him for his refusal to do so. —*Judgment reversed.*

DIVORCE — SUPPORT MONEY — ISSUANCE OF CITATION — GROUND FOR CHANGE OF VENUE—*Jenson vs. Jenson*—No. 13388—*Decided January 7, 1935—Opinion by Mr. Justice Holland.*

FACTS: Defendant in a divorce action was committed to jail for failure to provide support money ordered by Court. By reason of previous citations, continuances, irregular payments and ex parte communications between Judge and plaintiff in the action, defendant believed the Court to be prejudiced against him, and a fair and impartial hearing impossible. He files two motions. One for change of venue or reassignment to another trial judge, and the second, to quash the citation under

Sections 356 and 357, for lack of supporting affidavits. Both denied by the trial court.

HELD: Where the Court order, as here, is to pay money into the registry of the Court, supporting affidavits as under Sections 356 and 357 are unnecessary as the Court may examine the records and find whether or not the order has been complied with. In such case, the Court may issue citation on own motion. On rehearing, ruled that the motion for change of venue should have been allowed. There was reasonable justification for fear of prejudice in the mind of the ordinary man. In general, however, Courts in divorce cases are allowed great latitude in determining the issues and ex parte communications with the Judge are not ordinarily prejudicial nor grounds for change of venue.

INDICTMENTS—SPECIFIC CHARGE MUST BE STATED AS TO THE SUBJECT OR NATURE OF THE INQUIRY BEFORE THE GRAND JURY—*Treece vs. People*—No. 13539—*Opinion by Mr. Justice Holland.*

1. Denver Grand Jury investigating gambling, etc., in the County, indicted Treece for perjury, setting forth his testimony before it. The indictment failed to specify or set forth the subject or nature of the matter before the grand jury into which it was inquiring. Treece offered no defense and attacked the indictment upon said grounds.

HELD: 1. The substance of the matter before the grand jury was not set forth in the indictment as required by Sections 6776 and 6779, and therefore the same was defective and the judgment was reversed.

2. Strong dissenting opinions by J. J. Butler, Campbell and Burke quoting Sections 7062, 7068 and 7103 of the Compiled Laws of 1921.

CRIMINAL LAW—PROMISES OF DISTRICT ATTORNEY—INSTRUCTIONS—*Frady vs. The People*—No. 13552—*Decided December 17, 1934*—*Opinion by Mr. Justice Burke.*

The plaintiff in error Frady and one Kelly were separately tried for murder committed in accomplishing a robbery. Upon a promise of the district attorney that he would recommend that the court accept a plea of guilty to second-degree murder, Frady testified for the State. Upon this testimony Kelly was convicted and executed. The trial court refused to accept such a plea and instructed the jury that, "No one can promise anybody accused of a crime what punishment shall be inflicted. In capital cases it rests with the jury, * * *." In his opening statement to the jury the district attorney stated that Frady had been of assistance, that he had recommended to the court that it accept a plea of guilty to second-degree murder and that the State did not ask the death penalty. Frady was convicted of murder in the first degree, and the death penalty imposed.

1. Since no confession of guilt was made by Frady upon the promises of the district attorney, such promises were inadmissible as evidence.

2. The trial court did not abuse its discretion in refusing the tendered plea, and the district attorney carried out the promise he made by advising the jurors of the facts.

3. The restatement by the court of the law contained in the instructions, made to clarify the argument of defendant's counsel, was not prejudicial.

4. It is the attempt to rob, not the elements of malice, deliberation, etc., that classifies such homicide as first degree murder.

5. The instruction concerning the facts under which an accessory is held as a principal was correct—*Affirmed.*

AGENCY—POWER OF GENERAL AGENT TO ENDORSE NEGOTIABLE PAPER—*Independence Indemnity Co. vs. The International Trust Co.*—No. 13082—*Decided December 21, 1934—Opinion by Mr. Justice Holland.*

The dispute between the parties presents the question of the authority of the Indemnity Company's agent to endorse negotiable paper.

1. A general agent has authority to do all things relative to a particular business or trade and is presumed to act within his authority. Others who know him to be such general agent may deal with him in the assumption of his having full authority without further inquiry.

2. The rights of innocent third parties dealing with an agent within the apparent scope of his authority cannot be affected by private instructions to such agent or secret limitations upon his authority.

3. It is no defense that the general agent departed from private instructions when acting within the general scope of his authority.

4. The rule of strict construction adopted in the case of the execution by an agent of negotiable instruments is not to be pursued to the extent of defeating, by technical interpretation, the obvious intent of the principal as gathered from a reasonable interpretation of the instrument appointing the agent.

5. The power to make or endorse negotiable instruments may be implied as a necessary incident of powers expressly conferred.—*Judgment affirmed.*

PRINCIPAL AND SURETY — PRACTICE AND PROCEDURE — TRACING FUNDS EQUITABLY BELONGING TO OTHERS—SUBROGATION—*Hartford Accident and Indemnity Company vs. The Colorado National Bank of Denver*—No. 13422—*Decided December 31, 1934—Opinion by Mr. Justice Holland.*

The Indemnity Company was surety for a livestock commission company, insuring to all shippers the payment of such proceeds as would

be due to them from the sale of livestock consigned to the commission company. The commission company did its banking business with defendant bank. The bank permitted certain overdrafts by the commission company in the payment of shippers' accounts, and then applied later deposits toward repayment of such overdrafts. The commission company having failed to account to certain shippers, payment was made to such shippers by the Indemnity Company, which now seeks to be subrogated against the bank to the rights and remedies of the shippers.

1. A replication having been stricken and the plaintiff refusing to proceed further, a judgment of dismissal is proper. Such judgment is final as to every issue that could have been tried in the case.

2. The plaintiff by filing its replication waived any error in the rulings of the Court sustaining a motion to strike part of the complaint.

3. Failure of the Indemnity Company by its pleadings to trace the funds equitably belonging to the shippers into the bank destroys the right of the Indemnity Company to subrogation, if any such right it had.—*Judgment affirmed.*

TAXATION—EXEMPT INSTITUTIONS—*City and County of Denver vs. Colorado Seminary, a corporation*—No. 13396—*Decided December 21, 1934—Opinion by Mr. Chief Justice Adams.*

Colorado Seminary brought suit in the Denver District Court to enjoin the assessment and levy of taxes upon property at Sixteenth and Champa Streets, Denver, Colorado. The fee was owned by Corwin A. Welsh and Mary Thomas Welsh who gave plaintiff's remote grantor a 99 year lease, with a privilege of two renewals for like periods, reserving to themselves a ground rent of $36,000.00 per year, with a reservation in case of default. From 1924 to 1931 the Manager of Revenue of the City and County of Denver placed an assessed valuation on the lots and also an assessed valuation upon the buildings and improvements, and plaintiff paid the taxes for those years on the lots, but claimed exemption on the lots as well as the buildings. In 1932 McGlone, as Manager of Revenue, attempted to collect taxes for the years 1924 to 1931 inclusive on the buildings and improvements, and upon both lots and buildings for 1932. Plaintiff also claimed that since no previous notice had been given to collect taxes for the previous years it was an attempt to deprive it of its property without due process of law. Plaintiff filed the petition with the Board of Equalization of the City and County of Denver which was denied, and also with the Colorado Tax Commission which was likewise denied, and then commenced this suit. The trial court held that the building and leasehold interest of the plaintiff for the years in question are exempt, but not the fee title or reversionary interest since this was held by third parties who are not entitled to exemption.

HELD: 1. That the plaintiff, having obtained its charter by virtue

of legislative act on March 5, 1864, and being a charitable institution was entitled to an exemption of the buildings and improvements.

2. That fee title or reversionary interest was taxable under the particular facts of this case.

3. That the rules laid down in County Commissioners, et al., vs. Colorado Seminary, 12 Colorado, 427; 21 Pacific, 490, and Colorado Seminary vs. Board of County Commissioners of Arapahoe County, 30 Colorado, 507; 71 Pacific, 410 are applicable to this case and definitely determined the issues herein, and that not only the property in actual use for school buildings, campus and the like is exempt, but the exemption includes all property of the corporation, the income of which is exclusively devoted to the purposes of the Seminary, and which is necessary to carry out its design.

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS RE PROCURING WRIT OF ERROR—*Kosmos vs. The Industrial Commission et al*—No. 13635—*Decided December 17, 1934—Opinion by Mr. Justice Hilliard.*

In a proceeding under the Workmen's Compensation Act the claimant, displeased with the holding of the Commission, instituted an action in the District Court where judgment sustaining the Commission was entered. The writ of error was not sued out until forty-six days after the decision below and motion was made to dismiss the writ on the ground that it was not procured within time.

1. Section 106 of the Industrial Commission Act as amended in 1931 provides a short Statute of Limitations.

2. One of the purposes of the Compensation Act was to avoid the delay attending ordinary litigation.

3. Unless claimant perfects a writ of error within the time limited he has no remedy.—*Writ of error dismissed.*

COLLECTION AGENCIES—STATUTORY BOND—LIABILITY UNDER—*Young et al. vs. Cox*—No. 13645—*Decided January 21, 1935—Opinion by Mr. Chief Justice Butler.*

In an action against Young and Kelley as sureties on a statutory collection agency bond, Cox recovered judgment for $302.43. The defendants' general demurrer to the complaint was overruled and the defendants stood upon their demurrer and judgment was entered against them.

The first count alleges in substance that Young and Hermete were co-partners conducting a general collection business and had executed the statutory $5,000.00 bond guaranteeing faithful accounting, with the defendants as sureties and that the plaintiff entrusted to the collection agency some accounts owed by plaintiff and not accounts due the plain-

tiff, and that the plaintiff paid to the partners running the collection agency certain moneys and that they never paid this money over to the plaintiff's creditors.

The second count, on the ground that the collection agency employed one Stark as a collector and that Stark deposited with the defendants $100.00 to guarantee faithful accounting of all moneys collected by him.

1. The statutory bond required to be given by collection agencies does not cover the above case.

It is given for the benefit of one entrusting accounts to the collection agencies for the benefit of the party so entrusting them for collection.

The first count states no cause of action.

2. The second count states no cause of action, likewise.—*Judgment reversed with directions to dismiss.*

CONSTITUTIONAL LAW—ADMINISTRATIVE BODIES—LEGISLATIVE INTENT—*Edwin C. Johnson, et al., vs. People ex rel. Kelly, et al.*—No. 13611—*Decided January 7, 1935*—*Opinion by Mr. Justice Holland.*

Kelly, in accordance with the rules of the Civil Service Commission, was discharged from his position as steam boiler inspector. The Commission contended that his position was abolished by the administrative code of 1933 in that one position in such department was abolished and Kelly being the youngest in point of time was the person who was to be discharged under the Commission's rules relating to seniority. Kelly obtained a pre-emptory writ of mandamus against such action. Whereas the respondents appealed.

1. The provisions of this Act were reviewed and the Court found that one of the officers of the boiler inspection department was abolished.

2. The intention of the Legislature was to lessen the number of inspectors and such inspectors being under Civil Service, the one to be affected must necessarily be treated according to Civil Service rules and regulations.

3. The classification by the Civil Service Commission is discretionary and having exercised its discretion will not be interfered with in the absence of an abuse of such discretion.—*Judgment reversed.*

FORECLOSURE—PAYMENT OF TAXES AND INSURANCE BY MORTGAGEE—EFFECT OF—*The Denver Lumber and Mfg. Co. et al. vs. The Capitol Life Insurance Co.*—No. 13303—*Decided December 10, 1934*—*Opinion by Mr. Justice Hilliard.*

This was a suit to foreclose a real estate mortgage. Defendant in error, who is the plaintiff below, had judgment.

1. Where either the note or the mortgage in a foreclosure pro-

ceeding provides for an attorney's fee, and the mortgagee employs counsel, a reasonable sum to be fixed by the Court may be included in the judgment to be satisfied by the sale.

2. Where the mortgagee pays the taxes and there is no protest by the mortgagor for over a period of three years, and the first protest is raised at the trial such protest comes too late to be effective.

3. Where the mortgage required the mortgagor to keep the building insured against loss by fire and the mortgagor fails to do so the cost of insurance effected by the mortgagee is a proper item in the judgment of foreclosure.—*Judgment affirmed.*

FORECLOSURE — REAL ESTATE AND PERSONALTY — SUCCESSIVE MORTGAGES—*Conway vs. Headquist et al.*—No. 13256—*Decided June 18, 1934—Opinion by Mr. Justice Butler.*

1. Foreclosure sale of chattels should be held at the place where the chattels are located where a view of the chattels could be had by bidders.

2. However, where a chattel mortgage and real estate mortgage are foreclosed at the same time and the sale of both the chattels and real estate is ordered to be held at the Tremont Street entrance of the courthouse, and no objection was made in the court below to the sale of the chattels at such place, and there was nothing in the decree forbidding the presence of the chattels at the courthouse at the time of the sale, the fact that they were not there will not vitiate the sale.

3. Even if the chattels were not at the place where the sale was held, where no objection is made to the sale nor any steps taken to have it set aside, and the lower court was given no opportunity to pass upon the question, the Supreme Court will not pass upon the question. Objection that the articles were sold en masse and not separately must be made in the court below to be available.

4. Likewise, where the decree and the certificate of sale give the right of redemption to both the real estate and chattels, the fact that there is no right to redeem from the sale of chattels will not be considered where such objection was not urged below.

5. Where one buys personal property subject to a chattel mortgage and before the maturity of the debt and before any default, such chattel mortgage was valid against the purchaser even though not renewed by filing the statutory affidavit of renewal.

6. One who, before condition broken, buys mortgaged chattels from the mortgagor, is in no better position than the mortgagor and cannot profit by the failure of the mortgagee to take possession or to file the statutory statement.

Where two mortgages executed by a mortgagor on the same chattel property to different mortgagees, and the first mortgagee fails to take possession of the mortgaged property within the statutory time after

maturity of the debt which is secured, the second mortgagee may, by taking possession before the first mortgagee, divest the lien of the first mortgage and obtain the superior right.—*Judgment affirmed.*

CONSTITUTIONAL LAW—CHARTER OF THE CITY AND COUNTY OF DENVER—FIXING SALARY OF POLICE OFFICER—*McNichols as Auditor vs. The People*—No. 13511—*Decided June 18, 1934—Opinion by Mr. Justice Burke.*

Lawrence Cook, police sergeant, brought mandamus in the court below to compel the auditor to issue warrant for his salary in the amount fixed by charter on the ground that an ordinance passed by the City Council reducing his salary 10% was illegal.

1. Article 20 of the State constitution furnishes the plan under which the city charter exists.

2. Section 2 thereof provides that the officers of the city shall be such as by appointment or determination may be provided by the charter and that if any of them receive compensation the same shall be fixed by the charter.

3. Where the charter fixes the salary of policemen such salary cannot be changed by ordinance.

4. An amendment to the charter which purports to authorize the council by ordinance to reduce the salary of officers whenever in the judgment of the mayor and his cabinet, public finances or the financial condition of the City and County and its finances require it, is unconstitutional and an ordinance passed in the pursuance thereof is void.

5. Salary of officers must be fixed by the charter and a policeman is an officer.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—PRIVATE FUNCTIONS AS DISTINGUISHED FROM GOVERNMENTAL FUNCTIONS—LIABILITY FOR NEGLIGENCE IN PERFORMANCE OF PRIVATE FUNCTIONS—*LeMarr vs. City of Colorado Springs*—No. 13199—*Decided June 25, 1934—Opinion by Mr. Justice Burke.*

LeMarr sued the City for damages which she alleged she sustained by reason of the negligence of the driver of the city's street sweeping machine, which negligence caused a collision between that machine and the automobile in which she was riding, thereby inflicting injuries upon her. A general demurrer to the complaint was sustained. LeMarr elected to stand, and to review that judgment she prosecutes this writ of error.

1. The operation of a street sweeper by a municipality is not a governmental function but is a detail in the performance of the general duty of the city to care for its streets and for negligence in the performance thereof, the city is liable.—*Judgment reversed.*

WORKMEN'S COMPENSATION—LESSEE—OWNER NOT CARRYING INSURANCE—VIOLATION OF REASONABLE SAFETY RULE—*McKune vs. The Industrial Commission of Colorado et al.*—No. 13418—*Decided March 19, 1934—Opinion by Mr. Justice Butler.*

The owners of certain coal mining property leased to Knox for mining purposes, and McKune, one of the lessee's employees, was injured in a compensable case. The owners had no insurance and the lessee had no insurance and McKune was awarded as against the lessors and lessee $5.00 per week plus 50% thereof on account of non-insurance, making a total of $7.50, and later the Commission found that McKune had violated a reasonable safety rule and thereupon reduced the compensation by 50%, making the award $3.75. The District Court dismissed the proceeding against the State Compensation Fund but vacated the order that the owners pay compensation.

1. The computation of the award was correct.

2. Where the lessors of a coal mine failed to carry any insurance and the lease itself provides that the lessee shall protect the lessors by having all employees adequately insured by compensation insurance and the lease further contains royalty provisions and directions and regulations for the prosecution of the workings, the lessors as well as the lessees are employers within the meaning of the Workmen's Compensation Act.

3. Where an application for insurance was made on September 14, 1931, and the accident was on September 15, 1931, and the policy was effective September 17, 1931, and there was evidence that the policy was to become effective on the 14th, the day the application was made, but there was also evidence that it was not to be effective until the 17th the findings of the Commission that it was not effective until two days after the accident was a matter for the Commission to decide and its findings will not be disturbed.

4. At the time of the accident the lessee had been operating the property for two months without insurance and the lessors could have terminated the lease for a breach of covenant to insure or could have obtained insurance themselves at the lessee's expense. Where the lessors did neither, nor did they obtain a self-insurance permit, the situation in which the lessors find themselves is due to their own neglect and their remedy, if any, is on the lessee's covenant to insure for their protection. The employee cannot be made to suffer by reason of their failure to comply with the law.—*Judgment reversed with directions.*

GUARANTY—EFFECT OF PARTIAL PAYMENTS—LEAVING BLANKS—*Pohly vs. The Star Loan Co.*—No. 13112—*Decided March 19, 1934—Opinion by Mr. Justice Campbell.*

This was a suit on a promissory note against five defendants, including the defendant, Pohly. As to Pohly it was sought to hold him not as a maker, but as a guarantor, under the following:

"The undersigned, having carefully read the above and foregoing promissory note, for good and valuable consideration, severally guarantee to the payee the payment of the same to the extent of the amount set opposite his name, and hereby agree to all terms of said note as to waiver of notice." No amount was filled in after Pohly's name but the note itself was for $800.00 and at various times after the execution of the note, Pohly made four different payments aggregating $68.00. Judgment went against all defendants but Pohly was the only one who prosecuted error.

1. Where a guarantor, before any controversy, voluntarily makes different payments upon the note he thereby places his own construction upon the contract and recognizes his liability as a guarantor thereof, even though no amount was placed on the instrument opposite his signature.

2. The mere failure to set opposite his signature the amount for which he was willing to be held liable is cured by his subsequent payments on his alleged guarantee.

3. Such payments upon the instrument which he signed constitute a recognition by him of his obligation as a guarantor to pay.

4. In a guaranty where the sum is uncertain it must be taken in the sense in which the promisor had reason to suppose it was understood by the promisee.—*Judgment affirmed.*

WORKMAN'S COMPENSATION—CHANGE OF AWARD—DISCRETION OF INDUSTRIAL COMMISSION—PREJUDGMENT—*The Rocky Mountain Fuel Company et al., vs. Canivez et al.*—No. 13619—*Decided January 21, 1935—Opinion by Mr. Justice Holland.*

1. Courts will not allow the Industrial Commission to change its award merely through caprice and without any stated reason; but there will be no interference with the Commission's discretion to review and alter an award, when there is new and additional evidence that reasonably supports a change of conclusion.

2. Record examined and determination made that the Commission had not prejudged the case.—*Judgment affirmed.*