Denver Law Review

Volume 14 | Issue 8 Article 5

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

GUARANTY—NECESSITY OF COMPLYING STRICTLY WITH TERMS OF GUARANTY—DIRECTED VERDICT—*Wilcoxson et al. vs. McMullin*—No. 13802—*Decided December 14, 1936—Opinion by Mr. Justice Burke.*

McMullin sold his interest in the Bank of De Beque and as part of the sale, guaranteed in writing the full payment of the notes of one Henderson and Clark within one year, provided that the bank would use *every effort* to collect the amount due, and on the further condition that his guarantee be not divulged. The bank made no effort to collect, nor did it even try to get security for the notes when security was available. The court below gave an instructed verdict for defendant, McMullin.

1. The guaranty was based upon three conditions: First, that the bank use every effort to collect; second, that the guarantee be not divulged; third, that these conditions be kept until January 5, 1932, and the notes remained unpaid.

2. McMullin's liability as guarantor must be strictly construed. It cannot be extended.

3. Diligence required obtaining payment or security covering all or any portion of the debt reasonably possible.

4. The conditions of this guaranty were never met and were expressly repudiated and a directed verdict was proper.—*Judgment affirmed.*

Mr. Justice Young and Mr. Justice Holland dissent.

ESCHEAT—NECESSITY OF ORDER OF COUNTY COURT TO PAY FUNDS TO STATE TREASURER—DEMURRER FOR WANT OF FACTS—*The People vs. Cartwright et al.*—No. 13840—*Decided December 14, 1936—Opinion by Mr. Justice Holland.*

Cartwright, as administrator of an estate, gave bond as such, with a surety company as his surety. When the estate was closed the heirs were unknown and a decree so finding was entered, but there was no order of the county court directing such administrator to pay over the balance on hand to the State Treasurer under the escheat law. The Attorney General in the name of the people brought suit for this balance. The complaint failed to allege that any order had been made by the county court to pay over the balance to the State Treasurer. Demurrer to the complaint was sustained below.

1. In the absence of an order of the county court to pay such balance to the State Treasurer, no duty rests upon an administrator to

make payment under the escheat law, where the heirs are unknown, and a complaint against such administrator and his surety which fails to allege the entry of such an order and the failure to comply therewith is fatally defective.

2. Where a demurrer is grounded upon the alleged fact that there is another action pending between the same parties for the same cause, it is proper to overrule same where it appears that neither the parties are the same nor the cause of action the same.—*Judgment affirmed.*

GUARANTY—LACK OF CONSIDERATION—GUARANTY MADE PURSUANT TO ORAL AGREEMENT—INSUFFICIENCY OF ASSIGNMENT OF ERROR—*The Newton Lumber Company vs. Oberto*—No. 13780—*Decided December 14, 1936—Opinion by Mr. Justice Burke.*

The Newton Lumber Company sued Oberto and the Wilson Lumber and Mercantile Company to recover $3,000 for lumber sold the latter which it was claimed was guaranteed by Oberto. The guaranty was a written statement that if the Wilson Company did not pay the Newton Company in monthly installments for the lumber already sold and delivered, as it was resold, Oberto would. Oberto answered denying consideration. Judgment below went against the Wilson Company and in favor of Oberto.

1. The written guarantee expresses no consideration upon its face and appears to be a mere offer. The only evidence of its acceptance is that it was retained by the Newton Company. Apparently to cure these defects the Newton Company was permitted to amend its reply to allege that the guarantee was in confirmation of an oral guarantee made at the time of the execution of the principal contract. Passing the contention that the oral guarantee, if made, was within the statute of frauds, the writing becomes immaterial if there was no such oral guarantee. As to this, the evidence was in conflict and as against a general judgment we must assume that the court found that it did not exist.

2. Assignments of error must specifically point out the alleged error committed. A mere assignment that the judgment is contrary to law or that the findings are contrary to law, when there are no findings or that the court erred in entering judgment for Oberto for costs are insufficient for the purpose of review.

3. The judgment being a general judgment based upon conflicting evidence will not be disturbed.—*Judgment affirmed.*

CRIMINAL LAW—CONSPIRACY TO ACCEPT MONEY OTHER THAN STATUTORY FEE—SUFFICIENCY OF INFORMATION—*Carr vs. The People*—No. 13983—*Decided December 14, 1936—Opinion by Mr. Justice Holland.*

Carr and O'Toole were tried jointly with one Leisenring on charge of conspiracy to wilfully and corruptly take and receive the sum

of $3,000, which was not a fee or compensation allowed in the enforcement of the liquor law. Carr, who was then Secretary of State and in charge of the liquor law enforcement, was convicted and prosecutes error.

1. Where a defendant is acquitted on a count of an information any error assigned is without avail, as he cannot complain.

2. Where the jury returned their verdict on a holiday and the court advised the jury that it had not followed the instructions and directed that it pursue further deliberations which resulted in a verdict on a holiday, such proceedings by the court were not additional instructions, but were merely an exercise of the powers of the court connected with the receiving of the verdict. Such act is ministerial. Verdicts can be received on a holiday.

3. There was no failure of proof. While the court failed to instruct the jury that there was no direct evidence tending to prove what fees were or were not allowed by law to the state licensing authority, yet the defendant failed to request such instruction, and it is now claimed it was the duty of the court to give such instruction even without the request. No prejudice appears from the failure to give such instruction. All the evidence shows that this money was paid to and received by the defendants in their personal capacity and that the money so extorted was a "fixing" which was a condition precedent before the license would issue. There was no possible inference that the jury could draw that this money was paid as a statutory fee for the issuance of the license.

4. An information is sufficient which describes an offense either in the language of the statute or so plainly that the nature of the crime may be readily and easily understood by the jury.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—AWARD—CHANGING AWARD—NECESSITY OF FINDINGS SUPPORTING SUCH CHANGED AWARD—*National Lumber & Creosoting Company et al. vs. Kelly et al.*—No. 13973—*Decided December 14, 1936—Opinion by Mr. Justice Holland.*

Kelly was awarded compensation for an injury on the basis that he was permanently disabled to the extent of 25% as a working unit. This finding and order was made in 1931. In 1936, the commission made a supplemental award, finding that the claimant was and now is permanently and totally disabled and made an additional award based thereon. A petition for rehearing was filed which was denied, and on appeal to the District Court, the award was affirmed.

1. The award of the commission which was last made, since it changed and increased the former award, should have contained specific findings, based upon the testimony as to a changed condition, as well as specific findings as to error in the former findings.—*Judgment reversed* with directions, and sent back to the commission for hearing and entry of findings.

DEMURRER—PEREMPTORY WRIT—HOME RULE—ORDINANCES—STATUTES—CHARGEABLE KNOWLEDGE OF CONSTITUTION—LEGISLATURE—GENERAL ASSEMBLY—AMENDMENT OF ARTICLES OF CONSTITUTION—RETROOPERATIVE LEGISLATION—*City of Colorado Springs vs. State of Colorado, as Trustees of the Old Age Pension Fund of El Paso County, Colorado*—No. 13709—*District Court of El Paso County—Hon. John C. Young, Judge—Affirmed.*

FACTS: Defendants in error as trustees brought mandamus to compel the payment to them by the city of $4,000 collected for 50 beer licenses. A general demurrer to the amended answer to the alternative writ was sustained, and the writ made peremptory.

Colorado Springs, a "home rule" city, organized under Art. XX of the State Constitution, passed an ordinance providing for the payment of 50% of all beer licenses collected, to be turned over to the Old Age Pension Fund. The city brings error on the grounds that those portions of sections 2 and 3 of chapter 144, page 748, L. 1933, under which the defendant's claim, contravene section 6 of Art. XX and section 11 of Art. II of the State Constitution. Said section 11 forbids the passage of retrooperative legislation. The city says that the disposition of the fees is governed by ordinance and not statute, because this is a local and municipal matter, also that the sections of the ordinance herein referred to are retrospective.

HELD: 1. These questions are disposed of by amended article XXII of the Constitution, L. 1933, page 390, which was part of the Constitution when the ordinance was passed, and which provided that "all intoxicating liquors" became "exclusively" the subject of "statutory laws" from July 1, 1933.

2. If this chapter conflicts in any way with section 6 of Art. XX or said section 11 of Art. II, those were, to that extent, amended by it.

3. The legislature and the city are charged with knowledge of the said Art. XXII of the Constitution and must be held to have acted in the light thereof.

4. The regulation and sale of intoxicating liquors passed under the exclusive control of the legislature, and when it became effective, it operated on all liquor license revenue still existing and undisposed of, as were the funds here in question, and therefore under the full control of the General Assembly. En Banc.

Opinion by Mr. Justice Burke.

Mr. Chief Justice Campbell and Mr. Justice Young not participating.

WATERS—IRRIGATION—FIXING DATE OF PRIORITY—*In the Matter of the Adjudication of Priorities in District No. 1—Klug vs. Ireland*—No. 14044—*Decided December 31, 1936—Opinion by Mr. Justice Burke.*

This was a statutory adjudication for the settlement of priorities to water for irrigation. The court below set Klug's priority for his

reservoir No. 3 as of December 13, 1921. He contends that it should be set as of July 18, 1918, because the evidence shows that he decided to build it on July 6, 1918, and in pursuance thereof he made a survey and filed his map and statement of claim on September 9, 1918, and in 1920 made a contract with Ireland, the then owner, for the purchase of the land on which to build the reservoir, paying $100 down, but never completed the contract of purchase. There was evidence that the actual work of construction did not commence until late in the spring of 1922. There was also evidence that Klug told Ireland to keep the $100 payment, as he did not intend to complete the deal.

1. There was ample evidence to sustain the date fixed by the trial court under the well-recognized rule that diligence must be shown from inception to completion.

2. What constitutes diligence depends upon the facts of each case.

3. Trivial labor and expenditures will not carry the appropriation back by relation to the first substantial act of the appropriator for its acquisition.—*Judgment affirmed.*

DIVORCE—ENTRY OF DECREE NUNC PRO TUNC—UNDER WHAT CIRCUMSTANCES SUCH DECREE CAN BE ENTERED—*Perdew vs. Perdew*—No. 14045—*Decided December 31, 1936*—*Opinion by Mr. Justice Burke.*

In 1921, Alfreada Perdew sued for divorce in the District Court and on February 9, 1921, finding of fact and conclusions of law were entered but no decree of divorce was later entered, and in 1936, she filed a petition for entry of decree nunc pro tunc as of August 10, 1921. She had since remarried one Fifer and brought suit for separate maintenance and he defended on ground there was no marriage and objects to the entry of a decree of divorce in the Perdew case, as he would thereby lose his defense in the separate maintenance action. The latter had lived together for 11 years, both believing that a divorce had been granted, and Fifer in applying for the marriage license reciting such alleged divorce. Perdew also had remarried and had a child as the result of such latter marriage. The court below refused to enter the decree.

1. Where it appears that the plaintiff in the divorce action had requested her attorney, in August, 1921, to have the decree entered and she was informed that he had done so, and the attorney has since deceased; that she enquired of the clerk of the court and was informed that a decree had been entered and the clerk has since deceased and that the trial judge also since deceased, she presented the best evidence available and this was sufficient to warrant the entry of such decree nunc pro tunc.

2. The general rule is that judgments will be entered nunc pro tunc only where they have actually been rendered and the entry omitted, but there are exceptions to this rule.

3. Such decree can be entered in the interest of justice where the delay was the result of mutual misunderstanding.

4. While such nunc pro tunc will not be entered where the rights of third persons are adversely affected, yet in this case, Fifer will only be affected as to his right to defend the separate maintenance suit, while on the other hand he will be relieved of the stigma of bigamy by the entry thereof.

5. The entry of such judgment was within the discretion of the court and Fifer was no innocent person who would be adversely affected by it and the interests of the state and justice require such entry and it was error of the trial court to refuse entry.—*Judgment reversed* with directions to enter decree of divorce, nunc pro tunc.

PHOTOGRAPHS—RIGHT TO PRIVACY IN—WRONGFUL EXPOSURE OF TO THE PUBLIC—IMPLIED CONTRACT NOT TO EXHIBIT—EXPRESS CONTRACT—*McCreery vs. Miller's Groceteria Company et al.*—No. 13636—*Decided December 24, 1936—Opinion by Mr. Justice Butler.*

Dorothy McCreery sought an injunction and damages against defendants on the ground that one of the defendants, a photographer who had taken her picture, exposed her picture to public view without her consent, whereupon she purchased such copy and informed him that she did not desire her photograph exposed to public view and refused permission to expose it, and thereafter that the photographer entered into an agreement with the other defendants whereby such photograph was to be exposed in public places without her consent, to her humiliation, distress and damage. The photograph was thereafter exposed and used in an advertising scheme. General demurrers to the complaint were sustained and the suit dismissed.

1. A complaint to be bad on a general demurrer must be wholly insufficient to present facts sufficient to justify a recovery.

2. When the plaintiff employed the photographer to take her photograph, an implied contract arose that the photographer would not make a commercial use of plaintiff's picture.

3. Such unauthorized use would constitute an invasion of a person's right to privacy.

4. Recovery is generally permitted in such case and it usually rests on the contractual relations between the parties, there being an implied contract to make no additional copies for such use.

5. However, here, the plaintiff after exposure of a copy, purchased such exposed copy and notified the photographer not to display or use it for advertising, so that there was an express contract that her picture would not be so used. Here there was not a mere passive breach, but an intentional breach without any legal justification or excuse.

6. The complaint states a cause of action.—*Judgment reversed.*

Mr. Justice Bouck, Mr. Justice Young and Mr. Justice Holland dissent.

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