Denver Law Review

Volume 6 | Issue 8 Article 23

January 1929

Colorado Supreme Court Decisions

Dicta Editorial Board

Colorado Supreme Court Decisions

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of 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.)

AUTOMOBILES—COLLISION—RIGHT OF WAY—NO. 12064—*Kracaw vs. Micheletti—Decided March 25, 1929.*

Facts—Two automobiles collided at a street intersection. Defendant had the right of way, but was driving his car excessively fast. Accident occurred in broad daylight and nothing to prevent plaintiff observing excessive speed of defendant's car.

Held—Plaintiff in the exercise of reasonable care should have known that defendant's car was approaching at a highly negligent rate of speed and should have exercised reasonable care to have avoided being struck. Plaintiff has failed to explain her *prima facie* negligence and has failed to maintain the burden of proof.

Judgment Affirmed.

AUTOMOBILES — PLEADING — CONTRIBUTORY NEGLIGENCE—NO. 12,055—*Hicks vs. Cramer—Decided April 1, 1929.*

Facts—Hicks sued Cramer and wife for damages sustained in the collision between an automobile owned and driven by Hicks and an automobile owned by Cramer and driven by his wife. Defendants filed answer and counter claim. The jury found for the defendants.

Held—Although contributory negligence is an affirmative defence it is not always necessary in order to present that defence that it be specially pleaded in the answer. It is sufficient if the pleadings taken together raise the issue. If the pleading is technically insufficient evidence submitted without objection clears the defect. If contributory negligence appeared from the evidence introduced by either the defendant or the plaintiff, it would be sufficient to defeat the plaintiff's action. There was no misconduct on the part of a witness or the jury.

Judgment Affirmed.

BILLS AND NOTES—NO. 12,107—*Hurt vs. Nelson—Decided April 15, 1929.*

Facts—Plaintiff sued defendant on a promissory note. Court below instructed jury that the only question to determine was whether the defendant made and executed the promissory note. The court below on its own motion set aside the verdict and ordered a new trial on the ground that the foregoing instructions were erroneous.

Held—The sole question for the determination of the jury was whether the defendant made and executed the note and the instruction given was correct and it was error to set aside the verdict on the ground that the instruction given was an incorrect statement of the issues.

Judgment Reversed with Instructions.

CONTEMPT—FAILURE TO PAY SUPPORT MONEY—FOREIGN JUDGMENT—NO. 12048—*Lednum vs. Lednum—Decided March 18, 1929.*

Facts—The husband was adjudged guilty of contempt for failure to pay wife sums awarded for separate maintenance. The wife had obtained judgment in District Court for separate maintenance, in which action the husband personally appeared and was denied the divorce prayed for in a cross complaint. Five months after the date of the Colorado decree, the husband brought suit in Montana for divorce on ground of desertion and after service by publication, decree was entered. The husband pleads the Montana decree as defense against contempt charge.

Held—Montana decree for divorce bears upon its face indisputable proof of fraud by which it was obtained and this decree cannot be tendered as justification for failure to comply with the Colorado decree. Equity hears him with a straight face, but seeing the condition of his hands, refuses him relief.

Judgment Affirmed.

EMBEZZLEMENT — PROCEDURE — TECHNICAL ERRORS—NO. 12133—*Phenneger vs. The People—Decided March 11, 1929.*

Facts—The district attorney filed an information alleging that Phenneger embezzled $2500.00 belonging to the American Tax Company, a corporation of which he was president. After an extended trial Phenneger was found guilty, and brings error on the following grounds: (1) that the Court refused to segregate the state's witnesses; (2) that the trial court in over-ruling an objection by defendant, said "Assume you are interested in having the facts developed"; (3) improper evidence was admitted; (4) that the evidence introduced by the state in rebuttal should have been put on with the evidence in chief; (5) that the verdict of not guilty should have been directed; (6) cross examination was unduly restricted; (7) that improper evidence was given as to the values of certain property turned in to the company by Phenneger in exchange for stock; (8) improper evidence as to Phenneger's reputation, and (9) the giving and refusal to give certain instructions.

Held—The errors complained of by defendant are at most highly technical. The evidence shows a course of criminal dealing on Phenneger's part and the verdict may not be upset for the reasons assigned by defendant.

Judgment Affirmed.

LANDLORD AND TENANT—PAROL EVIDENCE—LEASES—NO. 12044—*Lavina Creek vs. Lebo Investment Company—Decided March 18, 1929.*

Facts—The Lebo Investment Company obtained a judgment against Lavina Creek for rent under a written lease. Mrs. Creek complains of the court actions in rejecting evidence offered by her in support of her counter claim for damages. She offered to prove a verbal agreement that as a condition preceding to executing this written lease the landlord agreed to install a boiler at once for heating purposes and that she signed the lease on a verbal understanding.

Held—An oral agreement to place the premises in condition fit for leasing and as an inducement to a prospective tenant to take a lease of the premises does not contradict, add

to or vary the terms of the written lease, but is an independent agreement capable of enforcement, and rejection of such evidence is error.

Judgment Reversed.

LARCENY — CIRCUMSTANTIAL EVIDENCE — ELECTION — NO. 12,221—*Sweek vs. The People—Decided April 15, 1929.*

Facts—Sweek was convicted of larceny and was found guilty on two counts, the fifth and seventh. The fifth charged him with larceny of nine hides, one being the property of one person, two being the property of another person, two being the property of a third person and the ownership of the remaining four being unknown. The seventh count charged Sweek with larceny of the same property, owner or owners unknown. The evidence as to the commission of the crime was circumstantial.

Held—(1) No more than one offense should be charged in one count, but the stealing of several articles at the same time and place as one continuous act or transaction may be prosecuted as a single offense, although the several articles belong to several different owners.

(2) There was no proper motion made requiring the people to elect.

(3) It was proper to introduce evidence that the defendant was not given permission to take the hides.

(4) The fact that ownership was unknown need not be proven by direct evidence and consent need not be proven by direct evidence.

Judgment Affirmed.

MOOT CASE—NO. 12,116—*Walker vs. Walker—Decided April 15, 1929.*

Facts—Court below adjudged defendant below guilty of contempt for refusing to pay $78.00 in arrears for support of defendant's son. Defendant was ordered confined until he paid such sum, whereupon he paid, to avoid confinement, and prosecuted this appeal.

Held—Such payment makes the case moot. When the

sole question involved has become moot, this court will decline to hear the same.

Writ Dismissed.

MORTGAGES—REMOVAL OF INCUMBRANCE—NO. 12,023—*Miller vs. Campbell—Decided April 1, 1929.*

Facts—Miller gave a mortgage on a farm and improvements to Campbell. Later, Miller, not being able to make payment, reconveyed the farm in settlement of the mortgage debt. Miller, while in possession, removed certain of the fixtures and improvements, such as a hog house, hay barn, etc., and Campbell brought suit for the value of the improvements removed and recovered judgment below.

Held—When the land was reconveyed in settlement of the mortgage debt, it was Miller's duty to deliver the farm intact and not diminished in value by the severance and removal of the fixtures. Miller is liable in law for the value of the removed articles, which, by their contract of settlement, belonged to the Campbells.

Judgment Affirmed.

QUIET TITLE—TAX TITLE—NO. 11791—*Kingore vs. Wallace—Decided March 25, 1929.*

Facts—This was an action to quiet title based upon tax deed. Defendant claimed under mesne conveyances from the United States, claiming possession and right of possession.

Held—Section 7429, Compiled Laws of 1921, which is the five year statute of limitations is not applicable. Plaintiff's rights depend upon the validity of the tax deed and his possession. His tax deed is void and he failed to establish possession. Plaintiff seeks to recover by reliance upon a technicality and is likewise defeated by a technicality.

Judgment Affirmed.

RECEIVER — CORPORATIONS — VOTING TRUST—NO. 12063—*Buchalter vs. Myers, et al—Decided April 1, 1929.*

Facts—Myers brought suit against Buchalter and Colorado Pulp & Paper Company, asking for cancellation of a voting trust agreement, for the appointment of a receiver, to

restrain alleged mismanagement of the corporation, and for an accounting. Relief prayed for was granted below.

Held—Complaint was based on *pre*-corporation affairs, but relief was granted on *post*-corporation affairs. There was a fatal variance between pleading and proof. It was error to impose a trust on Buchalter for it was not within the issues. The mere exercise of poor business judgment does not necessarily give rise to a cause of action in an application for the appointment of a receiver and for an accounting. An equitable accounting was unnecessary. A receivership is not a panacea for all business ills. The remedy may be worse than the disease.

Judgment Reversed.