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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.)

APPEAL AND ERROR—TIME FOR FILING BRIEF—NO. 12514—*Connell vs. Continental Casualty Company, et al—Decided March 24, 1930.*

Facts.—Connell filed a petition in the District Court to set aside default judgment in a workman's compensation case. Petition was denied and writ of error was issued November 30, 1929. Plaintiff in error filed his printed abstract January 20, 1930 and his printed brief February 19, 1930. February 21, 1930 two of the defendants in error filed motions to dismiss the writ for failure of the plaintiff in error to file his brief within 15 days after the issuance of the writ, the time limited by rule 45 in Industrial Commission cases.

Held.—Assuming that this case is governed by rule 45, the motion to dismiss is denied because the defendants in error delayed until February 21, 1930 to file their motions, after plaintiff in error had incurred the expense of having his abstract and brief printed.

Motion Denied.

BANKS AND BANKING—COLLECTION OF CHECKS—NEGLIGENCE—NO. 12143—*Federal Reserve Bank of Kansas City vs. First National Bank of Denver—Decided March 3, 1930.*

Facts.—The Amicon Company which had an $8,000.00 checking account in the Ordway State Bank, drew its checks in this amount and sent them to the Hallack & Howard Lumber Company, which on September 27, 1921 endorsed these checks and deposited them with the plaintiff for collection, using deposit slip which provided that plaintiff would not be liable for negligence or loss incurred in connection with mail items, and that out-of-town collections not paid would be charged back to the account of the depositor.

Plaintiff credited the checks to the Lumber Company's account, sent them for collection to defendant, which thereupon endorsed them and sent them for payment to the Ordway State Bank on which they were drawn. The Ordway State Bank received them on September 29, and on October 5, 1921 issued in payment thereof its draft to the Central Savings Bank & Trust Company, stamped the checks paid and charged them to the Amicon Company's account. The draft on the Trust Company was received by defendant through the mail October 6, presented to the Trust Company and dishonored. October 8 the Ordway State Bank was closed. Three weeks later defendant notified plaintiff of this failure of the collection.

Plaintiff alleges that defendant was negligent in (1) forwarding the checks direct to the bank on which they were drawn, (2) accepting payment in its draft instead of cash, and (3) delaying nine days in taking any action after the draft was dishonored.

Held.—In view of all the facts including the circumstances under which the Lumber Company deposited the checks with plaintiff, the defendant was negligent in all three of the respects complained of, and decisions from other jurisdictions in which the facts are materially different cannot govern.

Judgment Affirmed.

CONTRACT TO SELL STOCK—LIMITATIONS—REASONABLE TIME—NO. 12193—*Johnson vs. Johnson—Decided March 10, 1930.*

Facts.—Plaintiff, Arthur C. Johnson, and his brother, Fred, owned all of the stock of a corporation, Arthur owning 1,501 shares and Fred owning 1,499 shares. In 1919 they made an agreement that in consideration of Arthur's selling 100 shares to a third party, Fred would sell Arthur 100 shares at $15.00 a share "at any time considered proper". The object of the contract was to put the control in Fred during the lifetime of both brothers, but to permit a passing of control to Arthur at Fred's death. Fred died in 1922. His will, giving all of his stock to his widow, Marie F. Johnson, was probated

the same year. The estate was closed in 1926. During the pendency of the estate proceedings there were various negotiations between Arthur and Foley, the executor, but no definite results were accomplished until 1927 when Foley wrote Arthur a letter stating that the 100 shares in question would not be sold to Arthur. The principal questions are: 1. Whether this suit for specific performance will lie; 2. Whether Arthur is estopped on account of certain dealings with defendant; 3. Whether Arthur's claim is barred by the statute of non-claim, Section 5331, Compiled Laws of 1921; 4. Whether this suit is barred because of an implied trust; 5. Whether Arthur exercised the option during its life.

Held.—1. This is the correct form of suit. 2. The estoppel was not correctly pleaded. 3. Arthur's demand was not barred by the statute of non-claim. 4. This is not an implied trust. 5. There is no finding by the trial court as to whether the option in the contract was exercised during its life, that is, within a reasonable time, and the cause is therefore remanded for a finding of fact on this point.

Judgment Reversed and Cause Remanded.

COUNTY COMMISSIONER—CLAIM FOR SERVICES—NO. 12275—*Samples vs. Board of County Commissioners, Elbert County, Colorado—Decided March 17, 1930.*

Facts.—Samples, a water commissioner, for himself, and as assignee of one Hall, his deputy, filed claims with the Board of County Commissioners. Samples' claims named the county, bore the respective dates, set forth his capacity as water commissioner, gave the days when he served and the rate per day. Hall's claims, however, did not mention the month or year in which his services were rendered, did not state that he was a deputy water commissioner, and did not state that he rendered services. The trial court disallowed both claims. The only question is whether any or all of these claims are in the form required by statute.

Held.—Samples' claims are in substantial accord with the statute and should be allowed, but Hall's claims were not made according to law and are, therefore, disallowed.

Judgment Affirmed in Part and Reversed in Part.

CRIMINAL LAW—EVIDENCE—DIRECTED VERDICT—INSTRUCTIONS—NO. 12560—*Adams vs. People—Decided March 10, 1930.*

Facts.—Adams was found guilty of a second violation of intoxicating liquor laws. At the trial the evidence showed that one Culbertson, a prohibition agent, and another had bought intoxicating liquor from Adams. His counsel asked the prosecution witness, Culbertson, if he had not been divorced, how long he had been a stool pigeon, etc. This evidence was excluded. Adams, in due course, moved for a directed verdict. The motion was overruled and defendant noted an exception, but the motion and the grounds therefor do not appear in the record. Adams requested an instruction that uncorroborated evidence of witnesses participating in the commission of a crime is to be regarded with suspicion.

Held.—Defense counsel's questioning of Culbertson was inexcusable and the evidence was properly excluded. The motion for a directed verdict and the exception to the court's ruling thereon failing to appear in the record, the ruling cannot be considered on review. The instruction requested by defendant was improper because the purchase of the liquor by the prosecution witnesses was not a crime.

Judgment Affirmed.

CRIMINAL LAW—PLEA OF GUILTY—RIGHT TO APPEAL—NO. 12497—*People vs. Brown, et al.—Decided March 31, 1930.*

Facts.—Brown was charged with the unlawful possession of intoxicating liquor before a justice of the peace. He pleaded guilty and the minimum fine was assessed.. He appealed to the county court, and the district attorney moved for dismissal on the ground that there was no appeal from such a judgment of the justice of the peace. The motion was overruled; the district attorney declined to prosecute further and the defendant was discharged.

Held.—Defendant's only right to appeal was statutory. The statute does not permit an appeal on this state of facts. The appeal therefore was a nullity and the judgment of the justice of the peace still stands.

Judgment Reversed.

DECEIT—ELEMENTS—PROOF—NO. 12041—*Nelson vs. Van Schaack & Company—Decided March 3, 1930.*

Facts.—Nelson sued the Company to enjoin foreclosure of deed of trust and for damages for alleged fraudulent representations. He was non-suited in the trial court.

In 1926 the parties made a contract for the exchange of real estate in Denver under which Nelson received a terrace subject to encumbrance and gave additional encumbrance to the Company. The suit here is for damages on the ground that Nelson relied on the Company's statements about the terrace and that these statements were false. The evidence showed that Nelson had been a builder in Denver for 27 years, that he had examined the terrace, had discussed the matter with friends and had consulted a realtor about the exchange.

Held.—The facts showed that Nelson did not rely on the Company's statements. He is, therefore, not entitled to damages.

Judgment Affirmed.

DEED OF TRUST—FORECLOSURE PRIORITY—NO. 12309—*Bray vs. Trower—Decided March 24, 1930.*

Facts.—In April, 1919, Trower owned land in Kiowa County. He agreed to sell the land to Doll, et al, or their nominee and thereafter executed a warranty deed with the name of the purchaser left blank, and deposited it with Doll. The name of one Parks was filled in and he executed a note and deed of trust for $1,600.00 in favor of Doll. By mesne conveyances Bray became the owner of this note and deed of trust. At the same time the $1,600.00 note was executed Parks executed another note and deed of trust for $4,800.00 in favor of Trower. This encumbrance was recorded after the $1,600.00 deed of trust. Encumbrance held by Bray being in default he brought suit to foreclose, but was stopped by a permanent injunction issued by the trial court. Trower alleges that his encumbrance is superior to Bray's because—1. Bray bought his note after maturity and it is subject to defenses. 2. He, Trower, was defrauded by Doll. 3. Trower foreclosed his deed of trust and the public trustee's deed purports to give him clear title. 4. He did not know of Bray's trust deed till 1926.

5. His trust deed is a purchase money mortgage and entitled to precedence. 6. Case is moot because Bray stopped his foreclosure in accordance with the injunction of the District Court.

Held.—1. The time of Bray's purchase of the note is immaterial because this is not a suit against the original maker of the note. 2. Doll's alleged fraud cannot avail Trower in a suit against Bray. 3. The public trustee's certificate of sale issued to Trower is specifically subject to Bray's encumbrance and the public trustee's deed did not change the title taken by Trower. 4. Trower must have known of Bray's encumbrance long before 1926. 5. Bray's deed of trust is a purchase money mortgage as much as Trower's. 6. The case is not moot because Bray stopped his foreclosure only in obedience to an injunction.

Judgment Reversed.

DIVORCE—WRIT OF ERROR—NO. 12400—*Blackmer vs. Blackmer, et al—Decided March 3, 1930.*

Facts.—Plaintiff brought suit for divorce, which was refused by the trial court, whereupon plaintiff appealed.

Held.—In an action for divorce no writ of error lies where there has been no judgment of divorce.

Writ of Error Dismissed.

IRRIGATION COMPANY—BYLAWS—USE OF WATER—NO. 12249 —*Model Land and Irrigation Company vs. Madsen—Decided March 3, 1930.*

Facts.—Plaintiff held a large amount of land under the Desert Entry Act and operated an irrigating canal to concentrate the use of certain water on this land. Madsen purchased certain water stock and attempted to use it on ground distant from the Model tract.

A bylaw of the company provided that no transfer of water from one tract to another could be made without the approval of the Board of Directors. The Board refused to approve Madsen's contemplated transfer, but he nevertheless used the water on his land. The company brought this action

to restrain such use, was defeated in the lower court and appealed.

Held.—The bylaw in question is reasonable and enforceable.

Judgment Reversed.

IRRIGATION DISTRICT—BONDS—STATUTORY CONSTRUCTION—NO. 12152—*County Commissioners, Adams County, et al. vs. Heath, et al.—Decided March 10, 1930.*

Facts.—The North Denver Municipal Irrigation District issued $673,000 of 6% coupon bonds. Heath held four $500 bonds and one hundred and one $15.00 interest coupons. The commissioners, in making the levy in 1924 for the tax of 1925, did not increase the rate by 15 per cent of the bonds then maturing as alleged to be provided by Section 1997 C. L. 1921, and Heath brought mandamus to compel the increase in levy. The lower court directed that the additional levy be made.

Held.—The unpaid amount of one year's taxes cannot be collected by levying an additional 15 per cent upon those who pay the following years' taxes for the purpose of discharging the proportionate obligation of those who have not paid. The provisions of Section 1997, C. L. 1921, may apply to delinquencies to cover maintenance, operating and other expenses of the district, but its provisions cannot be extended beyond the cost of these items.

Judgment Reversed.

JUSTICE OF THE PEACE—JURISDICTION—WRIT OF PROHIBITION—NO. 12537—*Walker, Justice of the Peace, et al vs. People ex rel. T. M. Uchida—Decided March 10, 1930.*

Facts.—Uchida was a resident of Justice Precinct No. 1 in Pueblo. He was served by McAllister with a summons issued by Walker, Justice of the Peace in Precinct No. 113 in Pueblo County. Service was made in Precinct No. 1. Uchida failed to appear and judgment by default was entered against him. Thereafter McAllister levied on Uchida's property in Precinct No. 1, and proceeded to advertise it for sale. Uchida

sued out a Writ of Prohibition in the District Court which held that the Justice Court judgment was void.

Held.—Although Section 6044 C. L. 1921 provides that suit should be commenced before justices in the township in which the defendant resides, the word "township" must be construed to mean "precinct". The Justice Court, therefore, had no jurisdiction over Uchida, there was no duty upon him to appear, judgment is void and the Writ of Prohibition was properly entered in the District Court.

Judgment Affirmed.

LIABILITY OF SHERIFF—ACT OF DEPUTY—NO. 12175—*Hubert L. Corder and The Maryland Casualty Company, a corporation v. The People of the State of Colorado, etc.—Decided March 31, 1930.*

Facts.—On the evening of October 31, 1926 plaintiff Smiley and several other boys from the town of Pierce, Colorado, were indulging in Halloween pranks. Defendant Hatfield, a deputy sheriff, who was a store-keeper in the town, pursued the boys, warned them to stop their mischief-making; said that he was deputy sheriff and would make them respect the law. The boys continued and Hatfield fired several shots, one of which struck Smiley, who in due course brought this action against Corder and the Casualty Company, the official surety on Corder's bond as sheriff. Defendants contended that there was no competent evidence that Hatfield was acting in an official capacity and the case was submitted to a jury which found for Smiley.

Held.—There was sufficient evidence to go to the jury and the verdict is sustained.

Judgment Affirmed.

POSSESSION OF REALTY—HOMESTEAD—NO. 12039—*Vassek vs. Moffat County Mercantile Corporation—Decided March 3, 1930.*

Facts.—Mercantile Company brought an action against defendant below (plaintiff here) to recover possession of farm lands. The defendant, Ignatz Vassek, had taken the

necessary steps to secure to him a homestead right in the lands in question. Thereafter defendant's wife, Rosa Vassek, became ill and they left the State of Colorado for about six months, during which time their six minor children remained in the house on the disputed lands.

Mercantile Company alleged that the absent defendants were not in possession.

Held.—Under these facts the defendants, Ignatz and Rosa Vassek were in such possession as is contemplated by the statute giving homestead rights, and they are, therefore, entitled to the benefits of the statute.

Judgment Reversed and Case Remanded.

PERSONAL PROPERTY—SALE—DESCRIPTION—NO. 12296—*Denver and Salt Lake Railway vs. Hitchcock and Tinkler Equipment Co.—Decided March 3, 1930.*

Facts.—Defendant here, plaintiff below, brought an action for damages for the conversion of personalty. The property belonged originally to the Moffat Tunnel Commission, which entered into a lease with defendant covering the Moffat Tunnel approaches, tracks, etc., "together with all other property rights, easements and appurtenances connected with said Railroad Company, its approaches and equipment . . . that may be useful, incident or convenient for the use and operation of said Railroad Tunnel." Thereafter the Commission advertised for sale the property here involved and executed a bill of sale to plaintiff covering it.

Held.—The evidence for trial showed that the property in question was not "useful, incident or convenient for the use and operation of said Railroad Tunnel." It was, therefore, not covered by the lease and belongs to plaintiff under its bill of sale.

Judgment Affirmed.

PROMISSORY NOTE—EXTENSION—LIMITATIONS—NO. 12545—*American Medical and Dental Ass'n. vs. Grant—Decided March 10, 1930.*

Facts.—Grant executed a promissory note dated March

1, 1918, in the amount of $165.00, payable to A. J. Pate, and containing this clause: "The makers and endorsers hereof * * * agree to any extensions of time payment and partial payments before, at or after maturity." On the reverse side appeared the following: "Payment of this note is hereby extended to Sept. 1st, 1924." (Signed) A. J. Pate. There also appeared Pate's endorsement to the plaintiff in error. Grant denied the making of any extension agreement and affirmatively pleaded the statute of limitations.

Held.—The association having pleaded an extension of time, the burden was upon it to establish this fact. An extension of a note cannot be made without an actual agreement. No agreement having been proved here, the note is barred.

Judgment Affirmed.

RELIGIOUS CORPORATION'S SUIT BY MEMBERS—NO. 12156—*German Evangelical Emmaus Church vs. Free Evangelical Emmaus Church—Decided March 24, 1930.*

Facts.—Ehlrich, et al, as members of plaintiff congregation brought this suit in the name of the corporation to prevent defendants occupying a certain church property. The complaint alleges plaintiff is an incorporated congregation subject to The German Evangelical Snyod of North America and that according to the rules of said synod the church counsel is responsible for the property; that the 1926 dissension arose between Kauerz, then pastor of said congregation, and certain members; that Kauerz and his followers withdrew from the synod and organized a new church, but continued in possession of the old church building. The evidence shows that Ehlrich and his supporters are a small minority of the congregation and that they did not demand that the church counsel act in their behalf or that such a demand would be unavailing.

Held.—Ehlrich and his supporters have no right to bring a suit in behalf of the religious corporation without proving that the officers thereof had refused to bring a suit, or that a demand would be futile.

Judgment Affirmed.

TAXATION—LIVESTOCK—AGREEMENT WITH THE COUNTY COMMISSIONERS—NO. 12172—*Boyer Bros., Inc. vs. Board of County Commissioners, etc.—Decided March 31, 1930.*

Facts.—Boyer Bros., Inc., engaged in sheep raising in Wyoming, grazed its sheep on the United States forest reserve in Routt County parts of each year from 1918 to 1923. In 1916 the company made a written agreement with the county commissioners providing that the company should be assessed each year on one-third of the number of sheep brought to Routt County for grazing. In 1921 the legislature passed an act (C. L. 1921 Section 7249), providing that when personal property is brought into the state after April 1 of any year and is removed before April 1 of the following year, the owner shall file a schedule with the county assessor, and shall be liable for a pro rata tax based on that portion of the year in which the taxable chattels are in the county. Boyer Bros. brought this action to recover taxes paid under their agreement with the commissioners for the years from 1918 to 1923. The lower court gave judgment for the defendants for all these years.

Held—Prior to 1921 there was no basis for the taxation agreement, Boyer Bros. derived no benefit therefrom, and they are therefore entitled to recover. Beginning with 1921, however, the statute made it the duty of the assessor to levy a tax "according to the best information he can obtain". The judgment in favor of the commissioners for the years 1921 to 1923 was therefore correct.

Affirmed in Part and Reversed in Part.

Board of County Commissioners of Routt County vs. Routt County Live Stock Co.—NO. 12173—*Decided March 31, 1930.*

Board of County Commissioners of Routt County vs. Kipp Sheep Co.—No. 12174—*Decided March 31, 1930.*

These are companion cases to 12172 and the facts and holdings are substantially the same.

TAX SALE CERTIFICATES—RIGHTS OF PURCHASER—NO. 12000 —*Ireland vs. Collins, et al. and Gunnison Mountain Coal and Coke Co.—On Rehearing—Decided March 3, 1930.*

Facts.—Certain property of the Coal and Coke Company went to tax sale in 1922 and 1923, and was struck off to Gunnison County which transferred the certificates to plaintiff. The County Treasurer later issued tax deeds on part of the certificates, and as to the tracts included therein plaintiff brought ejectment, which was defeated below.

The principal question involved is the amount to which plaintiff is entitled on the cancellation of these deeds and certificates,—the amount on the face of the certificates plus specific taxes and penalties or only the amount which plaintiff actually paid for them with the usual legal interest.

Held.—The deeds are void, and plaintiff took nothing but a lien to the extent of the payment of the amount paid for the certificates, with legal interest thereon. Such payments by plaintiff did not discharge the tax in full but only so much thereof as was covered by the money actually received by the County, the balance of the tax remaining a lien on the property.

Judgment Affirmed.

WARRANTY DEED—DEED OF TRUST—CANCELLATION—FRAUD —NO. 12140—*Klein et al vs. Munz, as Executor of estate of Margaret A. Chatterton—Decided March 17, 1930.*

Facts.—Chatterton, on November 16, 1925, executed and delivered to E. R. Kuhlmann a warranty deed with the grantee's name left blank. Kuhlmann first inserted the name of one Danielson, then the name of one Petrone, and then the name of Lola Kuhlmann, his wife; the latter executed a note and trust deed on the property and these papers were, in ordinary course, bought by Klein, who sold them to Fields. Thereafter Chatterton died and her executor brought this action to cancel the warranty deed and the deed of trust. The district court held both instruments void and ordered them cancelled.

Held.—If there was fraud in Kuhlmann having filled in his wife's name in the warranty deed, it was made possible by

Chatterton. Her executor stands in the same position as Chatterton, and it is, therefore, correct to apply the rule that, when one of two innocent persons must suffer from a fraud, the one who has made the fraud possible should suffer.

Judgment Reversed.

WATER PRIORITIES—CHANGE OF USE—POINT OF DIVERSION—NO. 12171—*Baker, et al. vs. City of Pueblo, et al.—Decided March 31, 1930.*

Facts.—The City of Pueblo filed its petition seeking a decree permitting it to change the points of diversion of certain waters of the Arkansas River. Plaintiffs in error, junior appropriators from the same stream, appeared and objected to the petition. The ditches in question are in two groups: the general decree for the first providing that the appropriators shall have the right to use the water continuously for irrigating purposes, and the general decree for the second group providing priorities without giving the right to a continuous flow. The City of Pueblo sought to change the use of water from agricultural to domestic. The lower court awarded the city the right to change the point of diversion of all the water flowing through the first group of ditches, but only one-fourth of the water flowing through the second group.

Held.—The rights of junior appropriators must be carefully guarded. The evidence was that the plaintiffs in error would be damaged by the change of use of diversion of the water flowing in both groups of ditches; furthermore, the continuous flow provided in the general decree for the first group must be construed to mean only a continuous flow for these waters insofar as they are needed for agricultural purposes, and does not contemplate a continuous flow day and night for domestic purposes.

Decree Reversed.

WATER PRIORITIES—INDIVIDUAL DECREES—LIMITATIONS—NO. 12232—*Kibbee vs. Kostelic—Decided March 10, 1930.*

Facts.—There was a general decree for priorities in Water District No. 11, in which neither Pledger (Kibbee's

grantor) nor Kostelic appeared. Thereafter, in 1910, Pledger obtained an individual decree with priority as of March 20, 1898. Kostelic did not appear in this action. In 1927 Kostelic filed his individual petition asserting a priority from the same stream, as of May 1, 1886. Kibbee appeared and objected to Kostelic's claim on the grounds: (1) That Kostelic's claims could not be determined in his individual proceeding because his claims arose before the entry of the general decree. (2) That Kostelic's petition contained insufficient descriptions of ditches, owners, etc. (3) That Kostelic's claim was barred by limitation; and (4) Because the evidence was insufficient to warrant a decree in Kostelic's favor.

Held.—Kostelic's right of action, if any, is barred by Section 1785, C. L. 1921, which provides a four-years period of limitation from the time of the entry of a final priority decree, and also by Section 1789, C. L. 1921, dealing with arguments and reviews. Both of the above statutes apply to individual as well as to general priority decrees. It was, therefore, error for the district court to award Kostelic a priority superior to that of Kibbee.

Judgment Reversed.

WILLS AND ESTATES—DISTRIBUTION—APPEALABLE INTEREST—NO. 12506—*Fenn, et al. vs. Knauss, et al.—Decided March 3, 1930.*

Facts.—About three and one-half months after Warneke's will had been probated and letters testamentary issued, the specific legatees filed a petition asking that their legacies be paid, alleging that all demands had been paid and tendering repayment bonds. The executors resisted the petition on the grounds that one year from the issuance from probate had not run and that they were entitled to the protection afforded by the lapse of this time.

The County Court ordered the executors to pay the legacies. The executors appealed to the District Court, which reversed the order of the County Court.

Held.—The executors had no appealable interest in the order of the County Court and their appeal must be dismissed.

However, the court does not approve of orders like this, ordering payments of legacies in less than one year from the issuance of letters.

Judgment Reversed.

WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—"HORSE-PLAY"—NO. 12512—*McKnight vs. Houck, and Industrial Commission of Colorado—Decided March 17, 1930.*

Facts.—McKnight, plaintiff's son, while employed on the ranch of Dr. Houck was instructed by Houck to go with one Arnot, a fellow employe, to count some cattle and to take their pistols to kill any stray dogs or coyotes. On their return to the bunk-house they undertook to see which of them could draw his pistol first. In doing this McKnight was killed. The District Court held that the killing did not arise in the course of employment.

Held.—The District Court was correct and the so-called "doctrine of horse-play" does not exist.

Judgment Affirmed.

STATUTE OF LIMITATIONS—ABSENCE FROM STATE—RETROACTIVE EFFECT—NO. 12170—*Jones v. O'Connell—Decided February 17, 1930.*

Facts.—O'Connell sued Jones to recover on a promissory note which became due November 22, 1912, and time of payment was never extended. Suit was instituted May 27, 1927, fifteen years after its maturity. Last payment was made on the note about five years after its maturity and about ten years before suit was brought. Defense was the Statute of Limitations. Judgment against Jones below.

Held.—1. Actions on promissory notes must be commenced within six years next after the cause of action thereon shall accrue.

2. The Act of 1921, among other things, provided that if when a cause of action accrues against a person, he is out of the State, or has absconded or concealed himself, the period limited for the commencement of the action by any Statute

of Limitations shall not begin to run until he comes into the State, or while he is so absconded or concealed, and if, after the cause of action accrues he departs from the State, or absconds, or conceals himself, the time of his absence or concealment shall not be included as a part of the period in which the action must be brought.

3. In this case, the defendant was absent from Colorado from about June, 1920, and thereafter had his permanent domicile in California. The six years had elapsed before the complaint in this action was filed, and unless the defendant's (Jones') absence from Colorado suspended the running of the six year statute, the judgment below was wrong, *but,*

4. There is no express provision in the Statute of 1921 making it operative as to past transactions. Therefore, the Statute of 1921 does not affect the rights of the plaintiff or defendant in this case.

Judgment Reversed.

VENUE—INSURANCE—NO. 12440—*Progressive Mutual Insurance Company v. Mihoover—Decided Feb. 3, 1930.*

Facts.—Mihoover commenced this action against the Insurance Company, a domestic corporation, to recover upon accident insurance policy issued by the Insurance Company upon the life of the plaintiff's husband in which policy the plaintiff was named as beneficiary. The plaintiff resides in Pueblo County where her husband formerly lived. The application for insurance was made in Pueblo County and the premiums were there paid, and the husband died there. The defendant resides in the City and County of Denver where its principal and only place of business is maintained. Notice of process was had upon it in Denver. Defendant made application for a change of venue below which was denied.

Held.—1. The contract of insurance is silent as to the place of performance in event of loss under the terms of the policy.

2. Where the contract is silent as to the place of payment the debtor is obliged to seek the creditor in the County of his residence and at his usual place of business or abode and make payment to him there.

3. In the absence of a special provision in the policy of insurance, the county in which the plaintiff resides is a proper county in which to commence an action to collect thereon.

Judgment Affirmed.

WIDOW'S ALLOWANCE — ANTE-NUPTIAL CONTRACT — No. 12468—*Popham vs. Duncan—Decided February 24, 1930.*

Facts.—Plaintiff in error is the administrator, and defendant in error is the widow of Charles M. Duncan. Duncan and his wife made an ante-nuptial agreement that they might separate at any time, that he would pay her $100.00 for each year they would have lived together, and that she would waive her right as a widow, in the event of his death. In less than one year from the agreement they separated; he paid her $110.00 and she executed a receipt in full. After his death she claimed a widow's allowance, which the County Court denied, but which the District Court, on appeal, allowed.

Held.—The alleged ante-nuptial contract is against public policy and is void. Mrs. Duncan is, therefore, entitled to the widow's allowance.

Judgment Affirmed.