Denver Law Review

Volume 9 | Issue 6 Article 8

July 2021

Supreme Court Decisions

Dicta Editorial Board

• Supreme Court Decisions •

(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.)

TRESPASS—SHEEP — MEASURE OF DAMAGES —EXEMPLARY DAMAGES—*Bullerdick vs. Pritchard* — No. 12977 — *Decided February 8, 1932* — *Opinion by Mr. Justice Burke.*

1. Where the evidence is conflicting but the actual trespass and damage is clearly supported by the evidence, the verdict will not be disturbed.

2. Where the damages were caused by defendant wrongfully pasturing his sheep on plaintiff's land and rendering it worthless to plaintiff as pasture for plaintiff's sheep and plaintiff was unable to secure other pasture, his damages are not limited merely to the rental value. He is entitled to such damages as will reasonably compensate him for all the loss he has sustained taking into consideration the value of the pasture to plaintiff, the purpose for which it was intended, the situation of plaintiff as a result of defendants acts and the loss in weight and value of the sheep at market time on account of lack of pasture.

3. Exemplary damages were justified. The evidence showed a deliberate purpose on defendants part to destroy his pasture and injure his sheep.—*Judgment affirmed.*

EDITOR'S NOTE: This case is highly interesting on the weight of precedents. To sustain the judgment, counsel cited Blackstone and Exodus 22:5. The Court pertinently asks why such modern authority is relied on when the rule is sustained by Code of Hammurabi, sec. 57, 58, enacted about 2250 B.C.

MUNICIPAL CORPORATIONS—DISCONNECTION OF FARM LAND FROM CORPORATE LIMITS—*Reichelt vs. Town of Julesburg*—No. 12340—*Decided February 8, 1932*—*Opinion by Mr. Chief Justice Adams.*

1. In a proceedings under the statute to have lands disconnected from the corporate limits of a town, it is essential that such lands be proven to be agricultural or farm lands.

2. Where several owners of farms lands join in a petition to disconnect such lands from corporate town limits, it is not necessary that each of such tracts be contiguous to or upon the border of the town. If such tracts are contiguous to each other and one of the tracts is on the border, it brings the case within the statute.

3. The trial court erred in denying the petition on the ground that the town had improved the highways passing through and adjoining the tracts by construction of special improvements along over and under same such as electric current and water. The act of 1925 liberalized the conditions of release

from the corporate limits by placing further limitations upon the defenses to towns in proceedings to disconnect territory.

4. A transmission line for electric current rather imposes a servitude on the highway instead of being a special improvement.

5. Objection to jurisdiction of County Court on ground that the lands sought to be disconnected were worth more than $2000 and therefore outside the jurisdiction of the court is not tenable. This is a special proceeding and special statutory authority was conferred on the County Court in such cases. This class of cases has nothing to do with title to lands and is not dependent upon their value.

6. Such proceedings are not special or class legislation.—*Judgment reversed.*

Mr. Justice Hilliard dissents.

LIMITATIONS, STATUTE OF—PAYMENT—SUFFICIENCY OF PLEA—*People vs. Miller*—No. 12574—*Decided February 8, 1932—Opinion by Mr. Justice Butler.*

1. Where the State brought suit to recover a gasoline excise tax after the expiration of six years and the defendant pleaded the six year statute of limitations such plea was not good. Such limitation statute does not run against the State, unless the statute expressly so provides.

2. Where defendant pleads payments by averring that "if any sum of money was ever due plaintiff that defendant had paid it prior to the institution of the suit" such plea being hypothetical was bad and the demurrer should have been sustained.—*Judgment reversed.*

APPEAL AND ERROR—EFFECT OF LOWER COURT'S DECISION WHEN APPELLATE COURT IS EQUALLY DIVIDED—*Craddock vs. Craddock*—No. 12720—*Decided February 15, 1932—En Banc—Per Curiam.*

1. Where in appellate proceedings one of the justices of the Supreme Court does not participate in the hearing or in the consideration of the cause, and the remaining six judges are equally divided, three being of the opinion that the judgment of the lower court should be affirmed and three being of the opinion that it should be reversed, the judgment of the lower court will be affirmed by operation of law.—*Judgment affirmed.*

DIVORCE—EFFECT OF ENTRY OF FINAL DECREE ON MOTION OF GUILTY PARTY—POWER OF COURT TO MODIFY ALIMONY AND SUPPORT MONEY FOR MINOR CHILDREN—*Kastner vs. Kastner*—No. 12478—*Decided February 15, 1932—Opinion by Mr. Justice Alter.*

1. An entry of a final decree of divorce made and entered at the request and upon the motion of the guilty party to a divorce action, is void and any attempted modification thereof is a nullity.

2. However, where the parties to a divorce action enter into a con-

tract for a property and financial settlement between them and said contract is approved by the District Court in the findings of fact and conclusions of law, but said contract was not filed in court nor made a part of the findings of fact and conclusions of law, the mere approval of the court did not operate to make the independent contract of the parties a part of or enforcible as a preliminary or final decree.

3. When both parties, after the entry of the preliminary decree voluntarily appeared and submitted the question of alimony and support money constituted the first request and the court's first opportunity to determine this question, and therefore the court had power to enter an order with reference to same, and the mere fact that the order was entitled "Modified Decree" was wholly immaterial.—*Judgment affirmed in part and reversed in part.*

STATUTE OF FRAUDS—ORAL SALE OF GOODS—VALIDITY OF—*Saliba vs. The Reed Electric Co.*—No. 12995—*Decided February 15, 1932—Opinion by Mr. Justice Alter.*

1. An oral agreement by one to construct an article particularly for and according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor. In such case, the contract is for the manufacture and sale of a thing made to suit the fancy and serve the particular convenience and purpose of the defendant, without a market value for use in general trade, and therefore, although the agreement might result in the productions and sale of a chattel, is one for work and labor and is not within the Statute of Frauds.

2. When the subject matter of the oral contract is an article which is such as the seller usually carries as a part of his stock in trade, as distinguished from one to be manufactured for special use and according to a particular plan and design, such contract comes within the Statute of Frauds.—*Judgment reversed.*

JUDGMENTS—MODIFICATION OF JUDGMENT AT SUBSEQUENT TERM—UNDER WHAT CIRCUMSTANCES—*Osborne v. MacDonald*—No. 13036—*Decided February 15, 1932—Opinion by Mr. Justice Butler.*

1. Ordinarily a court cannot in the absence of a permissive statute set aside or modify its judgment upon application made after the expiration of the term.

2. The exceptions to this rule are where a judgment is entered without jurisdiction of the defendant or where there has been a clerical mistake in the entry of the judgment of the court or where a judgment debtor, through no fault of his own, fails to get before the reviewing court a bill of exceptions necessary to a review of the errors assigned by him.

3. In an action founded upon tort, where the jury found that in committing the tort complained of defendant is guilty of fraud and wilful deceit and defendant was committed to jail for a term of six months and where more than one year after such judgment was entered the court modified the judgment by reducing the defendant's confinement from six months to 110 days, the court was without power to so modify the judgment. The applica-

tion for such modification not being made under Section 81 of the Code, as having been taken through mistake, inadvertence, surprise or excusable neglect. —*Judgment reversed.*

APPEAL AND ERROR—EFFECT OF LOWER COURT'S DECISION WHEN APPELLATE COURT IS EQUALLY DIVIDED—*LaArgo vs. Cronbaugh, et al.*—No. 12870—*Decided February 15, 1932—En Banc—Per Curiam.*

1. Where in appellate proceedings one of the justices of the Supreme Court does not participate in the hearing or in the consideration of the cause, and the remaining six judges are equally divided, three being of the opinion that the judgment of the lower court should be affirmed and three being of the opinion that it should be reversed, the judgment of the lower court will be affirmed by operation of law.—*Judgment affirmed.*

JUDGMENTS—FINALITY OF—DISMISSAL OF WRIT OF ERROR—*Stuchlik vs. Talpers*—No. 12458—*Decided February 15, 1932—Opinion by Mr. Justice Burke.*

1. In an action for ejectment where the lower court made findings for the plaintiff and judgment was entered for possession by the plaintiff and immediately thereafter the plaintiff requested a hearing on the question of damages for the use of the land and the court continued the hearing on the question of damages to a later date, and the record is silent as to how the question of damages was disposed of, there was no such final judgment from which a writ of error could be prosecuted; and the writ should therefore be dismissed.

2. Writ dismissed.

NEGOTIABLE INSTRUMENTS — COGNOVIT NOTES — JUDGMENTS ON — SET ASIDE WHEN—EVIDENCE—PAROLE EVIDENCE—*Denver Industrial Corporation vs. Kesselring et al.*—No. 12413—*Decided February 23, 1932—Opinion by Mr. Chief Justice Adams.*

I.

Where a plaintiff took judgment without service of process pursuant to its rights under a cognovit note, defendant may thereafter file an affidavit of a meritorious defense and, if filed within a reasonable time, the judgment may be set aside and the defendant given leave to plead.

II.

Where defendant has purchased stock in the plaintiff's corporation and has later deposited that stock with the plaintiff as security for a loan, evidence, to the effect that the plaintiff agreed to sell defendant's stock at any time that the defendant should request it to do so and that defendant did request plaintiff to sell the stock which was of greater value than the note which plaintiff sued upon, is admissable. It is not parole evidence attempting to vary the terms of a written contract but was the statement of an agreement between plaintiff and defendant, obligatory upon the plaintiff. Such evidence does not

tend to dispute the validity of the note in question but merely advances another agreement not in conflict with the note.

III.

An agreement by the seller of stock to resell is properly the subject of a contract and, even though not embodied in the written instrument, is capable of enforcement.—*Judgment affirmed.*

REAL PROPERTY — LEASES — FORCIBLE ENTRY AND DETAINER — IMPLIED WARRANTIES—A DEFENSE TO—WHEN—*Martin vs. Grant*—No. 12510 —*Decided February 23, 1932—Opinion by Mr. Justice Campbell.*

I.

When the plaintiff in a forcible entry and detainer suit has agreed, in the lease, to permit the defendant lessee to use the water pumping plant on the premises, providing that the lessee shall pay for all costs of its operation, there is no warranty, express or implied, that the pumping plant is in condition for immediate use. Even though such a warranty could be deemed to exist, the failure on the part of the lessee to have the plant repaired for more than two months, resulting in the ruination of his crop, would preclude him from asserting such implied warranty as a defense.—*Judgment affirmed.*

SCHOOLS AND SCHOOL DISTRICT—MINORS—RESIDENCE OF—*Fangman et al vs. Moyers et al*—No. 13028— *Decided February 23, 1932—Opinion by Mr. Justice Burke.*

I.

The residence of a child may be other than that of its parents or guardian.

II.

Where a child resides with the family and pays for his upkeep partially by work and partially by moneys received from his father and where the father has placed the minor with the family to give him a proper home influence, the residence of the child for the purposes of determining his right to schooling is with the family and not his father.

III.

Where the statute provides that the residence of an unmarried person of school age shall, in all cases, be held to be identical with the bona fide residence of the parent or guardian, this statute is merely intended as a guide in making up the required census and does not pertain to residence in "as applied to school privileges."—*Judgment affirmed.*

LIFE INSURANCE—CANCELLING POLICY WITHOUT CONSENT OF BENEFICIARY—EFFECT OF—*Hill vs. Capitol Life Insurance Co.*—No. 12445— *Decided February 29, 1932—Opinion by Mr. Justice Hilliard.*

1. Where insured gives his note for first year premium on life insurance policy and by agreement between insured and insurer, his note was not

paid but was cancelled and returned in consideration of cancellation of insurance policy, such cancellation of policy is ineffective as to rights of beneficiary, when beneficiary does not consent to such cancellation.

2. This is true even where policy reserves right in insured to change beneficiary.

3. In such case, the beneficiary named had a vested interest therein. —*Judgment reversed.*

CONSTITUTIONAL LAW — CRIMINAL LAW — INSPECTION OF MELONS — INVALIDITY OF ACT—*People vs. Stanley*—No. 12627—*Decided February 29, 1932—Opinion by Mr. Justice Alter.*

1. A statute, prohibiting any person from selling, shipping, or offering for sale or shipment, or placing upon the market any cantaloupes or melons unless the same are first inspected and certified by State Inspector as to maturity and fitness of condition for shipment, is unconstitutional, where it provides no definite rules, regulations, specifications, classifications or standards for determining such maturity and fitness of condition.

2. In such case, such statute reposes in the inspector absolute and arbitrary power to certify or not and is violation of the due process of law and equal rights provisions of both the United States and Colorado constitutions.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—LIEN FOR WATER ASSESSMENTS—PRIORITY—DEMURRER—*Town of Ordway vs. Kaiser*—No. 12567—*Decided February 29, 1932—Opinion by Mr. Justice Burke.*

1. In an action by a town to collect water assessments, and to have judgment declared a lien upon real estate of defendant, a complaint is fatally defective where it fails to set forth facts showing priority of its lien.

2. Where it appears that the town is seeking to have water assessments declared a lien against real estate, it cannot claim a lien for water furnished prior to a time it alleges there was any ordinance in effect creating such lien.

3. A lien for water furnished is junior to a lien of a deed of trust, unless created before the recording of the deed of trust.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DISCRETION OF INDUSTRIAL COMMISSION TO RE-OPEN AND RECONSIDER CLAIM—FINALITY OF CLAIM—*Industrial Commission vs. Lockard*—No. 13016—*Decided February 29, 1932—Opinion by Mr. Justice Butler.*

1. Where the Industrial Commission refuses to re-open and reconsider a claim upon the grounds that there was no error, mistake or change in conditions, the District Court is without power to order the Commission to make findings of fact and conditions and circumstances which moved it to refuse to re-open the case.

2. Where the Commission based its refusal upon the matters appearing in the record before it, and such record does not show that the action of the commission was the result of fraud or a clear abuse of discretion, its action should have been affirmed by the District Court.—*Judgment reversed.*

DAMAGES—PERSONAL INJURIES—NEGLIGENCE—MISCONDUCT—*Averch vs. Johnston*—No. 12946—*Decided February 29, 1932—Opinion by Mr. Justice Butler.*

1. Where plaintiff was rightfully delivering coal to defendant's packing plant and was picking up coal that had fallen to ground while being shovelled out of truck, adjoining a cattle chute, and defendant's servant in trying to drive cows through chute, hurled a large stick at one of the cows, which glanced off cow and struck plaintiff, injuring him, and when defendant's servant knew of his presence there, the question of negligence was a question for the jury.

2. In such case, a verdict for $2800.00 was not excessive.

3. Plaintiff was not a mere trespasser, even though at the time of the injury he had finished unloading the coal, as his duty included picking up the coal that had fallen to the ground.

4. Even though he had finished his work, and might be considered a trespasser, this did not relieve the defendant from liability. If defendant knew of his presence there, they owed him the duty of using reasonable care not to injure him by any affirmative act.

5. Improper statements by plaintiff's counsel in argument, cured by Court at once instructing jury to disregard such statements.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—DEPENDENTS—RULE FOR ESTABLISHING—*Colorado Fuel & Iron Co. vs. Industrial Commission*—No. 12976—*Decided February 29, 1932—Opinion by Mr. Justice Moore.*

1. The question of dependency must be determined as a matter of fact, and cannot be based upon an existing legal duty to provide support.—*Judgment reversed.*

EXECUTIONS—SALE OF EXEMPT PROPERTY—AUTOMOBILE USED IN BUSINESS AS EXEMPT—LIABILITY OF SHERIFF—*Blum vs. Kasik*—No. 13042—*Decided March 7,1932—Opinion by Mr. Justice Moore.*

1. Where an automobile is seized by a sheriff under writ of execution and judgment debtor files claim of exemption with the sheriff on the claim that the automobile is exempt because used in his business, the sheriff is liable for treble damages for selling same.

2. Where execution is issued by District Court of Denver County to sheriff of Boulder County and that sheriff seizes an automobile and judgment defendant files claim of exemption with the sheriff, and thereupon the District Court of Denver County proceeds to a hearing without notice to judgment defendant and denies his claim of exemption, such court is without jurisdiction to enter such order.

3. The Colorado statute being silent as to how a claim of exemption shall be determined, a judgment debtor claiming exemption of property seized has two remedies. He can submit to the jurisdiction of the court out of which the execution issued and ask that it determine his claim or he can notify the sheriff in possession of the property claimed to be exempt of such claim and

demand its return, and in the event of sale thereafter, pursue the remedy provided by statute for such illegal sale.—*Judgment affirmed.*

BANKS AND BANKING—INSOLVENCY—COUNTY FUNDS NOT PREFERRED—*Board of County Commissioners vs. McFerson*—No. 12822—*Decided March 7, 1932—Opinion by Mr. Justice Adams.*

1. As applied to insolvent banks in which deposits of public money have been made, the rule is that in the absence of a statute or a showing of facts sufficient to create a trust, a claim for public money has no preference over the claims of the general creditors of a bank, but stands on the same footing with them.

2. In Colorado there is no statute that warrants such a preference.

3. The fact that the state holds insufficient security is inadequate to justify a preference.

4. Neither is the fact that the county is in urgent need of the funds so deposited of any weight.

5. There was no error in the judgment below in disallowing the claim as a preferred claim without prejudice to its right to apply for the allowance of its demand as a common claim.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—LOSS OF PARTS OF FOUR FINGERS—METHOD OF COMPUTING COMPENSATION—*Cresson Consolidated Gold Mining Co. vs. The Industrial Commission*—No. 12969—*Decided March 7, 1932—Opinion by Mr. Justice Moore.*

1. Where injured employee is permanently disabled by loss of little finger of left hand at proximal joint, index finger of right hand at distal joint and middle and ring fingers of right hand at second joint, the industrial Commission was in error in awarding him compensation under section 4452 C.L.1921 based upon a finding of 25% disability as a working unit.

2. In such case, the injuries sustained were specifically provided for together with the rate of compensation by sec. 4447, C.L.1921 as amended, which allows a specific number of weeks compensation for each of such injuries, which when added together will give the total compensation to be awarded. —*Judgment reversed.*

DEEDS—WARRANTY DEED—RESERVATION OF LIFE ESTATE—WHETHER A WILL OR A DEED—PARTITION—*Million vs. Botefur*—No. 12599—*Decided March 7, 1932—Opinion by Mr. Justice Moore.*

1. Where, in an ordinary form of warranty deed containing the regular granting clause, there is added to the habendum clause, a reservation, reserving in the grantor a life estate and providing that upon the death of the grantor the fee simple title to vest in grantee, such instrument will not be construed as a will.

2. Under such circumstances, the instrument was valid as a deed. It conveyed a present interest in the property.

3. The granting clause controls over the clause containing the reservation.

4. The apparent and reasonable construction to be applied to the terms of the proviso is that the life estate reserved to the grantor terminated upon her death leaving the fee simple title thereto vested in the grantee, free and clear from any reserved interest.

5. Irrespective of the construction placed upon this proviso, the deed having been delivered, it will be sustained as a present grant of a future interest.—*Judgment affirmed.*

BLUE SKY ACT—WITHDRAWAL OF REFERENDUM PETITION DURING HEARING—EFFECT OF AS DISMISSAL OF ACTION—*Robinson vs. Armstrong*—No. 13001-13002—*Decided March 7, 1932—Opinion by Mr. Justice Burke.*

1. Where plaintiffs filed a petition to refer the Blue Sky Act to the electorate and a protest was filed with secretary of state and protest sustained and action was then brought in District Court to review such action, and pending review, plaintiffs withdrew the petition, such withdrawal amounted to a dismissal of the action and there is nothing before the court to review. —*Judgment affirmed.*

MORTGAGES—FORECLOSURE—RIGHTS OF SUBSEQUENT ENCUMBRANCE—REDEMPTION — METHOD OF ASCERTAINING JUDGMENT — *Bailey vs. Merritt*—No. 12570—*Decided March 7, 1932—Opinion by Mr. Justice Butler.*

1. Where defendant gave to plaintiff note secured by deed of trust and thereafter plaintiff loaned additional money to defendant and to secure the additional loan, conveyed the same real estate by warranty deed to plaintiff and upon default on first loan, plaintiff had the public trustee foreclose and at the same time brought suit in the District Court to have the warranty deed declared to be a mortgage and for judgment for the amount found to be due and to foreclose the interest of defendant, and plaintiff at public trustees sale purchased the property for the amount of the original loan and indebtedness secured thereby, and thereupon discovered that there were judgment creditors and to avoid judgment creditors liens, plaintiff redeemed the property as a subsequent encumbrancer, and received a certificate of redemption, the court below, in the suit to have the deed declared a mortgage erred in decreeing that there must be a foreclosure of such deed decreed to a mortgage where plaintiff only was insisting upon a judgment and that the deed be held to be a mortgage.

2. Under such circumstances the plaintiff could not be compelled to proceed to a foreclosure of the mortgage deed.

3. Where the grantor fails to redeem, the subsequent encumbrancer who redeems is entitled to a deed. This negatives the idea that the plaintiff herein must proceed to a foreclosure of her mortgage.

4. Where the property is worth less than the amounts secured by both the first and second encumbrances, plaintiff is entitled to have such value ascertained by the court and credited upon the debt, less the amount paid by plaintiff to redeem.—*Judgment reversed.*

AUTOMOBILES — COLLISION — RIGHT OF WAY — CITY ORDINANCES — DIRECTED VERDICT FOR PLAINTIFF—*Englebright vs. Rowley*—No. 12593 —*Decided March 7, 1932—Opinion by Mr. Justice Butler.*

1. Where plaintiff's wife was driving an automobile south on Broadway in city of Pueblo, a double street with parkway in the middle, and made a left hand turn and defendant's truck was coming north on the right hand side of the parkway and was about 150 feet away from intersection just before plaintiff's wife started to make a left hand turn and she did not again look to the right and the collision occurred in the intersection, the lower court erred in directing a verdict for plaintiff.

2. Under the Pueblo ordinance, which provides that of two vehicles approaching an intersection, the one approaching from the right shall have the right of way, therefore under the facts in this case, defendant's truck had the right of way.—*Judgment reversed.*

CONDEMNATION—LANDS ABUTTING STREAM—WATER COURSES—INSTRUCTIONS—*Heimbecher vs. Denver*—No. 12620—*Decided March 7, 1932—Opinion by Mr. Justice Campbell.*

1. In a condemnation suit by a city against the owner of lots abutting a non-navigable stream, where the owner adopts the theory in the court below that his ownership of the lots is limited to the bank of the stream and does not go to the thread of the stream, and the court below adopts the theory of the owner and instructs the jury accordingly, such owner will not be permitted to assail such instruction upon review.

2. Under such circumstances it is immaterial whether such instruction is erroneous or not.—*Judgment affirmed.*

CRIMINAL LAW—JUVENILE DELINQUENCY—SUFFICIENCY OF EVIDENCE—CONTINUANCE—MISCONDUCT RESPECTING JURY—*Sharp vs. The People* No. 12986—*Decided March 7, 1932—Opinion by Mr. Justice Alter.*

1. Evidence is sufficient to sustain charge of contributing to juvenile delinquency where it shows that defendant, a married man, the father of several children, induced a 15 year old girl to permit defendant to take picture of her in the nude.

2. Where the jury found that defendant aided and encouraged the taking of such pictures in the nude and that this act caused induced or caused the girl to become immoral and to associate with immoral persons and to perform immoral acts, such findings were amply sufficient to sustain the charge.

3. Where the defendant requested a continuance after the trial had started, the granting or denial of same rested in the sound discretion of the court.

4. Where the officer in charge of the jury, permitted the jury to separate in a restaurant and sit and converse with third parties, after the jury had retired to deliberate upon its verdict, which fact was known to defendant and he took no steps to call the officers attention thereto or take any steps to prevent it, he cannot sit idly by and upon the return of an unfavorable verdict, use this incident as an excuse to gain another trial.—*Judgment affirmed.*

CHATTEL MORTGAGES—PRIORITY OF LIEN OVER EXECUTION—PURCHASE PRICE MORTGAGE—*Robinson vs. Wright*—No. 12534—*Decided March 14, 1932—Opinion by Mr. Justice Butler.*

1. At common law, an execution bound debtor's personal property from the time it was awarded.

2. In Colorado, it only binds debtor's property from the time it is delivered to the Sheriff.

3. A chattel mortgage given for purchase price of automobile and mules is superior to lien of execution, although executed and recorded after execution is delivered to Sheriff and recorded in Sheriff's book.—*Judgment affirmed.*

SHERIFF—CASH BOND—EFFECT OF ON RIGHTS OF PARTY FURNISHING BOND—*Lowrie vs. Harvey*—No. 12625—*Decided March 14, 1932—Opinion by Mr. Justice Moore.*

1. A complaint alleging that plaintiff deposited with Sheriff a Liberty Bond for $1,000.00 to secure appearance of one Dobson in a criminal case and that Dobson appeared and bondsman was discharged; whereupon one Gibbons, who had filed criminal complaint obtained a civil judgment for the amount involved in criminal action, and had Sheriff levy on the Liberty Bond with full knowledge of plaintiff's ownership of Liberty Bond, and alleging ownership in plaintiff, denying ownership in Dobson, demand for possession and refusal of Sheriff to return, states a good cause of action, and it was error for lower court to sustain a demurrer for want of facts.

2. Assuming, but not deciding, that the Sheriff had no power to accept such cash bond in lieu of the appearance bond, required by statute, he held himself out as having power to accept it, and the plaintiff having deposited it in good faith, was entitled to have it returned.

3. It would be a travesty on justice to hold that because plaintiff participates in a technical violation of the Statute defining the kind of a bond to be given, that he would lose his security and the process of the court cannot be used to permit the property of a bondsman to be appropriated by a judgment creditor in such a case.—*Judgment reversed.*

NOTICE!

In order to keep the files intact The Denver Bar Association Library requires the following numbers of The Denver Bar Association Journal.

January, February, March, April, June, July for....1926
March for....1928
March, April, May, July, September, November, December for....1929
May, June, July, August, September, November, December for....1930
January, February, April, June, September, October, November, December for....1931

Any persons having copies will confer a favor by communicating with The Denver Bar Association Library, Court House, Denver, Colorado.