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Supreme Court Decisions

Dicta Editorial Board

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Supreme Court Decisions

No. 14640. *Dillon v. Sterling Rendering Works, Inc., et al. Decided September 16, 1940.*

Action of negligence. Finding below of negligence in defendant and contributory negligence on part of plaintiff; reversed for further trial.

No. 14830. *Moore v. Burritt, et al. Decided September 16, 1940.*

In action for injunction, defendant contends that his answer and cross-complaint could not be stricken as sham where cross equitable relief is sought. Held, that the striking out was proper. In any event, the defendant was not prejudiced, having been permitted to introduce evidence "as fully as though his cross-complaint had not been stricken out."

No. 14827. *Dependency of Jessie Jones, Infant. Jones v. Wheeler, et al. Decided September 16, 1940.*

Denial below of petition for rehearing in dependency which had resulted in commitment to home for dependent children was error where evidence was offered to show capability and willingness of maternal aunt to take and care for the child in her home. The welfare of the child should be the controlling element considered.

No. 14577. *Rosenberg, doing business as Barnum News v. Donovan, doing business as Edna Cash Grocery. Decided September 16, 1940.*

On conflicting testimony verdict for defendant affirmed.

No, 14580. *Serv-Us Chain Stores, Inc. v. Arden Realty and Investment Company. Decided September 16, 1940.*

In suit for rent of Park Hill store, directed verdict below for plaintiff reversed because (1) the assignee of plaintiff, a necessary party, was not joined: (2) a question of fact existed as to fraud in connection with plaintiff's lease.

No. 14664. *Conklin v. Armstrong, et al. Decided September 16, 1940.*

Controlled by In Re Interrogatories of Senate, 100 Colo. 342, 67 P. (2d) 1038. The ruling is that writ of mandamus will not lie to

compel state officials to pay 85% of all revenues from service tax into pension fund.

No. 14738. *McFadden v. People ex rel. Lewis. Decided September 16, 1940.*

Judgment affirmed on the basis of *People v. Downen,* decided this day. (See next case.)

No. 14691. *People ex rel. Wade v. Downen. Decided September 16, 1940.*

Question: Does appointing power to office of member of real estate brokers' board reside in the Governor or in the Secretary of State?

Answer: In the Governor.

Because the express authority of 1925 S. L. Ch. 147 is not repealed by implication by the Administrative Code of 1933, Ch. 3, '35 C. S. A., which makes the heads of departments responsible for their departments.

No. 14828. *Reeser v. People. Decided September 16, 1940.*

Dependency petition by mother of an unborn child. Verdict against respondent Reeser. Held, under the facts, motion for new trial on grounds of newly discovered evidence, should have been granted.

No. 14621. *People use of The Federal Land Bank of Wichita, Kansas v. Ginn, et al. Decided September 23, 1940.*

Action on the official bond of a county clerk and recorder for his negligence in transcribing to his records a trust deed upon the S. W. ¼ of Sec. 7, etc., as being upon the S. E. ¼ of Sec. 7, etc. As a result of this error, plaintiff bank loaning money on S. W. ¼ of Sec. 7 was left in ignorance of the prior trust deed, and subsequently lost its security and its money.

The principal questions:

(1) At what time does plaintiff's cause of action accrue, so as to start the running of the statutes of limitation?

(2) Is plaintiff barred by constructive notice through the correct trust deed, itself filed for record, or by the indices correctly transcribed by the clerk?

(3) Is plaintiff barred by its own negligence in not examining the records themselves, instead of relying entirely upon an abstract furnished by an authorized abstract company?

The court holds:

(1) Following *People v. Cramer,* 16 Colo. 155, 25 Pac. 302, and reiterating "the minority rule" as the law of this state "that the statute

(of limitations) begins to run at the time of the occurrence of the consequential injury caused by the breach of duty and not at the time of the breach." Further, that the consequential injury occurred in this case when plaintiff's trust deed was established by judgment as inferior to the one inaccurately recorded.

(2) That the constructive notice of a recorded instrument itself protects holders under such instrument and is not notice to bar an action such as this.

(3) That the record itself controls and correct indices are not notice.

(4) That there can be no requirement for plaintiff to search the records; the abstracter is its agent for such purpose, and it may rely on the abstract.

Judgment below sustaining the defense of statute of limitations reversed, with directions to ascertain the damage sustained by plaintiff and to enter judgment accordingly.

No. 14835. *Byouk v. Industrial Commission, et al. Decided September 23, 1940.*

Affirms the Industrial Commission's award of $3,640 as the statutory maximum on a finding of 60% permanent partial disability. The fact that claimant probably could never work again as a coal miner is not the sole test to determine whether his disability be total or partial, although it is pertinent and material to such question. Conflicting evidence appears as to his present and probable future ability to do other work.

No. 14633. *Hill v. Hill. Decided September 23, 1940.*

Appeal from order of district court allowing plaintiff judgment for $2,080.00 instead of $5,646.00, which she claimed as alimony arrearages.

Affirmed. The court finds sufficient evidence of a modifying agreement between the parties reducing the amount to that involved in the lower court's decision.

No. 14865. *People ex rel. Lenzini v. District Court. Decided September 25, 1940.*

Under Rule 14C of the Supreme Court an alternative writ against District Judge Ralston made peremptory.

Original Proceeding in Prohibition. It here appears that Hon. John L. East disqualified himself, *sua sponte,* in the trial. Over protest of petitioner he transferred the cause to Hon. David M. Ralston, District

Judge of the same district. Alternative writ thereupon issued from this court. The matter being now at issue, the Supreme Court holds that Rule 14C is applicable. Writ accordingly made peremptory as to Judge Ralston, the cause remanded to Judge East to proceed in conformity to said rule, the ten days provided thereby to begin to run from the date of this order.

No. 14778. *Miller, et al. by Aubert, Next Friend v. Industrial Commission of Colorado, et al. Decided September 3, 1940.*

Action by two minor daughters of deceased employee to correct an award of the Industrial Commission which refused compensation because of failure to file notice claiming compensation within the time required by C. S. A. Chapter 97, Section 36.

(1) That payment of hospital and medical expenses is not payment of compensation.

(2) That since the statute fails to make minority disability a fact tolling the statutory limitation, it is not within the province of the courts to do so.

(3) Ignorance of the fact of the father's death (as of facts giving rise to a cause of action) does not delay or suspend the operation of the statute of limitations. Judgment affirmed.

No. 14818. *Keithline, et al. v. Keithline, et al. Decided September 3, 1940.*

The plaintiffs, heirs (but not all the heirs) of their parents' estate, took over, built up and cared for a certain dairy business belonging to such estate and they seek a decree giving them the dairy business to the exclusion of the other heirs. Held, below that all heirs were tenants in common of such business.

Judgment affirmed. Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a special agreement or mutual understanding to that effect.

In the following cases judgment was affirmed without a written opinion:

No. 14805. *Graham, et al. v. Severance. Decided September 16, 1940.*

No. 14831. *Kamp, et al. v. Ficcio. Decided September 23, 1940.*

No. 14753. *Mental Incompetents; Jurisdiction. People ex rel. Smith v. County Court, et al. Decided April 8, 1940. Original Proceeding in Prohibition. In Dept. Writ Issued.*

FACTS: A. Petitioner seeks the exercise of the original jurisdiction of the Supreme Court to prohibit the County and District Courts of Fremont County and their judges, from exercising any jurisdiction over property of petitioner or over claims heretofore filed in a proceeding in the County Court, entitled, "Matter of the Estate of Will H. Smith, Mental Incompetent", other than to approve the final report of the conservatrix and to return petitioner's property to him, he having been legally adjudicated a mental incompetent prior to said proceedings and subsequently adjudicated restored to mental competency and released.

HELD: 1. Where it appears that mental incompetent has been adjudicated restored to reason, and conservatrix petitions court for discharge and due notice is given setting a certain date, and on that date, due to illness of judge, hearing was continued to another date, and where it appears that prior to latter date final report was filed, that petitioner approved report in writing and prayed for discharge of conservatrix and asked for return of property, and where it appears that petitioner, in writing, agreed to assume the payment of all lawful claims and had paid all expenses of administration, then, certain claimants with unallowed claims may not, on latter date, have their claims adjudicated in said court prior to the discharge of the conservatrix.

2. Upon restoration of petitioner's competency, the county court has no jurisdiction except to settle the accounts of the conservatrix and restore to him control of his property, and it may not make any orders attempting to control the property, burden it, or impose any judgment obligation on the petitioner, and such orders are void.

Opinion by Mr. Justice Young. Mr. Chief Justice Hilliard and Mr. Justice Knous concur.

No. 14736. *Workmen's Compensation; Assignment of Policy; Estoppel; Fifty Per Cent Penalty for Failure to Carry Insurance. Anderson, et al. v. Dutch Maid Bakeries, et al. Decided April 8, 1940. District Court, Denver. Hon. Joseph J. Walsh, Judge. Judgment affirmed in part and reversed in part. In Dept.*

FACTS: A. Employer of injured employee is successor by purchase of the Wigwam Bakery. It had previously been conducted by a partnership which in turn had succeeded one of its members who had been doing business as an individual. The latter was insured in the State Fund, but the policy remained in his name and no claim was asserted under it while the partnership conducted the business.

B. The purchaser and present owner, paid the partnership (seller) the amount of the unearned premium on the policy, but no as-

signment of the policy was made, nor was the Fund notified of change of ownership, although policy required both steps and the approval by insurer of the assignment.

C. Employer contended that since another employee had been injured, after change of ownership and a report made to the commission and Fund, and on the claim blank someone had written over the stated name of the employer "Dutch Maid Bakeries, Inc.," the name "Wigwam Bakery," the Fund had notice of the assignment and therefore was estopped to deny liability. (This prior claim was never prosecuted.)

HELD: 1. The mere report of the prior accident and the unexplained writing in of the name "Wigwam Bakery" can not take the place of a specific assignment and consent thereto as required by the policy.

2. Estoppel may not be predicated on the facts stated.

3. The statute ('35 C.S.A., Chapter 97, Section 306) provides that the employer shall be responsible for fifty per cent additional compensation as a penalty for failure to carry insurance. The liability is not determined by good faith or willful neglect, and it is immaterial that employer thought he had insurance.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bakke and Mr. Justice Burke concur.

AMENDMENT NO. 1

Would Take $3,060,176

Out of Denver Pocketbooks Every Year

No. 1 would add $73,520 to the cost of Denver school district bonds.

No. 1 would add $109,123 a year to the cost of building and loan shares in Denver.

No. 1 would add $374,605 a year to the cost of Denver municipal bonds.

No. 1 would subject Denver bank deposits to $1,814,554 in taxes each year.

Vote NO on No. 1

At the Election November 5, 1940

Sam Jones, Jr., Chmn. Colo. Committee Against Amendment No. 1

DICTA

The Denver Bar Association
The Colorado Bar Association

SOLDIERS' AND SAILORS' RELIEF ACT OF 1940

AN ANOMALOUS TAX SITUATION

NEW RULES AFFECTING PROPERTY RIGHTS

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