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Supreme Court Decisions

INSURANCE — FIRE — SOLE OWNERSHIP — EVIDENCE OF VALUE— MORTGAGE—*Universal Insurance Co. vs. Arrigo*—No. 13475—*Decided April 29, 1935—Opinion by Mr. Justice Holland.*

Plaintiff below recovered on a fire insurance policy for loss of residence and household goods occasioned by fire.

1. Where it appears that at the time policy was issued that the agents of insurance company knew that plaintiff was not the sole owner of the house but that her husband was purchasing same on time and had agreed to deed the property to her as soon as he acquired the full title and all this was carried out before the fire occurred, the provision in the policy rendering the policy void if the interest of the assured be other than unconditional and sole ownership, did not void the policy.

2. Conversations between the plaintiff and her husband and the insurance agents who solicited and procured the insurance were admissible without preliminary proof of their agency, in view of our statute providing that any person who solicits and procures an application for insurance shall be deemed to be the company's agent in any controversy between the parties.

3. Where a person bought a property, lived in it for several years and improved it, he was competent to testify as to value.

4. Where insured placed a deed of trust against the property nearly three years after the policy was issued, such encumbrance did not void the policy nor come within the prohibition of a clause which made the policy void if the insured concealed or misrepresented any material fact or circumstance concerning the insurance.—*Judgment affirmed.*

WILLS—CHARITABLE BEQUESTS—CONSTRUCTION—LACK OF TRUSTEE—*Jeffreys et al. vs. International Trust Co.*—No. 13336—*Decided April 29, 1935—Opinion by Mr. Chief Justice Butler.*

The International Trust Company, as executor, presented a will for probate to which a caveat was filed. Will sustained by both County and District Courts.

1. Where will is attacked for lack of testamentary capacity and juries in two courts found that testatrix had such capacity and the evidence is conflicting and the findings are amply supported by the evidence, such findings will not be disturbed.

2. The court, in proceedings to probate a will in this state, has power to pass upon all objections made in the caveat to the legality of the contents of the will and is required to do so.

3. If a portion of the will is void and the rest valid and binding, the will must be admitted to probate only as to the part that is valid and

binding and it is only where the entire contents of a will are void, that it must be declared not subject to probate.

4. Where a will, omitting its formal parts, states: "I make the International Trust Company of Denver my executor. I leave my entire estate after payment of my just debts to the Denver Foundation for the benefit of needy Denver people," such will is not invalid because it fails to name a trustee to carry out the purpose of the bequest, where it appears that there is an organization, unincorporated, known as the Denver Foundation to accept as trustees charitable and benevolent bequests and devises.

5. It is sufficient if the testatrix has provided or indicated some method or means of selecting from the class or group the particular individuals to receive the benefit of the charitable bequest or devise.

6. The testatrix sufficiently indicated a desire that the trust should be administered in accordance with the Denver Foundation plan and under that plan the distribution committee has authority to select the particular individuals to receive the benefit of the bequest.—*Judgment affirmed.*

INDUSTRIAL COMMISSION — ORDER FORBIDDING LOCKOUT — CONTEMPT—JURISDICTION—BUSINESS AFFECTED WITH A PUBLIC INTEREST—*The People et al. vs. Aladdin Theatre Corporation*—Nos. 13367-13368—*Decided April 29, 1935—Opinion by Mr. Justice Burke.*

Defendant below is charged in contempt with the violation of a mandatory injuction forbidding the continuance of a lockout and directing the reinstatement of employees. To review a judgment discharging defendant, the Commission prosecutes this writ.

1. One operating a theatre is not operating a business affected with a public interest and, therefore, is not subject to the provisions of the Industrial Commission Act of the State of Colorado declaring strikes and lockouts unlawful, prior to or during a hearing on disputes between employees and employers over wages, hours or conditions of employment.—*Judgment affirmed.*

WATERS—PRIORITIES—CAPTURED WATER—*Dalpez vs. Nix*—No. 13665—*Decided April 29, 1935—Opinion by Mr. Justice Young.*

This action was brought by Nix to secure an adjudication of his right to the use of waters for irrigation which he claimed were developed from seepage and springs and except for such developments would not have reached a natural water course. He had judgment below.

1. One who artificially develops or produces water and adds or turns the same into a natural stream, which water would not in due course otherwise have reached the stream, may acquire a right thereto superior to the adjudicated rights of earlier appropriators of the natural waters of the stream.

2. However, it is incumbent on him to establish by clear and satisfactory evidence that the water thus added was produced and contributed by him and that, if not interfered with, it would not have reached the stream.

3. Where it appears that the county at its own expense put in a tile drainage system to prevent flood or bogging of a county road which developed water for irrigation, but no part of such expense was borne by plaintiff nor by his efforts, such water so developed does not give plaintiff a superior right to that of other appropriators of the stream, especially where it appears that such water would have ultimately reached the stream if not intercepted.—*Judgment reversed with directions.*

COUNTIES—PLEADING—PROPER METHOD OF SUING COUNTY—*John Deere Plow Co. vs. The County of Phillips*—No. 13400—*Decided May 6, 1935—Opinion by Mr. Justice Hilliard.*

An action to recover taxes paid under protest. Judgment of dismissal entered and taxpayer assigns error.

1. The proceedings in the court below were brought against "The County of Phillips, State of Colorado." An action so brought is not maintainable.

2. In all suits or proceedings by or against a county the name in which the county shall sue or be sued shall be the Board of County Commissioners of the county of.....

3. A suit brought against County of Phillips was improperly brought. It should have been brought against the Board of County Commissioners of the County of Phillips, as that is the corporate name of the county for purposes of suit.—*Judgment affirmed.*

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

TAXATION — EXCISE TAXES — CONSTITUTIONALITY—WHEN CANNOT BE QUESTIONED—*Wade et al. vs. State of Colorado*—No. 13658—*Decided May 6, 1935—Opinion by Mr. Justice Holland.*

The State of Colorado filed suit below to recover from the defendant and its bondsman for all taxes and penalties due under the Motor Fuel Act. The State had judgment below.

1. The defendant below and its sureties are not in a position to attack the constitutionality of the Motor Fuel Act, because they would receive no benefit, neither would they suffer any injury by or through a holding as to the validity or invalidity of the Act.

2. The defendant below sought and obtained a privilege under the statute as a distributor of motor fuel and in securing the motor fuel it collected the tax imposed by the Motor Fuel Act from the purchasers, and no equitable principle permits it to receive the privileges of collecting a tax and retaining the proceeds, and then attack the constitutionality of the law under which it collected such tax.

3. As to the tax collected by the defendant, the defendant became the trustee thereof until such taxes were paid to the State Treasurer.

4. This case falls within the rule that this court will not pass upon the constitutionality of a statute unless necessary for a determination of the case.

5. The State was entitled to a judgment without a consideration of the constitutional questions presented.—*Judgment affirmed.*

WORKMEN'S COMPENSATION — LIMITATIONS ON FILING CLAIM— EFFECT OF—*Evanoff vs. Industrial Commission*—No. 13706—*Decided May 6, 1935—Opinion by Mr. Justice Hilliard.*

A proceeding under the Workmen's Compensatiton Act, December 4, 1929, as the result of an accident arising out of and in the course of his employment, John Evanoff was instantly killed. No notice of claim of benefits was filed until October 13, 1934, when notice was filed by the widow and the claim rejected.

1. The Workmen's Compensation Act requires that a notice claiming compensation shall be filed within six months after the injury or within one year after death resulting therefrom or it is barred.

2. The fact that a doctor, under a contract with the employer, made an examination of the body of the deceased and the insuring company paid the expense of the burial is not sufficient to take the case out of the Statute of Limitations, for the claimant had filed no claim and no claim was recognized.

3. The exception to the Statute of Limitations applies only to a claimant to whom compensation has been paid.—*Judgment affirmed.*

TRUST—CONSTRUCTION—MOOT CASE—RIGHT OF ADOPTED CHILD —*Brunton vs. The International Trust Co.*—No. 12792—*Decided May 6, 1935—Opinion by Mr. Justice Hilliard.*

This is a suit concerning what is described as the Brunton Trust. Suit was brought below to procure decree interpreting and construing the language of the trust, particularly with reference to the rights of an adopted child of a beneficiary of the trust, and whether such adopted child would be considered lawful issue of the beneficiary. John D. Brunton, father of the adopted child, was one of the beneficiaries.

1. Where a trust provides for income to be paid to certain beneficiaries and to the line of each beneficiary which shall consist of the beneficiary and his lawful issue of any degree, and the trust is to continue during the natural lives of the founders and the natural lives of the immediate beneficiaries, and during the further period of the life of the children of the beneficiaries and for 21 years thereafter, and the lawful issue of each degree of such line, shall take per sterpes and not per capita, children on leaving children, under the trust are not entitled to share in the trust concurrently with their respective progenitors.

2. Hence, the question of whether or not an adopted child of a living beneficiary should be considered as lawful issue under the terms of the trust presents a moot question, as such adopted child has no immediate interest in the trust and any decision rendered would be upon a hypothesis which may never arise.

3. The lower court should have sustained the defendant's demurrer upon the grounds that the complaint failed to state facts sufficient to afford any relief to the adopted child at this time.

4. Courts are not constituted to render advisory opinions to private litigants and will not adjudicate issues framed upon facts which may never occur.—*Judgment reversed.*

Mr. Justice Holland and Mr. Justice Young not participating.

APPEAL IN ERROR—MOTION TO DISMISS—FILING MOTION FOR NEW TRIAL AFTER JUDGMENT—*Neighbors of Woodcraft vs. Charles W. Hildebrandt*—No. 13713—*Decided May 6, 1935—Opinion by Mr. Justice Hilliard.*

Defendant in error, plaintiff at trial, moves to dismiss the writ of error on the ground that judgment was entered before leave was sought for filing a motion for a new trial.

1. Section 238, Code 1921, does not require motion for new trial to be filed before judgment is entered.

2. Where motion for a new trial is filed after judgment is entered but otherwise within the required time the judgment is suspended so that it becomes final only when the motion is overruled.

3. The time of adverse ruling on the losing party's motion for new trial marks the date when the judgment becomes final fo rthe purpose of the prosecution of a writ of error.

Motion to dismiss the writ of error denied and supersedeas granted.

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—MANIFEST WEIGHT OF EVIDENCE—*London Guarantee and Accident Co. vs. Coffeen*—No. 13649—*Decided March 18, 1935—Opinion by Mr. Justice Young.*

1. Section 4452 Compiled Laws of 1921 as amended by Section 11, Chapter 186, Session Laws of 1929, among other things provides, "In determining permanent partial disability the Commission shall ascertain in terms of percentage the extent of general permanent disability which the accident has caused, taking into consideration not only the manifest weight of evidence, but the general physical condition and mental training, ability, former employment and education of the injured employee."

2. The use of the words "manifest weight of evidence" does not impose on the claimant any greater burden of proof than the proof required where other matters are in issue before the Commission.

3. This statute means that permanent partial disability shall be translated into or expressed in terms of general permanent disability and the percentage of such general disability fixed.

4. The words "the manifest weight of evidence" are merely one of the factors to be considered.

5. The actual physical disability or injury that is manifest, apparent, evident to the mind, and clear to the Commission, after the weighing of the evidence of it, and determining the nature of such actual disability from the preponderance thereof, is the "manifest weight of evidence" to which reference is made in the statute.—*Judgment affirmed.*

CRIMINAL LAW—HABITUAL CRIMINAL ACTS—*Smalley vs. The People*—No. 13502—*Decided March 18, 1935*—*Opinion by Mr. Justice Burke.*

1. The habitual criminal act found in Chapter 85, Page 309, Session Laws of 1929, contemplates a single sentence for a second conviction, not one sentence for the crime charged and another sentence for being an habitual criminal.

2. This only applies where at the time of filing the information for second offense, the District Attorney knows of, and therein charges, the former conviction, or that he learns of it before trial and amends his information accordingly.—*Judgment reversed.*

LANDLORD AND TENANT—LEASE—FORFEITURE—*Frank A. Gustafson, Plaintiff in Error, vs. Frank A. Maxwell, et al., Defendants in Error*—No. 13602—*Decided March 4, 1935*—*Opinion by Mr. Justice Hilliard.*

Plaintiff alleged that defendants conspired together to bring about a forfeiture of his lease. Judgment was for the defendants.

1. The lease contained covenants which warranted forfeiture if not observed. There is no evidence of a common design among defendants.—*Judgment affirmed.*

AUTOMOBILES—NEGLIGENCE OF DRIVER—MEDICAL TESTIMONY—*Westfall vs. Kern*—No. 13334—*Decided March 25, 1935*—*Opinion by Mr. Chief Justice Butler.*

1. Where there is evidence showing that driver of automobile removed both his hands from the steering wheel while traveling 40 miles an hour, immediately following an unusual cracking sound and turned his head to the rear and the car then ran off the road and overturned, injuring plaintiff, a guest, such was sufficient to support a verdict for plaintiff.

2. Where the complaint alleged severe injuries, fracture of pelvic bone, bladder ruptured, vertebrae dislocated and that by reason of such

injuries that her health was impaired and her vigor and opportunity for usefulness and happiness was impaired, such allegations were sufficient to admit medical evidence that in the future, in case of marriage and pregnancy that she would not be able to give birth to a child by any process of normal delivery.—*Judgment affirmed.*

CONTRACTS—CONSTRUCTION BY PARTIES—*Johnson Oil and Refining Company, a Corporation, Plaintiff in Error, vs. J. T. Elder, doing business as Elder's Garage, Defendant in Error*—No. 13391—*Decided March 11, 1935—Opinion by Mr. Justice Holland.*

Suit on account for purchase price of two carloads of gasoline. Defendant counter claimed for overpayment on gasoline previously bought, and recovered against the plaintiff. The contract price was the general posted tank wagon price. As a result of a "gas war" defendant contended he should be charged the prevailing tank wagon price. Plaintiff protested, and the defendant thereafter paid the higher agreed contract price.

1. An action will not lie to recover back money paid voluntarily, with a full knowledge of the facts and circumstances.—*Judgment reversed.*

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