PEOPLE ex rel. LINDSLEY, Dist. Atty., v. DISTRICT COURT OF FREMONT COUNTY et al.

(Supreme Court of Colorado. Jan. 12, 1903.)

PROHIBITION—JURISDICTION—ERRORS—CHANGE OF VENUE.

1. On an application for a writ of prohibition to a court, questions of jurisdiction which have not been presented to or passed on by such court will not be considered.

2. Where a lower court enters orders without requisite notice to the parties, such errors may be corrected in that court on motion of any party interested.

3. An application for change of venue on the ground that the parties reside in another county, where the cause of action arose and summons was served, that the convenience of witnesses demands the change, and that the judge is so prejudiced that a fair and impartial trial cannot be had before him, does not oust the court of all jurisdiction except to grant the application, but is addressed to the discretion of the court.

4. Error of a district court in passing on a motion for change of venue cannot be reviewed by prohibition.

Application for prohibition by the people, on the relation of Henry A. Lindsley, district attorney, against the district court of Fremont county and Morton S. Bailey, judge. Dismissed.

Stuart & Murray and James F. Callbreath, for petitioner.

PER CURIAM. This is another application for leave to institute a proceeding in prohibition growing out of the action of the district court of Fremont county, had primarily in an action commenced by Dennis Sullivan against the Denver Gas & Electric Company, referred to in Callbreath v. District Court, 71 Pac. 387. So far as the present application is based upon the alleged want of jurisdiction of the district court to appoint a receiver, and its action in denying the petition of intervention presented, we shall not determine these questions, for the reason that they have never been presented to the lower court for its consideration and determination. Callbreath v. District Court, supra. If the lower court has assumed to enter orders without the requisite notice to the interested parties, that is an error which it has the authority to correct on motion by any one entitled to be heard. No such motion has been made below. After the proceedings complained of in the Sullivan case were had, the district attorney commenced an action in quo warranto against the Denver Gas & Electric Company in the district court of Arapahoe county. On motion of the company that action was transferred to the district court of Fremont county. The district attorney then moved to have the cause retransferred to the court in which it was originally brought, and also at the same time moved to have the action in which the receivership proceedings were had transferred to the same tribunal. These motions were based upon the ground that the parties resided in the county of Arapahoe; that the cause of action arose in that county; that summons in the quo warranto case was served there; that the convenience of witnesses demanded its trial in that county; that the judge of the district court of Fremont county was so prejudiced that the people and intervener could not obtain a fair and impartial trial; and that the parties in the receivership proceedings had fraudulently conspired to confer jurisdiction in that case upon the district court of Fremont county. These motions have been denied. The petitioner claims that the district court is without further jurisdiction; that it abused its discretion in denying these motions; and that a writ of prohibition should now issue from this court directing the lower court to proceed no further in either of the actions than to enter an order removing them to the district court of Arapahoe county.

From the earliest decisions of this court on the subject of prohibition down to the present time, it has uniformly been held that the only question which can be considered is whether the inferior tribunal is exercising jurisdiction which it does not possess, or, having jurisdiction, has exceeded its legitimate powers. It has also been uniformly held that a writ of prohibition cannot be converted into a writ of error for the purpose of correcting mere errors in the exercise of a jurisdiction with which an inferior tribunal is invested. Leonard v. Bartels, 4 Colo. 95; People v. District Court, 6 Colo. 534; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; People v. District Court, 29 Colo. 5, 66 Pac. 896; People v. District Court, 29 Colo. 83, 66 Pac. 1068. We have also held that our authority to entertain proceedings in prohibition is conferred by the constitution, and is not dependent upon or governed by the statute or Code on that subject (People v. District Court, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850); and hence the chapter of the Code relating to certiorari and prohibition has no application to proceedings of that character in this court, and we cannot stay the hands of an inferior tribunal because of an alleged abuse of discretion in a matter of which it has jurisdiction. There can be no doubt but that the district court of Arapahoe county had jurisdiction to order the quo warranto proceedings transferred to the district court of Fremont county. At least, that authority is not challenged. It may have made a mistake in directing the change, but, if it did so, that was merely an error in the exercise of a jurisdiction which it possessed. The transfer of the cause to the district court of Fremont county gave the latter tribunal jurisdiction to entertain it, and the only question presented is whether or not the filing of the motions for a change of venue ousted the district court of all jurisdiction to further proceed in the actions than to pass upon these motions and grant them. None of the grounds upon which these mo-

tions are based entitle the parties in whose behalf they were made to a change of place of trial as a matter of right. The fraud charged is limited to the alleged fraud of the parties to the Sullivan suit. Whether or not this was sufficient to authorize the court to transfer the case to the district court of Arapahoe county was a question which the court had authority to determine. The prejudice of the judge is charged, but it is not of a character to ipso facto disqualify him from trying the causes. The alleged prejudice charged is of a character which he has the authority to and must pass upon in the first instance. The convenience of the place of trial, as measured by the residence of the parties and their witnesses, were all matters addressed to the discretion of the court, and which it had authority to determine. If it has erred in this respect, it has simply committed an error within its jurisdiction. That the cause of action upon which the quo warranto proceeding is based may have arisen in the county of Arapahoe, and the summons been served in that county, is immaterial in this instance. Had the suit originally been instituted in some other jurisdiction, perhaps these questions might have been successfully raised, but, as they are now presented, they are matters which the lower court has the power and authority to determine. In short, none of the grounds upon which the motions for a change of venue are based entitle the parties to a change as a matter of right, but present only questions which the lower court has the jurisdiction to determine, and, if it errs in passing upon them, its error cannot be reviewed in prohibition. In this respect, the grounds upon which the applications for a change of venue are based are entirely different from those presented in People v. District Court, 30 Colo. —, 69 Pac. 597. Although this court is the supreme tribunal of the state, its authority is circumscribed by law, and it can no more exercise a power which it does not possess than can the inferior tribunals of the state. It may be that the lower court has erred in the decision of matters submitted for its consideration, and of which plaintiff complains, but we are precluded from determining those questions in this proceeding, unless we should assume, in violation of all law, to review the errors complained of in prohibition. It may be true that the ordinary remedy by appeal or writ of error to review these matters is not plain, speedy, and adequate. However that may be, it is the fault of the procedure provided for correcting errors of this kind. The remedy lies with the legislature; we cannot legislate. It is only where an inferior tribunal is exercising a jurisdiction which it does not possess, or, having jurisdiction, has exceeded its legitimate powers, and the remedy to correct such errors by appeal or writ of error is not plain, speedy, or adequate, that the writ of prohibition will lie. In other words, although errors may have been committed by an inferior tribunal, they cannot be corrected by proceedings in prohibition, unless they relate to the exercise of jurisdiction on the part of the inferior tribunal which it does not have.

The application is denied and the proceedings dismissed.

LITTLE DORRIT GOLD MIN. CO. v. ARAPAHOE GOLD MIN. CO.

(Supreme Court of Colorado. Dec. 1, 1902.)

MINES—ABANDONMENT—RELOCATION—INSTRUCTIONS—EVIDENCE—HARMLESS ERROR.

1. Where defendant requested and the court, in substance, gave, a certain instruction in answer to an inquiry of the jury, defendant could not insist on appeal that the law laid down in the instruction was erroneous.

2. Under the direct provisions of Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], a failure to perform the annual labor on a mining location does not render it open to a relocation made after the owners have resumed work.

3. Annual work can be performed on one mining location for the benefit of several, when there is a community of interest in all the locations.

4. An instruction was requested by those claiming the forfeiture of a mining location that, while the burden of establishing a "forfeiture" was on the party relying thereon, yet under certain circumstances the burden was on the owners of the location to prove that work done was intended as assessment work, and went to the benefit of the location. The instruction was given, but the judge used the word "abandonment" instead of "forfeiture." *Held* not prejudicial error.

5. A jury in a mining litigation asked for instructions as to the effect of the inclusion of all the workings of a certain location in the survey for a patent for another location owned by the same parties. The court instructed as to the effect of taking in workings of the first location, but omitted the word "all." *Held*, that the instruction was responsive to the question.

6. No request having been made for a fuller instruction, the alleged omission would not constitute reversible error.

7. An instruction that assessment work could be performed outside a mining location, where it was intended as assessment work, and was of a character inuring to the benefit of the location, plainly required compliance with both the requirements.

8. A jury was instructed that assessment work could be performed outside a mining location only where it was of a character inuring to the location's benefit. Subsequent instructions stated that such work must tend "approximately and directly" to the development of the location. *Held*, that any omission in the first instruction, in failing to state that such work must "manifestly" so tend, was cured by the later instructions.

9. Any error in excluding evidence was cured by the subsequent admission of the same evidence on cross-examination.

10. Where, under the issues and instructions, the question left with a jury was whether a mining location had been abandoned at the time of its relocation by others, evidence that employés of the relocators told a witness who warned them off the ground that they were being paid for their work, and did not care whether they were sinking on ground subject

¶ 3. See Mines and Minerals, vol. 34, Cent. Dig. § 54.