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One Year Review of Courts, Judgments and Procedure

Dick Bernick

ONE YEAR REVIEW OF COURTS, JUDGMENTS AND PROCEDURE

By DICK BERNICK *of the Denver Bar*

, The case of *Holland v. McAuliffe*[1] dealt with an attack on Denver Ordinance No. 233, Series of 1953. The ordinance gave discretionary power to the municipal court to place a defendant on conditional suspension of sentence or fine for a period not exceeding two years. In the event the municipal court found the defendant to have breached the conditions of suspension it was required to reinstate the original sentence or fine. The ordinance also provided that for purposes of appeal the date of conditional suspension was to be considered the date of final judgment.

Two months before the ordinance in question became effective the defendant was given a fine and jail sentence. The Court suspended the jail sentence and part of the fine on condition that defendant "refrain from driving any motor vehicle for one year from date." More than four months later the Court issued its warrant for defendant's arrest for an alleged breach of the conditional suspension. At the hearing the court modified and reinstated the original sentence and then denied defendant's application to appeal such sentence. Defendant, after an unsuccessful attempt to obtain reversal through certiorari in the Superior Court appealed to the Supreme Court via writ of error.

The Supreme Court held the judgment of the municipal court erroneous on the following grounds:

1)The conditional suspension was unlawful because the prohibition against driving was apparently worldwide thus exceeding the court's territorial jurisdiction of the City and County of Denver.

2) The conditional suspension was unlawful because the one year conditional suspension exceeded the ninety day jurisdiction of the municipal court.

3) Reinstating the sentence under an ordinance which was enacted subsequent to the original sentence and suspension constituted unlawful retroactive procedure.

The Court held that the denial of defendant's right to appeal by the municipal court was erroneous because the defendant had the right to appeal either at the time of the original sentence or at the time it was reinstated and the City could not by the ordinance in question limit appeals of municipal court cases.

In the case of *French v. Haarhues*[2] plaintiffs in error, who were plaintiffs in the trial court, appealed to the Supreme Court on writ of error seeking reversal of a judgment of dismissal. The

[1] 286 P. 2d 1107.
[2] 287 P. 2d 278.

designation of the record included a "direction for entry of judgment" but no designation of the final judgment itself. The record as transmitted to the Supreme Court included the order of dismissal and the order for the entry of the judgment. The judgment itself was not included in the record on error because the clerk either failed to enter the judgment or failed to include it in the record on error despite the fact that Rule 112 provides that the judgment or part thereof to be reviewed shall be included in the record whether designated or not. The Supreme Court dismissed the writ of error because of the absence of a final judgment and in doing so emphasized the responsibilities of an appealing party saying, "The entry of a judgment upon the court's order is a ministerial duty on the part of the clerk, but if a defeated litigant desires a review by writ of error in this court, it is his *duty* to see that the record presented here is properly prepared and completed and contains a final judgment; otherwise dismissal will follow."

In *Ferkovich v. Ferkovich*[3] the wife brought an action for divorce and in connection therewith the Court granted her motion for relief *pendente lite,* ordering her husband to make certain payments for the support of the wife and child. The wife's complaint was dismissed and on appeal to the Supreme Court the dismissal was affirmed. The wife subsequently moved the lower court for a judgment in the amount of the aggregate of her husband's delinquencies under the order *pendente lite* and also petitioned for her costs and counsel fees in the Supreme Court. The lower court denied the motion for judgment and ruled that it had no jurisdiction to grant the petition for costs and fees in the Supreme Court.

On appeal both rulings were reversed. The Supreme Court held the trial court had jurisdiction to entertain the petition for expenditures in connection with the Supreme Court review and therefore had erred when it denied the petition on the ground of lack of jurisdiction. It was held to be error for the trial court to refuse to enter judgment for the past due support installments since those installments constituted a debt against the husband

[3] 274 P. 2d 602.

and the trial court was without authority to enter an order which, in effect, would be a cancellation of the payments in default.

It is interesting to note, in connection with the case of *French v. Haarhues,* above, that the husband here contended that the writ of error should be dismissed because the orders appealed from were not final judgments. The court dispensed with this argument by saying, ". . . the orders were in every respect a finality so far as plaintiff's rights were concerned."

Carrera v. Kelley[4] was the latest in a line of cases emphasizing the limited jurisdiction of county courts in dependency matters. The mother, faced with the necessity of working, had placed the child in the care of petitioner. The petition in dependency alleged that for a period of about one year prior to the time the petition was filed the petitioner had provided the entire care and support of the child. The trial court found that the child was dependent and neglected and that the custody of the child was vested in the court. An order was entered whereby the child was to spend about nine months of the year with petitioner and three months of the year with the mother. The order set out certain conditions and payments the mother was to meet over a period of two years after which period, if she fully complied with the terms of the order, the custody was to be vested in her. The Supreme Court, in a sharply worded opinion, ruled that the petition itself showed that the child was not a dependent or neglected child under the terms of the statute. It was held that there was no showing that the child was neglected or imposed upon, because, on the contrary, the petition showed the child was being cared for by petitioner. For this reason it was held that the trial court had no jurisdiction over the child.

The case of *Miller v. Singer*[5] was an action in which the complaint and evidence charged the defendants as joint tortfeasors. The trial court instructed the jury that joint tortfeasors were "jointly and *separately* liable" instead of the usual "jointly and *severally* liable." The trial court then submitted two forms of verdict by which the jury was permitted to and did in fact return separate verdicts in different amounts against various defendants. The Supreme Court held that the above instruction and the approval of the verdict in separate amounts constituted error, reciting the general rule that, "Where an action is brought against joint tortfeasors, if . . . the finding is against all of them, the verdict must be a single verdict against all for a single sum and not a several verdict against each defendant either for the same or separate sums."

In the case of *People v. Griffith*[6] the defendant was arrested and taken into custody without a warrant and an information was filed against him in the County Court charging him with

[4] 263 P. 2d 162.
[5] 279 P. 2d 846.
[6] 276 P. 2d 559.

driving while under the influence of liquor, speeding and leaving the scene of an accident. The defendant moved for dismissal, relying on Sec. 290, Ch. 16, '35 C.S.A. which directed that in cases concerning the offenses with which he was charged "the arrested person shall be immediately taken before a magistrate." The defendant argued 1) that the County Court had no jurisdiction over the charges made against him because the above quoted portion of Section 290 conferred exclusive jurisdiction on justice of the peace courts, and 2) that County Court had no jurisdiction over the person of the defendant since he was arrested without warrant and was not taken immediately before a magistrate. The County Court dismissed the information and the State appealed. The Supreme Court reversed the dismissal holding that the language of Section 290 did not repeal the statute conferring original jurisdiction upon county courts in misdemeanor cases, and that even if the arrest was illegal it did not deprive the Court of jurisdiction over the person of the defendant.

The case of *National Motor Finance Co. v. DeMarco*[7] involved an attempted appeal from a judgment of a justice of the peace court to the county court. Instead of filing an appeal bond substantially in the form prescribed by statute (C.R.S. 1953 79-13-13), counsel for the appealing party filed his check and a petition for supersedeas. The petition for supersedeas did not contain certain information required in the statutory form of appeal bond,

[7] 287 P. 2d 265.

such as the name of the justice of the peace and the date of the justice court judgment. The Supreme Court held that the County Court never obtained jurisdiction, on two grounds:

1) A litigant cannot deposit money or a check as security for the prosecution of an appeal, instead of entering into an undertaking where the statute prescribes the form of the bond.

2) The petition was lacking in essential allegations, and the deficiency was not satisfied by any subsequent happenings.

The case is also significant for the Court's statement that the defendant's appeal bond in a justice court replevin action must be in an amount at least *equal* to the established value of the propperty replevined and costs. The statutory form of appeal bond prescribes a bond in *double* the amount of judgment and costs.

In the case of *American Furniture Company of Denver v. Veazie*[8] the buyer brought an action against the seller of a gas stove to recover damages for injuries she sustained as a result of the explosion of the stove. The complaint contained two causes of action for the same injury; one upon the basis of implied warranty of fitness, and one based on negligence. The court submitted three forms of verdict to the jury; one for the plaintiff on her first cause, one for the plaintiff on her second cause and one for the defendant, with the instruction that the jury should return but one verdict. The jury returned two verdicts for the plainiff, one on each claim, which verdicts were accepted by the court. On appeal, the Supreme Court reversed the judgment on the proposition that plaintiff was not entitled to recover on two theories for one injury.

In its opinion the Court suggests that the trial court should have submitted two forms of verdict for the first cause of action, one for the plaintiff and one for the defendant, and two forms of verdict for the second cause of action.

A somewhat related situation was presented in the case of *Hood v. The People.*[9] In that case three counts of an information were submitted to the jury. The court submitted three separate forms of guilty verdict, one on each count, and but one form of not guilty verdict. The defendant was found guilty on one count and on appeal argued that the trial court erred in not submitting separate forms of not guilty verdict as to each count. The Supreme Court held in this case that submitting three forms of not guilty verdict would have been mere surplusage and that no error was committed.

[8] 281 P. 2d 803.
[9] 277 P. 2d 223.

In the case of *Rinn v. City of Boulder*[10] the defendant was found guilty in Police Court of violations of Boulder municipal ordinances and the defendant appealed to the County Court. The defendant filed various motions and a request for a jury trial. The motions were denied and the defendant was allowed ten days in which to file an answer. The defendant failed to answer and the County Court dismissed the appeal. The Supreme Court held that the dismissal was error.

The opinion holds that no answer is required in such a case because the issues are framed by the perfection of the appeal from the Police Court and the County Court merely tries *de novo* the issues made in Police Court.

In the case of *Dickerson v. Cary*[11] the plaintiff brought an action against the defendants to foreclose a defaulted deed of trust. The defendants had previously commenced an action in another court asking damages for fraud in connection with the same sale contract in which the deed of trust was given. On defendant's motion the court stayed the plaintiff's foreclosure proceedings indefinitely or until disposition of the damage suit. On appeal it was held that the stay was improperly granted since the defendants had acknowledged their liability when they elected to sue for damages rather than recission of the contract. The opinion also held that the stay was erroneous because the disposition of one action would not determine all of the issues of the other and the suits were therefore not identical.

In *Trujillo v. District Court*[12] the petitioner was charged with the misdemeanor of involuntary manslaughter. Bail was set at $2000.00 and petitioner was released on bond. Upon the return of a guilty verdict the court, on its own motion, ordered the petitioner remanded to custody, discharged the bond and denied his motion to remain on bond until the disposition of his motion for a new trial.

The petitioner then brought an original proceeding in the Supreme Court for a ruling upon the District Court to show cause why he should not be released on bond. The order to show cause was issued and in response thereto the District Court filed an answer setting out that the admission to bond after verdict was a discretionary matter and that it was the settled policy of the court to refuse all bonds after conviction and before sentence in such cases. The Supreme Court agreed that whether the bond should be allowed to remain in effect after verdict was a discretionary matter, but held that following a rigid policy regardless of the facts or circumstances did not constitute an exercise of discretion. Since the undisputed facts were that the petitioner had lived in the state all his life, and not one scintilla of evidence

[10] 280 P. 2d 1111.
[11] 285 P. 2d 831.
[12] 282 P. 2d 703.

adverse to his reputation and character had been brought out in his trial, the District Court was ordered to reinstate the bond.

In the case of *Maniatis v. Stiny*[13] an action for accounting in District Court was referred to a master and trial was held before the master. The master made his report and objections thereto were filed by the defendant. The nature of the objections were such that the District Court could not properly pass upon them without a reporter's transcript of the evidence introduced before the master. However, no such transcript was supplied for the judge's information in ruling on the objections. The judgment was reversed on the ground that the trial court lacked authority to pass upon the defendant's exceptions without examining the evidence taken before the master.

The case of *Smith v. Wagner*[14] was really an affirmance of the lower court without an opinion except to correct an obvious mathematical miscalculation in the judgment. In so doing the Supreme Court reenunciated the familiar rule that the trial court, having seen and heard the witnesses testify, is the best judge of their credibility and therefore its findings upon conflicting testimony are presumed to be correct and may not be disturbed except to correct manifest miscalculation.—*D. B.*

[13] 274 P. 2d 975.
[14] 279 P. 2d 1057.

The Dicta staff wishes to announce that commencing with the 1956 March-April Issue, a picture of the author and a biographical sketch will be published with each article. It is requested that all future contributors of material include a 5x7 photograph and a "brief" biographical sketch with their articles. Persons who have previously submitted material which has not yet been published will be contacted individually by the Student Article Editor for their pictures and sketches.

ARNOLD M. CHUTKOW, Editor