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Supreme Court Decisions

Dicta Editorial Board

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Habeas Corpus; Child; Custody; Full Faith and Credit Clause of the Constitution. No. 14592. Decided January 1, 1940. Hedgen, etc. v. Byrne. District Court, Jefferson County. Hon. Samuel W. Johnson, Judge. Affirmed. In Department.

FACTS: A. Petitioner sought a writ of habeas corpus to compel production in court of a minor child and for a determination of its proper custody. The trial court sustained a general demurrer to the petition.

B. The child was the issue of the marriage of the plaintiff in error (father) and defendant in error (mother) in Michigan which was the matrimonial domicile. In 1936, a final decree in divorce in an action by the wife was granted her in Michigan and she was awarded the custody of the child. The father, under the decree, was entitled to custody at certain times. Shortly after the decree was entered, the father went to South America and the mother brought the child to Colorado where she obtained employment and established her residence.

C. The parents of the father, then petitioned the Michigan court for a modification of the original decree and requested the appointment of a legal guardian. The mother was served with notice of this hearing, but she made no appearance in the Michigan hearing. The plaintiff in error, H., was appointed guardian and the court decreed the custody of the minor to him. He demanded the child; it was refused; he filed petition for writ of habeas corpus.

HELD: 1. The Colorado court was not bound to recognize the orders of the Michigan court under the full faith and credit clause of the Constitution.

2. The primary and controlling issue in cases of this kind is the interest and welfare of the child.

3. A petition for habeas corpus, in this kind of a matter, based solely on the full faith and credit clause, does not state grounds sufficient to authorize the issuance of such a writ.

4. Although there were allegations to the effect that defendant in error was not a bona fide resident of Colorado, but a fugitive from Michigan on the eve of the presentation of a petition to change the custody of the child, the Michigan court did not so determine, nor did that court adjudge her in contempt for violation of any former order.

5. The case of People v. Torrence, 94 Colo. 47, 27 P. (2d) 1038, applies here.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Burke concur.

Quiet Title; Unknown Defendants; Publication of Summons; Duty to Notify Defendants Discovered After Entry of Order for Publication and Before Decree, Setting Aside Decree Within Year; Petition to Vacate Judgement. No. 14494. Decided January 1, 1940. Bray, etc. v. Germain Investment Company. District Court, Denver. Hon. Otto Bock, Judge. Reversed. In Department.

HELD: 1. It is error for the trial court to refuse to vacate a judgment and set aside a decree in a quiet title suit where it appears that the names of some of the unnamed defendants were made known to the plaintiff in the suit to quiet title, after order for publication of summons was entered and before the decree was signed.

2. The information was such that had it been acted upon, the plaintiff would have been able to secure the names of all of the holders of the various notes secured by a deed of trust which the suit attempted to cut out.

3. There was a duty on the plaintiff, after obtaining the information concerning some of the originally unknown noteholders to act upon the information and to attempt to obtain personal service in Colorado or substituted service outside of the state.

4. The law permitting the rights of unknown parties to be cut off upon service by publication in actions in rem is limited strictly to cases of necessity. "If reasonable diligence to discover the identity of a party interested in the res involved in an action is not exercised and service is made upon him by publication of summons—in which he is not named—issued on a complaint describing him as an unknown party, such service should not be permitted to be the basis of a judgment cutting off rights in the res involved."

5. Granting that reasonable diligence in determining the defendants was exercised prior to the time the order to publish was entered, that such diligence did not disclose the identity of the noteholders, nevertheless, when without being under legal obligation to use more diligence, knowledge of the identity and of the addresses of the defendants described as unknown came to the plaintiff before the service of summons was begun by even a first publication, the spirit of the law required that reasonable effort then be made, in the light of that knowledge, to bring actual notice to such persons of the pendency of an action affecting their rights in or to the res involved in the litigation.

6. Section 50 of the code permits unknown parties not personally served to move to set aside the judgment within one year after its entry.

7. "If under Section 50 it is ever necessary to tender or otherwise disclose a prima facie good defense, such showing is not required where

application to vacate the judgment is based on lack of service and, therefore, want of jurisdiction to enter the decree."

8. "Paragraph 81 of our code is applicable only in cases where valid service has been had and one served is seeking to be relieved of his failure or neglect to plead to the complaint. In such a case a defense prima facie sufficient to require a different judgment must be clearly disclosed by tendered pleading or otherwise."

9. A holder of notes secured by a trust deed has an interest in land.

10. It is immaterial that the holder of the notes obtained them after the decree was signed so long as his assignors were not properly served.

Opinion by Mr. Justice Young. Mr. Chief Justice Hilliard and Mr. Justice Knous concur.

Criminal Law; Burglary; Instructions; Drunkenness; Motion for New Trial; Newly Discovered Evidence. No. 14696. Decided February 13, 1940—McPhee v. People. District Court, Denver. Hon. Robert W. Steele, Judge. Affirmed. En Banc.

HELD: 1. The court did not err in refusing to give a tendered instruction to the effect that while voluntary drunkenness is no excuse for a crime, still it may be considered by the jury for the purpose of determining intent to commit the crime charged. The court's instructions numbers 9 and 10 covered the question properly and followed the language of the pertinent part of Section 10, Chapter 48, '35 C. S. A.

2. The court did not err in refusing to give instruction containing a definition of sanity as given by Webster's dictionary. The court fully instructed the jury on that feature of the case, and no objection was made to the giving of such instructions. "Under the established rule, the assignment (of error) on this point calls for no further consideration."

3. Where it appears that the alleged newly discovered evidence, upon which defendant bases request for new trial, was within defendant's knowledge at time of trial, the trial court did not err in refusing new trial.

4. Evidence examined and found to be sufficient to justify trial court in refusing a directed verdict.

Opinion by Mr. Justice Bock.

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