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Colorado Supreme Court Decisions

Dicta Editorial Board

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(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

WILLS—TRUSTS—CONSTRUCTION OF WILLS—*In the Matter of the Estate of Edgar B. Gardner, Deceased, et al. v. The International Trust Company, et al.*—No. 12897—*Decided October 26, 1931—Mr. Justice Burke delivered the opinion of the Court.*

1. Where a mother created a trust providing that the income therefrom should be paid to her son during his lifetime, and that he should have power to dispose of the corpus by will, and the son died leaving a will, which, after providing for the payment of debts and certain legacies, conveyed the residue in trust for his daughter, and he left an excess of debts over assets, the lower court was right in ordering that after the exhaustion of decedent's unbequeathed personal property, the unpaid portion of the debts should be satisfied out of the trust fund created by the mother.

2. Where there is an express intent in a will to exempt the trust estate from the payment of debts and legacies, or the will is silent, or uncertain on that subject, the trust estate will not be liable for the debts and legacies.

3. Where testator includes the entire trust estate in the description of the balance, residue, and remainder, and where he also includes in the balance and remainder all the property and estate over which he had the power of disposition by willl, and provides generally for the payment of debts and provides specifically for the payment of taxes out of his gross estate, the will should be construed on the theory that his personal property and the corpus of the trust estate were considered by him as a single fund for all the purposes of the will.

4. Where, without resort to the corpus of the trust, a testator left no estate from which his debts could be paid nor anything out of which legacies could be paid, and there is nothing to indicate that he was not fully cognizant of this fact, and yet specifically provides for the payment of debts and legacies, there was an express intention on his part from the terms of the will not to exempt the trust estate from the payment thereof.

5. Since a will takes effect only at death, it generally speaks from that date.

6. Where a testator uses the language above set forth, even though the will was executed three years prior to decease, the testator could by no reasonable construction have in mind debts existing at the date of the will, but on the contrary, must have contemplated debts existing at his death.—*Judgment affirmed.*

PRINCIPAL AND SURETY—EVIDENCE—SUFFICIENCY OF—PRIMA FACIE—*National Surety Company v. The Denver Sewer Pipe & Clay Co.*—No. 12490—*Decided November 2, 1931—Mr. Justice Campbell delivered the opinion of the Court.*

1. Where suit is instituted against a construction company and against a surety company, which had, in its surety contract, made itself liable for labor and materials used or performed in the prosecution of the work provided for in the construction contract, and where the question was raised as to whether or not the articles sold by the plaintiff were used in the construction in question, and where the uncontradicted testimony disclosed that one of plaintiff's employees saw some, but not all, of the materials in question being used in the construction, this evidence was sufficient to establish a prima facie case by the plaintiff.—*Judgment affirmed.*

APPEAL AND ERROR—QUESTIONS TO BE DECIDED BY—FINAL ORDERS ONLY REPEATED WRITS—*Boxwell v. The Greeley Union National Bank*—No. 12483—*Decided November 2, 1931—Mr. Justice Campbell delivered the opinion of the Court.*

1. Matters will not be determined upon a Writ of Error when the determination thereof does not constitute a final judgment.

2. Where plaintiff's complaint alleges fraud upon the part of one defendant, and further alleges that the other defendant, the Bank, received from the defendant, moneys, which, in equity, belong to the plaintiff, being part of the money of which plaintiff had been defrauded, and of which fraud the Bank was aware, and where demurrers to the complaint of the other defendants were overruled and the demurrer of the Bank to the complaint was sustained, the upholding of the Bank's demurrer is not properly subject to a Writ of Error because the order was not a final judgment, but was interlocutory.

3. For a judgment to be final, it must end the particular suit in which it was entered. It should not leave undecided issues.

4. The Supreme Court has inherent authority to regulate its jurisdiction so as to prevent successive appeals from a judgment.—*Writ of Error dismissed.*

DIVORCE—CUSTODY OF CHILD—DISTRICT COURT, JURISDICTION OF—JUVENILE COURT, JURISDICTION OF—*Georgia Orahood Ross v. John Chaffee Ross*—No. 12448—*Decided November 2, 1931—Mr. Justice Butler delivered the opinion of the Court.*

1. Where, in a divorce suit, the mother is awarded custody of a child by the District Court and where subsequently, the child's grandfather and father petition the Juvenile Court to have the child declared a dependent, and where the father petitions the District Court for modification of the divorce decree so as to award his parents the custody of the child, the District Court is not divested of jurisdiction by the institution of the proceedings in the Juvenile Court.

2. The jurisdiction of the divorce court is exercised merely between the husband and wife, while the jurisdiction of the Juvenile Court is exercised "as between the state, or, so to speak, the child, and the parents of the child".

3. Contention that the father by electing to intervene in the dependency proceedings was barred from seeking relief in the District Court, the doctrine of election of remedies is not applicable.

4. Ordinarily, a custody order should be modified only when there has been a subsequent change of conditions, or a discovery of material facts formerely unknown. However, under some circumstances, the Court may consider evidence introduced prior to the decree.—*Judgment affirmed.*

WATER RIGHTS—ADJUDICATION OF—FINDINGS OF FACT—CONTRACTS—INTERPRETATION—WATER DEED—*Caldwell, et al. v. States*—No.12379—*Decided November 2, 1931—Mr. Justice Butler delivered the opinion of the Court.*

1. Where the findings of fact, by the trial court, are supported by a preponderance of the evidence, they will not be disturbed upon appeal.

2. It is the duty of the court, where the language of a contract is indefinite or ambiguous, to adopt the construction and particular interpretation, which the parties themselves have put upon it and to enforce that construction.

3. A water adjudication settles priority of rights as between two ditches, but it cannot adjudge the respective rights and claims of water users under either ditch.

4. Where a deed conveys land "together with all water rights, including all of first party's interest in and to the Japan ditch and its water rights and priorities and 200 shares of capital stock of Rockland Reservoir Company, and all other water rights which have been and are used for irrigation of above described land and for the irrigation of any part thereof", such deed carried all water rights.—*Judgment affirmed.*

JUSTICE COURT JUDGMENTS—STATUTE OF LIMITATIONS AGAINST—*The New England Electric Company v. Willis Bowes*—No. 12533—*Decided November 2, 1931—Mr. Justice Moore delivered the opinion of the Court.*

1. Where, nine years subsequent to obtaining a judgment in Justice Court, a transcript thereof was filed in the District Court and execution and levy made thereon, a motion to vacate the judgment as being barred by the statute of limitations is properly upheld.

2. The statute of limitations, providing that action shall be instituted within six years unless "he is out of the State * * * and if, after the cause of action accrues, he depart from the State * * * the time of his absence or concealment shall not be computed as part of the period within which the action must be brought", does not apply to judgments already obtained in the Justice Court.

3. After a lapse of six years, a Justice Court judgment is dead.—*Judgment affirmed.*

CRIMES—PERJURY—ELEMENTS OF—*L. L. Stonebraker v. The People of the State of Colorado*—No. 12917—*Decided November 2, 1931—Mr. Justice Hilliard delivered the opinion of the Court.*

1. "Perjury is wilfully and corruptly swearing falsely to a matter material to the issue or point in question."

2. Where defendant was convicted of perjury and there is an entire lack of testimony to show the materiality of the alleged perjured evidence, the conviction cannot be sustained.

3. Where the defendant was sued in a civil action for injury to plaintiff's reputation and credit, by virtue of the defendant's having cancelled certain policies of insurance of the plaintiff and where the testimony which was alleged to have been perjured was not shown to relate to policies in dispute, no conviction of perjury would lie.—*Judgment reversed.*

WILLS AND ADMINISTRATION—ESTATES—WIDOW'S ALLOWANCES—CLASS OF CLAIM—*Mary Eisenberg v. Edna D. M. Reininger*—No. 12932—*Decided November 2, 1931—Mr. Justice Moore delivered the opinion of the Court.*

1. Where the statute provides that expenses of administration and settlement of the estate shall comprise second class claims and all allowances to the widow, wife or orphan shall compose the fourth class claims, a claim of the second class takes precedence over a widow's allowance which is a demand of the fourth class.—*Judgment reversed and remanded.*

CRIMINAL LAW—CHANGE OF VENUE—ADMISSION OF TESTIMONY—INSTRUCTIONS—SUFFICIENCY OF THE EVIDENCE—*Gould vs. The People*—No. 12849—*Decided November 9, 1931.—Opinion by Mr. Justice Burke.*

1. Defendant below was found guilty of murder in the first degree, and sentenced to life imprisonment. The evidence was wholly circumstantial. The defendant did not take the stand and explain away any of the incriminating circumstances, and the sufficiency of the evidence was a matter for the jury.

2. Where defendant fails to take advantage of his right to explain away circumstantial evidence, which might be construed to indicate his guilt of the charge, he cannot complain that the jurors drew inferences warranted by the evidence.

3. A change of venue of the place of trial is ordinarily within the discretion of the trial court, and where no abuse appears, the trial court's ruling will not be disturbed.

4. Objections to circumstantial evidence on the ground that it is indefinite, uncertain and inconclusive is not well taken for its weight is a question for the jury.

5. Failure of the Court to give requested instruction to acquit the defendant if the evidence as a whole raises only a suspicion of guilt is not error where the court gives another instruction covering reasonable doubt.—*Judgment affirmed.*

MECHANIC'S LIEN—ARCHITECTS' LIEN—SUBSTITUTION OF PLANS—PARTIAL USE OF ORIGINAL PLANS—WHEN FILED AND WHEN FORECLOSED—*The Park Lane Properties, Inc., et al., vs. W. E. Fisher, et al.*—No. 12589—*Decided November 9, 1931—Opinion by Mr. Justice Moore.*

1. Where an architect furnishes plans for the erection of a building, and where his services are later dispensed with and the building is built under plans of subsequent architect, but the essential features of the original plans are embodied in and used in the construction of the building, the architect has a lien against the real estate and the structure thereon for his services.

2. An architect has three months after the completion of the building to file his lien statement and has six months after completion in which to institute suit.

3. An architect's lien is prior to that of a first deed of trust where the architect's services were commenced prior thereto.—*Judgment affirmed.*

IRRIGATION DISTRICTS—ELECTIONS IN—CONTESTS OF—*People Ex Rel Shaklee vs. Milan*—No. 12678—*Decided November 9, 1931—Opinion by Mr. Justice Alter.*

I. Tenants in common, under a statute permitting owners of horticultural or agricultural lands to vote in an irrigation district election, are entitled to vote. Tenants in common hold several and distinct titles with unity of possession.

II. Those holding contracts for the purchase of real estate are not owners within the purview of the statute and cannot vote.

III. When it is provided that persons, paying taxes on real property during the calendar year preceding the election, shall have the right to vote, the calendar period so designated means the period from January 1 to December 31 preceding the election.

IV. A voter otherwise qualified must vote in the proper precinct or his vote will be invalid.

V. Owners of town lots with garden plots thereon are not, under the statute, permitted to vote.—*Judgment reversed.*

MUNICIPAL CORPORATIONS—CHARTERS—CONSTRUCTION OF—PAVING DISTRICTS—*Miller vs. Denver*—No. 12425—*Decided November 16, 1931—Opinion by Mr. Justice Butler.*

I. Where the Municipal Charter provides that, except on petition, no paving district shall include more than twelve blocks, the fact that the district includes eleven blocks, and the strip in question was not platted, would not be a violation of the Charter so long as the unplatted parcel, considering area, would not exceed twelve blocks when added to the platted parcel. There is compliance with the Charter provision.

II. When the Manager of Parks and Improvements obeys the provisions of the Charter, his acts will not be deemed legislative.

III. Notice given fifty-eight days within which property owners may object is not good when the Charter provides that property owners may introduce their objections at any time within sixty days after the first publication of notice.

IV. When the Manager of Parks and Improvements did not complete a paving project in accordance with the ordinance giving him authority to act, the Charter rights of the plaintiff were ignored and the assessment levy on his lots was void.—*Judgment reversed.*

MUNICIPAL CORPORATIONS—FIRE DEPARTMENTS—LIABILITY FOR—NEGLIGENCE OF—*Moses v. City and County of Denver*—No. 12516—*Decided November 16, 1931—Opinion by Mr. Justice Campbell.*

I. When a Municipal Corporation is not liable for acts of negligence committed by its employees in the exercise of its governmental functions.

II. The maintenance of a Fire Department by a Municipality is a governmental function.

III. The City is not liable for injuries to persons caused by the negligence of employees of the Fire Department while such employees are pursuing their duties.—*Judgment affirmed.*

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