Denver Law Review

Volume 10 | Issue 12 Article 1

January 1933

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

CONTRACTS—CONSTRUCTION OF—AND PAYMENT—*H. C. Lallier Construction and Engineering Company, et al. vs. The Weicker Transfer and Storage Company*—No. 12926—*Decided September 11, 1933*—*Opinion by Mr. Justice Bouck.*

Lallier, defendant below, made a contract with one De Spain under which De Spain agreed to do a portion of certain excavating work at an agreed price per cubic yard, and for which payment was to be made on the basis of monthly estimates of work done made by a designated engineer, fifteen per cent of such estimated value to be retained until completion, the other eighty-five per cent to be paid over to De Spain monthly. Shortly before completing her contract De Spain assigned to plaintiff all her right, title and interest in amounts to be retained by Lallier under the contract then owing or to become due in the future, and such assignment was accepted in writing by Lallier. The engineer's estimates of the work done proved excessive, so that the eighty-five per cent of the estimates already paid out by Lallier was considerably more than eighty-five per cent of the actual earnings. Plaintiff claims that under the assignment and acceptance by Lallier it is entitled to fifteen per cent of the total contract price of the work done, such liability not being lessened by previous overpayments to De Spain. The trial court gave judgment for $984.33.

HELD: Plaintiff is entitled to only the difference between the amount actually earned by De Spain and the amount paid to De Spain by Lallier prior to the assignment; $198.52, and interest thereon, and not to fifteen per cent of the total earned by De Spain. Payments of eighty-five per cent of the estimated work done were payments on account and the fifteen per cent withheld by Lallier was not a deposit or definite fund but merely an unpaid balance the size of which necessarily remained undetermined until final estimate and acceptance. The trial court did not indicate the reasoning by which it arrived at the amount of its judgment and the defendants (plaintiffs in error) did not request enlightenment as to this. Since such a request might have corrected the obvious miscalculation by the trial court, plaintiffs in error are to recover only two-thirds of their costs in the Supreme Court and the defendant in error (plaintiff) shall recover all of its costs in the lower court.—*Judgment reversed with directions.*

DEEDS—DELIVERY—ESCROWS—*Barnes, et al. vs. Spangler*—No. 12861—*Decided September 11, 1933*—*Opinion by Mr. Justice Holland.*

On October 20, 1922, one James S. Willard made and executed a regular warranty deed to a certain residence property conveying the

same to defendant, and delivered the deed to a bank with th following written instructions:

"Gentlemen:

"I hand you herewith Warranty Deed dated October 20, 1922, given by me to Vera May Spangler, conveying residence property situate at 221 N. Cascade, Colorado Springs, Colorado, which I shall ask you to accept for safekeeping and deliver to Miss Vera M. Spangler in the event of my death."

All of this was done out of defendant's presence and without her knowledge.

Thereafter Willard died and on the following day the bank delivered the deed to defendant, who promptly filed it for record. Plaintiffs as Willard's heirs at law sued to set aside this deed on the ground of non-delivery.

The trial court heard all the evidence and found that Willard constituted the bank as trustee for defendant, intended to reserve no control or dominion over said deed, and intended to and did convey title to defendant in praesenti. Plaintiffs bring error.

HELD: The facts do not justify the finding of the trial court that there was a legal delivery.

The court says:

"A careful reading of the instructions which accompanied the handing of the deed to the depositary, dispels any doubt in the writer's mind as to Willard's intentions. They were made clear by the instructions. He intended delivery to be made after his death and said so. Under this writing, the bank was Willard's agent and possession of the bank or depositary was the possession of Willard, and the bank could have delivered the deed to Willard at any time before his death, without liability to defendant and Willard could have destroyed it without liability to defendant. This instrument could not operate as an escrow on account of the lack of sufficient parties and consideration, also the failure to actually contract."—*Judgment reversed with directions.*

TAXATION—REDEMPTION FROM SALE FOR TAXES—LIABILITY OF COUNTY FOR WRONGFULLY INCLUDING PERSONAL TAX—*Jefferson County, et al. vs. Stuart*—No. 13371—*Decided September 11, 1933*—*Opinion by Mr. Chief Justice Adams.*

The Board of County Commissioners of Jefferson County disallowed the claim of Annie C. Stuart for a refund of taxes paid by her on certain real estate. She appealed to the District Court and obtained judgment. The Board assigns error and asks for supersedeas.

One Thompson executed and delivered to Stuart a deed of trust. Subsequently the County Treasurer sold the land to satisfy Thompson's delinquent real and personal property taxes with interest and penalties

for the year 1929 and for the year 1930. Stuart, in order to protect her trust deed lien, asked the Treasurer for a statement of taxes due on the real estate. By mistake, the Treasurer included the personal tax with penalties amounting to $198.23, which Stuart paid without knowledge that it was a personal property tax and she obtained judgment below for this amount.

1. The County Treasurer, in advertising and selling the land to satisfy its owner's delinquent real and personal property taxes, acted under the provisions of Sec. 7402 C. L. 1921, but in selling the land for the personal tax, the Treasurer could not thereby cut off a valid prior lien on the real estate created by the recorded deed of trust.

2. The County contends that claimant should not be permitted to recover because she voluntarily paid the personal property tax without any protest. There was no occasion for her to protest when the Treasurer, by mistake, gave her the wrong figures and in reliance thereon she believed that she was paying only the real estate tax. She was entitled to rely on the Treasurer's statement, and did not pay the tax voluntarily when she paid it with the express intention of having it applied on the real estate.—*Judgment affirmed.*

PLEADING—DEMURRER—CAUSE OF ACTION—*Slusser vs. First National Bank of Denver*—No. 12878—*Decided September 11, 1933—Opinion by Mr. Justice Holland.*

A complaint states a cause of action, good against general demurrer, by allegation of the following facts: That a certificate for designated shares of stock was deposited with defendant bank for delivery of all or part of said shares to plaintiff, or his order, upon payment of the stipulated price to the bank for the credit of the owner of the stock; that the bank's fee for acting in such capacity was paid; that plaintiff thereafter paid to the bank the stated price for part of said shares, together with the transfer charges, and requested delivery of said part; and that the bank, ignoring its duty, then returned plaintiff's money to him and returned all of said shares to the owner thereof without request for such return by said owner.—*Judgment reversed with instructions to reinstate complaint.*

CONTRACTS OF EMPLOYMENT—RESIGNATION—STATE COLLEGE—*Trustees of State Normal School vs. Wightman*—No. 12920—*Decided September 11, 1933—Opinion by Mr. Justice Bouck.*

Wightman was approved as professor of physics at the Western State Teachers College, and in April, 1929, was employed in that capacity. On September 12, 1929, Wightman's resignation was requested

by the president of the school, and a resignation was tendered on September 20th. On October 4th a telegram rescinding the resignation was sent by Wightman to the president. This suit is for wages claimed by Wightman. Wightman had been professor since 1920. Wightman recovered judgment below.

1. Sec. 8164, C. L. '21, make the trustees a body corporate, and they are, therefore, proper parties defendant.

2. In the absence of an express condition a Ph.D. degree is improper grounds for a removal of a professor.

3. A contract of employment becomes effective upon acceptance.

4. Resignation only is effective upon acceptance. Trustees alone had the authority to accept resignation, and this was not done.—*Judgment affirmed.*

CHATTEL MORTGAGES—FORECLOSURE—TROVER—PLEADING—*Second Industrial Bank vs. Surratt, et al.*—No. 12789—*Decided September 11, 1933—Opinion by Mr. Justice Holland.*

The Surratts gave the bank their note secured by chattel mortgage upon some personalty. They later rented the premises to a tenant and moved to California in December. A month later the tenant moved out, and the bank took possession of the chattels, and sold them at auction for $165.00. The following February the Surratts returned, and brought suit, claiming that the chattels were worth more than $165.00, and that they were unlawfully obtained and sold, and converted by the bank. Surratts recovered judgment below.

1. Where a demurrer is overruled, and an answer upon the merits filed, the right to question the court's ruling upon review is waived.

2. Trover can be maintained by one having possession or the right to immediate possession against one wrongfully taking and converting property to their own use.

3. Acceptance of a smaller payment than is due to mortgagee waives the right to proceed as on default until expiration of reasonable time.

4. For court to review wrongful admission of evidence it must be set forth in the abstract.—*Judgment affirmed.*

ACCORD AND SATISFACTION—AGENCY—FAILURE OF DEFENDANTS TO TESTIFY ON CONTROVERTED ISSUE—*Dresser, et al. vs. W. H. Mullin Lumber Co.*—No. 12927—*Decided September 18, 1933—Opinion by Mr. Justice Bouck.*

The lumber company sued in the district court to recover an alleged balance of a claim for goods sold and delivered to Dresser and his wife. Judgment was entered for the plaintiff.

1. There is no accord and satisfaction when the alleged settlement is made by paying less than the amount actually due, where, as here, the smaller sum was received under an express protest at the time.

2. Where plaintiff seeks to fix liability upon defendants through contract made by an alleged agent and agency is denied but neither the defendant nor the agent testify, a slight prima facie case is sufficient to satisfy legal requirements touching the burden of proof.—*Judgment affirmed.*

TORTS—DEATH—DAMAGES—LICENSEE OR INVITEE—*Gotch vs. K. & B. Packing & Provision Co.*—No. 13032—*Decided September 18, 1933*—*Opinion by Mr. Justice Butler.*

Gotch sued the K. and B. Packing and Provision Co. for damages of the death of his wife. The trial court granted motion for nonsuit. The company operated a slaughter house and several times a week for four years, Mrs. Gotch had taken lunches to her son Mike, who worked there in the slaughter room. On the day of her death, she passed through the doorway from a shipping platform into the shipping room and proceeded toward the slaughter room, but instead of entering the open doorway to the slaughter room, she for some unexplained reason, stepped into an unguarded elevator shaft and fell to the bottom and was killed.

1. Tresspassers and mere licensees take the premises as they find them. The owner is not under the same obligation to trespassers and licensees as he is to those who are upon the premises by his express or implied invitation. To the former he owes no duty to have his premises in a reasonably safe condition. The only duty he owes is not to wilfully or intentionally injure them.

2. A city ordinance, which requires an automatic gate on elevator shafts does not change such rule. Such ordinance does not confer a right of action for a violation, to a tresspasser or mere licensee.

3. As there was no evidence of a violation of any duty owing to a tresspasser or mere licensee, the controlling question is: Was Mrs. Gotch an invitee? Held that she was not an invitee.—*Judgment affirmed.*

SALES—SELLING GOODS BY BRAND—COUNTER-CLAIM—MEASURE OF DAMAGES—*Thompson vs. Swain Flour Brokerage Co.*—No. 12774—*Decided September 18, 1933*—*Opinion by Mr. Justice Burke.*

Thompson, a Denver baker, contracted with the company for flour. After delivery, acceptance and use of a portion, Thompson, claiming the flour was inferior to that purchased, refused to accept the remainder. This the company thereupon sold and sued Thompson for an unpaid balance on that accepted, plus its loss and damage on that resold, a total of over $800.00. Thompson counterclaimed for damages of about $1,500.00. The plaintiff company recovered judgment for $884.08.

1. Where a contract calls for Competition Spring (old flour) and the flour delivered is put up by the seller under that identical brand and was described on the label as "Hard Northern Spring Wheat" and

all this was known to buyer when he made the contract, and where it is shown that the buyer had previously bought and used the same flour, and since buyer had accepted deliveries each week over a period of more than four months, and it appears that this flour was identical in brand and quality with that under present contract, the buyer could not have been deceived.

2. Any attempt to show a different kind and quality was contracted for would clearly be an attempt to alter a written contract by parol.

3. The company's right, on Thompson's breach, to resell and sue for the difference is clear.—*Judgment affirmed.*

Frank J. Mannix has returned to active practice with offices at 827 Ernest & Cranmer Building. Frank left Denver nearly three years ago and was located for a while in California.

According to Judge Carl V. Weygant, Chief Justice of the Ohio Supreme Court, that body is now considering increased requirements which will limit the number of lawyers admitted to the bar in view of the fact that the profession is becoming overcrowded. (Ohio State Bar Association Report, August 21, 1933, Vol. 6, No. 21.)