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Colorado Supreme Court Decisions

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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.*)

APPEAL AND ERROR—BILL OF EXCEPTIONS—NO. 12373—*Employers Fire Insurance Company vs. Bartee—Decided February 24, 1930.*

Facts.—The company insured Bartee against loss from theft of his automobile. Bartee filed a complaint alleging that his car was stolen and wrecked, and in due course had a verdict against the Company. After the case was lodged in this court Bartee moved to strike the bill of exceptions, which was done. Pending this motion the Company filed its brief on application for a supersedeas and asked for a decision on the merits.

Held.—The only question worth considering, that is whether "theft" includes borrowing with intent to return, is excluded through the striking of the bill of exceptions.

Judgment Affirmed.

ATTORNEYS—DISBARMENT—INDEFINITE SUSPENSION—NO. 12515—*People v. Kelley—Decided Feb. 10, 1930.*

Facts.—This was an original proceeding in the Supreme Court against one Kelley for abuse of his privileges and a violation of his trust as an attorney and officer of this Court. A dispute arose between one McCune and one Hower concerning the possession of certain personal property. A legal remedy existed for the settlement of that question. Kelley, representing McCune, attempted to intimidate Hower and twice threatened him with criminal prosecution. These tactics failing, he obtained police assurance that he might resort

*EDITOR'S COMMENT: This issue marks a departure in the conduct of this department of Dicta. Hitherto abstracts of decisions have not been printed until the lapse of the time within which a petition for rehearing might be filed or until such petition, if filed, had been disposed of. In future, such abstracts will be published in the issue next appearing after rendition of the decision. Thus the abstracts are not in a strict sense final. Any withdrawal or modification of any opinion resulting from a petition for rehearing will, however, be duly noted in subsequent digests.

to force without interference. Thereupon he broke down the door, took possession, and held possession of an office room over night. Kelley's threats rendered him liable to a fine of $500 and six months' imprisonment.

Held.—The judgment of the Court is that respondent be indefinitely suspended from the practice of his profession. Mr. Chief Justice Whitford and Mr. Justice Butler concurred in part and dissented in part.

ATTORNEYS—DISBARMENT—SUSPENSION—NO. 12519—*People v. Ginsberg—Decided Feb. 17, 1930.*

Facts.—Original proceedings brought in the Supreme Court on relation of The Colorado Bar Association against Ginsberg to disbar him from practicing as an attorney or otherwise discipline him. The original petition contained four charges.

Held.—1. For a lawyer to advertise for claims against others, whether they are in financial difficulties or not, tends to bring reproach on the legal profession. Such conduct is grossly unethical.

2. A lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

3. The position of an attorney as attorney for the Receiver of a defunct concern and as a private speculator in its securities is wholly inconsistent.

4. Attention is called to the seventeenth canon of ethics.

Judgment of Suspension for One Year.

CONTRACTS—REPURCHASE AGREEMENT—CHATTEL MORTGAGE—AGENCY—NO. 12277—*International Trust Company v. Stearns Investment Company, et al.—Decided January 27, 1930.*

Facts.—The Court below sustained a general demurrer to the complaint, and the plaintiff elected to stand on the complaint. The Water Company, the Investment Company, and the Securities Company were allied and interrelated corporations with interlocking offices and directors.

The Investment Company sold to the International Trust Company a promissory note executed by the Land Company

to secure a Deed of Trust, and the Investment Company agreed "upon request to re-purchase this loan * * * at any time on sixty days' notice at par and accrued interest." When demand was made for a repurchase, the Investment Company was hopelessly insolvent and was unable to re-purchase.

Held.—The Investment Company was under no contractual obligation to repurchase the note, and there is nothing in the record to suggest that had demand been made before it became insolvent, it would not have repurchased it. Faced with the possibility of again becoming the owner of the note, its action in protecting its interest by purchasing the property at tax sale, thus preventing its purchase by a stranger was the exercise of ordinary business prudence. No contractual right of the Trust Company was violated by the transaction. Under the agreement the Trust Company had the right to return the note and receive the amount of the principal of the note, with interest thereon; that, and nothing more. It received that amount when at the foreclosure sale it bought the property for the full amount of the principal indebtedness, interest, costs, and expenses of sale. The demurrer was properly sustained.

Judgment Affirmed.

CONTRACTS—ACCEPTANCE—COUNTERCLAIM—AMENDMENT

No. 12344—*Rugby Coal Company v. Interstate Fuel Company—Decided February 17, 1930.*

Facts.—The Interstate Fuel Company had judgment below against the Rugby Coal Company for balance due for coal delivered. The Coal Company admitted the delivery of the coal and the balance due, but sought by counterclaim to recover damages occasioned by loss of profits arising out of a breach of an alleged contract between the parties by reason of certain letters. The offer of sale was made by letter, and in the alleged acceptance letter, the acceptance was made, but with certain modifications.

Held.—1. The modification of the Fuel Company's offer was substantial and material and effectually operates as a refusal to accept the Fuel Company's offer, and constitutes a counter offer to the Fuel Company, which the record dis-

closes was, in fact, never accepted. The minds of the parties never met upon the exact terms and conditions of the contemplated agreement set forth in the counterclaim, and therefore no enforceable contract was consummated.

2. The first application for leave to amend the counterclaim appears in the brief of the Coal Company in support of its motion for a new trial. Such request came too late, and it was not error for the Court to deny such request.

Judgment Affirmed.

CRIMINAL LAW — AGGRAVATED ROBBERY — EVIDENCE — NO. 12334—*Bunch v. People—Decided January 20, 1930.*

Facts.—Bunch was sentenced for a term of fifteen to eighteen years on a verdict of aggravated robbery. The only assignments argued are: 1—The insufficiency of the evidence; 2—The giving of instruction No. 4.

Held.—Evidence sufficient. Corpus delicti may be made by circumstantial evidence. Rule requiring corroboration of a confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real and not imaginary. Instructions not erroneous.

Judgment Affirmed.

CRIMINAL LAW—MURDER—INSANITY—NO. 12426—*King v. People—Decided Jan. 20, 1930.*

Facts.—Farice King was found guilty of murder in the first degree. Her defense was "not guilty by reason of insanity."

Held.—First: The evidence did not raise a reasonable doubt as to defendant's sanity, and the determination on this point by the jury was final.

Second: The Court did not err in refusing inspection of letters.

Third: Photograph of deceased taken immediately after shooting was properly admitted.

Fourth: Lower Court's treatment of attorney for defendant not prejudicial.

Judgment Affirmed.

CRIMINAL LAW—MURDER—SUFFICIENCY OF EVIDENCE—LEADING QUESTIONS—NO. 12418—*Weiss v. People—Decided February 3, 1930.*

Facts.—Weiss was convicted of murder in the first degree for killing his wife and sentenced to be hanged. At the time of the homicide Weiss was seen running at full speed in pursuit of his fleeing wife out on the street with a gun in his hand and when within eight feet of her, he shot her in the back of the neck severing the spinal cord from which she died.

Held.—1. On a charge of murder, a trial by jury is imperative. In the instant case, the jury has passed upon the credibility of the witnesses and determined the weight of the evidence, and having found the facts against the defendant and the evidence as a whole being sufficient, the verdict of the jury cannot be disturbed.

2. Where the State is taken by surprise in one of its witnesses, it is proper under such circumstances for the State to be permitted to cross examine this witness.

3. Improper questions asked of the defendant by the State on cross-examination where the objection to the question is sustained and the Court later instructs the jury not to consider evidence rejected by the Court is not sufficient to constitute reversible error.

Judgment Affirmed.

INSURANCE—SUICIDE—NO. 12464—*Massachusetts Protective Association, Inc. v. Daugherty—Decided January 13, 1930.*

Facts.—Daugherty recovered judgment on an insurance policy which contained a clause insuring against any loss resulting from bodily injuries effected by accidental means, but excluding self-destruction while sane or insane. The insured committed suicide after the policy had been in force more than a year. No notice was served upon the insurance company of the claim until about two years after the death.

Held.—1. Where a person commits suicide while insane, the death is an accident.

2. Under the Statutes of Colorado, the suicide of a policy holder after the first policy year is not a defense against the payment of the life insurance policy.

3. Where the policy provided for immediate notice of the claim of the company, yet under the circumstances of this case where the policy itself expressly said the company would not be liable in the event that the insured committed suicide, this was sufficient excuse for a delay in making the claim; and further, the very fact that the company put this in this policy was, in effect, a denial of the claim in advance and inured to the benefit of the beneficiary.

Judgment Affirmed.

MUNICIPAL CORPORATIONS—DAMAGES—DEFECTIVE MANHOLE—FAILURE TO SERVE NOTICE OF CLAIM—NO. 12303—*Peek v. City of Lamar—Decided Feb. 17, 1930.*

Facts.—Action by Peek for personal injuries alleged to have been sustained through negligence of the City in permitting a manhole of a storm sewer in one of its streets to remain for a long time in a defective and dangerous condition. General demurrer was sustained by the trial court. Plaintiff elected to stand on the amended complaint and the ruling of the trial court sustaining the demurrer. No written notice was served by the plaintiff upon the City in regard to his alleged injuries within 90 days, as provided in Section 9157, Compiled Laws of 1921.

Held.—In an action against a municipal corporation, to recover damages for an injury resulting from defective streets, the complaint must show that the written notice required by statute has been given, or it fails to state a cause of action.

Judgment Affirmed.

MUNICIPAL CORPORATIONS—FRANCHISE—ELECTIONS—NO. 12452—*Inland Utilities Company, et al. v. Schell, et al.—Decided January 6, 1930.*

Facts.—The town of Burlington, Colorado, an incorporated municipal corporation, was the owner of its electric light plant and also its water plant, which were used in connection with each other. It attempted to pass an ordinance selling its electric light plant to private parties and to grant a twenty-five year franchise without the parties applying for the franchise, advertising that an application would be made

to the town council for a franchise as provided in sections 9172 and 9173 by the Compiled Laws of 1921 and later an election was held in attempting to ratify the sale of the electric light plant.

Held.—The pleadings affirmatively showing that no publication was made of the application for a franchise to operate an electric light plant as provided for in section 9173 of the Compiled Laws of 1921 the lower Court was right granting an injunction enjoining the sale of the electric light plant and the granting of the franchise.

Judgment Affirmed.

PAYMENT—APPROPRIATION—JUDGMENT—SUBPOENA DUCES TECUM—NO. 12053—*Armour & Company et al v. McPhee & McGinnity Company—Decided February 17, 1930.*

Facts.—While case was pending in Supreme Court, trial court requested that claim of one, Vosmer, whose lien had been established, be remitted to the trial court for further investigation because of a showing that had been made indicating misconduct on the part of Vosmer, which caused improper judgment in his favor. Hearing was had on Vosmer's claim, court found that he had testified falsely and that he had failed to produce records required by subpoena duces tecum, and adjudged him guilty of contempt and ordered him confined in the County jail for a period of thirty days.

Held.—1. Vosmer failed to comply with the subpoena duces tecum.

2. The Court did not err in vacating the judgment which had been rendered in favor of Vosmer at the time of the first trial and in entering judgment in favor of Armour and Company, dismissing Vosmer's claim of lien.

3. While a creditor is not obliged to make an application immediately the payment is made, still where he does apply the payment in a particular way, he is bound by his act and cannot afterwards change the application without the consent of the debtor.

4. While a creditor has the right to apply a general payment made, to any account which it may have against the debtor, when no application is made by the debtor himself, yet

this must be done at the time and before any controversy arises. It is too late to make application of payments while preparing for suit or after the suit is instituted.

Judgment Affirmed.

PRACTICE AND PROCEDURE—MISTRIAL—WITHDRAWAL OF COMPLAINT—MALICIOUS PROSECUTION—NO. 11973—*Reagan v. Dyrenforth, et al.—Decided February 24, 1930.*

Facts.—This writ of error is to review a judgment of the Denver district court for $15,000.00 in favor of plaintiffs below (defendants here) for malicious prosecution. The defendant below and plaintiffs below are owners respectively of adjoining mining claims, and have been engaged in litigation for many years in various courts. Plaintiffs began an action against defendant in this case in the district court of Gunnison County for damages for malicious prosecution. On October 5, 1925, a jury was sworn, and thereupon, defendant moved for judgment on the pleadings. The court refused to enter this judgment, but granted plaintiff's request that a juror be withdrawn, a mistrial directed, and that he be given 30 days in which to file a new complaint so that the case might be ready for trial at the April term of the court. The new complaint was not filed in 30 days, but a new action (the present one) was commenced over eight months later in the Denver district court. The defendant filed a motion to dismiss this action, which the trial court overruled.

Held.—The action should have been dismissed. The trial in the district court of Gunnison County having commenced, the plaintiffs did not have an absolute right to withdraw their complaint, but only as and on such terms as the trial court, in its sound discretion might order. The court, in effect, imposed the terms that plaintiffs should file a new complaint in the same court within 30 days. These conditions were not complied with, and plaintiffs could not seek another forum for their action.

Butler J. dissents.

Judgment Reversed and Case Remanded.

PRACTICE AND PROCEDURE—WAIVER—NO. 12255—*Cadwell v. Dunfee, et al.—Decided February 24, 1930.*

Facts.—Cadwell sued Dunfee and Mink for damages for their interference with his alleged "way of necessity" through their land. At the trial, plaintiff waived the claim of statutory "way of necessity", and consented that the case be tried on the existence of an alleged independent agreement. The trial court found no agreement.

Held.—The claim under the statute was waived at the trial and cannot be pressed here. There was no conflicting evidence about the alleged agreement, and the finding of the trial court must stand.

Judgment Affirmed.