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Supreme Court Decisions

Dicta Editorial Board

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INTOXICATING LIQUORS—LICENSE—JURISDICTION—MANDAMUS—*Saunders, Secretary of State vs. Norton*—No. 13946—*Decided May 11, 1936—Opinion by Mr. Justice Holland.*

This is an action in mandamus brought in the county court of the City and County of Denver by Norton to compel Saunders, as Secretary of State and ex officio state licensing authority, to issue to him a renewal of his license to conduct a retail liquor store in the town of Garden City, Weld County, Colorado. Judgment was for Norton on the license feature of the case.

1. Chapter 142, Session Laws of 1935 (liquor law) provides a special method for reviewing the action of the state licensing authority in refusing a license and is controlling. This special proceeding provides for a review by application of writ of certiorari to any court of general jurisdiction having jurisdiction of the place for which the application for license was made.

2. The application for license having been made in Weld County, the county court of the City and County of Denver had no jurisdiction over the subject matter of the litigation and the demurrer which raised this question should have been sustained. Respondent did not waive the jurisdictional question by proceeding further. He could do nothing to invest the court with jurisdiction over a matter of which, in view of the statutory provision, it did not have, and could not acquire. All the subsequent proceedings, including the judgment, were void.—*Judgment reversed with directions to sustain the special demurrer and dismiss the action.*

Mr. Justice Hilliard not participating.

AUTOMOBILES—CAR STRIKING PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—*Publix Cab Company, et al. vs. Phillips*—No. 13667—*Decided May 11, 1936—Opinion by Mr. Justice Young.*

Phillips recovered judgment below for damages for personal injuries caused by his being struck by a taxicab belonging to defendants which he claimed was negligently driven and operated.

1. There was a sufficient showing of negligence on the part of the defendant's driver to carry the case to the jury.

2. Section 15-A of the Denver ordinance giving a pedestrian the right of way at a street crossing means that when a person is crossing a street at an intersection to which the provisions of the ordinance are applicable, and an automobile is approaching the crossing at a speed

and on a course such that he or the car must alter speed or direction to avoid a collision, the driver of the auto must so act as to avoid running down the pedestrian, and his failure to do so is a violation of the ordinance and constitutes negligence.

3. Where there is no conflict in the testimony bearing upon the subject either of negligence or contributory negligence, the court may, in a clear case, treat the question as one of law, and grant a nonsuit or direct a verdict; but when the determination of the question depends upon the inference to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent and upright men, then the question should be submitted to the jury under appropriate instructions, even though there be no conflict in the testimony.

4. The question of contributory negligence was properly submitted to the jury.—*Judgment affirmed.*

Mr. Justice Holland dissents.

FRAUD—SUFFICIENCY OF COMPLAINT—CHATTEL MORTGAGES FRAUDULENT AS AGAINST CREDITORS—*Bowman, as Trustee in Bankruptcy vs. Melnich, et al.*—No. 13740—*Decided May 4, 1936—Opinion by Mr. Justice Holland.*

A demurrer was sustained by the district court to plaintiff's amended complaint, on which he elected to stand, and cause was dismissed. He seeks reversal.

1. This action purports to attack the validity of the chattel mortgages, and even though it is by a trustee in bankruptcy, the bankruptcy act is not applicable. The solution of the question of whether or not the mortgages are valid depends upon, and is controlled by, the laws of the state where they were executed.

2. The demurrer was general upon the ground that the complaint as amended did not state sufficient facts to constitute a cause of action, and was argued on the ground that it does not allege that the plaintiff represents creditors who were such at the time of the execution of the chattel mortgages or prior thereto; who were creditors at the time of the commencement of this action; also that it does not allege that the defendants and the bankrupt conspired or agreed to do the things of which complaint is made for the purpose of hindering, delaying or defrauding subsequent creditors, alleged to have been defrauded; and further, because there is no allegation that the bankrupt became insolvent at the time of the making of the chattel mortgages. It was not necessary to allege the above matters in the complaint.

3. The question presented by the amended complaint is not one of fraudulent intent, and it is not a question of whether the trustee of all the bankrupt's creditors represents a particular creditor who was such at the time of the conveyance in question or subsequent thereto;

neither is the question one of failure to allege that the bankrupt was or became insolvent at the time of and on account of the transaction. The real question presented upon the face of the complaint is: Was the transaction ipso facto a fraud upon the then existing creditors and an increase of the liability of the corporation from which it received no benefit?

4. Where, among other things, the amended complaint alleges that the chattel mortgages were made while the said bankrupt was indebted in large sums of money and in contemplation of the incurring of other large debts, by reason whereof the chattel mortgages were fraudulent and void as to the creditors of said bankrupt, and the plaintiff, as trustee of the bankrupt estate, it stated a cause of action and the demurrer should have been overruled.

5. If the allegation as to the then existing indebtedness is true, the defendants, as directors and sole stockholders, are chargeable with knowledge of the existing financial condition of the company. By the transaction, they added nothing to the assets of an indebted corporation, but did increase its liabilities to the amount of the questioned chattel mortgages, and by the transaction they shifted their position from that of stockholders of an involved corporation to that of preferred creditors with a first lien upon the assets of a burdened corporation from which they severed their connections. While the transaction may have been free of any dishonest intention, yet it operated in law as an injury and fraud upon creditors.—*Judgment reversed with instructions to reinstate the amended complaint.*

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

SALES — INSTALLMENT CONTRACT FOR DELIVERY OF MILK — BREACH—RIGHT TO RESCIND—WARRANTY—*Myers vs. Anderson*—No. 13660—*Decided March 16, 1936—Opinion by Mr. Justice Holland.*

Myers contracted to purchase daily supply of milk from Anderson's dairy for a period of five years to be distributed to Myer's customers. There was a warranty that milk should be pure and unadulterated new milk and comply wtih the laws, rules and regulations of the State of Colorado and City of Alamosa regarding the inspection of cows and the handling of milk and its by-products. The undisputed evidence showed that the milk at different times was not of the quality required and that it was too high in bacteria count to comply with the ordinance and after many of said deliveries were accepted under protest and the milk still failed to comply with the contract, Myers declined to accept any more deliveries. Suit below was for damage for breach of contract in refusing to accept deliveries and verdict was for plaintiff for damages.

1. Myers was bound only to take and pay for pure milk.

2. If at times he accepted an inferior product, he did not thereby waive his right to refuse to take milk not in accordance with the contract.

3. Even though this was in the nature of an installment contract, the rule that a buyer in accepting installments of milk of an inferior quality waives the right to refuse further deliveries, should not be strictly applied.

4. When Anderson defaulted then Myers could rescind the contract as a whole if Anderson persisted on delivering installments of inferior milk.

5. The uncontradicted evidence discloses that Anderson failed to comply with the terms of the contract and that Myers was relieved therefrom and Myers' motion for a directed verdict should have been granted.—*Judgment reversed.*

MUNICIPAL CORPORATIONS—ZONING ORDINANCES—BUSINESS DISTRICT—RESIDENCE DISTRICT—MANDAMUS—*Hedgcock vs. People of the State of Colorado on the Relation of Arden Realty and Investment Company*—No. 13566—*Decided April 6, 1936*—*Opinion by Mr. Justice Hilliard.*

Arden Realty and Investment Company brought suit in mandamus against Hedgcock as building inspector, Denver, to grant relator a permit to erect a store building on its property. The defense was that the city refused to issue a permit because the relator's property was within an area zoned for residence purposes, as evidenced by Denver's zoning ordinance of 1925. Writ was granted below.

1. Where it appears that the relator's property is contained in a zone restricted to use for residence purposes only, but that the property immediately surrounding it is used almost entirely for business purposes and that the property itself is more valuable for business purposes than for residence purposes and is particularly suitable for business use and that the injury to nearby residence property would be negligible if the property were devoted to business purposes rather than residence purposes, an ordinance limiting the use of the property solely to residence purposes is unreasonable and arbitrary and such a classification should not be upheld.

2. A general ordinance zoning property into business districts and residence districts and otherwise is constitutional, but such a holding is not to be construed as passing upon and approving each and every provision of the ordinance, nor as fixing its application to every circumstance that may arise.

3. Where in a particular case to uphold the ordinance would work an arbitrary and oppressing result, relief should be granted from the operation thereof.

4. The courts have a right to inquire as to the reasonableness of a zoning ordinance in its application to a given situation.

5. Where it appears that the invasion of the property of the plaintiff was serious and highly injurious, and since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the constitution and cannot be sustained.

6. Mandamus was the proper remedy to invoke in this case.

7. The clear inference from the testimony is that prior to the adoption of the zoning ordinance the block in which the relator's property is situated was a business center and has continued so and that it ought never to have been zoned otherwise.—*Judgment affirmed.*

Mr. Justice Burke and Mr. Justice Holland dissent.—Mr. Justice Bouck will file an opinion announcing his position.

WILLS—ADVANCEMENTS—EXTRANEOUS WRITINGS—EFFECT OF INVENTORY—ESTOPPEL—*In the Matter of the Estate of Ida Grigsby, Deceased, et al. vs. Grigsby, Administratrix*—No. 13785—*Decided April 6, 1936—Opinion by Mr. Justice Holland.*

Gail G. Grigsby, administrator of his mother's estate, filed petition in the county court praying that certain notes that his father had given to his mother be adjudged and decreed to be no part of the estate and that the notes be decreed to be satisfied and cancelled. Under the terms of her will she left one-half of her estate to her husband and $1000 to her son, Gail, and the balance to her daughter, Ruby. Her husband had executed notes to her aggregating $16,000 and in an extraneous writing the deceased indicated that she did not wish her husband's notes to appear in her estate on account of the inheritance tax, but that the notes must be deducted out of his share of the estate. The demurrer was sustained both in the county court and the district court.

1. The petition to cancel the notes seeks to have invoked the doctrine of advancements but the question of advancements has no place in consideration of the disposition of a testator's estate unless such advancements are specifically mentioned, and provision for their disposition made in the will.

2. Extraneous written statements even tending to support the theory of advancement are insufficient to overcome the express terms of the will where the will is clear and unambiguous.

3. However, in this case the extraneous writings indicate that the testatrix considered the notes in question as part of the assets of her estate, wherein she directed in such statements that "but the notes must be deducted out of his share."

4. Where the maker of the notes was the executor of the estate and listed the notes in the inventory as part of the assets of the estate he and his successors are estopped from claiming that they were not assets to the estate.

5. Where the maker of the notes accepts the return of the notes in settlement of his distributive share of the estate, he and his successors are estopped from claiming that the notes were cancelled or that they were not part of the estate.—*Judgment affirmed.*

PRACTICE—DISMISSAL FOR FAILURE TO FILE COMPLAINT IN TEN DAYS—POWER TO SET ASIDE DISMISSAL—*Howell et al. vs. Goldberg*—No. 13803—*Decided March 16, 1936—Opinion by Mr. Justice Bouck.*

Suit was instituted by service of attorney summons. Complaint was lodged in district court under 10 days, but was mislaid and never filed. Case was dismissed on motion for failure to file complaint. Later order was entered over six months later setting aside dismissal and reinstating case which was then, on motion of plaintiff, dismissed without prejudice, a new suit having been filed.

1. Where a motion to dismiss on ground of failure to file complaint within 10 days after service of summons is granted without notice to opposite party in the suit and on newly discovered evidence the lower court found that the complaint had been lodged but had been lost by the clerk with no fault of plaintiff, it was proper to set aside the dismissal, reinstate the case and permit plaintiff to take a voluntary dismissal without prejudice, so that res judicata could not be interposed in another case between the same parties on the same cause of action.

2. Rule 5, which provides that every dismissal shall be held to be with prejudice unless differently ordered by the court, has no application to facts in present suit.

3. When plaintiff had no notice of hearing of dismissal and had no opportunity of raising question of whether suit should be dismissed with or without prejudice, the court below had jurisdiction to reinstate the action and permit plaintiff to dismiss without prejudice.—*Judgment affirmed.*

APPEAL AND ERROR—REVERSAL FOR INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—TRIAL DE NOVO—SUFFICIENCY OF SHOWING—*Youngblood vs. Bosick*—No. 13907—*Decided April 6, 1936—Opinion by Mr. Justice Young.*

This case was before the supreme court before and was reversed for insufficiency of the evidence to support the verdict and for error of the trial court in not sustaining a motion for a directed verdict. After the remittitur was sent back to the district court the plaintiff sought a trial de novo and her attorney filed an affidavit in support thereof in an attempt to show that on a new trial the plaintiff would produce competent evidence to support her cause of action. The court below sustained a motion to dismiss and the court below denied a trial de novo and dismissed the complaint with prejudice.

1. In order to warrant granting a new trial on the ground of newly discovered evidence, the requirements are that it be such as will probably change the result if a new trial is granted; that it has been discovered since the trial; that it could not have been discovered before the trial by the exercise of due diligence; that it is material to an issue in the case; that it is not merely cumulative to the former evidence; and

that it does not merely tend to impeach or contradict the former evidence, except it may be in cases where it clearly appears that it would probably change the result in case of a new trial.

2. Where the judgment is reversed for insufficiency of evidence and the cause is remitted to the lower court it is in the sound discretion of the lower court to pass on the question whether or not the showing of newly discovered evidence is sufficient to warrant retrying a case and its judgment will not be disturbed except in case of abuse of discretion.—*Judgment affirmed.*

TAXATION—EXEMPTIONS—SCHOOLS—LOTS AND GROUNDS—*Horton, as County Treasurer, et al. vs. The Fountain Valley School of Colorado*—No. 13650—*Decided April 6, 1936*—*Opinion by Mr. Justice Holland.*

The Fountain Valley School of Colorado is a corporation organized under the Colorado laws for educational purposes and its charter indicates that it is not organized for pecuniary profit, the object being to maintain a school for boys in the nature of a ranch school where they would have the opportunity to not only have preparatory school work but riding horseback, and for this purpose the school acquired a ranch containing 1600 acres of which approximately 75 acres adjacent to the buildings was irrigated land and the residue being dry land. Action was brought below to enjoin the taxing officials from taxing the lands and to prevent the issuance of tax deed on taxes formerly assessed. The court below held that the buildings and that part of the land adjacent to the buildings was exempt to taxation, but that the balance of the land used merely for horseback riding purposes was not exempt.

1. Where it appears that the school was organized not for profit and that not only the buildings but some 1600 acres of land was used in connection with the school for the purpose of carrying out school purposes not only the buildings and the ground immediately joining, but all of the land is exempt from taxation.

2. There is no constitutional limitation as to the number of lots or the amount of land that may be held by schools, neither is there any statutory limitation as to the extent of grounds that may be used in connection with schools.

3. While the statute of exemptions used the word "lots" lots include "grounds."

4. The fundamental object of the law exempting school property from taxation is to exempt property used for school purposes. To carry out this design, the uses permissible must necessarily embrace all which are proper and appropriate to effect the objects of the institution claiming the benefits of the exemption.—*Judgment affirmed insofar as it exempts a portion of the property from taxation, and reversed, as to the non-exemption applied to the residue of the real property involved.*

Mr. Justice Burke and Mr. Justice Butler concur for affirmance of the judgment in its entirety.—Mr. Justice Young not participating.

NEGOTIARLE INSTRUMENTS—INSTRUCTIONS—ORAL EVIDENCE TO SHOW CONDITIONAL DELIVERY—*McCaffrey vs. Mitchell*—No. 13536—*Decided April 6, 1936—Opinion by Mr. Justice Holland.*

In 1929 McCaffrey sold to Mitchell certain real property and as part of the consideration Mitchell gave his promissory note for $200 secured by second deed of trust, which note is in controversy. The defense was that the plaintiff had orally agreed to look for payment of the note only to the real property and second, that the plaintiff had accepted certain assignment as payment and, third, that there was another suit pending for the same cause of action in justice court. At the trial the court below dismissed the first and third defenses and submitted to the jury solely on the defense as to whether or not the assignment had been accepted as payment.

1. Where there is no evidence to show an implied acceptance of an assignment in settlement, it is error to submit an instruction thereon to the jury that such acceptance might be either express or implied.

2. An attorney employed to collect a note has no implied authority to settle the note otherwise than for cash.

3. An attorney without special authority who receives an assignment instead of cash in settlement of a note does not thereby bind his client.

4. It is error for the court not to submit to the jury the defense that as part of the consideration for the execution of the promissory note that the payee orally agreed at the time the note was signed that the payee would look only to the property secured by the note and would not hold the defendant personally liable on the note.

5. While ordinarily, parol evidence may not be produced to vary the terms of a promissory note, yet when the controversy is between the original parties to the note, parol evidence is admissible which goes to the very existence of the note as an actual obligation. Where the parol evidence is to show that it had no validity as a binding contract and that it was delivered conditionally, parol evidence is admissible.

6. The defense that a prior suit was still pending in justice court is properly stricken, where it appears that the former suit was brought in justice court and that there was a request by the plaintiff to dismiss it and that for more than a year no further action was taken in the justice court by either party, and under such circumstances the action was legally discontinued by abandonment.—*Judgment reversed.*

Mr. Justice Bouck will file a specially concurring opinion.—Mr. Justice Young specially concurs.

MECHANIC'S LIEN — MOTION — MOTION FOR NONSUIT — SUFFICIENCY OF EVIDENCE—QUANTUM MERUIT—*Fagg vs. Courtright*—No. 13782—*Decided April 6, 1936—Opinion by Mr. Justice Bouck.*

Courtright brought suit below against Fagg to enforce a mechanic's lien. Money judgment was entered and a lien was decreed upon

certain real property. Plaintiff was a plumbing contractor and entered into a written contract to furnish plumbing for a cottage camp which provided for certain payments to be made when the rough work was completed and the balance to be paid upon completion of the contract. After the plaintiff had completed the rough work the defendant became financially unable to make the payments and offered to enter into a new contract, which was declined, and as payments were not made the plumbing contractor ceased work.

1. Under the circumstances the plumbing contractor was entitled to withdraw from the work and to recover as for quantum meruit.

2. The evidence being conflicting the appellate court has no right to interfere with the conclusions duly arrived at in the trial court on conflicting evidence.—*Judgment affirmed.*

PLEADING—MOTION FOR JUDGMENT ON THE PLEADINGS—ISSUES OF FACT—TESTAMENTARY INSTRUMENT—*Franco et al. vs. Gould, Administrator*—No. 13898—*Decided March 30, 1936*—*Opinion by Mr. Justice Bouck.*

This action was brought in the district court by the administrator of the estate of one Thomas Roberts to set aside a deed filed and acknowledged by Roberts, dated June 2, 1934, and purporting to convey certain real estate to George Franco and Nellie Franco. The complaint was based on fraud, duress and undue influence, principally, and the defendants denied all these allegations in their answer and the answer also contained a second defense setting up a written contract for the conveyance of the land pursuant to which the deed was executed.

The plaintiff failed to plead to the second defense and filed a motion for judgment on the pleadings which was sustained and judgment entered against the Francos, ordering a cancellation of the deed.

1. A motion for judgment on the pleading is never proper when there remains any issue of fact which has not been tried.

2. Question whether or not the deed is a mere testamentary instrument and not executed with the formalities prescribed for a will, no opinion is expressed thereon, as the case is being sent back for further proceedings. To pass on the question at this time would be to treat the motion for judgment on the pleadings as equivalent to a general demurrer. That would be contrary to good practice and would be an invasion of the field properly belonging to the trial court.—*Judgment reversed with directions.*

IS THIS A PART OF THE NEW DEAL?

"* * * for though we have seen much of the liberality of Nevada practice, we assume that even in that forward-looking jurisdiction parties to a cause of divorce may not litigate by day and copulate by night, inter sese et pendente lite."

Holt vs. Holt, 77 Fed. (2) 538, at 540, U. S. Court of Appeals for District of Columbia.