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Supreme Court Decisions

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MARRIAGE—ANNULMENT—SUFFICIENCY OF EVIDENCE—*James vs. James*—No. 13543—*Decided Sept. 30, 1935—Opinion by Mr. Justice Holland.*

Plaintiff below obtained a decree of annulment of common law marriage with defendant. Defendant below attacked decree on insufficiency of evidence.

1. Evidence sufficient to establish a common law marriage.
2. Actual words of agreement and consent are not always necessary to establish a common law marriage.
3. All the facts and circumstances evidence a mutual consent that may be inferred from cohabitation and repute.—*Judgment affirmed.*

CHATTEL MORTGAGE — NOTE — USURY — EFFECT OF — *Cady L. Daniels, Inc. vs. Fenton*—No. 13500—*Decided September 30, 1935—Opinion by Mr. Justice Campbell.*

1. Moneylenders' Statute (Sec. 3781 to 3801 C. L. 1921), with relation to avoiding all contracts for loans less than $300.00 where more than 12% interest is charged, has no application to the "spreads" between cash and credit sales of second hand automobiles, when the "spread" is agreed to by both parties, where the down payment is small and the purchaser takes possession.—*Judgment reversed.*

TORTS—INJURY TO MINOR BY BONFIRE—VIOLATION OF ORDINANCE —ATTRACTIVE NUISANCE DOCTRINE—*Dunbar vs. Olivieri*—No. 13485—*Decided Sept. 23, 1935—Opinion by Mr. Justice Bouck.*

Dunbar, a minor, brought suit by next friend to recover damages for personal injuries on two causes of action. First, that the defendant built a bonfire on a vacant lot during hours other than from 4:00 P. M. to 8:30 in the evening, in violation of a City ordinance and, second, on the ground that the fire was an attractive nuisance, likely to attract children, including the plaintiff. Plaintiff was non-suited below.

1. The mere fact that one does a thing prohibited by Statute or Ordinance does not render the doer liable for harm unless the intent of the ordinance is to protect the interest of an individual and the interest invaded is one which the enactment is intended to protect and the enactment is intended to protect an interest from a particular hazard, and the invasion of the interest ensues from that hazard and the violation is a legal cause of the invasion.
2. This case does not fall within the class of cases relying upon the doctrine particularly termed "attractive nuisance." — *Judgment affirmed.*

CONTRACTS—CONSTRUCTION—USAGE—*Bankers Union Life Insurance Co. vs. Rudolph E. Atschel*—No. 13526—*Decided September 16, 1935—Opinion by Mr. Justice Holland.*

Atschel, Special Agent for Bankers Union Life Insurance Co., brought suit below to recover the balance of $1825.93 due on an agency contract.

He recovered below.

1. Before testimony would be offered by the defendant to show that by custom and usage in the insurance business, the words "Drawing account" in an agency contract have a peculiar meaning, the contract itself must be ambiguous; where the contract is free from ambiguity such evidence of custom and usage is not admissible. — *Judgment affirmed.*

CORPORATIONS—DIRECTORS—DATE TO DISCLOSE—TRUST IMPOSED WHEN—*Colorado and Utah Coal Co. vs. Harris et al.*—No. 13289—*Decided September 9, 1935—Opinion by Mr. Justice Burke.*

I. Plaintiff sues defendants to impress a trust upon coal lands standing in the names of the defendants. It appears that the defendant, Harris, was president of the plaintiff from 1914 until 1927, and continued as a director until 1929. It was alleged that Harris, prior to the termination of his official relationship with the plaintiff, secretly purchased certain coal acreage which he conveyed to a corporation other than the plaintiff. It is further alleged that the plaintiff had an expectancy in these properties, and that Harris, having obtained the information relative to the value of the properties at the expense of and while acting in a fiduciary capacity for the plaintiff, holds in trust. Defendant admitted the purchase of land in question but denies that, after 1927, he, Harris, had acted actively as a director of the plaintiff company. He also alleged that the plaintiff company was guilty of a conspiracy to monopolize the coal business. The trial court found for the defendants on all matters except that the plaintiff was guilty of a conspiracy. The assignment of error under consideration reads:

"The court erred in finding that an agent may acquire property in which his principal has an expectancy; and the court erred further in finding that plaintiff had no expectance in the property upon which it seeks to impose a trust."

II. The trial court determined the questions of fact upon evidence which either supports the judgment or is conflicting. Under those circumstances, the findings of fact will be sustained.

III. In order to establish a trust such as the plaintiff seeks to impose, evidence thereof must be "clear" "convincing" "certain" "unequivocable" "conclusive." While Harris had no right to do anything which would cripple or injure his principal, he was not precluded

from acting for himself in other manners. The evidence disclosed that the plaintiff company had a prior opportunity to examine and inspect the property in question.

IV. In such a case, plaintiff is "bound to establish not only that the properties in question possessed value to it but that it had practical, and not a mere theoretical, use therefor."—*Judgment affirmed.*

WORKMEN'S COMPENSATION—FINDINGS OF COMMISSION—NOT DISTURBED IF SUPPORTED BY EVIDENCE—*The Industrial Commission of Colorado et al. vs. White*—No. 13746—*Decided September 9, 1935—Opinion by Mr. Justice Hilliard.*

The claimant's decedent died following an operation for an obstruction caused by looping of the intestine. There was evidence that this was caused by adhesions from a previous operation; also that it was due to an accidental fall and strain. The Commission found that the accident did not cause the obstruction. The District Court held for the claimant.

1. The Commission is the fact-finding tribunal. The finding has respectable evidentiary support and is controlling.—*Judgment reversed.*

CONSTITUTIONAL LAW—*Johnson vs. McDonald*—No. 13764—*Decided September 9, 1935—Opinion by Mr. Justice Young.*

The defendant in error brought an action against the plaintiff in error for an injunction to enjoin them from carrying out the provisions of Chapter 181, S. L. 1935, which, with Chapter 124, S. L. 1935, provided a way for the State of Colorado to procure from the Federal Government $25,000,000 for a public highway in Colorado.

A general demurrer to the complaint was overruled and defendants below elected to stand.

1. Courts are concerned with consideration of the power of the Legislature to act but not with the policy it pursues within those powers.

2. If a statute creates a debt, if it creates a fund to pay it, if that fund would not be available for general purposes if not used to pay the debt, the Act is not prohibited by the Constitution.

3. That the law itself declares certain Acts shall be irrepealable, after contracts shall have been entered into under its authority, is of no moment, because they become irrepealable whether so declared or not.

4. That interest is paid from a fund upon a warrant drawn on that fund has never been regarded as a diversion of the fund for purposes other than that for which it is raised.

5. The Act does not delegate non-delegable powers to the Highway Department.—*Judgment reversed.*

Mr. Justice Campbell, Mr. Justice Bouck and Mr. Justice Hilliard dissent.

APPEAL AND ERROR—MOTION TO DISMISS—TIME FILED—*Youngberg vs. The Orlando Canal and Reservoir Co.*—No. 13769—*Decided September 9, 1935—Opinion by Mr. Justice Hilliard.*

Defendants in error move to dismiss the writ of error pending in the Supreme Court on the ground that the record was not lodged in the court within the time fixed by rule 18, that is to say, within one year. Suit for a receivership was instituted in 1910. A receiver was appointed and in July, 1915, pursuant to court order, the assets of the defendant company were sold. That sale was properly approved. Nothing further was done until May, 1933, when plaintiff filed an amended complaint. In June, 1933, the court ordered that the amended complaint be stricken. On July 9, 1934, plaintiff again filed an amended petition for a receiver which was denied and dismissed the same day. The record was filed in the Supreme Court on July 5, 1935. The court concluded that the final disposition of the cause was on July 9, 1934. It, therefore, follows that the time of filing in the Supreme Court was within the rule.—*Motion denied.*

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — GASOLINE STATION — *Hollenbeck vs. City and County of Denver* — No. 13497—*Decided September 16, 1935—Opinion by Mr. Justice Holland.*

Hollenbeck was fined $25.00 in the Municipal Court of Denver for violation of City ordinance which provides that every gasoline filling station shall annually pay a license fee of $25.00 for one gasoline dispenser and an additional annual fee of $10.00 for each additional dispenser.

1. Ordinance No. 30, Series 1933, City and County of Denver, is constitutional.

2. The existence of a gasoline filling station within the confines of a city imposes an additional burden both upon the Police Department and the Fire Department, one as to traffic regulations and one as to fire prevention, and necessarily increases the costs of such departments in the proper supervision.

3. It is immaterial whether the ordinance is a revenue measure enacted under the guise of police regulation, for the city has power to impose a license tax whether on the ground that it is a revenue measure or a police regulation or for both purposes.—*Judgment affirmed.*

CONTRACTS—MEASURE OF DAMAGES—FIXING MEASURE BY CONTRACT—PLEADING—SUFFICIENCY OF COMPLAINT — *Midland Oil & Refining Co. vs. Heating Service and Oil Co.*—No. 13524—*Decided September 16, 1935—Opinion by Mr. Justice Holland.*

The Heating Company obtained a judgment below against The Midland Oil Company for damages for breach of contract.

1. Where it is apparent that the parties to a contract realized the uncertainty of performance and made provision therefor, in that certain benefits were to inure to either party upon non-performance by the other, in an action for damages for breach, they will be limited to the very provisions they voluntarily adopted.

2. Where the complaint for damages is based upon failure to deliver oil alone, disregarding the other portions of the contract, such complaint fails to state a cause of action.

3. Plaintiff cannot select certain portions of a contract, beneficial to it, to the exclusion of other portions it had made and agreed upon.—*Judgment reversed.*

PARTNERSHIP — CONTRIBUTION BETWEEN PARTNERS — *Goff vs. Bergerman, et al.*—No. 13341—*Decided September 9, 1935—Opinion by Mr. Justice Bouck.*

Judgment for $2500 was rendered against Goff below on a claim for contribution made by his partners for some debts they had to pay. Defense was an agreement limiting contributions.

1. Contribution among partners, even where it might be proper, will not be enforced until after a final accounting and settlement of the partnership affairs.

2. An agreement between partners restricting the liability of one to a certain amount is of no effect as to creditors without knowledge of the limitation.

3. But partners as between themselves may limit the right to contribution or may exclude it altogether.—*Judgment reversed.*

CHATTEL MORTGAGES — RECORDING — DESCRIPTION — OWNERSHIP ESTOPPEL — INTEREST — *Thomas vs. First National Bank of Price*—No. 13488—*Decided September 9, 1935—Opinion by Mr. Justice Bouck.*

Brown owned some 306 sheep, 283 of which were ear marked. In 1930 they executed a chattel mortgage to Bank of Price, which was duly recorded in Utah, but not in Colorado.

In 1932 the Swapp Company executed a chattel mortgage to the Colorado bank of which Thomas was Conservator, which mortgage was duly recorded in Colorado and covered some 1400 head of sheep, and was alleged by Colorado bank to include those covered by Brown mortgage. The Colorado bank seized all the sheep under its mortgage and plaintiff instituted Replevin.

Held:

1. The Utah mortgage is valid even though not filed in Colorado; the owners of the property not having executed the second mortgage and the Colorado bank not being in priority with the owner or having brought itself within the class of third person or lien creditors

protected by the Colorado statutes. There was no transfer in ownership from Brown to the Swapp Company.

2. The description in the Brown mortgage, even if it was defective, became immaterial if the Colorado bank was not legally in position to attack it and was good between the parties.

3. Estoppel is not involved as there was no change in position by the Colorado bank while relying on the conduct of the other party.

4. There being no conflict in the evidence, the trial court correctly directed a verdict for plaintiff; defendant not having objected to instructions granting interest, under these well known rules there can be no review.

INHERITANCE TAX—OLD AGE PENSION—CONSTITUTIONAL LAW—TAXATION—*Estate of Hunter vs. State of Colorado, et al.*—No. 13726—*Decided September 9, 1935*—*Opinion by Mr. Justice Holland.*

The estate of Estelle Hunter was assessed an additional 10% inheritance tax to comply with 1933 Session Law for old age pension. The constitutionality of the act was attacked on the following grounds:

Colorado Constitution

(a) Article X, Sec. 7 (For County purpose)
(b) Article X, Sec. 3 (Uniformity of taxation)
(c) Article X, Sec. 25 (Local or special laws)

Federal Constitution

(d) Fourteenth Amendment (Equal protection)
(e) Fourteenth Amendment (Due process) and Article 11, Sec. 25 Colorado Constitution

Colorado Constitution

(f) Article V, Sec. 21 (One subject legislation)
(g) Article V, Sec. 24 (Re-enactment of existing statutes, by reference)

The act was further attacked on the ground that the 10% assessment was on the full amount of the tax and not the amount payable if paid within the six months, and on the further ground that the act imposes a new tax.

Held: The legislature has a right to declare what is or what is not a county purpose and can constitute the Board of County Commissioners its agents for distribution. The act does not impose a new tax and is definitely anchored to the inheritance tax act by reference expressed in the title. The tax is uniform on all of the same class and is applicable alike.

The act is constitutional.

WORKMEN'S COMPENSATION — ATTORNEY AND CLIENT — UNDER WHAT CONDITIONS AN ATTORNEY IS ENTITLED TO COMPENSATION FOR INJURIES—*O. P. Skaggs Co. et al. vs. Nixon*—No. 13675—*Decided September 9, 1935—Opinion by Mr. Justice Young.*

John C. Nixon, an attorney, under a monthly retainer by O. P. Skaggs Co., was injured in an automobile accident while driving from Denver to his home at Greeley, the trip caused by his coming to Denver, Colorado, to attend to business for his client. The Industrial Commission declined his claim for compensation on the ground that he was not an employe of O. P. Skaggs Co. within the meaning of the Workmen's Compensation Act. On appeal to the District Court the District Court set aside the order of the Commission and found that Nixon was an employe of the Skaggs Co. The question of employment was the only issue before the Court.

1. There was competent evidence to support the finding of the District Court that Nixon was an employe of the Skaggs Co. and that such evidence was uncontroverted.

2. Therefore, the finding of the Commission that he was not such employe acted in excess of its powers.

3. The District Court did not substitute its own findings of fact for those of the Commission for the Commission found the existence of a negative condition, that is, non-employment, and when the Court found there was competent evidence of employment and that it was uncontroverted, the Court was passing on questions of law and not making a finding of fact.

4. The Commission failed to make findings of fact on any question except that of non-employment. Therefore, the case should be remanded to the Commission to make the further statutory findings, that is, as to whether or not the claimant was performing services arising out of and in the course of his employment and as to whether or not the injury was proximately caused by accident arising out of or in the course of his employment.—*Judgment affirmed as to the order of the District Court finding that the uncontroverted evidence established the relationship of employer and employe and with directions to remand the case to the Commission for the purpose of determining the other questions.*

EVIDENCE—CREDIBILITY OF WITNESSES—*Thomas Edgar Kidd vs. People of State of Colorado*—No. 13788—*Decided September 30, 1935—Opinion by Mr. Chief Justice Butler.*

1. Plaintiff in error was convicted of receiving stolen goods. Part of the evidence was obtained by means of a dictograph on admission of which evidence plaintiff appeals.

2. Rules of evidence permit admission of evidence obtained by use of dictograph when the party testifying can establish his familiarity with the voice of the accused.

3. Rules of evidence also require admission of evidence tending to disprove credibility of accusing witness. Exclusion of such evidence cannot be other than prejudicial, considering the nature of evidence produced against plaintiff in error.—*Reversed and remanded for new trial.*

MUNICIPAL CORPORATIONS—CITY ATTORNEY—MEASURE OF COMPENSATION—*Kinzie vs. The Incorporated Town of Haxtun*—No. 13795—*Decided October 7, 1935*—*Opinion by Mr. Justice Young.*

Plaintiff brought suit below to recover judgment against a municipal corporation for services as attorney.

1. Section 9064, C. L. 1921, among other things, provides:

"The Board of Trustees shall appoint a town attorney * * * shall prescribe their duties and compensation or the fees they shall be entitled to receive * * *."

2. From the foregoing it was evident that it was the legislative intent that the Board of Trustees of a town should fix and determine the character of the services to be rendered and the compensation to be paid to one appointed as an attorney for an incorporated town.

3. It was the duty of the trial court to determine the scope of plaintiff's duties as attorney under his original contract of employment. If the duties performed were within the requirements of the original contract it is not probable that the Board of Trustees would have offered additional compensation for the rendition of services required to be performed thereunder. If they were not within the terms of the original contract then it was for the District Court to so determine.—*Judgment reversed and cause remanded for further proceedings in the District Court.*

PROHIBITION — NON-RESIDENT CORPORATION — JURISDICTION OF COURT OVER CORPORATE STOCK—*People vs. District Court*—No. 13809—*Decided Oct. 7, 1935*—*Opinion by Mr. Justice Bouck.*

On petition of the Edinburg State Bank and Trust Co., a Texas corporation, for a writ of prohibition, a rule to show cause was entered in this court directed against the District Court, Routt county.

Houston purchased certain lands and water rights at foreclosure sale. The water rights consisted in part of stock in the Still-Water Ditch and Reservoir Co., a Colorado corporation.

In an action commenced by Houston he charged that the certificates of stock so claimed have been fraudulently disposed of by delivery to the Texas bank and that the Still-Water Co. refuses to recognize his ownership of the stock.

1. Service of summons on non-resident corporation is insufficient to subject the latter to jurisdiction over its person.

2. However, when the cause of action is in rem, the District Court has jurisdiction over the property, that is, the stock certificates which have their situs in Colorado and may lawfully proceed with reference to it so long as it avoids entering a personal judgment against a non-resident defendant.—*Rule discharged and petition for writ of prohibition denied.*

PUBLIC UTILITIES—POWER COMPANIES—WHAT CONSTITUTES—*Colorado Utilities Corporation vs. The Public Utilities Commission et al.*—No. 13481—*Opinion by Mr. Justice Bouck—Decided September 30, 1395.*

The Moffat Coal Company and the town of Oak Creek, Colorado, entered into a contract whereby the company was to supply an electric current and the town was to distribute it to its inhabitants. The town paid the company a flat per kilowatt rate. The inhabitants of the town formerly obtained their electric power from the Colorado Utilities Corporation, the plaintiff here. The action brought before the Utilities Commission was dismissed, the Commission ruling that the company was not a public utility within the contemplation of the statute. Upon appeal to the District Court the holding of the Commission was affirmed. Error was alleged.

I. It is impossible to contract away a statute. The mere fact that the contract between the town and the company provided that the company was not a utility did not make it so. The facts control.

II. Section 2913, C. L. '21, defines a utility as "The term 'public utility' when used in this act, includes every * * * electrical company * * * operating for the purpose of supplying the public for domestic, mechanical or public uses * * *." An arrangement to sell for public uses is of itself sufficient to constitute the seller a public utility. "It is no answer to the question before us to say that the company's sale is to the town as a single individual customer only." If a municipality desires to place itself beyond the control of the Utilities Commission, it must produce as well as distribute electric current.—*Judgment reversed with directions.*

MORTGAGES—CONSTRUCTION OF CONTRACT—COVENANTS OF WARRANTY—PAYMENT—*Associated Oil Company of Wyoming vs. Rector*—No. 13292—*Decided September 30, 1935—Opinion by Mr. Justice Hilliard.*

The Rectors executed to plaintiff's remote assignor a note secured by deed of trust which was foreclosed as a mortgage in the court below. It contained the following: "This deed of trust is subject to a certain oil lease," etc., the said lease having been made between the same parties at a prior date. There were several extensions made as to the maturity

of the note and the period of the lease. The last extension was to August 1, 1928, when an abandonment under the lease occurred by reason of the failure to commence a well. Defendants contended that the lease created an estate for twenty years and that the obligation to pay rent continued until the lessee reconveyed to the defendants by reason of which they are entitled to certain credits on the note and further that the trust deed should be reformed to create an exception as to the oil and gas rights.

1. The parties treated the lease as having, in the absence of extensions, a definite limitation. The defendants are bound by their agreed construction of the lease.

2. The deed of trust contained covenants of warranty and conveyed the fee title and necessarily carried with it any oil and gas rights not covered by the lease, and the reversion of the lease.

3. A set-off or counterclaim does not amount to payment, since there has been no delivery of money by the debtor to the creditor.—*Judgment reversed.*

LIFE INSURANCE—CHANGE OF BENEFICIARY—BENEFICIARY NOT THE LAWFUL HUSBAND OF INSURED—*Moore vs. Metropolitan Life Insurance Co. et al.*—No. 13703—*Decided August 19, 1935*—*Opinion by Mr. Justice Bouck.*

A life insurance policy was issued to Cornelia White prior to her marriage to plaintiff below, which contained a provision making the policy payable to the executor or administrator in case of death. After her marriage, by proper endorsement, she designated Thomas Moore, husband, the plaintiff below, as beneficiary. Contest below was principally between the husband and the administrator as to who was entitled to the death benefit. The court below awarded it to the administrator.

1. Under the policy the insured had the right to change the beneficiary and had the right to substitute Thomas Moore, husband, as beneficiary, in place of the executor or administrator, and complied with all terms of the policy in so doing.

2. Where it appears that the changed beneficiary was not the lawful husband of the insured by reason of the fact that the insured had not obtained a divorce from a former husband, nevertheless, the change in beneficiary to the plaintiff was legal because the title of husband added to his name in the endorsement was a mere matter of description. The insured was not limited in her choice of beneficiary to any particular class or classes.

She had the right to select whomever she desired to benefit regardless of any supposed absence of an insurable interest on the part of the beneficiary, where there was nothing in the pleadings or evidence to suggest any restriction of that choice.—*Judgment reversed.*

RAPE—EVIDENCE OF SEPARATE CRIME—HEARSAY—CORROBORATION—*Granato vs. The People*—No. 13756—*Decided August 12, 1935*—*Opinion by Mr. Chief Justice Butler.*

Granato was convicted of the crime of statutory rape in the court below.

1. Where evidence is admitted tending to prove the commission of a separate crime than that charged but such evidence is an inseparable part of the entire transaction leading to the commission of the crime charged, it is not error to admit the same.

2. Where prosecutrix made statements to defendant's relatives that defendant had not harmed her in any way or mistreated her, and relying on this statement such relatives had a right to ask prosecutrix to tell defendant's lawyer the truth and stop the prosecution and where thereafter in the trial prosecutrix was permitted to testify that the relatives wanted her to go to defendant's lawyer and tell him that nothing had happened, such evidence, though hearsay and made out of the presence of the defendant, was not prejudicial.

3. In a rape case, an instruction that the evidence of a prompt and early complaint of the wrong by prosecutrix may be considered in corroboration of her other testimony is proper.—*Judgment affirmed.*

JUDGMENTS—VERDICTS—VERDICT FOR PLAINTIFF—VERDICT FOR DEFENDANT—RECONCILING VERDICTS—*Creek vs. Lebo Investment Co.*—No. 13438—*Decided August 19, 1935*—*Opinion by Mr. Chief Justice Butler.*

Creek, who was the defendant below, seeks the reversal of a judgment rendered against her in an action brought by Lebo Investment Company to recover rent.

There have been three trials. The judgment rendered against the defendant in the first trial was reversed. At the second trial the jury rendered two separate verdicts, one in favor of the plaintiff for $5,648.20 and another in favor of the defendant on defendant's cross-complaint, for $8,437.50. A motion for new trial was granted on the counterclaim only.

At the third trial verdict was entered and judgment entered thereon for $6,650.00 in favor of the defendant on a counterclaim.

1. Where the jury at the second trial found two separate verdicts, one in favor of the plaintiff upon which judgment had already been rendered, and the other in favor of the defendant on her counterclaim, and the defendant did not seek to have the verdict and judgment against her set aside, and where the plaintiff sought and obtained a new trial on the counterclaim only and the verdict and judgment in plaintiff's favor was permitted to stand, then there existed two verdicts upon which separate judgments had been rendered and it was permissible for the court to deduct the lesser judgment from the greater and render a corrected judgment for the difference.—*Judgment affirmed.*