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Supreme Court Decisions

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Supreme Court Decisions

WORKMEN'S COMPENSATION—POWER OF COMMISSION TO REOPEN AWARD AND GRANT FURTHER RELIEF—*Moffat Coal Co. vs. Podbelsk*—No. 13651—*Decided March 11, 1935—Opinion by Mr. Justice Hilliard.*

1. In case of error, mistake or change of conditions the Industrial Commission may at any time review any award and on such review may make an award ending, diminishing, maintaining or increasing the compensation previously awarded.

2. Where on reopening a case the Commission finds that the award as originally made was insufficient in that claimant's condition from the beginning justified a larger award the Industrial Commission is authorized to increase the award for compensation.—*Judgment affirmed.*

EXECUTION—FRAUDULENT CONVEYANCE TO DEFRAUD CREDITORS —*Ashworth vs. The Hugo National Bank*—No. 13372—*Decided March 11, 1935—Opinion by Mr. Justice Campbell.*

The bank brought suit against Ashworth on promissory notes and recovered judgment. Before levy was made under execution he conveyed the lands without consideration, to his wife.

1. Where a husband conveys all of his lands to his wife without consideration after judgment is entered against him and before levy of execution and the wife is aware of the fact that such conveyance is made to avoid the payment of the judgment, such conveyance is in fraud of creditors and will be set aside.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—WHO ARE DEPENDENTS—MARRIAGE SUBSEQUENT TO INJURY—STATUTES—*McBride vs. The Industrial Commission, et al.*—No. 13661—*Decided March 11, 1935 —Opinion by Mr. Justice Holland.*

An employee, having been injured in the course of his employment, applied for compensation through the Industrial Commission. He was awarded a definite sum, payable in weekly installments. Subsequent to the date of his injury, the employee had married the claimant. Upon the death of the employee the claimant filed this claim for the unpaid portion of the sum theretofore awarded to her husband.

1. All portions of the Workmen's Compensation Act, as originally enacted and later amended, should be read together and harmonized if possible. Sec. 57, Ch. 210, Session Laws of 1919, as amended by Sec. 9, Ch. 201, Session Laws of 1923, which provides that the identity of dependents shall be determined as of the date of the accident, is modified by other provisions of the Act as shown by Sec. 52,

Ch. 210, Session Laws of 1919, and Sec. 1, Ch. 174, Session Laws of 1931.

2. Conditions constituting dependency may change during the period between the injury and the death of the injured employee, and, therefore, the extent of the right to death benefits cannot always be fixed as of the date of the accident. Claimant, although having married the employee after the date of the injury to him, is to be classed as a dependent, and, as such, is entitled to the unpaid portion of the lump sum award.

3. The Commission having determined the full liability of the insurer by the award of a lump sum to the injured employee, such award became a vested right, which right would survive.

4. A strict interpretation is not to be placed upon seemingly conflicting provisions of the Workmen's Compensation statute.—*Judgment reversed.*

Mr. Justice Hilliard and Mr. Justice Bouck dissent.

Mr. Justice Hilliard dissenting:

1. The only statute fixing the identity of dependents is amended Sec. 57, above mentioned. Sec. 52, above mentioned, fixes merely the degree of dependency, not the identity of dependents.

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—*Frank vs. Industrial Commission*—No. 13573—*Decided March 18, 1935*—*Opinion by Mr. Justice Bouck.*

Frank claims under Workmen's Compensation Act, as an injured employee of the Black Diamond Fuel Co. for compensation on account of a ruptured appendix with a resulting peritonitis. The injury occurred while claimant was lifting a mine car in the company's coal mine. He consulted the company's physician who examined him, had him removed to a hospital and saw that an appropriate operation was performed.

The Industrial Commission denied this claim and the District Court affirmed the decision. No notice of the claim was filed with the Commission until nearly ten months after the injury.

1. The injury was a compensable one.

2. The six-month period prescribed for filing notice with the Commission does not apply to any claimant to whom compensation has been paid.

3. The furnishing of medical services rendered by or under the direction of the company's physician constituted the payment of compensation within the meaning of the Act where such services are rendered by authority of the employer.—*Judgment reversed with directions.*

MINES AND MINING—PLEADING—INTERPLEADER—SUFFICIENCY OF COMPLAINT—*Mosquito Gold Mines, Inc., vs. London-Butte Gold Mines Co.*—No. 13603—*Decided April 29, 1935—Opinion by Mr. Justice Bouck.*

1. Where suit was brought by London-Butte Gold Mines Co. against the American Smelting and Refining Co. to recover the net proceeds of all shipments and the smelting company filed a motion for a substitution of Mosquito Gold Mines, Inc., as defendant supported by affidavit that Mosquito Gold Mines, Inc., claimed the proceeds of the ore shipments, and the substitution was made, this procedure constituted an effective interpleaded of the two claimants.

2. Where the amended complaint against the interpleader defendant sets forth the shipments and that the interpleaded defendant claims some right, title or interest in the proceeds thereof, such amended complaint is good against a general demurrer.

3. Jury being waived, the credibility of the witnesses and the weight of the evidence were matters for the trial judge to determine.—*Judgment affirmed.*

AUTOMOBILES—FORM OF VERDICT—DAMAGES—POLL OF JURY—NEW DISCOVERED EVIDENCE—*Morgan vs. Gore*—No. 13339—*Decided April 22, 1935—Opinion by Mr. Justice Hilliard.*

Gore recovered judgment below for damages for death of wife in one count and for injuries to himself and damage to his car in another count against two defendants growing out of a collision between three cars.

1. Where there was evidence that the two cars driven by two defendants were traveling between 55 and 60 miles an hour just before crashing into plaintiff's car, defendants were not entitled to a directed verdict. Whether the defendants were exercising due care as well as whether plaintiff was guilty of contributory negligence was for the jury to decide.

2. Where verdicts were returned against the two defendants jointly for $2500 on each count but the jury added to each verdict that one defendant should be assessed 75% and the other 25% thereof, such added matter may be rejected as surplusage and the verdicts upheld, particularly where the court had clearly instructed the jury that if they found both defendants guilty of negligence and damage resulted, that each would be liable for all loss, injury and damage resulting from his own negligence even though the negligence of the other defendant may also have contributed.

3. A verdict is not vitiated where it finds the whole issue for plaintiff and then attempts to find more for the finding of what is not in issue is but surplusage.

4. The jury has no right to apportion the damages between joint tort feasors.

5. Whether there shall be a poll of the jury in a civil case rests in the sound discretion of the court.

6. Newly discovered evidence held insufficient to warrant new trial.—*Judgment affirmed.*

AUTOMOBILES — CHATTEL MORTGAGES — SALE OF MORTGAGED PROPERTY WITH CONSENT OF MORTGAGEE—WAIVER OF LIEN —*Prather vs. Auto Industrial Corporation*—No. 13407—*Decided April 22, 1935—Opinion by Mr. Justice Holland.*

1. A mortgagee of an automobile does not waive the lien of his mortgage, duly filed or recorded, by consenting to the sale of the equity in the car to a purchaser who assumes and agrees to pay the mortgage.

2. An attaching creditor could attach only the equity that judgment debtor had in the car.

3. That as between the holder of a purchase money mortgage and an attaching creditor, who parted with no consideration, and did not become a creditor by relying upon debtor's ownership, the equities are in favor of the mortgagee.—*Judgment affirmed.*

Mr. Justice Bouck dissents.

WATERS—CHANGING POINT OF DIVERSION—SUFFICIENCY OF FINDINGS — *Antonioli vs. Arlian* — No. 13390 — *Decided April 22, 1935—Opinion by Mr. Justice Campbell.*

Antonioli brought suit below whereby she sought to have decree entered to change the point of diversion of certain decreed water rights and was denied relief.

1. Where the relief sought was to obtain a decree changing point of diversion but the evidence was that the change had been made 30 years prior and water ever since had been diverted from this changed point but the court below and both parties proceeded on the theory that it was an action to change point of diversion thereafter to be made, this inconsistency in the pleadings and the evidence where the evidence showed from the records that the change had been decreed theretofore, will not be considered.

2. Where the court found from conflicting evidence that the plaintiff failed to establish that the change in point of diversion can be made without injuriously affecting the vested rights of others and denied relief, such judgment will not be disturbed.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—PRIVATE CORPORATIONS REFUSING TO FURNISH LIGHT AND ELECTRIC POWER—POWER OF PUBLIC UTILITIES COMMISSION—*Highland Utilities Company vs. Public Utilities Commission*—No. 13555—*Decided April 22, 1935—Opinion by Mr. Justice Campbell.*

1. Since the passage of the public utilities act, the power to ascertain and determine whether or not a public utility should or should not

continue service to the public is possessed solely by the Public Utilities Commission, subject to a review by the courts of the action of the Commission.

2. Such Commission has exclusive regulatory power over all service rendered to the public by the utilities throughout the state including municipalities.

3. When a public utility assumes to act as such, it thereby in legal effect agrees to have its business regulated by public authority.

4. The court below properly denied a petition for writ of certiorari against the Commission seeking to set aside its order to compel petitioner to furnish light and electric power to a municipality where it appears that in a prior suit in the District Court, an order of the Commission ordering the furnishing thereof was sustained and such judgment of the District Court has never been set aside and is still in force. —*Judgment affirmed.*

WORKMEN'S COMPENSATION—METHOD OF DETERMINING AVERAGE WEEKLY WAGES WHEN EMPLOYED PART TIME—*Danielson vs. Industrial Commission*—No. 13654—*Decided April 22, 1935—Opinion by Mr. Chief Justice Butler.*

1. Ness, a painting contractor, worked for Danielson for wages a few days in each week during three calendar weeks in the twelve months preceding injury received growing out of and during the course of such employment. He died as a result thereof. During all the rest of the twelve months, he carried on his business as a painting contractor. The Commission added the number of days Ness worked for wages during the three weeks, making a total of ten days and held that he worked two weeks and that the average weekly wages was one-half of the total earned which was sustained by the District Court.

2. The contention that because the wages were earned during portions of three weeks, that the total earned should be divided by three in order to ascertain average weekly wage is not sound.

3. Sec. 4421 C. L. as amended is construed to mean that where the claimant was in business for himself for forty-nine weeks plus five days in all fifty weeks, that the total wages earned during the remainder should be divided by two and not three in order to determine average weekly wage.

4. While for most purposes a week means a calendar week, this is not true in all cases, particularly the instant case.—*Judgment affirmed.*

TAXATION—EXEMPTIONS OF RELIGIOUS PROPERTY—NECESSITY OF ACTUAL USE FOR SUCH PURPOSES—*McGlone vs. First Baptist Church*—No. 13523—*Decided April 15, 1935—Opinion by Mr. Justice Holland.*

1. Vacant lots held by a religious corporation and not in any manner in actual use for religious worship or strictly charitable purposes

are not exempt from taxation under Sec. 5, Article 10, of the Constitution of the State of Colorado.

2. An intention to later use the vacant lots for the erection of a church is not sufficient to exempt them.

3. It is the actual use and not the intention that creates the reason for the exemption.—*Judgment reversed.*

Mr. Justice Bouck and Mr. Justice Young dissent. Mr. Justice Campbell not participating.

FORGERY—PLEA OF FORMER ACQUITTAL—SUFFICIENCY—*Sharer vs. The People*—No. 13397—*Decided April 15, 1935—Opinion by Mr. Justice Bouck.*

Sharer was convicted of a charge of forgery and sentenced to the penitentiary.

1. Where it appears that defendant was convicted by a jury for forging an endorsement on a $700 check and in another case he was acquitted by a jury for forgery of a similar check growing out of the same transaction and both checks were a part of the same transaction, the plea of "former acquittal" was a good plea and defendant should have been discharged.—*Judgment reversed.*

Mr. Justice Burke dissents.

INSURANCE—FIDELITY—CANCELLATION—EFFECT—LIMITATIONS—*Thomas Hickerson Motor Co. vs. Central West Casualty Co.*—No. 13439—*Decided April 15, 1935—Opinion by Mr. Chief Justice Butler.*

The Thomas Hickerson Motor Co. sued the insurance company and another to recover on a fidelity bond. The Court directed a verdict for the insurance company.

1. Where a fidelity bond was issued and thereafter an instrument was executed by the insured releasing the insurance company from liability for any and all acts of the employees committed on and after August 11, 1931, such instrument terminated the bond.

2. Where the insured did not file its claim for loss until after the expiration of six months thereafter, it lost its right to enforce the claim, where the bond required claim to be filed within six months after cancellation.—*Judgment affirmed.*

Mr. Justice Hilliard and Mr. Justice Bouck dissent.

INSURANCE—LIFE—ASSIGNMENT TO CREDITOR—ORAL TRUST—*Bosma vs. Evans*—No. 13690—*Decided April 15, 1935—Opinion by Mr. Justice Burke.*

1. Where a life insurance policy payable to a wife has a creditor substituted as the beneficiary, the creditor to pay for reinstating the

lapsed policy and keep up the premiums and at the time the insured was ill and creditor doubted he would recover and such creditor was not a relation having any insurable interest in life of the insured, the creditor was a mere speculator and the policy in his hands was a wager and was invalid.

2. Where in such case there was an oral agreement claimed by the wife that such assignment of the policy was only for security for debts and payments of premiums and the balance should be paid to her, and the defendant admitted in his written sworn answer that there was an oral trust for at least the premiums he paid, such admission takes the case out of the rule that an oral creation of an express trust must be by evidence beyond a reasonable doubt.

3. An insurance policy may be assigned to a creditor as security but in case of great disparity between the debt and face of policy the transaction is a speculation and the beneficiary is entitled to balance after debt is paid.—*Judgment affirmed.*

TAX DEED—PRESUMPTION OF REGULARITY—BURDEN OF PROOF ON ATTACKING PARTY — *Richardson et al. vs. Halbekann* — No. 13403—*Decided April 15, 1935—Opinion by Mr. Justice Campbell.*

Halbekann obtained a decree below quieting title to certain lots in Denver relying on a tax deed received in evidence.

1. At common law a tax deed was not admissible in evidence unless accompanied by proof that all the requirements of law had been complied with by the officer issuing same.

2. This rule has been abrogated by statute in Colorado.

3. In this state a tax deed is made prima facie evidence of its regularity.

4. The burden of proving irregularity in the proceedings leading up to the tax deed is upon the party attacking same.—*Judgment affirmed.*

Mr. Chief Justice Butler specially concurs. Mr. Justice Burke, Mr. Justice Hilliard and Mr. Justice Young dissent.

WATERS—RIGHT OF DIRECT IRRIGATION AS AGAINST STORAGE—MANDAMUS—SUFFICIENCY OF COMPLAINT—*The People etc. vs. Hinderlider et al.*—No. 13235—*Decided April 15, 1935—Opinion by Mr. Justice Burke.*

Plaintiff has decree for storage water for irrigation. It takes its water from Surface Creek but except in flood times the creek does not furnish sufficient water for direct irrigation for land under ditches taking therefrom. Some direct ditch rights are prior and some subsequent to plaintiff's storage right. The State Irrigation officials refused to permit storage when water was needed for direct irrigation and plaintiff

sought mandamus to compel storage as against subsequent priorities for direct irrigation. Demurrer to complaint sustained.

1. Sec. 1682, C. L. 1921, expressly limits right to store waters when not needed for immediate use for domestic or irrigation purposes and the time so needed clearly relates to the time when stored.

2. A senior reservoir decree may not be supplied with water when the water is needed by junior ditches for direct irrigation.

3. The above statute is constitutional.—*Judgment affirmed.*

INJUNCTION—TAXPAYERS—RIGHT TO ENJOIN EXPENDITURES BY TRUSTEES OF THE STATE NORMAL SCHOOL—*Hoyt et al. vs. Trustees of State Normal School*—No. 13655—*Decided April 8, 1935—Opinion by Mr. Justice Holland.*

Plaintiffs in error were plaintiffs in the trial Court and in the capacity of taxpayers brought this action against the trustees of the State Normal School to enjoin the carrying into effect of a loan agreement with the U. S. Government for the purpose of erecting dormitories for students on the school campus.

The Court below dismissed the complaint on the ground that the plaintiffs were without capacity to maintain the action.

1. Section 1, Article 8 of the Constitution of the State of Colorado, provides that:

"Educational * * * institutions * * * shall be established and supported by the State in such manner as may be prescribed by law."

2. Pursuant to this constitutional mandate the Legislature, by statute, prescribed the control and regulation of such institutions, and authorized the establishment of a State Normal School and created the board of trustees, and make it mandatory upon such trustees to provide suitable buildings for the use of the school.

3. This power embraces discretion for its application in the board of trustees.

4. This discretion was exercised by the trustees in their examination of the need for dormitories sought to be constructed.

5. The power to govern carries the power to construct and whether it shall construct is a matter solely for the determination of the Board.

6. Where the trustees contract to borrow money from the United States Government for the construction of such dormitories, with a further provision that bonds issued therefor and interest thereon shall be paid only from the revenues to be derived from the operation of such dormitories, and not by taxation, and that such obligation shall never become a charge against the State of Colorado, the plaintiffs below, as taxpayers, are not in position to enjoin such contract.—*Judgment affirmed.*

CIVIL SERVICE—POWER OF LEGISLATURE TO INVEST GOVERNOR WITH AUTHORITY TO SUSPEND FUNCTIONS OF ANY DEPARTMENT OF STATE GOVERNMENT—*Getty et al. vs. Gaffy*—No. 13698—*Decided April 8, 1935*—*Opinion by Mr. Justice Hilliard.*

A suit to enjoin the members of the State Civil Service Commission from interfering with plaintiff, Gaffy, in the exercise of the duties of Secretary of the Commission, threatened by an executive order by the Governor.

Plaintiff was given a permanent writ of injunction below.

1. Plaintiff claims under Section 13, Article 12 of the Constitution, and Section 127 Compiled Laws of 1921, authorizes the Civil Service Commission to appoint a secretary, and under the constitutional provision that persons in the classified service shall hold during efficiency and removal to only be had on written charges.

2. On the other hand, the suspension of the Secretary of the Commission was made by the Governor under Chapter 177, Session Laws of 1933 which, among other things, provides that where there is not sufficient revenue available the Governor may suspend or discontinue the services of any department, commission, board or bureau of the State government.

3. The position of Secretary of the Civil Service Commission is legislative and not constitutional creation.

4. Since the Legislature may abolish positions of its creation and may provide for temporary cessation of the activities thereof and may invest such power in the Governor by legislative enactment such as Chapter 177, Session Laws of 1933.

5. The act of 1933 was within the constitutional powers of the Legislature and the order of the Governor acting thereunder in suspending the Secretary was lawful.—*Judgment reversed.*

FRAUD—VACATION OF JUDGMENT—SUFFICIENCY OF PETITION TO VACATE—STATUTE OF LIMITATIONS—*Hunter vs. Williams*—No. 13454—*Decided April 8, 1935*—*Opinion by Mr. Justice Holland.*

1. Petition to vacate a judgment entered in 1926 which petition was filed in 1933, where the allegations were fraud in obtaining the judgment against a mental incompetent, held not too late.

2. The statute of limitations does not run against a mental incompetent where his guardian was unaware of the entry of such judgment until 1932 and then filed petition to vacate same.

3. The petition to vacate judgment alleged sufficient fraud in its procurement that it was error to sustain a motion to strike the petition.

4. If the Court was misled into entering a false judgment, once false it is always false and persons under a disability will be protected by the courts not only to redress a wrong to the helpless and injured but to preserve the sancity of all that a judgment should be.—*Judgment reversed.*

WATERS—ABANDONMENT — NON-USER — EVIDENCE — *The Commonwealth Irrigation Co. vs. The Rio Grande Canal Water User Association et al.*—No 13093—*Decided April 8, 1935—Opinion by Mr. Chief Justice Butler.*

1. Abandonment of a water appropriation consists in non-use coupled with an intention of the owner not to repossess himself of the use of the water.

2. The question of abandonment is one of intention. Non-use alone is not sufficient.

3. But where by clear and convincing evidence it is shown that for an unreasonable length of time available water has not been used, an intention of abandon may be inferred in the absence of proof of some fact or condition excusing such non-use.

4. Where objection is not made to introduction in evidence of water commissioner's reports because not sworn to, and admissibility of such evidence is first questioned in Supreme Court, it is too late to urge such objection.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—CONTROL OF SIDEWALKS—OBSTRUCTIONS—MANDAMUS—*Wood et al. vs. The People*—No. 13370 —*Decided April 8, 1935—Opinion by Mr. Justice Holland.*

1. A city of the second class is not authorized by either charter or statute to pass an ordinance permitting the erection and maintenance by private parties for private gain of gasoline pumps on the sidewalks of the city which are obstructions to public travel.

2. Such city cannot authorize a permanent encroachment by private individuals and the latter cannot successfully set up a claim of right to encumber the public streets and walks.—*Judgment affirmed.*

DIVORCE — PLEADING — SUFFICIENCY OF EVIDENCE—*Guilford vs. Guilford*—No. 13679—*Decided April 1, 1935—Opinion by Mr. Justice Campbell.*

Where a plaintiff brought suit for divorce on the grounds of extreme and repeated acts of cruelty and asked for alimony and the case is tried to the Court without a jury and the Court enters findings of fact in favor of the plaintiff, even though the evidence is conflicting, where there is sufficient evidence to justify such findings they will not be disturbed on appeal.—*Judgment affirmed.*

TROVER—FRAUD AND DECEIT—STATUTE OF LIMITATIONS—ALLEGING VALUE—*Rogers vs. Rogers*—No. 13577—*Decided April 1, 1935—Opinion by Mr. Justice Young.*

1. The mere breach of a contract will not support an action in trover.

2. Conversion means any distinct unauthorized act of dominion or ownership assumed by one person over personal property belonging to another.

3. Where defendant as collateral security for a loan delivered a note and mortgage to plaintiff, and thereafter secured possession of the collateral upon a representation that he would temporarily use said collateral for the purpose of another loan from a third party and would return the collateral to plaintiff, and that instead of so using the collateral for such other loan caused the mortgage to be released and the collateral to be destroyed, defendant was liable for conversion.

4. The plaintiff had such a qualified property interest in the note and mortgage put up as collateral as to sustain an action in tort for its conversion.

5. In an action for conversion of the note and mortgage it is not necessary to set forth the value thereof as in conversion of a note and mortgage, the face value is prima facie their value.—*Judgment reversed.*

ACCIDENT INSURANCE — OCCUPATION — GENERAL MANAGER — ACCIDENT WITHIN TERMS OF POLICY—QUESTION OF FACT FOR JURY—*Rex vs. Continental Casualty Co.*—No. 13348—*Decided April 1, 1935—Opinion by Mr. Justice Young.*

1. Where an accident policy was issued to the deceased as a select risk, and his duties described in the policy as General Manager of a limestone company and his duties were described as "general manager, office and traveling duties only" and he was killed by being run over by a tram car while walking along a track at a limestone quarry, whether or not such death was within the terms of the policy was a question of fact which should be submitted to the jury.

2. Under such circumstances it was error for the Court below to direct a verdict.

3. When the plaintiff established the death of insured to have been accidental, she made out a prima facie case under the terms of the policy and the burden was then upon the defendant if it would avoid payment to show that the accident was within one of the exceptions named in the policy.

4. When the policy classified the deceased as general manager of a limestone company with office and traveling duties it would be assumed that he would do the things general managers of such concerns usually do, and this would include not only office work but traveling with a destination in view, and duties to be performed upon his arrival, and it was a question of fact for the jury as to whether he was performing such duties after his arrival at destination at the time of his death.—*Judgment reversed.*

REPLEVIN—AUTOMOBILE—NECESSITY OF TRANSFER OF POSSESSION AS AGAINST CREDITORS—*Daniel vs. Surratt*—No. 13642—*Decided April 1, 1935—Opinion by Mr. Justice Holland.*

1. Section 5113 Compiled Laws of 1921 which provides in substance that if sale of chattels made by vendor, shall be presumed to be

fraudulent and void as against creditors of vendor unless accompanied by immediate delivery and change of possession, applies to the sale of an automobile.

2. Where a husband transferred his automobile to his wife by assignment of certificate of title at a time when he was indebted to creditors, and after such assignment, the husband took out a license in his own name and the car was continued to be kept in the same garage at the home of the husband and wife at night and in a public garage during the day time, and the husband continued to use the car, and the wife's use of the car, both prior and subsequent to the assignment, was only casual, there was no such immediate delivery followed by actual and continued change of possession, as would take the transaction out of the statute.

3. There must be an actual delivery and actual and continued change of possession in order to constitute a valid sale as against the rights of creditors.

4. A joint or concurrent possession of both vendor and vendee as is likely to occur between members of a household, particularly, husband and wife, as here, is not permissible where the interests of creditors are involved.

5. Even if it be proven that the sale was bona fide and no fraud intended, the case is not taken from under the statute.

6. Only the Legislature can remove the harshness of the application of this statute to such facts as are present in the case at bar.—*Judgment reversed.*

MISTAKE—RELEASE OF MORTGAGE—LACK OF KNOWLEDGE OF RECORD — PLEADING — SUFFICIENCY OF COMPLAINT — *Holt vs. Mitchell*—No. 13644—*Decided March 25, 1935*—*Opinion by Mr. Justice Young.*

1. Where holder of a first mortgage releases same and takes a new mortgage without knowledge of liens that had attached to the land subsequent to the recording of the first mortgage, relying on a statement of the county clerk and recorder that no liens existed, a complaint alleging such facts states a cause of action for relief in having such later mortgage to be declared to be a lien prior to a second mortgage, where the other parties had not changed their status by reason thereof.

2. The mistake and bona fides of it are the matters material in the complaint and where third parties resist correction of such mistake, the burden is on them to show damage resulting to them in reliance on the act done by mistake.

3. Equity, however, will refuse to rectify a mistake where it is caused through inexcusable negligence of party who asks to be relieved from mistake.

4. It is not always necessary to secure an abstract of title and have it examined before releasing a senior lien in order to state a cause of action for relief against mistake in releasing senior lien.—*Judgment reversed.*

LANDLORD AND TENANT—COAL LEASE—INJUNCTION—DEMURRER FOR WANT OF FACTS—EASEMENT—*Clark vs. Louisville-Lafayette Coal Co.*—No. 13309—*Decided April 1, 1935—Opinion by Mr. Justice Burke.*

1. Where plainff leased land to defendant for coal mining purposes and defendant owned leases on adjoining lands, which adjoining lands it had been working, both surface and underground, through the lands of the plaintiff and the lease by its terms, contemplated the mining of coal from adjacent properties and provided special compensation therefor, only in case royalties in excess of 10c per ton be paid thereon, the general consideration for the lease must be the consideration for all coal so mined on royalties, of that amount or less, and plaintiff is not entitled to an injunction to prevent the operation of the adjacent mines through plaintiff's land.

2. Separate premises in a contract require no apportionment of the consideration.

3. Where a lease discloses the intention of the parties that certain privileges should form an incident thereof such as the lease in controversy discloses with respect to coal mined from adjacent premises on royalties not exceeding 10c per ton, an easement may be acquired.

4. Such easement may be acquired irrespective of the form in which such intention may be expressed.

5. The allegation that defendant has largely abandoned operations under its lease with plaintiff and is devoting its activities principally to the mining of coal on adjacent lands, contains no statement of fact to support damages or fix the amount, particularly in view of a provision of the lease that a fixed royalty of $100 per month must be paid regardless of operations.

6. Where the lease provides in case of breach the remedy is forfeiture, but that thirty days' notice must be given, with opportunity to remedy, before action may be maintained, such notice must be given. —*Judgment affirmed.*

WATERS—INTERPRETATION — DECREE — SEEPAGE AND EVAPORATION—*Riverside Reservoir and Land Co. vs. Hinderlider*—No. 13358—*Decided April 1, 1935—Opinion by Mr. Justice Bouck.*

1. A decree adjudicating priorities provided that there be allowed to flow into the reservoir of plaintiff from the South Platte River, under certain priorities, to be diverted through its inlet, a certain number of cubic feet of water annually, and by virtue of another priority a certain number of cubic feet annually to be also diverted through its inlet.

2. Under such a decree the plaintiff is only entitled to senior priorities for the specific number of cubic feet to be diverted from the South Platte River through the inlet of its reservoir, and it is not entitled to add thereto an additional quantity of water sufficient to make up for such seepage as might occur while its reservoir is filling or for the

evaporation going on from the surface of the reservoir after the water has been taken from the stream.

3. The decree is clear, complete and unambiguous. It calls for diversion of specified quantities of water from the river. The amount so diverted can be measured by recognized methods and the State Engineer in construing such decree was correct in holding that the plaintiff was not entitled to divert an additional amount of water equivalent to the losses suffered by seepage and evaporation.—*Judgment affirmed.*

AGENCY—AUTHORITY OF AGENT—WEIGHT OF EVIDENCE—*Merrow vs. Silversmith*—No. 13429—*Decided March 25, 1935*—*Opinion by Mr. Justice Holland.*

1. Where an agent is authorized to sell stock for a corporation, such authority does not include authority to pledge stock or borrow money.

2. Where party dealing with an agent has full opportunity to make inquiry as to agent's authority, and does not do so, he deals with agent at his peril.

3. Where facts are in dispute as to what oral contract was made with agent, trial court's findings will not be disturbed.—*Judgment affirmed.*

HIGHWAYS—PRIVATE ROADS—RIGHT OF COUNTY TO INTERVENE—*Leach vs. Manhart*—No. 13560—*Decided March 25, 1935*—*Opinion by Mr. Justice Hilliard.*

1. In an action for injunction between private parties to enjoin the obstruction of an alleged public road, the County through its Board of Commissioners have a right to intervene.

2. Interference with the use of a public highway may be enjoined by a board of county commissioners.

3. The Court below erred in denying right of county to intervene.—*Judgment reversed.*

MERGER—*International Trust Co. vs. Rodewald*—No. 13200—*Decided March 18, 1935*—*Opinion by Mr. Justice Burke.*

1. Mergers are presumed when equity demands, otherwise, not. Where Rodewald gave a first and second mortgage on real estate and the holder foreclosed on the second and bid the property in for more than its value the holder of the first mortgage can sue the maker on the note and is entitled to judgment. In such case there is no merger.

2. The right to waive the security and sue on the note, even when the security has substance, is well established.—*Judgment reversed.*