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# Colorado Supreme Court Decisions

Dicta Editorial Board

# 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.)

SUITS TO QUIET TITLE—LIENS—OPTIONS—NO. 12279—*Thomas E. Anderson vs. E. H. Pihlstrom Investment Company, et al.—Decided May 19, 1930.*

*Facts.*—This is a suit to quiet title to property, alleging title and possession. The defendant, the Title Investment Company, failed to answer. The defendant, E. H. Pihlstrom Investment Company, cross-complained, claiming a lien for $2500 which was evidenced by a certain recorded document. The plaintiff contends that this document is no more than an unexecuted option.

On July 2, 1924, the defendant obtained in a trade with one Mrs. Rose A. Agnew, two notes, one for $1000, and the other for $2491.23 secured by a deed of trust to property located in Jefferson County. Upon default, this property was foreclosed and bid in by the defendant for the amount of the smaller note. The defendant received a public trustee's deed on May 15, 1926.

On June 26, 1925 Mrs. Agnew transferred the title to the property in question (a residence in Denver) to the Defendant, The Temple Investment Company, of which she was the organizer and the President.

On September 11, 1925, the recorded contract, which it is now contended constitutes a lien, was executed. On January 5, 1926, The Temple Company transferred, by Quit Claim Deed, the property now in question to the Plaintiff. This deed was recorded on March 2, 1926 on which date Mrs. Agnew died.

The terms of the contract in question, made between the Pihlstrom Company and the Temple Investments Company, provided if the Temple Company would pay the notes of $1000 and $2491.23, the taxes, and the foreclosure costs by executing a Deed of Trust to the Denver property (now in question) within ten days after the Pihlstrom Company re-

ceived a Trustee's Deed to the Jefferson County property, that then the Temple Company was to have the right to purchase the Jefferson County property, and that this Deed of Trust before mentioned was to constitute full consideration for the transfer of the Jefferson County property to the Temple Company. It was further provided that time was the essence of the contract. The rights of the Temple Company under this contract were never exercised.

The lower court held that Plaintiff had title subject to the lien claimed by the Defendant. Plaintiff alleged error.

*Held.*—"Undoubtedly this instrument is nothing more than a mere conditional option" the privileges of which have not been exercised. Accordingly, it can in no way be construed as a lien.

*Reversed and Remanded.*

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CONTRACTS—INTERPRETATION OF—NO. 12268—*Martha A. Brown and Hazel Brown Flanagan vs. The Estate of John J. Roche, Deceased.—Decided May 19, 1930.*

*Facts.*—The Plaintiffs, as sole heirs of D. W. Brown, claimed 1212 shares of stock in the Rocky Mountain Fuel Company from the estate of John J. Roche. The transaction from which the claim arose contained the following writing, "Apr. 4th 1922—In settlement made this date between D. W. Brown and John J. Roche on Pfd and Common Stock R M F Co, there are shares of Pfd and Common Stock Said Co—Still due D. W. Brown—John J. Roche". Between the words "are" and "shares", there appeared a figure which could be taken as 1212 or as 12½. The County Court allowed the claim for 1212 shares and an appeal was taken to the district court, where, from evidence not presented in the county court, an award was made for 12½ shares. The court found that the last "1" in the figure "1212" was intended as a fractional line making the amount 12½ shares. Plaintiffs allege error.

*Held.*—The findings of fact of the district court on the trial, without a jury, was well justified by the evidence, and they will not be disturbed by the higher court.

CONTRACTS—SEVERABLE—CONSTRUCTION OF—No. 12271—*Gus Stroup and J. L. Shepard, co-partners, doing business under the firm name and style of Stroup and Shepard, and Gus Stroup vs. P. C. Pearce—Decided May 19, 1930.*

*Facts.*—The Plaintiff, Pearce sued to recover $635.60 alleged to be owing to him for hauling ties. The terms of the written contract were substantially as follows.

In the first paragraph of the contract, the Plaintiff agreed to haul ties from Dutton Creek Landing, Wyoming, to Rock River, Wyoming, the job to be completed by a stipulated time. The second paragraph of the contract provided that Stroup was to pay 17c per tie for all ties hauled from Dutton Creek Landing, "and the sum of 2c for each tie per mile or fraction thereof hauled from above Dutton Creek Landing" plus the 17c for hauling from Dutton Creek Landing to Rock River. The third paragraph provided that the Plaintiff should execute a bond to assure his performance.

The bond which was executed assured performance by the Plaintiff in hauling from Dutton Creek Landing. The question was whether or not the Plaintiff had obligated himself to haul ties from above Dutton Creek Landing.

The trial court held that the Plaintiff, by the terms of the contract, had received the right to haul from above Dutton Creek Landing for the additional compensation, but that he had not obligated himself to do so. Judgment was given for the Plaintiff.

*Held.*—If the contract was ambiguous, the parties, by the execution of the bond, placed their own construction upon it.

*Judgment Affirmed.*

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PARTNERSHIP — RETIRING PARTNER — LIABILITY OF — No. 12554—*Robert S. Faricy vs. J. S. Brown Mercantile Company, a Corporation—Decided May 12, 1930.*

*Facts.*—Faricy and one M. C. Davis were engaged in a partnership. The partnership was dissolved and Davis retained the assets of the firm and agreed to pay the existing liabilities. Faricy notified the plaintiff company of the terms of the agreement and told them to proceed to collect from

Davis what was due them. Davis, it was alleged, was then solvent and able to take care of his obligations. Subsequently, Davis became insolvent. The Brown Company, not having been paid instituted this action. The defendant contended that the planitiff had not pursued its action against Davis diligently and that therefore this action should be barred. Judgment was had for the plaintiff in the trial court.

*Held.*—"Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement consents to a material alteration in the nature or time of payment of such obligations." Here, the creditor did not consent nor can his refusal to sue Davis be construed as consent to any alteration of the obligation.

*Judgment Affirmed.*

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INJUNCTION—NAMES—RIGHT TO USE OF—NO. 12242—*L. I. DaPron vs. J. T. Russell, doing business as DaPron School of Dancing—Decided May 12, 1930.*

*Facts.*—J. T. Russell brought this action to restrain the defendant "from using the name DaPron in any manner pertaining to a school of ballet and ball room dancing." The plaintiff came into ownership of a dancing school originally owned and operated by the defendant. Defendant, a considerable time after the plaintiff owned the school, started another school known as "The DaPron School for Ballet and Ball Room Dancing." The plaintiff sought an injunction and the defendant counter claimed for an injunction, each seeking to enjoin the other from using the name DaPron in connection with a ball room. The trial court dismissed the counter claim and granted plaintiff an injunction. Defendant alleged error.

*Held.*—A man has a right to use his own name in conducting his business so long as he is not guilty of "fraud, deceit, or other unfair or dishonest practice, or that he violated some contractual obligation respecting the use" thereof.

***Judgment reversed with instructions to dismiss the complaint.***

WATER RIGHTS—PRIORITIES—ABANDONMENT—NO. 12151—*The South Boulder Canon Ditch Company, a Corporation vs. The Davidson Ditch and Reservoir Company, a Corporation, and The New South Boulder and Rock Creek Company, a Corporation.—Decided May 12, 1930.*

*Facts.*—The Plaintiffs were junior and the Defendants senior appropriators to water rights. Defendants, by virtue of a decree of 1882, held an adjudicated right to a total of 218.37 cubic feet per second. The Plaintiff sought to enjoin the defendant from using more than 66 feet of the defendant's decreed water on the grounds that the remainder had been abandoned. The evidence showed that for a period of forty years subsequent to the adjudication, the defendant used but 66 feet of the water. The lower court granted the injunction. Defendant alleged error.

*Held.*—"While the record in this case undoubtedly discloses evidence of intention to abandon, other than that imputed by non use over a long period of years, still we have no hesitancy in ruling that evidence of non-use of water for a period of forty years in itself is sufficient to prove a prima facie case of abandonment."

*Judgment Affirmed.*

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WATER RIGHTS — PERCOLATING WATERS — EVIDENCE—SUFFICIENCY OF—NO. 12276—*The Pure Springs Supply Company, a Colorado Corporation vs. The Town of Olney Springs, Colorado, et al.—Decided May 12, 1930.*

*Facts.*—The Plaintiff Corporation sought to enjoin the Defendant Municipality from using wells constructed by the Defendant to supply its citizens, on the grounds that the Defendant's use caused a diminution of the Plaintiff's supply. Plaintiff was prior in time and Defendant's wells were on adjoining tract of land to that on which were the wells belonging to the Plaintiff. The trial court found for the defendant stating that the Defendant's use did not interfere with the Plaintiff's supply.

*Held.*—The Supreme Court will not disturb the findings of fact of the trial court unless it appears that such findings

are not sustained by the evidence.

*Judgment Affirmed.*

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ATTORNEYS AT LAW—DISBARMENT—NO. 12520—*The People of the State of Colorado ex rel The Colorado Bar Association Petitioner vs. Samuel Winograd—Decided May 5, 1930.*

*Facts.*—On complaint by the Grievance Committee of the Colorado Bar Association acting pursuant to rules of the Supreme Court five specific charges were recorded against the respondent. No evidence was offered as to one of the charges, and the evidence as to another was brief and unsatisfactory. The remaining three are namely:

1. The Flood-Konklin charge is to the effect that respondent failed to make settlement for monies collected by him for his client until he was forced to do so.

2. One Price employed the respondent to file a mechanics lien, which respondent failed to do, so that his client was deprived of his lien and compelled to employ another attorney.

3. Gonzales and Doninques employed the respondent to represent them on a grand larceny charge. Respondent agreed that if the defendant were given a penitentiary sentence he would refund his fee. Defendant's clients were sentenced to the penitentiary and respondent gave his note for the returnable fee. This note has not been paid.

*Respondent Indefinitely Suspended.*

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ATTORNEYS AT LAW—DISBARMENT—NO. 12592—*The People of the State of Colorado upon the Relation of the Attorney General vs. John G. Powell—Decided May 5, 1930.*

*Facts.*—Respondent, according to the charges against him represented to Phillip Van Cise in the Ver Stratton case that for proper consideration he could furnish the names of certain members of the jury panel who would vote for acquittal. Respondent in his answer refused to admit the charges but would not defend himself against them.

*Held.*—"By failure to deny the same the respondent in legal effect admits the charges to be true."

*Respondent disbarred.*

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INJUNCTION — PROPER PARTIES — SALES—NO. 12295—*The Denver Milk Bottle, Case & Canned Exchange, Inc. vs. J. A. McKinzie—Decided May 5, 1930.*

*Facts.*—The plaintiff corporation composed of 75 members was organized to collect the bottles of its members and re-distribute them to their proper owners. Compiled Laws 21 provides that the owners of milk bottles may register their mark with the Secretary of State and stamp that mark upon the bottles owned by them. All of plaintiff's members had complied with the statute. Defendant who is not associated with the Exchange admits possession of 110 bottles bearing the names of 16 members of the Association. Defendant contended first that the plaintiff was not the party to bring the action, but that it should have been brought by the members whose bottles he held. Second, that injunction should not lie, the plaintiff having adequate remedy at law, and third that the defendant was the owner of the bottles in question. The trial court held for the defendant and the plaintiff alleged error.

*Held.*—1. The Exchange, in the furtherance of its obvious corporate purpose can protect its various members. Hence, if injunction is the proper action the plaintiff is the proper party.

2. It having been shown that the cost of suit was clearly more than the value of a recovery in an action to retrieve the bottles or to recover their value, and in so far as such remedies offer no protection against future offences "the preventive remedy is injunction, the only remedy that is adequate."

3. As milk bottles are never sold but are merely loaned, any deposit placed upon them by a consumer or dealer being merely to insure their return, the defendant could not have purchased them as he contended in so far as no title could pass to him.

*Reversed and Remanded.*

QUIET TITLE—LIENS—PUBLIC TRUSTEE SALES—NO. 12274—*M. C. Harrington and R. W. Hershey as the Manager of Safety and Excise ex officio Sheriff in the City and County of Denver vs. Enoch Anderson.—Decided May 5, 1930.*

*Facts.*—This was an action by Anderson to quiet title to lands against which Harrington contended he held a lien. On March 5, 1924, one Hahnwold executed a trust deed to the Public Trustee to secure a loan made by the Western Finance and Development Company. Subsequently because of default, foreclosure was had by the Public Trustee at which the Star Investment Company became the purchasers. The Public Trustee issued a certificate of purchase on August 25th, 1925. On May 9th the State Bank Commissioner recovered judgment against Hahnwold. On September 5th the judgment was assigned to the defendant. On February 18, 1926, the Star Company recovered judgment in the District Court against Hahnwold. There was no redemption from the Trustee's sale during the six month period. On February 26th the Star Company as a judgment creditor redeemed from the sale. The Star Company got an execution on its judgment and procured a sale by the sheriff. The sheriff's deed to the Star Company was dated March 29th, 1926. Plaintiff acquired the rights of the Star Company. Plaintiff also paid off a prior mortgage on the property and secured a release thereof. Defendant procured an execution on his judgment, and on September 21st a notice of levy on the land in question was filed. Shortly before the time set for the sheriff's sale on defendant's levy, plaintiff brought this action to quiet title. The trial court held for the plaintiff.

*Held.*—Session Laws 23 Chapter 185 gives judgment creditors of a mortgagor a right after the expiration of six months, and before nine months to redeem lands which were not redeemed by the mortgagor.

Plaintiff's grantor complied with the statute and defendant's grantor did not.

*Judgment Affirmed.*

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CONTRIBUTORY NEGLIGENCE—EASEMENT—LACK OF MEMORY—INSTRUCTIONS—NO. 12216—*The Mountain States Tele-*

*phone and Telegraph Company, a corporation vs. Charles J. Sanger—Decided May 5, 1930.*

*Facts.*—Plaintiff while riding a horse was injured by colliding with the defendant's telephone lines, which crossed his the plaintiff's land. Defendant had an easement over the land to maintain their lines secured from Plaintiff's grantor. From a judgment for the plaintiff for $9000 defendant brings error.

*Held.*—1. Defendant had only such an easement as was necessary for their use without any more than the peril necessarily involved in such use. Phone lines should not menace travel.

2. An instruction that it was the defendant's duty to maintain its lines so as not to interfere with the plaintiff's use is objectionable, because it would deny the defendant's right to the proper use of their easement if that use were inconsistent with the plaintiff's use of his land.

3. An instruction stating the measure of damages and enumerating "bodily pain", "mental suffering", "actual damages", "impairment of health" and "permanent injury" was objected to as misleading in so far as all of these are included in "actual damages", the court directs that the instruction be remedied so as to avoid the possibility of being misleading.

4. Justifiable distraction and forgetfulness relieves a party of contributory negligence. The question as to what constitutes justifiable distraction is one for the jury.

5. A man can introduce evidence of his earning capacity, even though he be a farmer with capital invested, not for the purpose of offering a measure of damages but to aid the jury in estimating a fair compensation for being prevented by the complained of injury from engaging in his work.

*Reversed and Remanded.*

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DOGS—RABIES—NEGLIGENCE IN KEEPING DOGS—INSTRUCTIONS—NO. 12292—*John Carlberg vs. Joe Willmott—Decided May 5, 1930.*

*Facts.*—Plaintiff kept a herd of milch cows one of which was bitten by defendant's dog. The injured cow died from

rabies, and plaintiff had his entire herd vaccinated. The plaintiff's evidence showed the reasonable value of the cow to be $150 and the cost of vaccinating $100. Prior to this event the town counsel had warned all owners of dogs to keep them securely restrained, it having been learned that rabies was prevalent in the community. Defendant admitted having been warned but alleged that he had complied with the warning, and that at the time the plaintiff's cow was injured the defendant's dog had been set free by another person against the defendant's wishes and without his knowledge. The case was tried upon the theory of negligence exclusively, and not with reference to the common law or statutory liability. Judgment was had in the Justice of the Peace Court for $250, and defendant appealed to the County Court where verdict was entered for $150. To review this judgment defendant brought error.

*Held.*—1. When the owner of a dog knows of the presence of rabies in the community "he becomes liable for all damages by reason of injuries inflicted by the dog when rabid."

2. Objections to instructions must be made in compliance with the rule 7 of the rules of the Supreme Court or it will not be considered.

*Judgment Affirmed.*

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DEED OF TRUST — FORECLOSURE — BROKERS—AGENCY—NO. 12,312—*Alma Hahn vs. Bert L. Alexander, The Interstate Securities Company, The Farmers State Bank of Brush, Colorado, et al—Decided April 28, 1930.*

*Facts.*—Alexander made a note dated January 2, 1917, due January 2, 1924, secured by deed of trust on land in Washington County, Colorado. The note and interest coupons attached to it were all made payable to The Interstate Securities Company in Minneapolis. March 8, 1917 the note was assigned to John Hahn, and thereafter to Margaret Hahn, the plaintiff in this case, who alleged that certain interest coupons and the principal had not been paid, and prayed for judgment against the makers and for a foreclosure of the deed of trust. The evidence shows that the principal and interest were paid

to The Interstate Securities Company but were not remitted by it to Hahn. In 1924 the company went into the hands of a receiver. The evidence showed that Hahn had owned another loan which he had purchased from The Interstate Securities Company, and had expressly authorized it to represent him in its collection. The lower court found that The Interstate Securities Company was the agent of Hahn in this case and not the agent of Alexander. Judgment was entered for the defendant and foreclosure was denied.

*Held.*—The lower court was right and the various cases cited by the plaintiff in support of her case were based upon facts unlike those in the present case.

*Judgment Affirmed.*

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IRRIGATING WATER—PRIORITIES—ADJUDICATION—JURISDICTION—NO. 12,582—*Fred W. Hazard, et al vs. The Joseph W. Bowles Reservoir Company, a corporation—Decided April 29, 1930.*

*Facts.*—In the general adjudication proceeding in the District Court of the Fourth Judicial District in Douglas County plaintiff company was awarded a reservoir priority in Patrick Lake. In the same proceeding the senior priority in the same lake was awarded to Hazard but the decree thereafter was changed, making the corporation's priority senior to that of Hazard. Thereafter the corporation brought suit for an injunction to restrain Hazard from taking any of the water from the Patrick reservoir which is contained in it from the bottom of the present outlet of Bowles reservoir. The District Court for the First Judicial District in Arapahoe County issued an injunction restraining Hazard from using any of the water from the reservoir.

*Held.*—The Arapahoe County District Court had no jurisdiction to decide this question because the District Court of Douglas County first acquired jurisdiction to adjudicate the relative priorities of right to use water from the reservoir. Thereafter no other District Court had any jurisdiction to hear an action attempting to modify in any way the decree entered by the District Court of Douglas County.

*Judgment Reversed and Remanded with Instructions.*

CRIMINAL LAW—MURDER—EVIDENCE—NO. 12,493—*Amelio Herrera vs. The People of the State of Colorado—Decided April 28, 1930.*

*Facts.*—Herrera was convicted of murder in the first degree for killing his wife. The evidence showed that he had pulled her into a dark and narrow passage-way. Shortly thereafter there was the report of a gun shot, the scream of a woman and three more gun shots. A man fled from the entry-way but was not caught. Thereafter Herrera registered at a rooming house under an assumed name. The next morning he was arrested. His first story was that his wife had committed suicide. This was followed by a statement that he had shot her. His statement was again changed to a declaration that the gun had been accidentally discharged while he and the deceased were struggling for its possession.

*Held.*—Credibility of the witnesses was for the jury. There was sufficient evidence to warrant the jury in finding that Herrera was guilty. The verdict, therefore, will not be disturbed.

*Judgment Affirmed.*

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BANK STOCK—ASSESSMENT—FRAUD—NO. 12,222—*J. L. Lengel vs. The Commercial Bank of Las Animas, Colorado, a Corporation—Decided April 28, 1930.*

*Facts.*—In 1926 the State Bank Commissioner notified the plaintiff below, The Commercial Bank of Las Animas, that its capital stock was impaired, and ordered it to make an assessment upon its capital stock of $100.00 per share. The defendant Lengel, a stockholder, was notified in due course, but refused to pay the assessment, whereupon the bank brought its action and obtained a judgment for the assessment and costs. Lengel defended on the ground that he had been defrauded at the time the stock was sold to him by various individuals who at the time of the sale were also officers of the bank.

*Held.*—The fact that individual owners of corporate stock had misrepresented the value of the stock or the condition of the bank is no defense to an action brought to secure

payment of an assessment made to restore the impaired capital, and there is no estoppel against the bank to claim the assessment.

*Judgment Affirmed.*

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PERSONAL INJURY—CITY ORDINANCE—CONSTRUCTION—No. 12212—*Kathryn Hicks, an infant, by Ella S. Hicks, her next friend vs. George W. Cramer, et al—Decided April 28, 1930.*

*Facts.*—Plaintiff, a minor, was riding in the rear seat of an automobile driven by her father. Defendant's car approached from their left colliding with plaintiff's father's car and plaintiff was injured. The Pueblo city ordinance provides, first, that the vehicle on the right shall have the right of way, and, second, that the one nearest the center of the intersection shall have the right of way. The lower court instructed the jury that if defendant's car had entered the intersection before plaintiff's father's car, then defendant had the right of way, but if plaintiff's father's car had entered the intersection first, then it had the right of way. There was a verdict for the defendant.

*Held.*—The lower court attempted to harmonize two inconsistent ordinances. The effect should have been given only to the one giving the right of way to the vehicle approaching from the right.

*Reversed and Remanded.*