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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.)

ELECTIONS—CONTESTS—DEMURRER—No. 12767—*Gunson v. Baldauf—Decided March 9, 1931.*

Facts.—The parties hereto were rival candidates for the office of county commissioner, and contest was filed. The contestee filed answer and counterclaim, and in the answer embodied what purports to be a general demurrer, and the Court below sustained the demurrer.

Held.—The action of contest was brought under Sections 7794 to 7804, C. L. 1921, which created an exclusive and summary procedure for the contest of an election of certain persons. The statement of contest enumerated sufficient facts to be good as against a general demurrer. Special demurrers are not authorized by the statute and cannot be interposed. Because special demurrers may not be interposed in contest of this character, and because the statement of contest states sufficient facts, the Court below erred in sustaining the general demurrer.

Judgment reversed.

ATTORNEYS AT LAW — UNPROFESSIONAL CONDUCT — REPRIMAND — No. 12469—*People v. Marshall—Decided March 16, 1931.*

Facts.—Respondent, a member of the Bar, an elderly man, found guilty of misappropriation of $11.00 Court costs, and proceeds of two small claims of clients.

Held.—Respondent reprimanded and directed to make restitution and his failure to do so, or commission of other like acts will result in automatic disbarrment.

APPEAL AND ERROR—BILL OF EXCEPTIONS—NO OFFICIAL REPORTER—NOTICE—No. 12758—*Ehrenkrook v. Winchester—Decided March 16, 1931.*

Facts.—Action for unlawful detainer brought by plaintiff in error in Justice Court, where plaintiff prevailed. On appeal to County Court, defendant prevailed. Testimony in Justice Court was taken by reporter, but testimony in County Court not reported. Plaintiff in error filed Bill of Exceptions containing transcript of testimony in Justice Court with affidavit of two persons that it was a substantially true and correct transcript, but no notice served upon defendant in error. County Judge refused to settle or allow Bill of Exceptions. Motion filed to dismiss (writ) and strike portions of Bill of Exceptions.

Held.—1. Transcript of evidence taken in Justice Court not properly a part of Bill of Exceptions because plaintiff in error did not comply with Section 420 of Code.

2. Motion to dismiss writ of error granted because in the absence of testimony, it is presumed there was no error.

Writ dismissed.

INJUNCTION — SET OFF — DISCHARGE IN BANKRUPTCY — No. 12093 — *Bacher v. Lord—Decided March 16, 1931.*

Facts.—Lord, plaintiff below, sought restraining order against collection of a judgment, and to offset against judgment certain notes defendant had given to a bank, and which plaintiff had purchased. It appeared that maker of note filed petition in bankruptcy and had been discharged from payment of notes. Judgment for plaintiff.

Held.—1. Discharge in bankruptcy releases bankrupt from all provable debts, except such as are excepted by the Bankruptcy Act.

2. Set off could not be allowed of debts discharged in bankruptcy.

Judgment reversed.

BAILMENT FOR HIRE—LIABILITY FOR RENTAL TO END OF TERM—FORFEITURE—No. 12360—*Electrical Products Corporation of Colorado v. Mosko —Decided March 16, 1931.*

Facts.—Plaintiff in error, plaintiff below, sued on contract for lease of electrical sign, for full rental under contract, which provided for monthly payments for 36 months, title to sign to remain at all times in lessor, lessor to service sign and in case of default, right to take possession of sign and hold it until paid, and when paid, lessee to again have sign for balance of term. Also in case of non-payment of rental installment lessor could declare rental to end of term due.

Held.—1. Transaction is a bailment for hire.

2. While the general rule is that when the bailor resumes possession of the hired chattel before the end of the bailment, he can only recover pro tanto for payment of the hire, yet the bailee may agree to terms that will compel him to continue payment.

3. In this case, the agreement made bailee liable for the rental for the entire term of the contract.

Judgment reversed, with directions.

AGENCY—ESTOPPEL—FORGED NOTE—PAYMENT—No. 12385—*The Colorado National Bank, of Denver v. Rehbein, et al.—Decided March 23, 1931.*

Facts.—The Colorado National Bank sued to foreclose a deed of trust, executed by Rehbein and given as security for the payment of her note for

$3,000.00, payable to the order of Louis A. Siener and to cancel a release of said deed by the public trustee, and to recover personal judgments against Rehbein, Giggal and Giggal for the principal of said note. Siener delivered said note for $3,000.00 to the Colorado National Bank with the deed of trust as collateral security for a loan of $3,000.00. Rehbein at no time knew that the Bank held her note and deed of trust. Siener's note was renewed from time to time. Mrs. Rehbein conveyed the real estate subject to the deed of trust, to Giggal and wife who thereafter, with the bank's knowledge, made all interest payments to Siener personally. Siener had forged a duplicate of the note and endorsed the payments on the forged note. The Colorado National Bank, without the consent of the maker or of the Giggals, permitted Siener to endorse on said note an extension of the time of payment thereof. Judgment for defendants below.

Held.—1. The payment to Siener constituted a defense against the Colorado National Bank.

2. The Bank permitted Siener to represent himself as the ostensible owner and holder of the Rehbein note and deed of trust and to collect interest thereon, and to endorse an extension thereon.

3. This established an agency by implication.

4. If Siener had disclosed this agency to the Giggals, they could have required the production and cancellation of the original note, but in order to avoid such disclosure, Siener forged a similar note and caused the Giggals to believe it to be genuine, and to make payment thereof. Payment to Siener because of his ostensible ownership coupled with his undisclosed agency to collect principal and interest of said note operates as a complete defense against bank's claim.

5. The bank was estopped to deny Siener's ownership.

Judgment affirmed.

REAL PROPERTY—COVENANT OF WARRANTY—COVENANT OF SEISIN—STATUTE OF LIMITATIONS—No. 12226—*Stone and Kochevar v. Rozich—Decided March 23, 1931.*

Facts.—Stone and Kochevar failed in the Court below in their action against Rozich to recover damages for alleged breaches of two covenants in a deed given to them by Rozich. Two causes of action were alleged: (1) for breach of covenant of a warranty; (2) for breach of covenant of seisin. The plaintiffs are here complaining of the judgment dismissing their action.

Held.—1. The plaintiffs were not entitled to recover on the covenant of warranty. Possession was delivered to and taken by them. That possession never was menaced within the meaning of the applicable statute. There never were any legal proceedings to obtain possession from the plaintiffs except the foreclosure proceeding which does not come within the terms of that statute.

2. The plaintiffs were not entitled to recover for breach of the covenant of seisin. Assuming that there was a breach of this covenant and that a cause

of action on the covenant once existed, this right of action was barred by the statute of limitations because by the great weight of authority this covenant, where a statute does not otherwise provide does not run with the land but is a purely personal covenant. It runs in the present as of the date of the deed and the breach, if any, occurs and the cause of action arises immediately upon the giving of the deed. The deed was given in 1921, and the action on the covenant of seisin was not commenced until 1926, which was more than three years thereafter, and the right of action was barred by the statute of limitations.

Judgment affirmed.

OIL AND GAS—WORKING AGREEMENT—ABANDONMENT—NO. 12439—*The Yarg Producing and Refining Company, et al. v. The Iles Investment Company—Decided March 30, 1931.*

Facts.—The Yarg Producing and Refining Corporation prosecutes this writ of error to review a decree of the lower court quieting title to real estate in The Iles Investment Company. The Iles Investment Company in 1923 deeded certain real estate to one Ahearn, reserving one-eighth (1/8) of oil and gas, and conveyed subject to a working agreement for development of the land, which was contained in a separate instrument, reference to which was made in the deed, which said separate instrument was recorded at the same time. As part payment Ahearn delivered Trust Deed on the same real estate and upon seven-eighths' (7/8) interest in oil and gas. Later, the trust deed was foreclosed, and trustee's deed executed and delivered to the Iles Investment Company, and possession taken by it. Before foreclosure Ahearn executed oil and gas lease to plaintiff in error. The Yarg Producing and Refining Corporation, which drilled a dry hole and abandoned the property in April, 1925, and made no further claim thereto until the institution of this suit, but claimed as assignee under the working agreement.

Held.—1. If there was any evidence that the Yarg Producing and Refining Corporation was ever assignee of the working agreement, it lost its rights by abandonment.

2. The operating agreement was not a conveyance of mineral rights, but was a contract for development.

3. The purpose of such an agreement in undeveloped territory is to determine the presence of oil and gas and is not drawn with the intent or purpose to give a perpetual right to explore for oil.

Judgment affirmed.

WORKMEN'S COMPENSATION—METHOD OF COMPUTATION OF WAGES—NO. 12760—*Williams Bros. Inc., et al. v. Grimm—Decided March 30, 1931.*

Facts.—Grimm was awarded compensation for an injury arising out of and in the course of his employment; during the twenty-six (26) week period preceding the injury, he worked for fifteen (15) weeks and earned $418.00, and was on a vacation for eleven (11) weeks thereof. The Commission

awarded him compensation under Section 4421 C. L. 1921 (B), by dividing $418.00 by twenty-six (26) weeks. The District Court ordered the Commission to enter an award under Section 4421 (c) which provides among other things, that where the method given under subdivision (b), by reason of illness or other reason the average weekly wage would not be a fair measure that the Commission can use the daily earnings or other reasonable method to compute the average weekly wage. His average weekly wage, under (b) was $16.08, and under (c) was $27.08, and the District Court ordered the commission to pay on the basis of average weekly wage of $27.67.

Held.—The District Court was right in ordering the Commission to make award under Section 4421 (c), but was wrong in directing a specific award of a certain sum per week. The amount is for the Commission to decide.

Judgment modified.

EXECUTORS AND ADMINISTRATORS—WIDOW'S ALLOWANCE—No. 12786—*Ahlf vs. King, Admin.—Decided April 6, 1931.*

Facts.—Plaintiff in error, and plaintiff below, who was widow of deceased, moved for an appraisal of the specific items of property allowable to her as widow, and filed her application for widow's allowance. King, as administrator de bonis non, resisted claim and claim was disallowed. Husband of plaintiff died intestate and plaintiff was his sole and only surviving heir at law. She was appointed administratrix, made no claim for widow's allowance, closed the estate, and received approximately $20,000.00 as sole heir. Later, brother of deceased, on discovery of additional assets had estate reopened and administrator de bonis non appointed, filed his claim against the estate, and if widow's allowance had been allowed there would have been nothing to apply on his claim.

Held.—1. A claim for widow's allowance is part of the expense of administration.

2. In the original proceedings, the widow made no claim for widow's allowance.

3. The widow, having received about $20,000.00 from her deceased husband's estate, suffered no financial loss and the estate having a net value of more than $2,000.00 so that it is immaterial whether she received the sum of $2,000.00 as a widow's allowance or its equivalent as an heir at law.

Judgment affirmed.

NEGLIGENCE—CHILDREN PLAYING ON UNSAFE DITCH BANK—DIRECTED VERDICT—No. 12488—*Smith, et al. vs. The Windsor Reservoir and Canal Company—Decided April 6, 1931.*

Facts.—This is an action by parents for damages because of the death of their minor son by drowning in an outlet ditch owned and used by the defendant-in-error in connection with the reservoir. The Court directed a verdict for the defendant in error and entered judgment on the verdict.

The child, seven years old, was precipitated into the water and drowned by the giving way of a false bank, composed of drifted sand blown upon ice formed in the ditch. This condition was of annual occurrence and there was evidence that the defendant in error knew of the condition, and knew that children frequently played upon the false bank.

Held.—There was proof that defendant knew of the danger and the fact that children actually played on the false bank, and yet permitted them to do so. Evidence offered was sufficient to go to the jury and it was error not to have submitted the case to the jury.

Judgment reversed.

APPEAL AND ERROR—IMPERFECT ABSTRACT OF RECORD—VIOLATION OF RULE 36 OF THE SUPREME COURT—No. 12315—*Kestle et al. vs. Preuit —Decided April 6, 1931.*

Facts.—Plaintiff below, defendant in error here, owned farm lands in Arapahoe County and entered into contract with defendant below for exchange of this farm for farm lands in Park County. One of the terms of the contract provided that the agreement was made subject to the right of plaintiff to inspect and approve the Park County lands, and the plaintiff claimed that he approved the Park County lands, but the defendants refused to convey, and plaintiff's action was for damages for failure to convey. There was a verdict of the jury for the plaintiff for $4,000.00, and judgment was entered thereon.

Held.—The abstract of record failed to summarize the evidence and the instructions of the Court were not contained therein, and it was impossible to determine from the abstract of record the questions which are argued in the brief of the plaintiffs in error. We must presume from the condition of the record before us that no prejudicial error was committed by the trial court. It is incumbent upon a plaintiff in error to show error. It sufficiently appears from the record that the testimony was more or less in conflict and we must presume that in the absence of anything appearing in the record to the contrary, that the Court properly advised the jury on the law applicable to the case.

Judgment affirmed.

BILLS AND NOTES—ESCROW—JUDGMENT BY CONFESSION—REINSTATING ORIGINAL JUDGMENT—No. 12807—*Axelson v. The Dailey Co-Operative Company, et al.—Decided April 6, 1931.*

Facts.—The Dailey Co-Operative Company obtained judgment below upon two promissory notes. Judgment was first entered by confession under power contained in notes and was assigned to Kelsey who levied execution upon lands of Axelson. Thereafter judgment was set aside upon motion and showing of meritorious defense, upon terms that the defendant give bond for value of land levied upon, to abide final judgment. Bond given, issues made up and trial had and upon failure to sustain defense, original judgment was reinstated.

Held.—1. On conflicting evidence judgment will not be disturbed.

2. Judgment was not entered on confession before notes were due as they contained a clause that upon failure to pay interest when due, entire amount could be declared due.

3. The court did not err in reinstating original judgment. Defendant was given full opportunity to present his defense, but having failed to establish same, and plaintiff's proof being complete, the court had no alternative but to reenter judgment. Judgment was complete as court had jurisdiction over the person and the subject and it was within discretion of court to impose terms on vacating original judgment.

Judgment affirmed.

PARTITION—TENANTS IN COMMON—LEASE AND MORTGAGE UPON PREMISES—ALIENATION—No. 12768—*McIntire vs. Midwest Theatres Company—Decided April 13, 1931.*

Facts.—Plaintiff in error was defendant below. The company brought suit against him to partition property which was owned by the parties as tenants in common. In May, 1922, McIntire and one Gill owned theatre property in Sterling. They executed a 10 years lease thereon. In 1924, the Midwest Theatres Company bought the interest of Gill and by consent of McIntire became the owner of the lease and in consideration of the reduction of the rent, the rent was secured by a mortgage upon the premises and it was further provided that a failure to pay promptly, should abrogate the reduction and restore the former rental. The court below granted partition, but upon condition that McIntire was to be protected in his rent for the premises only in the event he became the purchaser at the partition sale.

Held.—(1) The general rule is that a tenant in common is entitled to partition.

(2) But the right to partition may be alienated.

(3) In this case, the company contracted it away. It agreed to pay McIntire the rent until May 1, 1932 and secured these payments by a mortgage upon the leased premises and it cannot by partition, release that mortgage and evade rental payments.

Judgment reversed.

ELECTIONS—ABSENT VOTER—ACT CONSTITUTIONAL—No. 12772—*Bullington vs. Grabow—Decided April 13, 1931.*

Facts.—The parties to this election contest were rival candidates for the office of county superintendent. Two questions were presented (1) The constitutionality of chapter 94, session laws of 1921, an act relating to absent voters and (2) the sufficiency of certain votes cast thereunder.

Held.—The absent voters act is constitutional. Under the constitution of Colorado, a voter does not have to be personally present when "he offers to vote". The purpose of the act is laudable. It permits and encourages the exercise of the elective franchise by registered voters absent from their counties or too ill to attend the polls.

(2) Section 3 of the act is mandatory in requiring that when absent voter casts ballot, it must be accompanied by voter's affidavit identifying himself by duplicating his signature on the duplicate application and stating that such voter received the ballot and exhibited to, and marked the same in the presence of, election board or official authorized to administer oaths and that the voter has not voted at such election or primary, otherwise than by such ballot.

Judgment affirmed.

CONSTITUTIONAL LAW—OPINION OF SUPREME COURT REQUESTED BY HOUSE OF REPRESENTATIVES—WHEN REFUSED—No. 12832—*Decided April 18, 1931.*

Facts.—This court is in receipt of House Resolution requesting an opinion on proposed income tax law which had passed the house on 3rd. reading but which had not reached the Senate or the Governor. Three questions were asked. (1) Has the legislature authority to adopt a flat or graduated income tax. (2) Has it authority to use the proceeds thereof for certain specified purposes. (3) Has it authority to provide certain exemptions therefrom.

Held.—Sec. 3, Article VI of our constitution provides, "The Supreme Court shall give its opinion upon important questions upon solemn occasions when required by the Governor, the Senate, or the House of Representatives" (1) Sec. 3 authorizes an inquiry by the House only when a bill involving a constitutional or publici juris question is before the body. (2) It authorizes inquiry by the Governor only when such bill has been passed by both house and senate and is before him for signature. (3) The bill is no longer before the House and will never again be if its action be rejected or approved in toto by the Senate. If so, no such "solemn occasion" will confront that body. If otherwise, the Senate may not wish our opinion. If the Senate rejects the bill, no question in relation thereto can confront the Governor. If it passes the bill, he may not wish our opinion. (4) Since the questions asked do not fall within said sec. 3 the Court respectfully requests the House to withdraw them.

Per Curiam.

CRIMINAL LAW—UNLAWFULLY TRANSPORTING FISH—INSUFFICIENT INFORMATION—HOW ATTACKED—No. 12795—*Iwerks vs. The People—Decided April 20, 1931.*

Facts.—Defendant was found guilty of unlawfully transporting fish and sentenced to 30 days in county jail. The information charged that while lawfully in possession of the fish, that she did unlawfully transport the fish within the State of Colorado without having obtained a permit from the state Game and Fish Commissioner.

Held.—(1) Defendant's act as alleged in the information did not constitute a crime. Sec. 1507 C.L. 1921, merely provides one of the means of obtaining a transportation permit for fish but only when and if the law re-

quires such permit and when transportation is not otherwise provided for by some other section of the act. It does not pretend to create a statutory crime of any degree. (2) Defendants objections in the form of motion in arrest of judgment did not come too late. While it would have been better to make all objections to the information before the plea of not guilty, yet where the information is destitute of any criminal charge, objection can be taken at any stage of the proceedings.

Judgment reversed.

ATTORNEYS—DISBARMENT—No. 12765—*People vs. Cowen—Decided April 20, 1931.*

Facts.—Cowen, an attorney at law, was convicted of unlawfully owning a still for the manufacture of intoxicating liquor and sentenced to the penitentiary. Thereafter the Attorney General filed a petition to procure his disbarment on the ground that he had been convicted of a felony. He failed to answer and default was entered but a referee was appointed nevertheless to take proof and upon proof being taken, referee found him guilty.

Held.—Respondents conviction of this felony conclusively shows his disregard for law, inconsistent with his oath of office and indicates beyond question that he lacks the requisite moral character to engage in an honorable calling such as the legal profession.

Respondent disbarred.

JUDGMENTS—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—No. 12800—*Sweeney vs. Cregan and the District Court of Pueblo County—Decided April 20, 1931.*

Facts.—Cregan obtained judgment against Sweeney and upon execution being returned unsatisfied, filed his verified petition for supplemental proceedings in aid of execution which resulted in an order commanding Sweeney to appear and answer concerning his property. Defendant moved to set aside and vacate order because no notice of application was given him, which was denied. Defendant questioned the sufficiency of the petition and refused to be sworn because he claimed that his answers might incriminate him.

Held.—(1) The only prerequisite to the granting of an order for examination is the execution returned unsatisfied. No notice is required. (2) The petition contained all the allegations necessary. (3) When a witness is called to testify and is sworn and interrogated, he may decline to answer because to do so may incriminate him or tend to do so, but this privilege must be claimed by the witness himself and subject to the determination of the judge whether or not the answer will have that effect; but before this can be determined, the question must first be asked and a witness cannot claim this privilege before any question is asked, much less refuse to be sworn. The defendant was clearly guilty of contempt in refusing to be sworn.

Judgment affirmed.

WORKMEN'S COMPENSATION—PARTIAL LOSS OF EYE—METHOD OF COMPUTING LOSS—NO. 12769—*The Colorado Fuel and Iron Co. vs. The Industrial Commission and Crawford—Decided April 20, 1931.*

Facts.—Court below affirmed an award of Commission allowing compensation to injured employee. In addition to temporary disability, Commission found that the permanent disability consisted of 40% loss of vision in left eye and that employee had previously lost all vision in right eye. Commission ordered that payment be made at rate of one half weekly wages for temporary disability and one half weekly wages for 124.8 weeks for permanent disability plus medical expenses.

Held.—This award was made under sec. 4450 C.L. 1921 but it should have been made under sec. 4447 as amended by laws of 1929, chap. 186, page 655. The legislature having made provision for compensation for disability arising from partial permanent impairment of vision based upon sec. 4447, as amended, and not having authorized an award in such cases to be based upon sec. 4450, the Industrial Commission had no power to make the award.

Judgment reversed with directions that award be based upon one half of weekly wages for 40 per cent of 104 weeks.

RECEIVERSHIP—EXCESSIVE FEES—CONTROL OVER LOWER COURT—NO. 12590—*Sparling Coal Company v. Colorado Pulp & Paper Company, et al.—Decided April 20, 1931.*

Facts.—This was petition for rehearing and modification of the opinion, the former opinion having been handed down January 13, 1931. Similar petitions were also filed in Myers v. Beck; Myers v. Pulp Company, and Rossi v. Pulp Company.

Held.—1. In addition to the disallowance of the sum of $2,000.00 receiver's fees as directed in the former judgment the additional sum of $12,500.00 allowed the receiver by the lower court is disallowed as excessive and unwarranted; and the receiver is ordered to restore all fees allowed him in excess of the sum of $5500.00.

2. Fees allowed attorneys Stidger and Walker affirmed.

3. Fees allowed attorneys Ginsburg and Gobble disallowed and remanded to lower court for further hearing.

4. Order of trial judge transferring cause to another judge while this cause was pending in the Supreme Court was wholly without jurisdiction.

5. Cause remanded with direction that all further proceedings in the court below shall be conducted before the present presiding judge of the second judicial district.

Opinion modified and rehearing denied.

Mr. Justice Hilliard filed dissenting opinion.

JUDGMENT—FRAUDULENT TRANSFER OF PROPERTY—*Roberts vs. Dietz*—No. 12696—*Decided April 27, 1931.*

Facts.—Dietz recovered judgment against Roberts for damages sustained in automobile collision. He then sued to set aside as fraudulent a trust deed given by Esther Roberts to secure the payment of three promissory notes. The Court below held that the conveyance was given to hinder, delay, and defraud Dietz, which judgment was reversed and case remanded for a new trial. On second hearing judgment below for plaintiff.

Held.—1. The trial court is the judge, not only of the credibility of witnesses and of the weight of the evidence, but of the inferences properly deducible from the facts and circumstances as proved.

2. On review the record is viewed in the light most favorable to the party successful in the trial court, and every inference fairly deducible from the evidence is drawn in favor of the judgment.

3. In view of the facts in this case, and the close relationship and intimate association of the parties, the finding of the trial court that the transfer of her property was fraudulent and transferred for the purpose of avoiding payment of the judgment, was supported by the evidence, and the inferences reasonably to be drawn therefrom.

Judgment affirmed.

AUTOMOBILE—INSURANCE—THEFT—*Union Insurance Society of Canton, Ltd. vs. Robertson*—No. 12585—*Decided April 27, 1931.*

Facts.—Robertson, plaintiff below, obtained judgment on policy of insurance for theft of his automobile. Plaintiff gave his son permission to use the car, but no express authority to his son to let anyone else have the car. The son and Elmer Carlson, and a young lady, drove to the apartment of William Cosgriff where the son and Carlson became intoxicated, and started to take the young lady home in the automobile, but went to another apartment, and on the way, collided with another automobile. After arriving at the other apartment, the son, on account of his condition was unable to continue any further, and Carlson got the automobile key from Robertson's pocket and took the young lady home, then returned the car to the Cosgriff apartment and left the car there. The plaintiff's automobile was found to be damaged and the key was on the floor of the automobile.

Held.—Under this state of facts, there was no larceny within the meaning of the statute, and there was no theft of the automobile within the terms of the policy; the loss therefor was not covered by the policy.

Judgment reversed with directions.