Denver Law Review

Volume 12 | Issue 1 Article 8

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

BILLS AND NOTES—EVIDENCE—CREDIBILITY—RECORD—HOLDER AFTER MATURITY—RELEASE OF ATTACHMENT—*Vigil vs. Pacheco*—No. 13586—*Decided Oct. 1, 1934—Opinion by Mr. Justice Burke.*

These parties appear in reverse order. This was a suit to cancel a promissory note. Defendant counterclaimed and sued out a writ of attachment. A general demurrer to cross-complaint was filed and ruling reserved. On trial, plaintiff has judgment.

1. The evidence is ample to support the judgment.

2. The credibility of witnesses, weight of the evidence and inferences therefrom are for the court.

3. The record must be viewed in the light most favorable to the successful party.

4. The holder after maturity takes subject to defenses, including illegality and want of consideration.

5. Judgment against attaching parties releases the property, restores proceeds, if any, and dissolves the writ.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—WIDOW NOT ENTITLED WHERE SEPARATED FROM HUSBAND—*Clarke vs. Clarke, et al.*—No. 13592—*Decided Oct. 1, 1934—Opinion by Mr. Justice Hilliard.*

Edward Clarke, an employee of the City and County of Denver, was struck and killed by lightning while in the course of his employment. Claim for compensation was made before Industrial Commission by his widow, sister and mother. Compensation was awarded the mother alone and this was affirmed by district court.

1. A widow is properly excluded from compensation where it appears she was separated from her husband at time of his death and was not dependent upon him in whole or in part.—*Judgment affirmed.*

APPEAL AND ERROR—APPEAL BOND—AFFIDAVIT OF INSUFFICIENCY—NEW BOND—*Walker vs. First Industrial Bank*—No. 13597—*Decided October 1, 1934—Opinion by Mr. Justice Butler.*

1. Upon appeal from the justice court to the county court, the sufficiency of the appeal bond may be attacked by motion supported by affidavits, and it is proper for the county court to consider such affidavits.

2. The county court is under no legal duty to give a litigant repeated opportunities to file a sufficient bond, but it has the discretionary power to do so.—*Judgment affirmed.*

PLEADINGS AND PRACTICE—JUDGMENT ON PLEADINGS AFTER ISSUE TENDERED—RECOUPMENT—LIMITATIONS—*Wyatt vs. Burnett*—No. 13599—*Deecided October 1, 1934—Opinion by Mr. Justice Bouck.*

1. In an action by a physician to recover for services rendered, a judgment on the pleadings in his favor is prejudicial error where the answer had put in issue the value of such services.

2. The answer, in such a case, may allege the physician's negligence by way of recoupment, notwithstanding the provisions of Ch. 130, S. L. 1925.—*Judgment reversed with directions.*

CHANGE OF VENUE—*Welborn vs. Bucci*—No. 13580—*Decided October 8, 1934—Opinion by Mr. Justice Bouck.*

Welborn, who was sued in the county court, applied for a change of venue, which was denied. Standing on his motion he suffered default and judgment to go against him, but appealed to the district court, where his motion for change of venue was again denied and default again entered, and he brings this case here for review.

1. Th Code of Civil Procedure provided that in all other cases (including the case at bar) the action shall be tried in a county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant, in such county * * *. Actions upon contracts may be tried in the county in which the contract was to be performed * * *.

In this case the defendant was served in county of plaintiff's residence and this was an action upon a contract and it is clear that under the code provision a trial could properly be had, if not in the county of defendant's residence, then only in the county in which the contract was to be performed.

The action was brought in the county where the defendant resided and also in the county where the contract was to be performed and the court below did not abuse its discretion in denying the application for a change of venue.—*Judgment affirmed.*

INFANTS—DEPENDENT—JURISDICTION OF JUVENILE COURT—PARENTAGE—RAPE—*Dikeou vs. The People, etc., in the Interests of Cassidenti*—No. 13585—*Decided October 15, 1934—Opinion by Mr. Justice Burke.*

1. A child is dependent, even though it obtains all its necessary sustenance from its mother, if the mother is without means of support and must be cared for by charity.

2. The juvenile courts have authority to determine the question of dependency. Even though the statutes do not specifically give said courts authority to determine the question of parentage, such authority

is conferred by necessary implication, the legislative interest being made clear by Sec. 650, C. L. 1921.

3. In a dependency proceeding the juvenile court is not deprived of jurisdiction through the circumstance that defendant's fatherhood of the child arose from the commission of a rape.

4. Fact that the questions of non-support and parentage might have been tried in other courts under different statutory provisions does not deprive the juvenile court of the jurisdiction given it in juvenile delinquency and dependency cases.—*Judgment affirmed.*

CHATTEL MORTGAGES—EQUITABLE ASSIGNMENT—CONFUSION OF GOODS—*International Harvester Co. vs. McFerson*—No. 13587—*Decided October 15, 1934*—*Opinion by Mr. Justice Burke.*

McFerson sued one Olander and obtained judgment for $1,800.00. In aid of execution the Great Western Sugar Co. was garnisheed. It answered that it owed Olander for sugar beets over $2,600.00 which was claimed by the Harvester Co. and others. The Harvester Co. intervened, claiming a part of the proceeds under its chattel mortgage. McFerson had judgment and the Harvester Co. brings error.

1. A chattel mortgage upon "my full undivided one-half interest in ten acres of sugar beets" where at the date of the mortgage the mortgagee had over 40 acres in the field, such mortgage is invalid for uncertainty in description.

2. The doctrine of equitable assignment to reach cash proceeds of sale of mortgaged property only applies where a fixed proportion is specified.

3. The mortgagee is only protected by the doctrine of confusion of goods under which it would be entitled to a pro rata share where there was an original separation of the mortgaged property.

4. The doctrine of confusion of goods does not apply where the commingling was with the knowledge and consent of the mortgagee.—*Judgment affirmed.*

BANKS—STOCKHOLDERS' DOUBLE LIABILITY—COLORABLE TRANSFER OF STOCK—*McFerson vs. Anderson*—No. 13590—*Decided October 15, 1934*—*Opinion by Mr. Justice Bouck.*

The State Bank Commissioner seeks reversal of a judgment which dismissed an action brought by him against Anderson to recover on his statutory liability as a shareholder in a state bank.

1. Where a stockholder in a state bank transfers his shares of stock for an insignificant amount in cash and takes a note for the balance with no expectation that the note will be paid, such transaction is merely colorable.

2. Under these circumstances the seller of the stock was still the equitable owner even though the stock had been transferred.

3. Such party is not exempt from statutory liability even though the stock he transferred is held as collateral security for the payment of the note because the note did not represent a bona fide debt.—*Judgment reversed.*

ELECTIONS—CONTEST—SERVICE—TIME TO PRESENT DEFENSES—SUFFICIENCY OF PETITION—*Cruse vs. Richards*—No. 13618—*Decided October 15, 1934—Per Curiam.*

1. In an election contest following a primary election, an attempt was made to obtain service on the defendant contestee at his place of residence on the fourth day after the election. Defendant was absent on business which had taken him to another part of the state. He returned on Sunday, the fifth day after the election, but was not personally served until Monday. Prior to the end of the fifth day after the election copies of the summons and petition had been left with the clerk of the court in ostensible compliance with the last sentence of Sec. 7574, C. L. 1921. Held, said portion of Sec. 7574 did not apply under the facts shown, and the service was defective. A motion to dismiss the proceeding was sustained.

2. Contestee had filed a demurrer on the ground of lack of jurisdiction because of defective service and on the ground of insufficient facts to constitute a cause of action. Such demurrer had been filed at the same time as the motion to dismiss. Primary election contests require early determinattion. A summary procedure has been provided for such purpose and it is proper to present all defenses at the same time. Consequently, the filing of the demurrer simultaneously with the motion was not a waiver of objection to the defective service.

3. The petition in a contest proceeding must allege facts which will enable the court to determine that a different result will follow in the vote by reason of such facts. It is not sufficient to set out mere general conclusions.—*Judgment affirmed.*

BUILDING AND LOAN ASSOCIATIONS—CERTIFICATES—CONSTRUCTION—STATUS AS SHAREHOLDER OR CREDITOR—INTEREST PAYMENTS—*Exchange National Bank, etc., vs. Receivers of the City Savings, Building and Loan Association*—No. 13490—*Decided October 22, 1934—Opinion by Mr. Justice Bouck.*

1. A certificate, entitled "Certificate of Deposit," issued by a building and loan association, reciting the deposit with it of a specified sum of money by a named person, repayable at a definite time, with interest at a rate therein stated, and which further recites: "The person named hereinabove is a member of said Association, and is the owner of one share for each One Hundred Dollars of the amount hereof," is a certificate of stock. The holder thereof is a shareholder and member of the association, not a creditor.

2. The status of the certificate holder is the same as that above stated, even though the certificate, otherwise identical with one described above, states that the certificate holder is the owner of such stock, "if issued."

3. Fact that the certificate uses the word "interest" to describe the return stipulated in the certificate does not mark the transaction as a loan to the association.—*Judgment affirmed.*

PRINCIPAL AND AGENT—SCOPE OF AGENT'S AUTHORITY—PRINCIPAL'S KNOWLEDGE OF AGENT'S ACTS—*Zeller, et al. vs. Taylor* —No. 13564—*Zeller, et al. vs. The Morey Mercantile Company* —No. 13565—*Decided October 22, 1934—Opinions by Mr. Justice Butler.*

The scope of an agent's employment is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or, in the exercise of ordinary care, ought to know, the agent is doing in the transaction. Agency and the extent of the agent's authority may be proved by circumstances. Facts examined and determination made that the principals were bound by purchases made for them by the agent.—*Judgments affirmed.*

EXECUTION—WRONGFUL LEVY—DEMAND ON THE SHERIFF—*Hollenbeck vs. The People, for the Use of Churchill*—No. 13298—*Decided October 22, 1934—Opinion by Mr. Justice Bouck.*

1. The defendant, Hollenbeck, as sheriff of Chaffee county, levied an execution on a judgment against E. O. Churchill against property which was conclusively proved by the evidence to belong to Mrs. Churchill. Prior to the time of the levy, the sheriff was notified and advised by Mrs. Churchill and by her attorney concerning this fact.

2. The main objection to the verdict was that Mrs. Churchill had never made a demend of the sheriff for possession of her property. Where, as here, the sheriff was forewarned, such a demand is not necessary.—*Judgment affirmed.*

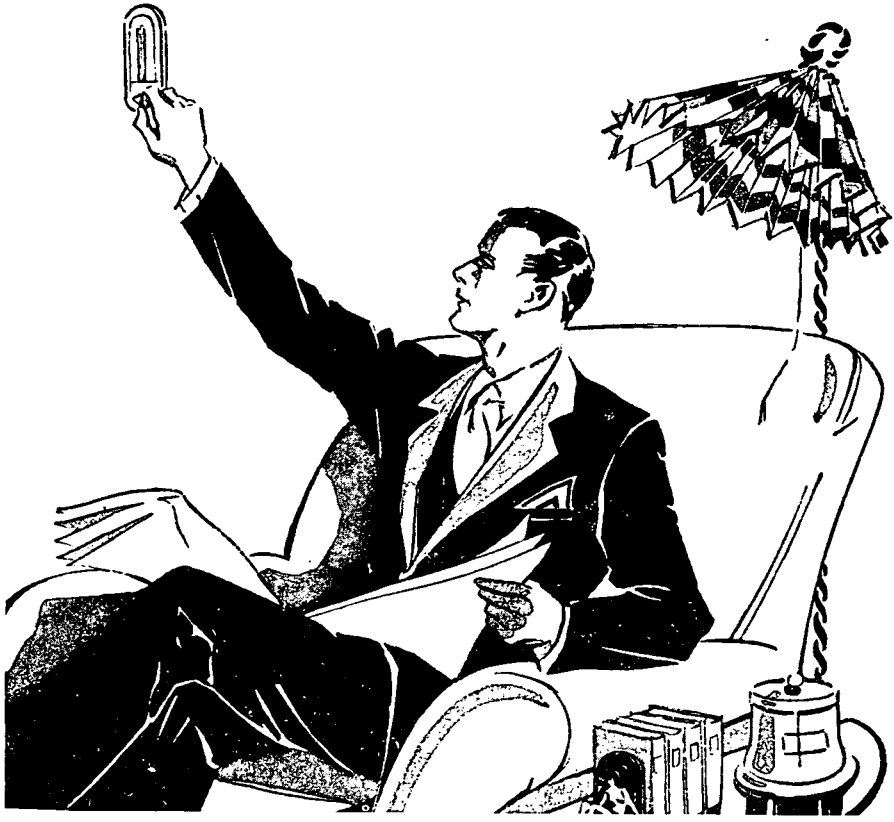
MINING CLAIMS—TITLES TO—WITNESSES EXCLUDED—CROSS EXAMINATION UNDER STATUTE—ORDER OF PROOF—*Kline et al. vs. Slater et al.*—No. 13075—*Decided October 22, 1934—Opinion by Mr. Justice Burke.*

1. U. S. Code, Title 30, Sec. 30, provided for actions to determine the fee in mining property. It is not proper, therefore, to attempt to secure an adjudication of equitable interests in an action brought under this section. A motion to strike parts of a complaint setting up the interests of a trustee was properly sustained.

2. When witnesses are excluded, pursuant to call, and one not

knowing of the rule, listened to part of the testimony and was later used as a witness, it is not error unless the record discloses some prejudice. It was a matter within the court's discretion.

3. An objection was made to cross examination under the statute, attacking the defendant's claim. The objection was sustained on the ground of order of proof. Order of proof is discretionary with the court within reasonable limits.—*Judgment affirmed.*



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