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# Supreme Court Decisions

Dicta Editorial Board

# Supreme Court Decisions

PARTIES—PROPER PARTY PLAINTIFF IN SUIT TO RECOVER AGAINST SURETY—COUNTY TREASURER—*Bell vs. The People of the State of Colorado*—No. 13306—*Decided May 22, 1933*—*Opinion by Mr. Justice Butler.*

Suit was brought in the court below in the name of The People of the State of Colorado against Bell, who was surety on a County Treasurer's bond, the suit being based on alleged failure of the County Treasurer to account for and turn over moneys in his hands as such Treasurer. It was contended below that the plaintiff was improperly named in that the suit should have been brought in the name of the People of the State of Colorado for the use of the Board of County Commissioners of Garfield County.

1. Held: The plaintiff had capacity to sue and suit was brought in the proper name.—*Judgment affirmed.*

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PRACTICE—INSTRUCTIONS—SOLE PROXIMATE CAUSE—*Zang vs. Wright*—No. 12819—*Decided May 22, 1933*—*Opinion by Mr. Justice Campbell.*

This was an automobile accident case for damages for personal injuries. Among the instructions given by the Court below was one to the effect that in order for the plaintiff to recover that the alleged negligent acts of the defendant must be a proximate cause of the injuries sustained.

1. Held that such instruction was erroneous in not advising the jury that the alleged negligent acts of the defendant must be the *sole* proximate cause and not *a* proximate cause. —*Judgment reversed.*

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LANDLORD AND TENANT—LEASE—PURPOSE OF—CONSTRUCTION OF—*Vick Roy vs. General Outdoor Advertising Co., Inc.*—No. 13106—*Decided May 22, 1933*—*Opinion by Mr. Justice Burke.*

1. A suit was instituted by the plaintiff for the recovery of rent. From a judgment for the plaintiff in the Justice Court, the defendant appealed to the County Court where judgment was entered for the defendant. Plaintiff was the lessor and the defendant the lessee of the roof of a building to be used for display advertising. The lease provided "The tenant reserves the right to cancel this lease by giving 60 days' written notice to the landlord, in case the view of the advertising displays becomes obstructed." Pursuant to this provision of the lease, defendant served notice on the plaintiff that the view to the leased prop-

erty had become obstructed and that it, therefore, desired to terminate the lease. The obstruction complained of was the growth of nearby trees. On the trial in the County Court, the jury inspected the premises and, pursuant to their inspection, found for the defendant.

2. "Any act of the lessor by which his tenant is deprived of the enjoyment of the whole or a material or substantial part of the demised premises, * * * amounts in law to an eviction." If the trees which caused the obstruction belonged to the plaintiff and he had permitted them to grow so as to interfere with the view, there is no doubt but that the judgment should be affirmed inasmuch as defendant provided that if the view "becomes obstructed" the same conclusion must be reached.—*Judgment of the County Court affirmed.*

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RECEIVERS — FOREIGN CORPORATIONS — ASSESSMENT — AGAINST STOCKHOLDERS—PROCEDURE—PUBLIC POLICY—*Chandler vs. Manifold*—No. 13301—*Decided May 22, 1933—Opinion by Mr. Justice Bouck.*

1. Action by the United States court in Minnesota of levying an assessment against stockholders of a Minnesota corporation, at a hearing which was not held within the required length of time after the date of the order fixing the hearing, was a violation of the contract between the stockholder and the corporation, and was invalid except as to those stockholders actually appearing at the hearing or those duly served in Minnesota. Therefore, the assessment cannot be enforced in Colorado against a Colorado stockholder to whom notice of the hearing had been mailed.

2. The procedure, concerning the levying of such an assessment, to which the stockholder must have assented by becoming a stockholder, must contemplate a specific period during which the assessment might be paid. An order requiring payment forthwith, and permitting the receiver forthwith to recover the assessment by suit, is contrary to the public policy of the Colorado practice.—*Judgment affirmed.*

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WORKMEN'S COMPENSATION—FINDINGS—SUFFICIENCY—REOPENING CASE—*Winteroth vs. Industrial Commission*—No. 13304—*Decided May 29, 1933—Opinion by Mr. Justice Butler.*

Winteroth sustained accidental injury arising out of and in the course of his employment consisting of a sprain or torn ligament in the left knee. The Industrial Commission found that the injury accrued July 17, 1931, and that temporary total disability terminated December 1, 1931, and that claimant had sustained a 25% loss of the use of the left leg measured at the knee and awarded compensation therefor under section 73 of Workmen's Compensaton Act.

1. The findings were sufficiently detailed so as not to require a remanding.

2. The award was properly made under section 73 of the act and does not come under section 78 of the said act. An award under section 78 could be supported only by a finding of the extent in percentage of general permanent disability and there was no such finding nor any evidence upon which such finding could be based.

3. The trial court did not err in refusing to enter an order requiring the commission to reopen the case so as to permit Winteroth to show that since the award his condition has grown worse. The commission has discretion to reopen the case on its own motion.—*Judgment affirmed.*

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TAX DEED—REGULARITY—SALE LATER THAN SECOND MONDAY OF NOVEMBER—*City and County of Denver vs. Bach*—No. 12744—*Decided May 29, 1933—Opinion by Mr. Justice Butler.*

Bach brought suit to quiet title to certain lots in Denver, claiming under a tax deed executed subsequent to the second Monday in November but containing a recital that sale was held on such later date due to inability of treasurer to compile the advertised lists within the time prescribed by statute. Judgment below for plaintiff.

1. A tax deed reciting a sale commencing later than the second Monday in November and also reciting good cause for the delay, shows a sale authorized by statute and is not void on its face but is prima facie valid; and it is sufficient to cast upon the one attacking it the burden of showing its invalidity.—*Judgment affirmed.*

Mr. Justice Burke dissents.

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MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS IN GOVERNMENTAL CAPACITY—COLLISIONS—RIGHT OF WAY—*Johnson vs. Baugher et al.*—Nos. 12738, 12739, 12752, 12753—*Decided May 29, 1933—Opinion by Mr. Justice Campbell.*

Four suits were consolidated for trial below growing out of personal injuries sustained in collision of two automobiles, one of which was driven by a police officer in the line of duty. The Court below refused to permit plaintiff to introduce certain ordinances of the City of Denver governing right of way at intersections of police cars and instructed the jury that the car in which the injured plaintiff was riding had the right of way and the court directed verdict for the City of Denver.

1. The court erred in not admitting said ordinances. The evidence showed that one of the cars was being driven by a police officer in line of duty. The question of who had the right of way was a question for the jury and the ordinances were proper for the jury to consider in this connection.

2. The city was at the time acting in its public or governmental capacity and is not liable for damages for the alleged injury to any of the plaintiffs. —*Judgment reversed and cause remanded.*

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PLEADING—RIGHT TO INTERVENE—CAUSE OF ACTION ACQUIRED PENDENTE LITE—*Hollingsworth vs. Hunn*—No. 12787—*Decided May 29, 1933—Opinion by Mr. Chief Justice Adams.*

Hunn and others sued as stockholders to wind up defunct Multa Trina Ditch Company. While this suit was pending, Hollingsworth levied upon shares of stock held by defendants in this suit and 5 days before the day set for trial in this action, filed petition in intervention and sought to file an answer which the court below denied.

1. At the time this suit was brought Hollingsworth had no claim of any kind and would not even have been a proper party. The parties to this suit, through whom Hollingsworth claims to have acquired the stock through a levy, continued as the representatives of such interests.

2. The request to intervene came too late.

3. The defendants whose interest were acquired had put in issue all defenses available to any stockholder.

4. Hollingsworth was a purchaser pendente lite and bought at her peril.—*Judgment affirmed.*

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ASSIGNMENTS FOR BENEFIT OF CREDITORS—COMMON LAW ASSIGNMENT—RIGHTS OF UNACKNOWLEDGED CHATTEL MORTGAGEE —*McMinn vs. Harrison*—No. 12805—*Decided May 29, 1933—Opinion by Mr. Justice Bouck.*

A common law assignment was made to Harrison for benefit of creditors of a drug store stock and fixtures. After he took possession under the assignment, McMinn set up claim for a lien by virtue of a written instrument, denominated a lease, not acknowledged but recorded, but which had the effect of a chattel mortgage as security for the purchase price. The lower court denied the claim of McMinn.

1. When the assignee, with assent of any of the creditors, took possession of the drug stock and store under the assignment, his claim became superior to that of an unacknowledged chattel mortgage.

2. A common law assignment is valid in Colorado .notwithstanding the special statute in regard to assignments for the benefit of creditors.

3. Where a mortgagor in possession is permitted to sell the mortgaged property such as a stock of merchandise in the usual course of trade, it is void as against creditors and third persons.

4. Such a mortgage upon a merchandise stock could at most only apply to the stock on hand at the time of the mortgage and the

burden is on mortgagee to identify same.—*Judgment affirmed in part and reversed in part.*

Mr. Justice Butler, Mr. Justice Moore and Mr. Justice Hilliard dissent.

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GUARANTY—DRAFTS—FAILURE OF CONSIDERATION—*The Raceland Bank & Trust Co. vs. The Pueblo Savings & Trust Co.*—No. 12928—*Decided May 29, 1933—Opinion by Mr. Justice Butler.*

The Raceland Bank & Trust Company sued the Pueblo Savings & Trust Company for $1,147.50 on telegraphic guaranty. The King Fruit Company sought to purchase carload of Triumph potatoes by telegram and offered to buy minimum car. The Pueblo Bank wired the Raceland Bank: "We guarantee payment draft car Triumphs Pacific number 6449 La Fourche Produce Company King Fruit Company." Pursuant to this, instead of minimum car of 24,000 pound, a car of 42,500 pounds was shipped, which upon arrival at Pueblo were decomposed and destroyed by the City Health Department. The Pueblo Bank refused to pay the draft. The court below directed verdict for Pueblo Bank.

1. A fair construction of the guaranty is that the Pueblo Bank guaranteed the payment of the draft drawn for the purchase price of potatoes fit for human consumption.

2. Such guaranty does not require the Pueblo Bank to pay a draft drawn for the purchase price of something that, for all practical purposes, was non-existent. The transaction does not come within the terms of the guaranty.—*Judgment affirmed.*

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MORTGAGES—RIGHT OF HOLDERS OF UNCERTIFIED BONDS—*Thede vs. The Colorado National Bank of Denver*—No. 13210—*Decided May 29, 1933—Opinion by Mr. Justice Butler.*

The Equitable Bond and Mortgage Company entered into a trust agreement with The Colorado National Bank, as trustee, whereby it was to issue certain savings bonds and deposit with the trustee securities therefor of not less than 110% of the face value of such bonds, which bonds were to be certified by the bank, such securities to be held for the pro rata benefit of such certified bonds. Without the knowledge of the bank, the company issued bonds to plaintiff below and others which were not certified. The company went into receivership and this action was brought by the holders of uncertified bonds to share in the above trust funds. The court below denied this relief.

1. The holders of uncertified bonds have no right to participate in a distribution of the trust fund to the prejudice of the rights of the holders of certified bonds.—*Judgment affirmed.*

ATTORNEYS AT LAW—REINSTATEMENT AFTER DISBARMENT—*The People vs. Lindsey*—No. 12130—*Decided June 5, 1933*—*Opinion by Mr. Justice Bouck.*

The petitioner, Ben B. Lindsey, a former Judge of the Juvenile Court of the City and County of Denver, asks to be reinstated as a member of the Colorado bar.

1. Where, after an attorney has been disbarred, he publishes a book containing unbridled and venomous language denouncing those members of this court who took part in the disbarment proceedings, and files thereafter a petition to be reinstated as an attorney at law but offers no evidence of regret or expression of sorrow in extenuation of such unseemly tirade, he is not entitled to be reinstated.

2. Such petition will be denied so long as those charges stand without a manly apology such as one worthy of readmission to active membership in the legal profession would be willing and anxious to make.—*Petition for reinstatement denied.*

Mr. Justice Butler and Mr. Justice Hilliard dissent.

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CONSTITUTIONAL LAW—GAME REFUGE—*Maitland vs. The People*—No. 13266—*Decided June 5, 1933*—*Opinion by Mr. Justice Butler.*

Maitland was convicted of killing a buck deer within the limits of the Colorado State Game Refuge and was fined $25. He challenges the constitutionality of the act creating the game refuge.

1. The game refuge act does not contravene that part of our constitution forbidding the General Assembly to pass local or special laws. The fact that Maitland owned a ranch within such game refuge and that the act makes it a crime for him to kill a deer on his own land, whereas his neighbors just outside the refuge can kill a deer in open season without being guilty of an offense does not make the act a local or special law. The act applies to all persons alike. It is not special legislation.

2. The act does not offend against that article in our constitution providing that private property shall not be taken or damaged for public or private use without compensation. Whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection but incidental injuries are not sufficient to render the protecting statute unconstitutional.—*Judgment affirmed.*

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LIFE INSURANCE—PLEADING—PAYMENT—BURDEN OF PROOF—*The Sethman Electric & Manufacturing Co. vs. Mountain States Life Insurance Co.*—No. 12816—*Decided June 12, 1933*—*Opinion by Mr. Justice Hilliard.*

Suit below was on a life insurance policy issued by defendant upon the life of George Henry Sethman which policy was assigned to

the plaintiff. Defendant below, as affirmative defense, alleged that failure to pay any premium when due worked a forfeiture and alleged that neither the insured nor the assignee paid the premium due December 22, 1926. Plaintiff in replication generally denied the allegations of non-payment and plead extended insurance. Court below refused to permit evidence of payment of premium on part of plaintiff because payment was not plead.

1. Payment is an affirmative defense and must be so pleaded; but, where an answer alleges non-payment and a reply in the nature of a general denial is filed, the issue then is not payment but non-payment. The burden was on the defendant to prove non-payment and a general denial of non-payment in replication is sufficient for the admission of evidence on the part of plaintiff tending to prove payment.

2. A contract entered into between an insurance company and the assured subsequent to the issuance of the policy, changing the time and method of payment of premium, is admissible, notwithstanding C. L. 1921, Sec. 2516, which provides that the policy shall constitute the entire contract. Such statute does not mean that the policy shall continue to be the sole contract between the parties. It only refers to the policy as originally issued, and should not be construed to abrogate the rule that competent parties shall enjoy freedom of contract.—*Judgment reversed.*

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WATERS—ADVERSE POSSESSION—PAYMENT OF TAXES FOR SEVEN YEARS—*The Pleasant Valley & Lake Canal Co. vs. Maxwell*—No. 12842—*Decided June 12, 1933*—*Opinion by Mr. Justice Campbell.*

Maxwell and wife, plaintiffs below, brought this action against The Pleasant Valley and Lake Canal Company for a decree quieting their title to certain water right. The defendant denied any title in plaintiffs. Court below entered decree for plaintiffs.

1. Where plaintiffs and their predecessors in title have, for a period of more than thirty years, been in the actual, open, notorious, continuous, adverse and exclusive possession of sufficient water for the irrigation of 50 acres, the same being 50 inches of the waters at any time in The Pleasant Valley and Lake Canal Company hostile to defendant and under claim of right, the plaintiffs have good title to the 50 inches of water.

2. Where the plaintiffs and predecessors in title and interest have, for a period of more than seven years been in actual, open, notorious, continuous, adverse and exclusive possession of sufficient water at any time in Pleasant Valley and Lake Canal to fully irrigate 50 acres of land, the same being 50 inches of water, hostile to defendant and under claim and color of title made in good faith and have, during said time, paid all taxes legally assessed thereon, the plaintiffs have good title to said 50 inches of water.

3. The title to the plaintiffs in and to said water shall not be deemed in any way to determine or affect the rights of grantees and their successors in interest under deeds for water for neighboring lands theretofore executed by the defendant company, and the same shall be subject to all prior rights thus acquired.—*Judgment affirmed.*

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BILL AND NOTES—ALTERATION—POSSESSION AS CONSTRUCTIVE NOTICE—HOMESTEAD CLAIM—*Farley et al. vs. Harvey*—No. 13324—*Decided June 19, 1933—Opinion by Mr. Justice Burke.*

Mrs. Farley was record owner of residence on which she and her husband resided. To pay off a mortgage, two new loans were negotiated, the first for $4,500 to Parker Realty Company of which Harvey became owner. It contained express waiver of homestead right. Mrs. Harvey later made marginal homestead reservation. Upon non-payment foreclosure was had and Harvey secured trustee's deed. Action below by Mrs. Farley and husband to quiet title against Harvey. Judgment below for Harvey.

1. Where alteration of note is claimed on ground that description of property securing it was endorsed on note but evidence is conflicting as to when it was so endorsed, finding of court below in general findings for defendant disposes of question.

2. There is no variance between note and deed of trust where both husband and wife sign note but wife only signs deed of trust and deed of trust recites that only wife executed the note.

3. Where title is in wife's name, fact that husband resides on the property is no notice of joint ownership claim of husband.

4. Mrs. Farley's homestead claim is impotent as against the foreclosure of her deed of trust.—*Judgment affirmed.*

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EXECUTORS AND ADMINISTRATORS—PROOF OF CLAIM—EXHIBITING ORIGNAL NOTE—STATUTE OF NON-CLAIM—*Bender vs. Anderson, Executrix*—No. 13277—*Decided June 19, 1933—Opinion by Mr. Justice Bouck.*

Bender filed in County Court affidavit of a proposed claim for balance due on promissory note as per copy attached. The attached copy does not mention her as a party to the note nor is an endorsement by payee shown. After expiration of year, Bender moved, without notice, to amend claim which was denied and claim dismissed. Bender appealed to District Court and there no attempt was made to amend the claim nor was there any offer made of the original note and claim was dismissed.

1. There could be no valid claim until and unless the original note should be exhibited or filed. This never happened. The District Court which tried the case de novo could only act on what came before it. Its ruling on the motion to dismiss was right.—*Judgment affirmed.*

PRINCIPAL AND SURETY—COMPLETION BOND—CONFLICTING INTERESTS OF AGENT—KNOWLEDGE OF INTERESTS—*Independence Indemnity Co. vs. The Silver State Building and Loan Association* —No. 12851—*Decided June 19, 1933—Opinion by Mr. Justice Butler.*

The Silver State Building and Loan Association recovered judgment below upon a completion bond. In June, 1928, The Dencol Investment Co. and the building association made an agreement for exchange of properties. The Dencol Investment Co. was to and did exchange an apartment building which was under construction for properties of the building and loan association and the Dencol Co. gave a completion bond that it would complete the apartment building free and clear of all liens. Randolph Crews was the sole agent for the bonding company and also owned practically all the stock in the Dencol Investment Co. He never reported issuing the bond to his company and the company never received any premium and it had no knowledge of the transaction until the loan association made claim against it on the bond, after Crews had disappeared and the apartment building left uncompleted.

1. Where the statutory agent of a bonding company also had power of attorney generally authorizing him to write bonds with the same effect as though executed by the president and secretary, such broad powers are not sufficient to authorize the execution of a bond in a transaction in which the agent has a personal interest adverse to that of his principal or represents another who has an interest adverse thereto.

2. If the obligee accepts the bond knowing that the agent has or represents such adverse interest, he cannot recover on the bond, unless he proves that the principal with full knowledge of the facts, assented to, or ratified the act of the agent.

3. The rule that where an agent is the sole representative of the corporation, the corporation cannot claim anything except through him and if it claims through him, after notice of the facts, it must accept his agency with its attendant notice, does not apply in this case because the bonding company is not seeking to enforce any contract made by its agent or claiming any right under the contract.—*Judgment reversed.*

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TAXATION—AUTHORITY OF DISTRICT COURT TO REDUCE TAX ASSESSMENT FIXED BY THE COLORADO TAX COMMISSION—*Colorado Tax Commission vs. Midland Terminal Railway Co.*—No. 12963—*Decided June 26, 1933—Opinion by Mr. Justice Bouck.*

This case having been consolidated for trial with Colorado Tax Commission vs. Midland Terminal Railway Company, No. 12962, is governed by the decision of this Court in the last mentioned case. The only real difference is that while the latter case involves the District

Court's reduction in the El Paso County portion of a tax assessment, this case involves a judgment purporting to reduce the Teller County portion of the same tax assessment, from $654,330, fixed by the commission, to $345,138, fixed by the District Court.—*Judgment reversed and case remanded with directions to enter a judgment affirming the Commission's assessment.*

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APPEAL AND ERROR—EQUALLY DIVIDED COURT—*The Midland Oil Refining Co. vs. Allen*—No. 13331—*Decided June 26, 1933—Opinion per curiam.*

Mr. Justice Moore did not participate. Three of the justices are in favor of affirmance and three in favor of reversal. The case, therefore, stands affirmed by operation of law because of an equally divided court. No good purpose would be served by a statement of the issues or reasons of the conclusions of the several members of the Court.—*Judgment affirmed.*

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PRINCIPAL AND AGENT—EXECUTORS AND ADMINISTRATORS—DECEIT—FOREIGN JUDGMENT—*Zahn vs. Enyart et al.*—No. 13274—*Decided June 26, 1933—Opinion by Mr. Chief Justice Adams.*

Plaintiffs Zahn originally brought suit in Kansas against Frank Enyart, a resident of Colorado. Enyart's mother, without authority, employed Kansas attorney to defend the action. He entered personal appearance and judgment was later entered against Frank Enyart. Frank Enyart sought to set aside judgment in Kansas, but was unsuccessful. Plaintiffs then brought suit in Colorado on the foreign judgment and same defense was interposed and defense was successful. Later the mother of Frank Enyart died and plaintiffs filed claim against her estate for damages in the sum of $18,783.85, on the theory that the deceased had wrongfully employed the Kansas attorney and thereby plaintiffs had been prevented from obtaining a personal judgment against her son in Colorado. County Court dismissed the claim, and on appeal to the District Court, the claim was dismissed.

1. One who falsely represents himself to be the agent of another is liable in an action on the case to those who are injured by his misrepresentations.

2. However, if there be any liability, it should not go beyond that which plaintiffs actually lost by the deceased's unauthorized employment of Kansas attorney on behalf of her son.

3. But there is a total failure to show that plaintiffs suffered any injury by reason of the conduct of the deceased in employing such attorney.

4. In Kansas plaintiffs lost nothing because the court there declined to interfere with the judgment in personam against Frank Enyart. Likewise, in Colorado, the conduct of the deceased failed to alter

or impair plaintiff's original status, for if the deceased had kept wholly out of the transaction, plaintiffs would have had nothing more than a judgment in rem to carry to this state, and they still have it.

5. For the reasons stated, the claim was properly disallowed.—*Judgment affirmed.*

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PRACTICE—CHANGE OF VENUE—PROPER PLACE FOR TRIAL—*Kimberlin vs. Rutliff*—No. 13323—*Decided June 26, 1933—Opinion by Mr. Justice Hilliard.*

Error is assigned by the denial of application for change of place of trial. Suit was brought in Pueblo County for failure to perform the terms of a written contract by which the parties were to exchange real properties, that of the plaintiff's situate in Pueblo and that of the defendant in Canon City. Defendant applied for change of venue to Fremont County and showed by affidavit that service of process was in Fremont County and that the defendant was a resident of Fremont County. These statements were not controverted. In the complaint, however, it was alleged that the contract was to have been performed in Pueblo County, and this was not negatived in the showing made for change of venue. The court denied the application and defendant declining to plead further, judgment was entered against defendant for damages prayed for.

1. The court erred in denying the motion for change of venue. The contract is silent as to place of performance. In that situation the Code provision relative to the right of trial in the county where the contract is to be performed is not applicable. Such provision has reference to contracts, which, by their terms, are to be performed at a particular place.

2. In determining the question of place of trial, the court was not at liberty to give consideration to the allegation of the complaint that the contract was to be performed in Pueblo County where the contract itself was set out and is silent as to place of performance.

3. The record considered, the action must be regarded as personal and held to be triable in the county of the defendant's residence.—*Judgment reversed and ordered that application for change of venue to Fremont County be granted.*

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RECEIVERSHIP—APPOINTMENT OF—EX PARTE WHEN—*Oberto vs. Moore*—No. 13335—*Decided June 26, 1933—Opinion by Mr. Justice Bouck.*

This is an application under rule 18 of the Supreme Court for a review of an order appointing a receiver. Plaintiff and defendant were partners in a mining property and had been for several years. Plaintiff brought suit for dissolution, accounting and receivership. At the time

of serving the summons and the complaint, defendant was served with notice that the plaintiff would call for hearing the application for appointment of a receiver two days later. The motion requested that the plaintiff be appointed receiver. The morning after having been served, defendant phoned his attorneys and he promptly mailed to them the papers he had received. The attorneys were quite a distance from the Court and immediately advised the Court that they could not be present. Defendant and his attorneys were not present at the hearing for the receivership and pursuant to that hearing a "Temporary Receiver" was appointed and the defendant was ordered to show cause why the appointment of said temporary receiver should not be made permanent. On the return day of the citation to show cause, defendant's attorney filed a demurrer to the complaint. Arguments were had on the demurrer, which was overruled, but no evidence was taken.

1. If there are special cases that require ex parte action in the appointment of a receiver, they are limited to "Momentous emergencies, which manifestly threaten dire destruction of health, safety or irretrievable estate." No such emergency existed here. There was no contention that the defendant was insolvent.

2. The issuance of a citation requiring the defendant to show cause why the ex parte appointment should not be made permanent did not cure the vital defect in that appointment.

3. The partnership contract provided that in the event of differences between them, the controversy should be referred to arbitration. The court refused to pass upon the failure of the plaintiff to so do, for this issue may be litigated in the main case.—*Judgment reversed with the directions.*

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TAXATION — ASSESSMENT — REVIEW BY COURT — PURPOSE AND SCOPE OF REVIEW—PRESUMPTIONS—BURDEN OF PROOF—*Colorado Tax Commission vs. The Midland Terminal Railway Company*—No. 12962—*Decided June 26, 1933—Opinion by Mr. Justice Bouck.*

1. On appeal to the District Court to review an assessment made by the Colorado Tax Commission, the court may not try the matter de novo, nor substitute its own opinion as to value in place of the judgment and discretion of the Tax Commission as an administrative agency of the executive branch of government. Nor may the court correct mere errors in the exercise of such discretion by the commission. The sole power of the court, on such review, is to determine whether or not an assessment is manifestly excessive, and, if not, whether it is also manifestly fraudulent, erroneous or oppressive.

2. There is a definite and well settled presumption that an assessment made by the regular assessing officers is correct. Such an assessment cannot be overthrown except by clear and convincing evidence ad-

duced by him who assails it.—*Judgment reversed and case remanded with directions.*

Mr. Chief Justice Adams and Mr. Justice Campbell dissent.

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DRAINAGE DISTRICTS — ASSESSMENTS — PROCEEDS — ADDITIONAL LEVY—*Henry Wilcox & Son vs. Riverview Drainage District*—No. 12975—*Decided June 26, 1933*—*Opinion by Mr. Justice Burke.*

1. Sec. 2169 C. L. 1921, concerns drainage districts, and provides that the tax levied by the district shall be such "as will meet the requirements of and will provide for the punctual payment of the interest upon and the principal of the bonds as the same accrue," and requires the district to make an additional levy if the "proceeds" of the original levy are not sufficient to pay the principal of and interest on "all of the bonds which may at any time be issued." Under this section, the word "proceeds" means whatever the levy produces, which may be cash or tax sale certificates or both. The original levy having produced sufficient of such "proceeds" to meet its demands, the district could not be compelled by mandamus to levy an additional assessment to raise sufficient cash to pay the principal of matured bonds.

2. Irrespective of said section, however, those who, in a drainage district, pay their taxes, are not also subject to the taxes of those who do not pay. In the absence of sufficient cash proceeds from the levy, the bondholders must look to each tract of land as security for the taxes levied thereon.—*Judgment affirmed.*

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## IT TAKES TIME, ROBERT, IT TAKES TIME

In the sprightly monthly column entitled *Dicta Observes* (10 DICTA 223) it is announced that the quondam dean of the law school of the University of Colorado has gone back to work for a living. Recounting the Dean's adventures on the campus our learned contemporary remarks: "Mr. Stearns, very shortly after taking charge at Boulder, won the respect and honor of the faculty and the students."

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## OBITUARIES

James P. Veerkamp, Monte Vista, Colorado.

Isaac Dunn, Denver, Colorado.

Judge Julian H. Moore, Denver, Colorado.