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Supreme Court Decisions

Dicta Editorial Board

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ARBITRATION—CLAIMS AGAINST THE STATE—*Parry et al. vs. Colo. Board of Corrections*—No. 13024—*Decided Dec. 4, 1933—Opinion by Mr. Justice Burke.*

Defendant Board of Corrections employed plaintiffs as architects to make certain plans for contemplated additions to the State Hospital at Pueblo. The contract provided for arbitration of all questions in dispute. The legislature failed to appropriate money for the contemplated structures. The architects presented a claim for $12,000.00, of which only $500.00 was allowed by the defendant Board. Three arbitrators were then chosen in some manner and the defendant Board appeared specially and objected to their jurisdiction. The arbitrators held a hearing and a majority joined in an award to the plaintiffs, which was filed with the Clerk of the District Court and judgment entered and execution issued thereon. Defendant Board then moved in the District Court to set aside the judgment and quash the execution, which motion was granted, and plaintiffs appeal.

Held: Under the statutes of Colorado controversies which may be submitted to arbitration and become the basis of a judgment in the District Court, as was attempted here, are limited to those which may be the subject of a civil action. The claim of plaintiffs here was a claim against the State, whoever were the nominal defendants. The State cannot be sued without its consent, and no consent had been given in this case. Therefore the arbitrators were without jurisdiction. —*Judgment affirmed.*

CONTRACTS—CONSTRUCTION OF—*Heid Bros., Inc. vs. Carver*—No. 13076—*Decided December 11, 1933—Opinion by Mr. Justice Bouck.*

Carver sued the company for breach of a written contract to buy certain alfalfa hay. The company pleaded as the defense that Carver had given a chattel mortgage on the hay and therefore was not the owner of the hay under the provision of the contract, in which Carver "guarantees that they were the owners of all this alfalfa hay and that the same is clear and free of all mortgages, liens and claims of whatsoever nature." Carver replied that the company knew of the chattel mortgage when it made the contract and paid money thereunder, and that the mortgagee approved the contract and waived and released his lien. Upon conflicting evidence the trial court gave judgment for Carver.

Held: The evidence tended to prove that the parties considered the chattel mortgage as waived and not existent within the true meaning of the contract provision.—*Judgment affirmed.*

MORTGAGES — FORECLOSURE OF — RECEIVERSHIP — PROCEEDS — *Chemical Bank and Trust Co. vs. Nat'l Mortgage and Discount Co.*—No. 12925—*Decided December 18, 1933*—*Opinion by Mr. Chief Justice Adams.*

1. Plaintiff, as the holder of a first mortgage, and defendant, as the holder of a second deed of trust, claim funds in the hands of a receiver. Approximately two months after the sale of the property to the plaintiff bank for the full amount of its claim with interest and costs, plaintiff applied for the appointment of a receiver. The receiver collected $16,081.55. These funds are claimed by the bank on the grounds that after the sale and during the period of redemption it expended approximately $40.00 more than the amount collected by the receiver for taxes. The defendant contends that, irrespective of what the bank paid, it was equivalent to the payment of taxes on its own property and, therefore, cannot be recovered.

2. Motion was made to dismiss the writ of error on the grounds that the bank did not file a motion for a new trial as required by rule 8. This rule does not apply when the questions presented to the trial court were purely questions of law, as here.

3. Statute compels the owner during the period of redemption to pay taxes and it was incumbent upon the court to order the receiver to pay the current taxes if the owner failed to do so. Judgment should have been for the bank.—*Reversed.*

ALIENATION OF AFFECTIONS—EVIDENCE—ADMISSIBILITY OF—*Supperstein vs. Woods*—No. 12887—*Decided December 18, 1933*—*Opinion by Mr. Justice Campbell.*

From a verdict and judgment thereon in favor of the plaintiff, the defendant alleges error. Two main contentions of the defendant are:

1. Plaintiff was permitted to introduce into evidence a decree of divorce which he had obtained against his wife. In this regard, the jury was instructed that it was not to take into consideration those facts which served as the basis of the divorce but was merely to consider the fact of the divorce to show the loss of affection.

2. The court permitted the admission of statements made to the plaintiff by his five-year-old son to the effect that the defendant had been a visitor to his father's house during the latter's absence. This was properly admissable to show that opportunities were available to the defendant to visit the plaintiff's wife and that the defendant had taken advantage of those opportunities.—*Judgment affirmed.*

REPLEVIN—IN AID OF FORECLOSURE—*Denver Credit Bureau vs. Dull et al.*—No. 13392—*Decided December 18, 1933*—*Opinion by Mr. Justice Hilliard.*

1. Defendant executed its note to the Public Industrial Bank, which note was secured by a chattel mortgage. The payee had previously sought to foreclose but was nonsuited because no demand for pos-

session had preceded the action. The note was then assigned to the plaintiff here, who commenced this action. At the close of the plaintiff's case, defendant moved for judgment on the grounds that the former adjudication of the action by the payee barred this action or that the defendants had discharged their obligation.

2. The judgment against the payee was not on the merits of the case but on the sole premise that demand for possession had not been made and is such a situation that judgment does not bar the present action and is not res adjudicata.

3. Contention that payment had been made did not appear to be supported by the evidence.—*Judgment reversed.*

WORKMEN'S COMPENSATION—REVIEW ON COMMISSION'S OWN MOTION—FURTHER AWARD—SUFFICIENCY OF EVIDENCE—*Reynolds et al. vs. Fraker Coal Co. et al.*—No. 13404—*Decided December 18, 1933—Opinion by Mr. Justice Butler.*

The Industrial Commission, on its own motion as authorized by Sec. 4484, C. L. 1921, Colorado, held a further hearing to determine if there had been any error in the previous award or any change in the claimant's condition, and made a supplemental award to the claimant. Evidence relative to the claimant's physical condition and inability to work from the time of the accident to the date of the further hearing was presented and held sufficient to establish an error in the previous award within the meaning of said Sec. 4484.—*Judgment reversed with directions.*

DEEDS—BOUNDARY LINES—ORAL AGREEMENTS—*Sobol vs. Gulinson*—No. 12979—*Decided December 22, 1933—Opinion by Mr. Justice Butler.*

Parties hereto are owners of adjoining lots. In 1912 defendant decided to erect a brick building on his lot. At that time the line between his lot and the adjoining lot (which was later acquired by plaintiff) was uncertain, and defendant therefore asked Devinsky, the then owner of the adjoining lot, to share the expense of a survey. Devinsky refused, and told defendant that the line of the fences then standing would be the boundary line and agreed to use the wall of the building defendant intended to erect as his fence. Defendant then constructed the building, which has remained there ever since.

Plaintiff acquired title to Devinsky's lot in 1929 and thereafter claimed defendant's building encroached on her lot about eight inches, and brought this suit in ejectment. The District Court gave judgment for defendant.

Held: Where there is doubt as to the true location of a boundary line the adjoining owner may establish the line by parol agreement.—*Judgment affirmed.*

PUBLIC UTILITIES—ABANDONMENT OF RAILROAD STATION—POWER TO AUTHORIZE—CONTRACTS—CONSTRUCTION BY PARTIES—*Denver and Salt Lake Railway Co. vs. St. Clair et al.*—No. 13030—*Decided December 18, 1933—Opinion by Mr. Justice Butler.*

1. A particular method of operation under a contract for a period of twenty-nine years constitutes a practical construction of the contract by the parties.

2. A contract, whereby land was conveyed to a railroad company in consideration of the establishment and maintenance of a railroad station thereon, is subject to the requirements of public interest. Such station may be abandoned when required by the public interest, notwithstanding the contract.

3. The question whether the public interest does or does not require the abandonment of the station is to be determined by the Public Utilities Commission, not by the courts.—*Judgment reversed.*

WORKMEN'S COMPENSATION COMMISSIONS' POWER TO REOPEN CASE—*Clayton Coal Company et al. vs. Industrial Commission et al.*—No. 13401—*Decided December 22, 1933—Opinion by Mr. Justice Bouck.*

One Zak was awarded temporary compensation, under the Workmen's Compensation Act. No petition for review was filed by either side and the award became final.

Thereafter, the Commission, under Sec. 4484, C. L. '21, ordered a further hearing, notified both sides and took additional testimony. The Commission awarded compensation for permanent disability, but did not specifically find that any error, mistake, or change of condition had intervened, as stated in the statute.

Held; that since there was a change in the Commission's findings, we must assume that the Commission regarded itself as having previously erred. Under principle laid down in C. F. & I. vs. Industrial Com., 85 Colo. 237, 275 Pac. 910.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—*Empire Zinc Co. vs. Industrial Commission of Colorado and Luisita M. Vasquez et al.*—No. 13410—*Decided December 22, 1933—Opinion by Mr. Justice Burke.*

The only question in this case was whether the employe was killed by an accident arising out of and in the course of his employment. The Commission so held and the employer sought a review of the award, which the District Court affirmed. The testimony of the only eye witness tended to show that the employe was not killed in the course of his employment. The only evidence offered to the contrary was the company's report of the accident to the Commission on a form supplied by the Commission, and the report of the State Mine Inspector.

Held: Such reports were proper evidence in the hearing before the Workmen's Compensation Commission.—*Judgment affirmed.*

REAL ESTATE BROKERS—COMMISSION—TRADE CLOSED BY OWNER —IMMATERIAL TESTIMONY—FAILURE TO PRESENT ALL INSTRUCTIONS IN ABSTRACT OF RECORD—*Houston vs. H. G. Wolff & Son Investment Company*—No. 13048—*Decided December 18, 1933—Opinion by Mr. Justice Burke.*

1. The admission of immaterial testimony, even if erroneous, is without prejudice.

2. Where parties to a real estate trade are brought together and the trade effected through the agency of the broker, his claim for commission will not be defeated by the fact that the owner himself closed with the broker's client on terms slightly different from those previously quoted.

3. Certain assignments of error were based on two instructions given by the trial court, but all of the instructions were not set out in the abstract. In such case the presumption is that the jury was properly instructed.—*Judgment affirmed.*

MECHANIC'S LIEN—SUBCONTRACTORS—CONFLICT OF EVIDENCE—*Nelson L. Protheroe et al. vs. Fred Bonser*—No. 13005—*Decided December 22, 1933—Opinion by Mr. Justice Campbell.*

Fred Bonser was a subcontractor under Protheroe, who was constructing buildings for St. Francis Sanatorium. He brought this action to enforce mechanic's lien. Protheroe defended upon the ground that Bonser had abandoned his contract. The trial court found the issues for Bonser.

Held, upon review, that the case, as made by plaintiff's evidence, justified the findings, the decrees entered upon these findings cannot be interfered with.—*Judgment affirmed.*

PLEADINGS—MOTION TO STRIKE—DISMISSING WITH PREJUDICE—*Lazarus Bearman vs. I. D. Bronfin et al.*—No. 12914—*Decided December 22, 1933—Opinion by Mr. Justice Holland.*

Plaintiff filed his complaint for damages founded in tort. He alleged a conspiracy upon the part of defendants, who were physicians, to destroy his health and reputation. After his complaint had been amended twice, upon defendant's motion to strike, the trial court sustained said motion, and dismissed the amended complaint with prejudice.

Where a complaint, and the amendments thereto, contain a mass of useless and unnecessary statements, it is proper to strike the amendments, if they are merely repetitions of the original complaint, but where a cause of action is stated, even though it be poorly stated, it is error to dismiss the complaint with prejudice.—*Judgment reversed.*

CONTRACT—PAROL EVIDENCE—AGENCY—*Hoffman vs. Wichita Farm Lighting Company*—No. 13080—*Decided January 2, 1934*—*Opinion by Mr. Justice Burke.*

Plaintiff corporation sold defendant lighting and heating equipment pursuant to written contract and defendant, having failed to pay the price stipulated, plaintiff brought suit for the amount provided for. Defense was an oral guaranty which defendant claims should have been but was not written into the contract, and a denial of plaintiff's corporate capacity. The written contract contained a provision that no agent of plaintiff had made any statement or guaranty such as alleged by defendant or any other condition than the absolute sale of the merchandise. At the opening of the trial defendant admitted plaintiff's corporate capacity, whereupon plaintiff moved for judgment on the pleadings and motion was granted.

Held: Negotiations leading up to a contract are inadmissible to to vary its terms, and the recitals in the contract limited the authority of the agent and were binding on the defendant.—*Judgment affirmed.*

CHATTEL MORTGAGES—RECORDING—PRIORITY—*McClain vs. Saranac Machine Co.*—No. 12952—*Decided January 2, 1934*—*Opinion by Mr. Justice Burke.*

Controversy was between a chattel mortgage of certain machinery, whose chattel mortgage was not recorded, and bondholder, whose deed of trust, executed by the mortgagor of the machinery prior to mortgagor's purchase of the machinery, contained a clause covering after-acquired property. Bondholder with notice of the unrecorded mortgage brought suit on his obligation and a receiver was appointed. Chattel mortgagee then brought replevin for the machinery against the receiver.

Held: 1. The receiver's possession was the possession of the court and not possession of either the chattel mortgagee or the bondholder.

2. The chattel mortgage, though unrecorded, was good between the parties, and the mortgagee having taken possession before the rights of third persons attached, the bondholder not being injuriously affected by the mortgagee's secret lien on the machinery, the mortgagee must prevail

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CONTEST—INTEREST ON—JUDGMENT AGAINST—*Roberts vs. Board of County Commissioners of the County of Conejos*—No. 13014—*Decided January 2, 1934*—*Opinion by Mr. Justice Campbell.*

Plaintiff secured a judgment against Conejos County for moneys paid to the county for tax certificates which were invalid, together with interest on said sums at 8 per cent per annum, as provided by statute. Trial court's judgment itself, however, did not bear interest, and plaintiff contends that the judgment should likewise bear interest at the rate of 8 per cent per annum, which is the only question in the case.

Held: Judgments against counties growing out of matters conducted in their governmental capacity do not bear interest.—*Judgment affirmed.*

DIVORCE—FINDINGS OF FACT AND CONCLUSIONS OF LAW—LIMITATION ON ACT OF CHAPTER 90—1925 SESSION LAWS—JURISDICTION OF JUVENILE COURT—*Cartier vs. Cartier*—No. 12836 —*Decided January 8, 1934—Opinion by Mr. Justice Holland.*

January 28, 1929, plaintiff below obtained findings of fact and conclusions of law in her favor on noncontested case in divorce. No motion to set the same aside was ever filed. On October 5, 1929, the court, on motion of the defendant and over the objection of plaintiff, entered a final decree of divorce, which judgment was reversed by the Supreme Court and finding reinstated.

On April 6, 1931, the lower court vacated the findings and gave defendant five days to file a motion to set aside the reinstated findings and the court thereafter set aside the findings and entered new findings of fact on April 13, 1931, including an automatic decree of divorce, and further found that the Juvenile Court had acquired jurisdiction over defendant with regard to the support and maintenance of the minor children, and on April 13, 1931, the plaintiff tendered for filing a decree of separate maintenance which was refused, and on April 14, 1931, plaintiff filed motion to strike the findings and particularly the new provisions in regard to an automatic decree and case was brought on error to the Supreme Court.

1. This Court reviewed and fixed the status of the parties herein in case No. 12482 by ordering that the decree forced upon the plaintiff by motion of the guilty defendant be set aside and the findings reinstated.

2. Chapter 90 of the Session Laws of 1929 provided for findings of fact and conclusions of law and for provision for either party within six months filing a verified petition to set them aside, and the losing defendant cannot fail to avail himself of this right of such filing within six months and wait until two years after the date of the original findings and by the indirect method of asking to have entered in lieu of the original findings a findings that would automatically operate as a final decree at the end of six months.

3. The provision in such law that the findings of fact shall operate as a decree of divorce at the expiration of six months if not set aside on motion tending to set same aside, is not a retroactive provision.

4. The District Court cannot deprive itself of jurisdiction of the defendant and the children by a finding that jurisdiction was excessive in the Juvenile Court, where the record discloses that the action in the Juvenile Court was for nonsupport and not a dependency charge. Had the Juvenile Court acquired jurisdiction of the children in a dependency charge, it could have retained that jurisdiction, but it was improper in this case for the District Court to abdicate its jurisdiction.—*Judgment reversed.*

WORKMEN'S COMPENSATION—TOTAL DISABILITY—MEDICAL EXPERTS—*Poole vs. Industrial Commission et al.*—No. 13343—*Decided January 8, 1934—Opinion by Mr. Justice Burke.*

Poole was employed by the Southern Colorado Power Co. as a lineman and was injured in an accident arising out of and in the course of that employment. The Commission's final award was temporary total disability ending June 23, 1931, and 80 per cent permanent loss of the right leg measured at the knee. Claiming a total disability, he obtained review in the District Court, where the award was affirmed.

1. There is no valid objection to the award that the evidence of the extent of disability was restricted to medical experts.

2. Where in the final award the Commission made a finding raising permanent disability from 20 per cent to 80 per cent and provided for a credit of prior payments thereon, such award is not objectionable, being based on the findings of fact of which the Commission was the sole judge.

3. An objection that the date of the termination of temporary disability, as fixed by the Commission, is nonsupported by the evidence is not tenable, this finding being based upon disputed facts and the finding being based on conflicting evidence.—*Judgment affirmed.*

MISTAKE—FORECLOSURE—*Walter W. Olmsted et al. vs. I. B. Melville et al.*—No. 13146—*Decided November 27, 1933—Opinion by Mr. Justice Butler.*

Through an error in figuring the amount of interest due, the defendants in error overbid, for certain property offered at a public trustee's foreclosure sale, the sum of $3,746.38. Plaintiffs, as the former owners of the property, sue for this excess between the price bid and the amount really owed.

1. Plaintiffs neither did nor refrained from doing any act in reliance upon the mistake, nor were their positions altered. There was no claim that they refrained from redeeming the property because of the additional amount as stated in the certificate of purchase. In addition, plaintiffs were offered this property for the correct amount due, and the defendants also offered to resell the property, but the plaintiffs refused both offers.—*Judgment affirmed.*

REAL ESTATE—DAMAGES—APPEAL BOND—ESTOPPEL—*Brown vs. Ohman*—No. 13020—*Decided November 27, 1933—Opinion by Mr. Justice Burke.*

Plaintiff in error, plaintiff below, brought suit against defendants for damages for dispossessing him of a strip of a lot 28 inches wide. In the County court plaintiff recovered damages and on appeal to the District Court, judgment was for defendants and plaintiff appealed to this court.

1. Where in appeal from County Court the bond is approved by county judge and in the District Court the bond is attacked on the ground that there was no order of the County Court fixing the amount of the appeal bond, the approval of the bond by the County Court was tantamount to an order fixing the bond.

2. Where the District Court, on appeal from County Court, fixes the amount of appeal bond and a new bondsman by mistake signs the old bond, instead of the new bond, and the same is approved by the clerk of the District Court, such old bond becomes the appeal bond and it is too late to raise such objections for the first time in the Supreme Court.

3. The District Court held that the plaintiff was estopped to bring the action. This is supported by the evidence.—*Judgment affirmed.*

HOMESTEADS—EXEMPTION—DEBT CONTRACTED PRIOR TO PATENT —BREACH OF PROMISE TO MARRY—ACTION EX CONTRACTU —*Duling, as Sheriff, etc. vs. Salaz*—No. 12988—*Decided November 27, 1933—Opinion by Mr. Justice Holland.*

1. In determining whether homesteads are subject to the debts of the homesteader, exemption is the rule and liability is the exception.

2. Breach of promise to marry, and judgment obtained thereon, constitute a debt contracted, within the terms of R. S., U. S. Sec. 2296 (U. S. C. A. Title 43, Sec. 175), which provides that homesteads shall not be liable to the satisfaction of any debt contracted prior to the issuing of patent therefor.

3. An action for breach of promise to marry is an action ex contractu.

Mr. Justice Bouck, specially concurring.

The liability on the original promise to marry did not constitute in itself a debt contracted as of the date of the promise. Such liability was not then in a liquidated or ascertainable sum, and so was not a debt as that word is used here.—*Judgment affirmed.*

Opinion by MACON C.

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"I concur, Macon C."
"I dissent, Stallcup C."

TRITCH V. NORTON, 10 Colo. 337, 357.

(Dug up by Judge Denison.)