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# Supreme Court Decisions

Dicta Editorial Board

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No. 14594. *Estates; Power of County Court to Order Audit. Dunklee, etc. v. County Court of Denver, et al. Decided April 8, 1940. District Court, Denver. Hon. Joseph J. Walsh, Judge. Affirmed. En Banc.*

FACTS: A question raised as to whether, in the matter of the Estate of George W. Clayton, deceased, the Denver County Court had jurisdiction to order a general audit of accounts of the Clayton College Trustees and Clayton Trust Commission.

HELD: 1. "Where a testator so directs, or such intent is apparent from his will, the county court, under its original jurisdiction in probate matters conferred by Section 23, Article VI of the Constitution and the terms of Section 227, Chapter 176, '35 C.S.A., properly may continue to supervise the administration of a testamentary trust created by such will to the extent commanded thereby, notwithstanding the debts of the estate and the legacies fixed by the will have been paid in full and the executors discharged."

2. It is the opinion of the court that the express provisions of the Clayton will manifestly demand the application of the above rule to the situation under consideration.

3. Although said Section 227 was adopted in 1903, one year after the alleged effective date of the discharge of the executor, the estate proper was in the process of administration until the entry of a 1905 decree, and thereafter until the executor filed in the County Court his receipt as trustee.

4. It would seem certain that even if the said Section 227 were given retroactive effect, it being purely remedial and procedural in character, no contract or vested right would be violated.

Opinion by Mr. Justice Knous. Mr. Justice Bouck and Mr. Justice Bock dissent.

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No. 14663. *Estates: Claim Against Estate Based Upon Oral Statements of Decedent: Evidence; Consideration; Witness. Parker v. Hilliard, Jr., etc. Decided April 8, 1940. District Court, Denver. Hon. Henry A. Hicks, Judge. Affirmed. In Dept.*

HELD: 1. Testimony in support of a claim against an estate, consisting entirely of a recital of alleged oral statements of deceased against his interest, is the weakest of evidence.

2. Evidence to support a claim against an estate should be clear and convincing as to its existence as well as to the amount of the claim.

3. It may be questioned whether past services when rendered under circumstances which create no legal liability, constitute consideration for a subsequent promise.

4. Where the incompetency of a witness is only partial, an objection on that ground should not be entertained until he is asked to testify to those matters as to which he is incapacitated.

5. " 'Where a witness which a party tenders is competent as to certain facts, but not as a general witness, and he is objected to as incompetent,—the party tendering him should state what he proposes to prove by him, so that the court may know that it is proper; otherwise an appellate court can not say that there is any error in refusing to allow him to testify.' "

Opinion by Mr. Justice Knous. Mr. Justice Bock and Mr. Justice Burke concur.

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No. 14540. *Criminal Law; Probation; Constitutional Law. People v. District Court. Decided April 8, 1940. In re Probation of Siraguso. Original Proceedings. Writ of Mandamus ordered issued. En Banc.*

HELD: 1. A district judge may not grant probation to convicted defendant over objection of district attorney.

2. Chapter 140, Section 1, '35 C.S.A. (S.L. 1931, Chapter 136, Section 1) providing that the judge of any district court, may, in certain instances "with approval of the district attorney" grant probation in certain cases, is constitutional.

Opinion by Mr. Justice Bouck. Mr. Justice Bock dissents. Mr. Justice Burke concurs in the conclusion and Mr. Chief Justice Hillard not participating.

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No. 14748. *Wills; Incompetency. In re Estate of McCrone. Decided April 8, 1940. County Court, Denver. Hon. Henry Bruce Teller, Judge. Reversed. In Dept.*

HELD: 1. Although a testator, at the time of executing his will had previously been found incompetent, and the court had appointed for him and his estate a conservator, and although such appointment was in force at the date of execution of the will, it is possible that the testator may have recovered and have been of sound mind and memory.

2. Where caveator alleges facts of incompetency and appointment of conservator, and proponent answers alleging that testator was

mentally competent at time of making will, such defense, if proved, would be good and it was error for the trial court to sustain a demurrer to the answer.

3. The appointment of a conservator is not conclusive.

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

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No. 14315. *Insurance; Suit for Recovery of Money: Right to Jury Trial: Cross-Examination. Kansas City Life Insurance Company v. Lathrop. Decided April 8, 1940. District Court, Denver. Hon. George F. Dunklee, Judge. Reversed. En Banc.*

HELD: 1. Where suit is based upon an insurance policy provision for recovery of money, it is an action at law and it was error for the trial court to refuse a trial by jury.

2. Where suit is based upon claim for disability and defense is to effect that $3500.00 was paid to plaintiff in full settlement it was error for trial court to sustain objection to following question put to plaintiff on cross-examination: "Now, Mr. Lathrop, at that time what did you understand this $3500.00 was being paid to you for?"

Opinion by Mr. Justice Bouck.

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No. 14749. *Equity: Fraud. Scott v. McClain. Decided April 8, 1940. District Court, Denver. Hon. Henry S. Lindsley, Judge. Affirmed. In Dept.*

FACTS: A. Plaintiff brought suit on grounds of fraud against defendants alleging certain fraudulent representations as to a lease and that defendants failed to put lease in good standing thereby causing plaintiff to lose his interest.

B. Defendants claim that plaintiff failed to offer to do equity by restoring them to substantially the same position which they occupied previously.

HELD: 1. The trial court correctly found for plaintiff, and demurrers of defendants to complaint were properly overruled because it appears that the lease was lost through the fault and neglect of defendants, and that plaintiffs could, therefore, not restore the lease to the defendants.

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

No. 14588. *Notes; Statute of Limitations. District Landowners Trust v. Bengston. Decided April 8, 1940. District Court, Denver. Hon. George F. Dunklee, Judge. Affirmed. En Banc.*

HELD: 1. Defense of statute of limitations against a suit on a note held to be good where it appears that more than six years elapsed after last payment.

2. On conflicting evidence trial court held against plaintiff's contention that defendants were estopped to raise question of statute of limitations, and appellate court will not disturb trial court's finding.

3. Case, under statute, not to be taken out of rule of statute of limitations unless alleged new promise or acknowledgment is in writing.

Opinion by Mr. Justice Bakke. Mr. Justice Bock and Mr. Justice Burke dissent.

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No. 14605. *Sanitary Sewer District Bonds; Failure of Town Treasurer to Pay in Numerical Order; Parties. Wanguild v. Town of Haxtun. Decided April 8, 1940. District Court, Phillips County. Hon. Arlington Taylor, Judge. Reversed. En Banc.*

FACTS: Suit brought against town for tortious failure of its agent to comply with plain provisions of the law relative to the disbursement of trust funds coming into his hands by virtue of his office. The town treasurer failed to redeem sanitary sewer district bonds in their numerical order.

HELD: 1. Colorado has no statute limiting the liability of municipalities for its agents' tortious acts in failing to comply with the statute requiring payment of trust funds in a specific manner, and therefore, such suit may be maintained.

2. In such case the town treasurer need not be made a party.

Opinion by Mr. Justice Bakke.

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*Domestic Relations; Custody of Minor Child; Conflict of Laws; Juvenile Courts; Habeas Corpus; Jurisdiction. No. 14759. Decided June 17, 1940. Snyder v. Schmoyer. District Court, Denver. Hon. Floyd F. Miles, Judge. Affirmed. En Banc.*

FACTS: A. Father sought and obtained writ of habeas corpus awarding him custody of minor child. The petition for the writ was based largely on a judgment rendered by Montana Court, after a full hearing on petition by mother, determining that each parent should have the child six months of each year until child is of school age.

B. The mother had custody of child first and brought the child to Denver and refused to surrender him to the father at the end of her six months' period.

C. The mother, anticipating action by the father, filed a "petition in dependency" in the Denver Juvenile Court. This petition was prepared and acknowledged before, but, according to filing stamp, was not filed until the same day that father filed his petition in District Court.

HELD: 1. The district court has jurisdiction in some cases under habeas corpus to determine the matter of the custody of minor children in counties having a population of over 100,000 (Denver).

2. The fact that exclusive jurisdiction has been given to the Denver Juvenile Court in matters concerning the custody of minor children generally does not deprive the district court of its jurisdiction, unless the jurisdiction of the juvenile court is properly invoked or available.

3. Estoppel by judgment is available against the mother since it is not reasonable to believe that there could have been any such changed conditions subsequent to decree of the Montana Court as would justify a re-litigation of the facts already determined by that court.

4. Parties are bound by judgments rendered by courts of competent jurisdiction, whether they expressly agree to that judgment or not; an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character and renders it no more sacred than the ordinary judgment.

5. Parties who have voluntarily submitted their controversy to a court having jurisdiction of the subject matter cannot be allowed to question its authority.

6. Every possible controversy arising concerning the custody of the child does not ipso facto give the juvenile court jurisdiction. The juvenile court was without jurisdiction to proceed with any action on the ground of dependency in this case, for there was involved no new "controversy," as the word is used in the statute.

7. The mother alleges that the father will take the child to Canada and there keep it away from her. It is hardly proper for a Colorado tribunal to adjudicate a possible contempt matter arising in the court of another state.

8. While the language of the statute giving the juvenile court jurisdiction in cases of dependency states that the jurisdiction of district courts to dispose of questions of custody of children in divorce cases shall not "interfere with the jurisdiction of the juvenile court in cases

concerning the dependency of such children," such language shall be construed as meaning dependency in fact and not a fictitious condition.

9. It is not the law that both the child and its custodians may be dragged from court to court and subjected to a ceaseless round of discomfort and litigation at the whim of the petitioner.

10. The decree of the Montana court states that it is (and in fact it is) for the best interests of the child to spend part of its time in the city and part on a ranch.

Opinion by Mr. Justice Bakke. Mr. Justice Bock concurs in the result. Mr. Chief Justice Hilliard, Mr. Justice Bouck and Mr. Justice Young dissent.

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*Water Rights; Conditional Decrees. No. 14474. Decided June 17, 1940. Taussig, et al. v. Moffat Tunnel Water and Development Company. District Court, Grand County. Hon. Charles E. Herrick, Judge. Decrees modified and, as modified, affirmed. En Banc.*

HELD: 1. Conditional decrees concerning water rights were granted by our courts prior to statutory authority. In 1919, the legislature gave statutory authority for such conditional decrees and provided for certain procedure.

2. Construing Section 195 of Chapter 90, 1935 C. S. A., it is held that a court may enter a conditional decree before the diversion and application of water to a beneficial use have been wholly or partially completed.

3. " 'Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.' "

4. In effect, to require the water company to complete its project before granting it any decree would constitute a denial of the constitutional right to divert waters to a beneficial use.

5. It is not an unusual practice in acquiring a decree that the first step be the making of a survey of the project.

6. Under Section 195, where a conditional decree is granted, the court retains supervisory jurisdiction of the question of reasonable diligence and the bona fides of petitioners for conditional decrees.

7. Where only conditional decrees are involved, it is immaterial that the claim statement omits the number of acres of land lying under the proposed project, although before final decree the claim statement must be completed.

8. Where conditional decrees are involved, it is not necessary that the appropriation be for specific water and for a designated and definite purpose. However, the maximum amount of the water to be diverted must be stated.

9. The evidence must show a definite proposed use, even for a conditional decree. It is not good practice to predicate a beneficial use in a conditional or final decree "for beneficial purposes other than irrigation." The language is too indefinite. Some uses have preferences over others and should be specifically stated, even in a conditional decree. The decrees should be modified to show that they relate only to irrigation, domestic and municipal uses.

Opinion by Mr. Justice Bock. Mr. Chief Justice Hilliard not participating.

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*Damages; Exemplary; Verdict; Costs. No. 14760. Decided June 10, 1940. Livingston v. Utah-Colorado Land and Livestock Co. District Court, Moffat County. Hon. Charles E. Herrick, Judge. Reversed. En Banc.*

HELD: 1. It is the general rule that exemplary damages are not recoverable in the absence of proof of actual damages. Upon the question of whether it is essential that the money extent of the actual damages must be found as a predicate to an award of punitive damages, the authorities are in conflict.

2. Colorado follows the rule that where actual damages occur, although not determined in money value, punitive damages will be upheld.

3. But where a jury expressly finds no actual damages, it may not award punitive damages.

4. The recommendation of the jury that both parties pay their own costs is improper and not binding on the court.

5. The taxing of costs as to the branch of the case resolved in favor of the plaintiff was discretionary with the trial court, and under the facts, the trial court did not abuse its discretion.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard not participating.

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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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