Denver Law Review

Volume 9 | Issue 7 Article 10

January 1932

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

• 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.)

QUO WARRANTO—LIBRARY BOARD—RIGHT TO HOLD OFFICE—*People vs. Shaffer*—No. 12998—*Decided March 14, 1932—Opinion by Mr. Justice Burke.*

1. Under Colorado Statute, a Library Board consists of the Mayor and six members, the offices of three expiring each year, and the vacancies to be filled by remaining members, and when at an election, the Mayor and one member of Board vote for two old members and two other members of Board vote for three other candidates, two remaining members not voting, there was a tie, and all candidates so elected were without title to the office.

2. The Mayor, being a member of the board, was entitled to vote.

3. The members of Library Board, whose terms expired, did not hold over under Section 1 Article XII of our Constitution.—*Judgment affirmed.*

DIVORCE — EXTREME CRUELTY — SUFFICIENCY OF EVIDENCE — *Miller vs. Miller*—No. 12635—*Decided March 14, 1932—Opinion by Mr. Justice Burke.*

1. Evidence that husband beat wife until she was black and blue; that he wanted to fight, cursed her, called her names; that his threats of violence continued for three years, is sufficient to sustain a decree of divorce.

2. Such conduct establishes extreme and repeated acts of cruelty.

3. Such cruelty may be inflicted by words alone.

4. Plaintiff's explicit statement as to the results of such acts, not essential to support finding to that effect.—*Judgment affirmed.*

ATTORNEYS AT LAW—DISBARMENT—REPRIMAND—*People vs. Blank*—No. 13070—*Decided March 21, 1932—Opinion by Mr. Justice Burke.*

1. Where an attorney is a deputy district attorney and shares expense of a stenographer with another attorney engaged in civil practice only, and has stenographer sign claims for salary in blank, and then fills in blank for full amount of salary, approves them in his official capacity, adds verification and files with county and collects warrants issued therefor and deposits same to his own account, he is guilty of unprofessional conduct.

2. Where an attorney is a deputy district attorney and as such files criminal complaint against one of the parties and accepts employment from

the other party to collect damages from party against whom the criminal complaint was filed, he is guilty of unprofessional conduct.

3. If a prosecutor has a private interest in a criminal case under his jurisdiction, it bars him from proceeding as such prosecutor.

4. He cannot act even by consent of the parties.

5. Under such facts, the recommendation of the Grievance Committee of the Bar Association that such attorney be merely reprimanded is too lenient.

6. However, in view of his former unblemished record and the further fact that the recommendation of such Committee should be given the same effect as the presumption indulged in in favor of the action of a trial court or jury who have tried the case and had the opportunity of seeing and hearing the witnesses, the recommendation will be accepted.

Reprimand administered by the Court.

TRUSTS—RESULTING—INSUFFIENCY OF EVIDENCE—DEFECTIVE ABSTRACT —*Ehrenkrook vs. Ehrenkrook*—No. 12605—*Decided March 21, 1932—Opinion by Mr. Justice Burke.*

1. Evidence examined and held to be insufficient to establish a resulting trust.

2. Where important facts are omitted from the abstract and are supplied by a supplemental abstract furnished by defendant in error, the cost thereof will be taxed to plaintiff in error.

3. Where the trial court's findings that no resulting trust existed in the real estate is supported by such a mass of damning facts as exist in this case, the most indefatigable legal research and keenest judicial vision could not discover any legal rights in favor of plaintiff in error.—*Judgment affirmed.*

ATTORNEYS AT LAW—DISBARMENT—READMISSION ON PROBATION—*People vs. Hillyer*—No. 12548—*Decided March 21, 1932—Per curiam.*

1. Where an attorney has been disbarred, and a petition is filed for reinstatement and Committee on Grievances of the Colorado Bar Association after investigation, recommends that attorney be reinstated on condition for a period of one year, on probation, the Supreme Court will follow such recommendation.

2. Judgment of disbarment suspended and respondent is permitted to resume and exercise his office as an attorney at law until the further order of the court in the premises.

Campbell, J. not participating.

CONTRACTS—CONSTRUCTION—AGREEMENT TO INDEMNIFY OR MERELY DEFEND ACTION—MOTION TO STRIKE—*Hall v. Cannon*—No. 12643—*Decided March 28, 1932—Opinion by Mr. Justice Burke.*

1. Where plaintiff takes possession of an automobile, as mortgagee, and defendant, contending that mortgage is void, and that he is about to sue

out an attachment, enters into an agreement with plaintiff that he will forego the attachment by plaintiff transferring equity in car to defendant and defendant agrees that he "will further defend plaintiff against any and all suits or actions which may be brought against him," such contract is not a contract of indemnification.

2. Such contract is performed by defendant's furnishing attorneys and paying costs of such defense.

3. Where plaintiff accepted the services of the attorneys furnished by defendant, without objection, he cannot hold defendant liable for any alleged negligence of the attorneys in handling the defense, and it was proper to strike such allegation from the complaint.—*Judgment affirmed.*

CORPORATIONS—NEGLIGENCE—PRIMA FACIE CASE—NON SUIT—*Blankette v. Public Service Company of Colorado*—No. 12587—*Decided March 28, 1932—Opinion by Mr. Justice Butler.*

1. It is error to grant motion for non-suit where plaintiff has made a prima facie case.

2. Where defendant was a public service corporation furnishing electricity, it was its duty to exercise the highest degree of care that skill and foresight can attain, consistent with the practical conduct of the business under known methods and the present state of the business.

3. This rule applies to the maintenance and inspection of its entire plant, including its poles and its transmission and service wires.

4. Plaintiff may establish a prima facie case of negligence of defendant by circumstantial evidence. —*Judgment reversed.*

DAMAGES—EXEMPLARY—POWER OF COURT TO AWARD IN ABSENCE OF JURY—SURFACE RIGHTS ON PLACER CLAIM—*Calvat v. Franklin*—No. 12526—*Decided March 28, 1932—Opinion by Mr. Justice Campbell.*

1. Where the locater of a placer claim has received final receipt from United States therefor and leases the surface for pasturing sheep, the lessee can maintain trespass against a stranger who destroys the pasturage thereon.

2. In such case, where actual and exemplary damages are claimed and both parties waive a jury and try cause to the Court, the judge has power to award *exemplary* damages.—*Judgment affirmed.*

DEEDS—BREACH OF COVENANT—INSTALLMENT TAXES FOR SPECIAL IMPROVEMENTS—LIABILITY—*Wilson v. Barney*—No. 12607—*Decided March 28, 1932—Opinion by Mr. Justice Butler.*

1. Where a deed contains a covenant that the real estate is free and clear from all taxes and assessments levied since April 15, 1925, and it appears that at date of deed, there were existing and future installments of special improvement taxes against the real estate which had been levied prior thereto, there was a breach of covenant, for which the grantor was liable in damages.

2. The assessments, although due in the future, were a charge on the real estate at the date of the deed.

3. In case of any conflict between provisions in a contract to convey and a deed executed in compliance therewith, the deed, being unambiguous and expressing the final agreement of the parties, controls.

4. The Court erred in sustaining a demurrer to the complaint for want of facts.—*Judgment reversed.*

DEEDS—TAX DEEDS—VOID ON FACE—EFFECT—NON SUIT—*Hochmuth v. Norton*—No. 12679—*Decided March 28, 1932—Opinion by Mr. Justice Burke.*

1. Where, in an action in ejectment, plaintiff relies on fee title and defendant claims title under a tax deed, and tax deed is not offered, but plaintiff offers abstract which shows that tax deed was issued pursuant to a sale held November 30, 1915, where under the statute the sale should have been held on November 8, 1915, and there was no record of its being an adjourned sale, such tax deed is void on its face.

2. The five-year statute of limitations has no application to a tax deed void on its face.

3. The trial court erred in granting a non suit on ground that plaintiff's title was extinguished by defendant's tax deed.—*Judgment reversed.*

EXECUTORS AND ADMINISTRATORS—RIGHT OF CREDITOR TO ADMINISTRATION—*Estate of Webb v. Jack*—No. 13009—*Decided March 28, 1932—Opinion by Mr. Justice Alter.*

1. Where a person dies intestate, leaving no surviving wife or known heirs, a creditor has a preferential right over a stranger to be appointed administrator.

2. In such case, the County Judge has no discretion to appoint any one except such creditor, being otherwise qualified.

3. While our statute (Sec. 5222 C. L. 1921) employs the words "the County Court *may* grant administration to any creditor who shall apply for same," the word "may" means "shall" or "must."—*Judgment reversed.*

FRAUD—CONSPIRACY—PROOF OF—*Ellis vs. The Colorado National Bank*—No. 12824—*Decided April 4, 1932—Opinion by Mr. Justice Hilliard.*

1. Allegations that the Colorado National Bank and others conspired with Mrs. Ellis, who had illegally procured the property and business of her insane husband, in the drawing of a will, creating a trust estate and that the bank acted as executor after her death and as testamentary trustee and disposed of some of the property for merely nominal consideration and ousted the plaintiff and that these acts were done with knowledge that the plaintiff was insane, were not sustained by the evidence.—*Judgment affirmed.*

Mr. Justice Burke dissents.

MANDAMUS—MUNICIPAL CORPORATIONS—SUFFICIENCY OF COMPLAINT—REMOVAL OF PUMPS FROM SIDE-WALKS—*People, ex. rel. Stonebraker vs. Wood*—No. 13060—*Decided April 4, 1932—Opinion by Mr. Justice Burke.*

1. In a complaint for mandamus against a city and its officers to compel the removal of 30 gasoline pumps unlawfully in the city streets and sidewalks, where the plaintiff is a private person, he has capacity to sue.

2. Private persons may move for mandamus to enforce a public duty not due to the government as such, without the intervention of the government law officer.

3. In such case it was not necessary to join the several owners or operators of the pumps. The defendant city and its officers were necessary parties defendant but while the owners or operators of the pumps would be proper parties, they were not necessary parties. The object of the action was to compel the city to do its duty in removing obstructions on the sidewalks and in the streets.

4. There was no misjoinder of causes of action. This is a single suit against the city only to enforce a specific legal duty.

5. The demurrer to the complaint should have been overruled.—*Judgment reversed.*

DEEDS—WHEN CONSTRUED AS MORTGAGES—BURDEN OF PROOF—*Oppegard vs. Oppegard*—No. 12571—*Decided April 4, 1932—Opinion by Mr. Justice Butler.*

1. A deed purporting to be an absolute conveyance may be proven by parol evidence to be, in fact, a mortgage but to have that effect, the evidence must be clear, certain and unequivocal and must be convincing beyond a reasonable doubt.

2. Where the evidence is conflicting, the decree of the court below finding the evidence insufficient to declare the deed to be a mortgage will not be disturbed.

3. The burden of proof rested upon the plaintiff and the evidence relied on by him to establish his case does not meet the requirements of the law.—*Judgment affirmed.*

FATHER'S RIGHT TO CUSTODY OF CHILD—BILL OF EXCEPTIONS—VACATION OF ORDER ENTERED IMPROVIDENTLY—*Lowe vs. Ruh, et al.*—No. 12556—*Decided April 4, 1932—En Banc—Mr. Justice Moore not participating—Opinion by Mr. Justice Campbell.*

1. When the mother has been awarded the custody of a child and the father has removed to another state and has failed for many years to pay alimony to the mother and support money for the child, and the father, shortly after the mother's death, returns to Colorado and obtains an order for the custody of the child, without notice, in the first instance, to the grandparents, in whose care the child has been placed, it was proper for the district court, at a later hearing, to vacate the original order giving the custody to the father.

2. Where there is no bill of exceptions the decision of the Supreme Court must be based on matters contained in record proper.

3. The validity of adoption proceedings instituted by the child's grandparents, without notice to the father, is commented upon but not held necessary to the decision of this case.—*Judgment affirmed.*

NEGLIGENCE—EVIDENCE DIRECTED VERDICT—*Denver Tramway Corporation vs. Wells*—No. 12402—*Decided April 4, 1932—En Banc—Mr. Justice Moore not participating—Opinion by Mr. Justice Alter.*

1. Negligence is never presumed but must be proven by the preponderance of the evidence by the one alleging it.

2. The evidence showed that a street car operated by the defendant below was going east on Larimer Street; that it stopped to take on passengers; that the motorman rang his gong, made the proper signal, and threw the electric switch so that the car turned to the left. The plaintiff testified that she did not hear any gong rung, or see the motorman make any signal; that she saw the street car only twice; the first time when she was going west on Larimer Street at some distance from the corner, and the second time when she saw the street car's headlight flash in her face, after which she became unconscious. Under this evidence the injury to the plaintiff was solely the result of the negligence of the driver of the car in which the plaintiff was a passenger. The plaintiff was not entitled to recover damages.—*Judgment reversed with instructions.*

Mr. Justice Butler and Mr. Justice Hilliard dissent.

WORKMEN'S COMPENSATION—SUPPLEMENTAL AWARD—NECESSITY FOR FINDINGS OF FACT BY INDUSTRIAL COMMISSION—*Hayden Brothers Coal Corporation, et al, vs. Industrial Commission of Colorado, et al*—No. 13025—*Decided April 4, 1932—Opinion by Mr. Justice Alter.*

1. When the Industrial Commission makes an award of compensation, and thereafter makes a supplemental award, it is the duty of the Commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts. In the absence of such findings of fact such a supplemental award cannot be sustained.—*Judgment reversed with directions.*

WORKMEN'S COMPENSATION—SUPPLEMENTAL AWARD—NECESSITY FOR FINDINGS OF FACT BY INDUSTRIAL COMMISSION—*North Park Coal Company, et al, vs. Industrial Commission of Colorado, et al.*—No. 13010—*Decided April 4, 1932—Opinion by Mr. Justice Alter.*

1. The holding in this case is similar to that of No. 13025 above.

FIRE INSURANCE—HOSTILE FIRE—PLEADING PERFORMANCE AND PROVING WAIVER—*Fire Association of Philadelphia vs. Nelson*—No. 12603—*Decided April 11, 1932—Opinion by Mr. Justice Campbell.*

1. Where fire is employed as an agent, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limit of the agencies employed, as from the effects of smoke or heat evolved thereby.

2. The insurer is liable where there is an actual ignition outside of the agencies employed, not purposely caused by the insured, and damage ensues from the smoke and heat caused by the fire dehors the agencies.

3. Where insured alleges performance on his part all conditions precedent to recovery, he can prove waiver by the insurer of such conditions or requirements of the policy.—*Judgment affirmed.*

FRAUD—MISREPRESENTATIONS—SETTING UP IN COUNTER-CLAIM TO FORECLOSURE SUIT—BURDEN OF PROOF—*Catrow vs. Kinghorn*—No. 13062—*Decided April 11, 1932—Opinion by Mr. Justice Burke.*

1. In an action to foreclosure a mortgage on a gasoline filling station, where the defendant files counter-claim for recision and damages because of misrepresentations and failure of consideration, the burden of proof of establishing same rests upon the defendant.

2. Where the defendant alleged that the misrepresentations were made to him by agent of seller, but proof shows that before closing the deal for the purchase, defendant discussed all these matters with plaintiff, it cannot be said that the defendant relied upon the representations of the agent. However, this was a question of fact to be determined by the Court.

3. Where part of the representations were that the business had earned a certain net income over a period of time and the evidence was in dispute, this was a question of fact for the Court.

4. Where part of the representations were that the investment was safe, sound and profitable and the trial court found that the defendant made his own investigation and reached his own conclusion in regard thereto, such was based on conclusions properly deducible from the disputed evidence.—*Judgment affirmed.*

When you jump out of bed for a hurry-up morning, with face taut and nerves on edge from lack of sleep—that's no time to have the HOT faucet run COLD, encouraging the razor to nick and slice as you shave. But when you turn on the good old HOT water, work up a quick creamy lather for a shave as smooth as silk, top off with more HOT water and a towel, then ALL'S WELL WITH THE WORLD.

Install an AUTOMATIC GAS WATER HEATER today and have hot water ALWAYS, when you want it!

Public Service Company of Colorado