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Supreme Court Decisions

Dicta Editorial Board

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AGENCY—CONTRACTS—STATUTE OF LIMITATIONS—NON-SUIT—*Tuke vs. Mountain States Packing Co.*—No. 13414—*Decided May 13, 1935*—*Opinion by Mr. Justice Holland.*

Plaintiff below sued to recover $500.00 which he alleges he paid to the defendant for certain shares of stock which were never delivered to him, and upon a second cause of action for an alleged agreement of defendant to give its notes or interest bearing certificates in lieu of the stock. A motion for non-suit was granted below

1. Where it appears that the plaintiff bought stock from a third party and not from the defendant, and there is no evidence to establish that such third party was the agent of the defendant, and the defendant had nothing to do with the sale of the stock, motion for non-suit was properly granted.

2. On second cause of action where plaintiff alleged an agreement on the party defendant to execute notes or certificates of indebtedness evidence examined and held insufficient to establish such agreement. —*Judgment affirmed.*

APPEAL AND ERROR—REMITTITUR—WHEN A NEW TRIAL UNNECESSARY—*Silver State Bldg. and Loan Assn. vs. Independence Indemnity Co.*—No. 13461—*Decided May 13, 1935*—*Opinion by Mr. Chief Justice Butler.*

This case was formerly tried on its merits to the Court below, appealed to the Supreme Court and the judgment reversed and remittitur issued directing the lower Court to take such further proceedings as shall conform to the judgment of the Supreme Court.

After the remittitur reached the District Court the plaintiff moved for leave to amend its replication and the indemnity company moved for dismissal. The Court refused leave to amend and dismissed the case. Whereupon the building and loan association sued out this writ of error.

1. There was nothing in the remittitur indicating that the Supreme Court intended that there should be a new trial.

2. The dismissal may be a further proceeding under the terms of the mandate.

3. Whether or not a new trial is to be had upon reversal depends upon circumstances.

4. Where the case was fully tried and all the evidence that could be produced was produced at the trial, and there was no indication that there was any newly discovered evidence and the Supreme Court, on appeal, held that under the law as applied to the facts, that the plaintiff was not and is not entitled to judgment, under such circum-

stances where a remittitur is filed in the Court below, directing the Court to take further proceedings in conformity with the judgment, there was only one thing for the trial Court to do and that was to dismiss the case.

5. Where an amendment to a pleading is merely an elaboration of what has already been stated, and where all of the evidence that could be admitted under the amendment could have been and was introducd under the issues as made; and all the matters alleged in the amendment were as well known to the pleader when the original pleadings were filed as when the amendment was tendered, the Court did not err in refusing leave to amend.—*Judgment affirmed.*

PLEADING—COMPLAINT—DEMURRER—ELECTION TO STAND UPON —*Brown vs. Standard Oil Co. et al.*—No. 13443—*Decided May 13, 1935—Opinion by Mr. Justice Bouck:*

Brown as plaintiff brought an action in the District Court to require an accounting of the defendants. The latter interposed demurrers which, among other things, set up Statute of Limitations. The demurrers were sustained and the action dismissed.

1. Where the complaint consists largely in statements of legal conclusions it is insufficient because the ultimate facts are absent.

2. Where the plaintiff sought to have the defendants held as trustees for certain oil and gas lands, where from the complaint, it appears that neither the plaintiff nor any of his grantors proceeded under the provisions of the Federal Leasing Act to obtain any title or estate from the Government by lease or otherwise, the complaint fails to state a cause of action.

3. In order to maintain a suit of this sort plaintiff must establish not only that the action of the Secretary was wrong, but that the complainant himself was entitled to a lease and that it was refused him because of an erroneous ruling of law by the Secretary of the Interior, and complaint in this case wholly failed to so allege.

4. A motion filed in the Supreme Court long after the printed briefs had been filed, seeking to bar certain of the defendants from defending on the ground that they were foreign corporations and had not paid their license taxes is too late.—*Judgment affirmed.*

FIRE INSURANCE—PRORATION OF LOSS AMONG DIFFERENT COMPANIES—*Springfield Fire and Marine Insurance Co. vs. First National Bank of Fort Morgan*—No. 13484—*Decided May 13, 1935—Opinion by Mr. Justice Holland.*

1. Where there were three policies of fire insurance, each of which contained a clause that the company shall not be liable for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance, whether valid or not,

and one policy is for $1,500 and two other policies are for $1,000 each, making a total of $3,500, judgment below should have been entered for 15/35, 10/35 and 10/35 of loss under each policy respectively.—*Judgment is modified—affirmed.*

Mr. Justice Bouck concurs in the conclusion. Mr. Justice Hilliard not participating.

FIRE INSURANCE — UNCONDITIONAL AND SOLE OWNERSHIP — AGENCY—BANKRUPTCY—DUAL CAPACITY OF AGENT—OTHER INSURANCE — *Weghorst vs. County Fire Insurance Co.* — No. 13486 — *Decided May 13, 1935* — *Opinion by Mr. Justice Holland.*

Weghorst was the owner of a dwelling on which the insurance company had a fire policy, and he later obtained another policy in another company and later filed petition in bankruptcy and claimed the real estate as a homestead. His attorney, who filed the bankruptcy petition, was also agent for the fire insurance company. Later Rickel issued a third policy on the property and in the third policy the loss payable clause referred to the trustee in bankruptcy. Fire and loss thereafter occurred.

1. Where the insured had a right to homestead exemption in the property and asserted this right in his bankruptcy petition, the title to the exempt property never vested in the trustee so that even by the bankruptcy proceedings there was not such a change in title under the terms of a fire insurance policy as was prohibited and the policy was valid in the hands of the insured.

2. The insurance company, by its second policy, contracted to pay the loss, if any, to a trustee in bankruptcy and the bank. This policy was issued six months prior to the fire and suggested a change in ownership on conditions known to Rickel, its agent, and when occasion for inquiry was presented which, if accepted, by the insurance company, would have disclosed all the facts, even the existence of additional insurance in another company, upon which, if the hazard was increased the company could then have cancelled its risk. Not having availed itself of this opportunity of protection, it must abide the result of its failure therein.

3. There was no evidence indicating that Rickel was attempting to perpetrate a fraud on his principal, the insurance company, or that he was personally interested adversely to it. True, he was acting as agent for the insurance company and also, as attorney for the insured, in filing the petition in bankruptcy, and he, apparently, was negligent and for such negligence the company, his principal, must suffer.

4. It is to be presumed that an agent will convey all knowledge acquired, to his principal and the knowledge of the agent is the knowledge of the principal, when the agent acts within the scope of his authority. It was within the scope of Rickel's authority to issue the second

policy in defendant company. It was issued and the company assumed the risk. Rickel neglected to advise his principal of the existence of other insurance, but when he was acting without any adverse interest, then his knowledge was that of his principal. The company, therefore, is estopped to deny liability on the ground that existence of additional insurance was not endorsed on its policies.—*Judgment reversed.*

Mr. Justice Bouck concurs in the conclusion. Mr. Justice Hilliard not participating.

WORKMEN'S COMPENSATION—AUTHORITY OF COMMISSION TO SET ASIDE FINDINGS OF REFEREE WITHOUT TAKING ADDITIONAL TESTIMONY—SUFFICIENCY OF EVIDENCE—*United States Fidelity and Guaranty Co. vs. The Industrial Commission*—No. 13686—*Decided May 13, 1935*—*Opinion by Mr. Justice Young.*

The claimant, widow of Chris Yuenger, the deceased, was awarded death benefits by the Industrial Commission, which award was sustained by the District Court.

1. Under Chapter 177, Session Laws of 1931, the Industrial Commission has authority to set aside the findings of the referee without taking additional testimony or having hearing de novo.

2. An accident is a result, the causes of which are unexpected and unusual or it may be also an unexpected and unusual injury from ordinary causes.

3. By the term "injury" is meant not only an injury the means or cause of which is an accident, but also any injury which is itself an accident.

4. Where one is employed as watchman for a bank one of his duties is to preserve order among the employees, and when one of the employees, becoming intoxicated, starts an argument and attacks the watchman and the watchman in repelling the disorder dies as a proximate result of the exertion, even though he had heart trouble, such evidence is sufficient to support the finding that the deceasd came to his death from overexertion and that the overexertion constituted an accident arising out of and in the course of his employment.—*Judgment affirmed.*

AUTOMOBILES—LIABILITY OF DRIVER FOR INJURY TO GUEST—CONSTRUCTION CHAPTER 118, SESSION LAWS 1931—*Millington vs. Hiedloff*—No. 13394—*Decided May 20, 1935*—*Opinion by Mr. Justice Young.*

Plaintiff below, guest in an automobile, was injured in an automobile accident and had verdict below. Judgment was entered on the verdict.

1. If, from the evidence, reasonable men might draw the conclusion that the injuries and damage to the plaintiff were caused by the negligence of the defendant and that such negligence consisted of a will-

ful and wanton disregard of plaintiff's rights, then the cause of action should be submitted to the jury, and the jury's conclusion that there was negligence of such character, would be binding on the Supreme Court.

2. The guest statute, chapter 118 of Session Laws of 1931, requires more than simple negligence. The negligence required must consist of or amount to a willful and wanton disregard of plaintiff's rights. Negligence, in its generally accepted meaning, has in it no element of willfulness; but involves a state of mind which is negative.

3. This guest statute means that to constitute culpable conduct entitling recovery there must be in the first instance acts or omissions such that if they were the result of mere inattention to their character and to a failure to weigh the probable consequences they would constitute negligence, and in addition to this the acts or omissions must be of such a character or done in such manner or under such circumstances as to indicate that a person of ordinary intelligence actuated by normal and natural concern for the welfare and safety of his fellow men who might be affected by them, could not be guilty of them unless wholly indifferent to their probable injurious effect or consequences.

4. In addition to being willful, to entitle recovery the conduct must be wanton, such that under the circumstances, indicates in and of itself to ordinarily intelligent and considerate persons, a disregard for the safety of those liable to be affected thereby or an indifference to the injurious consequences that may result therefrom.

5. Where the evidence showed that the driver drove carefully until the snowstorm came on and that when she was cautioned to slow up she did so and that she was driving forty-five miles an hour in a snowstorm, but that the evidence did not show there was any snow on the pavement and she had a windshield wiper that kept her view from being obstructed, and that an accident occurred the fact that she made an error in judgment in driving at that rate of speed would be negligence, but there was no evidence that the mere speed of the car constituted reckless disregard and indifference to the consequences that might result either to the driver or to the plaintiff, and the fact that she did slow down when cautioned negatives either a willful or wanton disregard of plaintiff's rights and under this state of the evidence, the evidence was insufficient to submit to the jury.—*Judgment reversed.*

LIFE INSURANCE — DISABILITY CLAIM — APPLICATION — FRAUD — AGENT — *Federal Life Insurance Co. vs. Kras* — No. 13460 — *Decided May 20, 1935—Opinion by Mr. Justice Holland.*

Action below was brought to recover for disability claim under an insurance policy. Plaintiff was successful below.

1. Where at the time an application for insurance was made by plaintiff, the plaintiff could not speak English, answered all questions through an interpreter to the agent taking the application, and through the interpreter informed the agent that he had had previous illnesses

but the agent wrote in the answers that the applicant had never had any serious illness or disease, in such case misrepresentations in the application are not chargeable to the insured.

2. A solicitor of an insurance company is its agent. His acts and knowledge are those of his principal, and the insured cannot be held responsible for a wrong perpetrated through the agent's fraud or negligence.

3. The rule that where an insured receives a policy of insurance to which is attached a copy of his application and retains it for a reasonable length of time, that he is presumed to have examined it and know the contents of it, and where he received and retained possession of it with full knowledge of the circumstances concerning its issuance without examining it, together with the attached copy of his application, that his negligence precludes recovery has no application where the insured was a foreigner, could not read English and had to act through an interpreter, because under these circumstances it cannot be presumed that he would or could have familiarized himself with the policy to the extent necessary to make it obligatory upon him to repudiate the false answers shown in the application.

4. The evidence concerning the disclosures of previous illnesses by the insured to the agent was properly before the jury, and is amply sufficient to sustain a finding upholding plaintiff's claim that the insurance company had knowledge of the previous illness through the knowledge of its agent.—*Judgment affirmed.*

TAX DEEDS—INVALIDITY OF SECOND TAX DEED ISSUED WHERE COUNTY HAS PRIOR OUTSTANDING CERTIFICATE OF PURCHASE —*Cowen vs. The Driscoll Construction Co.* — No. 13671 — *Decided May 20, 1935—Opinion by Mr. Justice Bouck.*

Driscoll Construction Company brought an action in ejectment against Cowen and his wife to recover real estate. Jury being waived finding and judgment were for the plaintiff below. On the trial the plaintiff relied upon a quit-claim deed from the owner of the record title and also upon a tax deed issued by the County Treasurer and recorded in 1934. This tax deed was given in exchange for a tax certificate issued to Pueblo County as purchaser at a tax sale in 1921, which certificate was not assigned by the County until September, 1933.

The tax deed relied upon by the defendant was given in exchange for a tax certificate which had been received by the Pueblo Conservancy District when it bid in the property in 1926 for delinquent taxes for local improvements and the certificate was assigned to the defendant in 1930.

1. The tax deed issued to the defendant in 1930 was invalid by reason of the fact that there was an outstanding certificate of purchase issued to Pueblo County in 1921 and was still held by the County at the time the tax deed was issued to the defendant.

2. In view of this holding it is unnecessary to decide whether or not, under the statutes of Colorado, the lien for the general taxes involved in the 1921 tax sale, upon which the defendant's tax deed was based, is paramount to the lien for the conservancy taxes.

3. This decision does not affect the lien for the conservancy tax as a lien, because such lien still survives under the Conservancy Act, and all other applicable statutes, and will eventually have to be paid.—*Judgment affirmed.*

Mr. Justice Hilliard not participating.

AUTOMOBILES—GUEST STATUTE—CONSTRUCTION OF—ELECTION —*Foster vs. Redding*—No. 13689—*Decided May 20, 1935*—*Opinion by Mr. Justice Burke.*

Mrs. Redding, plaintiff below, was injured while riding as a guest in defendant's automobile. Judging this to be the result of defendant's intoxication and wanton and willful misconduct she had a verdict below for $1,500 and judgment was entered therein.

1. The statute involved limits recovery by a non-paying guest to damages caused by the driver's intoxication or by negligence consisting of a willful and wanton disregard of the rights of others.

2. One who is willfully and wantonly negligent may not be intoxicated, but one who is sufficiently under the influence of liquor to impair his capacity as a driver or who has just consumed intoxicants sufficient to speedily reduce him to incapacity, yet sufficiently sober to know he is undertaking a sober man's job, puts himself at the wheel of an automobile and takes the road, is guilty of a willful and wanton disregard of the rights of all persons who ride with him or use the highway he drives. A guest who voluntarily occupies a car with the driver who is intoxicated is guilty of contributory negligence, but where the guest is unaware of such condition there is no support for the defense of contributory negligence or assumption of risk.

3. Where two causes of action are stated, one for damages on account of intoxication and the other for damages for willful and wanton negligence there was no necessity of requiring plaintiff to elect under which cause of action she was proceeding, as the allegations of either count could have been proved under the other.—*Judgment affirmed.*

CORPORATIONS—SUIT BY MINORITY STOCKHOLDER—ACCOUNTING CONVERSATIONS WITH DECEASED STOCKHOLDER — *Allen vs. Fleming et al.*—No. 13356—*Decided May 27, 1935*—*Opinion by Mr. Chief Justice Holland.*

Sadie J. Fleming and her two daughters brought suit as minority stockholders of the Fleming Brothers Lumber Co. against Calvin Fleming and his son, a majority of the directors of the corporation, for an

accounting of the transactions between the latter and the corporation. The trial Court found in favor of the defendants and dismissed the suit.

1. Where the Board of Directors fixed the salary of the officers and the same is attacked as unreasonable and excessive at the suit of a stockholder, and the trial Court found against the plaintiff, finding will not be disturbed.

2. Findings of the trial Court allowing credits to one of the officers for moneys advanced is supported by the evidence.

3. Where there is a suit for an accounting by a stockholder against officers of a corporation and the party plaintiff is the wife of a deceased officer, and sues as a stockholder, Section 6556 of Compiled Laws of 1921, which prohibits any party to a civil action to testify therein when any adverse party sues or defends as heir, is not applicable to a suit by a stockholder.—*Judgment affirmed.*

STATUTE OF LIMITATIONS—CONTRACT MADE IN FOREIGN STATE AND CAUSE OF ACTION NOT BARRED RY LAWS OF FOREIGN STATE—EFFECT IN COLORADO—*Simon vs. Wilnes*—No. 13434 —*Decided May 27, 1935—Opinion by Mr. Justice Campbell.*

Action below by Wilnes against Simon to recover judgment on note for $3,000 given January 20, 1922, due six months after date, at Sidney, Nebraska. Answer pleaded Statute of Limitations of both Colorado and Nebraska where contract was made. Plaintiff had judgment below.

1. If a plaintiff's right to bring an action in another State other than that of Colorado has elapsed more than six years prior to the time that the action is started in Colorado, this is a bar to bringing the action in Colorado, but where the cause of action was not barred in the foreign State at the time the suit was started in Colorado, because of the absence of the defendant from the foreign State, therefore, the action not being barred by the laws of the State where the contract was made, it is not barred by the laws of the State of Colorado even though more than six years have elapsed since the cause of action accrued.—*Judgment affirmed.*

Mr. Chief Justice Butler and Mr. Justice Hilliard especially concurring.

Mr. Justice Bouck and Mr. Justice Holland dissent.

ATTORNEYS AT LAW—ATTORNEY'S LIEN—FOR WHAT SERVICES AND WHAT PROPERTY ATTORNEY'S LIEN ATTACHES—*Duncan vs. Stickney Real Estate and Investment Co.*—No. 13436—*Decided May 27, 1935—Opinion by Mr. Justice Campbell.*

Plaintiff, Duncan, a practicing attorney, sought to recover of defendent corporation a balance of $5,000 for legal advice and

services and to have the judgment allowed to be an attorney's lien. Demurrer was sustained below.

1. An attorney at law has a lien on the fruits of a judgment which he has procured for his client.

2. However, an attorney's lien against the fruits of a specific judgment only applies to services rendered in that particular case and cannot include services rendered to clients in other cases.

3. Where the case is tried below on the theory that the suit is brought for foreclosure of an attorney's lien the cause of action cannot be presented in the Supreme Court on a different theory. Namely, that it is a suit for a general personal judgment.—*Judgment affirmed.*

DEEDS—PLEADINGS—AMENDMENT CHANGING CAUSE OF ACTION NOT PERMISSIBLE—LACHES—*Johnson et al. vs. Staats, Deceased* —No. 13489—*Decided May 27, 1935*—*Opinion by Mr. Justice Holland.*

Staats died in 1917. No administration was made of his estate for 17 years, and his wife was appointed Administratrix and brought action below as Administratrix for construction of a deed to her given two weeks before her husband's death that the life estate conveyed to her did not vest until his death and, therefore, became assets of the estate and subject to the payment of the widow's allowance.

In her original complaint she alleged delivery of the deed and at the trial asked leave to amend by alleging that instead of there being a delivery of the deed that the deed was merely given to her by her husband to be by her deposited in his box for safekeeping. The amendment was allowed, but before the amendment was allowed defendants moved for dismissal on the grounds that the admitted facts to the pleading entitled them to judgment.

The habendum clause of the deed provided for life estate in the wife and on her death title to vest in the living heirs of the grantor.

1. The amendment allowed was a distinct departure from the original cause of action and should not have been permitted. Consequently, evidence to support the amendment was inadmissible.

2. The petitioner verified the original petition and the verification estopped a delivery of the deed as alleged regardless of the intention of the grantor. The deed was absolute and did not express the contention alleged. The intent to convey was evidenced by the acknowledgment and execution of the deed.

3. There can be no conditional delivery or delivery in escrow by the grantor to the grantee.

4. The record discloses acceptance of the terms of the deed by the petitioner who went into possession and conveyed the premises, and neglected, during an unexplained silence of 16 years, to assert the claim now made. This constitutes laches.—*Judgment reversed.*

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—ASSAULT AND DEATH BY ACT OF INSANE PERSON—*London Guarantee and Accident Co. et al. vs. McCoy*—No. 13625—*Decided May 27, 1935—Opinion by Mr. Justice Burke.*

This is a Workmen's Compensation case. McCoy met his death while in the employ of the Liberty Co. He was a sales agent for the Liberty Co. and went to Pueblo on behalf of his employer to take possession of an automobile bus, and while there and in pursuance of said business went into a house to telephone in connection with this business, and while in the house was assaulted and killed by an insane man. Compensation awarded below.

1. The accident which caused this death was one arising out of the deceased's employment.

2. McCoy was reasonably required to be at this particular place and at this particular time, by reason of his employment, and while there met with this accident which was doubtless one with which any other person then and there present would have met irrespective of his employment. Yet, being of necessity at this particular place by reason of his employment the accident is one arising out of the employment even though he was killed by an insane person.—*Judgment affirmed.*

HUSBAND AND WIFE—HUSBAND LIABLE FOR INJURIES TO WIFE CAUSED BY HIS NEGLIGENCE—LATITUDE IN EXAMINATION OF JURORS—EVIDENCE—INSTRUCTIONS — *Rains vs. Rains* — No. 13332—*Decided June 10, 1935—Opinion by Mr. Chief Justice Butler.*

Leona Rains recovered judgment against her husband for damages for injuries sustained in an automobile accident caused by his negligence. An insurance carrier conducted the defense for defendant.

1. In Colorado a wife may sue her husband for personal injuries caused by the negligence of her husband.

2. Where the defendant carries liability insurance and an insurance carrier conducts or assists in conducting the defense it is proper for plaintiff on the examination of the jury to inquire of the juryman whether he has had any business dealings or any interest in or any connection with the specific insurance carrier.

3. Where a witness on behalf of defendant testifies without objection that she was the wife of the agent of the insurance carrier and where attorney for plaintiff in his opening argument in commenting on her testimony, stated that she was the wife of the general manager of the insurance carrier, and the defendant moved for a mistrial, the refusal of the Court to declare a mistrial was not error.

4. Objections urged to given instructions in the Supreme Court must be upon the same grounds urged in the lower Court or they will not be considered.—*Judgment affirmed.*

CHATTEL MORTGAGES — PRIORITIES — NECESSITY OF EXTENSION AFFIDAVIT—EXTENSION BY AGENT—EFFECT OF—*Stokes vs. Kirk*—No. 13516—*Decided May 27, 1935—Opinion by Mr. Justice Holland.*

Plaintiff, Kirk, replevied chattels under a chattel mortgage, which chattels had been taken possession of by Stokes under a subsequent chattel mortgage. Kirk's mortgage was given in 1930 by one Portis on livestock in the amount of $15,000, but Kirk was not the beneficial owner of it, but took the mortgage for the Colorado National Bank.

He thereafter made and filed extensions of the chattel mortgage as the actual owner of the mortgage, but he failed to file the affidavit required by Chapter 76, Session Laws of 1927, providing that if the mortgage is in excess of $2,500 an affidavit must be filed beginning two years from the date of filing or recording, and within thirty days after the two year period and annually thereafter, that the loan was given in good faith and what part, if any, has been paid.

1. Section 76, Session Laws of 1927, applies to any and all chattel mortgages. Where possession remains in the mortgagor and where the indebtedness shall exceed $2,500 it is mandatory that the sworn statement as provided in the Act be filed within thirty days after the expiration of two years from the date of the mortgage. This provision applies to Kirk's mortgage in this case.

2. Where the mortgagee at the time of filing a purported extension, had parted with all title to the mortgage, mortgagee's affidavit extending the mortgage is a nullity.

3. An agent in extending a chattel mortgage must disclose in the extension affidavit such agency, and a failure to disclose such agency renders the extension invalid.—*Judgment reversed.*

HUSBAND AND WIFE—GIFT BY HUSBAND DURING LIFETIME WIDOW'S RIGHTS IN HUSBAND'S PROPERTY DURING HIS LIFETIME—*Norris vs. Bradshaw*—No. 13520—*Decided May 27, 1935—Opinion by Mr. Justice Holland.*

Plaintiff, Norris, was the widow of William Norris, deceased, of whose estate she is Administratrix, and she brought this suit as Administratrix to set aside a gift made by her deceased husband to defendant below, son-in-law. Judgment below for defendant.

Norris, before his death, and while in good physical and mental condition, and owing no debts, gave his son-in-law, the defendant, $3,240 which was all the property he had with the exception of about $200. In a former trial of this case the Court permitted the defendant and his wife to testify as to statements and transactions with

Norris occurring before his death. On appeal to the Supreme Court the judgment was reversed on the ground that the admission of such testimony was reversible error. The case was again tried below where judgment was for defendant.

1. The Court below, upon competent evidence, attempted to determine that the gift was not made in lieu of a will, and that there was no undue influence, and that the gift was voluntary and was not made for the purpose of depriving the wife of an interest in deceased's estate, and such finding will not be disturbed.

2. A claim for a widow's allowance is not the same as a debt owing by deceased. To hold that the possibility of a claim for a widow's allowance might exist and constitute a debt owing by deceased in his lifetime, such as would defeat the right of a husband to transfer or give away his property in a bona fide transaction, would render the ordinary commercial transactions of life unstable.

3. During coverture the wife has no interest in the husband's personal property except to the extent of his liability for her support. The husband's personal property is free of any vested interest of the wife and he has the absolute and unqualified dominion over it, and can dispose of it during his lifetime by sale or gift.—*Judgment affirmed.*

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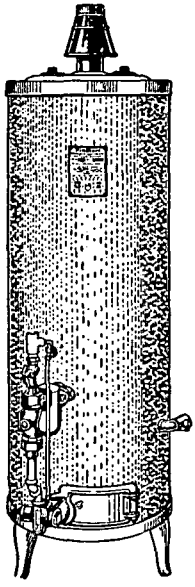

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