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

TAXATION—POWER TO TAX MUNICIPALITY—*People v. City and County of Denver*—No. 12690—*Decided May 2, 1932—Opinion by Mr. Justice Campbell.*

1. In an action by the state to recover unpaid gasoline taxes from the city, the fact that the municipality is a home rule city is of no consequence.

2. Gasoline used by the city in the construction, maintenance and repair of its highways is not taxable within the meaning of the statute. (See *People v. Weld County.*)

3. The fact that Denver is a home rule city does not make the streets merely local highways for the use of the residents of citizens of Denver alone. City streets are state highways.—*Judgment affirmed.*

DAMAGES—DENYING CHANGE OF PLACE OF TRIAL—GIVING JUDGMENT AGAINST ONE OF TWO DEFENDANTS WHO DID NOT FIRE SHOT THAT RESULTED IN PLAINTIFF'S PERSONAL INJURY—AWARDING OF EXEMPLARY DAMAGES—*Reyher v. Mayne*—No. 12410—*Decided May 2, 1932—Opinion by Mr. Justice Hilliard.*

1. Plaintiff, who was a Sheriff of Kiowa County, sued two brothers for damages for personal injuries and recovered general and exemplary damages, the basis for the suit being that the defendants, without right, entered upon certain premises where the plaintiff was in the legal enjoyment of hunting privileges and carelessly discharged guns at the plaintiff's decoy geese while the plaintiff was in a blind nearby, killing some of the geese and some of the shot striking the plaintiff as he suddenly arose from the blind; the complaint also included damages for the loss of the geese.

2. The court did not abuse its discretion in denying application for a change of place of trial on the alleged bias of the people of the county of which the plaintiff was then Sheriff, on the claim that it was impossible to secure an impartial jury, where there were affidavits, both in support of and against the application. In the absence of the abuse of discretion, the trial court's determination of the question is controlling on review.

3. Where both the defendants were unlawfully hunting upon the land where the plaintiff had a right to be, and where both of them shot at and killed some of the plaintiff's decoys, and while they persisted in this unlawful act, the shots from the gun of one of them injured the plaintiff, it is no defense that the shots from the gun of one of them only injured the plaintiff.

4. It is the fact of participation, not the degree, or the extent, or the particulars, that makes every participant in such a tort liable. Each defendant here is properly answerable for the sum or aggregate of the damage inflicted by both wrongdoers.

5. The Court erred in submitting to the jury the right to recover exemplary damages; while the defendants were wrongfully on the premises, there is no reason to believe the defendants were prompted by any evil purpose toward the plaintiff. They did not see the plaintiff, nor the blind in which he was concealed, and when they started firing at the geese, the plaintiff unexpectedly emerged from the blind and was struck by the shot.

6. In such case, the circumstances negative any evil intent on the part of the defendants to injure plaintiff, and they were not guilty of such wanton and reckless disregard of plaintiff's rights as to evidence wrongful motive, and there was an entire absence of malice.—*Judgment modified by eliminating exemplary damages, and affirmed as to the balance.*

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—EFFECT OF VERDICT OF NOT GUILTY ON CERTAIN COUNTS AND VERDICT OF GUILTY ON SIMILAR COUNT—EFFECT OF WITHDRAWAL OF CERTAIN COUNTS—*Crane v. the People*—No. 12726—*Decided May 2, 1932—Opinion by Mr. Justice Burke.*

1. Where defendant and others were charged with conspiracy to obtain money by means of false pretenses in eleven different counts, all growing out of the same transaction, and at the close of the Peoples' evidence, the People withdrew six of the counts and the jury returned a verdict of not guilty on four of the remaining counts and of guilty on the remaining one, the withdrawal of the six counts did not amount, in law, to verdicts of acquittal on all.

2. In such case, the verdicts of not guilty on the four remaining counts are not inconsistent with and do not render impotent the verdict of guilty on the remaining count.

3. *Webb v. The People,* 83 Colo. 1, overruled.—*Judgment affirmed.* Mr. Justice Butler and Mr. Justice Hilliard dissent.

CRIMINAL LAW—LARCENY—EMBEZZLEMENT—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF VERDICT—APPEARANCE OF SPECIAL COUNSEL—RULINGS ON EVIDENCE—*Critchfield v. The People*—No. 12399—*Decided May 2, 1932—Opinion by Mr. Justice Alter.*

1. An objection to an information on the ground of duplicity in that it charges both larceny and embezzlement in one count comes too late when such objection is raised to the introduction of evidence.

2. Where an information is duplicitous, the objection must be presented either by motion to quash or demurrer.

3. Neither a demurrer or a motion to quash can be properly made while a plea to the indictment or information stands.

4. Where a defendant is found guilty under an information charging both larceny and embezzlement in one count, and no objection is made to the form of the verdict given, the Supreme Court will not consider any errer therein raised for the first time in this court.

5. Where, after a jury has been empaneled and sworn, but before the introduction of any evidence upon motion of the District Attorney, additional counsel was endorsed for the People, and the defendant objects thereto, the objection is overruled, but defendant's counsel makes no application for a further opportunity of examining the jury with reference to their relations and acquaintance with such newly entered counsel and there is no indication that the substantial rights of the defendant were prejudiced, the ruling of the Court in permitting additional counsel to be so entered is not error.

However, this practice is condemned and as a general rule defendant's counsel should have ample notice of all counsel to appear in the trial of the cause so that the opportunity of interrogating respective jurors may be full and complete.

6. Where the prosecuting witness, in a cattle stealing case, was asked on cross examination if he thought he could claim a reward for the prosecution and he answered "No," and on objection by the People, the question and answer were stricken, such ruling of the Court was improper, but in view of the fact if the answer had stood, it would have shown no interest in the witness and when it was stricken and the record was silent as to his interest, error cannot be predicated thereon.—*Judgment affirmed.*

APPEAL AND ERROR—DIVORCE—TIME WITHIN WHICH APPEAL MUST BE MADE FROM COUNTY COURT TO DISTRICT COURT—*Hayhurst v. Hayhurst*—No. 12524—*Decided May 16, 1932—Opinion by Mr. Justice Campbell.*

1. Appeals may be had from any judgment or decree of a county court in any action for divorce in the manner provided by law for appeals in civil actions.

2. Appeal must be made within ten days after judgment or within such further time as the county court may authorize.

3. Where in an action for divorce, the county court entered an order nunc pro tunc setting aside a former order vacating an interlocutory and final decree of divorce and at the same time, reinstates its previous interlocutory order and final decree and plaintiff prays for an appeal to the District Court and appeal bond is filed and approved within ten days thereafter, such appeal is taken in time.

4. An order of court vacating a previous order, setting aside a judgment is not a final judgment from which an appeal will lie, but where court re-enters original judgment, this is a final judgment as of the latter date.—*Judgment affirmed.*

ATTACHMENT AND GARNISHMENT—TRAVERSE OF GARNISHEE ANSWER—*Stollins, et al. v. Shideler, et al.*—No. 13056—*Decided May 2, 1932—Opinion by Mr. Justice Butler.*

1. Shideler obtained judgment in the County Court against Lawrence Roe and Julia Roe and caused a garnishment summons to be served upon Paramount Life Company. That Company answered denying indebtedness to the defendant and alleged that they employed Roe and others to move a house for $250.00 and that Roe was indebted to the garnishee in the sum of $25.00 for damages done to the house in moving, and that laborers employed on the job were claiming $248.40 for their work. The plaintiff traversed the answer. The other laborers intervened claiming the aforesaid $248.40 for services in moving the house. The plaintiff answered denying the allegations in the petition in intervention. Judgment was for the plaintiff in the County Court and upon appeal and trial in the District Court, judgment was for the plaintiff, and the garnishee and intervenors bring the case here for review.

2. The Court rightfully denied garnishee's motion to strike the traverse on the ground that it had been filed more than ten days after the expiration of the time allowed for the filing of the garnishee's answer where the answer was not filed until 13 days after the expiration of the time allowed. The garnishee by its own delay having made it impossible for the plaintiff to file the traverse within the statutory time is in no position to complain.

3. Where the garnishee and intervenors claim that before the work of moving commenced there was either an assignment by Roe to the intervenors of the money to become due Roe or that there was a novation whereby the garnishee became directly liable to the intervenors for the services they were to render and the evidence was conflicting, the ruling of the trial court against such claim will not be disturbed.

4. Where it is claimed that at the time of service of the garnishment summons the work had not been completed and therefore that part of the debt had not been impounded by the garnishment, but there was also evidence to the effect that the work had been completed at such time and moreover where such objection was not called to the attention of the trial court and the trial court was not given an opportunity to pass on the question this assignment is without merit.—*Judgment affirmed.*

REPLEVIN—COUNTER CLAIM FOR DAMAGES NOT INVOLVING POSSESSION OR DAMAGES INCIDENT THERETO—*Mason v. General Machinery & Supply Co.*—No. 13057—*Decided May 16, 1932—Opinion by Mr. Justice Moore.*

1. In an action for replevin of machinery a defendant cannot counterclaim for damages in repairing the machinery.

2. Replevin is a summary action to recover possession and damages for unlawful detention of personal property. The efficacy thereof would be lessened if a counter-claim, not involving possession or damages incident thereto, could be heard and determined therein.—*Judgment affirmed.*

NOTICE

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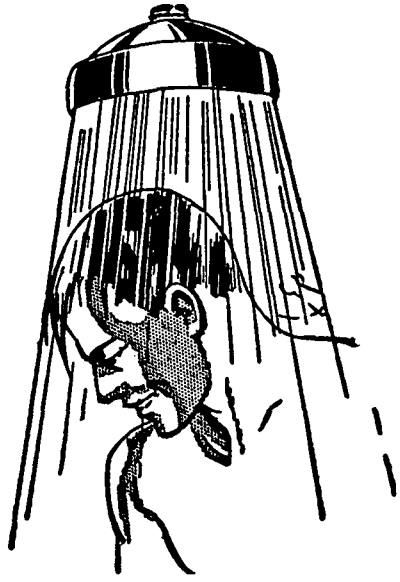

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