Denver Law Review

Volume 5 | Issue 5 Article 4

January 1928

Colorado Supreme Court Decisions

Denver Bar Association Record

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(Editors 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. 11,992

Joseph M. Bohe v. Edwin A. Scott.

Decided March 5, 1928.

Affirmed.

Opinion by JUSTICE BURKE

Replevin—Fraud

Facts—Bohe took in a portrait as a credit on a bill against Scott, representing the picture to be of little worth. At the time he so believed, but at the time he received the picture and bill of sale therefor he knew it to be an old masterpiece, but concealed the fact. On discovery of the fact, Scott brought replevin without demand or tender. Judgment for Scott, and Bohe appeals.

Held—Tender being only an incident to demand is unnecessary where it is admitted demand would have been futile.

A material misrepresentation, innocent when made, becomes fraudulent if, on discovery of its falsity, the one making it conceals the truth from the other party, who acts in reliance thereon.

No. 12,016

Harley F. Stotts v. Mary Ellen Stotts.

Decided March 5, 1928.

Affirmed.

Opinion by JUSTICE WALKER

Divorce—Contempt

Facts—S was adjudged guilty of contempt for failure to pay alimony pendente lite.

Held—Affidavit for contempt need not aver that S had any property, money or means of raising money. Sufficient to aver that "S has been well able to make such payments". Court can continue alimony hearing without losing jurisdiction to later enter judgment for contempt. Whether imprisonment for contempt where evidence shows that S was unable to comply with Court's order would be imprisonment for debt, not decided because S failed to comply with rule eight of the Supreme Court.

No. 12,015

The State Civil Service Commission of The State of Colorado v. Barnard Cummings.

Decided March 12, 1928.

Reversed.

Opinion by JUSTICE CAMPBELL

Certiorari—Mandamus

Facts—C, with approval of State Civil Service Commission, was serving as Provisional Appointee, as Assistant Commissioner of Securities. Civil Service Commission discharged C. Lower Court granted writ of *certiorari* to review order of the commission terminating his employment.

Held—Certiorari did not lie. *Quo warranto* is the remedy for trying title to office. *Mandamus* is the remedy for reinstating to office. *Certiorari* is an extraordinary remedy and will not issue if some other adequate remedy exists, and it is restricted to jurisdictional matters.

No. 11,999

Ben Grimes v. The John Harvey Fuel and Feed Company, a corporation.

Decided March 12, 1928.

Application Denied. Judgment Affirmed.

Opinion by JUSTICE WALKER

Abuse of Discretion—Excusable Neglect

Facts—Counsel for Grimes moved to vacate County Court's denial of Motion for New Trial, alleging his absence from the hearing and reliance on oral assurances of opposing counsel that they would notify him of the court's ruling on said motion for new trial, which was not done until after time for appeal had elapsed. Motion denied and appeals here asking supersedeas.

Held—Only an agreement not to ask final judgment without notice and not to take technical advantage is shown, such is insufficient to justify failure to attend said hearing or ascertain its result. Clearly no abuse of discretion in denial of motion to vacate.

No. 11, 761

F. G. Gasche v. The Lincoln Mines and Reduction Company, a corporation, The Ironclad Hill Mining and Development Company, a corporation, and Thos. Kavanaugh, as Receiver of and for The Lincoln Mines and Reduction Company, a corporation.

Decided March 19, 1928.
Affirmed.

Opinion by JUSTICE ADAMS

Attachment—Appeal and Error.

Facts—Gasche, the plaintiff, sued defendant on money demands for amounts due for wages as general manager and amounts advanced for company expenses, and attached defendant's property. Defendant counter-claimed, and the trial court found in part for both parties but gave final judgment against plaintiff for some $2,000.00 and dissolved the attachment. Both parties appealed.

Held—(1) Findings on conflicting evidence not disturbed.

(2) *Net* result showed defendant not indebted to plaintiff. Hence attachment was rightly dissolved.

No. 11,997

Athens Confections and Candies Company v. Keithline.

Decided March 19, 1928.
Affirmed.

Opinion by JUSTICE WHITFORD

Accord and Satisfaction—Principal and Agent

Facts—K. brought suit against A. to recover for milk delivered. A pleaded Accord and Satisfaction on ground that A. gave check to milk driver employed by K. for much less than the amount claimed, but which check had written at the bottom thereof "payment for milk service in full to date" and driver gave receipt on the statement "paid, L. Keithline, Feb. 4, 1926".

Held—Evidence shows that milk driver was merely an agent to deliver milk and to receive payment therefor, and was without authority to enter into a compromise settlement not authorized by his principal.

"High On Injunctions"

A young lawyer who applied to Judge Miller, in the United States Circuit, for an injunction, to establish the right to a restraining order, was reading from "High on Injunctions." When the Judge, stopping him, asked: "Young man, what are you reading from?" The attorney answered, "From 'High on Injunctions'." "Well", said the Judge, "you needn't read any further. I was making law before the author of that book was born."—*Samuel F. Miller.*

The Lawyer's Estate

"The true lawyer is seized of an estate as secure and venerable as an estate in lands; its income, better than rents; its dignity, higher than ancestral acres."—*Sam'l F. Miller, a common saying.*