Denver Law Review

Volume 11 | Issue 5 Article 9

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

WILLS—LOST WILLS—METHODS OF PROOF—COMPETENCY OF WITNESSES—*Eder vs. The Methodist Church Association*—No. 12770—*Decided January 15, 1934*—*Opinion by Mr. Justice Hilliard.*

Eder died in 1928 and thereafter one Fox was appointed administrator. Thereafter petition was filed seeking admission to probate as a lost will a carbon copy of such purported lost will. The copy was admitted to probate as a lost will.

1. Where a caveat to a will is filed the statute contemplates the filing of the answer of the caveat, and even where the parties without objection proceed to trial on the theory that the allegations of the caveat were to be taken as denied, such practice is not commended.

2. The burden of proof is upon the proponents to establish facts to admit the will but upon the caveat the burden is upon the objectors.

3. The fact that a witness is attorney for the proponents does not disqualify him as a witness by the fact that he would be entitled to fees for his services in a will contest. A beneficiary under the will is an incompetent witness. The administrator and proponents of the will being parties to the proceedings and directly interested in the event thereof, are incompetent witnesses. Where a church is beneficiary under a will a member of the church is not disqualified as a witness. The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment.

4. A will, once validly made and published, remains a will although the writing, the best evidence of it, in the absence of intent to revoke, be lost or destroyed.

5. The declarations of a testator subsequent to the making of a will with reference to the existence thereof are admissible.—*Judgment reversed.*

EJECTMENT—QUIET TITLE—PLEADINGS—CONDEMNATION—*MacKenzie vs. Corley*—No. 12981—*Decided January 15, 1934*—*Opinion by Mr. Justice Holland.*

MacKenzie sought to quiet title to 100-foot strip of land formerly used for railroad right of way. In 1900 the strip of land was condemned for railroad purposes for right of way and damages paid to the then owner. The land was used for railroad purposes until 1922 when the railroad property was sold by a receiver to Corley. The railroad later dismantled and the right of way of the railroad converted into a toll road.

The plaintiff claims that this was a change in the granted use and that plaintiff had a reversionary interest in the land. Defendant alleged ownership and possession by virtue of deed from receiver and a

right to use it for toll road by virtue of a permit from the United States, and that the plaintiff purchased the land with full knowledge and made no objection to expenditure for conversion to a toll road.

Plaintiff's demurrer to the answer was overruled and plaintiff replied denying that the construction, operating and maintaining of the toll road was with his consent or with the consent of his predecessor. General demurrer to the reply was sustained and on plaintiff's refusal to plead further, order of dismissal was entered.

1. While the parties below treated this as an action in ejectment, the pleadings disclose it to be an action to quiet title.

2. While the complaint on its face was insufficient as a complaint to quiet title for lack of necessary allegation of possession, however, the answer alleged ownership and possession and prayed that the rights of the defendant be determined. This answer gave the Court equity jurisdiction to determine the controversy and when the plaintiff filed his reply alleging ownership and right to possession an issue was made.

3. The answer disclosed a substantial defense if proven.

4. If the plaintiff knew that the defendant was changing the use of the right of way from railroad uses to that of a toll road and allowed the defendant without objection to make expenditures in construction of the toll road he is estopped from maintaining either trespass or ejectment for the entry of such changed use and is restricted to a suit for damages. In law he is regarded as having acquiesced in such action on the part of the defendant and his grantee, the plaintiff herein, taking title with the same notice is also estopped from maintaining an action in ejectment or trespass and cannot recover damages for the occupation thereof.

5. The right to recover damages belongs to the original owner alone and did not pass with the land to his grantee.

6. These allegations formed an issue and required proof and the Court was in error in sustaining defendant's demurrer to plaintiff's replication and dismissing the complaint.—*Judgment reversed.*

WORKMEN'S COMPENSATION—ATTORNEY AS EMPLOYEE WITHIN ACT—*Industrial Commission of Colorado vs. Moynihan*—No. 13353—*Decided January 22, 1934*—*Opinion by Mr. Justice Hilliard.*

Moynihan, an attorney, residing at Montrose, Colorado, was employed by the Oliver Power Co., a public utility corporation, under retainer and subject to its call for services at any time and while so employed came to Denver, Colorado, on its behalf, and while returning home was injured in an automobile accident. Moynihan prevailed in the Court below and the Court below ordered the Commission to determine the extent of disability and fix compensation.

1. Section 4383 Compiled Laws 1921 as amended Session Laws 1931, page 819, does not exclude members of the legal profession; he

is, otherwise, within the statute for the enjoyment of its protecting purpose.

2. Where a lawyer is especially employed in particular instances the circumstances may be such as to make him an independent contractor, and, therefore, not entitled to relief by virtue of compensation legislation.

3. However, where an attorney, by the terms of his employment, gives his time and services subject to the call of his employer and is regularly employed by that client, his employment is not casual, neither is he an independent contractor but is an employee within the terms of the compensation act.—*Judgment affirmed.*

MANDAMUS—TRANSFER OF SHARES IN CORPORATION—*Hertz Driv-Urself-System, Inc., et al. vs. Doak*—No. 13446—*Decided January 22, 1934*—*Opinion by Mr. Chief Justice Adams.*

Doak brought mandamus to compel the transfer to him of 625 shares of capital stock of defendant corporation. Mandamus was awarded below.

1. A defendant in a mandamus action cannot defeat same by filing an answer alleging that the ownership of the stock is in dispute and offering no proof in support of the answer.

2. Defendant cannot oust the jurisdiction of the Court in the mandamus proceedings by simply raising issue of ownership.

3. The duty of corporate officials to issue stock certificates to those entitled thereto is a ministerial duty enforceable by mandamus.

4. Mandamus is a discretionary writ and the order is reversible for abuse of discretion, but there was no such abuse of discretion in granting the writ in the present action.

5. No one is entitled to the writ of mandamus whose right is not clear and unquestionable and it is not a proper remedy when it is apparent that the interests of third parties who are not before the Court are involved, but it is always a proper remedy to procure a transfer of corporate stock when the facts justify it.

6. A sham answer followed by no proof in support of it cannot operate as a stalemate to check the petitioner in his rightful demand for the transfer of stock to which he is entitled on the books of the corporation.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DISTINCTION BETWEEN PUBLIC EMPLOYER AND PRIVATE EMPLOYER—PUBLIC EMPLOYEE—*The Industrial Commission vs. The State Compensation Insurance Fund et al.*—No. 13408—*Decided January 22, 1934*—*Opinion by Mr. Justice Holland.*

Susman was allowed compensation for injury incurred in accident arising out of and in course of his employment. The employer, a mining company, was the lessee of minerals in school lease made by

State Board of Land Commissioners. The award of Industrial Commission was set aside by the District Court and error prosecuted therefrom.

1. In order that an injured workman can fix liability in a public employer, he must first be in such employment as a public employee.

2. When such workmen is working for a private mining company which is lessee of minerals from the Board of Land Commissioners, he is not a public employee but a private employee and is not entitled to compensation.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—SUFFICIENCY OF PLEADINGS—STATUTORY LIMITATIONS ON COMMISSION—NECESSITY OF FINDINGS —*Sherratt et al. vs. The Rocky Mountain Fuel Co. et al.*— No. 13424—*Decided January 29, 1934—Opinion by Mr. Justice Holland.*

Defendants in error were plaintiffs in the trial Court where they sought to set aside an award of the Industrial Commission and to review an adverse judgment; the claimant and the commission prosecute this writ. The judgment of the District Court was to the effect that the commission acted without and in excess of its powers in making its award of June 29, 1933, and its affirmation of same on July 10, 1933, and vacated said award and remanded the case to the commission with directions to deny further compensation. This judgment, on a petition for rehearing, was modified and the case remanded to the commission for further hearing and proceeding in conformity to the former ruling of the Court.

1. From the face of the record, the award of April 9, 1931, was not subject to review other than, and only, upon the commission's own motion. That procedure is prescribed and limited by the statute. Any supplemental award that would change, alter or modify the effect of the award of April 9, 1931, by which the claimant was found to have fully recovered from his injury, would require a specific findings as to a change in this recovered condition.

2. The Industrial Commission cannot after it has made an award to the effect that the claimant had made a complete recovery, make subsequent awards on the ground that it had overlooked the original award of April 9, 1931, and vacate the subsequent awards and make an award of resumption of payments which still leave the original award of April 9, 1931, containing a specific findings of complete recovery.

3. The Industrial Commission wholly failed to follow the statute and if it attempted to disregard the express requirement of the statute, then it acted without auhority. It did not find that there was any error or mistake in the award of April 9, 1931, which contained the specific findings of complete recovery. It did not find that there had been a changed condition since the date of that award.

4. Authority to award a fixed aggregate amount of compensation

must come from a finding, in the award, of permanent disability.—*Judgment affirmed.*

ORIGINAL PROCEEDINGS ON INTERROGATORIES FROM THE SENATE—IMPORTANCE OF QUESTION—*In re Interrogatories of the Senate Concerning the Constitutionality of House Bill No. 45*—No. 13463—*Decided January 29, 1934*—*Opinion en Banc.*

The senate of the 29th general assembly by resolution submitted to this Court certain interrogatories concerning the constitutionality of a portion of house bill No. 45.

1. Under Section 3 of Article 6 of the Constitution the Supreme Court is required to give its opinion upon pending legislation only "upon important questions upon solemn occasions when required by * * *, the Senate, * * *."

2. Extraordinary sessions of the general assembly can only be convened by proclamation of the Governor and the business transacted therein is limited to that named in the proclamation.

3. A bill entitled "An act to provide revenue for the relief of the unemployed, destitute and suffering," but which in its body provides for the regulation of the manufacture, sale and use of malt, vinous and spirituous liquors and merely provides for relief of the unemployed and destitute by virtue of a small amount of the revenue raised from the liquor control into the Old Age Pension Fund and setting aside another small amount for the use of the Colorado State Relief Committee, is not within the Governor's proclamation and could under no circumstances be valid if passed by the present extraordinary session.

4. A bill whose chief purpose is other than the raising of revenue does not become a revenue measure merely because some of its provisions produce revenue.

5. The legislature cannot go beyond the limits of the business "specifically named in the proclamation" of the Governor at an extraordinary session.

INTERVENTION—PARTNERSHIP DISSOLUTION—RIGHT OF DIVORCED WIFE OF ONE PARTNER TO INTERVENE—*Stokes vs. Dollard et al.*—No. 13378—*Decided January 29, 1934*—*Opinion by Mr. Justice Burke.*.

Dollard sued Stokes for dissolution of partnership. Mrs. Stokes filed petition in intervention. Dollard demurred and demurrer sustained. Mrs. Stokes stood on demurrer and moved for stay of execution. This was denied. Dollard had judgment in the main case and Mrs. Stokes brings error.

1. Mrs. Stokes, the intervenor, had a right to stand on her petition when the general demurrer thereto was sustained. She had no duty to amend or move for leave. That ruling was, as to her, a final judgment.

2. That judgment being final Mrs. Stokes was entitled to a stay of execution.

3. One who has an interest in the subject matter of the litigation, or in the success of either party, may intervene.

4. A deserted wife whose absconding husband has no property save what is tied up in a partnership may intervene in dissolution of her husband's partnership for the purpose of impounding whatever interest her husband may be decreed to have therein for the support of herself and minor children, and is not required to wait before intervening for a final determination of her divorce action.—*Judgment reversed.*

WORKMEN'S COMPENSATION—SUFFICIENCY OF COMMISSION'S FINDING ON CONFLICTING EVIDENCE—*The Hayden Brothers Coal Corporation et al. vs. The Industrial Commission et al.*—No. 13425—*Decided January 29, 1934*—*Opinion by Mr. Justice Holland.*

This is an action to review a judgment of the District Court in affirming a supplemental award for additional compensation made by the commission upon a review had on its own motion.

1. Where the record discloses a conflict in the evidence before the commission this Court will not pass upon the weight of the evidence in a workmen's compensation case. This is exclusively for the determination of the Industrial Commission.

2. Where there is a conflict of evidence and there is competent evidence to support the findings of fact made by the commission the findings so made are final.—*Judgment affirmed.*

FIRE INSURANCE—SUFFICIENCY OF MOTION FOR NEW TRIAL—FAILURE TO FILE PROOF OF LOSS—*Home Insurance Company vs. Taylor*—No. 13111—*Decided February 5, 1934*—*Opinion by Mr. Justice Campbell.*

Taylor and others recovered judgment below on fire insurance policy.

1. Where motion for new trial and assignment of error are merely to the effect that the trial court erred in not finding the issues joined in favor of the defendant and against the plaintiff, they are insufficient to invoke the jurisdiction of the Supreme Court to entertain a writ of error.

2. Where the insured fails to file proof of loss within time required by the policy, but the insurance company refused to pay the loss in any event, it waived compliance with the policy requiring notice of proof of loss.—*Judgment affirmed.*

PHYSICIANS AND SURGEONS—DENTISTS—MEASURE OF LIABILITY—*Brown vs. Hughes*—No. 13176—*Decided February 5, 1934*—*Opinion by Mr. Justice Holland.*

Mrs. Hughes recovered judgment in court below against Brown, a dentist, and against Desmond, a physician and surgeon, for $5,000 damages for death of her husband alleged to have been caused by their joint and several negligence in pulling 16 teeth and removing his tonsils at the same operation, at a time when he was in bad health. Among many assignments of error, the controlling one is that the evidence was insufficient to justify a verdict.

1. The facts in this case are insufficient to justify a verdict against the dentist and physician.

2. All that the physician and dentist in this case were required to render in the way of service, in the diagnosis and treatment of their patient, was such a degree of skill and care as is ordinarily possessed by those in the practice of their profession under similar conditions of the patient and in their particular locality.

3. The defendants here must first have left and entirely abandoned all knowledge acquired in the fields of exploration and adopted some rash or experimental methods before liability would ensue and the evidence wholly fails to evince any want of skill or a reckless disregard of consequences.—*Judgment reversed.*

JUDGMENTS — CONSISTENCY — MODIFICATION — *Mystic Tailoring Company vs. Jacobstein, Admx.*—No. 13465—*Decided February 5, 1934*—*Opinion by Mr. Chief Justice Adams.*

Bertha Jacobstein, as administratrix of her deceased husband's estate, recovered judgment below for $150.00, for services rendered by her husband during his lifetime. The company assigns error and the administratrix assigns cross-error. The deceased was employed by the company at a salary of $100 per week and for a period of three weeks was paid no salary. The only defense was that the deceased, being an officer and stockholder, voluntarily agreed to waive his salary, which was denied. Counsel for the company argue that the judgment for $150.00 cannot be reconciled with the evidence and that the judgment should be for nothing or for $300.00. Counsel for the administratrix confesses the rule but argues that it was error not to enter judgment for the full $300.00.

1. A verdict or judgment must be consistent with some legitimate theory of the testimony, and where it is not, should be set aside.

2. In this case, the judgment should have been for $300.00 and it accordingly is so increased to correspond with the undisputed facts. —*Judgment modified and affirmed.*

WORKMEN'S COMPENSATION; ACCIDENT—PROXIMATE CAUSE—*Peer vs. Industrial Commission of Colorado*—No. 13441—*Decided February 5, 1934—Opinion by Mr. Chief Justice Adams.*

Claimant was employed as dishwasher in restaurant and had been for years and was accustomed to use a metal instrument like a putty knife to scrape pans and one night while using this scraper, noticed soreness in palm of hand which later developed into osteomyelitis of the wrist bone, caused by infection. There was no abrasion of the skin of the hand or any cut or evidence externally to show how the infection started. The Commission denied an award which was affirmed by the District Court.

1. An accident, under the Workmen's Compensation act, must be traceable to a definite source.

2. The burden of proof is upon claimant to show that her injury was the proximate result of an accident arising out of and in the course of her employment.

3. The record fails to show that claimant was bruised or injured by the scraper, or what the cause of the injury actually was. It does not appear that it was in any way attributable to or connected with her employment.—*Judgment affirmed.*

WILLS—JOINT TENANCY—*Kwatkowski vs. Reindt*—No. 13440—*Decided February 5, 1934—Opinion by Mr. Justice Bouck.*

Under the last will and testament of Kwatkowski he bequeathed to Herbert E. Canfield and Mary E. Canfield, jointly and severally, all of his property. Herbert E. Canfield pre-deceased the testator. Testator left no known heirs. The state of Colorado, claiming this was an estate in common and not a joint tenancy, asserted in the court below that the proceeds of one-half of the estate must be paid to the state of Colorado. The court below held it to be a joint tenancy and the state of Colorado prosecuted error.

1. The laws of Colorado expressly favor tenancies in common as against joint tenancies.

2. No estate in joint tenancy can be created unless the instrument of conveyance expressly declares that the title shall pass, not in tenancy in common but in joint tenancy.

3. The terms in a will that two persons shall take, "Jointly and severally" does not constitute a joint tenancy.—*Judgment reversed.*

PARTNERSHIP—WHAT CONSTITUTES—*Fisher vs. Colorado Central Power Co.*—No. 13091—*Decided February 5, 1934—Opinion by Mr. Justice Burke.*

The Colorado Central Power Co. sued Fisher and Stack as co-partners doing business as the Acme Sand & Gravel Co., for approximately $900.00 due on open account for electric power furnished for

the operation of a gravel pit. Fisher denied that he was a partner. The cause was tried to the Court and the Power Company had judgment.

1. The Acme Sand & Gravel Co. being an unincorporated association the owners thereof were partners.

2. Neither a specific intent nor a written contract to form a co-partnership are essential to its creation.

3. As to persons who had dealt with a partnership or to whom it was indebted the responsibility of a partner, in the absence of notice of his withdrawal, is clearly settled.

4. The statute requires that a partnership using a trade name shall file with the County Clerk and Recorder an affidavit setting forth, among other things, the names and addresses of its members.

5. Fisher was in personal charge of the finances of the Acme Sand & Gravel Co. and his office was its office, he received its money and bills of this particular creditor against it were sent to him there and paid there by his employee without protest and sometimes by checks of a corporation which he owned or controlled, and he owned the land on which the gravel pit was operated.—*Judgment affirmed.*

TAXATION—UNIFORMITY OF ASSESSMENT—*Colorado Tax Commission vs. Colorado Central Power Co.*—No. 12949—*Decided February 5, 1934*—*Opinion by Mr. Justice Bouck.*

This action was commenced in the District Court in Jefferson County by the Colorado Central Power Co. under C. L. 1921, Section 7287. It seeks to set aside the assessment of the company's property heretofore made for the year 1929 by the Colorado Tax Commission on the principal ground that the assessment was illegal and not uniform with the assessment made against other like parties. The Court below reduced the Commission's assessment of $863,100.00 to $569,-460.00.

1. A motion has been filed in this Court to dismiss the proceedings in error, the ground being that the judgment of the Court below is not subject to review. The motion is denied.

2. A judgment of the District Court even in a purely statutory proceeding will be deemed to fall within the general provision for review by this Court where no contrary intention is expressed.

3. The record fails to sustain the charge that the assessment was illegal. Where the evidence shows a substantial difference between the many assessed corporations that exactly similar computations are impracticable and incapable of accomplishing a fair and proportionate assessment the same and identical plan is not required to be applied to each one. All taxpaying properties of this character must necessarily be considered from many angles. No single method can be applied to all.

4. The description in C. L. 21, paragraphs 7343-7345 reveal a plain legislative purpose to place an effective screen of secrecy around the information elicited from public utility corporations by the inquisitorial

powers of the Commission, and with this the judicial branch cannot rightfully interfere.

5. Before an objection to the evidence can be considered a record must not only show the offer and refusal thereof but the materiality of it.—*Judgment reversed.*