Denver Law Review

Volume 6 | Issue 3 Article 6

January 1929

Colorado Supreme Court Decisions

Dicta Editorial Board

Colorado Supreme Court Decisions

COLORADO SUPREME COURT DECISIONS

(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.)

ABATEMENT OF NUISANCE—JURISDICTION. — No. 12,046. — *Gaskins vs. State of Colorado.—Decided Nov. 26, 1928.*

Facts.—Gaskins owned an interest in realty, on which the other owner and the tenant maintained a nuisance. The other owner and the tenant were served with process, but Gaskins was not, either personally or by publication, and she did not appear. The Trial Court entered a decree against Gaskins personally, and ordered the premises closed for one year.

Held.—The decree against Gaskins was error, but is affirmed as to the property. Under the Statute, she may come in, pay all costs, fees and allowances, and file a bond for the full value of the property, conditioned that she will immediately abate any nuisance thereon, and prevent it from being established within one year. Thus she can immediately regain the use of the property. It is immaterial that Gaskins was not within the jurisdiction of the Court, and the District Attorney was not bound to wait until she could be served before proceeding against the tenants and the property.

Judgment Modified and Affirmed.

APPEAL AND ERROR—MOTION FOR NEW TRIAL.—No. 12,194. *Blackmer vs. Blackmer.—Decided Nov. 12, 1928.*

Facts.—The question before the Court was upon a motion to dismiss the Writ of Error under Rule Eight. Rule provides that the party claiming error must move the Court for a new trial unless such motion is dispensed with. The judgment below was for temporary alimony, attorney's fees and court costs, which were issues of fact.

Held.—Issues of Fact heard and determined by the Trial Court cannot be reviewed in this Court in the absence of a motion for a new trial or an order dispensing therewith in the record.

Writ of Error Dismissed.

EXECUTION—LIEN OF SHERIFF—LEVY.—No. 12,177.—*Justice, as Sheriff, vs. Hoch.—Decided October 29, 1928.*

Facts.—Justice, as sheriff, brought action against Hoch for two grain drills that the former claimed he had levied upon, and to which Hoch claimed the title. The grain drills were in a tin building. The sheriff went to the building and tacked up a notice of levy on the building. The sheriff did not remove the grain drills nor was any custodian left in charge, nor was any lock placed on the door.

Held.—Levy insufficient. A valid levy cannot be made under a Writ of Execution as against third persons where no change, either actual or constructive, is wrought in the possession, custody or control of the goods claimed under the levy.

Judgment Affirmed.

GAMBLING DEBTS—NEGOTIABLE INSTRUMENTS—RATIFICATION.—No. 11,908.—*National Surety Co., vs. Stockyards National Bank.—Decided November 26, 1928.*

Facts.—The Surety Company was subrogated to the rights of its assured, one of whose employes, Decker, was trusted with signed checks to be filled in for paying his employer's bills under $100.00. The bank knew nothing of this limitation. Decker gambled and paid his gambling debts with these checks drawn on the bank. Two or three years later this suit was started. There was evidence that the bank might have recovered from Decker, if it had known the facts at once.

Held.—Sec. 6869, C. L. 1921 is not decisive of this case. The Surety Company's long delay constitutes a ratification of the bank's acts in paying the checks.

Judgment Affirmed.

MUNICIPAL CORPORATIONS — DAMAGES — INSTRUCTIONS.—No. 12,007.—*The City of Ft. Collins vs. Smith.—Decided October 29, 1928.*

Facts.—Mrs. Smith had a verdict and judgment against the City of Ft. Collins for $11,800.00 for personal injuries sustained in a collision between a streetcar in which she was riding and an engine operated by the Colorado and Southern

Railroad Company. Objections were entered to instructions given by the Lower Court and refused by the Lower Court on the ground of newly discovered evidence.

Held.—Lower Court did not commit error in giving or refusing the instructions. Newly discovered evidence was largely cumulative and not sufficient to warrant granting a new trial.

Judgment Affirmed.

NON-SUIT — REFUSAL TO TESTIFY — CONTRIBUTARY NEGLIGENCE.—No. 12,011.—*Conner & Conner vs. Sullivan.—Decided November 26, 1928.*

Facts.—Sullivan was driving his car on a public road, when the engine suddenly stopped. He got out and went to the rear of the car to investigate, when he was struck by the Conners' car and injured. At this trial the Conners' motion for a non-suit was overruled, and they put on evidence in defense but refused to testify themselves. They now assign error, based on the overruling of their motion.

Held.—Sec. 1271, C. L. 1921, prohibiting stopping on public highways, does not apply here, because plaintiff did not stop voluntarily. The question of contributory negligence was for the jury. Defendants' failure to testify could well be taken to be equivalent to making positive admissions. The former opinion, holding that a defendant, by putting on a defense waives the error of the trial court in denying a non-suit, is withdrawn.

Judgment Affirmed.

PRINCIPAL AND AGENT—REAL ESTATE LEASES.—No. 12,191. —*Great Western Finance Company vs. Davis.—Decided November 5, 1928.*

Facts.—Great Western Finance Company was the agent of Stansfield, the owner of a certain house, for the purpose of renting it. Davis claimed damages for breach of contract to give the lease of the residence property.

Held.—The owner of the real estate and not the agent is the party liable. When a real estate agent acting in behalf of the owner and with authority to do so agrees to lease the

owner's property, the owner and not the agent is the one that is bound by the agreement.

Judgment Reversed.

QUIET TITLE—FORECLOSURE.—No. 12,105.—*Pope vs. Parker. —Decided November 5, 1928.*

Facts.—Pope made a contract with one Pelz to sell certain land to him. Pelz assigned his interest to Parker. The contract of sale provided that in case of default Pope would have a right to enter upon the premises described and sell the same at public sale to pay the purchase price, accounting to Pelz for any surplus. Pope's action was to quiet title.

Held.—Contract was nothing but a mortgage. The provision for entry and sale was void. The court below should have defeated it as a foreclosure and not as an action to quiet title and should have given relief as in foreclosure cases.

Judgment Reversed with Directions.

QUIET TITLE—FORECLOSURE.—No. 11,975. — *Pioneer State Bank vs. Herron.—Decided November 5, 1928.*

Facts.—Herron obtained a judgment quieting title as against the claims of the Pioneer State Bank. In 1917 Georgia A. Strelow, the owner of real estate, executed a promissory note and secured the payment by a trust deed. The Pioneer State Bank acquired the note. Georgia A. Strelow died leaving as her sole heirs, her husband and four children, one of them being the Plaintiff. The bank foreclosed on the mortgage but neglected to make the children parties to the suit.

Held.—The foreclosure decree in sale were valid as to the husband's interests, but not as to the children's interests, because they were not parties to the action, nor were they before the Court; notwithstanding the fact that the bank bid the full amount of the mortgage debt at the sale, all it acquired was the husband's interest in the property, and the Court below instead of quieting the title should have entered a decree that the bank's trust deed was still a lien upon the children's interest in the lots to the extent of one-half of the trust deed indebtedness.

Judgment Reversed with Directions.

TAXATION — GASOLINE TAX — MUNICIPAL CORPORATIONS.—No. 12,019.—*State of Colorado vs. City & County of Denver.—Decided November 26, 1928.*

Facts.—The State brought suit against the City, alleging five causes of action, under various state statutes imposing taxes on the sale of petroleum products:

1. For the recovery of two cents per gallon of gasoline under the Act of 1919, as amended;

2. For the recovery of one mill per gallon of gasoline inspection tax, under the Act of 1915;

3. For the recovery of three cents per gallon of gasoline, under the Act of 1927;

4. For the recovery of three cents per gallon of gasoline used by the Denver Board of Water Commissioners since the passage of the Act of 1927;

5. For the recovery of oil inspection fees since the passage of the Act of 1927.

Held.—1. The Act of 1919 amended is not broad enough to include cities, either specifically or by necessary implication, and it therefore does not apply to them;

2. The City should pay the inspection fee on gasoline. This is a measure, not for revenue, but for public protection;

3 and 4. The City's claim of exemption under Article X, Sec. 4 of the Colorado Constitution is unsound, because the tax imposed by the Act of 1927 is an excise tax, not a property tax.

5. The oil inspection tax was established by Sec. 3623, C. L. 1921. This was expressly repealed by the Act of 1927, and no substitute for it was provided. The City is, therefore, not liable for this tax since 1927.

Judgment Reversed.

WARRANTY DEEDS—AFTER-ACQUIRED TITLE—REFORMATION.—No. 12,070.—*Trout Fisheries vs. Welfenberg.—Decided November 26, 1928.*

Facts.—Welfenberg owned a tract of land which he conveyed to the Fisheries by warranty deed. He also included in the deed an adjoining two acre tract which he did not then own, but which he later acquired, mortgaged and sold. The Fisheries, claiming after-acquired title, brought this suit to

cancel the mortgage and subsequent deed executed by Welfenberg, who alleged that the two acre tract was included in the first deed through mistake of both parties, and prayed for a reformation of this deed, which was awarded by the trial court.

Held.—The Fisheries' contention, (1) that Welfenberg did not plead mutual mistake, and (2) that the evidence does not justify reformation, cannot be sustained.

Judgment Affirmed.

WATER RIGHTS PRACTICE.—No. 11,954.—*The San Luis Valley Irrigating District, et al., vs. The Centennial Irrigating Ditch Company.—Decided October 29, 1928.*

Facts.—The Ditch Company petitioned for a change of the point of diversion in its irrigation system. It published notice of the proceeding, and assumed to obtain service by publication rather than personal service. This was its fourth attempt to change point of diversion, and the matter had been previously passed upon by the Supreme Court.

Held.—(1) The petition should have been dismissed as this was a clear attempt to re-litigate a matter previously determined. (2) Water right proceedings are subject to the provisions of the Code and must be prosecuted in accordance with such provisions and service must be had as in the service of summons in other civil cases.

Judgment Reversed with Directions.

WILLS — CONSTRUCTION — LAPSED LEGACY.—No. 12,129.—*Gibson & Stevenson vs. Hills as Executor.—Decided November 26, 1928.*

Facts.—Hills, as Executor of Harriet Hauser's will, filed a petition for construction of the will. Gibson and Stevenson answered, claiming the residue of the estate. The will gave testatrix' sister $500.00, but if she died before testatrix, this gift was to go to Gibson and Stevenson, the sister's daughters. The residue of the estate was left simply to the testatrix' sister, whose daughters now allege that the will is ambiguous, and that the County Court should have admitted evidence of the close relations between testatrix and their mother.

Held.—The will is not ambiguous in any way, and the

residuary legacy, having lapsed, went to the heirs as in cases of intestacy, under Sec. 5271, C. L. 1921.

Judgment Affirmed.

WITNESSES—DECEASED PARTY.—No. 12,004.—*Haffner, vs. Van Blarcom and Marsh as Trustees under the Last Will, etc., of Mary L. Haffner, deceased, and Henry Gianella.*

Facts.—Haffner and the defendant Gianella entered into a written contract for the development of certain mining property. Under the contract both advanced certain money. Title to the property was taken in the name of Haffner, and there were certain outstanding tax sale certificates which he acquired and caused the assignments thereof to be made to one Marion Patton Scott, who afterwards became his wife. Haffner then conveyed an undivided one-half interest in the property to the defendant Gianella. Marion Patton Scott died without having assigned her interest in the property back to Haffner. Haffner sues the trustees of Marion Patton Scott for the interest acquired under the tax deeds issued under the tax certificates, and the defendant Gianella for an accounting as partner. At the trial of the case Haffner offered himself as a witness in his own behalf. The defendants objected under the provisions of Section 6556 of C. L. 1921.

Held.—The testimony offered by Haffner was clearly competent upon the issues between him and defendant Gianella, as the section of the statute referred to could not possibly bar his testimony in so far as Gianella was concerned.

Reversed—but on rehearing remanded for new trial as to defendant Gianella and otherwise Affirmed.

WORK AND LABOR—DEPUTY WATER COMMISSIONER—STATUTORY ACCOUNT.—No. 12,034.—*Board of County Commissioners vs. Ellis.—Decided November 19, 1928.*

Facts.—Ellis sued the Board for compensation for services alleged to have been performed in October and November, 1923. The Board offered evidence to show that the ditches under Ellis' supervision were in good condition and that there was no need for his services. This offer was refused by the

trial Court. The Board also objected to the form of bill. Judgment was directed for plaintiff.

Held.—The evidence offered by the Board was material and should have been received. The bill presented by Ellis was not in statutory form and the objection to it should have been sustained.

Judgment Reversed.

WORKMEN'S COMPENSATION—RE-MARRIAGE OF BENEFICIARY. —No. 12,159.—*Ruth G. Tavenor,* (now Mrs. Thomas E. Fisher), *vs. Royal Indemnity Company, et al.—Decided October 29, 1928.*

Facts.—The plaintiff received an award at a hearing before the Industrial Commission. The defendants paid some of the payments provided for by the award. Later the plaintiff claimant was married, and a short time thereafter applied for a lump sum settlement under the terms of Section 55 of the Act of 1919, which lump sum settlement was allowed. Defendants contended that Section 55 did not apply, but that Section 82 was a proper section upon which to proceed. The commission allowed said lump sum settlement, and expressly granted it under the terms of Section 55, and not under Section 58, which provided among other things that the benefits shall terminate upon marriage of beneficiary.

Held.—That Section 58 being later in time must have by implication repealed Section 55 as the two could not be reconciled, Section 55 allowing lump sum payments after the marriage of the beneficiary and Section 58 expressly providing that they should cease upon marriage of the beneficiary.

Judgment Affirmed.

WORKMAN'S COMPENSATION — STAY — No. 12, 229. — *The John Thompson Grocery Company vs. Industrial Commission.—Decided November 12, 1928.*

Facts.—The Commission allowed compensation, temporary and permanent, to one Healy. The temporary was paid and the insurance carrier contested the permanent. Plaintiff in Error asks for a stay until the decision here. It appears that Healy, the injured person, is now at work.

Held.—In case of one at work and not in immediate need, denial of a stay and consequent payment of the full amount will, in case of a reversal, defeat the Writ of Error and in the present case stay should be allowed.

Stay Ordered.

RECENT TRIAL COURT DECISIONS

(EDITOR'S 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, the Juvenile Court, and occasionally the Justice Courts.)

MUNICIPAL CORPORATIONS—SEWERS—BASIS OF ASSESSMENTS—DENVER DISTRICT COURT—No. 101392, Division 2—*Santa Fe Land Improvement Company vs. Denver—James C. Starkweather, Judge.*

Facts.—Plaintiff sues to enjoin assessment for sewer costs, claiming its property was already served by a sewer and not benefitted by the new one. The Council, sitting as a Board of Equalization, had refused to hear plaintiff, on the grounds it had no right to change the cost apportionment. Defendant demurred.

Held.—Sec. 20 of the Charter provides City may make improvements and "assess the cost * * * upon the property especially benefitted * * *", but Sec. 60 provides, "The cost of district sewers shall be assessed * * * in proportion as the area of each piece of real estate in the district is to the area of all the real estate in the district * * *", and makes the basis *area,* not *benefit.* The Council's decision that the improvement was reasonable and beneficial to the territory *as a whole,* was a legislative act and final, and justified the creation of the district, irrespective of individual benefits.

Demurrer Sustained.

ANNULMENT—FRAUD. — DENVER JUVENILE COURT. — No. 6338.—*Sides vs. Sides.—Robert W. Steele, Judge.*

Facts.—Action to annul marriage on ground that said marriage was procured by fraudulent representations. Among