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Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

No. 14864. State of Colorado, et al. vs. Wilson, et al. Decided November 1, 1940.

1. Held that the constitutional amendment (Art. XXIV) applied to state taxes, and not to municipal taxes and hence the Old Age Pension Fund had no claim upon the Denver tax on cigarettes.

2. Intervenor's claim was no part of the controversy here and is not answered. Opinion by Justice Bouck.

No. 14774. Peiffer vs. People. Decided November 4, 1940.

1. Where the defendant was charged with operating a confidence game and obtaining property under false pretenses, a note signed by the defendant under the circumstances of the case held a "bogus instrument well calculated to impose upon the unskilled and unwary" within the meaning of Sec. 222, Ch. 48, C. S. A.

2. Evidence found ample to support the charge of false pretenses.

3. Similar transactions are admissible to prove intent.

4. Failure to give the instruction that any person may transact business under a trade name of his own choosing held not prejudicial error here. Opinion by Justice Burke.

No. 14654. Stone vs. Union Fire Insurance Company. Decided November 4, 1940.

1. While the American Bar Association advocates admission of statements otherwise violative of hearsay rule where the death of declarant has subsequently occurred and where the declarations were made before the controversy had arisen, no such exception to the hearsay rule has been sanctioned by legislative action or judicial pronouncement in this state.

2. Admission of testimony of assistant fire chief that in his opinion fire was caused by highly inflammable liquids, held error because the business in this case was in no way connected with the plaintiff.

3. No greater degree of proof than by the preponderance of the evidence is necessary with regard to the defense of willful burning.

4. Refusal of the court to instruct the jury to disregard defense of lack of notice of a chattel mortgage was held not error, as this is a question of fact by the jury.

5. Admission of testimony and witness from the assessor's office to show tax schedule where the plaintiff had fixed the value of the property held not error. If it had been offered to show the value the assessor had put on the property, it would have been error. Opinion by Justice Bock.

No. 14857. Vasquez vs. Morrow, et al. Decided November 4, 1940.

1. In a personal injuries case where the trial court made findings of fact and gave judgment to the defendant on the grounds that the plaintiff was contributorily negligent, the case was reversed and remanded in that the evidence did not support the finding of fact. The finding of fact by the trial court is not conclusive where there is insufficient evidence to sustain such findings.

2. Where two automobiles are traveling in the same direction, the one in front has the superior right and may maintain this position if there is sufficient space on its left to enable approaching car to pass safely.

3. Motorist passing is bound to ascertain if the situation is one in which an ordinary prudent person would think it safe to pass. Opinion by Justice Knous.

No. 14547. Dikeou & Dikeou, Copartners Doing Business as Dikeou Bros. vs. Food Distributors Association. Decided November 12, 1940.

Question whether defendants sold cigarettes below cost with intent to injure competitor under Unfair Practice Act (Ch. 261, S. L. 1937), held: 1. A nonprofit corporation is a proper party to institute proceedings under the act.

2. Evidence found sufficient to establish that cost, plus cost of doing business, was above the selling price here.

3. Cost need not be absolutely exact but good faith is necessary, and the evidence here warrants a finding of lack of good faith.

4. The question of permitting the filing of amended pleadings is within the trial court's discretion.

5. Unfair Practice Act is not a price fixing law. The court mentioned the fact that though the constitutionality of the act was not in issue here, four states had held a similar act unconstitutional. Opinion by Justice Bock. Burke dissents.

No. 14679. Fishel vs. City and County of Denver. Decided November 12, 1940.

In a proceeding to acquire land for bombing field for the air school the question was whether in the instant proceedings the city was authorized to exercise the power of eminent domain.

HELD: 1. Since the question was raised on demurrer and pleadings stated that the land was to be used in cooperation with the federal government and that the field would be of local use and benefit of the city and its people, a demurrer contending that eminent domain could not be exercised since the field was for exclusive governmental purpose was properly overruled.

2. Bombing field for the air school held a municipal purpose under the authority of 101 Colo. 316.

3. Under Constitution Art. XX it was intended to give as much home rule in local municipal affairs as could be granted under a republican form of government and the enumeration of powers there is not exclusive, but merely a simple expression of a few of the more prominent powers which municipal corporations are frequently granted.

4. Such a municipality can under such power condemn land outside municipal limits.

5. Where there is nothing in the record from which it can be definitely ascertained that the jury did not take into consideration the question of interest in fixing the amount of the verdict even if instruction in regard to interest were given by the court, the court cannot after verdict add interest to sum found by the jury.

6. The statute providing for payment of taxes by the vendor where the transfer is made after July 30th applies to voluntary conveyances and not to condemnation proceedings. Opinion by Justice Knous.

No. 14872. Schmoyer vs. City and County of Denver, et al. Decided November 12, 1940. Affirmed without opinion.

No. 14729. George Rush vs. The Lung Sanitarium, et al. Decided November 12, 1940.

Where an action is brought before a justice of the peace in one county and is transferred to a justice of the peace in another county, the latter held not to have jurisdiction to try the case. Opinion by Justice Hilliard.

No. 14785. Alson Investment Co. and The National Casualty Company vs. Youngquist, et al. Decided November 18, 1940.

In a workmen's compensation case where A was the owner of property and where R managed the property, collected the rent and made improvements and repairs and received 10% plus on repairs, and where claimant was hired by R and did not know A, held owner (A) was not subject to the Workmen's Compensation Act under Sec. 329, Ch. 97, C. S. A. Opinion by Justice Burke.

No. 14488. de Bit vs. Howard. Decided November 18, 1940.

In an action to foreclose an attorney's lien, where there was a subsequent compromise between the parties and such compromise provided for periodical payments and living expenses of the plaintiff, held: lien attaches to the amount which the defendant was obligated to pay the plaintiff and that the defendant is in no way prejudiced because the defendant may credit the amount paid to the attorney against that which he would otherwise pay to the plaintiff. Opinion by Justice Bakke.

No. 14750. Polly vs. People. Decided November 25, 1940.

1. Statements made by decedent on plea of the physician that the decedent would have no chance of recovery unless she confided in him, held not to satisfy requisites of a dying declaration, for the decedent must be conscious of impending death and the declaration must be voluntarily made to constitute a dying declaration.

2. "Any object" held not an "instrument" within the abortion statute.

3. Instruction that "when a physician inserts into the womb of a pregnant woman an instrument calculated to produce irritation and derangement of female economy, and abortion follows, the intention to produce the result is a necessary conclusion of the act" held error. Opinion by Justice Bock.

No. 14809. Industrial Commission, et al. vs. Strome. Decided November 25, 1940.

Willful assault by a fellow employee held not arising out of employment.

No. 14742. Rice vs. Marlar. Decided December 2, 1940.

1. Taxicab company held liable for wilful assault upon the plaintiff by the employee of the cab company while the plaintiff was a passenger in such cab and the employee was within the scope of his employment in driving the cab.

2. Motion for non-suit admits the truth of the plaintiff's evidence and every inference of fact that can legitimately be drawn therefrom and the evidence must be interpreted most strongly against the defendant. Opinion by Justice Bock.

No. 14706. Medberry vs. People. Decided December 2, 1940.

Assuming but not deciding that the common law writ of coram nobis is applicable in Colorado, held that in this case such a writ would not lie. The writ in jurisdictions where it applies will not be granted in criminal cases after trial and conviction except where it clearly appears that the petitioner had a valid defense in the facts of the case but which without negligence on his part was not made because of duress, fraud, or excusable mistake. The contention here was that defendant's former counsel refused to permit defendant to show indecent proposals which lead to a fight in which the defendant contended the decedent was killed as a result of accidental shooting. Held that an affidavit of defendant unassailed by counter affidavits did not establish the truth thereof; that accidental shooting had been pressed in the original trial; whether one or another cause preceded the shooting was immaterial, and indecent proposals was not a new defense. Trial court affirmed. Opinion by Justice Bock.

No. 14682. Cox vs. Godec. Decided December 9, 1940.

1. In an F. E. D. suit where the title is placed in issue in a justice court the cause must be certified to the District Court as set out in Sec. 12, Ch. 96 C. S. A. and if there is any contrary language in *Wise v. Schummel*, 76 Colo. 184 to the effect that only under subdivisions 6, 7, 8, and 9, of Sec. 4, Ch. 70 C. S. A. is certification to the District Court required, it must to that extent be modified.

2. Where there is a permissive entry upon land, it is only when it is shown by satisfactory evidence that such possession of the entrant became antagonistic and hostile, with notice to the owner and such possession continues for the period required by law, that adverse possession can prevail. Opinion by Justice Bock.

No. 14631. Rocky Mountain Beverage Co. vs. Walker Beverage Co. Decided December 9, 1940.

1. In an action on a book account, a ledger into which sales slips were posted is a book of original entry and admissible in evidence under Sec. 3, Ch. 177 C. S. A.

2. It was not error for the court to dismiss defendant's cross-complaint without prejudice on defendant's motion. Opinion by Justice Bakke. Bock, Justice, dissents.

No. 14859. Emerson vs. Guthner, Mgr. of Safety, et al. Decided December 16, 1940.

In a habeas corpus proceeding where it was alleged that the petitioner was not in the state at the time of the issuance of the writ, the court should not have dismissed the writ but should have inquired into the ability of the respondent to produce the petitioner. Opinion by Justice Knous.

No. 14340. National Surety Corp. vs. Hall. Decided December 6, 1940.

1. In an action on a bond evidence reviewed and found that employee was in the scope of his employment at the time of the theft against which the bond was conditioned.

2. Recovery on the bond of one does not prevent recovery on a bond of another for the same default. Opinion by Justice Bakke.

No. 14885. Gates vs. Central City Opera House Assn., et al. Decided December 23, 1940.

Where an artist while performing services for the defendant froze his fingers the injury resulted from an accident within the meaning of the workmen's compensation act. Opinion by Justice Bock.

No. 14641. Cowles vs. People. Decided December 23, 1940.

1. Evidence reviewed and found sufficient to justify conviction of procuring an abortion.

2. It is not necessary that all witnesses for the same side concur in the details. It is the province of the jury to determine their credibility.

3. Where the statement of the decedent was shown to and assented to by the defendant upon his arrest it became admissible in evidence against the defendant. Opinion by Justice Burke.

No. 14796. Weidensaul vs. Industrial Commission, et al. Decided December 9, 1940.

In a workmen's compensation case where claimant did not file claim until after six months from time of accident held that the assurance by the claimant's doctor to the claimant that everything would be taken care of did not constitute an estoppel of the right to raise the statute of limitations.

2. Evidence reviewed and found sufficient to justify the finding that the claimant was mentally competent to have filed a claim before the expiration of the six months period.

No. 14883. Warner Construction Company, et al. vs. Watkins, et al. Decided December 23, 1940.

Where the decedent employee of a construction company stopped at his home for dinner and was injured at that time, the injury arose out of and in the course of his employment so as to entitle him to compensation under the workmen's compensation laws. Opinion by Justice Knous.

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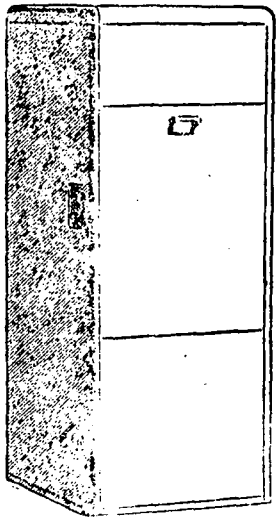

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A LAWYER'S VIEWPOINT

The following excerpt is taken from an address before a meeting of the American Bankers Association by Mr. John H. Freeman of the law firm of Fulbright, Crooker and Freeman, of Houston, Texas, on the subject:

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"A mechanic cannot work without tools and the better the tools, the better work a good mechanic can do. In the trust field the modern corporate executor and trustee has a full complement of the very best.

"What are the trust tools? System, adequate accounting and auditing control, statistical service, adequately trained personnel—indeed, the most of the advantages we are here discussing are also, in fact, part of the tools of the corporate trustee."

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