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Colorado Supreme Court Decisions

Dicta Editorial Board

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(EDITORS NOTE.—It is intended in each issue of the 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—APPEAL FROM COUNTY COURT TO DISTRICT COURT.—No. 11,960.—*Katz, vs. Cohen.—Decided October 1, 1928.*

Facts.—May 6, 1927, Katz had judgment against Cohen in the County Court of Denver. The defendant, Cohen, was granted time and given twenty days within which to elect to appeal. On May 24, 1927, and within the period of twenty days, the defendant appeared in the County Court and sustained the judgment and made an appeal to the District Court, and on that day the County Court allowed the appeal on the condition that he file an appeal bond to be approved within ten days. The bond was filed and approved within this time. It was contended that the Statute provides that appeals from the County Court to the District Court must be made within ten days after judgment unless the Court upon sufficient cause shown extends the time for perfecting the appeal.

Held.—The County Court's granting twenty days within which to elect to appeal was the equivalent of granting further time within which to perfect the appeal, and the appeal was made in time.

Judgment Affirmed.

APPEAL AND ERROR—DAMAGES—INSTRUCTIONS.—No. 12,001. *Rollman vs. Stenger, as Receiver.—Decided October 29, 1928.*

Facts.—Margaret Rollman was injured in a collision with a street car operated by employees of Stenger, as Receiver. Verdict and judgment was for the Plaintiff. Plaintiff failed to incorporate in Abstract of Record the instructions given by the Court.

Held.—Under the circumstances, the Court will not consider refusal to give requested instructions for so far as the

abstract is concerned, the Court may have given an instruction stating the law substantially as requested. To entitle a party to have this Court consider an assignment of error based upon the refusal of the Trial Court to give a requested instruction, the abstract must set out the instructions that the Court gave to the Jury. In any event the Court finds no actual error in the Trial Court's refusal to give the requested instruction.

Judgment affirmed.

AUTOMOBILES—IMPUTED NEGLIGENCE.—No. 11,914.—*Paul Parker, Plaintiff in Error, vs. Anna Ullom, Defendant in Error.—Decided October 28, 1928.*

Facts.—One Ullom, husband of the Defendant in Error, riding in an automobile driven by one Beckman, was killed in a collision with an automobile driven by Parker. The evidence tended to show that Beckman and Ullom were acquainted, that at the time of the collision they were on their way to participate in a gambling game. Beckman owned the car which he was driving, and was not subject to Ullom's control. Parker contends that Beckman's negligence should be imputed to Ullom.

Holding.—In a case like this, negligence will not be imputed to a passenger unless he undertakes to or has the right to exercise control over the movement of the vehicle.

Judgment affirmed.

COGNOVIT NOTES—PROHIBITION.—No. 12,104.—*The Investors Finance Company vs. Luxford, as County Judge.—Decided October 29, 1928.*

Facts.—The District Court sustained a demurrer to an alternative Writ of Prohibition addressed to the County Court. The Finance Company obtained a judgment in 1922 on a cognovit note without service or notice on maker. Maker's attorney was in correspondence with the Company at the time and had set forth his client's claim of defense and was led by them to believe that they acquiesced in these claims. Yet during this correspondence they took the judgment.

Held.—That this amounts to fraud in procuring the judgment. Judgment debtor moved to set it aside and County Court so ordered. Order was right. Motion was the proper way to present the matter. County Court did not lose jurisdiction after one year to set it aside.

Judgment affirmed.

CONSTITUTIONAL LAW—MUNICIPAL DEBTS.—No. 12,157.—*Searle vs. Town of Haxtun.—Decided October 22, 1928.*

Facts.—Suit was brought against the Town of Haxtun to enjoin the issue of bonds for improvements to the town's electrict light plant. The town already owned an electric light plant and voted the bonds for the purpose of making improvements. It was claimed that if the bonds constituted a debt that they were in excess of the constitutional limit.

Held.—That since by the term of the bonds the bonds were payable only out of the income from the plant and the town itself was under no obligation to pay them, that such bonds did not constitute a debt of the town within the constitutional meaning of debt.

Judgment affirmed.

DECREE—MODIFICATION.—No. 11,983.—*Levand vs. North America Realty Company.—Decided October 8, 1928.*

Facts.—Decree was entered by lower Court against Levand, requiring specific performance of a contract for sale of real estate. Levand prosecuted a Writ of Error to the Supreme Court and the Decree was affirmed in its entirety. One of the things which the Decree required Levand to do was to procure and deliver a policy of fire insurance on the improvements in the sum of eighteen hundred dollars. Levand claimed he could not comply because the improvements did not exceed two hundred fifty dollars in value, and was cited for contempt.

Held.—Lower Court had power to modify a Decree as to portion impossible for performance even after the Decree had been affirmed in its entirety by the Supreme Court.

Decree so Modified.

DEEDS—DELIVERY.—No. 12,179.—*Ora Pearl Griffith, vs. Lelia May Sands, as Administratrix, et al.—Decided October 8, 1928.*

Facts.—Plaintiff's father signed, sealed and acknowledged a deed, which purported to convey certain land to plaintiff, but died without actually delivering it to her. Prior to his death he stated that upon his death the deed should be delivered. Plaintiff sues the administratrix and heirs of the grantor in said undelivered deed.

Held.—That there must be an actual delivery of a deed, and that the facts in this case do not justify a holding that there was a constructive delivery, as the deed was expressly not to be delivered until after the death of the grantor. Delivery is not merely a matter of intent alone, but some act by which the grantor parts with control of the instrument must accompany the intent. There is only oral evidence of a trust, and that is insufficient under the Statute of Frauds.

Judgment affirmed.

DISPUTED BOUNDARIES.—No. 11,952.—*Gamewell vs. Strumpler.—Decided October 15, 1928.*

Facts.—Action by Gamewell for injunction to restrain Strumpler from entering upon Gamewell's lands. Answer was general denial, coupled with demurrer for insufficient facts. Judgment below for dismissal of the action.

Boundary lines between lands of plaintiff and defendant had been changed by decree of the District Court in a former action under Chapter Twenty-four of the Code of Civil Procedure.

Held.—Decree established boundary lines in the former action and was sufficient under Code. The fact that lands lying in township other than the township in which plaintiff's and defendant's lands lie were included in the decree, did not effect the decree between plaintiff and defendant. Service by publication on defendant held to be sufficient.

Judgment affirmed.

DIVORCE—DIVISION OF PROPERTY.—No. 11,773.—*Ikeler vs. Ikeler.—Decided October 8, 1928.*

Facts.—Mrs. Ikeler obtained verdict and findings of fact and conclusions of law in a divorce case, and a decree dividing the property was entered before the six months for entry of final decree had elapsed.

Held.—Under Statute, alimony and counsel fees, *pendente lite* may be allowed before final decree of divorce, but no decree for division of property can be entered until a final decree of divorce is granted.

Judgment Reversed and Case Remanded.

MANDAMUS—ELECTIONS.—No. 12,231.—*Armstrong, Secretary of State, vs. Simonson.—Decided October 19, 1928.*

Facts.—Simonson obtained an alternative Writ of Mandamus commanding the Secretary of State to accept for filing a certificate nominating Simonson as candidate for office as State Senator.

Simonson had been designated by the assembly of the Republican party for State Senator and had accepted the designation, but was defeated at the primary by Stephen. Stephen had died between the date of the primary and the general election. The committee to fill vacancies thereupon had nominated Simonson to fill the vacancy created by the death of Stephen.

Held. — Section Five, Chapter Ninety-eight, Session Laws of 1927, which declares that "No person who has been defeated as a candidate in primary shall be eligible as a candidate for the same office in the next ensuing general election", does not prevent the second choice of his own party for the nomination for a particular office from receiving the nomination where the first choice of the party was prevented through death, or voluntary surrender of the nomination from being a contender for the office.

One of the principal purposes of this statute was to prevent a person who had sought a party nomination and was defeated at the party primary election from running as the candidate of a rival party in opposition to the candidate of his

own party, and/or to prevent such person from running independently by petition after being defeated in opposition to the candidate of his own party.

Judgment Affirmed.

MANDAMUS — MUNICIPAL CORPORATIONS. — No. 12,087.— *City of Victor vs. Halstead.—Decided October 8, 1928.*

Facts.—Halstead obtained a peremptory Writ of Mandamus against the City of Victor, ordering the levy of a tax to pay certain interest coupons on bonds of the city. Defense was that the City was heavily in debt and that if the levy was made, it would require a levy of eighty-three mills, forcing property owners to abandon their property.

Held.—1. The granting or refusing to grant a Writ of Mandamus is somewhat discretionary with the Court.

2. The Court below did not abuse this discretion. A judgment should not be refused on the ground that a trial Court has abused its discretion, unless the record clearly discloses a plain abuse of that discretion.

Judgment Affirmed.

NUISANCE.—No. 12,047.—*Mongone vs. The People.—Decided October 29, 1928.*

Facts.—Mongone was perpetually enjoined from conducting or maintaining a nuisance on certain property under the Provisions of Chapter 136 of Session Laws of 1921.

Held.—Complaint stated a good cause of action in equity for the abatement of a nuisance. Where the real estate was described by lot and block number in the Complaint, but the evidence showed that the building was located at the southwest corner of two certain streets, the real estate was sufficiently identified.

Judgment Affirmed.

PAYMENT.—No. 12,051.—*McAloon vs. Erickson.—Decided October 15, 1928.*

Facts.—Erickson had judgment in Trial Court against McAloon, et al, for failure to deliver a tax sale certificate.

McAloon owned the tax certificate, deposited it with the County Treasurer for proceedings to get a tax deed.

Erickson wanted to get an assignment of it and gave a check drawn on Cheyenne State Bank which was deposited in Akron Bank and sent to Cheyenne State Bank with instructions to remit a draft for it. The Cheyenne State Bank failed before the check was paid.

Held.—McAloon should have demanded cash of Cheyenne State Bank and if he had, he would have received the money before the bank failed. Bank was McAloon's agent and when bank accepted draft instead of cash, it did so at its own risk.

Judgment Affirmed.

PLEADING AND PRACTICE—DISMISSAL.—No. 12,190.—*Schueler vs. O'Berdo.—Decided October 29, 1928.*

Facts.—O'Berdo was plaintiff and on his motion the District Court dismissed his action and the counter claim of the defendant. A notice of the motion to dismiss, and that the motion would come up for hearing on March 3 was served on February 28. On March 3, the hearing was continued to March 12, when the dismissal was ordered.

Held.—That the plaintiff may dismiss his action at any time before trial if no counter claim has been made. The notice of dismissal was served before the counter claim was filed. The order of dismissal related to the first step taken in its procurement and is to be regarded as having been made at that date.

Judgment Affirmed.

PLEADING—QUANTUM MERUIT.—No. 12,161.—*McDonald, Plaintiff in Error, vs. Thibault, Defendant in Error.—Decided October 15, 1928.*

Facts.—Trial Court rendered judgment against McDonald. Complaint alleged that defendants were indebted to the plaintiff on account of services rendered as broker in securing a purchaser for hotel business.

Complaint failed to allege either an agreed price or the reasonable value of the services. General demurrer was overruled.

Held.—Complaint defective because of failure to allege either an agreed price or the reasonable value of the services.

Judgment Reversed.

PRACTICE — PLEADING — DEFAULT. — No. 12,189. — *Sauve, Trustee in Bankruptcy, vs. Hamilton.—Decided October 22, 1928.*

Facts.—Hamilton filed suit for foreclosure of a mortgage given to one of the defendants, the Western Securities Investment Company. The Western Securities Investment Company went into bankruptcy and Sauve was appointed Trustee in Bankruptcy.

Sauve, the Trustee, failed to appear and default was entered. Sauve after being in default two months appeared, during the trial of the action, and asked leave to intervene. Court below denied his application.

Held.—The Court's ruling denying the application was within its legal discretion. Moreover, evidence was introduced below and Sauve failed to file a motion for a new trial, and the issue being one of fact and not of law, a motion for a new trial was essential to secure a hearing on review in the Supreme Court.

Judgment Affirmed.

TAXATION—APPEAL FROM ASSESSMENT—PROCEDURE.—No. 11,939.—*E. J. Longyear Company, a corporation, vs. County of Lake, Colorado.—Decided October 8, 1928.*

Facts.—On June 19, 1924, the assessor of Lake County placed a valuation on certain property owned by the Longyear Company, on the basis of which tax was levied and paid under protest. Thereafter, the Company perfected an appeal to the District Court of Lake County which was allowed by the assessor on December 15, 1924. Depositions were taken by the Company, and in this the County participated. On March 29, 1926, the County moved to dismiss the appeal upon the

ground that no complaint had been filed as required by statute.

Holding.—In the opinion in *Sugar Company vs. Fellows,* 74 Colo. 242, handed down December 3, 1923, the Court held under Section 7292 C. L. 1921, that the filing of a complaint in a case like this was not necessary. Thereafter, in the opinion in *Phillips vs. Commissioners,* 78 Colo. 387, handed down December 14, 1925, the Court held that Section 8703 C. L. 1921 required a complaint to be filed within ten days after taking an appeal. In the present case the appeal was perfected under the earlier decision, and both parties appeared to have acquiesced in its application. Therefore, the filing of a complaint within ten days is not jurisdictional, but this may be done any time before trial.

Judgment Reversed.

TAX SALES—RIGHT OF DEFUNCT CORPORATION TO REDEEM.—No. 11,961.—*Ruth vs. Devany, as County Treasurer. Decided October 22, 1928.*

Facts.—Ruth sued Defendant as County Treasurer, et al, to set aside a redemption from tax sale. A mining corporation had owned the real estate and had been declared defunct by the Secretary of State and attempted to redeem the property from tax sale through and by the surviving members of its last Board of Directors.

Held.—Even though the corporation was declared defunct and inoperative, neither the payment of taxes nor the payment of redemption money comes within the prohibition of the statute, being Section 2317 of the Compiled Laws of 1921.

The last Board of Directors of the corporation had a right to redeem the property from sale because such a redemption would inure directly to the benefit of the corporation and indirectly to the benefit of the stockholders, and also indirectly to the benefit of creditors, providing that the corporation might later on secure enough money to be reinstated.

Judgment Affirmed.

WORKMAN'S COMPENSATION.—No. 12,141.—*Central Surety and Insurance Corporation, et al, vs. The Industrial Commission of Colorado and Fugitt.—Decided October 22, 1928.*

Facts.—The Industrial Commission awarded Compensation to Fugitt for hernia. Under the Statute in order for an employee to be entitled to compensation for hernia he must clearly prove, first, that its appearance was accompanied by pain, and second, that it was immediately preceded by some accidental strain suffered in the course of the employment.

Held.—The facts sufficiently meet the above requirements of the Statute.

Judgment Affirmed.

RECENT TRIAL COURT DECISIONS

(EDITORS NOTE.—It is intended in each issue of Dicta to note any interesting decisions of the United States District Court, the Denver District Court, the County Court, and occasionally the Justice Courts.)

UNITED STATES DISTRICT COURT.—No. 7885.—*Spencer Penrose, vs. United States—J. Foster Symes, Judge.*

Facts.—Action to recover additional income tax illegally assessed on 1918 return. Plaintiff in 1918 sold copper stock which he contended he acquired in 1916 and on that basis resulting in a loss. The *certificates* delivered were acquired prior to March 1, 1913, nevertheless, plaintiff insisted he intended to sell *stock* acquired in 1916. A gain resulted if the stock sold in 1918 was acquired prior to March 1, 1913.

Held.—(1) Certificates of stock delivered do not identify the shares sold, the intention of plaintiff controls; (2) the fair market value of stocks sold on New York Stock Exchange, dealt in generally and freely, is determined by listed quotations; (3) proof that the grounds in the application for refund filed before Commissioner are the same as the grounds sued upon, is a condition precedent to the jurisdiction of the court.