Denver Law Review

Volume 11 | Issue 6 Article 6

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

WILLS—COMPETENCY OF WITNESSES—DECLARATION—BURDEN OF PROOF—INSTRUCTIONS—*Aquilini, et al. vs. Chamberlin*—No. 13065—*Decided February 26, 1934—Opinion by Mr. Justice Butler.*

In a will contest judgment went against the contestants. They seek a reversal of the judgment. The will was admitted to probate upon the force of a petition that there were no heirs, and notice was given by publication to unknown heirs. Ten months later the contestants below, appearing as heirs, petitioned the County Court to set aside the probate on the ground of lack of capacity to make the will, and undue influence. The petition was denied and appealed to the District Court. The will was sustained.

1. An attorney who draws a will and is paid for his services and also acknowledges as an attesting witness and who participates as an attorney in the contest of the will merely as an attorney of record and not as active in conduct of the case, is not disqualified as a witness to the will. It only affected his credibility and not his competency.

2. A testator, in publishing the will, does not need to declare the instrument to be his last will and testament in the words of the statute.

If the testator, by word or deed, clearly indicates that the instrument is his last will and testament, it is sufficient.

3. An instruction that a testator is under no legal obligations to divide his property among his relatives, and that the very right to make a will implies and presupposes the making of a will and a disposition of his property in a manner different from that provided by law, is proper.

4. An instruction that influence gained by reason of love and affection, kindness and appeals to feeling is not undue influence, is a proper instruction where there is evidence to support it.

5. An instruction that the burden of proof rests upon the contestants is proper where the will has once been admitted to probate and such contest is brought after probate.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—REOPENING AWARD—CHANGE IN CONDITION—*Boulder Valley Coal Co., et al. vs. Shipka, et al.*—No. 13427—*Decided February 26, 1934—Opinion by Mr. Justice Holland.*

The Industrial Commission awarded to Shipka, claimant, compensation for permanent disability. The District Court affirmed the award. The claimant received an injury while working for the company in a coal mine by being caught under falling coal, and filed his claim for injury but did not include any injury to his back. Hearing was had and

award made and over a year later further hearing was had and supplemental award made on account of injury to back.

1. Where the evidence supports the Commission's finding of a changed condition of claimant subsequent to the original award and there is substantial evidence to sustain a finding that this changed condition was a result of the injury, such award will not be disturbed.—*Judgment affirmed.*

LANDLORD AND TENANT—JUDGMENT ON PLEADINGS—SUFFICIENCY OF ANSWER—DEFECTS UNKNOWN TO TENANT—*The Capitol Amusement Co., et al., vs. Anheuser-Busch, Inc.*—No. 13085—*Decided February 26, 1934—Opinion by Mr. Justice Holland.*

Defendant in error, as landlord, brought suit against plaintiff in error, as tenant, to recover $6,400.00, balance of rent under written lease. The leased premises were a portion only of a building. A second amended answer was tendered alleging, among other things, that the wall, which was a party wall, was negligently constructed and in unsafe condition and wholly unknown to be so by the tenant at the time the lease was entered into, and that this wall was no part of the premises leased by the tenant and that its unsafe condition was either unknown by the landlord, or by the exercise of ordinary care could have been known, and that on account of its unsafe condition the tenant lost a sub-tenant, who vacated the premises.

The Court below denied permission to file this second amended answer and entered judgment against the tenant for the full amount.

1. There is no implied warranty on the part of a lessor that the premises, as leased, are safe for occupation thereof by the tenant.

2. But there are exceptions to this rule, one being that where the wall of the building is defective and known to be so by the landlord and unknown to the tenant at the time of entering into the lease, and if such condition was not ascertainable by the tenant upon an ordinary or reasonable inspection of the premises, then it was the duty of the landlord to make such condition known to the tenant and a failure so to do gives rise to liability on the part of the landlord.

3. Where it appears that the defective wall was no part of the premises leased to the tenant and that the control of said wall remained with the landlord, in such case the tenant is under no obligation to inspect the wall. The only obligation of the tenant is to inspect the premises covered by the lease. Tenant has the right to assume that the landlord had properly constructed the wall and was keeping and would keep same in such condition as to make the premises leased to the tenant safe for occupancy.

4. The covenant of a tenant to keep the premises in repair does not extend to such part of the premises as are not under his control.

5. A demise of parcels out of the building leaves the responsibility for what is not demised, upon the landlord. The roof, halls and

passages not demised, chimneys, eaves and outside walls, remain the landlord's.

6. The failure of the landlord to discharge the duties imposed by law, as alleged in the tenant's tendered answer, is sufficient to constitute a defense if proven, and the trial Court was in error in denying leave to file it on the ground that it did not state a defense.—*Judgment reversed.*

WORKMEN'S COMPENSATION—INJURY SUBSEQUENT TO AWARD—EFFICIENT INTERVENING CAUSE—*Post Printing & Publishing Co., et al. vs. Erickson, et al.*—No. 13409—*Decided February 26, 1934—Opinion by Mr. Justice Bouck.*

Claimant's claim for compensation was affirmed by the District Court. The claimant was originally awarded compensation for an injury to his right knee. Later, claimant was able to and did return to work and on the following morning while walking along the sidewalk on his way to work, but several miles from his place of work, slipped and fell and broke his right ankle. There was a severe snowstorm at the time and he was awarded compensation for this latter injury on the theory that this was a continuation and, practically, a renewal and aggravation of the injury sustained in the first accident.

1. Any natural development of an industrial injury uninfluenced by an independent intervening cause, should be attributed to such injury as part of the loss to be compensated.

2. But upon the happening of a later accident like the one involved here, due to an efficient intervening cause, and not arising out of or in the course of the employment, the law does not contemplate that the original compensation shall be increased merely because the later accident might or would not have happened if the employee had retained all his former physical powers. It is presumptively for the loss of these that he was awarded the original compensation.—*Judgment reversed.*

WORKMEN'S COMPENSATION — EMPLOYEE SHOT BY ASSAILANT WHILE WORKING—NOT WITHIN STATUTE—*The Rocky Mountain Fuel Co., et al. vs. Kruzic, et al.*—No. 13457—*Decided February 26, 1934—Opinion by Mr. Justice Holland.*

Kruzic, while working for the company, was shot by former employee. There was no evidence that the assault had any connection with the company. A former employee shot claimant while he was at work without there being any altercation or any reason whatsoever assigned in the evidence for the assault. Claimant was allowed compensation by the Commission and the District Court affirmed the award.

1. Under the Workmen's Compensation Act it is necessary that the accident originated in a risk peculiar to the employment and that there was a causal connection between the employer and the accident or injury.

2. An accident arises out of an employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.

3. The burden rests on the claimant to establish such facts as were necessary to a legal award, based upon a causal connection between the accident and the employment. The basis of such facts must be more than a mere possibility.

4. The test is whether or not there is a causal connection between the injury and employment, that is, are they so connected that the injury naturally resulted from the employment?

5. In this case the injury did not arise out of and in the course of the employment.—*Judgment reversed.*

SURETY—LIABILITY OF SURETY ON BOND OF RECEIVER FOR ACTS DONE AS GENERAL MANAGER—*The Fidelity & Guaranty Co. of New York vs. The People for the Use of Milton D. Green, Special Receiver*—No. 13389—*Decided February 26, 1934*—*Opinion by Mr. Chief Justice Adams.*

Judgment was rendered against the surety company below for $2,500.00 and interest. The surety company had signed George W. Beck's bond as receiver of the Colorado Pulp and Paper Co. After the bond was executed the Court appointed receiver as general manager of the defunct concern.

In said case where the surety company was not a party this Court set aside an order of a lower Court of $12,500.00 allowed to Beck as general manager, but did not set aside the fees of $5,500.00 allowed him as receiver. He refunded $10,000.00 and this suit was for the balance of $2,500.00.

1. After the Court had appointed a receiver and ordered him to give bond in that capacity and after he had taken his oath of office and after the surety company signed the bond for the faithful performance of the duties of the receiver, and the Court then creates a new and distinct office of general manager, but no bond in the latter capacity was either ordered by the Court or given by Beck, such bond as receiver does not cover Beck's acts as general manager.

2. Where the terms "receiver" and "general manager" are not used interchangeably in the record but were intended to create two distinct offices, a surety on the bond of the receiver is only liable for the receiver's acts and is not liable for the acts of the general manager, even though both offices are held by one person.

3. The liability of the surety is measured by its contract which was only for the faithful performance of Beck's duties as receiver.—*Judgment reversed.*

PRACTICE—SUPREME COURT—DECISION BY LESS THAN MAJORITY OF ENTIRE COURT—*Dill vs. People*—No. 13190—*Decided February 26, 1934—Opinion by Mr. Justice Burke.*

A judgment of conviction in a criminal case was affirmed and motion for rehearing filed and on the day it was denied, defendant moved that the remittitur be stayed pending further hearing and that the case be remanded with directions to dismiss the action or for a new trial on the ground that there are seven justices of this Court, two did not participate and of the five remaining, two dissented, leaving the majority opinion supported by only three justices out of the seven.

1. Sec. 7116 of Compiled Laws 1921 which provides that "no punishment shall be inflicted in any case brought before the Supreme Court under the provisions of this chapter unless a majority of the justices of said court concur in respect to such punishment" was repealed by the criminal code which was passed in 1868.—*Motion overruled and remittitur will issue.*

APPEAL IN ERROR—APPEAL FROM POLICE MAGISTRATE—TIME TO FILE BOND AND PAY DOCKET FEE—*City of Idaho Springs vs. Coleman*—No. 13185—*Decided March 5, 1934—Opinion by Mr. Justice Holland.*

Coleman et al. sought to enjoin the City of Idaho Springs from enforcing its Police Court judgments against them and to restrain the enforcement of a penal ordinance and to cancel the appeal bonds in appeal from said judgments to the County Court. Coleman et al. prevailed below.

1. Injunction will not lie against the judicial enforcement of a penal code. There may be instances when officials may be enjoined from the arbitrary enforcement of such an ordinance, but such instances are not those where the interests or rights of the parties have been judicially determined after a hearing.

2. The city of Idaho Springs had the right to regulate and tax filling stations by ordinance. This was an occupation tax.

3. Where the defendants in the Police Court failed to prosecute an appeal, in the manner provided by statute for appeal, they cannot obtain relief in equity. The first statutory provision for appeal from police magistrate in cities under 25,000 is that within five days he shall make sufficient bond, conditioned that he will satisfy such judgment as may be rendered upon appeal and shall within ten days pay the necessary fee for docketing the case in the County Court. These are mandatory regulations and a failure to comply therewith is fatal to appeal.—*Judgment reversed.*