Denver Law Review

Volume 12 | Issue 10 Article 8

January 1935

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

WORKMEN'S COMPENSATION — TEMPORARY DISABILITY — PERMANENT DISABILITY—POWER OF COMMISSION TO REVIEW AWARD —*Consolidated Coal and Coke Co. vs. Todoroff*—No. 13721—*Decided June 17, 1935—Opinion by Mr. Justice Hilliard.*

A proceeding before the Industrial Commission; claimant prevailed there and the District Court affirmed the order. The employer and insurer company sued in error.

1. Where it appears that prior to claimant's injury he had been suffering from varicose veins in the injured leg, but that not until such injury was he unable to work and that the injury evidently caused an ulceration made worse by the varicose condition, such showing warranted the extended temporary disability found by the Commission, and with reference to permanent disability there was sufficient new evidence on rehearing to justify the Commission's modified findings.

2. The claim that the awards are not supported by the findings is without merit.—*Judgment affirmed.*

CONTRACTS—WAGES—WHEN WAGES ARE DUE UNDER CONTRACT TO PAY WHEN CONVENIENT—*The Royal Tiger Mines Co. vs. Ahearn*—No. 13499—*Decided June 17, 1935—Opinion by Mr. Justice Young.*

Mrs. Ahearn, as assignee of her husband, sued the Royal Tiger Mines Co. for balance of wages earned by him, and had judgment below.

The mining company being in financial difficulties, its employees, including Ahearn, made a contract in substance that rather than have the mine shut down they would continue and work, the company to pay them 40% of their wages in cash or merchandise, and the remaining 60% to be paid whenever it was convenient for the mining company to pay it.

1. Under such a contract it is not a contract for an indefinite postponement for the time of payment but is an agreement to wait a reasonable time for payment of the balance, and where more than seven months lapsed after the last services were performed and before suit was commenced, and it appears that the company's financial condition is such that to postpone time of payment further would jeopardize the chance to collect it out of capital assets, and it further appears that the work done by the wage earner has contributed to the capital assets of the company, the Court below was justified in holding that the plaintiff had waited a reasonable time and that the plaintiff was entitled to recover under the contract.—*Judgment affirmed.*

SCHOOLS—SCHOOL DISTRICT—POWER OF SCHOOL BOARD TO DISMISS TEACHER WITHOUT HEARING—*Roe vs. Hanington et al.*—No. 13474—*Decided June 17, 1935—Opinion by Mr. Justice Campbell.*

Miriam E. Roe had been a teacher in the public schools of the City and County of Denver continuously for eight years when she was dismissed by the Board of Education of the School District on the ground of incompetency without any charges being filed and without any hearing. The Court below denied application for writ of mandamus.

1. Under Section 8444, C. L. 1921, a teacher in a school district having 20,000 or more inhabitants cannot be summarily dismissed unless charges in writing are filed with the secretary of the board, and the teacher given, at least, thirty days' notice of the charges, and that the teacher shall thereafter be entitled to a hearing upon the charges.—*Judgment reversed with directions to sustain the writ of mandamus and reinstate the teacher.*

FIXTURES—ATTACHMENT—OPTION OR CONTRACT OF SALE—*Dierks vs. Fischer*—No. 13421—*Decided March 25, 1935—Opinion by Mr. Justice Holland.*

1. Contract construed and held to be a mere option and not a contract of sale.

2. Where removable machinery and equipment is placed on a mining claim by holder of an option to purchase and option is not exercised, he has a right to remove the same and they do not become fixtures which are a part of the realty where the option contract did not require him to place improvements on the real estate and the act of installing them was purely voluntary on his part.

3. The character of the occupancy is the determining feature upon the question of the right to remove improvements.—*Judgment affirmed.*

TAXATION—COUNTIES—TOWNS—LIABILITY OF COUNTY—PROPERTY FOR SPECIAL IMPROVEMENT ASSESSMENT LEVIED BY TOWN—*Board of County Commissioners of County of Douglas vs. Town of Castle Rock*—No. 13478—*Decided June 10, 1935—Opinion by Mr. Justice Campbell.*

The town of Castle Rock brought suit against the Board of County Commissioners of Douglas County to recover the amount of special assessment sewer tax which the town had levied upon the property of the County upon which the County Court house is situate. The Court below overruled the general demurrer to the complaint and entered judgment.

1. A municipality has power to levy special improvement taxes on County property.—*Judgment affirmed.*

EQUITABLE LIEN—FORECLOSURE—ALTERATION OF DEED—RESULTING TRUST—NOTICE—*Valley State Bank vs. Dean et al.*—No. 13413—*Decided July 1, 1935*—*Opinion by Mr. Chief Justice Butler.*

The Valley State Bank sued J. B. Dean and Mary Dean, individually and as administratrix of the estate of Sam M. Dean and her two children, to foreclose an equitable lien upon land in Baca County, on the theory that J. B. Dean and Sam Dean were brothers and that they made an exchange of land whereby the land in question standing in the name of J. B. Dean was to go to Sam Dean. Sam Dean drew up the deed and on account of judgments against him inserted his wife, Mary, as grantee. Sam took the deed and did not record it, but left it with the plaintiff to secure the payment of indebtedness to the bank. He partly erased the name of the grantee and authorized the plaintiff in case of default to complete the erasure and insert its own name and record the deed. J. B. Dean knew nothing of this erasure. Thereafter, J. B. Dean and Mary and Sam made an arrangement to exchange the Baca County land in question for land in Morton County, Kansas, and J. B. conveyed the Kansas land to Mary, and as the deed to Mary for the Baca County land had not been recorded, and J. B. Dean had continued in possession the parties considered a reconveyance unnecessary and the Baca County land was not reconveyed to J. B. Dean.

The plaintiff contends that it has an equitable lien upon the Baca County land to secure the payment of Sam's promissory note and is entitled to have a foreclosure thereof. Judgment went against the plaintiff below.

1. Where a deed is not only executed but delivered and there are no executory provisions in it, the rule that any material alteration after the execution made without the consent of the party sought to be charged, will render the instrument void, does not apply. Upon delivery of the deed in question the legal title of the land passed to and vested in Mary Dean and the alteration of the deed did not divest her of her legal title or vest the title in J. B. Dean.

2. The entire consideration for the Baca County land was given by Sam. For his own convenience he had it conveyed to his wife. Where a husband pays the consideration and causes the conveyance to be made to his wife there is a presumption that he intended it as a gift or advancement but such presumption is overcome where evidence that is strong and convincing shows that a gift or advancement was not intended, in which case a resulting trust arises in favor of the husband. The evidence in this case negatives any intent on the part of Sam to make a gift of the property to his wife. His wife held a bare legal title as trustee for her husband and the property was subject to levy and sale under execution against him.

3. It is clear that Sam Dean intended to charge his interest in the property with his deed to the plaintiff, the bank, and the circumstances

were such as to raise an equitable lien against the real estate in favor of the plaintiff.

4. While the equitable lien acquired by the plaintiff was good as against Sam Dean and his heirs and representatives, it was not good nor enforcible against J. B. Dean, because when he exchanged his Morton County land for the Baca County land he had no knowledge or notice that the plaintiff had or claimed any lien upon the land, and as he acquired an interest for a valuable consideration, without notice, he took his interest free of the claim of the plaintiff.

5. As against his co-defendants, J. B. Dean had a right to compel a reconveyance of the Baca County land and the plaintiff is in no position to complain of the decree quieting title.—*Judgment affirmed.*

MECHANICS' LIENS—FORECLOSURE—RIGHT OF REDEMPTION—*Twogood vs. Ocsay*—No. 13444—*Decided July 1, 1935*—*Opinion by Mr. Chief Justice Butler.*

Cauley owned certain real estate and Moberly, a lienor, sued to foreclose his lien and Gratke, another lienor, intervened. Personal judgments were rendered against Cauley in favor of the several lien claimants, including Gratke, and the property was ordered sold to satisfy the liens, which amounted to over $2,000, and at the sale the property was sold to Twogood for $825 and the share of the proceeds received by Gratke paid only a part of his judgment, whereupon he immediately filed for record a transcript of his judgment and assigned the judgment to Ocsay, who filed the assignment for record. She gave statutory notice of her intention to redeem and tendered to the sheriff the amount necessary to redeem, and thereupon Twogood commenced suit below against Ocsay and the sheriff to restrain the sheriff from permitting Ocsay to redeem. Decree entered below that the sheriff receive the tendered redemption money and issue certificate of redemption.

1. Upon foreclosure sale in mechanic's lien cases, there is the same right of redemption as in the case of sales of real estate on execution.

2. Where the owner fails to redeem within six months after the sale the lienor may redeem within ten days after the expiration of the six months' redemption period.

3. It is contended that Ocsay is not entitled to redeem because her lien is not subsequent to the lien upon which the sale was held. Such contention is not good because the mechanic's lien of her assignor was wiped out by the sale, whereupon he was left with an unsatisfied judgment but no lien and he subsequently acquired a lien by filing the transcript of his unsatisfied judgment.

4. When the transcript of the judgment was filed the title to the property was in Cauley as the sheriff's deed had not issued, and at the time the lien was acquired, by filing the transcript, Cauley not only

had the record title but the right of redemption, and the filing of the transcript attached to Cauley's interest in the property as a lien.

5. In this situation Ocsay, to whom Gratke had assigned his judgment, was the holder of a lien subsequent to the lien upon which the sale was held and as such she had the right to redeem.—*Judgment affirmed.*

INSURANCE—FRATERNAL INSURANCE—POWER OF FRATERNAL ASSOCIATION TO INCREASE ASSESSMENTS — *Woodmen of the World vs. Lamson*—No. 13477—*Decided June 24, 1935*—*Opinion by Mr. Justice Campbell.*

Lamson brought suit below to recover the difference between increased assessments which he was compelled to pay on his insurance certificate and the amount of assessments in force at the time he took out his contract of insurance, on the theory that the fraternal insurance company was without authority to increase his rate. He recovered below.

1. Where a fraternal benefit association provides in its articles of incorporation, constitution and by-laws that such association shall have power to modify and change the constitution, by-laws, rules and regulations at will, and where after issuing a benefit certificate based on a certain rate, it finds that such rate is insufficient and it is necessary to increase the rate to prevent financial disaster and protect its further operations, it has the power to amend its constitution, by-laws, rules or regulations, increasing such rate to a point to properly take care of its obligations notwithstanding it has issued a benefit certificate based upon a fixed rate of assessment.—*Judgment reversed.*

BILLS AND NOTES—AGENCY—AUTHORITY OF AGENT TO ACCEPT PAYMENT OTHERWISE THAN IN CASH—*Garrison vs. Kansas City Life Insurance Co.*—No. 13711—*Decided June 24, 1935*—*Opinion by Mr. Chief Justice Butler.*

The life insurance company brought suit below on a promissory note given by Garrison for premium on life insurance policy. The note was endorsed by the agent and sent in to the insurance company, which thereafter retained possession of the note. The defendant plead payment, in that he claimed that two years after he gave the note to Wilkerson, the agent, the agent agreed to and did accept potatoes in payment of the note. The potatoes were thereupon segregated for Wilkerson and were destroyed by fire.

The insurance company had judgment below.

1. An agent with authority to collect a promissory note has no authority to accept anything in payment of the note other than money.

2. Where in a suit on a note the defense is payment of the note by merchandise to an agent, the defendant must show either express or

implied authority on the part of such agent to accept such settlement. Otherwise, such settlement is not binding upon the principal.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DISEASED CONDITION AGGRAVATED BY INJURY—APPEAL AND ERROR—CERTIFYING CASE BACK TO COMMISSION FOR FURTHER FINDINGS—*The Industrial Commission et al. vs. Dorchak*—No. 13666—*Opinion by Mr. Justice Young.*

Proceeding under the Workmen's Compensation Act. The Commission made a finding that claimant was injured in an accident arising out of and in the course of his employment but that paralysis which followed was due to diseased condition of creeping palsy that claimant was afflicted with at the time of the injury, and that the accident was the result of his then condition, and denied compensation. On appeal to the District Court such court remanded the case back to the Commission for specific findings as to whether or not the accident aggravated the claimant's condition to such extent that he is or is not entitled to compensation. The employer and insurance carrier sued out writ of error from this order.

1. The trial court acted within its powers in ordering the cause back to the Commission for the determination as to whether or not the injury aggravated a pre-existing diseased condition.

2. The purpose of the Workmen's Compensation Act was to impose on the District Court the duty of seeing that all issues involved in the case are determined by the Industrial Commission and if they are not remand the case for that purpose.

3. Such order of the District Court remanding the case is an interlocutory order and is not such a final order as is subject to review by this court.—*Writ of error dismissed with directions.*

CORPORATIONS—STOCKHOLDERS STATUTORY LIABILITY ON UNPAID SUBSCRIPTIONS—*Frink vs. Carman Distributing Co.*—No. 13448—*Decided June 24, 1935*—*Opinion by Mr. Justice Burke.*

The Carman Company brought this suit against Frink on his statutory liability as a holder of unpaid stock of Zott Laundry Co. The plaintiff recovered below.

1. Where a corporation is organized with both preferred and common stock and the par value is $100 per share, both for preferred and common, and a person purchases the preferred stock and pays par value but is given shares of common stock as a bonus and the corporation becomes defunct and owes creditors, such a stockholder is liable to creditors for the par value of the common stock.

2. Where such stockholder has paid other creditors of the corporation approximately $5,000 he is entitled to a credit for the amount so paid as against another creditor seeking to enforce the statutory liability.—*Judgment reversed in part.*

PARTNERSHIP — LIABILITY OF PARTNER SERVED — GARNISHMENT AGAINST ONE PARTNER—*Denver National Bank vs. Ben Grimes* —No. 13450—*Decided July 8, 1935—Opinion by Mr. Justice Hilliard.*

Suit was brought below against Otis and Company, a co-partnership, and the summons was served upon one Sargeant, a co-partner. Judgment was entered against the co-partnership and after return of execution unsatisfied the court at a subsequent term entered judgment against the partner who was served with summons and execution issued and First National Bank garnisheed. Judgment was entered against the garnishee. The garnishee seeks to set aside the judgment.

1. Where several persons are associated in business under a common name the associates may be sued by such common name and summons served on one or more of the associates, but the judgment binds only the joint property of the associates and the separate property of the party served.

2. Where judgment was originally entered only against the partnership the court had power to enter judgment against the partner served with process at a subsequent term. The court had and continued to have jurisdiction of the partner who had been served and had power to subsequently enter judgment against him and this would not constitute an amendment to a judgment made after the term.—*Judgment affirmed.*

APPEAL AND ERROR—JUDGMENT—CONFLICTING EVIDENCE SUFFICIENCY OF EVIDENCE—*Simpson vs. Slee*—No. 13432—*Decided June 10, 1935—Opinion by Mr. Justice Campbell.*

Action of Slee to recover damages against Simpson for malicious prosecution of a civil suit. Plaintiff had judgment below.

1. Where evidence is conflicting and there is sufficient evidence to legally justify the finding of the trial Court, the judgment will not be set aside.—*Judgment affirmed.*

DIVORCE—SEPARATE MAINTENANCE—MOTION TO DISMISS WRIT OF ERROR—*Pierce vs. Pierce*—No. 13700—*Decided June 10, 1935 —Opinion by Mr. Justice Hilliard.*

Suit for divorce. Cross-complaint for separate maintenance. Defendant had verdict. Motion filed to dismiss writ of error.

1. The one year within which record in error must be filed in Supreme Court commences to run from actual entry of final decree below.

2. Sec. 5605, C. L. 1921, providing that party seeking review of divorce proceedings must within five days give notice of intention to apply for writ of error is no longer in effect.

3. Tender of Bill of Exceptions was made in apt time.—*Motion to dismiss writ of error denied.*

WORKMEN'S COMPENSATION—RIGHTS OF EMPLOYEE OF TERMINAL COMPANY—INTERSTATE COMMERCE—*The Denver Union Terminal Railway Co. vs. Industrial Commission et al.*—No. 13724—*Decided June 17, 1935*—*Opinion by Mr. Justice Holland.*

Claimant was employed by Denver Union Terminal Railway Co. and was engaged in moving interstate mail from one interstate train to another by terminal company truck at the Union Depot in Denver, and by a fall was injured in the course of his employment. He was awarded compensation by the Industrial Commission, which judgment was affirmed by the District Court.

1. The handling of United States mail across the country is interstate commerce.

2. A terminal company which acts as agent for a number of trunk railroads in operating a depot and having control of passengers and of their baggage, is engaged in interstate transportation by this essential part of the movement. It was the facility and agency relied upon by interstate railroad companies to complete their engagement, and for which they could be primarily liable for the acts of its agent.

3. A common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another.

4. An employee of a terminal company engaged in moving interstate mail from one interstate terminal to another is excluded from the provisions of the Colorado Workmen's Compensation Act, because such Act does not apply to common carriers engaged in Interstate commerce, nor to their employees.—*Judgment reversed.*

HIGHWAY—CONDEMNATION—INJUNCTION WHEN INJUNCTION NOT PROPER REMEDY—*Scarland et al. vs. Board of County Commissioners of Jefferson County*—No. 13546—*Decided June 10, 1935*—*Opinion by Mr. Justice Holland.*

Action in injunction to restrain the relocating of a public highway. The original located road was destroyed by a flood in Bear Creek, and County Commissioners sought by condemnation proceeding to acquire new right of way which would cause Bear Creek to intervene between plaintiff's land and new highway, thus cutting plaintiff off from egress and ingress to new highway. Demurrer to complaint for injunction sustained below.

1. Injunction will not lie. Plaintiff's remedy was to intervene in the condemnation proceedings. If damaged, they had a plain, speedy and adequate remedy at law by petition in intervention.—*Judgment affirmed.*