Denver Law Review

Volume 11 | Issue 1 Article 7

July 2021

Supreme Court Decisions

Dicta Editorial Board

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PROCEDURE—REFERENCE—ACCOUNTING—*H. C. Lallier Construction and Engineering Company vs. Morrison*—No. 12936—*Decided September 25, 1933—Opinion by Mr. Justice Holland.*

1. When the trial of an issue of fact requires the examination of any long account on either side, a reference is proper under the authority of the Code of Civil Procedure, but an interlocutory order that either side is or is not entitled to an accounting is not a condition precedent to the reference, and the reference is not premature under such circumstances.

2. Where the plaintiff had been guilty of fraud or misconduct toward the defendant but without depriving defendant of its underlying rights or causing any injury, the doctrine that plaintiff did not come into court with clean hands was not available as a defense.—*Judgment affirmed.*

NEGLIGENCE—PLEADING—SUFFICIENCY—INVITEES—LANDLORD AND TENANT—JOINT TORTFEASORS—NUISANCE—INSTRUCTIONS—*Gilligan vs. Blakesley*—No. 13308—*Decided September 25, 1933—Opinion by Mr. Justice Bouck.*

1. Courts will indulge in every reasonable presumption and inference to sustain a pleading where the opposing party has failed to employ the remedies intended by the Code of Civil Procedure, such as motions and special demurrer, to effect greater certainty and directness in the pleading.

2. A patient, entering rooms rented to a physician for the purpose of being used by him as his professional office, is not only the invitee of the tenant but also of the landlord.

3. Introduction into evidence of the mortality table (Sec. 6537 C. L. 1921) is not a prerequisite to recovery on a claim for permanent injury due to negligence.

4. Fact that a physician, in whose office a patient was injured due to defective condition of the premises, paid part of the damages claimed by the patient, does not release the landlord, since there was no allegation nor evidence that the physician was a joint tortfeasor.

5. Instruction approved which stated the circumstances under which a landlord was liable to a patient injured by defective condition of premises rented to a physician for professional use.

6. A dangerous condition which amounts to a nuisance, if created by the owner in the form of a palpable defect in the construction of a building, may render the owner liable irrespective of the question of negligence.—*Judgment affirmed.*

SPECIFIC PERFORMANCE—DAMAGES IN LIEU THEREOF—UNCLEAN HANDS—*Kern vs. Campbell*—No. 13373—*Decided October 2, 1933—Opinion by Mr. Justice Holland.*

Prior to November 5, 1927, Campbell was owner of land in Routt County, upon which a trust deed of $1,000 had been foreclosed and Kern became the owner of trustee's certificate of purchase. Campbell filed his complaint in 1931 claiming that on November 5, 1927, he entered into a contract with Kern's husband acting as agent to purchase the certificate of purchase for $1,148.69 and interest, and that Kern was to assign the certificate of purchase. He claimed to have made all the payments and that the certificate of purchase was assigned to him, but delivered to one George J. Humbert in escrow; that at the time of making the agreement he was placed in possession. That thereafter Kern obtained from Humbert the certificate of purchase and erased his name from same and procured a trustee's deed to the property and contends that the deed from the Public Trustee was obtained through fraud and that the title was held in trust for the plaintiff. Later Kern borrowed $650 and secured same by deed of trust on the land and used the money to pay delinquent taxes. Judgment below denying specific performance and awarding plaintiff the full purchase price amounting to $1,232.69.

1. There are exceptions to the general rule that the finding of the trial court on conflicting testimony is conclusive upon the Supreme Court.

2. Where it appears from the record that material exhibits have been altered by both parties to the litigation, the cause comes within the exception to the foregoing rule.

3. Where the real issue in a case turns on the question as to whether or not there have been material alteration in exhibits introduced, the Supreme Court is as well able to pass on the force and weight of such evidence as is the lower court.

4. Where it appears in a suit for specific performance or for damages in lieu thereof that both plaintiff and defendant are not in court with clean hands, the plaintiff is not entitled to the full measure of relief that he otherwise might be entitled to.

5. In this case the judgment should be modified by deducting from the full purchase price paid by plaintiff the $650 borrowed by the defendant for the purpose of paying delinquent taxes and expenses. *—Judgment affirmed as to that part denying specific performance, but money judgment modified as above.*

DIVORCE—DISMISSAL WITHOUT CONSENT OF DEFENDANT'S ATTORNEY—PAYMENT OF DEFENDANT'S COUNSEL FEES AS CONDITION PRECEDENT—*Frederick vs. Frederick*—No. 12957—*Decided October 2, 1933—Opinion by Mr. Justice Hilliard.*

Plaintiff brought suit for divorce against his wife in County Court. Wife consulted an attorney advising him that she was without funds

and would be unable to support herself and minor child and could not pay attorney's fees. Attorney advised her generally as to her rights and that on proper showing the Court would require her husband to make suitable support provisions and pay reasonable attorney's fee and costs. The attorney got into immediate touch with plaintiff's attorney, but they were unable to adjust the matter. Court hearing on these preliminary matters was arranged and defendant advised her attorney to do nothing further, but her attorney went to court and resisted plaintiff's dismissal until he was compensated. The Court entered conditional dismissal provided that the defendant's attorney was paid $50 and docket fee. Court below denied plaintiff's application to vacate the order allowing counsel's fees.

1. Where a husband initiates a divorce suit, the wife without means of her own is entitled to consult counsel and where the wife has employed an attorney and the attorney has not been compensated for his reasonable services, it is proper for the court to refuse to permit the plaintiff to dismiss the suit except upon the plaintiff's payment to defendant's attorney the reasonable value of his services.

2. Plaintiff's conclusion to withdraw the charges against his wife is commendable, but it did not operate to discharge his full obligation. He, not his wife, nor her counsel, initiated the act which gave rise to the reasonable added burden of his folly. The court below properly retains control of the case for the purpose of seeing that the plaintiff discharged his obligation in full by compensating his wife's attorney. This in no manner interfered with a reconciliation of the parties.—*Judgment affirmed.*

HOMESTEADS—EXEMPTIONS—WAIVER AND ABANDONMENT OF—*Reed vs. The State Savings Bank*—No. 12535—*Decided October 2, 1933—Opinion by Mr. Justice Campbell.*

One of the plaintiffs, B. K. Reed, was a householder in the City of Colorado Springs and the head of a family and the husband of Cornelia Reed. B. K. Reed owned a dwelling referred to as A which he and his family occupied as a residence. The Reeds homesteaded it by a proper entry on the margin of the record title and continued to occupy it as a residence until 1926 when they removed to another dwelling owned by them in Colorado Springs referred to as B and moved their furniture therein and permitted their son-in-law to occupy dwelling A under some purchase agreement. In 1928, the bank procured a judgment against the Reeds and the son-in-law and caused an execution to be issued and the dwelling A to be sold, which was bought in by the bank and sheriff's certificate of sale issued. The defendants thereupon brought this action against the bank to assert their homestead rights to premises A. The lower court denied their homestead exemption.

1. Under the homestead laws of Colorado the mere entering of a homestead claim on the margin of the record of the real estate in the

office of the County Clerk and Recorder is not in itself sufficient to preserve the homestead exemption. There must be in addition to this actual occupancy and continued occupancy by the husband or wife claiming the exemption.

2. After the entry of such homestead exemption on the deed as recorded in the office of the County Clerk and Recorder, such homestead right may be lost by abandonment of the dwelling as an actual place of residence.

3. Where a husband or wife claims exemption as a homestead of dwelling and real estate actually occupied as a homestead at the time of causing such homestead exemption to be entered in the office of the County Clerk and Recorder and thereafter the husband and wife take up their abode in another dwelling and a judgment creditor seeks to enforce a judgment against the homesteaded property, such a removal and abandonment destroys any homestead exemption in the property. —*Judgment affirmed.*

DEEDS—REFORMATION—MISTAKE IN SERIES OF DEEDS—*Heini vs. Bank of Kremmling*—No. 12941—*Decided October 9, 1933*—*Opinion by Mr. Justice Burke.*

In 1908 Heini owned tracts A and B, which adjoined and each contained 2 acres. He sold tract A to a creamery company, but through mutual mistake tract B was described in the deed. The creamery took possession of A and built a factory thereon. In October, 1908, defendant bank, through its president, Heini, the grantor, made a loan to the creamery and took a mortgage on A, but by mutual mistake, described B. Foreclosure was had later, and the bank bought it in and later received deed in 1919, which also contained the erroneous description. Heini died in 1919 and the bank discovered the error in 1928.

The heirs of Heini brought this suit against the bank claiming title, and the bank answered claiming title and asking for reformation of the deed. Court below granted relief to the defendant bank.

1. Where an error of description has been copied in a series of deeds, under circumstances which would entitle each grantee to a reformation as against his vendor, the last grantee will be entitled to a reformation as against the original grantor.—*Judgment affirmed.*

WILLS—CONTEST—ORDER OF PROOF—INSTRUCTIONS—*In re estate of Wartenbee vs. The Pueblo Savings and Trust Co.*—No. 12922—*Decided October 9, 1933*—*Opinion by Mr. Justice Bouck.*

The controversy is over the codicil of a will. No question was raised on the will but the codicil was attacked for lack of testamentary capacity and undue influence. Codicil upheld by County Court and in District Court verdict upheld codicil and contestants prosecute error to this Court.

1. Where contestants are not heirs but only related to deceased's husband the usual instructions regarding "natural object of her bounty" and "natural justice" are irrelevant.

2. In a will contest, the order of proof is in the sound discretion of the trial judge and in the absence of a showing of prejudice or abuse of discretion such order of proof would not constitute reversible error even though not the regular order of proof.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—PNEUMONIA CAUSED BY UNEXPECTED EXPOSURE IS ACCIDENT WITH ACT—*Industrial Commission vs. Swanson*—No. 13312—*Decided October 9, 1933*—*Opinion by Mr. Justice Bouck.*

Swanson, a mine superintendent, contracted pneumonia from sudden and unexpected exposure, caused by accidental opening of a tunnel door in mine, placed there to protect against down drafts from surface shafts, and died as a result therefrom. The referee awarded compensation to his widow, which the Commission reversed without any additional evidence and the District Court reversed the Commission.

1. The deceased sustained an accident within the meaning of the workmen's compensation law and his death resulted from accident arising out of and/or in the course of his employment.

2. The Commission was in error in holding as a matter of law, the opening of the door, under the circumstances, did not constitute such accident.—*Judgment affirmed.*

MINES—ADVERSE SUIT—INTERVENTION—*Harding vs. Brayton*—No. 12905—*Decided October 9, 1933*—*Opinion by Mr. Justice Burke.*

This was originally an adverse suit brought by Harvey against Brayton to adjudicate rights of possession and rights to patent to mining claim. After it was at issue, Harding intervened, Brayton demurred, Harding elected to stand and to review judgment of dismissal, Harding prosecutes this writ. Harding claims the right of possession to an undivided one-fourth interest. He admits rights of Harvey and asks no relief against Harvey but only against Brayton that patent issue to him for his one-fourth interest or convey to him when patent issues and for damages. Harding bought pendente lite.

1. Where one buys pendente lite and files no adverse claim in the U. S. Land Office contesting application to patent by claimant, he took subject to the rights of the litigants.

2. It appears from the record that the primary purpose of the intervention was to support the action of plaintiff below who filed no assignments of error and sued out no writ.

3. Harding was not entitled to intervene under these circumstances.—*Judgment affirmed.*

REPLEVIN—PLEADING—ANSWER—NEW MATTER—*Wyman vs. McCarthy*—No. 12893—*Decided October 9, 1933*—*Opinion by Mr. Justice Butler.*

In a replevin action, McCarthy recovered judgment against Wyman for the possession of 18 head of cattle, and for damages for unlawful detention. In one defense, Wyman denied that McCarthy was the owner and entitled to possession, and for a further defense and by way of counterclaim, Wyman alleged a joint adventure agreement between them on the cattle and that these 18 head were sold to Wyman, the purchase price to be deducted from Wyman's share of the profits, and that an accounting would show plaintiff indebted to defendant. This further defense and counterclaim was stricken and Wyman assigns error.

1. The allegations in the further answer were improper. They did not constitute new matter.

2. Affirmative matter requiring a special plea must be in avoidance. It is consistent with the plaintiff's cause of action, but operates to defeat it.

3. If the matter pleaded in the answer is inconsistent with the plaintiff's claim, its only effect is to disprove it, and it is admissible under a general denial.

4. The counterclaim was properly stricken. It did not arise out of the transaction set forth in the complaint nor was it connected with the subject of the action.—*Judgment affirmed. Mr. Chief Justice Adams filed a separate opinion concurring in affirmance of the judgment, but dissenting on the construction of the rule of pleading, being of the opinion that the matters set forth in defendant's answer under the heading "Further Answer and Counterclaim" was an allegation of material fact, which, if true, constituted a complete defense, and that the lower Court erred in striking it, but as the same matters were in evidence and permitted to be shown by the Court under general denial, that it was error without prejudice.*

TAXATION—EXEMPTIONS—FRATERNAL AND CHARITABLE USE OF REAL ESTATE—VACANT LOTS—*El Jebel Shrine Assn. vs. McGlone*—No. 12771—*Decided October 9, 1933*—*Opinion by Mr. Justice Campbell.*

Plaintiff-in-error, plaintiff below, filed complaint against the Assessor and Treasurer alleging that it was a holding corporation for El Jebel Shrine Temple, a mutual, fraternal, benevolent and charitable organization, that it is supported entirely from dues and entire proceeds are devoted to fraternal and charitable purposes, that the property of plaintiff is used solely for such purposes, that it acquired the real estate for such purpose and that it had commenced the construction of a building on the lots by placing a building foundation thereon, which was uncompleted at an expense of $50,000; that it acquired the lots ten years before and that the lots were always exempted from taxation until

1929 when the Assessor wrongfully placed them on the tax list and levied a tax of over $1,100. Plaintiff claimed the real estate exempt from taxation. The Court below sustained a general demurrer, and plaintiff stood upon the ruling.

1. Section 5 of Article X of Colorado Constitution provides: "Lots, with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes * * * shall be exempt from taxation."

2. Such provision does not mean that such lots must have a completed building thereon actually in use for charitable purposes.

3. A structure may be a building, although it is yet incomplete and unfurnished.

4. Where it appears that the lots in question were purchased with the intent of devoting their use to charitable purposes and that a portion of the building, which it proposes to use, has been commenced, and that $50,000 has been expended toward the building of such structure, and that the purpose is to complete the building and devote it to such purposes, such real estate is exempt from taxation.—*Judgment reversed.*

DECLARATORY JUDGMENTS—CONSTITUTIONALITY—*The San Luis Power and Water Company vs. Fred Trujillo*—No. 13109—*Decided October 16, 1933—Opinion by Mr. Justice Holland.*

In April, 1931, the County Treasurer filed this action to obtain a declaratory judgment to the effect that the Sanchez reservoir and its appurtenances, being the irrigation system of the water company, be subject to taxation for the years 1907 to date. He alleged the corporative existence of the water company, that it was operated for profit, that since 1907 it was the owner of water and water rights and that such water and water rights had been omitted from assessment. The defense was that the declaratory judgment act was unconstitutional, that the landowners were furnished with the water, were assessed for taxes based on the added value to the land by reason of being irrigable and this would make double taxation and that, in any event, its water and water rights could not be taxed under the statutory and constitutional prohibitions against separate taxation of irrigated works.

Judgment below for plaintiff.

1. The declaratory judgments act is constitutional.

2. The taxes on defendant's property have not been assessed and paid by the owners of the lands irrigated from its system because the lands have been assessed at a valuation on account of being irrigated lands.

3. The terms of the contract between the irrigation company and the landowners show that the landowners have no right, title or interest in the water or the water works system except as a consumer. The ownership of this irrigation system, its water and water rights being in the water company, it is separately taxable and does not fall within

the exemption of the constitution that "ditches, canals and flumes owned and used by individuals or corporations for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."—*Judgment affirmed.*

BILLS AND NOTES—STATUTE OF LIMITATIONS—DISCHARGE IN BANKRUPTCY—*Lieske vs. Swan*—No. 13387—*Decided October 16, 1933—Opinion by Mr. Justice Burke.*

This was a suit on a promissory note to which the defenses were the statute of limitations and discharge in bankruptcy. Jury was waived and case tried by the Court which found for plaintiff. Defendants below prosecute error.

1. Error cannot be predicated on the Court below allowing filing of replication out of time. This is in the discretion of the Court.

2. Error cannot be predicated on Court reserving ruling on motion for judgment on the pleas. This is discretionary with the Court.

3. Trial Court's conclusion on conflicting testimony is binding.

4. Dispute was as to whether or not an interest payment had been made, taking the note out of the Statute of Limitations. Findings on conflicting evidence will not be disturbed.

5. A discharge in bankruptcy is no defense where bankrupt promised to pay a note notwithstanding the bankruptcy proceedings. The moral obligation to pay such a debt is sufficient to support a promise to pay notwithstanding the discharge, whether the promise be oral or written, and whether, if made after the filing of the petition, it be made before or after discharge.—*Judgment affirmed.*

AGENCY—CONTRACTS—PLEADNG—EVIDENCE—SEGREGATION OF WITNESSES—*The Union Deposit Co. vs. Driscoll*—No. 12827—*Decided October 16, 1933—Opinion by Mr. Justice Bouck.*

Mary Driscoll brought an action as plaintiff in the District Court for damages for breach of contract. Plaintiff prevailed below.

1. Where a corporation contracts with "A" for exclusive agency for sale of its bonds and "A" employs salesmen to sell such bonds and where such contract of agency authorized the employment of subagents to deal for the company, such subagent is the agent of the company.

2. By answering over, any error in overruling motion or demurrer is waived, except as to questions of a jurisdiction and insufficiency of the alleged facts.

3. Where, at the request of a defendant, witnesses are segregated, such defendant cannot complain of an order of the Court refusing to permit a witness of the defendant, a handwriting expert, to remain in the court room.

4. Where a subagent of a company sells both for the company and takes a power of attorney to himself from the purchaser, such act

does not necessarily terminate his agency for the company and make him the agent of the purchaser, particularly where the power of attorney was unknown to the company at the time the transaction occurred and where the power of attorney had no connection with the transaction of selling the bonds.—*Judgment affirmed.*

TAXATION—DIFFERENCE BETWEEN EXCISE TAX AND PROPERTY TAX—*Walker vs. Bedford et al.*—No. 13380—*Decided October 24, 1933—Opinion by Mr. Justice Hilliard.*

Walker brought this action to enjoin the enforcement of Chapter 14, Session Laws of the Extraordinary Session of 1933, commonly known as the UR tax. Its constitutionality was attacked on several grounds, the principal ones being that it was not an excise tax but was an additional property tax and was in conflict with Sections 3 and 7 of Article 10 of the Colorado Constitution. Demurrer to complaint was sustained below.

1. Section 3 of Article 10 of our constitution provides among other things that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

2. Section 7, Article 10 provides among other things that "The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation."

3. The act in question imposes a property tax and is not an excise tax.

4. The general assembly is not at liberty to impose a property tax upon the theory that it is imposing an excise tax.

5. While a license tax may be levied upon such business or occupations as are proper subjects of municipal regulation and control and the purpose of such tax is for regulation or restraint, yet when all the elements of regulation or restraint are wanting, and the primary purpose of the act is the raising of revenue only, it then loses its character as a license tax and becomes a tax for revenue.

6. Where the primary purpose of the act is to tax automobiles from which fund the needy and destitute may receive aid it comes within the prohibitions of Section 7, Article 10, of our constitution. —*Judgment reversed. Mr. Justice Butler, Mr. Justice Bouck and Mr. Justice Holland dissent.*