Denver Law Review

Volume 6 | Issue 6 Article 9

July 2021

Recent Trial Court Decisions

Dicta Editorial Board

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.