Denver Law Review

Volume 10 | Issue 2 Article 8

January 1932

Supreme Court Decisions

Dicta Editorial Board

• 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 a filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digeests.)

CRIMES—MURDER—TIME FOR TRIAL—ATTORNEY APPOINTED BY COURT—*Carlson vs. The People*—No. 13034—*Decided October 3, 1932—Opinion by Mr. Justice Butler.*

I.

An attorney, appointed eight days after a homicide, when his client is confined to the psychopathic hospital four days after the attorney is appointed and when his client is retained there for five days throughout which time the attorney is refused the opportunity of communicating with his client, does not have sufficient time within which to prepare for trial when the trial is set for five days after his client's release from the hospital. It is error to refuse to grant a motion for continuance even though the motion be technically imperfect.

II.

In appointing counsel for a defendant without means, it is the duty of the Court to determine that counsel is appointed with adequate ability and experience to fairly represent the defendant.—*Judgment reversed.*

FORECLOSURES—REDEMPTION BY ASSERTED ENCUMBRANCER—*Carson vs. Bradford, et al.*—No. 12775—*Decided October 10, 1932—Opinion by Mr. Justice Alter.*

Plaintiff gave a chattel mortgage and a second trust deed to secure two notes to H. The chattels were later sold to R. on execution, subject to the chattel mortgage. R. paid the balance due on the two notes, which were then endorsed in blank and delivered to R. with the chattel mortgage and second trust deed. K. secured the notes and second trust deed from R. and, claiming a balance due on the notes, redeemed from a sale on foreclosure of the first trust deed. Plaintiff still had time to redeem but made no attempt to do so, and the property was redeemed by a third encumbrancer who, with full knowledge of the facts, paid the amount which K. had paid plus the amount which K. claimed was still due on the two notes.

Under these facts it was held that, whether or not the lien of the chattel mortgage had merged in the ownership title of R. and the notes had thus been paid by operation of law, requiring a release of the second trust deed, nevertheless the plaintiff, having made no effort to protect his equity of redemption, could not sustain an action against R. and K. for securing a fraudulent overpayment of the two notes.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES PROVIDING FOR ATTENDANT AT GAS FILLING STATION—*Starkey vs. City of Longmont*—No. 12821—*Decided October 10, 1932—Opinion by Mr. Justice Burke.*

Starkey was fined for violating a city ordinance by operating a gasoline filling station without a license. To review that judgment, he prosecuted error.

1. A municipal corporation under its police power may provide that an attendant must be in charge of any activity which may imperil public safety or morality.

2. A municipal corporation has the power to pass an ordinance requiring the presence of an attendant at a gasoline filling station.

3. The dispensing of gasoline is of such a dangerous character that an ordinance requiring an attendant and thereby prohibiting the use of "slot" machine gasoline filling stations is a valid exercise of the police power.

4. Such an ordinance is not void on the ground of uncertainty, discrimination, unreasonableness or of invasion of personal and property rights, or of violation of due processes or of Federal and State Constitutions.—*Judgment affirmed.*

MECHANICS LIENS—COMPLETION OF BUILDING—FURNISHING EXCESSIVE MATERIAL—*Mortgage Brokerage Company et al. vs. W. B. Barr Lumber Company et al.*—No. 12734—*Decided October 17, 1932—Opinion by Mr. Justice Butler.*

1. One who furnishes materials to the owner is a principal contractor, and, as such, has three months after completion of the building within which to file his lien statement.

2. Where the owner moves into a house which is in fact not completed, and on which further work is done, there is more than a trivial imperfection in the work, and such occupancy does not constitute constructive completion for purposes of determining the time when lien statements must be filed.

3. If the owner, who is building other houses in the vicinity, has materials for all houses delivered to one house, upon which he has already obtained a loan for purposes of getting additional materials, so that the other houses will be free of liens, and if the materialman knowingly helps to carry out such a scheme by delivering more material than could be used in the construction of the one house, its fraudulent conduct will prevent the enforcement of a lien in any amount as against the holder of the encumbrance.

4. If the materialman, though not participating in such a scheme, furnished material with knowledge that some of it was to be used in the construction of other houses, it could not, as against the holder of the encumbrance, enforce a lien for the material which it knew was to be used elsewhere.—*Judgment reversed and cause remanded.*

AUTOMOBILES—CERTIFICATE OF TITLE—SHORT CHECK—INNOCENT PARTY—RIGHTS OF—*Shockley vs. Hill*—No. 12904—*Decided October 17, 1932—Opinion by Mr. Justice Hilliard.*

Action below was replevin for automobile. Hill, auto dealer in Illinois, sold auto to one Goodman, taking check in payment and delivered auto, but

later check was returned no good. Auto passed by transfer into hands of Shockley who paid value and was innocent purchaser.

1. Where seller seeks to replevin auto from a third party, who purchased in good faith and for value from intermediate party who exhibited indicia of ownership and was in possession, seller cannot recover.

2. Where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall on him by whose act or omission the wrongdoer has been enabled to commit the fraud.

3. If the buyer by fraudulent devises secures possession without paying the purchase price, a bona fide purchaser from him for value would acquire a good title as against the seller's right to retake possession.—*Judgment reversed.*

LEASES—TERMS OF—INDUCEMENTS TO—PROOF OF—*Frosh vs. The Sun Drug Company*—No. 12680—*Decided October 17, 1932—Opinion by Mr. Justice Burke.*

1. Where, prior to the time a lease is executed, the lessor agrees to perform certain acts and make certain repairs, though these matters are not set out in the lease, they may be proved for they do not vary the terms of a written instrument.

2. Where the heating plant of a business location was improperly constructed and maintained and this fact was known to both parties prior to the execution of the lease and the lessor had promised the lessee to repair it but he had failed to do so, the promise of the lessor in such a case is admissable in a suit against the lessee for rent, not to vary the terms of a written instrument but to evidence matters of inducement.

3. When the lessee has paid rent for more than a year, he has not waived the injury when it is shown that the lessee was continually complaining and demanding relief and that the lessor was continually promising the necessary repairs.—*Judgment affirmed.*

MALICIOUS PROSECUTION—IN CIVIL ACTIONS—ALLEGATIONS IN—SUFFICIENCY OF—*Slee v. Simpson*—No. 12,708—*Decided October 24, 1932—Opinion by Mr. Justice Campbell.*

1. In a prior suit in which plaintiff sought to recover for personal injuries, defendant had filed a counter-claim. Plaintiff had recovered judgment for $8,000, which remains unpaid; and now brings this action for malicious prosecution based upon defendant's counter-claim. After a motion to strike filed by the defendant, which was sustained, plaintiff filed an amended complaint to which defendant demurred. The demurrer was sustained. Plaintiff elected to stand on her amended complaint, whereupon defendants' motion to dismiss was granted.

2. Although, as a general rule, actions for malicious prosecution are not encouraged, such an action may be maintained against one who maliciously and without probable cause attempts to prosecute a claim.

3. A counter-claim is the same as a new suit, the defendant being treated as a plaintiff and having the burden of proving the allegations set out in the counter-claim.

4. As long as a cause of action was properly pleaded in this case, a demurrer to the complaint should not have been sustained.—*Judgment reversed.*

TAXATION—EXEMPTIONS—INSTITUTIONS FOR PHYSICAL EDUCATION—*Denver Turnverein vs. McGlone, Manager of Revenue, etc.*—No. 12,971—*Decided October 24, 1932—Opinion by Mr. Justice Hilliard.*

1. The teaching of physical culture is comprehended by the term "education", and is within the purview of Sec. 5, Art. X, of the Constitution of Colorado, and Sec. 7198, C. L. 1921, making property used solely for schools, and not held or used for private profit, exempt from general tax levy.—*Judgment reversed.*

LIVE STOCK—SUIT AGAINST STATE AGENCY—LIMITATIONS—INTEREST—*Alfred et al vs. Esser*—No. 12,711—*Decided October 24, 1932—Opinion by Mr. Justice Moore.*

1. A suit against the members of the state board of stock inspection commissioners, to recover the proceeds of a sale of estray cattle, is maintainable.

2. The statutes concerning the sale of estray cattle by the state board contemplate notice to the owner of the cattle, and until such notice is given the limitations in Sec. 3221 C. L. 1921, against recovery of the proceeds of the sale, do not operate against the owner.

3. The owner is entitled to interest on the proceeds of a sale of his cattle equal in amount to that actually received by the state board while the fund was in its possession.—*Judgment affirmed.*

APPELLATE PRACTICE—ASSIGNMENTS OF ERROR—*Samuel Cunningham et al vs. Nellie Mae Snelling and Roy G. Cook*—No. 12,628—*Decided October 24, 1932—Opinion by Mr. Justice Burke.*

1. Where there is no compliance with Rule 32, Supreme Court Rules, the alleged assignments present nothing for review.

2. An assignment that the court erred in entering judgment and in overruling a motion for a rehearing is no assignment at all. It is merely equivalent to stating in general terms that the Court * * * was wrong in its judgment."

3. An assignment stating that the court erred in excluding or admitting evidence, without further particularity, cannot be considered.—*Judgment affirmed.*

CONTRACTS—BREACH OF CONTRACT—FINDINGS OF JURY—*School Dist. No. 16, in the County of Fremont, et al vs. Murray*—No. 12,695—*Decided October 24, 1932—Opinion by Mr. Justice Campbell.*

1. In an action by plaintiff, a school teacher, for her wages under a written contract, when the school board confesses judgment, and is satisfied

with said judgment, it is doubtful if the taxpayers may maintain or supplement themselves to defeat this action.

2. The questions of fact were resolved by the jury in favor of the plaintiff and there was unquestioned credible evidence fully justifying its findings.—*Judgment affirmed.*

MOTOR VEHICLES—COLLISION—RIGHT OF WAY—*Stocker vs. Newcomb*—No. 12,616—*Decided October 31, 1932—Opinion by Mr. Chief Justice Adams.*

1. Where more than one reasonable inference can be drawn from the evidence it is not proper for the trial court to invade the province of the jury.

2. The rule that an automobile driver on the left should yield the right of way to the one on the right does not deprive the driver on the left of his lawful right to use of the highway nor entitle the driver on the right to drive in a reckless fashion.—*Judgment reversed and cause remanded.*

INDUSTRIAL COMPENSATION—LEX LOCI CONTRACTUS—RIGHT OF RECOVERY UNDER COLORADO LAW WHERE CONTRACT ENTERED INTO IN COLORADO BUT INJURIES ARE SUSTAINED OUTSIDE OF STATE—*The Home Insurance Company et al vs. Hepp*—No. 13,145—*Decided October 31, 1932—Opinion by Mr. Justice Burke.*

1. In an Industrial Compensation case the findings of fact were that the decedent had entered into his contract of employment in the State of Colorado, but the major portion of his services were to be performed in the state of New Mexico, and that he was killed while driving his automobile in the state of New Mexico. Judgment for compensation under the Colorado Workmen's Compensation Act was awarded the heirs of insured and the defendant appealed.

2. Where the contract of employment is entered into in Colorado it is not essential, in order that recovery may be had for injuries sustained while employed under such contract, that the principal portion of services thereunder were to be performed in the State of Colorado.—*Judgment affirmed.*

MECHANICS' LIENS—TRUST DEEDS—PRIORITY—*Longton vs. Husung*—No. 12,633—*Decided November 7, 1932—Opinion by Mr. Justice Campbell.*

1. The purchaser of certain real property agreed with the vendor to make specific improvements thereon. The purchaser also gave the vendor a second deed of trust, which was recorded. Thereafter, the specified improvements were made, and a mechanic's lien was filed for labor and materials furnished in making the improvements. The lienor knew of the contract requiring the making of the improvements. The lien was held to have priority over the second deed of trust under Sec. 6444 C. L. 1921, because the improvements enhanced the value of the vendor's security, and because the improvements were required by the contract which was entered into at the same time that the vendor's second deed of trust was executed.—*Judgment affirmed.*