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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.)

CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—NO. 12299—*Case Threshing Machine Company vs. Deezautti—Decided June 2, 1930.*

Facts.—This was an action on a promissory note for $350. The plaintiff's evidence tended to show that the note had been paid. Defendant had possession of the note and claimed payment. Plaintiff contended that the note was mailed to the defendant by mistake, and furthermore that the note was not marked paid. A verdict was had for the defendant and the plaintiff alleged error in the refusal of the Court to give instruction to the effect—

1. That the mere fact that the plaintiff was a corporation should make no difference with the finding of the fact by the jury.

2. That circumstantial evidence is legal evidence, and it is often more reliable than the direct statements of witnesses.

Held.—1. It is within the discretion of the Court to grant or refuse an instruction such as this, and there does not appear to be any abuse of that discretion.

2. "The tendered instruction as to circumstantial evidence was properly refused, if for no other reason because there was no proper definition of circumstantial evidence."

3. Being ample evidence to support the verdict it will not be disturbed by this Court.

Judgment Affirmed.

CONTEMPT—ORIGINAL PROCEEDINGS—NO. 12602—*People, ex rel Attorney General vs. Thomas—Decided June 16, 1930.*

Facts.—The respondent, a licensed attorney for the state of Missouri, saw an accident in which a minor was injured. He subsequently offered to take up the case for the parents

of the injured boy. Later, he had professional cards printed, and after this, he petitioned for leave to take the examination for the Colorado Bar. He filed a complaint in the above injury case, signing himself as Attorney for the Plaintiff. Upon consultation with a local firm, he was advised that upon securing permission from the trial court, he could act as an attorney in the anticipated action. The record did not show that any such permission had been obtained, but it did show that the respondent at all times thought that he had permission. The commissioner who conducted the hearing recommended leniency "since the respondent acted in the belief that he was within the rule of comity and usage."

Held.—Respondent adjudged in contempt and ordered to pay $50 and costs or to go to jail for 10 days.

CRIMINAL LAW—FIRST DEGREE MURDER;—TIME FOR TRIAL—ADEQUACY OF;—VENUE—MOTION FOR CHANGE OF;—PLEA OF GUILTY—RIGHT TO CHANGE;—OTHER CRIMES—EVIDENCE OF—ADMISSIBILITY OF;—MITIGATING CIRCUMSTANCES—EVIDENCE OF;—INSTRUCTIONS—REFUSAL OF;—MOTION FOR NEW TRIAL—REFUSAL OF—No. 12558—*George J. Abshier vs. People—Decided June 9, 1930.*

Facts.—The defendant pleaded guilty of his activities in the robbery of The First National Bank at Lamar, Colorado. He was convicted of first degree murder, though he did not perform the killing himself, and was sentenced to death. The facts are well known and will not be set out here. Many allegations of error were set out, the important ones being as follows: 1. The crime of which defendant was convicted and the gist of the defense, 2. refusal of the trial court to grant continuance of two weeks instead of six days allowed, 3. refusal to change place of trial for alleged prejudice of inhabitants, 4. alleged bias or prejudice of jurors, 5. refusal to permit defendant to change plea of guilty to not guilty, 6. admission of evidence of other crimes connected with the crime charged, 7. evidence in mitigation or aggravation of offense, 8. instructions to the jury, 9. time for presenting motion for new trial, and denial of motion when presented.

Held.—1. "If the homicide in question was committed by one of his (defendant's) associates engaged in the furtherance of the common purpose to rob, he is as accountable as though his own hand had intentionally and actually fired the fatal shot and is guilty of murder in the first degree."

2. Six days having been allowed, the refusal of the court to allow two weeks for the defendant's counsel to prepare their case was not error. The gravity of the crime is not the sole standard for determining the length of time that a defendant shall have before he be tried. "If it were, an outlaw could rest assured that the greater the enormity of his offense, the longer time he would have to evade its consequences."

3. "The granting or refusal of a motion for a change of place of trial is one of the many matters wisely lodged in the discretion of the trial court, and in the absense of abuse, the order will not be disturbed."

4. The most prejudicial juror named by the defendant was one who testified that he had not arrived at any conclusion as to the defendant's punishment, nor had this juror been challenged for cause. There was no error here.

5. "An application to change a plea is addressed to the sound discretion of the court. Its ruling will be reversed only for abuse of that discretion resulting in prejudice."

6. Evidence of other crimes committed by the defendant was admissible insofar as it was essential for the purpose of placing a related story of the crime here involved before the jury. "Where relevant evidence is offered, it may be admitted notwithstanding it may disclose another indictable offense." "Such evidence is also admissible to show an aggravated crime, or in mitigation if there had been any such circumstances."

7. The reason the defendant did not prove mitigating circumstances was because there were none to prove; not because evidence thereof was excluded. The burden of proving circumstances of mitigation is upon the defendant.

8. It is not error to refuse instructions which correspond to those given. Nor can a party complain when the instruction given is more favorable than the one refused.

9. It is within the discretion of the court to grant leave to even file a motion for a new trial. Even more so, then, is it within the courts discretion to allot the time within which such a motion can be made.

Judgment Affirmed with orders to execute it during the week of July 19.

No. 12,559—*Howard L. Royston vs. People—Decided June 9, 1930.*

The facts here involved were, with the exception of a few details, the same as those in Abshier vs. People, *ante*. The assignments of error are substantially alike, and the judgment is sustained upon the same grounds.

Judgment Affirmed with orders to execute it during the week of July 19.

CRIMINAL LAW—FIRST DEGREE MURDER—CONFESSIONS—INDUCEMENT OF BY PROMISE OF IMMUNITY FROM DEATH—VALIDITY OF PROMISE; — JURORS — PREJUDICE OF — NO. 12580—*Ralph E. Fleagle vs. People—Decided June 9, 1930.*

Facts.—This is a companion case to Abshier vs. People, ante; and Royston vs. People, ante. The case involves only three elements which are not already discussed in the Abshier case, namely: (1) The alleged agreement pertaining to the penalty to be inflicted on the defendant; (2) Bias or prejudice of a juror; (3) Alleged prejudicial remarks by the special prosecutor.

Held.—(1) The defendant claims that he was promised immunity from the death sentence in lieu of his confession. Attorneys for the prosecution deny any such agreement, but state that they promised not to *ask* for the death penalty. The record shows that the death penalty was not asked, although instructions which sought to direct the verdict for life imprisonment were denied.

"Jurors are constitutional officers; they have their appointed function to perform, one of which is to fix the penalty in a case of this kind submitted to them. The court can not lawfully usurp this power, nor set aside the legislative will, and the trial court wisely refrained from doing so when requested

by an erroneous instruction tendered by the defense and refused. No one may acquire a power of attorney from the jury to make a 'compact' on its behalf."

(2) Affidavits of statements made by one of the jurors before trial were produced, the substance of which was that the juror would "stay in the jury room forever before I return any verdict except one of death." This juror, by affidavit, denied having made such a statement.

"The killing is admitted. The circumstances attending the homicide were such as to provoke comment, and it would tend to obstruct the administration of justice, with little benefit to persons accused of crime, to hold that remarks derogatory to a defendant would disqualify one to act as juror."

(3) Objection was made that the remarks to the jury by the special prosecutor were too severe. "It is impossible for us to think of any language that could have been used stronger than the evidence itself." Even so, the court asked the jury to disregard these remarks. "The prosecution did not ask for the death penalty, but the evidence urged it."

Judgment Affirmed with orders that it be executed during the week of July 12.

DECEIT — RESTRICTION OF ALIENATION — DAMAGES — NO. 12378—*Chandler vs. Ziegler—Decided June 16.*

Facts.—Action for deceit. Plaintiff purchased a lot from a group owned by the defendant upon the representation that all of the lots therein were restricted so that they could never be sold, leased, or occupied by a colored person. Plaintiff alleged that the lot adjoining his was sold to a Japanese.

An instruction given by the court directed the jury to allow additional damages "sustained by reason of annoyance and inconvenience." The jury awarded the plaintiff $400.

Held.—The evidence of the difference in the value of the lot was sufficient to go to the jury. The error in the instruction as to the measure of damages necessitates a reversal. "The measure of damages where the property would be more valuable had the representation been true is the difference between the actual value of the lot at the time of its purchase, and what its value would have been had the representation been true."

(2) "A person owning a body of land and selling part of it may, for the benefit of his remaining land, lawfully impose certain restrictions upon the use or occupancy of the land sold."

" . . . the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to utter subversion of the estate, such as prohibit entirely the alienation or use of the property."

Judgment Reversed and remanded for a new trial on the question of damages only.

GIFTS INTER VIVOS—LOTTERIES—NO. 12298—*Hardy vs. Carrington—Decided May 26, 1930.*

Facts.—The Western Colorado Fair purchased an automobile from the Carrington Chevrolet Company which was raffled to the plaintiff at a fair held in Montrose, Colorado in September 1927. The plaintiff expressed his dissatisfaction with the car and did not take it. The plaintiff's father declared his opposition to gambling and the final outcome was that the father and son agreed to give whatever interest the son had in the car back to the association, with the understanding that it would be sold to pay premiums due from the association to exhibitors. Pursuant to this understanding, the association returned the car to the Carrington Company who in turn returned the purchase check to the association. Subsequently, the plaintiff decided he wanted the car and sought to rescind his gift. To a judgment for the defendant, the plaintiff alleged error.

Held.—(1) "If it were necessary to pass upon the validity of this plan or scheme to attract visitors to the fair, we might be compelled to declare the entire plan illegal and that the plaintiff was entitled to no relief whatever in any view of the case."

(2) There was a valid gift by the plaintiff to the association. "The essentials of a completed gift *inter vivos* are: 1. A clear and unmistakable intention to make the gift; and, 2.

A consummation of such intention by those acts which the law requires to divest the donor and invest the donee with the right of property."

Judgment Affirmed.

INSURANCE—ACCIDENT POLICIES—SUICIDE CLAUSE—NOTICE —NO. 12464—*Massachusetts Protective Association, vs. Nora V. Daugherty.—Decided May 26, 1930.*

Facts.—The plaintiff's husband carried an accident policy with the defendant company. More than a year after the policy was executed, the insured committed suicide. The court found that he was insane at the time of the suicide. The Plaintiff did not give notice of the death of the insured to the defendant for more than two years after the suicide and her claim then was denied by the company which called attention to the provision of the policy which provided that the company would not be liable on the policy if the insured committed suicide while either sane or insane. Judgment was rendered for the plaintiff, and the defendant alleged error.

Held.—1. The C. L. '21, Sec. 2532 provides that suicide, committed after one year from the issuance of a policy, while either sane or insane, shall be no defense against the payment of a life insurance policy. This provision has been held applicable to accident policies also.

2. Notice to the company was unnecessary in this case because:

A. Upon learning of the invalidity of the suicide exemption provision of the policy, notice was immediately given by the plaintiff.

B. "The absolute refusal of an insurer to pay the loss in any event waives compliance with a provision requiring notice and proof of loss."

Judgment Affirmed.

JUDGMENTS—MOTION TO SET ASIDE—FRAUD AS GROUNDS FOR—NO. 12415—*Gardner vs. Rule—Decided June 16, 1930.*

Facts.—The plaintiff was the payee in a cognovit note made by the defendant. Without service on or appearance by

the defendant, the plaintiff recovered judgment. More than a year after the term in which this judgment was had, had expired, the defendant asked to have the judgment set aside, alleging payment prior to the original action, and contending that the judgment constituted a fraud upon him. Upon the hearing, it was ordered that the judgment be set aside and the defendant be permitted to answer. To the answer which alleged payment, plaintiff filed his replication denying payment. The jury returned a verdict for the defendant.

The plaintiff relies chiefly upon the provision of the code which permits relief from a judgment upon proper showing made prior to six months after the adjournment of the term in which the judgment was rendered.

Held.—" . . . a proceeding to cancel a judgment procured by fraud is not barred by the limitation of one year . . ." " . . . a judgment thus procured is not merely a fraud upon the judgment debtor but also upon the court that gave the judgment."

Judgment Affirmed.

LACHES—STATUTE OF LIMITATIONS—ESTOPPEL—NO. 12489 —*Greeley Gas and Fuel Co. and Ocean Accident and Guarantee Corporation, Ltd. vs. Thomas—Decided June 16, 1930.*

Facts.—In 1919, the Plaintiff Thomas was injured while employed by the defendant fuel company. Final judgment was had for the plaintiff in 1929. The injury had been caused by a third person, one Lohrey, against whom the plaintiff secured a judgment for $10,000, which was never satisfied.

The defendant sets up two defenses, namely; the Statute of Limitations (the Plaintiff had not given notice within the one year as required by the statute.) and Laches. The plaintiff contended that the defendant is estopped from asserting these defenses. The evidence which supported the plaintiff's contention of estoppel was that the plaintiff had proceeded against the third party upon the advice of the defendant and with the "acquiesence and encouragement" of the insurance company. There was no evidence of damage to the defendant or the Insurance company because of the delay. Judgment was had below for the plaintiff.

Held.—A defendant can not seek to avoid his liability by pleading the Statute of Limitations or Laches, when the plaintiff has delayed his action with the acquiesence and encouragement of the defendant, for the express purpose of decreasing the defendant's loss.

Judgment Affirmed.

MORTGAGE—FORECLOSURE OF—NEGOTIABLE INSTRUMENTS—ENDORSEMENT — EVIDENCE OF — LACHES — NO. 12289—*Middlesex Safe Deposit & Trust Company vs. Frankie Jacobs, formerly Wason, and Lily Gaffner.—Decided May 19, 1930.*

Facts.—This was an action to foreclose a mortgage deed on real estate executed by the defendant in favor of one Coram and alleged to have been assigned to the Plaintiff. The plaintiff introduced the note, which was admitted to have been executed, and rested. The defendant set up three affirmative defenses of which two are considered, namely: 1. That the note and mortgage were executed without consideration, but merely as an act of friendship to aid Coram in securing some ready cash, and with the understanding that the defendant would never be held on the instruments. This defense further alleges that she had no notice of the alleged assignment and sale to the plaintiff until long after this assignment and sale were supposed to have taken place. 2. That the plaintiff had been guilty of laches insofar as it had failed to prosecute its rights diligently, and that if the plaintiff had so proceeded, the defendant would have had a remedy against the payee, Coram, who had gone bankrupt long before the defendant was given notice of this action. The lower court held for the defendant and the plaintiff alleges error.

Held.—1. Where there is a denial of the assignment and endorsement of a mortgage and promissory note, both the execution and the endorsement must be established by competent proof. The mere introduction of the instrument into evidence is insufficient.

2. When a creditor has in his hands the promissory note of a third person as collateral for a loan to a debtor who subsequently becomes bankrupt, it is the creditor's "duty to

file its claim . . . in the bankruptcy proceedings, which it did not do," before it can hold the third party.

Judgment Affirmed.

NEGOTIABLE INSTRUMENTS—FRAUD—TRUSTEE IN BANKRUPTCY IS PURCHASER WITH NOTICE—NO. 12300—*Investors Finance Company vs. Joseph Bodnar—Decided June 9, 1930.*

Facts.—The plaintiff sued upon a promissory note for $750 upon which the defendant had paid $300. The plaintiff claimed to be a bona fide purchaser for value. The defendant admitted the execution of the note, but pleaded no consideration. The answer further sets out that the payee of the note, the Thrift Mercantile Company, had secured the defendant's subscription to stock on representations that the Thrift Co. would build a large store from which the plaintiff could purchase goods at a discount of 30%. The answer further states that no stock had ever been issued to the defendant. The replication alleged that the note was given for 100 shares of preferred stock in the Thrift Mercantile Company, the payee of the note, and that the Thrift Mercantile Company was adjudicated a bankrupt. The replication further states that this note, as part of the assets of the Thrift Company, was turned over to the Plaintiff by the Trustee in Bankruptcy as partial payment of a debt of $126,000 which the Thrift Company owed the plaintiff.

The evidence showed that the plaintiff company and the Thrift Company were mostly composed of the same individuals, that they had adjoining offices, and employed the same attorney. Judgment was had for the defendant.

The questions presented by the writ of error were:

1. Was there a failure of consideration for the note.
2. Was the plaintiff a holder in due course without notice.

Held.—1. While the false representations here were insufficient to sustain an action for fraud, insofar as they were made as to the future acts of the company, the defense was lack of consideration, not fraudulent representation. The lack of consideration is clearly shown.

2. The validity of a note in the hands of a bankrupt can not be determined by the proceedings in bankruptcy in which the maker of the note had no opportunity to be heard. Neither the trustee in bankruptcy, nor those who claim under him, can be considered as bona fide purchasers for value without notice—they merely step into the shoes of the bankrupt.

3. An unfulfilled promise will not be deemed such consideration as will support an action to recover on a promissory note, and as against all but a bona fide purchaser for value without notice lack of consideration is a good defense.

Judgment Affirmed.

PARTITION—COLLATERAL ATTACK—NO. 12314—*Second Industrial Bank vs. Marshall—Decided June 16, 1930.*

Facts.—Plaintiff seeks partition and sale of lands, alleging itself to be a tenant in common with the defendant. Defendant denied the plaintiff's interest and further alleged that the plaintiff obtained a judgment against one "Thomas" Marshall in justice court for $132.20, and that the justice certified a "pretended transcript" on the judgment to the district court, but that it appeared from the transcript that no execution was ever had upon the judgment; the defendant further alleged that "James" Marshall, the defendant's husband, had at all times been able to satisfy the justice court judgment, and that James Marshall was the owner of an undivided half of the land in question and that the defendant was the owner of the other undivided one half, and that the entire property had been homesteaded. The district court issued a fi fa pursuant to which a sheriff's deed was issued to the plaintiff. The defendant contended that this deed was a cloud upon her title. It was further alleged that two months after the sheriff's deed was issued, James Marshall tendered to the plaintiff $157.50 as full payment of principal interest, and costs, and that this tender was refused. The plaintiff's replication admitted all of the defendant's allegations except that the deed was a cloud on the defendant's title, and alleged that the homestead was entered subsequent to the date of the sheriff's deed. The court sustained a demurrer to the replication and dismissed the suit. The writ of error

presents these questions; (1) Must execution issue on a justice court judgment and be returned unsatisfied, before a transcript thereof can be legally filed? and (2) Can the plaintiff's sheriff's deed be collaterally attacked?

Held.—It is unnecessary to answer the first question because defendant "is a stranger to plaintiff's title and has no interest in the outcome of this action. Her attack thereon is collateral and cannot be maintained."

Reversed and Remanded.

Note: The opinion shows no connection between Thomas and James.