Denver Law Review

Volume 8 | Issue 8 Article 5

January 1931

Colorado Supreme Court Decisions

Dicta Editorial Board

Colorado Supreme Court Decisions

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.)

VENDOR AND PURCHASER — ESTATE SALES — MERCHANTABLE TITLE — FORECLOSURE—INJUNCTION—*Toll v. McKenzie et al.*—Nos. 12391 and 12392—*Decided April 27, 1931.*

Facts.—Two cases were consolidated in the supreme court, one from the district court on injunction, one from the county court in probate.

Title was in Owens, who in 1919 conveyed by warranty deed to McKenzie, who borrowed most of the purchase price from Casey, a close friend, and gave a trust deed to secure the loan. The warranty deed was not recorded, but the trust deed was. McKenzie died in 1922, leaving a will executed in 1918 in favor of his widow, which was abated (C.L. 5189) as to two children born in 1920 and 1921. Casey examining deceased's papers found the unrecorded deed. He procured a new warranty deed from Owens to Mrs. McKenzie (dated back to 1919) which he then (1922) recorded. He destroyed the unrecorded deed to McKenzie, released his trust deed and took a new one from Mrs. McKenzie for the $5,000 balance of the debt. Thereafter Mrs. McKenzie as apparent owner sold to Toll by warranty deed, who paid the purchase price except for the amount of the new Casey trust deed. Toll paid interest and $1000 on principal to Casey, who then disclosed to Toll the former ownership of McKenzie. Thereupon it was agreed by contract signed by Casey and Mrs. McKenzie with Toll to probate the McKenzie will, institute guardianship, give the court all the facts, and if the court approved sell the minors' interest to Toll, Mrs. McKenzie and Casey to furnish Toll funds to purchase, and to pay all the costs of the proceedings including fees of Toll's attorney.

The estates were opened, but the facts were not disclosed to the court. Mrs. McKenzie was appointed executrix and guardian. She obtained an order for the sale of the premises, and reported that she had sold it to Toll subject to an encumbrance (her trust deed to Casey) assumed by the purchaser, and had received the purchase price above the encumbrance. As guardian she receipted to herself as executrix for the minors' share on distribution. No cash actually passed.

Toll rejected the executrix' deed, and refused to pay Casey unless further steps were taken. Casey began foreclosure. Toll brought the district court action to stop him, alleging that Mrs. McKenzie and Casey had entered into a scheme to defraud the minors and palm off a bad title on Toll. The day before the trial Toll filed in the county court probate (closed 19 months) a disclaimer, alleging there had been no sale, he had not bought, no money had been paid, the court had not been given the facts (which he then gave),

Mrs. McKenzie had an interest hence was prohibited (C.L. 5317) from making the sale; and petitioned that the proceedings be vacated.

Defendants had judgment in the district court. Later the county court sustained a demurrer to Toll's proceedings there. Toll brought error from both judgments.

Held.—1. There was an intent to deceive, but no intent to injure the minors; hence the fraud was in that sense constructive only.

2. While the letter of the contract was violated, its spirit was not. It makes no difference now who gave the facts to the probate court. When they were given it still had discretion to affirm the sale.

3. By sustaining the demurrer the county court affirmed the sale.

4. That no actual cash was paid is immaterial. Making useless motions would have added nothing to the transaction. The sale on paper was in all respects valid. Mrs. McKenzie had already received in her personal capacity the money belonging to the minors, and when she charged herself with it in a proceeding in which she was bonded to account the result was the same.

5. Her "interest" was in fact against the sale, because the sale resulted in charging her for money which she had received in her personal capacity.

6. Toll's contract, plus the proceedings, makes him a purchaser.

7. Toll's litigation is not without reason. He was justified in believing that the title had turned out not to be good. The variations from the contract in the county court proceedings again cast a doubt on his title. But when this transaction is closed as hereinafter directed he will have good title.

8. A mortgagee who has participated in a fraud on a purchaser cannot assert estoppel against the purchaser.

9. The contract clearly implied that Casey should not foreclose until he had complied with his contract. He has not yet fully done so. He can get no relief by foreclosure or otherwise until the wrong he perpetrated is undone and those damaged are made whole.

Ordered.—That on or before June 1, 1931, Toll pay to Casey the balance due to Casey on the encumbrance with interest at 6% per annum, less the obligations assumed by Casey under the terms of his contract; that thereupon Casey release his trust deed to Toll. Each party bears his own costs in each court.

Judgment modified and affirmed.

On application for rehearing.—May 11, 1931. The district court case remanded to effectuate the opinion.

TRUSTS—STRANGERS TO TRUST—COLLATERAL ATTACK—*Underhill and Marsh v. Whitney, Trustee*—No. 12511—*Decided May 4, 1931.*

Facts—Whitney, as Trustee, had judgment in Court below against Underhill and Marsh for damages for breach of contract to purchase cattle. The Cross S. Cattle Company, an Arizona corporation, executed and delivered

a trust deed for $350,000.00 to one Henry Carstens, Trustee, on real estate and livestock in Arizona. This trust deed contained the usual provisions authorizing the appointment of a successor in trust. Subsequently L. L. Hillman was appointed successor in trust and later Hillman was succeeded by Haskell, as successor in trust. While Haskell was trustee he foreclosed the mortgage and as such trustee, and with the consent of 93 per cent of the bondholders purchased the real estate and livestock at the foreclosure sale and thereafter, as such trustee, sold certain cattle to Underhill and Marsh, delivered a part, and received part payment, and thereafter, Whitney was appointed successor in trust and brought this action against the defendants for the balance of the purchase price. At the trial below, defendants demurred to the plaintiff's evidence on the ground of want of capacity of the plaintiff to sue as trustee and moved for a non-suit, both of which were overruled and defendants electing to stand thereon, judgment was entered against the defendants.

Held—1. Plaintiff had capacity to sue as trustee.

2. The authority of his predecessor in trust, Haskell, did not terminate upon the foreclosure sale.

3. Haskell's purchase at the foreclosure sale was authorized by 93 per cent of the bondholders and he obtained title as trustee and not in his individual capacity.

4. The power to appoint a successor in trust after the foreclosure was not terminated by the foreclosure, as the power of trustee continued for the purpose of distributing the proceeds of sale to the bondholders, and the power to appoint a successor authorized by the trust deed also continued for such purposes.

5. The foreclosure decree specifically authorized any party to the action to become a purchaser at the sale, and no bondholders ever questioned the validity of the sale or Haskell's good faith, or his right to purchase as trustee, or to conduct the business as a going concern.

6. No bondholder has attacked Haskell's power to resign as trustee or to assign to Whitney, or Whitney's authority to act as their trustee, or to prosecute this action, for their benefit.

7. The defendants below are strangers to the trust and cannot collaterally attack the trust.

Judgment affirmed.

CHATTEL MORTGAGES—ADMINISTRATORS—FORECLOSURE WITHOUT LEAVE OF COURT—CONVERSION—*McCormick, Administrator, vs. The First National Bank of Mead, Colorado*—No. 12424—*Decided May 4, 1931.*

Facts—This was an action by plaintiff, McCormick, as Administrator of the estate of William J. Howlett, against the First National Bank of Mead for conversion, to recover a money judgment for damages. Howlett, during his lifetime, borrowed money from the Bank and secured the loan by chattel mortgage on his livestock and farming implements. The note fell due three days before his death, and after his death and before probate proceedings were commenced, the bank elected to foreclose, took possession of the chattels, and

at a public sale, sold the mortgaged chattels. Probate proceedings were not instituted until more than a year after Howlett's death.

Judgment below for defendant.

Held.—1. The action was for conversion of chattel property.

2. Trover cannot be maintained by one who has neither title nor right of possession.

3. Trover was the common law remedy for the conversion of chattel property.

4. The bank had title to the property and upon default had rightful possession also.

5. Section 5344 C. L. 1921, which provides that no mortgage upon any property, real or personal, owned by any person at the date of his death shall be foreclosed except by permission of the County Court does not apply to this case because letters of administration did not issue within one year from the death of Howlett.

Judgment affirmed.

INSURANCE—HAIL—CHANGE OF VENUE—WAIVER—*Great American Insurance Company v. Scott*—No. 12561—*Decided May 4, 1931.*

Facts.—Scott sued to recover damages to his wheat crop occasioned by hail and had a judgment below for $2,139.38. The wheat crop was located in Yuma County, Colorado, and the action was brought in the District Court of the City and County of Denver. The defendant sought a change of venue to Yuma County, charging that the real property involved was situate there and the insurance was payable there. The defendant suffered loss from two storms. He made no claim for damages from first storm, but did make claim for damages from second hail storm, and appraisers were appointed, made finding, but the Insurance Company refused to pay for the loss occasioned by the second hail storm unless the plaintiff signed a release of defendant's liability caused by the first. The defendant insisted that the complaint was defective because it did not charge that the plaintiff duly performed all of the conditions of insurance contract.

Judgment below for plaintiff.

Held.—1. The Court below properly denied the motion for change of venue. The suit was for breach of contract and not for damages to real property. The fact that the crops were growing in Yuma County is immaterial. The defendant being a non-resident of Colorado, the proper county in which to institute the action was that "designated in the complaint".

2. The allegations of the complaint substantially comply with Section 72 of the Code, relative to performance of the contract; and even if it did not, the allegations in the complaint of adjusted losses and repudiation thereof by the insurance company was a sufficient allegation of waiver of such performance.

3. Waiver may be proven under a general allegation of performance.

4. Even though the policy contains a clause prohibiting waiver, the law does not permit an insurance company to avoid liability on account of non-

performance of conditions required by the policy to be performed by the insured where the conduct of the insurance company's agents caused such failure.

Judgment affirmed.

WORKMEN'S COMPENSATION—REOPENING CASE—MODIFICATION WITHOUT NOTICE—*Mantor v. Industrial Commission, et al.*—No. 12788—*Decided May 11, 1931.*

Facts.—The Industrial commission denied Mantor's petition to reopen a compensation award. The District Court upheld the action of the Commission and Mantor seeks a reversal of the judgment.

Held.—1. Section 4471 of the Compiled Laws, 1921, permits any person dissatisfied with the finding and award of the Referee to petition the Commission for review, and provides that unless such petition is filed within ten days after the finding and award, or within the period of any extension that may have been granted, the finding and award shall be considered as the final finding and award of the commission. Mantor failed to avail himself of the provisions of this section.

2. Section 4484 of the Compiled Laws, 1921, gives the commission power, upon its motion, to review any award. This section permits, but does not require, the commission to review any award or make a new award. Action under this section is discretionary and the action of the commission cannot be set aside by a court, except in case of fraud or a clear abuse of discretion.

3. The Referee should not have corrected the award without a full hearing and upon notice to the parties, but in this case, in view of the fact that subsequently there were two full hearings upon notice and Mantor and his attorney participated therein without objections and Mantor has accepted full payment of the award he cannot now question the award.

Judgment affirmed.

ATTACHMENT—CLAIM OF THIRD PARTY—NECESSITY OF ISSUING CITATION—*Burnett v. Jeffers*—No. 12357—*Decided May 11, 1931.*

Facts.—Jeffers sued Updegraff and his wife for $300.00. A Writ of Attachment and a Summons in Garnishment were served upon Chase, as garnishee. Chase answered, stating that he was holding 110 bags of onions brought to his warehouse by Updegraff and that Burnett claimed to own the onions by virtue of an assignment by Updegraff to him. No citation of summons was served upon Burnett. Burnett filed his petition in intervention alleging ownership, which was later stricken, and his application to further plead denied, and judgment entered for Jeffers.

Held.—1. Where garnishee defendant in his answer states that a third party claims ownership, it is the duty of the Court to issue a citation or summons requiring such third party to appear and set up his claim.

2. Where, before the garnishment proceedings are determined, a third party files his verified petition in intervention, he is entitled to have his claim tried and determined.

3. In denying him that right, the Court below committed reversible error.

Judgment reversed and cause remanded for further proceedings.

QUIET TITLE—TRUST—HUSBAND AND WIFE—TRANSFER OF PROPERTY—*Hines v. Baker, et al.*—No. 12384—*Decided May 11, 1931.*

Facts.—Hines received a sheriff's deed to real property in Denver. He thereupon sued Isabelle Baker, C. H. Baker, and Frances Bacon, to procure the cancellation, as fraudulent, of certain deeds to the property, namely, a deed from the wife to the husband, and a deed from the husband to the wife under her maiden name. Baker filed a counter claim to quiet title in himself. The court below rendered judgment dismissing plaintiff's complaint and quieting title in C. H. Baker.

Held.—1. The transaction whereby the property purchased with the money of Baker was conveyed to his wife is presumed to have been a gift or an advancement.

2. Baker claiming that no gift or advancement was intended and that as the property was purchased with his money, the resulting trust arose in his favor and such claim being supported by the evidence, the judgment for Baker should be affirmed.

3. The claim that there was a resulting trust, to prevail, must be established by evidence that is strong and convincing.

4. The trial court is the judge, not only of the credibility of witnesses and of the weight of the evidence but also of the inferences properly deducible from the facts and circumstances proven at the trial.

Judgment affirmed.

PROHIBITION—JURISDICTION—STATE OFFICERS—*The People v. the District Court of the Second Judicial District, et al.*—No. 12657—*Decided May 11, 1931.*

Facts.—The exercise of the original constitutional jurisdiction of this court is sought by the People upon the relation of three members of the Colorado State Board of Corrections, the Warden of the State Penitentiary, the Special Deputy Warden, and the Chief of the State Law Enforcement Department in their petition for a writ of prohibition against the District Court and the judge thereof. The petitioners seek to restrain the District Court and the Judge from exercising jurisdiction in contempt proceeding to punish the petitioners for permitting certain freedom to an inmate of the State Penitentiary who had theretofore been sentenced to the Penitentiary and whose sentence had not expired.

Held.—1. A cause is pending until it reaches a final determination, either in the court of original jurisdiction or in the appellate court.

2. Sentence was pronounced in a criminal action in 1927 and no writ of error was sued out to review the final judgment of the District Court, and

the District Court was without jurisdiction of the cause at the time the contempt proceedings were filed.

3. But even if the Court had jurisdiction, penitentiary officials of Colorado, being state officers and not officers of the Court, are not guilty of the contempt charged against them in the District Court, and are only liable for their wrongful acts, if any they committed, to prosecution for a violation of official duty.

Writ of Prohibition granted.

CRIMINAL LAW—SEPARATE TRIAL—TRIAL COURT COMMENTING ON EVIDENCE—*Kolkman v. the People*—No. 12651—*Decided May 11, 1931.*

Facts.—John Kolkman, Roy Kolkman, J. B. Morrison, and William Morrison, fathers and sons respectively, were jointly charged with the crime of grand larceny. The Court granted the Morrisons a separate trial. Upon the trial of the Kolkmans, John was convicted and sentenced, but the jury failed to agree as to Roy. John Kolkman prosecutes error seeking reversal: (1) because of refusal of the trial court to grant his motion for separate trial; (2) the trial court's comments on the evidence made to the jury.

Held.—1. A. Unless the bill of exceptions discloses the admission of prejudicial evidence, no error is committed in denying a motion for a severance.

B. The motion for a severance, or the affidavit in support must set forth the incompetent and prejudicial evidence so as to advise the trial court in determining the question of granting or denying the motion.

C. Query: Can the defendant avoid the two rules above announced by alleging that he can not advise the court more definitely as to what the testimony to be offered by the People would be which would be competent against one and not against the other?

D. While the defendant cannot be required to do impossible things, yet the evidence in this case clearly shows a conspiracy to commit the crime of grand larceny and although conspiracy was not charged, yet the acts and declarations of one conspirator in furtherance of the common design were admissible against both defendants; and as such evidence would have been admissible had the defendant been tried separately, there was no prejudicial error in denying the motion for a separate trial.

2. Rule 14B, adopted by the Supreme Court, July 1, 1929, provides that the rules governing comments by district judges on evidence shall be those now in force in the United States District Court. Under this rule, the District Court may comment to the jury upon the evidence and express his opinion as to the facts in the case, so long as he leaves to the jury the ultimate decision as to what the facts are.

Judgment affirmed.

MUNICIPAL CORPORATIONS—TAXATION — SPECIAL ASSESSMENTS — BENEFITS—*Santa Fe Land Improvement Company v. The City and County of Denver*—No. 12286—*Decided May 11, 1931.*

Facts.—The Santa Fe Land Improvement Company, together with 46

other landowners of property in a sanitary sewer district brought an action in the district court against the City and County of Denver, and certain of its officers to have special assessments declared invalid and to enjoin and restrain the collection thereof, and to quiet title as against the same. A general demurrer to the complaint was sustained and plaintiffs elected to stand on their complaint and the action was dismissed.

Held.—1. The complaint stated a cause of action.

2. The allegations of the complaint, the truth thereof being admitted by the demurrer are that plaintiff's property is not benefited in the slightest degree by the construction of the sewer in said district, for the cost of constructing which, if the assessments are valid, plaintiffs' property is being taken under the guise of special assessment.

3. Section 60, Article 3, of the Charter of the City and County of Denver, provides that the cost of constructing sewers and laterals in all regularly organized sewer districts shall be apportioned as the area of each lot or piece of land in the district is to the area of all the real estate therein.

4. This does not mean that the taxing authorities can levy assessments irrespective of the benefits or that this method of assessment according to area is a legislative determination that the benefits exceed the assessment, and that this determination is conclusive upon all.

5. The City Council sitting as a board of equalization is not bound by this provision to make its determination irrespective of benefits.

6. Special assessments for local improvements are authorized and permitted upon the theory that the local improvement generally and peculiarly enhances the value of the property against which the assessment is levied to an amount equal to, if not in excess of, the amount of the special assessment.

7. Irrespective of the method of apportionment all special assessments are fundamentally and basically founded upon special benefits, without which they cannot stand.

8. When it is properly determined that a special benefit will result from a local improvement, any method of apportionment is valid so long as the amount thereof does not exceed the value of that special benefit.

9. The plaintiffs wrongfully were denied a hearing because the board of equalization believed itself bound by the charter provision requiring the cost to be apportioned according as the area of each tract bore to the entire area of the district; and that the board lacked the power or authority to deviate therefrom and consequently the question of benefits was immaterial. This was an erroneous assumption and a wholly incorrect conclusion.

Judgment reversed and cause remanded.