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Colorado Supreme Court Decisions

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(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

APPEAL AND ERROR—INSTRUCTIONS—PERSONAL INJURIES—*Fox Colorado Theatre Company vs. Zipprodt*—No. 12909—*Decided September 28, 1931. —Mr. Justice Alter delivered the opinion of the Court.*

1. In personal injury case it is error to instruct a jury that it was incumbent upon the defendant to use reasonable care in providing a place whereat and whereon the plaintiff had been invited to dance or give a public exhibition, and if defendant failed to use reasonable care in providing such a place, that the jury should find for the plaintiff.

2. This instruction was faulty in that it directed the jury to find the issues for the plaintiff upon failure of the defendant to use reasonable care irrespective of the question as to whether the negligence of the defendant was the proximate cause of plaintiff's injuries, or whether or not the plaintiff was guilty of contributory negligence.

3. Such instruction should have included a statement that such negligence must be a proximate cause of the injury and there must be absence of contributory negligence in order that the issues be found for the plaintiff.

4. The instructions given by the Court contained no instruction that no one of them contains all of the law applicable to the case, but that they must be taken, read and considered together because they are related and connected to each other as a whole.

5. Query: Had such latter instruction been given, would the case have been reversed?—*Judgment reversed.*

CRIMINAL LAW—RAPE—MISCONDUCT OF TRIAL JUDGE—MISCONDUCT OF DISTRICT ATTORNEY—REFUSAL TO GIVE TENDERED INSTRUCTIONS—STRIKING OF SUPPLEMENTAL MOTION FOR A NEW TRIAL—*Milow v. The People*—No. 12797—*Decided October 5, 1931—Mr. Justice Alter delivered the opinion of the Court.*

1. Where, in a rape case, the trial judge, in ordering all persons under eighteen years of age, except witnesses, excluded, remarked that the testimony to be introduced would be disagreeable and that in this class of cases the testimony was repulsive, and no objections were made to that part of the order excluding children, and the testimony later showed that while the remarks were prophetic, they were nevertheless true, no error was committed.

2. Where the trial court ordered the mother of the defendant to leave the court room for coaching the defendant by shaking her head when he was testifying, such order was not error.

3. Where district attorney in argument commented upon fact that defendant's child was born within four months after his marriage and that

defendant's mother had been excluded from the court room on account of coaching defendant, and no objection was made at the time, nor was court requested to instruct jury to disregard it, such error will not be considered.

4. Where the record showed that defendant made no objection to instructions given by court and tendered none, and thereafter just as court was about to read instructions to jury, defendant stated he would like to tender instructions which was refused by court, but such instructions were neither filed or tendered in compliance with rule 7, and the record does not disclose the trial court's refusal to give them, and they are not in the record except as attached to motion for new trial, they will not be considered by this court.

5. Supplemental motion for a new trial must be filed at the same term.

6. Action of attorney for the People, in attaching counter-affidavits to its brief to counteract affidavits filed in trial court, where such counter-affidavits are first filed in this court, is highly improper and this court on its own motion strikes them from record.—*Judgment affirmed.*

LANDLORD AND TENANT—LANDLORD WAIVING CONDITION AGAINST ASSIGNMENT BY CONDUCT—PLEADING—RES ADJUDICATA—STARE DECISIS—EFFECT OF FORMER DECISION—*Hughes v. Jones*—No. 12472—*Decided October 5, 1931—Mr. Justice Campbell delivered the opinion of the Court.*

1. The Court will take judicial notice of its own records, and if not res adjudicata, the Court may, on the principle of stare decisis, rightfully examine and consider the decision in a former case as affecting consideration of the case at bar.

2. Where, in a former case, between the same parties, it was decided that a lessor had waived his right to declare a forfeiture of a lease by accepting rentals regularly from an assignee of lessee without objection, after the lease had been assigned in violation of a clause prohibiting such transfer without the written consent of lessor, and assignee had expended a large amount in improvements to the leasehold, such decision is at least stare decisis if not res adjudicata.

3. In a subsequent case, it was proper for the trial court to strike from the pleadings, the defense that the lessor had not consented in writing to the assignment of the lease.

4. Judgment thereafter in favor of assignee of lessee in a suit by sole heir of lessor for possession and damages, was proper.

5. Sole heir of an ancestor lessor is bound by acts of deceased lessor in waiving terms of written lease against assignment without consent in writing of lessor.—*Judgment affirmed.*

DECLARATORY JUDGMENT—*The Continental Mutual Insurance Co. v. Cochran*—No. 12513—*Decided October 5, 1931—Mr. Justice Moore delivered the opinion of the Court.*

1. In an action brought by an insurance company against the insurance commissioner to obtain a declaratory judgment determining a controversy between it and the commissioner as to the legal construction of certain pro-

visions of its charter, wherein the company contended that under such provisions, it could, out of moneys paid in by charter members pay commissions for writing the business, and the commissioner contended that it could not pay out for commissions or any other purpose any part of the moneys so received, but that the same must be held in trust for the charter members, the charter members are necessary parties to such action.

2. In the absence of such parties, a declaratory judgment would not terminate the uncertainty of controversy.

3. Under such circumstances the district court was not authorized to enter a declaratory judgment.—*Judgment reversed.*

WORKMEN'S COMPENSATION—CONSTRUCTION OF SEC. 57 AND SEC. 73 OF COMPENSATION ACT—MEANING OF "ACCRUED"—*The Employers Mutual Insurance Company v. The Industrial Commission*—No. 12837—*Decided October 5, 1931—Mr. Justice Butler delivered the opinion of the Court.*

1. Where an injured employe was awarded compensation based upon temporary disability, thereafter died from illness and not from injury, and subsequent to his death the commission made an award based upon permanent partial disability, that Mrs. Wilkerson, to whom he was indebted for board and lodging, be paid $300.00 for such board and lodging and necessary care, the district court erred in sustaining such award.

2. Sec. 57 provides that where injured employe leaves no dependents, the commission may order the application of any *accrued* and unpaid benefits up to the time of his death, paid upon the expenses of the last sickness or funeral, does not authorize the commission to make the payments except out of accrued and unpaid benefits existing at the time of death.

3. Sec. 73 simply provides that injured employe shall in addition to compensation to be paid for temporary disability, be paid for 139 weeks under conditions therein specified.

4. The Workmen's Compensation Act is intended to compensate an employe for injuries received while performing duties arising out of and in the course of their employment. It is not intended as a death benefit act or to pay for medical, hospital, funeral, or other expenses incurred by reason of such injuries, illness, or death.

5. However it is not unreasonable to pay dependents or where there are none, to pay on account of such expenses, any unpaid installments of compensation that may have become due and payable during lifetime of employe.

6. The word "accrued" as used in the act means due and payable. —*Judgment reversed.*

CRIMINAL LAW—VIOLATION OF CITY ORDINANCE AGAINST DISPLAYING GOODS OR WARES ON STREET—FAILURE TO CHARGE OFFENSE—*Cornelius v. The People*—No. 12470—*Decided October 5, 1931—Mr. Justice Moore delivered the opinion of the Court.*

1. Cornelius was charged with violation of city ordinance prohibiting display of goods on sale on street. The ordinance in question prohibited such

display, but provided no penalty for such display and only provided penalty for selling or offering to sell. He sold no goods nor offered any for sale. The court below directed a verdict of guilty.

2. Where a specific violation of an ordinance is charged, it must be proven.

3. Assuming that displaying goods for sale on the street constitutes an offer for sale inhibited by the ordinance, defendant could not be found guilty of the offense, because he was not charged therewith.—*Judgment reversed.*

ATTORNEYS AT LAW—DISBARMENT—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF WITNESSES—ACCOMPLICES—*People v. Boutcher*—No. 12547—*Decided October 5, 1931—Mr. Justice Adams delivered the opinion of the Court.*

1. Boutcher, an attorney at law, was found guilty of gross professional misconduct by referee in aiding and abetting and procuring three witnesses to subscribe their names to a will, not in the presence of the testator, and certifying that it was signed in their presence by the testator, and that they, at testator's request and in his presence, and in the presence of each other signed as subscribing witnesses. The attorney denied any knowledge of the perjury and denied aiding, assisting, or abetting or procuring it. The referee found him guilty on the testimony of two of the accomplices.

2. One may be convicted upon the uncorroborated testimony of an accomplice.

3. The testimony of one accomplice may corroborate that of another, and when corroboration is required, this is sufficient.

4. Where the credibility of witnesses is attacked, the nature of the case must be considered. Where the witnesses testify as accomplices and admit their connection with perjured documents and perjured testimony, it must be remembered that just such kind of witnesses would naturally be sought to accomplish such a purpose.

5. The effect would be disastrous to depart from the rule announced in paragraph 3 hereof.—*Respondent disbarred.*

Justices Hilliard and Butler dissent.

DIVORCE—APPLICATION TO MODIFY JUDGMENT FOR PERMANENT ALIMONY—CHANGE IN FINANCIAL STATUS—*Canary v. Canary*—No. 12894—*Decided October 5, 1931—Mr. Justice Burke delivered the opinion of the Court.*

1. In an action by husband to modify a judgment for permanent alimony, solely on ground of change in financial status and his inability to make the payments by reason thereof, the lower court erred in sustaining an objection and dismissing application on ground that such a reason was insufficient.

2. In such an application for modification, it is not necessary to allege fraud, mistake, overreaching, unfairness or inequity.

3. Financial reverses of former husband is just as good a ground for modification as those set forth in paragraph 2 hereof.—*Judgment reversed with directions.*

CONTEMPT—JURISDICTION OF COURT—EXEMPTION FROM PROCESS—EXTRADITION—WAIVER—*Norquist v. Norquist*—No. 12902—*Decided October 5, 1931—Mr. Justice Adams delivered the opinion of the Court.*

1. Where a defendant in a divorce action fails to comply with order of Court for payment of support money for minor children, leaves jurisdiction and is extradited from sister state to answer criminal charge of non-support in Colorado Court, and while in Colorado, by virtue of extradition proceedings, is charged with and found guilty of contempt of civil court for such failure, the civil court has jurisdiction.

2. Quaere? Was the defendant exempt from civil process while in Colorado on extradition from a sister state on a criminal charge?

3. Even if it were conceded that he was exempt, such exemption was waived by defendant not objecting to a number of orders made by trial court in divorce action after he was extradited, and first raising the question of immunity some five months after extradition.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—NON-RESIDENT—EMPLOYE INJURED IN SISTER STATE—*Tripp v. The Industrial Commission, et al.*—No. 12867—*Decided October 13, 1931—Mr. Justice Burke delivered the opinion of the Court.*

1. Where a Nevada Corporation maintains a general sales office in Colorado and employs a salesman, who performs his duties for the Company in Kansas, and while working in Kansas moves his family to Kansas and is injured in Kansas, The Industrial Commission of Colorado is without jurisdiction to award compensation.

2. The purpose of The Industrial Compensation Act is to regulate the relation of employer and employe in the State of Colorado; therefore to constitute a person an employe under the provisions of the Act, such person must render service for another in the State of Colorado.—*Judgment affirmed.*

APPEAL AND ERROR—MOOT CASE—MUNICIPAL CORPORATIONS—REMOVAL OF VILLAGE TRUSTEE—*Goerke v. The Board of Trustees of the Town of Manitou, et al.*—No. 12473—*Decided October 13, 1931—Mr. Justice Campbell delivered the opinion of the Court.*

1. Where a village trustee was ousted by the village board of trustees, and thereafter obtained a writ of certiorari from the District Court, and was unsuccessful in the District Court, and sued out a writ of error, and while the case is pending in the Supreme Court, the term of office for which he was elected has expired, the case becomes moot.

2. Where one's right to hold an elective office is in controversy before the Court and before a decision thereon, his term of office has expired, the Court will not examine into his right to the office, and the writ of error will be dismissed.—*Writ of error dismissed.*

WATERS AND WATER RIGHTS—PRIORITIES—OWNERSHIP IN DITCHES—RIGHT TO USE WATER—*Robinson, et al v. The Alfalfa Ditch Co., et al.*—No. 12396—*Decided October 26, 1931—Mr. Justice Butler delivered the opinion of the Court.*

1. Decrees under the Water Adjudication Statute determine only the priorities of the several ditches and the amount of water awarded thereto.

2. In such proceedings, the Court has no jurisdiction to determine ownership or property rights in the ditches, or to determine who has the right to use the water awarded to the various ditches.

3. Where an irrigation ditch is enlarged, sworn statement must be recorded within ninety days after the commencement of construction or enlargement of the ditch, and no priority of right for any purpose shall attach to any such enlargement until such record is made, which provisions above were contained in the Session Laws of 1881, are void, being in conflict with Section 21 Article 5 of the Constitution.

4. The defendants, basng their claim on a right to convey water through the ditch by virtue of an enlargement, and the evidence showing that their predecessors conveyed water through the ditch from another source other than that source of the plaintiffs' water supply, the defendants are not entitled to any part of the water decreed to the Alfalfa Ditch.—*Judgment affirmed.*

WATERS AND WATER RIGHTS—NUISANCE—MAINTENANCE OF HEADGATE—*The Seven Lakes Water Users Association v. The Fort Lyon Canal Company*—No. 12783—*Decided October 26, 1931—Mr. Justice Campbell delivered the opinion of the Court.*

1. Where defendant maintains an intake ditch and dam without proper control devices, such acts are nuisances.

2. Such acts are both public and private nuisances.

3. Where the failure of the defendant to maintain a headgate at or near its own original site, contributed, with natural causes such as a flood that destroyed the original headgate, this does not operate to relieve the defendant of its statutory duty to maintain a headgate or some device equivalent thereto in its ditch.

4. Where the lower court ordered the defendant to erect and maintain in good repair suitable and proper headgates and construct a proper dam across the intake of the defendant's ditch sufficient to control and divert the waters of the river, and the option is given to the defendant to have therein a proper headgate and control device, the mere fact that the cost thereof would be great is not sufficient reason for not complying with such order.—*Judgment affirmed.*

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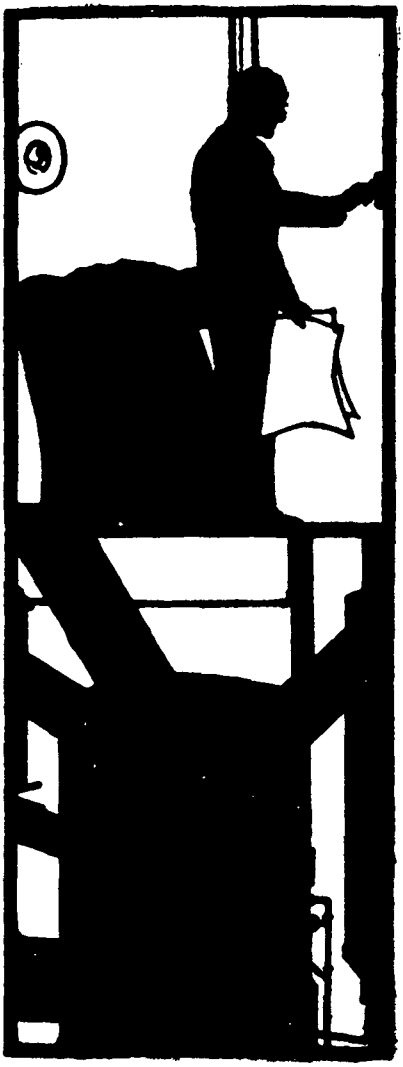

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