Denver Law Review

Volume 9 | Issue 9 Article 12

January 1932

Trial Court Decisions

Dicta Editorial Board

♦ ♦ Trial Court Decisions ♦ ♦

John Hancock, etc. Co. against Cohen, et al. No. A-3669. *In the Denver District Court before Judge Starkweather.*

Plaintiff is the holder of a note signed by defendant and secured by a deed of trust on property owned by him. The defendant collected from the tenant of the property, rent for five months in advance and shortly thereafter made default in the terms of the trust deed. The plaintiff thereupon secured the appointment of a receiver in the above case, and the receiver served the tenant with a three day notice requiring payment of a month's rent in advance. The tenant failing to vacate or to pay any rent on the ground that he had already paid the rent to the defendant owner, the receiver now applies to the court for an order requiring the tenant to pay him a month's rent or vacate.

Held: That the tenant must pay rent to the receiver or vacate the premises, even though he has previously paid rent to the owner of the property. Order granted.

Kastner vs. Kastner. In the Denver District Court, No. 97125. *Before Judge Dunklee. Decided June 20, 1932.*

This is one of the large number of cases now pending in which a final decree of divorce was entered on motion of the adjudged guilty party pursuant to the provisions of S.L. 1925, Chapter 90, Page 237 (later held unconstitutional in Walton v. Walton, 86 Colo. 1), and the guilty party subsequently married another person in reliance on such final decree.

The findings of fact and conclusions of law in this case were made and signed on March 13, 1928, and on September 15, 1928 a final decree of divorce was signed by the Court upon motion of the attorney for the defendant (the adjudged guilty party), the defendant subsequently marrying another woman. Later a motion was filed by the defendant to reduce the amount of support money payable to the wife, and on August 7, 1929 the Court signed an order termed a "modified decree" changing the alimony support money from $50.00 per month to $25.00 per month for the support of the minor child.

On August 13, 1929 plaintiff moved to vacate this decree and for a new trial, and on September 9, 1929 plaintiff filed a "Supplemental motion to vacate modified decree and for a new trial," raising for the first time the point that the original final decree was void under the decision of the Supreme Court in Walton v. Walton, 86, Colo. 1 (decided March 4, 1929). Both of plaintiff's motions to vacate and for a new trial were denied and plaintiff brought error to the Supreme Court, which held that the decree of divorce was void because entered at the request of the guilty party, but that the Court had jurisdiction to enter an order in reference to the support money. The Court therefore affirmed the portion of the judgment in reference to the support money, and reversed the Court for its refusal to set aside the decree of divorce

and remanded the case for further proceedings in harmony with its opinion (Kastner v. Kastner, 9 Pac. 2nd, 290).

This matter now comes on to be heard upon defendant's motion filed April 20th, 1932 to set aside the final decree of divorce on the ground that the same was null and void, and upon defendant's petition filed the same date, to amend the original findings of fact and conclusions of law entered and signed May 13, 1928, so as to include the statutory clause as provided by S.L. 1929, Chapter 91, Page 327, and also upon the answer to the petition filed by plaintiff on April 28, 1932 objecting to such amendment of the findings of fact and conclusions of law.

The Court finds the facts as above set forth, and then proceeds as follows:

TENTH. The Supreme Court holds in its opinion in this case of Kastner v. Kastner, as above cited, among other things as follows:

"The court erred in its refusal to set aside and vacate the decree of divorce herein, and therefore this portion of the judgment is reversed; it did not, however err in making and entering its order of August 7, 1929, with reference to alimony and allowance for the maintenance and education of the minor child, and this portion of the judgment is affirmed, costs herein to be taxed to defendant in error, Julius Kastner. The cause is accordingly remanded for further proceedings in harmony herewith."

ELEVENTH. The court has given careful attention and study to this case upon the records as disclosed herein with a view to finding some legal way to straighten out the unfortunate situation which the parties find themselves in by virtue of the fact of the conflict between the said decision of the Supreme Court and the provisions of said Chapter 90, S. L. 1925, adjudged unconstitutional after the decree was signed herein on the 15th day of September, 1928, adjudicated as void by the said Supreme Court decision herein, and for the further reason that there are quite a large number of other cases upon the docket of this court in the same legal situation, some of which have been before the court for adjudication.

TWELFTH. The court finds that the law as heretofore construed by the Supreme Court goes to great lengths to uphold the legality of a second marriage as a matter of public policy. In the case of Pittinger v. Pittinger, 28 Colo. 308, the court holds that where a marriage has been shown between a husband and wife, and thereafter a legal marriage has been established by either the husband or the wife to another party, the law raises the presumption that a divorce had been granted, and puts the burden of proof upon the party challenging the legality of the second marriage to prove to the contrary.

On page 311 the court says:

"By some of the authorities this presumption is said to be one of the strongest known to the law. Its strength increases with the lapse of time. This presumption arises because the law presumes morality and not immorality, and that every intendment is in favor of matrimony. Lampkin v. Ins. Co. 11 Colo. App. 249; 2 Nelson Divorce and Separation, Sec. 580; Boulden v. McIntire, 21 N. E. Rep. 445; In re Rash's Estate, 53 Pac. Rep. 312; Teter v. Teter, 101 Ind. 129; Johnson v. Johnson, 114 Ill. 611.

"This presumption applies with peculiar force in favor of one who is

unable to prove affirmatively that the man with whom she entered into the marriage relation in good faith was divorced from a former wife."

A number of other cases could be cited to the same effect.

THIRTEENTH. After the decision of the Supreme Court of March 4, 1929, in the said Walton v. Walton case, declaring Chapter 90, S. L. 1925, unconstitutional, the legislature by Chapter 91, S. L. 1929, p. 327, by an act approved May 9, 1929, passed a new act concerning marriage and divorce remedial in its provisions.

On page 329 among other things is the following clause:

"The General Assembly hereby finds and determines that it is contrary to public policy to permit the marital relation to remain undecided for a period exceeding six months after the signing of the findings of fact and conclusions of law, and that the public welfare requires that suits of divorce shall be definitely determined and ended within a reasonable time after the trial thereof.

"Section 3. No action shall be brought after the expiration of one year from the date that this act takes effect to set aside or to attack the validity of any decree of divorce heretofore granted upon the ground that the decree was entered upon the motion of the party who was not entitled to the decree."

FOURTEENTH. For the foregoing reasons the court finds and rules as follows herein, to wit:

a. That said motion filed herein asking that the decree of September 15, 1928, be set aside as null and void as per the decision of the Supreme Court of the state of Colorado herein be granted.

b. That the said answer to the petition of the defendant filed herein April 28, 1932, objecting to the said petition, filed herein April 20, 1932, is overruled.

c. That the said petition of April 20, 1932, to amend the Findings of Fact and Conclusions of Law so as to contain the automatic clause as provided for in said Chapter 91, S. L. 1929, p. 327, is granted, and the court signs the amended Findings of Fact and Conclusions of Law containing said clause, and orders the same filed herein.

d. The court overrules all of the other objections of the plaintiff to the proceedings herein and to the Amended Findings of Fact and Conclusions of Law.

The Court amended the findings of fact and conclusions of law entered March 13, 1928 by adding the following:

ELEVENTH. The court finds as a matter of law that the plaintiff is entitled to a decree of divorce herein at any time hereafter when she chooses to ask for same.

TWELFTH. That at the expiration of six months from the date of these findings of fact and conclusions of law, if the same have not been set aside and no motion to set the same aside remains unheard and undecided, these findings of fact and conclusions of law shall operate as a decree of divorce upon the terms and conditions in said findings of fact and conclusions of law, subject to any modification of the terms or provisions thereof by any intervening order or the court may enter a final decree of divorce or any other order or decree to set forth any terms, conditions or other matters properly included in a final decree.