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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.)

RECEIVERS — UNLAWFUL PREFERENCES — EXCESSIVE FEES— BANKRUPTCY—No. 12569—*Rossi vs. Colorado Pulp & Paper Co., et al.—Decided January 12, 1931.*

Facts.—This matter involves the winding up the affairs of the Colorado Pulp & Paper Company, an insolvent domestic corporation in the hands of a Receiver, who held under the appointment of the District Court of Adams County. After such appointment, the District Court temporarily lost jurisdiction by petitions in Bankruptcy, but the jurisdiction of the State Court was subsequently restored by the unconditional dismissal of the petition in Bankruptcy, before the administration of the Bankrupt's Estate, and the State Court then proceeded to its final determination. This matter was brought to the Supreme Court by William Rossi, a general creditor to review the various orders and decrees of the District Court.

Held.—1. General creditors, having repeatedly dealt with the Receiver in his official capacity and obtained Court orders that involved recognition of his appointment, thereby acquiesced in such appointment and cannot now complain of such appointment on the ground of mere irregularities.

2. Even though such appointment of a Receiver is not set aside for above reasons, it is not a recognition of the propriety of such Receivership.

3. The Receivership should never have been granted in the first instance.

4. The filing of a petition in Federal Court in Bankruptcy divests the State Court of jurisdiction.

5. Such filing deposed the Receiver and deprived him of any further duties, except to preserve the estate.

6. The stipulation entered into between certain of the parties, which did not include the general creditors, was void as against general creditors.

7. The general creditors were not estopped from attacking the stipulation.

8. The illegal stipulation acted as a parasite to aid in sapping the lifeblood of the Receivership's general assets almost from the start. It has robbed the general creditors of representation in the person of a receiver, who should have been unbiased and impartial.

9. The office of a Receiver is in the nature of that of a Trustee, and the trustee was unfaithful.

10. The practice of throwing business concerns into Receivership by the District Court must be discouraged, where grounds for such Receivership are flimsy.

11. In this case the Receivership was improvident, and unconscionable expenses and costs were incurred.

12. The Receivership never should have been commenced, but having been started, should have been ended long ago.

13. The Court has authority to wind up the corporation even though the original suit did not include the dissolution of the corporation.

Judgment reversed with directions.

NOTE: In the two cases of Myers vs. Beck and Myers vs. Colorado Pulp & Paper Co., both decided on January 12, 1931, the facts were the same as in the above case and both were reversed for the same reasons.

RECEIVERSHIP—UNLAWFUL PREFERENCES—EXCESSIVE FEES —BANKRUPTCY—No. 12590—*Sparling Coal Co. vs. Colorado Pulp & Paper Co., et al.—Decided January 12, 1931.*

Facts.—The facts were the same as in the case of Rossi vs. Colorado Pulp & Paper Co. et al.

Held.—The Court in its discretion may notice any other error appearing of record, even though the error is not assigned. In liquidation proceedings, the rights of creditors, debtors, and stockholders, are to be determined as of the time when it commences. Creditors of a Receivership whose claims have been proved and allowed under a decree, have a right to be heard in that Court upon any action of the Court or receiver, by which they might claim to be aggrieved.

Allowances of fees, made by the District Court, while a petition in Bankruptcy was pending in the Federal Court, cannot be allowed.

Judgment reversed.

GAMBLING—MECHANICS LIENS—PLEADING—No. 12234—*Denver Park & Amusement Co. vs. Kirchoff—Decided January 12, 1931.*

Facts.—Denver Park and Amusement Company owned certain real estate, which it leased to one, Throckmorton, who, with its consent, assigned to The Denver Greyhound Racing Association. The American National Bank, as Trustee for bondholders, held a mortgage on the property, and the Greyhound Company erected thereon and operated, a dog-racing enterprise, in which gambling was indulged in on the races. Kirchoff, having furnished material and labor, filed his mechanics' lien statement and brought the action to foreclose. Other lien claimants brought counter claims for foreclosure of their liens. One of the defences of the owner of the land was that Kirchoff, in furnishing the material, knew that it was being furnished for the purpose of erecting a racetrack for racing dogs, and for the purpose of gambling and wagering in violation of the laws of the state. The Court below sustained a demurrer to this defense.

Held.—The demurrer to this particular defence should not have been sustained. This defence set out an attempted enforcement of an illegal contract as to which the parties stand in pari delicto, and the defendant was entitled to present such defense.

Judgment reversed.

MUNICIPAL CORPORATIONS—SEWERS—DAMAGES—No. 12394—*City and County of Denver vs. Mason—Decided January 19, 1931.*

Facts.—Mason had judgment for $1250.00 for damages to her property during 1925, 1926, and 1927, as the result of the negligence of the City in the construction and maintenance of certain sewers. The City contended that no liability existed for injuries sustained as the result of the exercise of its quasi

judicial discretion in the adoption of a defective or insufficient sewer system, and that no negligence was shown in the construction and maintenance thereof.

Held.—Where a sewer, as originally planned and constructed, was found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudent measures, the municipal corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil.

Judgment affirmed.

PLEADING — DEMURRER — INTERVENTION — APPEAL — No. 12412—*The Commercial Credit Co. vs. John A. Higbee—Decided January 19, 1931.*

Facts.—In an action brought by the defendant in error against another, an automobile was attached as the property of the defendant below, who was not a party on appeal. The plaintiff in error, claiming ownership, filed a petition of intervention; to this petition, the defendant in error, plaintiff below, interposed a demurrer which was sustained. The intervenor elected to stand on its demurrer. Other than sustaining the demurrer and fixing a time for tendering a bill of exceptions, no other orders were made, and no final judgment entered.

Held.—Entry of final judgment is requisite to the right to predicate and prosecute error.

The Writ is dismissed, but without prejudice to further appropriate proceedings in the court below.

BROKERS — REAL ESTATE COMMISSION — PLEADING — No. 12253—*Kinney vs. Wither—Decided January 19, 1931.*

Facts.—Defendants below employed the plaintiff Kinney, real estate broker, to sell land, and agreed to pay him as a commission $2,190.00, the first half of the commission to be paid out of the first cash payment of the purchase price, and

the second half out of the second payment. The defendants paid the first half of the commission, but not the second half. The complaint alleged that the defendants accepted as payment in lieu of the second cash payment the promissory note of the purchaser, later brought an action against the purchaser, recovered judgment, and realized on the judgment more than the amount of the balance due on the commissions.

Held.—It was not essential to plaintiff's recovery to prove that the defendants accepted the note of the buyers as the equivalent of actual payment because when the defendants brought suit against the buyers to recover the second payment of the purchase price, and realized therefrom more than the second half of the commission, the defendants were liable for the payment of the balance of the commission.

Judgment reversed and remanded with instructions.

STATUTE OF FRAUDS—PART PERFORMANCE—No. 12757—*Jutten vs. Deeble—Decided January 19, 1931.*

Facts.—Deeble and Jutten made an oral contract whereby the former agreed to sell, and the latter agreed to buy, certain real estate. Claiming Jutten refused to carry out the contract, Deeble sued Jutten for specific performance, and obtained a decree therefor.

Held.—1. The Court below found that there was a contract, and that the consideration was $1,600.00. This finding is conclusive, being upon conflicting evidence.

2. Defendant pleaded Statute of Frauds, claiming that because the contract was oral, it was unenforceable. However, Jutten paid $100.00 on the purchase price and the seller ousted his tenant and delivered possession to Jutten, the purchaser. There was a partial performance of the contract sufficient to take it out of the Statute of Frauds.

Judgment affirmed.

MANDAMUS — CIVIL SERVICE — CHIEF CLERK—VACANCY—No. 12661—*Civil Service Commission vs. People, ex rel. Beates—Decided January 26, 1931.*

Facts.—Beates, an employee in the office of the Secretary of State brought mandamus action to compel Civil Service

Commission to certify for and appoint her to the position of Chief Information Clerk, Motor Vehicle Department. She was second on eligible list, but the one prior on list had never been tendered nor had ever refused the appointment.

Held.—It not having been shown that the first person on the eligible list had either been tendered or had refused such appointment or had failed to make demand therefor upon request of relator, the second on the list, obviously relator had no clear legal right to demand the position sought and therefore cannot maintain mandamus.

Judgment reversed.

MANDAMUS—SCHOOL DISTRICT—JOINT DISTRICT—BOUNDARIES—No. 12367—*Smith vs. Joint School District No. 3—Decided January 26, 1931.*

Facts.—This was a mandamus action brought by Joint School District number 3, lying partly in Otero county and partly in Crowley county, against Smith, County Superintendent to compel her to correct records of her office so as to show the correct boundaries of school district number 16, of Otero county, and School District number 3, lying partly in Otero and Crowley counties, particularly as to show that sections 5 and 6 were part of Joint School District number 3.

Held.—1. Joint School District number 3 had capacity to sue because even though irregularly created, it has been recognized as a school district for over twenty years, and its existence as a legal entity throughout that period had never been questioned.

2. Mandamus is the proper remedy because it only required a ministerial act, that of a county superintendent to correct her records showing the proper boundary.

3. School District number 16, of Otero County, was not a necessary party, nor were the bondholders thereof, because no relief was sought against School District No. 16, nor any of the bondholders.

Judgment affirmed.

AUTOMOBILES—RIGHT OF WAY—CONTRIBUTORY NEGLIGENCE —No. 12419—*Knifer vs. De Julio, et al.—Decided January 26, 1931.*

Facts.—In an automobile damage suit, defendants in error, defendants below, had judgment upon a verdict directed by the District Court. Plaintiff was driving an automobile South on country road. Defendant was driving his car East on an intersecting road. Plaintiff testified that he saw defendant's car approaching the intersection at approximately 150 feet therefrom at an excessive rate of speed and on the wrong side of the road, that plaintiff's brakes were in good condition, and that he had ample time to stop, but did not do so. The collision resulted.

Held.—The plaintiff, by his own testimony was clearly guilty of contributory negligence, and the facts being undisputed, it was the duty of the lower court to so hold as a matter of law and direct a verdict.

Judgment affirmed.

BILLS AND NOTES—USURY—MONEY LENDERS' ACT—No. 12693—*Angleton and Yeargan vs. The Franklin Finance Co.—Decided January 26, 1931.*

Facts.—Angleton and Yeargan, plaintiffs, co-makers on a note payable to Franklin Finance Company brought action to cancel their liability thereon. They were successful in the County Court, unsuccessful in the District Court. Contention was that loan being for less than $300.00 and more than 12 per cent having been charged, concealed in brokerage charges and other items, that the note was void.

Held.—The amount which the lender actually loans the borrower will determine whether or not the transaction comes within chapter 63 compiled laws of 1921. In this case, the defendant was attempting to avoid the consequences of a violation of the money lenders' act. The amount of the loan being under $300.00 and defendant having made charges in addition to the statutory amount allowable, the contract is void and the note is unenforcible.

Judgment reversed.

BILLS AND NOTES—CONSIDERATION—MISREPRESENTATION—BANK STOCKHOLDERS' LIABILITY—No. 12354—*Campbell vs. Hoch—Decided January 26, 1931.*

Facts.—Hoch sued Campbell on her promissory note. Defense was no consideration, misrepresentation, and that the minds of the parties never met. Campbell was owner of shares of the capital stock in First National Bank of Yuma. The capital stock became impaired and it was necessary to levy an assessment. Before assessment was levied, stockholders met and agreed to raise the necessary money that would be required by an assessment and defendant gave her note for her respective quota.

Held.—1. There was ample consideration for the note.
2. There was no misrepresentation.
3. The minds of the parties met.
4. She was liable on the note.

Judgment affirmed.