Denver Law Review

Volume 11 | Issue 11 Article 6

July 2021

Supreme Court Decisions

Dicta Editorial Board

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CHATTEL MORTGAGES—TRUST DEED—PRIORITY—*Tolland Co. vs. The First State Bank of Keenesburg et al.*—No. 13532—*Decided July 23, 1934—Opinion by Mr. Justice Hilliard.*

A controversy over certain funds in the registry of the Court—Tolland Co. claimed the proceeds of a sale of a crop of beets under a deed of trust and the First State Bank of Keenesburg laid claim to same under a chattel mortgage. The latter prevailed below.

1. A current crop, such as beets, growing from the season's planting, may be mortgaged as a chattel.

2. A chattel mortgage conveys title to the chattels subject to retention of the mortgagor.

3. A deed of trust is merely a lien.

4. A chattel mortgage of the crops by the owner in possession operates in law as a severance of them so that they will not pass under a mortgage of the land, even though the mortgage antedates the chattel mortgage where the entry after default and selling of the real estate is made subsequent to the chattel mortgage.

5. Even though the mortgage or deed of trust gives a lien upon the proceeds of the income they belong to the mortgagor until possession of the mortgaged premises is taken.

6. The chattel mortgage is not invalid although an acknowledgment was taken by an officer of the mortgagee corporation.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—REDUCTION OF COMPENSATION FOR WILFUL VIOLATION OF SAFETY RULE—*Clayton Coal Co. et al. vs. De Santis et al.*—No. 13559—*Decided July 23, 1934—Opinion by Mr. Justice Butler.*

De Santis sustained an accidental injury while working for Clayton Coal Co. The company employed no regular shot-firer and it was customary for the diggers to fire their own shots. He lighted the fuse on five shots and one missed fire, and after waiting fifteen minutes he returned and the missed shot exploded destroying the vision of his right eye and causing other injuries. He was awarded compensation by the commission, and the company and insurer claimed that it should be reduced 50% by reason of his wilful failure to obey reasonable rule of safety.

The District Court affirmed the judgment of the commission for full compensation.

1. Section 3594, C. L. 1921, which provides that where a shot has misfired and where fuse is used no person shall enter such working

place until four hours have elapsed from the time of such misfiring, has no application to a compensation case.

2. The Workman's Compensation Act has abolished the defense of contributory negligence where the workman's want of care is not wilful.

3. Only where the employer has adopted a rule for the safety of the workmen and that rule is a reasonable one, and a workman wilfully fails to obey it, that the compensation of the workman is reduced 50%.

4. Where the evidence shows that the employer had no rule relating to the conduct of workmen where there is a mis-shot, and the evidence further shows that it was the custom among the workmen to wait fifteen minutes after a mis-shot before going back, a 50% reduction of compensation does not apply.—*Judgment affirmed.*

JUDGMENTS—INTEREST—DISCRIMINATION IN ALLOWANCE OF INTEREST—ESTOPPEL—*Charles B. Myers vs. Colorado Pulp and Paper Co.*—No. 13556—*Decided July 23, 1934*—*Opinion by Mr. Justice Hilliard.*

To a decree denying certain general creditors interest on their allowed claims, and at the legal rate claimed by them, or 4%, which was allowed all other like creditors, the creditors suffering the discriminatory judgment bring error. In the receivership matter which was formerly before the Supreme Court in an earlier case, cause was remanded with the directions that general creditors receive 100% with legal interest. Thereafter, certain of the creditors stipulated to accept the face of their claims with 4% interest, but not objecting creditors; they never signed the stipulation and pursued their claims with interest in the Court below, and the Court below entered an order giving the creditors who stipulated the face of their claim the 4%, but that the particular creditors objecting should be paid the face of their claims with no interest, on the ground that they had unnecessarily delayed the Court by their proceedings and increased the costs of the case.

1. The fact that certain creditors objected to the allowance of their claims without including the full legal interest or, at least, the interest allowed other creditors, and thereby delaying the proceedings and incurring additional expenses is no sufficient ground for the Court below to penalize such creditors and refuse to allow them interest.

This was a discrimination which should not be upheld.

2. Motion to dismiss the writ on the ground that the objecting creditor's attorney had withdrawn from the clerk's office certain checks covering the sums awarded where the checks had not been cashed, does not estop them from pursuing the writ of error.—*Judgment reversed.*

STREET RAILWAYS—NEGLIGENCE—PROSPECTIVE PASSENGER ABOUT TO BOARD CAR—ADMISSIONS AGAINST INTEREST—*The Denver Tramway Corp. vs. Julia Kuttner*—No. 13192—*Decided July 23, 1934—Opinion by Mr. Justice Bouck.*

Julia Kuttner obtained a judgment for $2,250.00 as damages against the defendant for personal injuries. She was waiting to board a street car when the rear trucks of the street car immediately preceding the car she intended to board failed to follow the front trucks and went off on a switch track, thereby pinning her between the rear of the car and an automobile.

1. Where an electrically driven street car is wholly under the control of its owner, and if, while the latter applies or operates it, there is an accident which cannot be accounted for by any affirmative evidence reasonably within reach of the one injured thereby, a presumption of negligence is indulged to constitute a prima facie case of liability.

2. The fact that the plaintiff was not an actual but merely a prospective passenger does not prevent the doctrine of res ipsa loquitur from applying.

3. It was a prejudicial error to admit the testimony of a third party, of a conversation of the claim agent of the defendant, in which the claim agent made admissions of negligence where the claim agent was not an eyewitness to the transaction and is not shown to have any authority to speak for the corporation.

4. The rule might be otherwise as to statements made during an actual negotiation between the one injured and an agent authorized to make a settlement.

5. The admission of the Claim Agent was not admissible under the hearsay rule as an admission against interest.

6. General allegations of permanent injuries and inability to follow any gainful occupation, and allegations that the plaintiff be required to expend large sums of money for medical care and treatment where followed by a Bill of Particulars, are sufficient to admit evidence of payment for nursing care and attention, cost of medical attention, past, present and future, and evidence of the fact that plaintiff was a stenographer, accountant and office employee.—*Judgment reversed.*

RAPE—SUFFICIENCY OF EVIDENCE—REMARKS OF TRIAL COURT—*Boegel vs. The People*—No. 13419—*Decided July 23, 1934—Opinion by Mr. Justice Butler.*

The defendant was convicted below of statutory rape on a girl twelve years old. She had a baby as a result thereof and the defendant did not attempt to establish that any other person had access, but denied that he ever had sexual intercourse.

1. The evidence was sufficient to sustain a verdict of statutory rape.

2. After the jury had been out twenty-three hours it was proper for the Court to advise the jury that they try to agree on a verdict if they could do so conscientiously.—*Judgment affirmed.*

PLEADING—AMENDED ANSWER—SCOPE OF ISSUE—*Spangler vs. Barnes et al.*—No. 13491—*Decided April 23, 1934*—*Opinion by Mr. Justice Holland.*

The original trial in this controversy was had upon the sole question of the delivery of a deed from Willard to Spangler, plaintiff in error, which the heirs of Willard, who are defendants in error, sought to have cancelled. Judgment was entered to the effect that there was a valid delivery. That judgment was reviewed by this Court, reported in 93 Colo. 254, whereupon the judgment was reversed for further proceedings, not inconsistent with the views expressed in the opinion.

After the case was remanded to the District Court defendant asked leave to file an amended answer which was granted and the amendment filed, and when the case came on for hearing on plaintiff's motion the Court struck the amended answer and entered decree for plaintiffs, cancelling the deed, fixing the ownership of plaintiffs to the property in fee and awarded them the right to possession and damages for use of the property and to review this final judgment error was prosecuted.

1. The Court below erred in striking the amended answer.

2. When, growing out of the same transaction, such matter in defendant's original answer and amended answer as alleged an equitable interest and right to the possession of the property, were rightfully pleaded and all questions raised by such original answer and amendment should be adjudicated in this proceeding without the necessity of a new and separate action.

3. In an action to cancel a deed, the defendant is entitled to be heard on any fact, proof of which would entitle defendant to ownership of the property, even in the event the deed was ordered cancelled. —*Judgment reversed with directions to reinstate the amended answer and proceed to a determination of the issues thereby raised.*

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES—DEFECTIVE SIDEWALK—CONTRIBUTORY NEGLIGENCE—*Beck vs. City and County of Denver*—No. 13225—*Decided April 23, 1934*—*Opinion by Mr. Justice Burke.*

Mrs. Beck sued the City for $12,500.00 for injuries caused by defective sidewalk. Jury brought in a verdict for the defendant. The sole question presented on the review was whether the uncontradicted evidence shows the plaintiff was guilty of contributory negligence. At the time of the injuries Mrs. Beck was pregnant. There were a number of nails protruding from the surface of the sidewalk on which she stubbed her toe and fell, and this occurred in the nighttime and

the sidewalk was poorly lighted. Her eyesight was not good and she was suffering from other physical disabilities which caused a miscarriage, outside of the fall.

1. Not every defect in a sidewalk is actionable.

2. Where the person injured is physically impaired the care he is in duty bound to exercise while walking on a sidewalk is increased correspondingly.

3. There was sufficient evidence for the jury to conclude that the plaintiff, in view of the insufficient light, and her own physical condition, was guilty of contributory negligence at the time she fell.

4. The jury concluded by the verdict that the miscarriage was not caused by the fall and the evidence supports that finding. Hence, the verdict must stand.—*Judgment affirmed.*

AUTOMOBILES—COLLISIONS—NEGLIGENCE OF DEFENDANT—SUFFICIENCY OF EVIDENCE—*Shirley Garage, Inc. vs. Douglas*—No. 13476—*Decided March 12, 1934—Opinion by Mr. Justice Bouck.*

This is an action for damages arising out of an automobile collision. There are no pleadings, the first trial being before a Justice of the Peace. On appeal to the County Court the trial was De Novo; jury waived and judgment entered against the plaintiff company which is the plaintiff in error, both on its claim against the defendant and on defendant's counterclaim. The right to enter judgment on the counterclaim is challenged.

1. Where, in the trial of an automobile case a diagram of the place of accident is used by the witnesses in explanation of their testimony but such map or diagram is not preserved in the bill of exceptions, such diagram may have been the decisive factor in proving that the defendant's damage was the natural and direct consequence of plaintiff's negligence.

2. Even if it be conceded for the purpose of argument that the record shows that the defendant was guilty of contributory negligence in disobeying certain traffic regulations, it is apparent that the Court below believed that such negligence, if any, was not a contributing cause of the damages sustained by defendant, and under such circumstances this Court is bound by the conclusions of the trial Court.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—ACCIDENT OR LUMBAGO—*Allan et al. vs. Gettler et al.*—No. 13469—*Decided March 19, 1934—Opinion by Mr. Justice Butler.*

Allan was operating the Crown mine and was insured by a private company. Gettler was working in the mine. The Commission found that Gettler sustained accident arising out of and in the course of his employment and that his injury consisted of a back sprain and was

temporary, and awarded him compensation. Upon review the District Court affirmed the award though employer and the insurance company contended there was no evidence of accidental injury and that what Gettler suffered from was lumbago.

1. Even though Gettler was suffering from lumbago an injury to his back caused by lifting heavy timbers would be compensable.

2. A man who has lumbago, the same as one who has not, may suffer an accidental strain that is compensable under the Workmen's Compensation Act. The lumbago does not render him immune from strain.

3. The Commission's findings are sufficiently supported by the evidence.—*Judgment affirmed.*

VENDOR AND PURCHASER—FRAUD—BODY JUDGMENT—AGENCY—*Bosick vs. Youngblood*—No. 13152—*Decided June 12, 1934—Opinion by Mr. Justice Holland.*

Elizabeth Youngblood sued Charles Bosick and one Higbee in the court below to recover damages for fraud, based upon misrepresentations in the trade of an apartment building for country real estate and recovered a judgment for $8,500 and body execution against Bosick, but the action was dismissed as to Higbee.

1. Where plaintiff employs an agent to sell or exchange her land and the agent advertises the same and in pursuance of such employment procures a purchaser and continues to represent the plaintiff, such agent is the agent of the plaintiff and not of the defendant and plaintiff cannot rely on representations made by such agent as being representations of the defendant.

2. Where plaintiff enters into a contract to exchange two apartment buildings for country real estate and was given full opportunity to inspect the country real estate before the trade was consummated and did inspect it several times and took other parties to see it for the purpose of getting their opinion on it, plaintiff cannot in such case rely upon alleged false representations of the defendant as to its value and productivity.

3. If a purchaser of land does not avail herself of the means and opportunities which are afforded her for acquainting herself with the character and value of the land, she will not be heard to say that she has been deceived by the vendor's representations.—*Judgment reversed.*

WATERS—ASSESSMENTS ON STOCK OF DIFFERENT CLASSES—REASONABLENESS OF—*Robinson vs. The Booth-Orchard Grove Ditch Co. et al.*—No. 13145—*Decided March 19, 1934—Opinion by Mr. Justice Burke.*

The irrigation company owns and operates an irrigation ditch and its stock is divided into three classes based upon the dates of priority. It amended its articles to permit each class of stock to be assessed for

ditch maintenance on the basis of benefits. Robinson is an owner of Class A stock which bore the heaviest assessment, brought this suit to have the amendment nullified and the company officials enjoined from further action under it. Defendants demurred. The demurrer was sustained and plaintiff elected to stand and cause was dismissed in Court below.

1. Where there are three different classes of stock in an irrigation company their classifications are based upon priorities and the class of stock having the earliest priorities are assessed heavier than classes of stock holding later priorities and each class is entitled to a different use, and varying therefore in benefits from maintenance, the statute of Colorado requiring a pro rata assessment requires only that cost shall be equitably apportioned between the classes and that the assessment on each share in a given class be the same. —*Judgment affirmed.*

MUNICIPAL CORPORATIONS—LIABILITY FOR DEATH OF CHLD—DROWNING IN RIVER—*City and County of Denver vs. Stutzman* —No. 13246—*Decided June 12, 1934*—*Opinion by Mr. Justice Bouck.*

Mrs. Stutzman, plaintiff below, recovered a judgment for $1,128.50 against the City and County of Denver for her daughter's death, alleged to be due to the city's negligence in dredging a hole in the Platte River, the bed of which was owned by the city, and the child was drowned by stepping into the hole in the bed of the river.

1. A municipality is liable for the death of a child caused by stepping into a hole in the bed of a river owned by the city, such hole being created by the city in dredging the river for the purpose of flood prevention.

This work was not done in its governmental capacity but was clearly a local project and not in performance of any governmental duty imposed upon or delegated to the municipality by the State.

3. The question of whether the city was guilty of negligence in not posting signs or otherwise giving warning of the existence of the hole was properly a question for the jury.

4. The question of whether the child or the mother was guilty of contributory negligence was properly a question for the jury.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—WAGES DO NOT INCLUDE TIPS—*Industrial Commission of Colorado, et al. vs. Lindvay*—No. 13472 —*Decided March 19, 1934*—*Opinion by Mr. Justice Bouck.*

Lindvay was a bell boy in the employer company's hotel at Pueblo. For a compensable injury suffered by him the Industrial Commission awarded compensation, fixing the average weekly wages at $10.00. He

appealed to the District Court on the ground that the Commission had failed to take into consideration tips paid claimant by guests of the hotel. The District Court included the tips and held the average weekly wages were $28.00 instead of $10.00 and set aside the Commission's award.

1. Subdivision (a) in Section 47 of the Workmen's Compensation Act as amended by Session Laws of 1929, page 648, provides that the term "wages" shall not include gratuities received from employers or others.

2. This declaration by the Legislature must be enforced until the Legislature itself sees fit to change it. The language is clear and unambiguous.—*Judgment reversed with directions.*