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Colorado Supreme Court Decisions

Dicta Editorial Board

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(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.)

NEGOTIABLE INSTRUMENTS—COGNOVIT NOTES—JUDGMENTS ON—SET ASIDE WHEN—NO. 12,326—*Jessie Bacon Parham vs. Johnson—Decided October 20, 1930.*

Facts.—Plaintiff obtained judgment on a cognovit note against the defendant. More than one year later, the defendant filed a motion to vacate and set aside the judgment, and several months after filing this motion, the defendant tendered an answer for filing in the original action, together with affidavits in support of her motion. Plaintiff then filed a motion to strike the defendant's motion to vacate, which motion of the plaintiff was also supported by affidavits. The parties then agreed to let the matter of setting aside the judgment be determined upon the affidavits which were on file. The affidavits disclosed that the defendant was notified of the judgment and that no effort was made by her to set it aside until she realized that there was a possibility of recovering on it. The court held for the plaintiff, and the defendant alleged error.

Held.—A judgment confessed under warrant of attorney will be set aside to permit a defense on the merits, where there is a prima facie good defense and the application to set aside is made in apt time. Here the motion to set aside was not made in apt time, so there was no necessity of going into the merits.

Judgment affirmed.

REPLEVIN—RIGHT TO BRING—NO. 12,646—*Startzell etc. vs. Bowers et al—Decided October 20, 1930.*

Facts.—This was a suit in replevin. The plaintiff and the defendant, Auto Industrial Corporation, both claim under chattel mortgages. In a previous suit, the plaintiff's note and mortgage had been adjudged paid and satisfied. Under this action, plaintiff had taken possession of the car, and had

wrongfully resold it. The defendant recovered judgment against the plaintiff for $500. The plaintiff alleged error upon the grounds, mainly, that the judgment: (1) did not provide for the return of the car to the defendant. (2) was in favor of both defendants when it should have been in favor of but one of them. (3) fixed an excessive value on the property. (4) and that evidence was improperly excluded.

Held.—(1) To permit the plaintiff to return the car, after more than four months depreciation had been taken from its value, would be to allow the plaintiff to take advantage of his own wrong.

(2) The mere fact that the judgment was entered in favor of both defendants does not prejudice the rights of the plaintiff.

(3) The finding as to the value was based upon conflicting testimony and will not be altered here.

(4) There was no prejudicial error in the record.

Judgment affirmed.

INSURANCE—EVIDENCE—WEIGHT OF—NO. 12,586—*Western Assurance Company vs. Lark et al—Decided October 20, 1930.*

Facts.—The plaintiffs, W. S. Lark and M. B. Lark, sued to recover on two insurance policies. W. E. McClung was, on the face of the policies, the insured. The evidence, however, showed that McClung was really only the trustee for the benefit of the plaintiffs and the Newton Lumber Company, to whom the plaintiffs were indebted. Plaintiffs were erecting a building for which the Lumber Company was supplying the lumber, and arrangements were made with the agent for the insurance company to assign to McClung the two policies in question so that, in the event of a loss, the Lumber Company was to receive whatever the plaintiffs owed it, and the balance was to go to the plaintiffs.

The lower court rendered judgment against the Assurance Company, and in favor of McClung. The Assurance Company are complaining of the judgment only insofar as it is in favor of the plaintiffs.

Held.—The evidence was sufficient to support the finding and the judgment.

Judgment affirmed.

COUNTIES—CONTRACTS OF—NO. 12,699—*Heberer vs. Commissioners of Chaffee County et al—Decided November 3, 1930.*

Facts.—Heberer, a taxpayer, sued the board of county commissioners of Chaffee county to enjoin them from performing a contract and to have the contract annulled. One Matlock, also a taxpayer, intervened.

The contract under dispute was one made by the county commissioners with the other defendants, whereby the other defendants were to construct a building suitable for a court house, and lease the same to the commissioners at a monthly rental for a period of 25 years. By the contract, the county was given an option to purchase the property after 10 years.

A demurrer to the complaint and petition of intervention was sustained, and the plaintiff and intervenor seek a reversal.

Held.—(1) The contention that the lease creates an indebtedness of about $210,000 in violation of the state constitution (which prohibits an indebtedness of more than 4% of the taxable property of the county) is unsound in that the obligation under the lease is payable only from the current revenues of the county. "If the monthly rentals, together with all other current expenses, are paid out of the current revenues, there is no indebtedness incurred for such expenses within the constitutional inhibition."

(2) The C. L. 8694 prohibits the creation of any liability unless an appropriation shall have been previously made concerning the expense. The expenditures in question are of a current nature, to be provided for by annual levy and appropriation. A contract, such as the one in question, is not invalid because there is no appropriation for the entire period; it is sufficient if an appropriation is made each year to cover the annual payment of that year.

(3) A contract may be good even though its term extends beyond the time which the present commissioners hold office.

Judgment affirmed.

CONTRACTS—MONEY HAD AND RECEIVED—NO. 12,278—*The Greater Service Homebuilders Investment Association et al vs. Albright—Decided November 3, 1930.*

Facts.—The plaintiff alleged that the defendants received $1,000 from her which they failed to pay on demand. The defendants contended that the money was received by them under the provisions of a written contract. The question, accordingly presented, was as to whether or not there was a written contract. From a judgment for the plaintiff, the defendant alleges error.

Held.—Even though there was a writing, the defendants had not complied with their part of the agreement, nor were the terms of the so called contract valid or enforceable.

Judgment affirmed.

RECEIVERSHIPS—VALID WHEN—NO. 12,683—*Denver Motor Hotel Company vs. National Mortgage and Discount Corporation—Decided November 3, 1930.*

Facts.—The Hotel Company seeks a reversal of an order of the district court appointing a receiver, pending a foreclosure. The evidence clearly showed that the property involved in the action is insufficient to pay the obligations, and that revenue from the operation of the property had not been appropriated toward the payment of the mortgage and deed of trust. The provisions of the deed of trust provided for the appointment of a receiver in the event of insolvency.

Held.—The provisions of the deed of trust having been violated, the judgment is affirmed.

Judgment affirmed.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF—NO. 12,638 —*Moya vs. The People—Decided October 27, 1930.*

Facts.—The defendant was convicted of first degree murder, and the death penalty was imposed. The following main allegations of error were raised: (1) Insufficiency of the evidence. (2) The admission of certain confessions into evidence. (3) Admission of certain exhibits. (4) The giving of certain instructions.

Held.—(1) The facts were undisputed, except as to the testimony of the defendant to the effect that the killing was in self-defense. The verdict was amply supported by the evidence.

(2) The defendant contended that the so called confessions should not have been admitted because it was not shown that they were made voluntarily. The defendant, however, testified that they were made voluntarily. This objection is, therefore, unsound; even though one of the confessions was unsigned.

(3) It was not error to admit pictures of wounds and other evidence which tended to arouse the passions of the jury, provided such evidence is relevant, competent and material.

(4) Objection was made to the instruction bearing on the credibility of witnesses in that it advised the jury to disregard the whole or any part of the testimony of one who had sworn falsely, "except insofar as the same shall have been corroborated by other credible testimony." The court said, "The phrase should be omitted as valueless under all circumstances and possibly prejudicial under some." In this case, however, no prejudice was shown.

Judgment affirmed.

CIVIL SERVICE COMMISSION—JURISDICTION OF—APPEAL FROM—NO. 12,518—*State Civil Service Commission et al vs. Hoag—Decided November 10, 1930.*

Facts.—The Civil Service Commission ousted the defendant, Hoag, from his position as a member of the Colorado Board of Corrections. The portion of the charge upon which the judgment of ouster was based was, "That he used his official position as a member of the Board of Correction to further and promote his own personal, private ends and purposes * * *." The evidence which the commission contended supported the findings concerned the purchasing of coal by the defendant. To the judgment of ouster by the Commission, one commissioner dissented. The district court reversed the order of ouster and reinstated Hoag. To reverse the district court, the Commission contended that (1) The district court

was without jurisdiction. (2) That the evidence was sufficient to sustain the order of removal.

Held.—(1) "If the evidence at any such hearing is sufficient to justify the Civil Service Commission in the exercise of its discretionary power of removal, the courts are powerless to interfere with such exercise of discretion. However, where a complaint has been made that no sufficient evidence was introduced to support the charges made, the court undoubtedly has the jurisdiction and power to review such proceedings."

(2) After reviewing the evidence the court, agreeing with the district court, held that there was no testimony supporting the charges against the defendant.

(3) A public official is presumed to act honestly, faithfully and efficiently and the burden of proving that he has failed to do so is upon the one who seeks to oust him. Here the charges made were not proved.

Judgment affirmed.

AGENTS—FUNDS OF PRINCIPAL—DUTY TO SEPARATE—RIGHT TO SECURE ADVERSE TITLE DENIED—NO. 12,449—*Gibson Company vs. Elze et al—Decided November 17, 1930.*

Facts.—The plaintiff was the beneficiary under a trust deed, and this action was instituted for foreclosure and to cancel a tax certificate held by Lillian T. West, one of the defendants. The grantors of the trust deed were Mrs. West's parents and brother, for whom Mrs. West managed the property. The court found that part of the money used in securing the tax certificate was Mrs. West's personally. Whereupon the court held for the plaintiff, granting the foreclosure but cancelling the tax certificate only if the plaintiff would pay to Mrs. West the money which she expended in securing the tax certificate. To this judgment and decree, the plaintiff alleged error. The questions presented were: (1) Was the money expended in securing the tax certificate that of Mrs. West or was it taken from the receipts of the farm, and (2) If this was Mrs. West's money, did she have a right to secure an adverse title.

Held.—(1) When an agent mingles his own funds with those of his principal, the duty of distinguishing and separat-

ing such mixed funds devolves upon the agent; and if the agent fails in this duty, the whole becomes the subject of a trust for the principal.

(2) Because of the fiduciary relationship which an agent bears to his principal, such agent can not secure a title adverse to that of his principal.

Here, the court was unable to determine how much money was advanced by Mrs. West from her own funds. Accordingly, she is not entitled to receive reimbursement for such funds.

Judgment reversed.

MUNICIPAL CORPORATIONS—MUNICIPAL LIABILITY—NOTICE —WHEN EXCUSED—No. 12265—*Denver vs. Taylor—Decided October 6, 1930.*

Facts.—Taylor was injured in the municipal auditorium. The charter provides that before the city and county shall be liable for damages to any person for injuries upon any of the streets, avenues, alleys, sidewalks, or other public places, the person so injured, shall, within sixty days, give notice in writing to the mayor. Although Taylor had not given notice to the mayor, within the time required by the charter, he brought suit, alleging negligence, and recovered in the district court. Plaintiff also alleged that he was physically and mentally incapable of giving notice within the time required by the charter.

Held.—The charter provision refers only to those public places which are controlled by the city in its governmental capacity, and not to those places which it controls in its ministerial or private capacity. The city auditorium "—is not included within the purview of the charter provision under consideration. Therefore, the liability of the city and county for negligence, is, under the circumstances of this case, to be determined irrespective of the service of notice of injury."

Judgment affirmed.

Mr. Justice Butler, concurring: (On different grounds)

The statutes requiring notice have been given a reason-

able construction by this court. The court will not impose upon an injured party the necessity of doing the impossible. When the injured person is physically or mentally incapable of giving notice, he need not do so until his incapacity has been removed.

Judgment affirmed.

NOTICE

Mr. Rees D. Rees, well known to most of his brother attorneys of Denver, is a patient in St. Luke's Hospital recovering from the result of an accident. We feel sure that he will appreciate calls from his friends of the legal profession.