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Colorado Supreme Court Decisions

Dicta Editorial Board

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(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.)

APPEAL AND ERROR—DISTRICT COURT RULES—No. 12,257—*Halter vs. Wade—Decided December 31, 1928.*

Facts.—Halter, a debtor under a judgment rendered by the District Court of the City and County of Denver was, on December 30, 1927, allowed sixty days for tendering a bill of exceptions and no extension of time was given. The bill was tendered to the trial judge February 15, 1928, but was not lodged with the clerk of the Court until March 7, 1928. Notice of this lodging was served on counsel for defendant in error March 24, 1928. A rule of the Denver District Court requires that bill shall be lodged with the clerk immediately, and shall forthwith notify the opposite party, or his attorney. Wade has moved to strike the bill of exceptions.

Held.—The rule of the District Court has the force and effect of a statute. It is not in conflict with any other rule or law and must be observed. Plaintiff in error has not complied; the bill of exceptions must be stricken.

Motion to strike granted.

DIVORCE—ENTRY OF DECREE—STATUTORY CONSTRUCTION—No. 12,200—*Walton vs. Walton—Decided March 4, 1929.*

Facts.—Plaintiff below, defendant here, filed a complaint praying for a divorce and charging defendant below with cruelty and desertion. Defendant filed a cross complaint charging the plaintiff with cruelty, and seeking a decree of separate maintenance. Plaintiff withdrew his complaint; defendant amended her cross complaint to pray for an absolute divorce. The case was heard as a non-contested matter and an interlocutory decree was entered against the plaintiff in favor of the defendant. More than six months later the defendant filed a motion to set aside the findings of fact and con-

clusions of law, to which the plaintiff answered requesting that the cause be set down for hearing and trial upon the terms of alimony, and also praying that a decree of divorce be granted the defendant. The Court modified the property settlement and upon the plaintiff's application, entered a decree of divorce in favor of the defendant, under Chapter 90 S.L. 1925.

Held.—1—The Court had jurisdiction to modify the property settlement; 2—the Court erred in entering the decree at the plaintiff's request and over the defendant's protest because (a) the legislature does not have power to require a court of equity to grant a decree of divorce upon the application of the guilty party; (b) the act under which the decree was entered is in violation of Article 3 of the State Constitution, and (c) the act of entering the decree is not merely a matter of procedure; but even if it were, the legislature has placed such matters under the jurisdiction of the Supreme Court by vesting it with power to make rules of practice and procedure, (S.L. 1913, page 447, Chapter 121). Parsons vs. Parsons, 70 Colorado 154, 198 Pacific is overruled.

Judgment affirmed in part and reversed in part.

USURY—ESTOPPEL OF BORROWER—No. 12,042—*Nikkel vs. Lindhorst—Decided March 11, 1929.*

Facts.—Nikkel, a lawyer, obtained a loan of $80.00 from Lindhorst's assignor, and filled in a blank note form so that it provided for interest at 8% per annum to maturity, and 2% per month thereafter. When the note was not paid Lindhorst brought suit and Nikkel defended on the grounds of usury under C.L. 1921, Section 3797.

Held.—The provision for the alleged usurious interest was inserted in the note by Nikkel fraudulently and without the lender's knowledge. Nikkel is, therefore, estopped to maintain his defense.

Judgment affirmed.

CREDITOR'S BILL—MARSHALLING ASSETS—ATTORNEY'S FEES 12,017—*Legge vs. Peterson—Decided April 15, 1929.*

Facts.—This is an equitable action in the nature of a creditor's bill. Plaintiff below procured judgment against her

tenant and after execution was returned unsatisfied brought this action against tenant and bank. Court below marshalled assets and allowed bank attorney's fees.

Held.—(1) Before the doctrine of marshalling assets will be applied there must be two funds or properties at the time the equitable relief is sought belonging to the common debtor of both creditors on both of which funds one party has a claim or lien and on one only of which the other party has a claim or lien.

(2) Attorney's fees cannot be allowed on note in the absence of evidence as to the reasonableness of the fees and absence of evidence that holder of the note had incurred any liability for or paid any attorney's fees.

(3) Cost of harvesting should have been charged one-half to lessor and one-half to lessee.

(4) There is no evidence upon which fraud or conspiracy could be predicated.

Judgment modified and affirmed.

CRIMINAL LAW—LIQUOR—EVIDENCE—No. 12,113—*Wilder vs. The People—Decided April 29, 1929.*

Facts.—Defendant below was convicted of violating the liquor law on three counts, on the charge of possession, operation, and ownership of a still for the manufacture of intoxicating liquor.

Held.—Motion for change of venue properly denied. Evidence of advice of counsel goes only to the question of intent on the charge of operating a still. The extent to which a defendant testifying in his own behalf may give to the jury his life's history, not directly connected with the charge, is generally discretionary with the trial court. Verdict of the jury on each count is supported by the evidence.

Judgment affirmed.

BILLS AND NOTES—INNOCENT PURCHASER—No. 12,139—*Stewart vs. Public Industrial Bank—Decided April 29, 1929.*

Facts.—Public Industrial Bank recovered judgment against Stewart on a promissory note acquired by the bank

from the original payee before maturity. Claimed that note was non-negotiable because it contained a clause authorizing attorney to confess judgment.

Held.—Evidence sufficient to support finding that the bank was a bona fide owner of the note, having purchased it in due course. Inclusion in the note of the clause empowering attorney to confess judgment did not render the note non-negotiable.

Judgment affirmed.

BILLS AND NOTES—FORECLOSURE—DENIAL OF EXECUTION COMPARISON OF WRITING—No. 12,109—*Wilson vs. Scroggs —Decided April 29, 1929.*

Facts.—This is a foreclosure suit. Defendant filed answer denying execution of note and denying consideration. At trial plaintiff sought to introduce other notes and deeds of defendant for comparison of signatures. This evidence was denied by court below.

Held.—Court should have allowed the introduction of all evidence which tended to establish the genuineness of the signatures offered as a basis of comparison; should have determined, as a matter of law, whether or not that proof was sufficient to establish the authenticity of the defendant's signature upon them; and if this was done to his satisfaction, should have admitted the exhibits as standards of comparison to be used by the experts as well as the jury.

Reversed and remanded.

PATENT RIGHTS—EQUITY—FORFEITURE—No. 12,091—*The Operative Service Corporation vs. McIntyre Pump Company—Decided April 29, 1929.*

Facts.—McIntyre Pump Company, the owner of certain patent rights, sold and assigned the patent rights to the defendant below with the exclusive right to manufacture on a royalty basis. Contract provided for forfeiture in the event of failure to manufacture and pay royalties. Defendant defaulted.

Held.—Courts of equity have jurisdiction to rescind and cancel contracts where facts are established which clearly show

that the injury caused by the breach is irreparable and that damages are wholly inadequate.

Affirmed.

DRUGS — NON-SUIT—NEGLIGENCE—No. 12,074— *Campbell vs. Stamper Drug Company—Decided April 29, 1929.*

Facts.—Lower court directed verdict for the defendant. Deceased went into drug store and called for quinine. The clerk gave him strychnine, which caused his death.

Held.—Court below erred in holding that plaintiff and deceased were guilty of contributory negligence as a matter of law in failing to determine that the bottle delivered by the defendant's clerk contained strychnine instead of quinine. Proof of the violation of the druggist's statute is sufficient to make out a prima facie case of negligence against the defendant. The question of contributory negligence under the facts and evidence was for the jury.

Reversed.

ACCIDENT INSURANCE — AGE — WARRANTY — No. 12,284— *Western Casualty Company vs. Aarons—Decided May 6, 1929.*

Facts.—Plaintiff below, the assignee of Fannie M. Parker, had judgment against the Insurance Company for $120.00, being the amount paid to defendant on account of premiums for twelve years on an accident insurance policy. Parker, in her application, represented she was fifty-four years old, when in fact she was over sixty. She continued to pay premiums for twelve years. This suit was brought to recover the premiums paid on the theory that by this misrepresentation in regard to her age the policy was void and she was entitled to have the premiums returned.

Held.—The policy was voidable and not void. The company, having accepted the premiums over a period of years, waived its right to avoid the policy. The insured, having misrepresented her age but, nevertheless, for a period of twelve years, having the benefit of the insurance policy, cannot assert that the policy was void and that she is entitled to the premiums paid thereunder.

Judgment reversed.

WATER RIGHTS—PRIORITIES—No. 12,040—*In the Matter of Adjudication of Priorities, etc. vs. The Arkansas Valley Sugar Beet and Irrigated Land Company, et al—Decided May 6, 1929.*

Facts.—This is a review of a decree of the District Court of Bent County rendered February 3, 1927, in a statutory proceeding for adjudicating water rights in water district, No. 17, Division No. 2, both for direct irrigation and storage. It is the same Decree which was considered by this Court in Holbrook District versus Fort Lyon Company, 84 Colorado 174. The records show that there have been several adjudications in this district. The court below reopened the Water Right Decree on August 30, 1922, and entered a new decree.

Held.—The lower court had a right to reopen the decree. Plaintiffs, in the action now under review, themselves had also asked the trial court to reopen the earlier decree as the Holbrook District did. Therefore, Plaintiffs may not now complain of the very thing which they, themselves, asked to have done. Priorities, as fixed by the court below, were proper.

Judgment affirmed.

BODY EXECUTION—TIME LIMIT—TIME OF CONFINEMENT—No. 12,332—*Roll vs. Davis—Decided May 13, 1929.*

Facts.—Roll complains of the ruling of the trial court denying his motion to quash and recall writ of body execution. Body execution was issued two and one-half years after judgment, but during all of that time Roll was confined in the penitentiary under a criminal charge.

Held.—Delay in issuing body execution was excusable where the judgment debtor was confined in the penitentiary during the entire period from the entry of the judgment to the time of issuing execution. Body execution should not be quashed because of imprisonment for another wrong. Where the judgment was that Roll should be confined for a period not to exceed one year, or until the further order of the court, or until the amount of the judgment has been paid, such judgment is sufficiently definite. The Sheriff of the City and County of Denver had the authority to take possession of Roll's body in another county.

Judgment affirmed.

EQUITY—FORECLOSURE—ACTION AT LAW—No. 12,321—*The Fairview Mining Corporation vs. American Mines & Smelting Company—Decided May 20, 1929.*

Facts.—The grantors of American Mines & Smelting Company gave to Allen Burris, the grantor of The Fairview Mining Corporation, a mining lease and option to buy certain properties. Under this option, various payments were made and a number of extensions of time for payment were granted. Aggregate payments of more than $85,000.00 were made. Plaintiff below brought suit at law to recover possession of the property.

Held.—The facts pleaded in the answer showed an equitable defense. The grantors in the contract retained title to the property as security for payment of the agreed purchase price. The relations between the parties are the same as if title had passed from the grantor to the grantee, and the latter had conveyed the title back as security for payment. Plaintiff was wrong in resorting to an action at law for the recovery of possession. The plaintiff should have employed the equitable remedy of foreclosure and sale.

Judgment reversed and remanded.

FIRE INSURANCE—AUTOMOBILES—APPRAISAL CLAUSE—No. 12,318—*St. Paul Fire & Marine Insurance Company vs. The Walsenburg Land & Development Company* — and No. 12,319—*The Sun Insurance Office vs. Tressler—Decided May 20, 1929.*

Facts.—These two cases were consolidated for trial. The plaintiffs below each were owners of automobiles which were insured by the defendants below against fire. Both automobiles were wholly destroyed in a fire. Because of failure of the parties to agree on the damages, appraisers were appointed under a provision in the policies, to appraise the loss. The appraisers met and made an award without giving the plaintiffs below an opportunity to present any evidence as to the value of the cars. Judgment below was for the plaintiffs below.

Held.—The attempted appraisal of the value of the property destroyed was a nullity by reason of the fact that the plain-

tiffs were given no opportunity to appear before the board of appraisers at the time the appraisement was made. Every man has a right to be heard before judgment. Of course, he may waive that right, but the appraisal clause in these insurance policies was not such a waiver of this right. In this case both cars were totally destroyed; the appraiser had no knowledge of their value; and the owners of the cars should have been given the opportunity of presenting evidence of the value. Without such opportunity no hearing was had within the meaning of the law.

Judgment affirmed.

WATER AND WATER RIGHTS—CHANGE OF PARTIES—DELAY—No. 10,623—*The Northern Colorado Irrigation Company vs. The City and County of Denver Decided May 20, 1929.*

Facts.—This case was docketed in the Supreme Court six years ago. Through stipulation of the parties for various continuances, but through no fault of the Court, the case was unnecessarily delayed. In 1924 the plaintiff in error dismissed the case, and in 1927 other parties moved to reinstate and reopen, which was granted. It appears that in the trial below all claims presented were not determined.

Held.—That cause should be reversed because the court below failed to determine all claims presented. The rights of various water claimants have been seriously inconvenienced by the long delays which are caused by counsel and not by this court, and the court will enforce the rule that requests for delays, even when accompanied by a stipulation, must show sufficient reasons for extension of time.

Judgment reversed.

OIL—CONTRACTS—INDIAN LANDS—No. 12,003—*Pierce vs. Marland Oil Company—Decided May 20, 1929.*

Facts.—Pierce and McCall, plaintiffs below, brought action against Marland Oil Company of Colorado to recover damages for alleged breach of contract, to which several defenses were interposed, one of which was that there was no contract between the parties. The court below held that although extensive negotiations had been carried on, neverthe-

less that there was no completed contract, and on this ground granted a non-suit.

Held.—The evidence plainly shows there was no completed contract between the parties. Among other things, the vendors were to assign to Marland Oil Company certain leases they held on Indian Land. The evidence failed to show that the consent of the Secretary of the Interior to such assignments which was necessary in order to make a valid assignment had been obtained. The vendors failed to show that they were in a position to make the transfer.

Judgment affirmed.

AUTOMOBILES—POSSESSION—TITLE—No. 12,306—*The South Denver Bank vs. The Guardian Trust Company—Decided May 27, 1929.*

Facts.—This was an action by The South Denver Bank to recover from The Guardian Trust Company, as Administrator of the estate of Clarke, the possession of an automobile. The court below sustained defendant's motion for non-suit. The automobile was in possession of Clarke at the time of his death. The defendant trust company qualified as administrator and took possession thereof and was in possession at the time of the trial. A party by the name of Stanton gave a chattel mortgage on this same automobile to The South Denver Bank to secure a loan of $1800.00. There was no evidence to show that Stanton ever had title.

Held.—There was no evidence tending to show either ownership or right of possession in Stanton or in The South Denver Bank to this automobile.

Judgment affirmed.

ASSAULT AND BATTERY—INSUFFICIENT EVIDENCE—No. 12,148—*Osgood vs. The People—Decided May 27, 1929.*

Held.—Mrs. Osgood was convicted of assault and battery on an information in two counts, the first of which charged the defendant and one Phillips with an assault with a deadly weapon, and the second charging the defendant and Phillips with assault and battery. Phillips, who was Mrs. Osgood's chauffeur, engaged in a fist fight with another person in the

country. Mrs. Osgood, becoming alarmed for her safety, picked up a revolver that was in the car, got out of the car and pointed the revolver at a bystander who was not engaged in the fight. The bystander told her he had nothing to do with it, whereupon she expressed regret and apologized. She is not convicted for assault upon the bystander, but for assault upon the person who was fighting with Phillips.

Held.—There was no evidence justifying such a conviction. The defendant did exactly what any prudent and reasonable person would have done under all the circumstances of the case, and when she discovered her mistake, she explained her actions and promptly apologized.

Judgment reversed.

CONTRACTS—REAL ESTATE—UNILATERAL CONTRACT — ACCEPTANCE—No. 12,142 — *Morath vs. Perkins — Decided May 27, 1929.*

Facts.—Morath, a real estate salesman, sued Perkins and wife to recover judgment of $38,000.00, as damages for the failure of defendant to carry out the provisions of an alleged contract for the sale of defendant's real estate to plaintiff. The Court below directed a verdict for the defendant on the ground that the alleged contract in question was an offer to sell and that it had not been accepted by the plaintiff.

Held.—1. The contract involved was merely an offer to sell and was unilateral.

2. The evidence was not sufficient to show an acceptance.

Judgment affirmed.

FORECLOSURE—LACHES—No. 12,240—*Conrad vs. Scott—Decided May 27, 1929.*

Facts.—Conrad sued Scott to foreclose the lien of a Deed of Trust dated February 1, 1888, and given to secure the payment of a note of $300.00 of even date, payable in five years. Among the defenses was that of laches. The court below held Conrad guilty of laches and dismissed the suit.

Held.—Lapse of time is an important element of laches. Yet, unless a case falls within the operation of the Statute of Limitations, there is no such period within which a person

must assert his claim or be barred by laches. Delay alone is not laches. Scott purchased the property subject to the Deed of Trust and had paid no part of the principal or interest of the note secured thereby. To hold that Conrad cannot be permitted to foreclosure the lien of the Deed of Trust would operate to cancel a just debt which Scott should pay.

Judgment reversed.

DEEDS—REFORMATION—SUBSEQUENT GRANTEE—No. 12,117 —*Waters vs. Massey-Harris Harvester Company—Decided May 27, 1929.*

Facts.—The Harvester Company, a judgment creditor of Waters, sued Waters and his wife to reform a deed executed by the latter to her husband so as to include the property intended to be conveyed, instead of that described in the deed. The erroneous description arose through a mutual mistake of the parties thereto. A demurrer was overruled and defendant elected to stand upon the demurrer. The Harvester Company was not a party to the deed.

Held.—Since the grantee of a grantee in a deed containing a misdescription caused by mutual mistake cannot maintain an action to reform the deed, merely because he is a grantee neither can a judgment creditor.

Judgment reversed.

WORKMAN'S COMPENSATION—RISKS COVERED BY INSURANCE POLICY—No. 12,114—*Smart, et al, vs. Radetsky—Decided May 27, 1929.*

Facts.—The Industrial Commission awarded compensation to Smart and one other against Radetsky and the insurance company. It was claimed below that the risk was not covered by the insurance policy. The insurance policy was issued for a junk dealer, but provided the general coverage for other business operations. The employees were injured in dismantling a sugar plant and not upon work carried on by a junk dealer.

Held.—The insured had been engaged in dismantling abandoned plants for years to the knowledge of the insurance company. Dealing in old machinery constitutes second-hand

machinery business and not junk business, and, therefore, the clause in the policy under the heading of other business operations would cover this vocation.

Judgment affirmed.

ROADS—PRIVATE WAY—RAILROAD RIGHT-OF-WAY—No. 12,072—*The Denver & Salt Lake Railway Company vs. The Pacific Lumber Company—Decided May 27, 1929.*

Facts—This was an action by The Pacific Lumber Company against the railroad company to restrain the defendant railroad company from interfering with plaintiff's use of a private crossing over the defendant's railroad track where it passes across the plaintiff's patented land. The railroad right-of-way was acquired from the United States before any patent was issued to the plaintiff or his grantors for this land. The lower court entered an order prohibiting any interference by the railroad company with the plaintiff's use of the crossing.

Held—The right-of-way granted the railroad company by Act of Congress was more than a mere easement. It amounts to a qualified or limited fee, and so long as defendant railway company maintains its line of road it has the right of exclusive use and possession of its right-of-way. This not being a public highway crossing, the plaintiff acquired no right in the private crossing by estoppel.

Judgment reversed.

CRIMINAL LAW—MURDER — CIRCUMSTANTIAL EVIDENCE — No. 12,327—*Ives vs. The People—Decided June 3, 1929.*

Facts.—Ives was found guilty of murder in the first degree and the jury fixed the penalty of death. Judgment was pronounced in accordance with the verdict.

Held.—1. The evidence was not circumstantial. Under our statutes the death penalty could be fixed for the commission of a crime.

2. The evidence was sufficient to support the verdict.

3. The newly discovered evidence was not sufficient to warrant the granting of a new trial.

Judgment affirmed.

PROMISSORY NOTE—COGNOVIT—DEFAULT JUDGMENT—No. 12,092—*Peterson vs. Vanderlip—Decided June 3, 1929.*

Facts.—Action was brought to set aside and vacate a former judgment on a cognovit note where there was no service of summons, and the defendant did not appear at the trial in person or by an attorney of his own selection, and an attorney, not the defendant's attorney, appeared and confessed judgment in the principal of the note and interest then due. The note had already been paid before suit was brought on it.

Held.—The note, having been paid before this action was instituted, the conduct of the plaintiff in bringing suit upon the note and obtaining judgment was a fraud upon the court and its jurisdiction, and a willful abuse of legal process to accomplish an unworthy and illegal end. The judgment was unjust and should be vacated and set aside.

Judgment affirmed.

REPLEVIN—BURDEN OF PROOF—No. 12,102—*McAlpine vs. McAlpine—Decided June 3, 1929.*

Facts.—McAlpine sued her former daughter-in-law, McAlpine, to recover several articles of jewelry. The case was tried to the court without a jury. The findings and judgment were for the defendant.

Held.—1. The evidence was sufficient to support the findings and judgment.

2. The burden of proof was properly placed upon the plaintiff. Defendant's claim that the jewelry was given by the plaintiff to her son, and by the son to the defendant as a wedding present, is not an affirmative defense.

Judgment affirmed.

BANKS—CERTIFICATE OF DEPOSIT— LOSS —INTEREST — No. 12,158—*LeZotte vs. Bank of Del Norte—Decided June 3, 1929.*

Fact.—In 1921 Mrs. Comstock deposited with the Bank of Del Norte the sum of $3535.00 and received the bank's certificate of deposit therefor, due in ninety days with interest at 4% per annum, but no interest was to accrue or to be paid after maturity. After the maturity of the certificate in 1921,

Mrs. Comstock met her death in a sleeping car and her personal effects which she had with her were burned. The certificate of deposit was lost or destroyed.

Held.—The bank is liable for the amount of the certificate of deposit with interest to date of maturity, but is not liable for interest after maturity. The Statute of Limitations having run against the certificate, it was not necessary to give an indemnity bond to the bank.

Judgment affirmed.

FORECLOSURE — RECEIVER — No. 12,090—*Stevens vs. Realty Loan & Finance Company—Decided June 3, 1929.*

Facts.—A deed, absolute in form, was given by defendant below to plaintiff below, to secure the payment of a debt. The deed was in fact a mortgage. The deed conveyed the property together with the rents, issues and profits thereof. The property being insufficient in value to discharge the encumbrances against it and the defendant insolvent, the court below appointed a receiver .

Held.—Evidence sufficient to justify the appointment of a receiver.

Judgment affirmed.