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Colorado Supreme Court Decisions

Dicta Editorial Board

COLORADO SUPREME COURT DECISIONS

(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.)

BILLS AND NOTES—DISCHARGE IN BANKRUPTCY—DESCRIPTION IN SCHEDULE—NO. 12,531—*Kobebell v. Diers Bros.—Decided February 3, 1930.*

Facts.—Diers Bros. brought suit on a promissory note against Kobebell and recovered judgment in the lower court. The defense was that Kobebell had received a discharge in bankruptcy. In listing a description of this indebtedness in his bankruptcy petition he describes the note as being owed to Frank Baker of Scotts Bluffs, Nebraska, and not as being owed to Diers Bros. It seems that the manager for Diers Bros. at Scotts Bluffs, Nebaska, was a man by the name of F. R. Becker that Diers Bros. never had either actual or constructive notice of the pendency of the bankruptcy proceedings and never filed any claim therein.

Held.—1. A general assignment of error on the ground that a motion for new trial has been granted or denied without specifying particular errors will not be considered.

2. Fact findings of a trial court upon conflicting evidence will not be disturbed on review.

3. The attempted description of a promissory note in the bankrupt's petition was in no respect a compliance with the Bankruptcy Law and constituted no notice whatsoever to Diers Bros. and his discharge in bankruptcy did not operate to discharge him from this particular debt.

Judgment Affirmed.

CHATTEL MORTGAGES—AUTOMOBILES—CONVERSION—NO. 12,438—*Mosko v. Matthews—Decided Feb. 3, 1930.*

Facts.—Matthews brought an action in conversion against Mosko and others to recover the value of an automobile claimed by Matthews under a foreign chattel mortgage. Mosko defended on the ground that he was an innocent pur-

chaser of the automobile for value, and that the mortgage was not recorded in Colorado.

Held.—1. A chattel mortgage properly executed and recorded according to the law of the place where the mortgage is executed and the property is located will, if valid there, be held valid even as against creditors and purchasers in good faith in another state to which the property is removed by the mortgagor unless there is some statute in that state to the contrary, or unless the transaction contravenes the settled law or policy of the forum.

2. The validity of the mortgage is determined by the law of the place where it was made at the time the chattel was there located.

3. The employment of the rule of comity is conducive to mutual good-will between states, and is necessary to law in custom.

4. The old strict rule of pleading and proving statutes of other states should be relaxed.

Judgment Affirmed.

CRIMINAL LAW—RAPE—LEADING QUESTIONS—MISCONDUCT OF JUDGE—NO. 12,395—*Ewing v. People*—*Decided January 20, 1930.*

Facts.—Ewing was tried and convicted of rape. The prosecuting witness was a girl fourteen years of age, and the district attorney asked her leading questions. In the examination, the attorney for the defendant objected to an answer on the ground that it was prejudicial and the Judge, in his remarks, said it was prejudicial, but overruled the objection. This was assigned as error.

Held.—1. The method of examining a witness is in the discretion of the trial court even on the question of asking leading questions unless it clearly appears that the defendant was thereby denied a fair trial.

2. The remark of the trial court was not reversable error, nor was there any misconduct on the part of the prosecuting attorney.

Judgment Affirmed.

CRIMINAL LAW—SUFFIENCY OF EVIDENCE—INSTRUCTIONS—NO. 12,371—*Bowen vs. People—Decided Jan. 27, 1930.*

Facts.—Bowen was convicted of the crime of taking indecent liberties with the person of a girl ten years of age. He was sentenced to be confined in the penitentiary.

Held.—The evidence satisfied the jury beyond a reasonable doubt that the defendant was guilty. The fact that the trial judge refused to set aside the verdict and grant a new trial indicates that his reason and conscience approved the verdict. In the circumstances we cannot say that the verdict was unsupported by the evidence.

2. The instruction given by the Court when the jury, after being out for several hours, failed to reach an agreement, is approved. This instruction was substantially the same as one approved in *Sevilla v. People,* 65 Colo. 437.

Judgment Affirmed.

DEPENDENT CHILDREN—JUVENILE COURT—RIGHTS AS TO CUSTODY—NO. 12,227—*Saum v. Freiberg—Decided Feb. 3, 1930.*

Facts.—Annie Freiberg, maternal grandmother, filed in the juvenile court a petition declaring that her three grandchildren were dependent on the ground that the mother was deceased and that the father of said children was not a fit and proper person to have the custody, care, and control of the children. The lower court awarded the children to the grandmother.

Held.—In dependency cases the welfare of the children is paramount. As between a grandmother and a father of the children the custody awarded to the grandmother will prevail where it appears that the children have a marked aversion to the father and to his second wife who would share in the custody if their custody were awarded to the father. The lower court's finding that the grandmother was a more suitable person to have their care, custody, and control is supported by the evidence.

Judgment Affirmed.

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—EQUITY NO. 12,498—*Roberts, et al. vs. Dietz, et al.—Decided Jan. 6, 1930.*

Facts.—Dietz brought suit to set aside a Trust Deed given by Roberts to secure the payment of certain promissory notes on the ground that the trust deed was given with the intent to hinder and delay Dietz in the collection of certain debts and for the purpose of defrauding him. At the time of the conveyance, the grantee was a bona fide creditor of the grantor.

Held.—Where the grantee was a bona fide creditor of the grantor at the time of the conveyance, then the mere fact that the grantee knows that giving him a preference might or even would hinder or delay another creditor in the collection of his claim is not enough to deprive the grantee of his preference. The mere fact that the grantee knew that a verdict had been rendered against the grantor did not charge the grantee with notice that in giving the trust deed demanded by the grantee that the grantor was willing or even desired to postpone the collection of the judgment. Burden of proof is on the grantee to show good faith.

Judgment Reversed.

INJUNCTION — BONDHOLDERS — NECESSARY PARTIES — NO. 12,250—*Denver Land Company v. Moffat Tunnel Improvement District—Decided January 20, 1930.*

Facts.—The Denver Land Company brought action to enjoin Tunnel District and the commissioners from levying assessments to pay interest on supplemental tunnel bonds on the ground that the bond issue was illegal and void. None of the bondholders were made party defendants although attorneys for all parties below stipulated that they were not necessary parties.

Held.—Court below was without jurisdiction where none of the bondholders were made parties in the absence of a showing why they were not made parties. All bondholders within the jurisdiction should be made parties, or failing this a showing be made as to the reason for their non-joinder.

Judgment Reversed with Directions.

MANDAMUS—TRANSFER OF STOCK CERTIFICATES—NO. 12,192 *Sturner v. McCandless Investment Company, et al.—Decided Jan. 27, 1930.*

Facts.—This proceeding presents the question whether in the circumstances disclosed by the record, Sturner is entitled to a peremptory writ of mandamus to compel the transfer upon the books of the investment company of 937 shares of capital stock. In the trial below, McCandless as administrator tendered his verified petition in intervention and applied for leave to intervene, claiming ownership of the certificates in question. The Court denied the application to intervene.

Held.—1. In a proper case mandamus will lie to compel the issuance of stock certificates.

2. However, this is not a proper case because no one is entitled to a writ of mandamus whose right is not clear and unquestionable; if there is a doubt about his right, mandamus will not lie. The fact that a petition of intervention was tendered by a third party claiming ownership shows that plaintiff's right and title to the stock was in controversy, and it was proper to dismiss the proceeding.

Judgment Affirmed.

RES ADJUDICATA—VEXATIOUS SUIT—NO. 12,217—*London v. Allison—Decided Jan. 27, 1930.*

Facts.—London, plaintiff in error and plaintiff below seeks to review a judgment of dismissal based upon a plea of res adjudicata. The complaint was in three counts and charged that plaintiff was employed by defendant, and in January, 1920, a partnership was formed whereby he was to receive each year, in addition to his salary, one-fifth of the yearly net profits; in a second cause of action, he attempted to hold the defendant as trustee for the amount alleged to be due under the first cause of action; and the third cause of action was for the reasonable value of his services. A plea of res adjudicata was interposed.

Held.—While the former suit might be termed a suit for an accounting, and the present action is based upon express agreement, nevertheless the former suit sought to, and did

adjudicate defendant's rights under the identical agreement pleaded in the instant case. This is a typical case of res adjudicata.

The record discloses that this suit was vexatiously instituted and prosecuted, and plaintiff should therefore pay the amount of defendant's attorneys' fees, to be taxed as costs, for the determination of which amount the case will be remanded.

Judgment Affirmed and Case Remanded.

SCHOOL DISTRICTS—TEACHER—BREACH OF CONTRACT—DAMAGES—NO. 12,437—*Cheyenne County High School, Dist. 1, vs. Graves—Decided February 3, 1930.*

Facts.—Graves brought this action in the District Court and obtained judgment against Cheyenne County High School District 1 on a contract for services as its superintendent of schools. He prevailed below. The district employed him at a stated salary for one year commencing Aug. 1, 1925, and three days later on Aug. 4th, without any charges being filed or any hearing given Graves, he was discharged.

Held.—1. The findings of the trial Court, that Graves was discharged by motion carried on Aug. 4th and the keys taken from him on the 17th of August without any charges having been filed nor hearing had as required by statute, were sustained by the evidence.

2. The School District could not cure this by a later meeting and at a purported hearing attempt to ratify the previous discharge. The School District's breach was committed on August 4th which marks the date when plaintiff's cause of action arose.

Judgment Affirmed.