Denver Law Review

Volume 5 | Issue 9 Article 9

January 1928

Colorado Supreme Court Decisions

Denver Bar Association Record

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Edited by the Committee on Supreme Court Decisions: C. Clyde Barker, Chairman, Harold B. Wagner, Max P. Zall.

(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. 12,079

The People of the State of Colorado, on the Relation of S. Julian Lamme, v. Charles S. Buckland, et al.

Decided June 18, 1928.

Mandamus

Facts—Relator's daughter was expelled from high school for refusing to comply with a ruling of the committee requiring certain uniforms for girl pupils. Relator sued out a writ of *mandamus* to compel her reinstatement. The writ was quashed and the action dismissed, whereupon relator appeals.

Held—The statutes provide a system of appeals from the decision of the committee to the County Superintendent of Schools and thence to the State Board of Education, and until relator has exhausted these remedies, *mandamus* is premature. No opinion is expressed as to the reasonableness of the regulation nor as to the contention that the matter is within the exclusive jurisdiction of the school authorities.

Affirmed, but without prejudice to Relator's rights under the statutory system of appeals,

Mr. Chief Justice Denison specially concurring, Mr. Justice Walker dissenting.

No. 12,110

Villa Crosby v. T. Canino, doing business as The American Beauty Baking Company, and Walter G. Lett.

Decided June 11, 1928.

Violation of Ordinance—Contributory Negligence

Facts—Plaintiff got off a South bound car on Broadway, and instead of going to the near curb, started across to the East side of the street. A North bound Broadway car was coming and plaintiff stepped back one step to avoid this and was struck by defendant's truck, which had overtaken and was attempting to pass the line of cars which were getting in motion after stopping when plaintiff got off the street car. Plaintiff testified that the way to the near curb was blocked by a line of automobiles, some of which were already in motion as the street car moved on, that she sood a moment and then turned to cross to the far side. Plaintiff also introduced the ordinance requiring careful driving and forbidding passing at intersections. Defendants introduced the ordinance requiring passengers to proceed "immediately to the sidewalk to the right", and forbidding them to stand in the street. The court non-suited plaintiff, holding her guilty of contributory negligence as a matter of law.

Held—Although a violation of an ordinance is negligence *per se*. yet the rule is otherwise where compliance would require the doing of the impossible or taking a dangerous course when an apparently safe one is open. Here plaintiff's access to the near curb was blocked by autos along side the street car, some of them already in motion, and it was for the jury to say whether or not she acted reasonably in attempting to cross to the far side of the street, instead of attempting to go in front of these automobiles.

Reversed.

No. 12,144

Konicke, Plaintiff in Error, v. McFerson, Defendant in Error.

Decided September 10, 1928.

Banks and Banking—
Stockholder's Liability

Facts—A bank commissioner brought action to recover a statutory assessment upon stock of a defunct bank. Konicke demurrered to complaint, which was over-ruled, and elected to stand on his demurrer. Konicke's contention was that the provisions of the Session Laws of 1923, giving the bank commissioner a lien upon the property of a stockholder of an insolvent bank to secure the payment of his assessment, is unconstitutional.

Held—Chapter 67, Session Laws of 1923, is by express terms an amendment of Section 39 of the banking act of 1913, being Section 2696 of the 1921 Colorado Laws, which latter Section creates and defines the stockholders' liability in language identical with that of the amendment. If the amendment is unconstitutional, the original Section is still in force and sustains the action; not decided whether or not the amendment of 1923 was constitutional.

Judgment affirmed.

No. 12,166

The People of the State of Colorado, Petitioners, v. the District Court of the Second Judicial District, Respondents.

Decided September 10, 1928.

Prohibition

Facts—Defendants Bennett, Stearns, and Bradford, and others, made an application in a criminal case for the calling in of another Judge, claiming that Judge Dunklee was prejudiced against the Defendants. Application was denied.

Held—Not proper to issue a Writ of Prohibition in a case of this kind, as Writ of Prohibition will not be granted except in matters publica juris, or matters of great gravity and importance. Writ is not a writ of right and whether or not it shall issue is within the discretion of the Court; whether the ruling of the Court below was right or wrong can be determined in the event that the Defendants are convicted through a Writ of Error.

No. 12,131

The Hugo National Bank, Plaintiff in Error, v. Enoch J. Ashworth, Defendant in Error.

Decided September 10, 1928.

Creditor's Bill

Facts—The bank sued Ashworth, his wife, and Childress, alleging that the bank had reduced to judgment its claim against Ashworth, and that Ashworth transferred certain real estate to his wife without consideration, which made him insolvent. After the transfer, the wife contracted to sell the property to Childress on time payments. Demurrer to complaint was sustained below.

Held—Complaint stated a cause of action. Creditor's bill was the proper way to reach the property because the title of the real estate was not in the name of the judgment debtor.

Held Further—The sustaining of the demurrer and judgment of costs against Plaintiff constituted final judgment which was appealable.

Judgment reversed.

"Equity is a roughish thing, for law we have a measure. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure."—*John Selden.*