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Colorado Supreme Court Decisions

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COLORADO 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.)

WILLS—LIFE ESTATES—*Walton v. Wormington, et al.*—No. 12857.

Facts.—Henry Wormington by will left all of his property to his children, except one piece, and as to this piece of property, he left the income to his children. Provision was made that if any of the children died, leaving issue, the issue were to take the interest of the deceased parent, but that if such child died without issue, the interest was to go to the remaining children.

The question to be decided here is whether, under the will, one of the testator's children took a fee simple, or merely a life estate to the income. If the former, the widow of the deceased child is entitled to one-half of one-fifth of the estate, and each of his children, the legatees, are entitled to one-sixth of one-fifth of the estate. If the latter view was taken, each child was entitled to one-third of one-fifth.

Held.—"The law does not sanction the creation of a life interest in the income of an estate devised in fee to the same persons, because a devise of real estate in fee includes as a necessary incident thereof the absolute right to the income therefrom perpetually. The attempted creation of a life estate in the income being inconsistent with the devise in fee and, in affect, a restraint upon alienation, is void."—*Affirmed.*

CONTRACTS — SALES — LIQUIDATED DAMAGES — DURESS OF PROPERTY — *Moise Brothers Company v. Jamison*—No. 12487.

Facts.—Complaint states two causes of action:

1. On a draft.
2. On an agreement for the dismissal of a suit.

The draft, which was dishonored upon presentation, having been given for the dismissal of the suit, only one of these causes need be considered.

Defendant bought 610 steers from plaintiff in 1922. Under the contract certain defective and undesirable animals were to be excluded upon the instructions of the defendant. Defendant's agents found upon examination that few of the cattle complied with the agreement. Arrangements were made for plaintiff to take 174 head, for which was paid a total of $4754. Under the contract a penalty of $2.80 per head, or $1240.80, for the cattle bought but not delivered, is the amount plaintiff seeks to recover.

After defendant had put 174 head in transportation, plaintiff threatened him with a replevin suit, and to prevent this suit, defendant gave the draft in question under protest. The lower court held for the defendant and plaintiff alleges error.

Held.—Plaintiff was short in supplying cattle under the contract. Because of this, plaintiff would not be entitled to recover the penalty provided for. The draft in question, having been given under duress of property, was of no value.—*Affirmed.*

CRIMINAL LAW—CHANGE OF VENUE—*Hopkins v. The People*—No. 12863.

Facts.—Hopkins was convicted of embezzlement, and alleges as error, among other things:

1. Denial of motion for change of venue.
2. Denial of motion for mis-trial.
3. Admission of improper evidence.
4. Remarks and comments of the trial judge in the presence of the jury.

Held.—1. Although plaintiff's application for a change of venue was supported by affidavits, neither party challenged any of the jurors for cause. "This remarkable circumstance, in itself, would clearly indicate that defendant's fears of prejudice were unfounded."

2. Counsel's motion for a mis-trial was based upon the fact that one of the jurors, after all defendant's peremptory challenges had been exhausted, was accepted by counsel. Subsequently counsel learned of previous statements made by the juror concerning the defendant's guilt. The juror when being examined, however, stated that he could give and would give a fair and impartial trial. The showing made on the motion was insufficient.

3. The evidence complained of was that of the Certified Public Accountant. Objection was made that testimony of an accountant cannot be introduced without the consent of his client. Though the statute so provides, it was not shown that the accountant was ever in the employ of the defendant.

4. The remarks of the court which were objected to were in nowise prejudicial to the defendant's interests, these remarks being made by a court only to the objections of counsel, and an examination of the record does not show them to be prejudicial.—*Affirmed.*

MUNICIPAL CORPORATIONS—CONTRACTS OF—CONSTRUCTION OF—PROFESSIONS—ARCHITECTURE—PRACTICE BY CORPORATIONS—*Johnson-Olmstead Realty Company v. City and County of Denver, et al.*—No. 12322.

Facts.—Plaintiff, as a tax payer, seeks to attack the contract of the city with the Allied Architects, Inc. The case was submitted to the court on an agreed statement of facts. The contract to the Allied Architects was let without competitive bidding, and the Allied Architect is a corporation. The question was whether this contract was valid. The lower court held the contract to be valid, and the realty company alleged error.

Held.—1. Although to the charter provision demanding competitive bids on all contracts entered into by the city, an exception is recognized in contracts involving professional services, yet the contract in question was not exclusively one for professional services, and competitive bidding should have been entertained in accordance with the charter.

2. A corporation under the existing Colorado statutes is not qualified to practice the profession of architecture. "We do not wish to be thought to say that the legislature may not permit the granting of licenses to corporations, but to say that we are of the opinion it has not done so."

The dissenting opinion by Justice Butler:

1. The legislature did not contemplate that competitive bidding after advertisement should be necessary in the employment by the city of any person who is to render services calling for special skill, knowledge, or experience.

2. The statute provides that "any corporation * * * engaged in the planning or supervision of the erection * * * of buildings for others * * * shall be regarded as an architect within the provisions of this act, and shall be held to comply with the same." Another section of the statute forbids any corporation to practice architecture without a licence. The Board of Examiners pursuant to statutory authority, had empowered corporations to practice as architects when each and every member thereof is a licenced architect. This corporation having fully complied with all provisions of the statute, should be permitted to practice architecture.—*Reversed.*

EXECUTIONS—PROCEEDINGS IN AID OF—*Walker v. Staley*—No. 12856.

Facts.—Judgment against Walker for $769.51. Application was made by Walker to declare the judgment fully satisfied. To this application the court made an order that judgment be declared satisfied to the extent of $200., the original obligation having been secured by a Chattel Mortgage, and the $200. having been realized from the sale of the property. Under supplementary proceedings, an order was given, appointing a receiver of property, found by the court to belong to Walker.

Held.—1. The order declaring the judgment satisfied to the extent of $200. was proper and is affirmed.

2. (a) Of the property found there were accounts to be collected by Walker, and upon which he had not yet earned his commission. "The contingent fees were unearned * * * contingent fees not yet earned are not subject to a receivership and cannot be reached in proceedings supplementary to execution.

(b) The sale of the property found by the court to belong to Walker was real estate in his wife's name. "The court had no power to order the receiver to take possession of the property and sell it without first granting to Mrs. Walker her day in court." "Where title to real property claimed to belong to a judgment debtor stands in the name of another, a creditor's suit is the proper proceeding to subject the property to the satisfaction of a judgment."—*Reversed in part and affirmed in part.*

COUNTIES—CONTRACTS OF—*Langton v. County Commissioners*—No. 12503.

Facts.—The county commissioners purchased a right of way over the plaintiff's land, and agreed in addition to paying the purchase price of $300.—

1. To replace all fences.
2. To replace flumes.
3. To take care of and maintain a flume and ditch.

Plaintiff sues defendant for failure to comply with these three provisions of the agreement. Among other things, plaintiff alleges loss of crops, cost of reseeding, loss to a wooden flume because of non-use.

The court below gave judgment for the plaintiff upon the verdict of $393.32, plaintiff alleged error.

Held.—The county is liable not only for the disturbance to the plaintiff's land, and for its failure to replace the ditches, etc., but also for any loss of crops, which were occasioned by defendant's failure to abide by its contract. —*Reversed.*

AUTOMOBILES—DAMAGES—COLLISION—RELEASE— No. 12404 —*Yelloway, Inc. vs. Garretson—Decided August 10, 1931.*

Facts.—Garretson recovered judgment in Court below for $1,000.00 for personal injuries incurred while riding as a passenger in bus of defendant when bus collided with an automobile.

Held.—1. Where assignments of error fail to set out number of court's instructions complained of or otherwise identify them and where abstract contains none of the instructions given or requested, such assignments will not be considered.

2. Where assignments of error fail to refer to the folio numbers of the record where rulings and exceptions appear, such assignments based on objections to the evidence will not be considered.

3. Court will not consider error in refusing to grant a new trial where no particular error is specified.

4. Refusal to grant non-suit cannot be urged where defendant proceeds with trial after non-suit is denied.

5. The relation of passenger and carrier existed under the facts of this case.

6. The driver of the bus was negligent.

7. The question of the validity of the release signed by plaintiff was properly submitted to the jury.—*Judgment affirmed.*

PRINCIPAL AND AGENT—PRINCIPAL BOUND BY AGENT'S ACTS—FORCIBLE DETAINER—*Nordlander vs. Wood, et al.*—No. 12228—*Decided Aug. 3, 1931.*

Facts.—Nordlander brought suit to recover possession of certain real estate and for damages for the detention. Judgment for defendants below.

Held.—Where the owner of real estate appoints an agent for the handling of the real estate, the owner is bound by the agent's acts apparently within the scope of his authority, even though the agent acts contrary to his instructions and even though the agent withholds material facts that he should

have communicated to his principal, where the third party with whom the agent deals had no notice of the agent's limited authority.—*Judgment affirmed.*

CONVERSION—WHAT CONSTITUTES—No. 12465—*Lutz v. Becker—Decided July 6, 1931.*

Facts.—In an action for conversion, judgment was rendered for the plaintiff. Defendant alleges error on the grounds that the evidence was insufficient to support the judgment. Defendant had foreclosed a Chattel Mortgage on personal property. With the property taken by the defendant on the foreclosure, was some which was admittedly that of the plaintiff. Defendant had, however, co-mingled the plaintiff's property with his own. Plaintiff introduced evidence tending to prove that defendant forbade plaintiff from going on his premises to pick out the property.

Held.—When the important evidence before trial court is disputed the finding by that court, when there is sufficient evidence to support it, will not be disturbed upon review.

Dissenting opinion by Mr. Justice Hilliard.

"Not every act of interference with the owner's right to personal property is conversion."

The failure of the owner to properly identify his own property, would not make the defendant guilty of conversion.—*Judgment affirmed.*