Denver Law Review

Volume 5 | Issue 6 Article 5

January 1928

Colorado Supreme Court Decisions

Denver Bar Association Record

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Recommended Citation
Colorado Supreme Court Decisions, 5 Denv. B.A. Rec. 18 (1928).

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everlasting peace or emotional appeals to risk everything on a gamble that shall bring us the millenium as the prize. We have both heard too many high pressure salesmen to be impressed by promises unsupported with facts and, alas! we have both seen too many lifetime savings, that should have maintained moderate comfort and ease, thrown away to the siren song of luxury and wealth only to bring misery and despair.

I, for one, am well satisfied with my small holding of plain looking but safe and time tested securities of that great corporation called the United States of America and shall not willingly trade them for the honey worded, azure tinted, red sealed certificates of Utopia.

May your closing sentence prove prophetic, that "America, growing richer and more powerful every day, will not accept this idea . . . in this generation"!

With cordial regards, I am

Sincerely yours,

(Signed) H. H. WOLFF.

Colorado Supreme Court Decisions

Editor's Note—It is intended in each issue of the Record 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).

No. 12052

Public Utilities Commission, et al, vs. The People of the State of Colorado, on the relation of J. R. Hamrock.

Decided April 9, 1928
En Banc

Civil Service—Discretion of Public Utilities Commission—Mandamus

Facts—S. L. 1927, Ch. 134 empowered the Public Utilities Commission to appoint and employ inspectors and a salary for two inspectors was appropriated. The Civil Service Commission certified a list of those eligible for appointment, H. being first and one Dillon, second. Dillon only was appointed and H. brought mandamus to compel the Public Utilities Commission to appoint him.

Held—This position is that of employe only, not an office; therefore mandamus is the proper remedy.

No. 12060

Morris Schtul, versus M. A. Wilson.

Decided April 9, 1928.

Appeal and Error—Deceit—Evidence

Facts—Plaintiff alleged defendant induced him to accept the note of one Bentley in payment of a purchase by defendant, by misrepresenting Bentley's solvency. Summons demanded damages for fraudulently pretending that Bentley's note was good and the maker financially able to pay it. Judgment for plaintiff and findings of fraud, malice and wilful deceit.

Held—(1) Evidence shows Bentley did not own the property which defendant represented he did and on which plaintiff relied. This is prima facie proof of insolvency, without evidence of absence of other property.

(2) Plaintiff was not bound to investigate Bentley's solvency. Defendant's instruction to the contrary properly refused.

No. 11,819

Olney Springs Drainage District, et al, vs. William Auckland.

Decided April 2, 1928

Waters—Water Courses

Facts—Auckland brought action against Olney Springs Drainage District and Pantle, a ditch contractor, to enjoin them from diverting the water collected in the drainage system of the district, away from its outlet above plaintiff's land on which he used it for irrigation, and from changing its course into a new channel away from such lands and so depriving plaintiff of the use of such waters.

Findings were for plaintiff and permanent injunction issued against the defendant.

Held—1. Drainage water flowing from the drainage system of a district is subject to appropriation in the same manner as other waters of the State are subject to appropriation.

2. Plaintiff was not a trespasser in constructing a conduit from the drainage canal on the district's right of way, to carry the water over and upon plaintiff's land for irrigation, where the purpose of the construction thereof was to abate nuisance.

No. 11,843

Frank L. Miller, v. The East Denver Municipal Irrigation District, a public corporation.

Dept. 1

Contempt—Dismissal—Jurisdiction

Facts—In 1913 the District started suit and obtained an order for possession of a right of way over M.'s land. In 1914 the District moved that the cause be dismissed on certain terms. In 1920 the Court entered an order dismissing the case, but without giving notice to the District. In 1925 the order of dismissal was vacated and the case reinstated. M. contended that the court was without jurisdiction to reinstate this cause, and was fined for contempt upon refusing to obey the order for possession.

Held—The order of dismissal was made without notice to the District and was therefore void. The court retained jurisdiction of the cause, and M.'s failure to obey its order was contempt.

No. 11869

The Poudre River Oil Corporation, versus *Carey*.

Decided March 19, 1928

Oil—Lien Pleading—Practice

Facts—C. brought suit for services in drilling an oil well and to foreclose a lien for that amount which he had filed upon certain personal property belonging to Oil Company.

Held—1. The parties in Lower Court treating a matter as an issue, the omission of the specific allegation from the complaint cannot be raised for the first time in the Supreme Court.

2. Defaults of Oil Company entitled C. to abandon work.

3. Sections 6466 and 6467 Compiled Laws of Colorado, 1921 does not give a lien upon machinery and equipment, used in connection with oil well where C. only performed the labor and did not furnish the material. One furnishing labor only is limited in his lien to the well itself and the fee or leasehold interest. As to whether or not the labor lien statute might attach to machinery and equipment treated as a part of the oil well itself and not as severable personal property, not decided.

No. 11,894

Edna Whitaker Thayer, etc. *vs. Francis J. Kirchof*, etc.

Decided April 2, 1928

En Banc

Master and Servant—Respondeat Superior Independent Contractor

Facts—K. had the general contract for erecting a building. He made an arrangement whereby one Myers was to haul the dirt from the excavation for the building. Myers did not have enough teams of his own and one Delashmutt agreed to furnish some men and teams and sent one Stevens to do hauling, in the course of which W. was injured by Stevens.

Held—K. is not liable. Stevens was working for either Delashmutt or Myers and was doing their work, not K.'s.

No. 11,913

City and County of Denver, a Municipal Corporation, *versus The Bargan Land and Investment Company*, a Corporation.

Decided April 23, 1928

Municipal Corporations—Widening Strets—Ordinance

Facts—City and County of Denver sought to widen and straighten the jog in East Twelfth Avenue between Grant and Logan Streets, Denver. The work involved cutting off a strip of the curb, parking lawn and the sidewalk. Plaintiff, adjoining property owner, secured an injunction against the City.

Held—1. Failure to publish map accompanying and referred to in ordinance itself was published as required by law, where map itself is on file, does not void ordinance.

2. Delegation of authority with reference to minor matters in connection with public improvements to the proper officer does not void ordinance.

3. In determining what changes and improvements in a street will render the street more useful for a highway, the municipality has a large discretion, and courts will interfere only when it acts unreasonably, arbitrarily or oppressively.

No. 11,924

The First National Bank of Aurora, Colorado, et al *versus Edward J. Mulich.*

Decided April 2, 1928

Facts—The Action was by Edward J. Mulich, hereinafter referred to as plaintiff, against the bank to recover about One Thousand Dollars left on deposit by his deceased sister. Plaintiff's sister was a patient in Fitzsimmons hospital. She had in her own name a checking account in Defendant bank. She executed to Defendant Bank the following:

January 5, 1925 The First National Bank, Aurora, Colorado. Gentlemen: I hereby request that my checking account be made joint with my brother Edw. J. Mulich for him to check on only in case of my death. Yours truly, ISABEL E. MULICH. Sister died. Judgment below for plaintiff.

Held—1. Prior determination in County Court is not res adjudicata because no judgment of the County Court appears in the record. Mere findings and memoranda are not a judgment and do not constitute a record thereof.

2. There was a good gift inter vivos between sister and brother. Also title to money was in plaintiff for another reason i. e. letter of sister to bank amounts to a draft, payable at a future time, upon a contingency, and its retention by the bank was an acceptance constituting an agreement to pay the whole balance, if any, after the drawer's death, to the plaintiff.

No. 11951

John H. Gabriel, versus The Board of Regents of the University of Colorado, a Body Corporate.

Decided: April 30, 1928

Declaratory Judgments Act—Moot Questions

Facts—Suit was brought in court below by Clifford W. Mills under de-

claratory judgments act, to determine the validity of a contract. Defendant demurred to the complaint on the grounds of insufficient facts and want of jurisdiction. Demurrer sustained below.

Held—Declaratory judgments act provides that: "Any person interested under a * * * written contract * * * may have determined any question of construction or validity arising under the instrument, * * *."

Complaint fails to state that such question of construction or validity of contract has arisen. Mere fear that such question may arise in the future insufficient. This act was not intended to repeal the statute prohibiting judges from giving legal advice, nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions.

No. 11,980

Auguste Nicolas, versus Caroline I. Grassle, et al.

Decided April 16, 1928.

Highway—Obstruction—Injunction

Facts—Nicolas brought suit against Grassle et al., to enjoin the obstruction of a road which he claimed was a public highway.

Injunction denied by Lower Court.

Held—Congress has enacted that "The right of way for the construction of highways over public lands not reserved for public use is hereby granted." The word, "construction" as used in Federal Statute, does not require that work must be done on highway. Any use of highway over public land, however slight, and though it gives access only to one property owner, constitutes a highway. Federal Statute was an express dedication and the use by those for whom it was necessary was an acceptance.

Reserved:

No. 12,061

D. L. Coursey, vs. The Industrial Commission of Colorado.

Decided April 2, 1928

Dept. One

Industrial Commission—Review of Award

Facts—On April 28, 1926, C. was awarded compensation for injuries. On May 12, 1926 the referee set aside this award without notice to C. Upon review by the District Court, the dismissal was set aside and the original award was adjudged to be in full force. The Commission then ordered further hearings, of which C. had full notice, and further compensation was denied.

Held—Under C. L. '21, 4484, the Commission may order hearings diminishing, maintaining or increasing the compensation previously awarded, even though the original award has been affirmed by the District Court, because such affirmance adds nothing to the award.

Affirmed.

Recent Trial Court Decisions

Of General Interest

(Editor's Note.—It is intended in each issue of the Record to note interesting current decisions of all local Trial Courts, including the United States District Court, State District Courts, the County Court, and the Justice Courts. **The co-operation of the members of the Bar is solicited in making this department a success. Any attorney having knowledge of such a decision** is requested to phone or mail the title of the case to Victor Arthur Miller, who will digest the decisions for this department. The names of the Courts having no material for the current month will be omitted, due to lack of space.)

IN THE DISTRICT COURT

DIVISION VI.

No. 29570

The People of the State of Colorado vs. C. C. Bennett, et al.

Order.

The Court. In this matter, case No.