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Colorado Supreme Court Decisions

Dicta Editorial Board

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(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.)

CORPORATIONS — DIRECTORS — PREFERRED CREDITORS—SUCCESSORS—NO. 11998—*Beaver Park Co. vs. Hobson—Decided December 2, 1929.*

Facts.—Beaver Park Co. was organized to take over a former land company and an irrigation company, after the Pueblo flood had destroyed the irrigation system and the companies were without funds to proceed. Penrose, a director, loaned money to the company to perform the work, after the company had tried to raise money without success. Certain land owners had brought suit and obtained judgments against the former water company for damages and sought to hold the new company as successor of the old company and to have their judgments declared superior liens to that of Penrose for moneys he advanced and for which he took security from the company.

Held.—An officer of a corporation, in the absence of bad faith or fraud, has the same right to become its creditor, preferred or otherwise, as one who has no official connection therewith. The Beaver Park Company was not a continuation of, or reincarnation of, the old company and there being a consideration for the transfer of the assets from the old company to the new and no fraud nor merger nor consolidation, the new company cannot be held for the debts of the old company.

Judgment Reversed.

FORECLOSURE — PRIORITY — UNMATURED INTEREST — NO. 12154—*Toll vs. Colorado National Bank, et al—Decided December 23, 1929.*

Facts.—The Twin Lakes Land and Water Company executed a deed of trust to which were attached interest coupons paying 6 per cent. interest. At the same time they executed a series of 1 per cent interest coupons which were not attached

to the principal note. The original note and deed of trust with the coupons attached became the property of the Colorado National Bank and the 1 per cent interest coupons which were detached came into the possession of Toll as trustee.

Held.—First, in the absence of an agreement or a special equity to the contrary, assignees holding separately several notes secured by a mortgage or otherwise are entitled to share *pro rata* and without any preference in the proceeds arising from the sale of the securities, when insufficient to satisfy them all, and this is true if all the notes matured on different dates, and the assignments were made at different times. Second, Toll was not entitled to *pro rate* to the extent of his interest coupons that had not yet matured.

Judgment Affirmed and Modified.

INTOXICATING LIQUORS — AUTOMOBILES—FORFEITURE—NO. 12199—*Lindsley vs. Werner—Decided December 23, 1929.*

Facts.—Lindsley sold an automobile to Walling. The purchaser did not pay the entire purchase price, but gave back a mortgage. The mortgage contained a covenant against the use of the car in violation of the Federal or State intoxicating liquor laws. Thereafter, while the car contained intoxicating liquors, an officer seized the same and was proceeding to forfeit the car under the intoxicating liquor statutes, and the mortgagee, who was innocent in the transaction, instituted suit in replevin against the officer .

Held.—While the automobile is used or kept for the purpose of violating the provisions of the intoxicating liquor act, it can be forfeited to the State, notwithstanding that there is a chattel mortgage against it and the mortgagee was innocent and had no knowledge of the use to which the car was being put.*

Judgment Affirmed. ————

MECHANICS' LIENS—CONTRACTORS' BONDS—SUBROGATION—ESTOPPEL—NO. 11906—*Howard vs. Fisher—Decided December 9, 1929.*

Facts.—Howard owned five lots which she mortgaged to The Colorado Mortgage Company. Thereafter she hired

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*EDITOR'S QUAERE: Would this be true if the mortgagee was not a party to the action and was never notified of the seizure?

Brendle and Brent to build an apartment house on them, and they gave a contractors' bond with The National Surety Company as surety. Brendle and Brent defaulted and the Surety Company undertook the work, which it continued for a time, then dropped. It paid certain mechanics' lien claimants and assignments of their liens were taken in the name of Smith, the Surety Company's Vice-President. After work had been begun the Midland Company paid off the Mortgage Company's loan and took a new mortgage; after suit had been started one Auslender bought Howard's interest in the property, but the trial Court refused to make Auslender a party.

Held.—The Surety Company was estopped to assert the claims under the assignments of the mechanic's lien. The Midland Company's loan is inferior to the mechanic's lien claims, but it is entitled to the protection of the contractor's bond. Auslender should have been made a party to the proceedings.

Judgment Affirmed in Part and Revised in Part.

MUNICIPAL CORPORATION—ORDINANCE—FORTUNE TELLERS —No. 12496—*Watson vs. City of Denver—Decided December 23, 1929.*

Facts.—Watson was charged with the violation of section 1202 of the Municipal Code of Denver, was found guilty and was fined. She appealed to the County Court where she was again found guilty and fined apparently on the theory that she was a fortune teller without having procured a license. The complaint against her was that she violated Section 1202. Section 1202 defined fortune tellers and clairvoyants but contained no penalty.

Held.—Section 1202 of the Municipal Code creates no offense. The complaint states no offense. The verdict found Helen Watson guilty of no offense. Hence the judgment cannot stand.

Judgment Reversed.

RECEIVERSHIP—LACK OF PROOF—NO. 12264—*Kochiovelos vs. Kochiovelos Live Stock Co. et al.—Decided December 16, 1929.*

Facts.—This was a suit by one brother against another

and a company seeking the appointment of a receiver of the corporate property, a dissolution of the corporation, a disposition of the assets of the company and for an accounting. Judgment below was rendered for the defendant.

Held.—The evidence failed to sustain the plaintiff's allegations for receivership and accounting.

Judgment Affirmed.

REPLEVIN — CONFLICTING EVIDENCE — NO. 12260 — *Kritzmanich vs. Spehar, Administrator—Decided December 16, 1929.*

Facts.—The administrator brought an action in replevin in the District Court to recover certain cattle, horses, and miscellaneous farm equipment. Defendants were the two eldest of five sons of the deceased. The sole issue involved was whether the personal property was owned by the deceased at the time of his death, or by the defendants. There was conflicting evidence, and the trial court entered judgment for possession for the plaintiff.

Held.—On the question of possession or ownership, the evidence was conflicting, and there was sufficient, proper, substantial, and credible evidence from which the Court had the right to determine that the property involved in this suit was all owned by the deceased. Judgment of the trial court based upon such evidence will not be disturbed by this court.

Judgment Affirmed.

WILLS—CONTEST—FORMER ADJUDICATION—NO. 12446—*In re Last Will of Schmidt, Deceased, et al. vs. Dillingham—Decided December 16, 1929.*

Facts.—A beneficiary under the will sought to have it admitted to probate. Dillingham contested its provisions. Proponent demurred and the Court sustained the demurrer. Contestant elected to stand and appealed to the Supreme Court, which reversed the case, with directions to overrule the demurrer. The case went back, the trial court overruled the demurrer, and on motion, later struck out the answer on the ground that the matters set forth in the answer had been fully adjudicated by the Supreme Court in the former appeal.

Held.—For the lower Court to strike an answer without giving an opportunity to amend was a drastic action; but in this particular case, the answer consisted of a repetition of pleas formerly made and already adjudicated, and under such circumstances the Court did not err in adopting such drastic action.

Judgment Affirmed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYEES—NOTICE OF CLAIM—NO. 12320—*Comerford vs. Carr et al.—Decided January 6, 1930.*

Facts.—Comerford, the employer, was engaged in a rendering business and Carr the employee, testified that he was hurt while working for Comerford, that he ran a stone into his hand and was poisoned. The employer at different times had more than four employees working for him but they were not doing the same work, as Carr the injured employee was engaged in loading cars. Carr was awarded compensation.

Held.—(1) Carr was not required to file notice claiming compensation because he was paid compensation during the time he was off work. (2) He was injured in the course of his employment. (3) Comerford had more than four employees working for him. (4) The other employees were not casual employees because they were employed in the usual course of trade of the employer. (5) These other employees were engaged in a common employment. The mere fact that they were engaged in loading the cars was not a different employment. This was necessary for the conduct of the employer's business.

Judgment Affirmed.