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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.)

PARTITION—JUDGMENT OF THE PLEADINGS—QUIET TITLE DECREE IMPROPER—NO. 12351—*McLaughlin vs. Niles Company—Decided December 8, 1930.*

Facts.—Niles Company sued McLaughlin to partition certain improved lots. McLaughlin filed answer denying each and every allegation in the complaint and pleading another suit pending between the same parties and with reference to the same cause of action. Court below rendered judgment on the pleadings, quieting title but not decreeing partition.

Held.—Such denial is not a denial that defendant denies ownership in the property but only that defendant denies the particular ownership alleged in the complaint and it is improper to render judgment on the pleadings in such case.

While the Colorado statute gives to the court, in partition proceedings, power to determine questions of conflicting title, rights and interests of the parties, such determination is only incidental to partition, and is not intended to perform the functions of the Code action to quiet title.

Defendant should have been permitted to file an amended answer upon his application therefor.

Judgment reversed with directions.

MECHANIC'S LIENS—CESSATION OF WORK—TRIVIAL WORK—NO. 12718—*The Boise-Payette Lumber Co. vs. Longwedel et al—Decided December 8, 1930.*

Facts.—Plaintiff sought the enforcement of mechanic's liens as against a deed of trust held by one of the defendants. Plaintiff furnished the materials December 6, 1927, and was assignee of one Collins, a plumber, who had practically completed his work prior to March 2, 1928, save to connect water front in range on September 22, 1928. Both liens were filed

November 2, 1928. The building was not actually completed until November 1, 1928, but the owners had moved into it some seven months before that date. All work ceased from April 15th to July 5th of that year.

Held.—The cessation from labor came within the provisions of Sec. 6450 C. L. 1921 and the last work of the plumber in connecting water front was "trivial". The cessation of work on April 15th must be deemed equivalent to completion. The provisions of such statute constitute a limitation on the time for filing liens. The liens were not filed in time.

Judgment affirmed.

PRINCIPAL AND SURETY—GENERAL AGENT—RELEASE OF SURETY—NO. 12153—*Federal Surety Company vs. White —Decided December 15, 1930.*

Facts.—Defendant in error, plaintiff below, sued Surety company on sub-contractor's bond for damages and recovered. Defenses were that one Payne was a limited agent and not a general agent and had no authority to waive certain conditions of the bond and that surety company was released on the bond because of certain advances made by plaintiff to the sub-contractors and also because of certain acts of commission and omission of the plaintiff and sub-contractors and that the penalty of the bond being $20,000 that no judgment in excess thereof could be entered.

Held.—A general agent is one who is authorized to do all acts connected with a particular trade, business or employment and Payne was such general agent; the alleged acts of commission and omission were not sufficient to invalidate the bond; the surety company had notice of the alleged default and had the opportunity under the bond to take over the completion of the project but it declined this privilege and expressly disclaimed responsibility with reference thereto; while the judgment rendered against surety company was in excess of the penalty in the bond, such excess only consisted of interest and it was properly allowable.

Judgment affirmed.

ATTORNEYS—DISBARMENT—PRACTICING WITHOUT A LICENSE—NO. 12718—*People etc. vs. Castleman—Decided December 15, 1930.*

Facts.—Castleman appeared as counsel in a case pending in the District Court and participated in the trial without any order of court permitting such appearance. He also used a professional card of himself and partner advertising themselves as lawyers and giving their Denver office and phone number. His name does not appear on the roll of attorneys in the office of the clerk of the Supreme Court of Colorado.

Held.—Respondent is guilty of practicing law in this state without a license and without any authority and contrary to the statutes in such case made and provided, and ordered that he be confined in the County jail for twenty days unless he shall sooner pay to the clerk of this Court the sum of $100.

ELECTIONS—MANDAMUS—CANVASS—CERTIFICATE OF ELECTION JUDGES—NO. 12751—*People etc. vs. White, et al.—Decided December 22, 1930.*

Facts.—Vernon Pfeiffer sued out an alternative writ of mandamus wherein it was charged that the canvassing board of Teller County failed to properly certify the vote in a certain precinct; that the certified count of the judges delivered to the canvassing board showed that relator, Pfeiffer, had received 233 votes and his opponent for State Senator had received 188 votes and that the canvassing board unlawfully rejected the total as certified by such board and based their computation solely upon the tally marks which showed 221 votes for opponent and 200 for Pfeiffer.

Held.—The canvassing board had no power to reject the totals shown in words and figures as certified by the judges of election and compute the total number of votes cast solely upon the tally marks appearing opposite the names of each. It was not the purpose of the general assembly to allow mere tally marks, which are not certified, which contain nothing more than strokes of pen or pencil with respect to the number of

votes cast for any candidate and which can be readily changed, to be taken as evidence sufficient to contradict the certificate.

Judgment reversed with directions.

JUDGMENTS — DEFAULT — SURPRISE — SETTING ASIDE — No. 12733—*Calkins vs. Smalley—Decided December 22, 1930.*

Facts.—Lower court denied motion of defendant to set aside judgment. Defendant claimed that case stood at issue for 17 months, when plaintiff's attorney attempted to serve one W. M. Spaulding with trial notice which attorney refused to accept, advising that he intended to withdraw. No other notice was served and defendant had no notice or knowledge that case was set for trial or that judgment had been entered against him until after judgment. Defendant had employed Spaulding as his regular attorney in this case and in other matters and that Spaulding never informed him that the case had been set for trial and that he was completely taken by surprise.

Held.—The Court abused its discretion in not granting the motion to vacate the judgment.

Judgment reversed.

CHATTEL MORTGAGES—JUNIOR MORTGAGE—BANKRUPTCY—No. 12290—*Johnson vs. The National Sugar Manufacturing Co. et al.—Decided, December 29, 1930.*

Facts.—Johnson brought an action to recover money judgment from The National Sugar Manufacturing Company on the theory that one, Rife, mortgaged sugar beet crop to Johnson subject to a prior mortgage on the same crop to National Sugar Manufacturing Company. In an action against the mortgagor, the Sugar Company was garnished and answered that it held the proceeds subject to Johnson's mortgage, and Johnson demanded payment of his mortgage from the Sugar Company. Thereafter Rife went into Bankruptcy and Johnson filed his note and chattel mortgage in the Bankruptcy Court and thereafter withdrew the claim. Defendant pleaded proceedings in Bankruptcy Court as res judicata, and that the lien of the chattel mortgage had expired because not extended and that the proceeds of the crop were

lawfully in the custody of the Bankruptcy Court. Judgment for defendant.

Held.—(1) Junior mortgagee of the property is entitled to any part of the proceeds remaining after satisfying prior encumbrances.

(2) The complaint was for money had and received, and was not an action in conversion.

(3) When one who has in his possession funds which in equity and good conscience belong to another, the law creates a promise to pay said funds to their owner, and in case of refusal to do so, an action in assumpsit for money had and received is a proper action to enforce payment.

(4) After the Sugar Company had paid itself the amount due on its prior chattel mortgage, it became as to the surplus a holder thereof for payment to those entitled thereto, and its position as to such surplus being analogous to that of a trustee.

(5) The withdrawal of the plaintiff's claim from the Bankruptcy Court, after he had appeared therein, did not preclude him from maintaining this action.

(6) The lien of the plaintiff's chattel mortgage was in effect, on the date of plaintiff's demand and defendant's refusal to pay, and it was at this time that plaintiff's cause of action accrued.

Judgment reversed.

CRIMINAL LAW—MURDER—EVIDENCE OF OTHER CRIMES—No. 12684—*Walker, Ray, and Halliday vs. The People—Decided January 5, 1931.*

Facts.—Walker, Ray and Halliday were found guilty of murder in the first degree, and the penalty was fixed at death. The assignments of error presented: (1) The admission of evidence of other crimes; (2) Court's refusal to give instructions tendered by defendants.

Held.—(1) Evidence of bank robbery preceding the murder, to shooting immediately after, and to larceny of an automobile occurring subsequent to the murder was properly admissible, especially in view of the fact that the defendants had made a confession embracing these matters, which was admitted in evidence without objection.

(2) Court's refusal to give instruction stating the procedure to be followed by peace officers in apprehending fugitive criminals from other states was not error.

Judgment affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS—COMMON LAW ASSIGNMENT—No. 12676—*Damaskus, et al. vs. The McCarty-Johnson Heating and Engineering Co.—Decided January 12, 1931.*

Facts.—The Betsy Ross Cafe and Candy Company made a common law assignment, admittedly insufficient under the statute, for the benefit of its creditors, to one Mark Harrison, who thereupon sold the property involved, to Damaskus and others. Subsequently thereto, the McCarty-Johnson Heating & Enginering Company secured a judgment against the Betsy Ross Cafe and Candy Company, and a garnishee summons was served upon Damaskus and others, who answered that they had no property belonging to the Betsy Ross Cafe and Candy Company. A traverse was filed, and from a judgment of dismissal there was an appeal to the County Court, where judgment was entered in favor of the plaintiff and against Damaskus and others. The Court held that the assignment to Mark Harrison was void under the statute, and that he took no title to the property involved.

Held.—The common law right to make an assignment for the benefit of creditors is not abrogated by the statutory proceeding relative to such assignment.

Judgment reversed.

CRIMINAL LAW—RECEIVING STOLEN GOODS—JOINT CHARGE—No. 12528—*Pauline Garcia vs. The People of the State of Colorado—Decided January 12, 1931.*

Facts.—Two persons were jointly charged and jointly tried upon information charging them with feloniously receiving stolen goods. Both were convicted. The evidence showed that only one of them directly received the goods.

Held.—1. One of the defendants' motion for separate trial was insufficient, because it failed to set forth what the

evidence was that that defendant claimed would be immaterial and inadmissible against one of the defendants, although material and admissible against the other.

2. The defendant against whom the evidence is immaterial and inadmissible is the only one who can make the motion for a separate trial.

3. To sustain a joint charge of feloniously receiving stolen goods, there must be a joint receipt at one and the same time; and a receipt by one of the parties at one time and place, and a subsequent receipt by the other at another time and place will not support the joint charge; but will only support and justify the conviction of the one who first received them.

Judgment reversed.