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# Colorado Supreme Court Decisions

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fashions a means of escape. Unless we insist upon observance of the law and prompt and speedy punishment of offenders, we imperil the safety of our lives and homes. Unenforceable laws must go. Begin at the top. Impose life sentence as a maximum and the idea of judicial murder is dispelled. Should the innocent or the insane then be convicted and sentenced, opportunity for vindication and correction is afforded. Seven States of the Union have already done so and we have yet to hear that human life is less precious in Wisconsin than Missouri. On the contrary, the whole nation may profit by the example.

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# *Colorado Supreme Court Decisions*

(Editors Note—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of).

No. 12,009

*Holbrook v. Bank*

Decided June 11, 1928.

*Banks—Preferred Claims—Insolvency*

*Facts*—The irrigation District sought to obtain a decree that a deposit standing to the credit of the Irrigation District in the Defendant Bank should be paid by the State Bank Commissioner as a preferred claim upon two counts:

1. That the Secretary of the Irrigation Company had unlawfully deposited the monies in the bank instead of remitting them to the County Treasurer. The Secretary of the irrigation company also being cashier of the bank, and that, therefore, the bank must be deemed to have accepted the deposits with knowledge that they were unlawfully deposited, and that such deposits must be treated as a trust fund.

*Held*—1. That to entitle a trust creditor to a preference, it must be satisfactorily established that the property of the insolvent remaining for distribution includes the proceeds of the trust estate.

No. 11,931

*Conrad v. Davison*

Decided June 4, 1928.

*Release of Trust Deed—Innocent Purchaser.*

*Facts*—Conrad held a note and a trust deed taken as collateral to secure an antecedent debt. He received same in reliance on the record showing a release of a prior trust deed at the written request of the payee, stating payment in full. Said release was executed before maturity of the obligation but not acknowledged or recorded until a year thereafter. Davison claimed the said release was invalid, setting up that the note was not in fact paid at that time and that later he had bought the note in a transaction of purchase and not of payment, that Conrad was put on inquiry by the release before maturity and the lapse of time between its execution and recording, and that an antecedent debt was not value.

*Held*—The note not being paid in fact, the release in question would be invalid except as against a subsequent bona fide encumbrancer for value. Conrad was such, as the rule that a release before maturity puts one on inquiry is not in point where the request for release is signed by the payee herself and states payment in full. The lapse of time between execution and

the acknowledgment and recording of said release is not material, nor is the contention that an antecedent debt is not value of any merit.

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No. 11,967

*Dawson v. Scruggs*

Decided June 11, 1928.

*Mechanic's Lien-Fixtures*

*Facts*—Dawson sued the Scruggs-Vandervort Barney Realty Company et al., including Edward O. Lowy to seeure a personal judgment against Lowy and to have a mechanic's lien upon certain real property decreed and foreclosed. The Court below gave him a personal judgment against Lowy, but held against him on the lien claim. The lien was claimed for installing new pipes in a refrigerator plant that had been in use as a part of the building for fifteen years.

*Held*—Not necessary that in order to constitute a fixture that the pipes should be permanently affixed to the freehold, if it constitutes a part of a plant of machinery necessary to the successful operation of the whole, then it may properly be termed a fixture. The Plaintiff has a valid lien and is entitled to have it foreclosed.

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No. 12,038

*Armstrong v. Denver Saunders System*

Decided June 4, 1928.

*Statutes—Tax on Automobiles Transporting Passengers for Hire.*

*Facts*—Defendants in error brought mandamus to compel the Secretary of State to issue licenses to them without the additonal fee required under S. L. 1927, Chap. 135, which imposed upon "motor vehicles used in the transportation of passengers for hire * * * an annual registration license fee of five dollars for each passenger seat in said vehicle at rated carrying capacity". Defendants in error rent automobiles to persons who themselves drive them, the rental contract providing that customers shall not use the car as "a private or public carrier of passengers for hire". Demurrer to the complaint was overruled. The Secretary of State stood thereon, and the writ being made permanent, appeals.

*Held*—These cars are not within the scope of the statute, for defendants in error customers are bailees and not passengers in the sense of the statute. The statute cannot be stretched to cover the case of lease of the car itself, especially where the rental contract forbids the customer to use it as a carrier for hire.

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No. 12,068

*Armstrong v. Johnson Storage*

Decided June 4, 1928.

*Motor Vehicles—Licenses—Mandamus*

*Facts*—Johnson brought mandamus against Armstrong, Secretary of State to compel the issuance of a license for a motor truck upon payment of fees exclusive of those required by Session Laws of 1927 chapter 135. Defendant demurred to the alternative writ, demurrer was overruled, and defendant elected to stand and the writ was made permanent.

*Held*—The fact that Johnson was engaged in the business of transporting goods for hire over the streets of the City and County of Denver, and does not use the highways outside of the City of Denver, does not exclude him from the act. The streets of a city are highways of the State. The State has a right to license motor vehicles for hire within the limits of the City of Denver, at least until the City of Denver, under the Twentieth Amendment makes attempt to so license them itself and whether or not Denver has that right, it is not necessary to decide at this time.

No. 11,744

*Colorado v. Riverview Drainage District.*

Decided April 2, 1928.

*Quasi-Public Corporation—Liability for Tort.*

*Facts*—The Colorado Investment and Realty Company, hereinafter called Plaintiff, owned land in drainage district. Drainage ditch, as proposed, traversed plaintiff's land and if constructed as planned, would benefit the land. Land was assessed for benefits before ditch was constructed. Later proposed line of ditch was abandoned and ditch was actually constructed, so that it was of no benefit to the land in question. Land was sold for non-payment of drainage assessments, and plaintiff redeemed under protest, and brought suit for damages and to have assessment, etc., be decreed illegal, and for refund of the money paid and for restraining order.

General Demurrer was filed below and sustained on the one point that the drainage district cannot be sued because there was no statute authorizing suit against it.

*Held*—1. Drainage District not created by the State to remove the menace to public health, but constructed for the primary benefit to the owners of the land thereunder by making their lands productive, is not such a public corporation that the district may not be sued in a proper action.

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No. 11,771

*Rule v. Ling*

Decided May 28, 1928.

*Vendor-Purchaser-Merchantable Title*

*Facts*—Plaintiff agreed to convey to Defendant by good and sufficient warranty deed certain land and to furnish an abstract of title, showing merchantable title. Purchaser went into possession under this executory contract of sale with consent of seller. When abstract of title was furnished, it showed that a prior grantor had made a reservation of certain oil and gas rights and purchaser refused to accept title.

*Held*—1. Abstract did not show merchantable title.

2. If Vendee has in good faith, after entering upon the land, made improvements upon the same, or planted crops, he may retain possession until he removes the same.

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No. 11,822

*Fleming v. Miller*

Decided May 14, 1928.

*Evidence at Former Trial—Insane Person.*

*Facts*—M. sued F. for fraud and testified. Thereafter M. started another suit involving the same transaction, but became insane before trial. His testimony at the first trial was read at the second. F. was permitted to testify, but only as to the matters covered in the transcript of M's testimony at the first trial. F. claimed the right to testify about the whole series of transactions; M. objected to his testifying at all under C. L. '21, par. 6556.

*Held*—The error, if any, was in favor of F. and he cannot complain.

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No. 11,839

*Morley v. Post*

Decided May 21, 1928.

*Libel*

*Facts*—Plaintiff below sued Defendant on three causes of action for libel. Demurrers to the Complaint were sustained by the Court below and Plaintiff elected to stand upon his Complaint.

*Held*—1. To constitute libel, it is not necessary that a publication shall impute to a person the commission of a crime, it is sufficient if it tends to impeach his honesty, integrity, virtue or reputation.

2. Where a qualified privilege is claimed, the condition that makes such a communication privileged is that it be not made maliciously.

3. Where words or cartoons are ambiguous in their import, or may permit more than one interpretation and in some sense be defamatory, the question whether they are such, is for the jury.

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No. 11,862

*Insurance v. Baker*

Decided May 21, 1928.

*Insurance—Waiver of Appraisement*

*Facts*—Baker suffered a fire loss while insured in the companies noted. The adjuster's position was that Baker's loss was "slight, nominal ***", and he offered only $200.00, whereas Baker insisted the loss was total and $1000.00, the full face of the policy, was due. Baker sued and recovered in full, and the companies seek reversal on the ground of his non-compliance with the policy provision for appraisement "in the event of disagreement as to the amount of loss".

*Held*—Appraisement clause presupposes a *bona fide* disagreement. Here the company's attitude in substance was a deliberate attempt to create a disagreement and, hence, outside the scope of the policy's provision. Testimony further shows a repudiation of liability, which waived the right of appraisement.

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No. 11,910

*Hughes v. Pallas*

Decided May 14, 1928.

*Landlord and Tenant—Restrictions in Lease.*

*Facts*—Jones leased premises from plaintiffs in error for a restaurant and cigar store. The lease provided the premises shall be used "for the purpose of conducting the business of a restaurant and cigar store; and for no other business". Jones allowed two churches and the Salvation Army to use the room for rummage sales on three separate days, and the lessors claiming such was a violation of the lease, seek to forfeit the same. Judgment went against the lessors, who appealed.

*Held*—"No other business" as used in the lease meant occupation and use of the premises permanent and continuous in its character, as distinguished from a single act or business transaction or an occasional day's use of the premises without rent or profit to anyone. Such a charitable use as here shown is outside the scope of the prohibition.

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No. 11,917

*Jones v. Panak*

Decided May 21, 1928.

*Assignment of Claim—Counter-Claim*

*Facts*—One Pry built a house for Panak; on the agreed price there was due $2,772. Ply assigned this claim to Jones, who brought suit for this amount. Part of this was paid. Panak counter-claimed for more than the balance due from her, because of defective work by Pry, and judgment for this difference was awarded against Jones.

*Held*—On an assigned claim, the defendant may counter-claim against the assignee for an amount equal to the claim, but not for more than this.

*Reversed*

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No. 11,918

*Cortez v. Stabler*

Decided May 21, 1928.

*Fraudulant Conveyance—Purchase Money Trust.*

*Facts*—C. Company brought this action to set aside a transfer of a farm from defendant Minnie Stabler to her husband. The trial court found that

the husband had paid the entire purchase price and all expenses of maintenance, and that C. Company had in no way been misled by the wife's apparent title.

*Held*—Payment of the price gave the husband the beneficial ownership under a resulting trust. Here, there was no gift or advancement to the wife and the elements of estoppel are lacking. The conveyance, therefore, cannot be set aside.

*Affirmed*

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No. 12,076

*Industrial Commission v. Nissen*

Decided May 14, 1928.

*Industrial Commission — Review — Course of Employment.*

*Facts*—N. worked on his employer's farm and lived in his employer's alfalfa mill, a half-mile away. Going from the farm to the mill, he was killed. The District Court reversed the Commission's award denying compensation.

*Held*—This accident did not arise out of or in the course of N's employment, because there was no casual connection between the employment and the accident.

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No. 12,081

*Kansas v. Marshall*

Decided May 21, 1928.

*Evidence—Presumption of Death After Seven Years Absence.*

*Facts*—Insured was forty years old, a sober, industrious farmer, happily married, with a family of three children. In September, 1920, he drove to Denver to attend a relative's funeral. He reached Denver safely and bought certain supplies for his family, such as groceries and the like, and placed them in his car, but thereafter failed to attend the funeral and disappeared without trace. Plaintiff sues as beneficiary, relying on the presumption of death arising from seven years unexplained absence. The company contests on the sole ground that the policy had lapsed for non-payment five years after the disappearance of the insured, and that no presumption as to death *within* the seven years arises where no showing is made of the absentee's contact with a specific peril. The jury found insured had died within the seven years and within the life of the policy, and found for plaintiff.

*Held*—The presumption arising after seven years' unexplained absence is that of death only, and not as to *time* of death, but evidence of character, health, domestic relations, and the like, making abandonment of home improbable, is pertinent on the latter issue, and here justified the jury in its findings.

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## *International Law*

"There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished, except in accordance with law, or without such a hearing as the universally accepted principles of justice demand. If that right be denied to the most desperate criminal in a foreign country, his own government can and ought to protect him against the wrong."—*Elihu Root.*

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## *Requisites of a Lawyer*

"Accuracy and diligence are much more necessary to a lawyer than great comprehension of mind, or brilliancy of talent. His business is to refine, define, to look into authorities, and compare cases and split hairs. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wing of oratory. If he would stand on *terra firma* he must descend; if he would be a great lawyer, he must first consent to be only a great drudge."—*Daniel Webster.*