Denver Law Review

Volume 6 | Issue 6 Article 8

July 2021

Colorado Supreme Court Decisions

Dicta Editorial Board

COLORADO SUPREME COURT DECISIONS

(EDITORS NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

ATTACHMENT—LIABILITY OF GARNISHEE—No. 12246—*City of Denver, garnishee, vs. Jones. Decided February 4, 1929.*

Facts—Mary E. Jones, judgment creditor of the defendant Morris, an employee of the garnishee the City and County of Denver, attacks the validity of assignments of wages on the ground that they violate Section 5110 of the Compiled Laws of 1921. After the service of garnishment the garnishee paid the money to the assignee. The testimony showed that the assignment was primarily for the benefit of the assignor and certain of his creditors.

Held.—That the applicability of the statute to the transactions herein involved depends upon the definition or explanation of things in action set forth in the statute. The debtor was employed by the garnishee, and wages to be earned are things in action within the contemplation of the statute and could be assigned and when assigned would be subject to the statute here invoked. For that reason the assignments were void. The contention that the city could not be liable to the garnishor unless liable to the defendant is subject to an exception, and only where there is no fraud or the transaction infringes no established legal principle is the above rule true. In the instant case the assignment, being primarily for the benefit of the assignor, under the statute is void.

Judgment Affirmed.

CITATION TO PROBATE—WAIVER—EFFECT—No. 12066—*Wilson and Wolfe vs. Van Zant, et al—Decided February 18, 1929.*

Facts.—Thomas Wolfe died testate. A citation was issued for probate hearing on March 14, 1927, and on that day, the citation was filed bearing a waiver of notice and consent to probate, signed by plaintiffs in error, who were plaintiffs below. On the same day, Richard Wolfe filed a caveat and

on March 21 he filed a revocation of his waiver and consent to probate. On March 28 Kate Wilson filed her revocation of waiver. The County Court granted this, but refused Wolfe's and struck his caveat. The demand of both plaintiffs for a jury was refused and the will was probated.

Held.—The so-called "waivers" did not bar plaintiffs from contesting the will, because the position of none of the other parties had been changed, and there was, therefore, no estoppel. Plaintiffs are entitled to a jury trial.

Judgement Reversed.

CONTRACT OF EMPLOYMENT—CHANGE OF BY-LAWS—ESTOPPEL IN PAIS—No. 12028—*Farmers Life Insurance Company vs. Hetherington—Decided February 18, 1929.*

Facts.—Hetherington brought this action against the Insurance Company to recover damages for alleged breach of contract. He was chosen the Company's general counsel March 5, 1926, and discharged in November, 1926. Prior to March 5, 1925, the general counsel had been an officer of the company, holding office for one year, but this office was abolished on that date and the counsel's employment was at the will of the Board of Directors. In his complaint, Hetherington alleged his employment under the by-law providing for one year's tenure of office. The answer set forth the change of March 5, 1925, to which Hetherington filed a replication claiming that the company was estopped to set up this change, because the secretary had told Hetherington, in February, 1926, that the original by-law on this point had not been changed so far as he knew.

Held.—The trial court should not have permitted the case to go to the jury because the estoppel was not proved. Hetherington had access to the minutes and should not have relied on the secretary's qualified statement.

Judgment Reversed and Case Remanded.

EQUITY—"CLEAN HANDS"—COSTS—No. 12270—*Nolan vs. Lantz Sanitary Laundry Company—Decided February 11, 1929.*

Facts.—Nolan entered the Laundry's employ and signed

a contract providing that either party should give two weeks' notice of the termination of the employment, and that the employee should not enter the business of collecting or soliciting laundry work for a period of six months after leaving the Company's employ. The Company discharged Nolan, paying him two weeks' advance wages, which he accepted. Thereafter, and within six months, he solicited laundry work. This action was brought to enjoin this violation of the contract. He filed a cross complaint for $41.27, which the Company admitted was due and paid into the registry of the Court. No costs were allowed.

Held.—The receipt by Nolan of advance wages constituted a waiver of any failure by the Company to comply with the contract. Lower court's ruling on costs was within its jurisdiction.

Judgment Affirmed.

IRRIGATION DISTRICTS—ASSESSMENTS—No. 11991—*San Luis Valley Irrigation District vs. Noffsinger—Decided February 4, 1929.*

Facts.—Noffsinger, alleging that the district had over his protest constructed a drainage ditch across his land and in so doing seized or destroyed portions of his property, brought this action. The defendant in the court below was an irrigation district. Portions of the land included therein had gone to seep. It proposed and actually constructed a drainage ditch, which bisected the plaintiff's land. By reason of the proximity of the plaintiff's land to the ditch his land was completely drained, and he was one of the chief beneficiaries of the drainage ditch. The plaintiff paid the assessments generally made against all land within the district for the purpose of said district.

Held.—That the special damages sustained by the plaintiff through the taking of his land were offset by the special benefits he received in having his land completely drained, and that the instruction to the effect that benefits to land not taken should be offset against damages thereto should have been given by the lower court.

Judgment Reversed.

MECHANICS' LIENS—FILING OF CONTRACT BY OWNER—WAIVER OF LIEN—No. 12053—*Armour and Company vs. McPhee and McGinnity—Decided February 18, 1929.*

Facts.—Defendants in error, plaintiffs below, furnished labor and material for the erection of a building for defendant, for the construction of which one Sullivan was principal contractor. The bills of the various sub-contractors were not paid and they brought this action to foreclose their various liens. The defendant maintains that the lien under the Colorado statute is derivative and not independent.

Defendant recorded this contract with Sullivan, which refers to certain plans and drawings, but these were not attached. Defendant also claims that a waiver was executed by Sullivan, purporting to release any claims for liens which he or any sub-contractor might have against the owner, and that the Colorado statutory provision invalidating such waivers is unconstitutional. As to the plaintiff, Midwest Steel and Iron Works Company, defendant asserts that the fact that its corporate charter had expired destroys its right to maintain this action in its corporate name.

Held.—It is immaterial whether the lien is derivative or independent because the paper recorded by defendant is insufficient in that the plans are not included. All the work and labor are, therefore, deemed to have been done at the instance of the owner and it is unnecessary to decide the constitutionality of the statute regarding the waivers. The contract with Midwest Steel and Iron Works Company was made during the corporate life of this company and after the expiration of the charter the contractors, either in the name of the company or as trustees, may maintain this action.

Judgment Affirmed.

PROMISSORY NOTE—DEFENSE—PLEADING—No. 11993—*Riel and Riel vs. Schwalb and Cannon—Decided February 18, 1929.*

Facts.—Schwalb and Cannon sued Riel and Riel on a promissory note. Defendants' answer alleged that they had given their note for $2,000.00 to The Home Savings and Merchants Bank long before July 13, 1925; that on July 6, 1925, this bank consolidated with The Globe National Bank, through

fraud and deceit; that plaintiffs were directors of The Home Savings and Merchants Bank and knew of all the fraud practiced in the merger and in dealing with their notes; that about July 6, 1925, the Home Savings Bank and Merchants Bank sold the $2,000.00 note to another bank; that on July 13, 1925, defendants executed a renewal note (the one now in question) on the Globe Bank's representation that it held the old note; that the merged banks failed on September 19, 1925; that defendants had money on deposit in the Globe Bank sufficient to pay this note, on which they received dividends of $700.00, which they have offered to plaintiffs; that plaintiffs took this note without consideration, after maturity, and with full knowledge of its infirmities. The trial court sustained a demurrer to this answer.

Held.—The answer states a good defense.

Judgment Reversed with Directions to Overrule the Demurrer.

PROMISSORY NOTE—INTEREST—ATTORNEY'S FEES—No. 12045—*Slife vs. Credit Finance Corporation—Decided February 11, 1929.*

Facts.—The Corporation sued Slife on a note for $500.00, dated January 16, 1926, payable $50.00 per month beginning February 16, 1926, with interest at 1% per month after maturity, and providing for 15% attorney's fees. Fifty dollars was deducted from principal as the first ten months' interest. Default was made February 16, 1926, and this matured the note. Lower Court allowed 1% per month from that date, together with attorney's fees.

Held.—The $50.00 deducted in advance paid the interest until November 16, 1926, and additional allowance of interest was error.

Judgment Modified and Affirmed.

WORKMEN'S COMPENSATION—PRACTICE—No. 12236—*Colorado Fuel & Iron Co. vs. Industrial Commission—Decided February 4, 1929.*

Facts.—Various hearings were held before the referee, and the matter was continued from time to time for the purpose of determining the compensation, if any, due the claim-

ant. The Commission finally ordered that compensation be denied. Nothing further was done in the case for some time until a letter was written to the Commission in behalf of the claimant calling attention to an alleged injustice done the claimant and asking that the case be re-opened. The Commission caused notice to be served upon the claimant and the company that a further hearing would be had. The company objected on the ground that there had been a final order entered, and that no petition for review was filed, and there was no reason assigned by the commission for re-opening of the case. Nevertheless the hearing proceeded and an award was made. The company filed its petition to review and the former award was affirmed. Thereupon the Company commenced this action in the District Court.

Held.—That under Section 4484 of the Compiled Laws of 1921 the Commission on its own motion on the ground of error or a change in conditions may re-open the case, and it is not required that the commission set forth in its order in reopening the case any cause or reason therefor. To reverse this case would require that it be sent back to the Commission for further proceedings, and as substantial justice was finally done by the commission after the re-opening of the case it would be useless to return the case to it. There was sufficient evidence upon which the Commission could have found that the claimant was entitled to the award.

Judgment Affirmed.

WORKMEN'S COMPENSATION—REFEREE'S FINDING OF FACT—No. 12112—*Industrial Commission and Colorado Fuel & Iron Co. vs. Robinson—Decided February 18, 1929.*

Facts.—Robinson filed a workman's notice of claim for compensation in 1921, and alleged that he accidentally sustained injuries, arising out of and in the course of his employment by the Company. After a long series of hearings the Referee of the Industrial Commission found as a fact that Robinson's disability was caused by sciatica, and entered an award in favor of the Company. The District Court reversed this ruling.

Held.—There is a little evidence to support the referee's finding of fact, and it was, therefore, error for the District Court to reverse the award.

Judgment Reversed.

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of Dicta to note any interesting decisions of the United States District Court, the Denver District Court, the County Court, the Juvenile Court, and occasionally the Justice Courts.)

UNITED STATES DISTRICT COURT—No. 7858—*United States v. Broadmoor Hotel Company—J. Foster Symes, Judge.*

Facts.—Defendant, at its hotel, gives tea dances which are open to the public as well as guests. A table d'hote charge of seventy-five cents is made for tea, which is the uniform charge throughout the hotel, whether music and dancing are available or not. Those attending may occupy chairs and tables but are under no obligation to order refreshments, nor is there any cover or entrance charge.

The Government alleges the tax prescribed by Sec. 800(a), Subdiv. 6 of the Rev. Act of 1918, approved February 24, 1919, and Sec. 800(a), Subdiv. 5 of the Rev. Act of 1921* is applicable to these facts, and seeks to recover the tax and penalties for the years 1919 to 1924 inclusive.

Held.—The language of the sections in question imports something more than the furnishing by the hotel of agreeable surroundings and music by an orchestra, and it is contemplated that the entertainment be conducted for profit and admission charged. Here the charge of seventy-five cents is not an excessive one for the tea, and there is no direct profit.

The Sections call for something that might be termed entertainment, as distinguished from the mere service of food in the manner and with the accessories customary and expected by patrons of a hotel of the character of that of defendants.

*These sections are identical and read as follows: "A tax of 1½ cents for each ten cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service and merchandise; such tax to be paid by the person paying for such refreshment, service or merchandise."

The term "cabaret" denotes something more in the way of entertainment than is found in this situation; here no professional dancers or actors were hired by the hotel, and the music did not include soloists, either instrumental or vocal.

UNITED STATES DISTRICT COURT—No. 5985—*In the Matter of The Colorado Farms Company, Bankrupt—J. Foster Symes, Judge.*

Facts.—On June 30th, 1928, the Referee in Bankruptcy ordered the sale of 278 parcels of farm lands owned by the bankrupt to be sold free and clear of all liens and encumbrances, the liens of encumbrancers to attach to the proceeds to be realized from the sale. The sale was held August 2nd, and on August 14th an order was entered by the Referee approving the sale of certain of the parcels. Subsequently The International Trust Company, Trustee, and The Colorado National Bank, Trustee, each filed petitions for the application of the proceeds of the sales of the real estate in which they were respectively interested, asking among other things that the fees of the Trustee and Referee in Bankruptcy, amounting to a total of 2% of the sale proceeds, be found not to be a charge against the sale proceeds, but a charge against the general estate of the bankrupt. The Referee disqualified himself to hear the petitions insofar as the fee question was involved, and referred the question to the Judge of the District Court for decision.

Held.—That the fees and commissions of the Referee and Trustee in Bankruptcy in connection with the sales mentioned in the petitions could not be charged against the proceeds of these sales. The Court did not decide whether these fees should be a charge against the general estate of the bankrupt.

The Bankruptcy Act of 1898, as amended in 1903, provided:

> Trustees shall receive for their services, payable after they are rendered, * * * from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, * * * and one per centum on moneys in excess of ten thousand dollars.

This was changed in 1910 to read:

Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed *or turned over to any person, including lienholders,* by them, as may be allowed by the courts, etc.

The commissions allowed to referees are the same as the commissions allowed to trustees in bankruptcy.

The Circuit Court of Appeals for the 8th Circuit, in *In re Harralson, 179 Fed. 490,* construing the Bankruptcy Act as amended in 1903, held that under no circumstances was the trustee or referee entitled to commissions *to be paid from the proceeds* of the sale of encumbered assets, on the theory that the sale is for the benefit, not of the lienholder, but of the general estate, and that therefore these commissions should be paid out of the general estate.

It was decided by the District Court in the present case that the 1910 amendment, adding the words "or turned over to any person, including lienholders," did not change the source of payment of the trustee's and referee's commissions, but concerned only the amount of the commissions.

DENVER DISTRICT COURT—DIVISION 4, NO. 100,864—*Colorado National Bank v. Rehbein et al—Judge Henry Bray.*

Facts.—Rehbein, on December 28, 1923, signed a note for $3,000, payable to Louis Siener in three years and secured by deed of trust on certain property. Siener pledged the note with the bank as collateral for a loan of $3,000 to himself. A few months later Fred Giggals and Edith Giggals bought the property above from Mrs. Rehbein, the Giggals assuming the payment of the note and deed of trust. On December 28, 1926, the date of maturity, the Giggals, wishing to pay off the note, gave a deed of trust for $3,000 to the Capitol Life Insurance Company, which $3,000 was paid to Louis A. Siener, who gave a forged copy of the note therefor, and also a request for the release of the deed of trust. This release was executed by the Public Trustee. The release, and the mortgage to the Capitol Life Insurance Company, were recorded on the same day, but the release was by inadvertence recorded five minutes after the mortgage. On the same day, namely, the date of maturity, Siener told the bank that the note had been extended and, with their consent, wrote an extension on the back of the

note. He had previously endorsed the interest payments as each became due. Over a year later Siener was arrested for other crimes and the situation was disclosed. The bank brought an action to foreclose and for the amount of the note, against Rehbein, the Giggals and the Insurance Company.

The chief defenses were as follows:

(1) The bank was negligent in allowing Siener to collect interest, endorse payments, extend the note, and endorse the extension, without the bank notifying the maker that Siener was no longer holder or inquiring whether the note was really extended.

(2) The bank, by the above omissions, was estopped from denying Siener's agency to collect the principal.

(3) The note was avoided by a material alteration made with the bank's consent and without the assent of the maker.

(4) The Capitol Life Insurance Company claimed that they were purchasers relying upon the release of the deed of trust by the Public Trustee.

Held.—Judgment in favor of defendants on all points, particularly on the ground of the bank's negligence.

The Court considered that, although none of the parties had committed any wrong, the plaintiff bank had placed its confidence in Siener throughout, whereas the defendants, and particularly the Giggals, who bought the property and made payments of interest and were personally present when Siener received the principal, were not careless or negligent and should not suffer loss, and that it would be inequitable to set aside the release obtained by reason of the payment to Siener.