Denver Law Review

Volume 7 | Issue 12 Article 6

January 1930

Colorado Supreme Court Decisions

Dicta Editorial Board

Colorado Supreme Court Decisions

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.)

CORPORATIONS—ANNUAL REPORT—LIABILITY OF DIRECTORS
NO. 12608—*Bergren et al vs. Valentine Hardware Company—Decided September 15, 1930.*

Facts.—Plaintiff sues the defendants as directors of The Fairview Mining Company. There appears to be no serious dispute as to the amount of the debt owed by the company, the questions being (1) as to the sufficiency of the annual report, (2) the right of a stock-holder who is a creditor to sue the directors, and (3) the rights of an assignee to sue when the assignment is for collection purposes only. The evidence showed that the annual report did not comply with the requirements of the statute. Judgment was had for the plaintiff in the trial court, and the defendant alleged error.

Held.—(1) The contents of annual reports must comply with the requirements of the statute. "The statute means exactly what it says, and should, if officers and directors hope to escape a liability for corporate debts, be strictly followed."

(2) There is no distinction between creditors who are, and creditors who are not stockholders.

(3) An assignment, even though for collection purposes only, is good.

Judgment Affirmed.

DAMAGES—AWARD BY JURY—NO. 12247—*Tramway Corporation vs. A. K. Ancker—Decided September 15, 1930.*

Facts.—Plaintiff, Ancker, obtained a judgment on a verdict for $151.78 against the defendant. The evidence was conflicting, and though the plaintiff claimed $250 as depreciation to his car in addition to the costs for repair, the verdict was only for the costs for repair. Defendant alleged error in the admission of evidence of depreciation.

Held.—The defendant's rights were not prejudiced by the admission of evidence of depreciation insofar as the verdict only awarded repair charges. The Court refused to decide as to whether or not the admission of evidence of depreciation constitutes error.

The verdict was based on conflicting testimony and it will not be disturbed.

Judgment Affirmed.

ELECTIONS—ELECTION JUDGES—NO. 12655—*Winters vs. Pacheco et al—Decided September 22, 1930.*

Facts.—At a school election for one of the districts in Conejos County, Winters was named by the election judges as Treasurer of the District with 66 votes. Winter's opponent, one Pacheco was given 65 votes. Pacheco started proceedings in the County Court to contest the election, and the Court found that there was one illegible ballot which had been wrongly counted by the election judges as a vote for Winters. The Court thereupon held that the election was a tie, and ordered a special election. There was no doubt but that the ballot in question was illegible. Winters makes two allegations of error; (1) The opening of the ballot box without the proper foundation, and (2) The determination that the ballot in question was undecipherable.

Held.—(1) "Ballot boxes should not be ordered opened until some positive proof is offered to show that the election returns are not justified by the ballots in the ballot boxes, but when this preliminary proof is offered, it would be gross abuse of discretion for a court to deny contestor the right to substantiate his cause by documentary evidence."

(2) The findings of the elections judges are not binding upon the Court. "To give the judges of elections the unlimited power for which the contestee contends would force the courts and judges thereof to absolutely shut their eyes to the most convincing evidence, and follow blindly the lead of election judges. In matters of documentary evidence, we have repeatedly held that the findings of the lower courts are not

conclusive upon us because, —— 'We are in as good a position to judge such evidence as the trial court'."

Judgment Affirmed.

FRAUD—VITIATES ENTIRE TRANSACTION—NO. 12648—*Murray vs. Ready et al—Decided September 22, 1930.*

Facts.—The Plaintiff came into possession of a note and mortgage from her sister at a time when her sister, since deceased, was no longer in her right mind. As a part of the same transaction, the plaintiff obtained all of her sister's property. In a prior suit, the administrator of the estate sued the Plaintiff to quiet title to a parcel of land which she also procured. At that trial it was found that the plaintiff obtained the deed to the property without adequate compensation and while her sister was mentally incompetent. The plaintiff now seeks to collect the proceeds from a note and mortgage which were transferred at the same time as the parcel of land which was involved in the prior suit. Defendant, Ready, paid the money into court and the administrator was thereupon made a party defendant. The sole question is whether the judgment in the former suit determined the vital question presented in the present suit.

Held.—"It appearing, therefore, that the giving of the deed involved in the former suit and the giving of the assignment involved in this suit occurred at the same time and place as component parts of the same transaction, the same infirmity attaches to and vitiates the assignment that attached to and vitiated the deed."

Judgment Affirmed.

REAL PROPERTY—LIENS—NO. 12239 — *Kingdom of Gilpin Mines vs. McNeill—Decided September 15, 1930.*

Facts.—Action by McNeill to foreclose an equitable lien on certain mining property and real estate belonging to the company. The evidence disclosed that the plaintiff had originally had a mechanics lien on the premises before the property was owned by the company, but while it was owned by

one Bierbaum who was the promotor of the company. The plaintiff failed to foreclose on his mechanics lien within the statutory time, because of a new agreement made between him and Bierbaum which took the place of the former lien. This latter agreement, as established by oral testimony and letters, is the one upon which this suit was maintained. To the judgment for foreclosure and sale, the defendant sets out three main allegations of error; (1) In overruling the demurrer to the complaint, (2) In finding and decreeing a lien on the property, and (3) That the findings are contrary to the law and the evidence.

Held.—Defendants interposed a general demurrer to plaintiff's complaint and they now argue that McNeill's lien failed to satisfy the statute of frauds. "The statute of frauds is a privilege of which a defendant may or may not avail himself, at his option. If relied upon, it must be specially pleaded and raised by demurrer or answer, as the case may be, and to insure consideration by this court, must also be covered by an appropriate reference in the assignments of error."

Defendant's contention that the company had no notice of this second lien is also unsound. The company was notified of the second lien insofar as the president was the one who made it, even though the proviso in the deed to the company did not mention it.

Judgment Affirmed.

REAL PROPERTY—SALES OF—FRAUDULENT REPRESENTATIONS —No 12611—*Troutman vs. Stiles—Decided June 30, 1930.*

Facts.—The plaintiff sought to recover $9600. from the defendant by virtue of certain alleged fraudulent representations by the defendant. The amended complaint alleged the representations made by the defendant and set forth the terms of the contract. Among other things, the contract stated, "We each have inspected each other's property and are dealing solely on our own judgment and not upon any representations that have been made to us, and have carefully read this contract before signing." It appeared that the plaintiff went upon the defendant's land, but that he did not examine it thor-

oughly. A demurrer to the complaint was sustained, whereupon the plaintiff alleged error.

Held.—It seems well settled that "Where the parties deal upon equal terms, one who has failed to avail himself of means of knowledge readily within his reach cannot as a rule complain of the other party's representations."

Judgment Affirmed.

REAL PROPERTY—TITLES—BY ADVERSE POSSESSION—TACKING—NO. 12267—*Lundquist vs. Disenmann—Decided June 30, 1930.*

Facts.—Plaintiff sued to recover possession of a strip of eight feet of land claimed by the defendant. Plaintiff contended that the strip in dispute belonged to his Lot 40, and defendant contended that it belonged to her adjoining Lot 39. Upon trial the Court found that the plaintiff had title to 4.88 feet of the disputed strip by virtue of his deed, and that as to the remaining 3.12 feet the plaintiff had title by adverse possession. The evidence showed that the plaintiff and his family had continuously occupied the eight foot strip for a period of twenty-four years prior to the commencement of this action. The defendant contended that the plaintiff's possession was not continuous, but was interrupted by virtue of the fact that it was first held by the plaintiff, then conveyed to his wife and upon her decease intestate one-half thereof descended to each the plaintiff and his son. This appears to be the only plausible objection by the defendant to the judgment below.

Held.—"The law is firmly established in the courts of this country almost without exception * * * that where, as here, there is privity of title or estate the possession of successive disseizors may be joined or tacked together so as to be regarded as continuous possession."

Judgment Affirmed.

WORKMEN'S COMPENSATION—AWARDS—APPEAL FROM—NO. 12596—*Tyler et al vs. Hagerman et al.—Decided September 22, 1930.*

Facts.—Hagerman was injured on September 27, 1926.

On April 8, 1927, claim for compensation was properly made, and a hearing thereon having been had, the referee denied the claimant's right to compensation. After two hearings which were not made pursuant to application by the claimant, but upon the motion of the Commission, without notice, on December 19, 1928, the Commission affirmed the award of the referee. No petition for review was filed by the claimant within the 10 day period allowed under the statute, but on December 31, the claimant's attorney asked, by letter, for an extension of time. On January 23, 1929 (25 days after the statutory period had elapsed), the Commission granted an extension until January 31. This time was extended, pursuant to request, until February 10. On February 11, an application for review was filed, and on February 19, the Commission granted the application. On April 3, a hearing was held at which the attorney for the insurer objected to any admission of testimony. However, on May 7, 1929, the Commission awarded the claimant 30% partial permanent disability.

Held.—"Two methods of reviewing an award of the Industrial Commission are provided by the statute: First (Sec. 4471 C.L. '21), upon petition of any party in interest dissatisfied therewith which must be filed within ten days after the entry of any referee's order or award of the Commission unless further time is granted by the referee or the Commission within said ten days, and, unless so filed, said order or award shall be final, and second (Sec. 4484 C. L. '21), by the Commission upon its own motion on the ground of error, mistake or a change of conditions and 'after notice of hearings to the parties interested, * * *'."

Here, there had been no notice given.

Judgment Reversed.

TAX SALE—REDEMPTION BY FEE HOLDER—NO. 12287—*Newmyer vs. Tax Service Corporation, Board of County Commissioners of the County of Saguache, and Wilson P. Williams, as County Treasurer.—Decided June 2, 1930.*

Facts.—The parties appear as below: Dacre Dunn failed to pay taxes on his land for the years 1914, 1915, 1916 and 1919, and through oversight the County Treasurer did not

offer it for sale. Subsequent to 1919, Mr. Newmyer acquired title. In 1923 the failure to sell for the 1919 taxes was discovered, and on December 17, 1923, land was sold to Mrs. Newmyer. On February 16, 1925, the land was sold for the taxes of 1914 to the Tax Service Corporation. Thereafter the taxes for 1915, 1916, 1923 and 1924 were paid in full by the corporation.

On October 21, 1925, Mrs. Newmyer sold her tax certificate for the 1919 taxes, and five days later she accepted a deed from her husband conveying the fee to the property. Contending that her purchase of the 1919 tax "cut out" or discharged the lien for the taxes of 1914, 1915, and 1916, plaintiff prosecuted this action to redeem without paying the taxes for those years.

Three questions were raised: 1. The validity of the sale for the 1919 tax; 2. The admissibility of evidence to show cause why the date of the sale did not conform to the statute; 3. The right of the plaintiff to amend her complaint to allege that cause. If, however, Mrs. Newmyer is in no position to claim any rights or make any defense based upon that sale, these assignments of error require no consideration. From judgment for the defendant, plaintiff alleges error.

Held.—The interest that the purchaser of lands at a tax sale acquires is in the absence of a statute to the contrary freed from the liability for delinquent taxes of previous years. This is true as between purchasers in tax sales, but where the owner of the fee is involved the question "is simply this—if the land of a delinquent be sold to various purchasers for the unpaid taxes of a series of years, may the owner slip from the entire burden by merely redeeming from the last sale? If so, here is indeed a new way to pay old debts."

Judgment Affirmed.

WATER RIGHTS—ABANDONMENT—EVIDENCE OF—NO. 12085 —*Klug and The Peters Trust Company vs. Henrylyn Irrigation District, Ireland, and Box Elder Land Company—Decided June 30, 1930.*

Facts.—Klug had obtained a decree awarding him 500 cubic feet of water per second to supply approximately 1300

acres of his land and 80 cubic feet per second to supply 640 acres of land. This decree awarded flood water only, and for the purposes of obtaining the benefits of the decree Klug was given the right to build three reservoirs. Of these but one was constructed. Klug built a reservoir which had a capacity of from 10 to 100 cubic feet per second. At the trial those parties adverse to Klug were sustained by the lower Court in their allegation of abandonment and in accordance with this finding, the priority decree was held for naught, and Klug was awarded 90 cubic feet per second. The facts supporting abandonment were that Klug, by the construction of his reservoir, had made permanently impossible the use of the water awarded him in his priority decree. Klug alleged error.

Held.—We can conceive of no higher evidence of abandonment than this. It is non-user coupled with the presumption of permanence and proof of intent more persuasive than any oral declaration could be. It is comparable to proof of a man's abandonment of his right hand by voluntarily cutting it off."

"Briefly stated this resolves itself into a simple case of findings of fact based upon conflicting evidence, which findings a fundamental rule requires us to uphold."

Judgment Affirmed.

WORKMEN'S COMPENSATION—EMPLOYER CONSTRUED—NO. 12598—*Devereux et al vs. The Industrial Commission, and Wohlcke et al.—Decided June 30, 1930.*

Facts.—The Industrial Commission awarded compensation to the plaintiffs, which award was affirmed by the District Court. The plaintiffs are the widow and daughter of one Fred J. Wohlcke who was killed by a falling rock in a mine near Georgetown. Several months before Wohlcke met his death, he and his partner had sold the mine in which the accident occurred under a bond and lease to the defendants. There was a provision in the lease which gave Wohlcke and his partners a contract for "* * * two hundred feet at $12.50 per foot * * *" It was while Wohlcke was pursuing this contract, and after some money had been paid him thereon,

that he was killed. The defendants contended that they were not "operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub-lessee, contractor, or sub-contractor," and that they were accordingly not an employer within the meaning of the statute and that they were therefore not liable as such.

Held.—"The Devereuxs were engaged in the operation of a mining company by 'contracting out' part of the work. * * * It is immaterial that the Devereuxs did not own the property and had not perfected an interest therein at the time of Wohlcke's death.'

Judgment Affirmed.

DIVORCE—DECREE OF—NO. 12482—*Cartier vs. Cartier—Decided September 29, 1930.*

Facts.—Plaintiff obtained a divorce in the Lower Court to which no Motion to set aside was ever filed. At the expiration of six months defendant made a motion for a final decree, which was granted over the express objection of the plaintiff. Plaintiff asks for reversal.

Held.—The Session Laws of 1929 provide that a final decree shall be granted if such final decree is provided for in the Findings of Fact and Conclusions of Law. The Act is, however, inoperative if the Findings of Fact and Conclusions of Law do not contain the specific terms and provisions which are required by it.

The Court refuses to determine the constitutionality of the 1929 Statute.

Judgment reversed with directions to vacate.

CHILD WELFARE

Dicta, in line with its policy of being the Bar's Big Brother, strives to bring novel and important points of law to the attention of its readers and therefore passes along to them the following interesting information supplied by a "Constant Reader", to-wit: "Angry and disgusted children, if poor, should be warned that the Legislature has made provision for the 'apprenticeship of *indignant* children' (C. L. of Colo. 1921, top of page 2275)."