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Supreme Court Decisions

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PLEDGES—COUNTY TREASURER—DEPOSIT OF FUNDS IN BANK—*Horton as Treasurer vs. Grant McFerson as State Bank Commissioner*—No. 13423—*Decided February 19, 1934*—*Opinion by Mr. Chief Justice Adams.*

Horton as treasurer of El Paso County brought action against McFerson as State Bank Commissioner, who was in possession of the assets of the State Savings Bank at Colorado Springs. When the bank closed the treasurer had $39,233.90 on deposit in the bank and before the bank closed the bank entered into a trust agreement with the treasurer whereby the bank deposited $25,000.00 in liberty bonds with the First National Bank of Colorado Springs as trustee to secure deposits up to the amount of $25,000.00. McFerson sought to receive a dividend on the entire $39,233.90 before being required to resort to his security, but the Court decreed that the bonds be sold for not less than $25,000.00 and the proceeds delivered to the treasurer, the overplus, if any, to be paid to the commissioner, such proceeds to be applied against the $39,233.90, and that the commissioner pay to the treasurer a dividend of 50% on the balance.

1. As to the pledged security, there was no reason for the County Treasurer to expect the Bank Commissioner to offer anything more advantageous than the sum of $25,000.00 in cash.

2. The trust agreement defined the precise amount of the deposits that were contemplated and the limit and extent of the security which was only to the extent of $25,000.00.

3. All deposits in excess of the sum of $25,000.00 were not secured by the trust agreement.

4. When the trust is discharged, the commissioner as successor in trust to the pledgor is entitled to the return of the pledged property.

5. A pledge to secure a specific debt cannot be held by the pledgee as security for any other obligation, except by express agreement between the pledgor and pledgee.

6. The general rule of the rights of creditors to share in the general assets of insolvent concerns before exhausting their security, is not applicable here. The trust agreement here covers the rights of the parties, and to disregard it would be an unwarranted interference with their contractual relations.—*Judgment affirmed.*

LIBEL—QUALIFIED PRIVILEGE—HARSH LANGUAGE NOT NECESSARILY MALICIOUS—*E. W. Bereman vs. The Power Publishing Company et al.*—No. 13006—*Decided December 4, 1933*—*Opinion by Mr. Justice Butler.*

Bereman brought suit against the publishing company and others, alleging libel in that the Labor Advocate, a union labor paper, had said of him that he had deserted the cause of union labor and was a traitor to it.

Bereman, employed by Casey's Laundry, a union laundry, went to Columbine Laundry, a non-union establishment, and without revealing the change, solicited business for the non-union place. The editor had been told this much and also that the union would expel Bereman. The union did expel him before the trial. Bereman was non-suited at the trial.

Affirming the holding of the trial court, Mr. Justice Butler, for the court, en banc, affirmed upon the ground that the communication and publication was qualifiedly privileged. The Labor Advocate, a group paper, circulating among union men, enjoyed the qualified privilege of printing and publishing matter of interest to labor. While the story printed was emphatic, used extravagant and harsh language, this did not show malice requisite to sustain a cause of action in libel.

WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—FRAUD—*Rogers vs. Industrial Commission of Colorado et al.*—No. 13342—*Decided December 11, 1933*—*Opinion by Mr. Justice Burke.*

Rogers, an employee of Public Service Company of Colorado, filed claims with the Commission for alleged injuries and claims were contested and decided against Rogers. He died and his widow sought and was refused a review. Thereupon she brought this action seeking to have the award of the Commission set aside on the ground of fraud. General demurrers to her complaint were sustained below.

1. There is nothing in the evidence to justify a claim that the award was procured by fraud. The only fraud alleged is the false, colored and prejudicial testimony of witnesses for the company. The evidence of the witnesses for the company were flatly contradicted by witnesses for Rogers. The Commission had the sole power to find the facts from this conflicting evidence.

2. While the statute provides that awards may be set aside on the ground of fraud, a mere showing of conflicting evidence and an allegation that some of it was false or that it was given by prejudiced or interested witnesses, when such facts were before the Commission, is no plea of such fraud as the statute contemplates.—*Judgment affirmed.*

Mr. Justice Bouck specially concurs.

TAXATION — EXEMPTION — RELIGIOUS AND EDUCATIONAL USE — *Kemp et al. vs. Pillar of Fire*—No. 13017—*Decided December 11, 1933*—*Opinion by Mr. Justice Butler.*

Defendant in error is a corporation organized solely for religious, educational and benevolent purposes. It owns and conducts a college for both secular and religious instruction. The campus consists of 40 acres of land. Defendant also owns other land, aggregating about 200 acres, situated close to the campus. Part of this additional land is used for raising produce for the sustenance of the students, part is rented for cash, the cash rental being used exclusively for paying expenses of the college, and part of the land is idle. Most of the students pay nothing toward their tuition or sustenance; a few students pay a part. The college brought this action to have the said 200 acres of additional land removed from the tax rolls.

1. The use to which property is put is the test of the right to exemption, but the character of the owner sheds light on the nature of the use.

2. Constitutional and statutory provisions exempting property used for educational purposes are less strictly construed than those exempting property used for ordinary gain or profit.

3. The entire property of the college constitutes a unit. It is reasonably necessary to effect the objects of the institution, and is used solely for that purpose. Therefore, the entire property is exempt from taxation.—*Judgment affirmed.*

WATER—ORAL AGREEMENTS—ADVERSE POSSESSION—*Kountz vs. Olson and Perrino vs. Olson*—No. 13045—No. 13046—*Decided January 22, 1934*—*Opinion by Mr. Justice Holland.*

There was a dispute over water rights and priorities of decrees and claims over possession of plaintiff to use of water for over thirty years and payment of taxes on irrigated land for over seven years. Judgment below for defendants.

1. Oral agreements concerning priorities and title to water rights, followed with its change of possession and beneficial application, are valid.

2. Where plaintiff for over thirty years asserted their claim to use of the water and if necessary employed hostile methods to assert their use and rights, this shows an uninterrupted, exclusive and open possession and establishes title to same.

3. Continuous use of a water right invests possession.

4. Possession of such water rights, considered as land, where adverse and continuous for the period contemplated by the seven year statute of limitations, coupled with payment of taxes, vests title.—*Judgment reversed.*

PLEADING—SUSTAINING GENERAL DEMURRER—CONTRACTS—WATERS—*District Landowners Trust, et al. vs. Doherty*—No. 13416—*Decided February 26, 1934*—*Opinion by Mr. Justice Hilliard.*

Henry L. Doherty brought suit to recover on a certificate of indebtedness issued by the District Landowners Trust for the sum of $225,000.00. General demurrer was sustained to the complaint and Doherty was given judgment for $342,561.29 and costs.

1. Where a certificate of indebtedness refers to a separate declaration of trust, which by reference, was made a part thereof, such certificate of indebtedness must be construed in the light of the provisions of the declaration of trust.

2. An unexecuted trust will not terminate because of delay on the part of the trustee in executing it, notwithstanding the trust instrument directs its execution within a certain ime.

3. Where the certificate of indebtedness, which is the basis of plaintiff's cause, contains conditions, the conditions must be regarded as a part of the instrument.

4. Where the certificate of indebtedness is made payable at a certain date but by its provisions is tied to another instrument, a declaration of trust, and where there is another provision that the certificate of indebtedness shall be payable on or before the termination of the trust and the trust has not been terminated, the complaint fails to state a cause of action, as the indebtedness is not shown to be due.

5. Where the payment of certificate of indebtedness is to be paid out of a certain fund it is necessary to allege in the complaint the fulfillment of all conditions and the presence of such fund in order to state a cause of action.—*Judgment reversed.*

INSURANCE—ACCEPTANCE—SUFFICIENCY OF COMPLAINT—*Clarke vs. The Equitable Life Assurance Society of the United States*—No. 13113—*Decided February 26, 1934*—*Opinion by Mr. Justice Campbell.*

Clarke brought suit in the Court below to recover on an accident insurance policy, alleging that while riding in a bus in the State of Kansas, she sustained accidental injury, and that it was a total and permanent disability within the meaning of the disability provisions of the policy and, also, that the accident caused the development and growth of a goiter. The Court below sustained the general demurrer to the complaint, but notwithstanding sustaining the demurrer, entered a judgment for $50.00 in favor of the plaintiff which was acquiesced in by the defendant.

1. While the entering of a judgment after the sustaining of a general demurrer to a complaint presents an unusual procedure the validity thereof is not passed upon.

2. Where the complaint alleges that the injuries sustained by the plaintiff as the result of an accident, were of a permanent nature and that she took all necessary steps required by the policy to preserve her rights, and there is no requirement in the policy either as to the time or as to matter of substance, which the plaintiff was required to make compliance with as preliminary to her right to recovery that she did not observe, the complaint states a cause of action.

3. The concessions of the defendant are equivalent to an admission that the injury which the plaintiff sustained entitles her to substantial compensation under the policy, and if the plaintiff was entitled to anything at all, was entitled to more than the Court awarded her.—*Judgment reversed.*

CONTRACTS—MERGER—IMPLIED AUTHORITY OF AGENT—*Goldblatt vs. Cannon as executor*—No. 13033—*Decided March 5, 1934*—*Opinion by Mr. Justice Holland.*

Plaintiff, as the executor of the estate of George McCarroll, deceased, brought this action against Goldblatt and others to recover judgment on two notes for $12,500.00 and $2,500.00 respectively. A directed verdict was entered in favor of the plaintiff and Goldblatt alone brings error.

1. Where one makes a loan secured by a deed of trust without disclosing his principal and where thereafter, after default, there is no foreclosure but the owner gives back to the agent making the loan a deed for the property in which the name of the grantee is left blank, and thereafter such agent kept and exercised control over the property, the question of whether or not there was a merger and would be an extinguishment of the notes was a question of fact for the jury.

2. Whether or not such deed was delivered under an agreement that the notes and trust deeds were to be cancelled was a question of fact to be determined by the jury.

3. The jury should have been allowed to determine from the facts and circumstances of the case whether by the acts of the original owner, not in any way interfering with the agent, there was an implied authority by acquiescence, such as would bind the owner. The owner was bound if he allowed others to believe that the agent's authority was greater than actually existed.

4. In law a merger always takes place when a greater estate and less estate coincide and meet in one and the same person, in one and the same right, without any intermediate estate, unless a contrary intent appears and such intention is a question of fact to be tried and determined in the same manner as are other issues.—*Judgment reversed.*—*Mr. Justice Bouck dissents.*

SCHOOL DISTRICTS—COUNTIES—FINES AND PENALTIES TO WHOM PAYABLE—*City and County of Denver vs. School District No. 1* —No. 13084—*Decided March 5, 1934*—*Opinion by Mr. Justice Holland.*

The School District filed this suit in the District Court against the City in the nature of assumpsit to recover one-half of the moneys paid into the County treasury, from various Courts in the County, collected by said Courts for violations of state laws as fines imposed for the punishment of crimes and misdemeanors between July 1, 1923, and August 31, 1929, one-half of all moneys theretofore having been properly paid into the State treasury for the Policeman's Benefit Fund. The facts were stipulated and judgment was rendered in favor of the School District for $72,299.59.

1. By a statute enacted in 1861 all fines imposed for the punishment of crimes and misdemeanors are paid into the County treasury unless otherwise expressly directed. Under a later statute enacted in 1876 it was provided that all sums of money derived from fines imposed for violation of orders of injunction, mandamus and other like writs, and all fines collected within the several counties for breach of the penal laws shall be paid over to the County Treasurer and by him credited to the general county school fund.

2. The latter statute supersedes the earlier one.

3. Where two statutes of different dates exist, apparent conflicts should be reconciled and the statutes construed so as to give effect to the provisions of each, but where there is an irreconcilable conflict as in this case where the moneys are directly paid into the separate, distinct and different funds by each statute, then the latter statute prevails.

4. The words "Penal laws" as used in the latter statute are not confined to penalties imposed for violation of orders of injunction, mandamus and other like writs or for contempt of Court, but include laws for the punishment of crimes and misdemeanors.

5. The latter act having been for over half a century acquiesced in by executive and administrative bodies, such construction should be disregarded only for most cogent reasons.—*Judgment affirmed.*

ATTORNEYS AT LAW—LIABILITY FOR NEGLIGENCE—*Radetsky vs. Montgomery et al.*—No. 13104—*Decided March 5, 1934*—*Opinion by Mr. Justice Butler.*

Norton Montgomery and Erskine Myer sued M. S. Radetsky for attorney fees. Radetsky defended on the ground that in the rendition of their professional services the defendants were guilty of such gross negligence and incompetence as to make their services valueless, and also filed a counterclaim for damages. The case was heard by the Court below without a jury and the Court found the issues on both the complaint

and the counterclaim for the plaintiffs, the attorneys, and rendered judgment in their favor. Radetsky admits that if the plaintiffs are entitled to anything they are entitled to the amount sued for.

1. An attorney must be held to undertake to use a reasonable degree of skill and care, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession. If injury results to the client as a proximate consequence of the want of such knowledge or skill or from the failure to exercise such care, he must respond in damages to the extent of the injury sustained by his client. An attorney is liable for all damage resulting to his client for reason of improper or erroneous advice, where an attorney of reasonable knowledge and professional capacity, exercising ordinary care under the circumstances, would have avoided the error.

2. Evidence examined and held to sustain the finding of the trial Court that the attorneys were not guilty of actionable negligence either in the matter of the leases or in the matter of handling the execution sale of purchase property.—*Judgment affirmed.*

INSURANCE—ACCEPTANCE—REFORMATION — *The Pacific Mutual Life Insurance of California vs. Alice M. Clarke*—No. 13215—*Decided March 5, 1934—Opinion by Mr. Justice Campbell.*

The defendant insurance company issued to plaintiff, Alice M. Clarke, an accident and health insurance policy. While it was in force the plaintiff was seriously injured while riding in a bus. Defendant insurer disclaimed liability under the policy. Plaintiff thereupon brought this action in which she asked for a reformation of the policy and for disability payments and for the return of a premium which she had paid during the time of the disability which, by the terms of the policy, should not have been paid. She recovered judgment below for the premium she had paid, with interest.

1. The evidence below was sufficient to sustain the finding of the Court that she was entitled to recover back the premium paid during the time the disability existed.

2. The disability commenced on October 11, 1930, the day plaintiff stopped her work because of the accident.—*Judgment affirmed.*

TAXATION—EXEMPTION OF RELIGIOUS INSTITUTIONS—*Colorado Tax Commission vs. The Denver Bible Institute*—No. 12959—*Decided March 5, 1934—Opinion by Mr. Justice Bouck.*

A judgment was entered by the District Court in favor of the Denver Bible Institute when the Colorado Tax Commission stood upon a general demurrer. The judgment orders a refund of the 1929 taxes and the striking of the Institute's property from the tax roll, on the ground that the complaint showed that its property was exempt.

1. Where a complaint alleges that the Colorado Bible Institute is a corporation not for profit and organized to establish and maintain a Bible Institute for the instruction and training of Christian men and women and the knowledge of the word of God, and that its property that is assessed for taxation is not in any manner to be used for profit but solely and wholly for the purposes above set forth, such complaint states a good cause of action against a general demurrer and the judgment of the Court ordering a refund of taxation and striking of the property from the tax roll is correct.

2. Where a complaint is attacked by general demurrer only and the demurrer does not raise the question of jurisdiction of the Court then C. L. 1921, Section 7291 in reference to first applying to the county assessor for relief does not apply. This could only be raised by a special demurrer to the jurisdiction.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—CONSTRUING FINDING OF COMMISSION—*The C. S. Card Iron Works Company et al. vs. Radovich* —No. 13466—*Decided March 5, 1934—Opinion by Mr. Justice Burke.*

While claimant was employed by company, he suffered a strained back. Upon a hearing before the Commission a finding was entered that the back strain augmented a previously existing diseased condition and that temporary disability ended December 30, 1930, and that there was no permanent disability and compensation was paid accordingly. Two and one-half years later, claimant asked for rehearing which was had and Commission confirmed former award. The District Court vacated same and ordered Commission to find the extent of claimant's permanent partial disability.

1. It was the intention of the Commission when it found that the accident augmented the previously existing diseased condition to find that the injury contributed to the disability from May 1, 1930, to December 30, 1930, at which time the claimant wholly recovered from the back strain and that no disability thereafter evident was in any way connected with it.—*Judgment reversed.*

WORKMEN'S COMPENSATION—PENALTY FOR FAILURE TO REPORT INJURY—*Jabot vs. Industrial Commission et al.*—No. 13458—*Decided March 5, 1934—Opinion by Mr. Justice Bouck.*

Claimant was injured November 8, 1932, but failed to notify employer and did not leave his employment until February 6, 1933. The Commission found that temporary disability terminated June 1, 1933, and there was no permanent disability and that claimant failed to notify employer until some weeks after he left his work and that the employee must be penalized one day's compensation for each day's failure to report

his accident, as a result of which penalty, the claimant was entitled to no compensation beyond that for medical services. The District Court affirmed the award.

1. The penalty section of the Workmen's Compensation Law which provides that employee shall lose one day's compensation for each day's failure to report an accident, is in clear language and unambiguous and was properly enforced in this case.—*Judgment affirmed.*

REPLEVIN—EFFECT OF PARTIAL PAYMENTS AFTER DEFAULT ON CHATTEL MORTGAGE—TESTIMONY AS TO VALUE—RIGHT TO TAKE POSSESSION WHERE MORTGAGEE FEELS INSECURE—*Thomas vs. Berine*—No. 13170—*Decided March 12, 1934—Opinion by Mr. Justice Holland.*

Plaintiff filed his complaint in replevin to recover immediate possession of cattle described in chattel mortgage on the ground that he felt insecure and for failure to pay interest. Defendant answered denying failure to pay interest and alleging extension and denied insecurity, and on trial the verdict was rendered for defendant. Plaintiff seeks reversal.

1. Although partial payments made previous to the maturity of a debt do not affect the mortgagee's right to the possession of the entire property, in the absence of a provision in the instrument to that effect, partial payment made after default and accepted by the mortgagee is to be regarded as a waiver by the mortgagee, of his strict legal rights, and the rights of the parties are the same as if payment on the indebtedness had been extended.

2. Where a mortgagee seeks possession of property under chattel mortgage on the ground of insecurity in the debt, his determination must be reached in good faith and his judgment founded on reasonable grounds and probable causes. He must show some ground that would cause him to be apprehensive. This was a question for the jury.

3. Whether a witness's opinion on the value of cattle is admissible or not is a question for the trial Court to determine and the decision of the trial Court is conclusive unless clearly shown to be erroneous in matter of law.—*Judgment affirmed.*

QUIET TITLE—RESCISSION—FORFEITURE—ADEQUATE REMEDY AT LAW—*The Laramie-Poudre Irrigation Co. vs. Red Feather Lakes Resort, Inc.*—No. 13124—*Decided March 12, 1934—Opinion by Mr. Justice Holland.*

Plaintiff in error, plaintiff below, filed suit to remove clouds from the title to its property, occasioned by a written agreement between plaintiff and the predecessor in interest of the defendant. Demurrers to the amended complaint were sustained and plaintiff elected to stand and the case was dismissed. Plaintiff brings error.

1. In an action to quiet title and for rescission of the contract, where the contract contains no provision for forfeiture or rescission and the complaint affirmatively shows that there has been a substantial part of the contract performed, and there is no allegation of damage, under such circumstances a claim for forfeiture is looked upon with disfavor and, particularly, is this true where the complaint affords no suggestion as to how the defendant could be placed in status quo.

2. Where it appears that plaintiff seeks to rescind as to part of contract and accept the benefits from the complete or partial performance of parts of the contract he has no standing.

3. Rescission must be of an entire contract, not merely a part.

4. Equity will not decree a forfeiture unless the strict letter of the contract requires it.

5. Where it appears from the complaint that the contract contains no provision for rescission and it is apparent that damages, if any, can be ascertained and compensated in an action at law, equity will not grant relief for quieting title and rescission.—*Judgment affirmed.*

AUTOMOBILES—INJURY TO GUEST—VARIANCE—DEFECTIVE TIRE —*Henry vs. Strobel et al.*—No. 12900-1—*Decided March 19, 1934*—*Opinion by Mr. Justice Bouck.*

Henry was defendant in two cases wherein the Court below without a jury rendered two judgments for damages arising out of the same automobile accident, the plaintiff in each case being in Henry's car as a guest. The cases were consolidated for trial. The complaints, among other things, alleged that the tires were old, worn, greatly weakened and rotten and unfit for use, which was well known to the defendant and unknown to plaintiffs and that on this account one of the front tires blew out, causing the automobile to leave the highway and crash into a ditch and pole. The Court awarded damages to one guest for $2,750.00 and to the other for $750.00.

1. Where the plaintiff immediately after the accident stated that the tire was worn out and no good and he intended to get a new one and that it had gone over 20,000 miles and was over two years old, and that he intended to get a new one for some time but neglected to do so, such evidence would support the inference that Henry was guilty of negligence.

2. Where the complaint charges both an unfit condition of the tire and Henry's knowledge thereof and also charges negligent operation, there is no variance.

3. This was a case where it was incumbent upon the Judge before whom the case was tried without jury to do his best in the way of analyzing and interpreting the evidence and of applying correct legal principles and no prejudicial error is revealed by the result.—*Judgment affirmed.*

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