Denver Law Review

Volume 11 | Issue 8 Article 7

1934

Vol. 11, no. 8: Full Issue

Dicta Editorial Board

Vol. 11, no. 8: Full Issue

DICTA

VOLUME 11

1933-1934

DICTA

20 cents a copy $1.75 a year

JUNE, 1934

Published monthly by the Denver Bar Association and devoted to the interests of the Association.

Address all communications concerning:

Editorial Matters, to Dicta, Roy O. Samson, Editor-in-Chief, 1020 University Bldg., Denver, Colo.

Advertising, to Dicta, Sydney H. Grossman and M. O. Edison, Business Managers, 618 Symes Bldg., Denver, Colo.

Subscriptions, to Dicta, James A. Woods, Secretary Denver Bar Association, 1022 Midland Savings Bldg., Denver, Colo.

DENVER BAR ASSOCIATION

1933-1934

FRAZER ARNOLD, President
PERCY S. MORRIS, First Vice-President
FRED W. SANBORN, JR., Second Vice-President
JAMES A. WOODS, Secretary-Treasurer
Business Office: 1022 Midland Savings Building. Phone: MA. 6146

EXECUTIVE SECTION

TRUSTEES

FRAZER ARNOLD, ex-officio
GUY K. BREWSTER, ERNEST B. FOWLER to July 1, 1934
DUDLEY W. STRICKLAND, FRANK E. GOVE to July 1, 1935
GOLDING FAIRFIELD, HARRY S. SILVERSTEIN to July 1, 1936

COMMITTEE CHAIRMEN

ADMINISTRATIVE SECTION

Luncheons	*Banquets*	*Medical-Legal*	*Memorial*
Percy Morris	Lowell White	Charles A. Mantz	Milton D. Green

Outing
Floyd F. Walpole

LEGISLATIVE AND JUDICIAL SECTION

Criminal Justice	*American Law Institute*	*New Court House*
Robert L. Stearns	Bernard J. Seeman	Frank L. Fetzer

Women and Children	*Judiciary*
Mary F. Lathrop	William E. Hutton

BAR STANDARDS AND LEGAL AID SECTION

Ethics	*Grievance*	*Legal Education*	*Legal Aid*
Simon J. Heller	G. Dexter Blount	Robert W. Steele	John F. Rotruck

PUBLIC RELATIONS SECTION

Citizenship	*Judicial Salaries*	*Press and Bar*	*Publicity*
Kenaz Huffman	Hamlet J. Barry	Joseph A. Myers	Tom L. Pollock

GENERAL

Membership	*Auditing*	*Legislative*	*Justice Court*
Gail L. Ireland	William D. Morrison	Joseph P. Constantine	Horace N. Hawkins

Justice Court—Sub-Committee
Gustave J. Ornauer

DICTA

EDITORIAL BOARD

ROY O. SAMSON
Editor-in-Chief

WM. H. ROBINSON, JR., *Associate Editor*
B. C. HILLIARD, JR., *Dictaphun*
DAYTON DENIOUS, *Trial Court Decisions*
LOUIS A. HELLERSTEIN, *Adviser*
FRED Y. HOLLAND, *Historian*
SYDNEY H. GROSSMAN *and* MOLLY O. EDISON, *Business Managers*

Supreme Court Decisions

C. CLYDE BARKER, *Editor*
ERNEST C. BURCK
MARTIN C. MOLHOLM
NATHAN R. KOBEY
GEORGE LONGFELLOW, JR.
ROBERT PALMER

DICTA

Vol. XI JUNE, 1934 No. 8

Dicta Observes

"LAW DAY"

ATTRACTING to the conference some two hundred lawyers from Colorado, Wyoming and Nebraska, the first annual Law Day, sponsored by the School of Law of the University of Colorado, was pronounced a distinct contribution to legal development in the State of Colorado. The general subject for discussion at the Law Day held at Boulder, May 19, 1934, was the rule-making power of the Supreme Court. The morning conference was devoted to a discussion of the power of the Supreme Court to bring about procedural reform through the rule-making power. Further inquiry into the extent of the rule-making power occupied the attention of the afternoon conference, particularly with reference to bar organization and discipline.

The Hon. Earle W. Evans, President of the American Bar Association, was the guest speaker of the day. Speaking before a large audience of lawyers and their guests, Mr. Evans stressed the changes which were creeping into the attorneys' field as he outlined a program of enlarged activity for the younger members of the bar.

One thought became increasingly evident to those attending Law Day and that thought was that not only did the Supreme Court of Colorado have a vast inherent power to bring about procedural reform and bar integration, but that the Court was even discussing the problem with a view toward bringing about an integrated bar in Colorado. It also became increasingly evident as the conference progressed that Colorado was lagging far behind neighboring states in the matter of bar organization, as all of the surrounding states, except Nebraska, had already committed themselves to some plan of bar integration.

The morning session, presided over by Ernest H. Rhoads, President of the Colorado Bar Association, was opened by a paper read by Judge Robert Steele, which paper made a preliminary survey of the field of discussion and pointed out the problems and the possibilities attendant upon the rule-making power.

Following Judge Steele, Mr. John H. Denison suggested several innovations in the code of civil procedure, and urged the reform of pleadings and the elimination of waste of time and money over unnecessary haggling in pleadings. The next speaker, Hon. Stanley Johnson, Judge of the Juvenile Court of Denver, read a paper in which he outlined needed reforms in the control of delinquents and in the state homes for dependents and offenders. The last paper of the morning was read by Roy O. Samson, editor of DICTA, who discussed procedural reform in the justice courts, emphasizing the need of purging the justice courts of persons who practiced there, although not licensed as attorneys.

The afternoon conference, presided over by Fraser Arnold, President of the Denver Bar Association, devoted itself mainly to the discussion of the possible integration and organization of a State Bar. G. Dexter Blount, the incoming President of the Denver Bar Association, pointed out clearly in a paper which he read that the Supreme Court of Colorado had the inherent power to discipline and to organize the bar, and he showed further that the present machinery and organization now set up was inadequate and entirely out of date. In his discussion of the integrated bar movement, Allan Moore, Director of the Legislative Reference Bureau, pointed out the many channels which the integrated movement had taken and tentatively suggested the advisability of a judicial council.

Following Mr. Moore, Lowell White, President of the Law Club of Denver, discussed the problem of bar organization in Colorado under rule-making power of the Supreme Court demonstrating that the Supreme Court had the power to integrate the bar.

Although the conference formally adjourned at 5:30 p. m., many of the attendants were present at the annual dinner of the Bar Association of the Eighth Judicial District.

THE HIGHER LAW

By J. W. KELLEY, *of the Denver Bar*

WHEN WILLIAM H. SEWARD, replying to the argument that Negro slave property should not be taken without lawful process, declared there was a "higher law," many doubted the accuracy of his statement. A few years later the guarantees regarding slave property contained in the constitution were swept away before the operation of the superior and overwhelming power which Mr. Seward had pointed out. The law which forbids irregular excesses in human affairs acted with unconquerable force to correct a specific wrong. It was no general moral reform, for other abuses were left untouched. It is claimed now that this "higher law" is the law of overwhelming necessity; or the universal law of supply and demand; or the all-embracing law of nature, superior to all others, and having a sovereign contempt for man-made statutes.

At least three times in the past century this inexorable but little understood law has operated, despite the guarantee of constitutions, to deprive owners of property of billions of dollars of its value. The same law, which has been almost entirely unstudied by lawyers, because not justiciable in courts, also quickly restores the values it has caused to disappear.

In 1893, and several years succeeding, this law brought about what was termed a panic but which now is described by the less terrifying name of depression. Prices plunged downward; wool sold for three cents a pound. In 1894 Coxey's Army marched on Washington; in 1895 the government issued bonds to raise $62,000,000, which was considered a great sum in those days; in 1896 we made another bond issue of $100,000,000; in 1897 the pendulum began to swing the other way; wheat went to $1.00 a bushel and for the first time in our history our exports totaled over a billion dollars in one year. In 1898 the Spanish-American war broke out and a stamp tax was imposed which was virtually a sales tax. These stamps produced $200,000,000 in revenue in a single year. A war loan of $200,000,000, at 3

per cent, was offered and fourteen hundred millions was subscribed. The "higher law" had restored the vanished values and five years after the 1893 panic came its effects had entirely disappeared.

Efforts have been made to trace these sudden and remarkable changes in the country's condition to the influence of a large or small annual gold production. When in 1898 Bryan ran against McKinley for president the claim was asserted that unless large and immediate additions were made to our metallic money no revival of business could be expected. History seemed willing to verify the complaint. In 1850 our gold production had been $50,000,000. The yearly addition to the supply of gold constantly grew less until in 1896 it had decreased to $35,000,000. Upon the election of McKinley to the presidency the theory that was decisively repudiated at the polls by his election seemed vindicated by immense annual additions to our stock of gold which had for so many years been withheld. Benign nature unlocked great stores of gold in Alaska and Colorado, and its yearly output steadily increased until in 1915 the United States mined $101,000,000. Then the supply which had grown so generous declined until in 1927 it was five million below what it was back in 1850. Some students of the higher law find in these figures the cause of the country's present condition.

Inflation, obnoxious to this higher law because sudden and irregular, has received blame. In 1917, when we entered the world war, there began the most stupendous money expenditure the world has ever known. We poured out a million dollars an hour for twenty-five months. When the armistice was signed our outlay for war purposes was forty-four million dollars daily. We loaned the Allies, first and last, over ten billion dollars which was nearly all returned by them in trade with us. Our exports quickly rose to eight billions a year. To say that there is no law that inflicts quick and decisive penalties as a result of such sudden and momentous changes would be to deny the common experience of mankind. With 8,500,000 men dead as a result of the war the readjustment following this vast and unprecedented expendi-

ture and its abrupt stop could only be what always occurs when overflowing abundance is followed by rigid abstinence. No statutes could correct the condition brought about by a violation of a law which, by whatever name it is called, condemns and punishes sudden excesses of every kind against the consequences of which no provision is made. A people trained to provide against the extremes of heat and cold, drouth and flood, might be expected to guard against the reaction certain to follow sudden inflation and overwhelming prosperity, but apparently no student of the higher law was on guard.

We are depending with childlike faith on congress to remonetize silver and enable us to capture the trade of silver standard countries; yet in 1920, obedient to the law that transcends all the artificial aids of legislation, the price of silver rose to $1.34 an ounce and we acquired 16 per cent of the commerce of the 102 countries of the world. Then, on the decline of the price of silver, we quickly lost all but 8 per cent.

How this could happen without the aid and guidance of a Recovery Act or Reconstruction Corporation sorely puzzles the quid nuncs who view all phenomena in trade or government as the direct result of legislation.

By common consent the interpretation of this higher law has been given over to leaders of finance, heads of universities and persons who admit or claim to be statesmen. But the watchmen in the tower gave us no warning when the dread consequences of the violation of this higher law recently approached. They appeared to think the true study of world affairs was in observing tariffs, stock markets, crop reports and statistics relating to crime and its punishment.

A large responsibility has descended upon the legal profession. Whenever lawyers assemble to winnow the chaff of the reform of legal procedure from the wheat, and give ear to the public's complaints of the law's delay, some time should be devoted by them to a discussion of the state of the nation.

All other agencies trusted with the study of the higher law having lamentably failed only the lawyer remains on guard. The times call to the legal profession to examine life in its largest dimensions, not in its minor littlenesses. The

higher law has strewn the shores of time with the wrecks of vanished nations. Probably while Rome was hastening to its fall men's minds were trifling with analysis of the percentage of convictions in criminal cases, the need of reform in court procedure and the shocking increase of divorce. Nero's fiddling has its counterpart in every age.

DO I GET ANY MORE THAN I AM GOING TO GET?

The following letter, we are informed by a correspondent, is an exact copy of one received not long ago in the War Department:

Adjiten General of the Army,
Washington, D. C.

Dear Adjiten, General, Sir:—

My husband was induced into the surface eighteen months ago and I ain't received no pay since he was gone. Please send my elopment as I have a four months old baby and he is my only support and I kneed every day to buy food and keep us in clothes. I am a poor woman and all I have is gone. Both sides of my parents are very old and I can't expect anything from them as my mother has been in bed for thirteen years with one doctor and she won't take another. Do I get any more than I am going to get? Please send me a letter and tell me if my husband made application for a wife and child and please send me a wife's form to fill out. I have all ready written to the President and got me no answer and if I don't here from you I will write Uncal Sam about you and him.

Yours truly,

MRS. PETER RICKETTS.

P. S. I am told that my husband sets in the YMCA every night with a piano playing in his uniform. I think you will find him there.

SOME CONSTITUTIONAL ANGLES OF THE "NEW DEAL"

By SIDNEY S. JACOBS, *of the Denver Bar*

THE executive and legislative departments of the United States government have cooperated to create some of the most unusual legislation and governmental machinery that has ever existed in the history of the United States. That the "New Deal" is both popular and unpopular with certain portions of the public is a matter of every day knowledge. What the judicial department of the government will find concerning the constitutionality of the new legislation, however, is a matter of great conjecture and anxiety at this time. It is the intention of the author to present some of the constitutional problems which may arise concerning the constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act, the two principal statutes of the "New Deal."

Before commencing a discussion of the legality of said acts it may be well to explain briefly what each of these acts proposes to do. The N. I. R. A. is an attempt to bring back prosperity by increasing the purchasing power of consumers. It proposes to increase this purchasing power by creating codes of fair competition which fix prices, control output, raise wages, shorten hours of labor, and abolish or limit child labor. The A. A. A. is an experiment intended to raise the income of farmers. It proposes to do this by limiting the amount of crops planted so that production may be controlled and higher prices obtained. Farmers who cooperate with the government by reducing crops planted are to remunerated from process taxes placed upon manufactured articles.

In dealing with the constitutionality of the acts in question a distinction should be made between codes that are signed voluntarily and those which are imposed upon employers, industries and farmers against their will. The former class probably are valid inasmuch as they are contracts voluntarily entered into for the benefit of third party beneficiaries also; because the contracting parties hope indirectly to benefit themselves. An interesting decision on this point

was recently handed down in the Denver District Court by Judge Frank McDonough, Sr., who allowed employes to recover from their employer minimum wages set by a code which had been voluntarily signed by a restaurant owner. There is the possibility, however, that some code agreements which are signed voluntarily may be held unconstitutional if the signing was caused by duress. Where codes are arbitrarily imposed, however, a different problem arises. Codes of the latter type will be considered hereafter in this article.

It must be remembered that the United States government is a government of restricted powers; that only certain designated powers are given to it, and that under the tenth amendment to the constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Therefore, if the aforementioned acts are to be found constitutional, some specific authority of congress to pass them must be found.

Section I of the N. I. R. A. declares that "a disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people," exists in this country. It may be concluded from the above declaration that the constitutionality of the act is based upon the power of congress to regulate interstate and foreign commerce, or to provide for the public welfare. The latter ground will be considered first.

It has been repeatedly held that the "general welfare clause" is merely incidental to the power of congress to tax, and that said clause does not confer any new power upon congress.[1] The clause in question is Article I, Section 8 of the Constitution, which reads as follows: "The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." In view of the above, it is practically certain that

[1]Temple Law Quarterly, Vol. VIII, No. 1, page 6; and 36 Harvard Law Rev. 548.

the constitutionality of the acts in question cannot be sustained under the "general welfare" clause.

A more difficult question is presented, however, as to whether or not the acts in question are a valid regulation of interstate and foreign commerce. The general rule seems to be that it is unconstitutional for congress to attempt to regulate prices,[2] hours of employment, child labor,[3] and wages in the industries under the guise of regulating interstate commerce.[4] The most famous decision on this point was made in The Child Labor Case, Hammer vs. Dagenhart.[5] In that case an act of congress was held unconstitutional which intended to prevent interstate commerce in the products of child labor. The court stated:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to congress over commerce but also exerts a power to a purely local matter to which the federal authority does not extend."

Furthermore, the imposition of codes prescribing minimum wages probably constitute a deprivation of life, liberty, or property without due process of law, contrary to the provisions of Amendment 5 of the Constitution, for it has been held that liberty includes the right to make contracts of employment upon such terms as the employer and employe think proper.[6]

Proponents of the constitutionality of the N. R. A. and the A. A. A. claim that though the acts would probably be unconstitutional in normal times, that because they are predicated upon an emergency, and because they are expressly limited to two years, they are constitutional under the police power of the government.[7] In support of this position the

---

[2] 47 Supreme Court Reporter 426.
[3] 259 U. S. 20 and 247 U. S. 251.
[4] *Nation*, October 18, 1933.
[5] 247 U. S. 251.
[6] 262 U. S. 522, 208 U. S. 161, 236 U. S. 1.
[7] Temple Law Quarterly, Vol. VIII, No. 1, page 3.

cases of Wilson vs. New,[8] Block vs. Hirsh,[9] Marcus Brown Holding Co. vs. Feldman,[10] and Wolff Packing Cases[11] are cited.

Wilson vs. New held constitutional an act of congress which for 30 days only set minimum wages and maximum hours for employes of trains engaged in interstate commerce. The act was designed to prevent a strike which would have stifled interstate commerce, and is quite different from an attempt to regulate intrastate conditions of employment in factories, stores, etc. The *Wolff Packing Cases* cannot be considered authority for the acts of the "New Deal," because there the Kansas Court of Industrial Relations Act, which gave an administrative board the authority to fix the terms of contracts of employment, was held unconstitutional. Any statements in favor of the constitutionality of such acts as are considered here are only *obiter dicta.*

Block vs. Hirsh and *Marcus Brown Holding Co. vs. Feldman* were decided together, involve the same facts, and are known as "The Rent Cases." The former case involved an act of congress for the District of Columbia, and the latter case a statute of New York. During the world war so many people flocked to Washington, D. C., and New York City on official business that it became almost impossible for government officials to rent a house in those cities at a reasonable rent. Consequently, statutes were passed which allowed tenants to continue in possession of premises after the end of the term, and against the will of the landlord, provided the tenants paid rents which a commission determined were reasonable. The statutes were to be in effect for only two years. The statutes in each of these cases were held constitutional. In the decision of the court it was stated, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." The court based authority for the act in the police power of the government, and states, "The only matter that seems to us open to debate is whether the statute goes too far. For just as there

[8] 243 U. S. 332.
[9] 256 U. S. 135.
[10] 256 U. S. 170.
[11] 262 U. S. 522.

comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

Whether the police power provides sufficient constitutional authority for acts such as the N. I. R. A. and the A. A. A. is indeed a border line question, and one which the writer will not be so vain as to attempt to answer. The acts in the "Rent Cases" and the acts of the "New Deal" both are limited to two years. Both recite that they are based upon an emergency. In the Rent Cases the emergency was a war. Whether a depression can be considered such an emergency as would justify the government in doing things normally unconstitutional is yet to be decided. Then, too, the N. I. R. A. and the A. A. A. attempt to regulate many more things than simply the regulation of rent, and in the decision of the "Rent Cases" Justice Holmes recognizes that there is a point at which the police power ceases, and that the going beyond that point would be taking property without due process of law. In a more recent decision,[12] Justice Holmes discusses the "Rent Cases" in the following language: "The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act."

Those who, in view of past decisions, believe that the N. I. R. A. and the A. A. A. are unconstitutional claim that the acts attempt to make permanent economic changes rather than temporary changes and that the "emergency" will not abate but will continue. They say that if the acts succeed that they will not be done away with, but will be intensified.[13] In Pennsylvania Coal Co. vs. Mahon, *supra*, the court stated, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitu-

[12]Pennsylvania Coal Co. vs. Mahon, 43 Supreme Court Reporter 158.
[13]*Nation*, October 18, 1933.

tional way of paying for the change." If it is true that permanent changes are being made, nothing short of a constitutional amendment should justify the change; otherwise the Constitution would become a mere scrap of paper.

In wagering what decision the Supreme Court will hand down it should be remembered that in the past the court has always been very conservative and very prone to protect vested property rights; that the Child Labor Case and the Rent Cases are five to four decisions; that the personnel of the court is slightly changed from what it was; that it might prove very unpopular for the court to declare the acts unconstitutional; and that congress and the president could exercise their power of packing the Supreme Court by adding new justices as was done during the legal tender cases in the seventies.[14]

There are other constitutional angles concerning said acts which cannot be considered in this article (such as an improper delegation of the powers of the legislature to the executive department of the government). It is interesting to note that in the only decision by a federal judge down to the time of the writing of this article, the N. I. R. A. was held unconstitutional. In that case Judge Alexander Akerman refused to enjoin a St. Petersburg, Florida, cleaner who was charging prices below those set by the N. R. A. code. In his decision Judge Akerman said, "It would require a stretch of imagination beyond the power of this court to concede that a local industry engaged in the pressing, cleaning, and dyeing of clothes was engaged in interstate commerce . . ." The Constitution gave the national government no authority "to invade the reserve power of the states in regulation of a local industry even in an emergency."

[14]*Nation*, October 18, 1933.
[15]*The U. S. News*, December 11, 1933, page 16.

Dictaphun

HAVE A CARE, JUDGE!

In the issue of DICTA immediately preceding this, we observe an announcement by Judge Denison that he is collecting choice judicial mispeaks. A sample or two, culled or purloined from the Colorado reports, were appended. Our research department reports that the samples were not from any of Judge Denison's opinions.

GO AHEAD AND HAVE FUN, WE GET THE JOBS

Green with envy because of the widespread publicity given by this column of free speech to the New Deal Note of Joe Thomas, Esq., Edward L. Wood, Esq., Denver solicitor, and graduate of Stanford University, hotbed of Hooverism, submits an epistle addressed by an embattled Iowa farmer to the Secretary of Agriculture. Contributions from other Republican barristers will be welcomed for, as is well known, Republican lawyers have lots of time to write, whereas we Democrats are too busy examining abstracts. The forlorn farmer speaks:

Dear Sir:

About three weeks ago Jonas, the Don Juan of the pig lot, broke into the pen of Esmerelda, my prize brood sow. I'm a little worried about this and hurry to write you for instructions.

Esmerelda has been about the place three or four years. She is a great family pig, and in the past her litters have run from 19 to 27. I signed up under the corn-hog program and I don't want to lose any of my rights under that contract. I don't want to go back on my word, either.

As said, if Esmerelda keeps up her pace as a mama pig she just as like as not will have a family of around 20 or 25. The way I figured it out when I signed up with you Esmerelda was booked for a place on the birth control program this season. In fact, she wasn't to have any babies.

Carlotta, Dottie M. and Danzie IV were going to take care of the production on my place this year under the corn-hog program. I figured that as they have always been more reasonable and conservative they wouldn't go beyond my pig quota, which is 27. That gives them nine apiece and figures out about right. I'm entitled to that many.

Now, Esmerelda and Jonas, I'm afraid, have upset my calculations. What am I to do about it? Shall I kill Esmerelda right away? I sort of hate to do that.

It's too late to do anything about Jonas, and Carlotta, Dottie M. and Danzie IV. I'm a good soldier and want to obey orders. I don't want any more pigs than I'm entitled to. Shall I let nature take its course, or what?

And, Mr. Wallace, there's something else. On my southeast 20 which I had plowed up last fall I notice some corn already coming up. I guess when the men hauled the corn from the field last fall they must have spilled some kernels and they've started to grow. If they mature I will have more corn than the acreage I contracted for under the corn-hog program and I don't want to do that. Still, it seems a shame to start pulling up these plants that are trying to grow.

Just as like as not if I let them grow they'll exceed my acreage quota and I'll be doing something that I hadn't ought to do. I'm entitled to 62.0007½ acres. This self-raised corn will throw that all out of kilter. What if some inspector comes along and checks up and finds I'm raising more corn than I should and sees the condition Esmerelda is in? Will I have to go to jail? And if I do, will it be a Federal prison or some place closer to home?

And, Mr. Wallace, won't you or Mr. Tugwell or some of you, tell me what I'm going to do about Esmerelda?

Yours very respectfully,

H. SWOOLEY.

Supreme Court Decisions

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.*

Smart Folks Say: Coors, of Course

The popular swing to *Coors Golden Beer* is in full stride. After a whole year of sipping and sampling all kinds of beer, the public taste confirms the opinion of those unbiased judges who have designated *Coors* as *"America's Best Beer"*.

Sweet Spring Water . . .

Gushing in its pure, virgin state from the granite walls of the Rockies . . . used exclusively in brewing *Coors Golden Beer* . . . gives this famous brew its mellow, taste-pleasing flavor.

ADOLPH COORS GOLDEN COLORADO

Coors-GOLDEN BEER

TRUST BANKING

for

Corporations and Individuals

Services to Corporations

Trustee under Corporate Mortgages . . . Depository for Protective Committees . . . Transfer Agent and Registrar for Corporate Stock . . . Miscellaneous Fiscal Agencies.

Services to Individuals and Families

Executor and Administrator of Estates . . . Trustee under Wills . . . Trustee of Living Trusts and Life Insurance Trusts . . . Safe-keeping of Securities.

Escrows

BUSINESS SERVICE FOR BUSINESS MEN AND WOMEN AND THEIR COUNSEL.

THE AMERICAN NATIONAL BANK
THE DENVER NATIONAL BANK
THE COLORADO NATIONAL BANK
THE INTERNATIONAL TRUST COMPANY
THE UNITED STATES NATIONAL BANK