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Colorado Supreme Court Decisions

Dicta Editorial Board

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.)

PROMISSORY NOTE.—AGREEMENTS—No. 12,196—*Abercrombie vs. The Bear Canon Coal Co.—Decided June 10, 1929.*

Facts.—An action was brought upon a promissory note at the bottom of which was the following notation, "This note is issued under special agreement with the company and limited thereby". The complaint alleges that the note was not at any time subject to any special agreement.

Held.—That when suit is brought upon a promissory note and there is a reference to a special agreement, the plaintiff must allege and prove performance of the terms of that agreement as a condition precedent to the bringing of the suit. Having failed to do so the defendant's demurrer was properly sustained.

NEGLIGENCE — PROOF — No. 12,075 — *Denver & Salt Lake Railway Co. vs. Wm. Mullin—Decided June 10, 1929.*

Facts.—Plaintiff, a brakeman in the employ of defendant, lost an arm as the result of an accident. He sued the defendant and recovered judgment of $12,500. The evidence showed that plaintiff was a brakeman on defendant's train proceeding westward in the dark with river on its left and a mountain on the right. It had passed through a cut and was entering a sidetrack. The plaintiff was on top of an oil tank car. The conductor noticed sparks under some of the cars, and saw that some of the cars were derailed. The rear brakeman pulled the air. The emergency brake valve was applied whereupon the train came to a sudden stop. Plaintiff was thrown from the car, and his left arm was caught under a wheel and almost severed. There are two claims of negligence. One the rock on the track, and the other the sudden stop.

Held.—The burden was upon the plaintiff to show negligence on the part of the defendant either in permitting the rock to be on the track, or in causing the sudden stop of the train. There was no evidence of any negligence on the part of the defendant in permitting the rock to appear on the track, and the lower court having submitted the question of negligence to the jury on both matters, the judgment of the lower court must be reversed and the cause remanded.

PRACTICE—CHANGE OF VENUE—No. 12,244—*The People vs. Eldred—Decided June 10, 1929.*

Facts.—A civil action was brought against the defendant and his bondsman to recover damages for official misconduct. The case was brought in Denver. It was removed to Fremont County for trial on motion of defendant. Plaintiff thereafter moved to return it to Denver. Motion was denied.

Held.—The writ of error will be dismissed, because there is no final order or judgment.

WATER RIGHTS—SEEPAGE—No. 11752—*Nevius vs. Smith. Decided June 24, 1929.*

Facts.—Plaintiff appropriated water which he claimed was from a seepage stream arising on the lands of the defendant. His appropriation was adjudicated. Defendant claims that this percolating seepage and spring water is subject under the statute to the paramount right of the owner on land on which the water arises to use them when occasion requires, and that the adjudication must be regarded as subject to such right. The facts further show that the water arising on the land of the defendant actually reached the river, or would have reached it if not taken by the plaintiff.

Held.—That the statute clearly allows the appropriation of seepage and spring water, and that the water having once been appropriated the statute cannot make it possible for the owner of the land where it arises to reclaim it at any time without compensation. Even the preferred right to the use of water for domestic purposes does not allow the taking of

said water previously appropriated for other purposes without either the consent of the appropriator or condemnation. Further the constitution gives river water to the people subject to appropriation, and this water clearly was river water.

WATER RIGHTS—PRIORITY—NO. 12057—*Denver vs. Colo. Land & Livestock Co. et al.—Decided June 17, 1929.*

Facts.—The city has certain water rights for power and irrigation purposes, which water is diverted at a certain point on the Platte River, and the city attempts to change the point of diversion several miles upstream, and offers to reduce its appropriation to replace leakage. The cause was tried on the issue of whether or not the change of the point of diversion would injuriously affect any of the defendants and their vested rights, and the finding was that the change would injuriously affect the vested rights of other appropriations.

Held.—The burden was on the city to prove that the proposed change would not impair the vested rights of other appropriators on the stream.

WILLS—CHARITABLE PURPOSES—NO. 12089—*Johnston vs. Colorado State Bureau of Child and Animal Protection.—Decided July 1, 1929.*

Facts.—The will of Fred H. Forrester was admitted to probate in the County Court under which after specific bequests the remainder of his estate was left to the Colorado State Bureau of Child and Animal Protection to use the same "in perpetuity in affording relief to hungry, thirsty, abused and neglected cattle, horses, dogs and cats in Denver and in Colorado at large, etc." The opponents of the will contended that this created a perpetuity and was void under the statute against perpetuities, and only one question is involved. Does the purpose of the bequest create a charitable use?

Held.—That the bequest as designated in the will did create a charitable use. That the relief of dumb animals is a wholesome purpose in which the public at large is interested

and that for those reasons the use being charitable the bequest is good, and is not affected by the statute against perpetuities.

TORT—NO. 12302—*Barbara vs. Meyer et al.—Decided June 17, 1929.*

Facts.—Plaintiff brought an action to recover money alleged to belong to him, which defendants converted to their own use. Defendants were officers of a corporation.

Held.—In Scott vs. Schook 80 Colo. 40 the court did not hold that the defendants were liable solely because they were directors of the corporation, and the company is not a defendant.