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Colorado Supreme Court Decisions

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(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE—NO. 12471 —*Cherokee Realty Company vs. Allen—Decided December 9, 1929.*

Facts.—Allen had judgment against defendant for services rendered in effectuating the exchange of real estate belonging to plaintiff below. The plaintiff alleged that the compensation was to be paid in cash while the defendant alleged another method of payment.

Held.—The evidence upon the only question in dispute was in sharp conflict; there was competent evidence before the Court upon which to base his judgment, and under the well established and oft announced decisions of this Court, we are not at liberty to disturb it.

Judgment Affirmed.

ATTORNEYS — DISBARMENT — *People vs. Lindsey* — No. 12130—*Decided December 9, 1929.*

Facts.—Lindsey, while Juvenile Judge and also while still holding a license as attorney at law, accepted $37,500 from Mrs. Stokes and $10,000 from Samuel Untermyer, New York attorney, as the result of a contest instituted by Mrs. Stokes as guardian of her two minor children to set aside the will of their father in the State of New York. The contest resulted in a settlement whereby certain shares of stock were secured of great value. Proceedings with reference to the guardianship of the persons of these minors were at that time pending in the Juvenile Court, without having been finally closed. With the knowledge of the Juvenile Judge and at his instigation, proceedings were had in the County Court of Denver to have Mrs. Stokes appointed as guardian of the estate of said minors, a petition was filed therein stating that there was not sufficient cash in the estate and it was necessary to borrow money on the stock belonging to the minors in order

to pay certain local parties for services. An order was entered granting such permission. The certain local parties was the respondent, Lindsey. The respondent claimed first that the $37,500 and the $10,000 were a gift and were not for services as an attorney; and second that the contest over the Will, being in the State of New York, had no reference to any legal services or litigation in the State of Colorado over which this Court would have jurisdiction.

Held.—Lindsey rendered legal services and not mere services of a friend, mediator, or arbitrator. The money was paid to him for legal services and not as a gift. An essential element of a gift is an intention of the donor to bestow something on the donee voluntarily and without any consideration whatever. In the instant case, Lindsey gave a receipt in full for the moneys received by him. Gifts are exempt from the imposition of any income tax under the laws of the United States, yet the respondent, in his income tax, returned the amount received as income received. Respondent was false to his oath taken as a judicial officer, and also false to his oath as an attorney and counselor at law, and has proven himself unworthy of the trust imposed in him by this Court.

Judgment entered that respondent be removed from the office of attorney and counselor at law and his license revoked.

AUTOMOBILES — LAST CLEAR CHANCE — PLEADING — No. 12182—*Bragdon vs. Hexter—Decided November 12, 1929.*

Facts.—Personal injury action by Hexter against Bragdon. The trial Court introduced into the case for the first time by its instructions, the Last Clear Chance doctrine. The same was not pleaded by the plaintiff either in his complaint or replication. In the answer, the defendant alleged that plaintiff was guilty of carelessness and negligence. Plaintiff simply filed general denial.

Held.—When the defendant specifically alleged in the answer that plaintiff was guilty of negligence that directly contributed to the accident, and plaintiff filed replication consisting of a denial, plaintiff may not avail herself of the Last Clear Chance doctrine. If plaintiff desired to avail herself of

this doctrine, she must affirmatively plead facts showing that the last clear chance doctrine was applicable.

Judgment Reversed.

BANKS—CHECKS—DEPOSITS—*Broomfield vs. Cochran*—No. 12304—*Decided December 9, 1929.*

Facts.—Defendants issued a check to Cochran drawn on the International Trust Company. The check was endorsed and deposited in defendant's account at the Broadway National Bank. The drawee was permitted by the bank to draw against the check after its deposit. Payment was stopped on the check and the receiver of the bank brought suit against the makers to cover the amount paid out by the bank. Judgment for defendant in the Court below.

Held.—Where a check is drawn on one bank and unconditionally deposited in another, the latter becomes merely an agent of the depositor and title does not pass to said bank; but if the bank of deposit extends credit and permits the depositor to withdraw the amount of the check, the bank becomes the owner thereof.

Judgment Reversed.

BILLS AND NOTES—BONA FIDE HOLDER—CONSIDERATION—No. 11940—*Schwalb and Cannon vs. Riel—Decided November 12, 1929.*

Facts.—Plaintiffs sued defendant on two counts to recover on two promissory notes. Defendant interposed two defenses alleging no consideration, payment, and estoppel. The Court refused to instruct verdict for plaintiffs.

Held.—The undisputed evidence discloses that a valuable consideration was paid for the notes and that there was no payment by set-off, or otherwise, and that the defendants are not estopped to assert that they are *bona fide* holders for value in good faith, and without notice of any infirmity in said notes. The lower Court should have directed a verdict for the plaintiffs.

Judgment Reversed.

BROKERS' LICENSE—CONTRACTS—No. 12420—*Black Forest Realty & Investment Co. vs. Clarke—Decided November 25, 1929.*

Facts.—The Realty Company employed Clarke as its general sales manager to have supervision of all sales of lots owned by the Company. Clarke was to receive a salary, plus five per cent. of the purchase price on sales. He recovered judgment below; defense was that he had no real estate brokers' license. This issue was not tendered until day of trial and Court denied application to amend.

Held.—It was not necessary for Clarke to have a brokers' license. He was merely an employe of the Company. The proposed amendment presented no defense, but if it were otherwise, the delay in applying for leave to amend would justify the Court in denying the application.

Judgment Affirmed.

CONTRACTS—TIME NOT ESSENCE OF CONTRACT—*Kitt vs. Runge*—No. 12187—*Decided December 9, 1929.*

Facts.—Parties below entered into a contract to exchange certain lands, exchange to be made on October 1st, 1927. Exchange could not be completed on the date specified because there was a mortgage against one of the pieces of land, and the holder of the mortgage delayed in executing the release through no fault of the owner of the land. Time was not specifically mentioned as being of the essence of the contract. Court below granted specific performance.

Held.—Time is not of the essence of a contract, unless it is made so, either specifically or by the circumstances of the case.

Judgment Affirmed.

CRIMINAL LAW—CONFIDENCE GAME—BILL OF PARTICULARS —12343—*Stewart vs. People—Decided Dec. 2, 1929.*

Facts.—Stewart was convicted of an attempt to obtain money from an insurance company by means of the confidence game. He filed claim against an insurance company for theft of two wheels, tires and tubes. Upon investigation the alleged stolen property was found hidden on his premises. Stewart

introduced no evidence in defense. He asked for a bill of particulars.

Held.—It is within sound discretion of the lower court to grant or deny motion for bill of particulars in a criminal case. The evidence justified conviction.

Judgment Affirmed.

DEEDS—RESERVATION OF MINERALS—SURFACE RIGHTS—No. 12203—*Whiles vs. The Grand Junction Mining and Fuel Company—Decided November 12, 1929.*

Facts.—Plaintiff Whiles is owner of irrigated lands by virtue of divers mesne conveyances from the Union Pacific Railroad Company. The Railroad Company reserved minerals and coal underlying the surface. Defendant is lessee of the Railroad Company of the coal underlying Plaintiff's land. Action was for injunction to restrain defendant from entering upon or mining coal.

Held.—Impossible to mine coal in such a way as to leave sufficient support for the surface. Defendant may not remove coal unless it furnishes a statutory indemnity bond to protect the plaintiff in surface rights. Defendant restrained until such bond is furnished although surface owner is not obliged to ask for a bond, nevertheless, if bond is offered sufficient to protect the surface owner, the Court may permit further mining operations by requiring a bond that will cover all damages that the surface owner may suffer.

Judgment Affirmed.

DIVORCE—ENTRY OF FINAL DECREE—No. 12164—*Sarah A. Tierney vs. M. E. Tierney—Decided October 14, 1929.*

Facts.—Plaintiff below (plaintiff in error) brought an action for divorce and findings of fact and conclusions of law in her favor were entered. About four months thereafter she filed a petition asking that the suit be dismissed. Defendant resisted this petition and thereafter the Court entered a decree of divorce in favor of plaintiff, but over her protest.

Held—This case is governed by *Walton v. Walton,* 278

Pac. 780, which held that a guilty party may not obtain a decree of divorce over the objection of the successful party.

Reversed and Remanded with Instructions.

INJUNCTION — SPECIFIC PERFORMANCE—REPLEVIN—LEGAL AND EQUITABLE RELIEF—No. 12204—*Mosco vs. Jeannot—Decided November 25, 1929.*

Facts.—Mosco, through her next friend, brought action against defendants asking for an injunction, and at the same time asking for damages and for a body judgment, on the grounds that defendants were conducting a voting contest whereby the one receiving the largest number of votes was to win an automobile and the plaintiff alleged that she had the largest number of votes, but that defendants awarded the automobile to one, Martinez, one of the defendants, contrary to the rules of the contest. Demurrer to the complaint was sustained below.

Held.—Plaintiff below mistook her remedy. She should have brought an action in the nature of replevin to recover her automobile, and if she was entitled to it, it would have been awarded to her by the Court. The facts pleaded present no case for injunctive relief, nor for specific performance of contract.

Judgment Affirmed.

INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE—No. 12453—*Wilkins vs. The People—Decided October 28, 1929.*

Facts.—The Defendant below was convicted of a second offence in violation of the intoxicating liquor statute. The sole question on which defendant relies for reversal of the judgment is the insufficiency of the evidence.

Held.—There was sufficient evidence to sustain the verdict. The credibility of witnesses and the weight to be given to the testimony was exclusively for the jury, and the jury found the defendant "guilty".

Judgment Affirmed.

LIBEL—PRIVILEGED COMMUNICATION—MALICE—*Walker vs. Hunter*—No. 12272—*Decided December 9, 1929.*

Facts.—Walker sued Hunter and others for libel on account of matters contained in a petition to the County Commissioners to close a certain dance hall. In the complaint the plaintiff alleged that the defendants falsely, maliciously, and with intent to injure and prejudice the plaintiff, published the libel, and that the same was false and was known by the defendants to be false, and that the defendants were guilty of malice and wilful deceit in the matter. Court below sustained a demurrer to the complaint.

Held.—The complaint sufficiently charged express malice. The demurrer should have been overruled.

Judgment Reversed.

PHYSICIANS—OSTEOPATHY—No. 12237—*Newton vs. Board of County Commissioners—Decided November 25, 1929.*

Facts.—Newton has state license to practice medicine as an Osteopathic Physician, and seeks to enjoin the enforcement by the Board of a practice barring Osteopathic physicians from practising in two county hospitals maintained by the Board. The District Court sustained a general demurrer.

Held.—A physician has no constitutional or statutory right to practice his profession in a county hospital. The county board has complete supervision and control. A regulation excluding from the county hospital, or the right to practice therein, the devotees of some of the numerous systems or methods of treating diseases authorized to practice the profession in Colorado, is neither unreasonable or arbitrary.

Judgment Affirmed.

PLEADING—ABUSE OF—NEXT FRIEND—NO. 12,281—*Ellis v. Colorado National Bank—Decided October 28, 1929.*

Facts.—Plaintiff, who was apparently insane, but has never been judicially declared to be such was given permission by the Court below to bring suit by next friend on the ground that defendants were depriving him of his property by taking advantage of his mental disorder. Ellis' motions

were filed in the Court below, and the plaintiff standing on the complaint, the same was taken to the Supreme Court, which sustained the complaint and remanded the cause with directions to overrule the motions and proceed in harmony with the opinion. Instead of promptly proceeding with the discussion of the pleadings and getting the case to issue, various motions and demurrers were filed by the defendant. The Court below sustained a demurrer on the ground that the plaintiff could not sue by next friend, but only in person or by a conservator.

Held.—Plaintiff not having been judicially declared insane should have been permitted by the Court below in its discretion to sue by next friend. The repeated reversal of its rulings by the trial Court after long delays, amounted to such an abuse of discretion as to defeat the very purpose of that discretion. All motions and demurrers, if practicable, should be filed at the same time, and the trial should not be turned into a tournament of pleading, rather than a trial of substance.

Judgment Reversed.

RAPE—MENTAL INCOMPETENCE—WIFE TESTIFYING—No. 12441—*Wilkinson vs. People—Decided November 4, 1929.*

Facts.—Wilkinson was convicted of the crime of rape. Wilkinson was the step-father of the victim, and his wife, the mother of the victim, and the victim was a dwarf, twenty-four years of age with the mentality of a ten-year old child. Wife of defendant was permitted to testify as to her name, but was not interrogated further.

Held.—1. Wife is competent to testify against her husband where he is charged with rape against his step-daughter, who is the real daughter of the wife. 2. The victim was competent to testify, and whether or not she possessed sufficient mental capacity to give her legal consent was a question of fact for the jury. 3. If defendant relies upon improper conduct, or suggestions by the District Attorney, or others interested in the prosecution they should immediately be called to the at-

tention of the trial court, and if not, it is too late to complain in the Supreme Court.

Judgment Affirmed.

REAL ESTATE BROKER—COMMISSION—No. 12459—*Ness vs. Podd—Decided October 28, 1929.*

Facts.—Podd was a licensed real estate broker, and Ness listed said real estate with him for sale at $2850. The broker obtained a prospective purchaser who was pleased with the property, but wanted to get a reduction in price. Two weeks later, Ness sold the same property through another broker to the same prospective purchaser for a less price.

Held.—The broker was entitled to his commission for the sale. The law will not permit one broker who has been entrusted with the sale of land, and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling to the customer for a price less than the first broker is impowered to receive.

Judgment Affirmed.

SALES—PRINCIPAL AND AGENT—NEGATIVE PREGNANT—No. 12,463—*Everett vs. Cole—Decided November 4, 1929.*

Facts.—Cole claimed he sold Everett seven hundred pounds of buffalo bull meat at fifty cents per pound, for which the latter refused to pay. Defendant claimed he was not a purchaser, but plaintiff's agent to sell on commission, and that through no fault of his, nothing was sold; hence, that he owed nothing. Verdict below for plaintiff for the full amount. *Cole, a member of the bar, accustomed to "throwing the bull", was the owner of a certain buffalo bull, highly educated, having attained the degree of B.S., but notwithstanding this, was wild and fractious which resulted in his summary execution,** and what was left of the bull, after stripping him of his honors, was delivered to Everett who hung him up in his butcher shop, but before any of the meat was sold, it was

*Note: The italics are those of the Editor-in-Chief who admits himself greatly impressed by this rather novel, yet highly commendable, ground for executing an attorney.

condemned by a food inspector who belonged to the "Bull Moose" party.

Held.—The evidence was competent, material, and relevant, and sufficient to support the verdict for plaintiff. The instructions fairly state the law. There was no objection taken to the instructions, but because defendant's counsel had made objections at a former trial and also at his motion for a new trial, recited the objections, he claimed that he could assert the objections here. Rules of the Supreme Court require that specific objections be made to proposed instructions before such instructions are given to the jury. No waiver of a failure to comply with that rule can be binding in the Supreme Court. Furthermore, the answer was a perfect negative pregnant throughout; hence, the allegations of the complaint stand admitted.

Judgment Affirmed.

WORKMEN'S COMPENSATION—DISABILITY—STATUTORY CONSTRUCTION—NO. 12,347—*New York Indemnity Company vs. Industrial Commission and Carl Robinson—Decided October 14, 1929.*

Facts.—Robinson sustained an injury arising out of and in the course of his employment, which caused the loss of his right arm near the elbow and a ninety per cent loss of the left arm. The Commission awarded him compensation for total and permanent disability. Thereafter Robinson himself obtained employment and the Indemnity Company brought suit to reduce the award under Sec. 4451 C. L. 1921, which defines total disability as the loss of both hands, etc., except where *the employer* or *the Commission* obtains suitable employment for the disabled person.

Held.—Robinson having obtained his own employment, this case does not come within the statutory exception, and his compensation is continued.

Judgment Affirmed.

WORKMEN'S COMPENSATION—NONRESIDENT EMPLOYEE—No. 12428—*Platt vs. Reynolds—Decided October 28, 1929.*

Facts.—Platt was engaged in the automobile business in

Denver, and carried Liability Insurance under the Colorado Workmen's Compensation Act. Reynolds was an employee of Platt, but resided in Nebraska, and carried on his entire business in Nebraska. He was killed in Nebraska.

Held.—The Colorado Compensation Act does not apply to one employed by a Colorado Company where the employee contracts to work in another state and is actually injured in another state. The Commission could exercise no jurisdiction over that employment or its conditions. Its protection could not reach that employee there nor could our Courts adjudicate his controversies.

Judgment Reversed.