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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.)

BOARD OF DENTAL EXAMINERS—JURISDICTION—PROHIBITION —No. 12108—*People vs. State Board of Dental Examiners, et al—Decided March 4, 1929.*

Facts.—Mahurin, a dentist employed by Painless Parker Dentist, a California corporation, filed a petition in the Denver District Court for a writ of prohibition against the Board to restrain it from determining his right to practice dentistry. Mahurin conceded that the decision in this case depended upon the right of the employer corporation to operate dental offices in Colorado.

Held.—In the companion case, No. 12050, the Supreme Court held that the corporation could not practice dentistry in Colorado. The writ of prohibition in this case was, therefore, properly refused.

Judgment Affirmed.

BULK SALES LAW—VARIANCE—No. 11937—*Englewood State Bank vs. Tegtman—Decided March 18, 1929.*

Facts.—Tegtman, the owner of a store, sold the store to Dolton, with an agreement that if Dolton did not pay the entire purchase price within a certain time, Tegtman had the right to take back possession of the store and stock of merchandise. The payment was not made and Tegtman repossessed himself of the store and the stock. The Bank levied an execution on the stock of merchandise upon a judgment against Dolton only, and Tegtman recovered judgment for damages.

Held.—The Bulk Sales Law has no application to the facts in this case. The transaction between Tegtman and Dolton was more nearly like a mortgage than a sale, and as such did not come within the terms of the Bulk Sales Law.

There was no variance between the pleadings and the proof.

Judgment Affirmed.

CONTRACT—MEETING OF THE MINDS—INSTRUCTIONS—No. 12027—*Babcock vs. Bouton, et al.—Decided March 11, 1929.*

Facts.—This action was brought to recover money alleged to be due under a contract whereby Bouton, as buyer, and Babcock, as seller, agreed to the purchase and sale of an oil lease for $1,500.00. Shortly thereafter Babcock telegraphed Bouton a new offer for the lease "as agreed to by us in Denver." In reply Bouton wired his acceptance.

Babcock testified that he understood that the instructions as agreed to referred to the provisions of the first contract. Bouton testified that he had in mind the terms of an oral agreement, and contended that there was no meeting of the minds. He tendered to the trial court an instruction that the minds of all the parties must have met before there could be a valid contract. The Court refused to give this instruction, but did instruct the jury that the parties had made a valid contract and that if Bouton was ready, able and willing to comply with its terms, and that Babcock had failed to perform, the finding should be for Bouton.

Held.—The instruction requested by Babcock should have been given, but the ones above mentioned should not have been given because: (1) The question of the meeting of the minds should have been left to the jury; and (2) Bouton must not only have been ready, able and willing to perform his part of the bargain but must actually have delivered, or offered to deliver the assignments of leases.

Judgment Reversed and Case Remanded.

DAMAGES—MALPRACTICE—MUNICIPAL CORPORATIONS—No. 11958—*Meek vs. City of Loveland—Decided March 18, 1929.*

Facts.—Meek brought action for damages against the City of Loveland, mayor, city physician, chief of police, police officer and county physician, for negligently amputating plaintiff's leg. Plaintiff had been drinking, was accosted by a police officer, started to run and was shot by the officer and without any criminal charges being filed was thereafter forcefully removed from his home and taken into the county poor farm

against his will by the chief of police and city physician, where the amputation was performed by the county physician. Nonsuit was granted in the Court below.

Held.—1. City not liable for damages by reason of county physician's malpractice, if any.

2. City physician and chief of police were liable if acting together they caused plaintiff to be removed forcefully and against his will to the poor farm, as the jury would be warranted in finding that they both knew that an amputation was at least probable and by their actions subjected him to treatment by the county physician.

3. County physician is liable for his own negligence and chief of police and city physician liable on theory that plaintiff's injury was suffered by reason of their act in forcefully sending him to the poor farm, and, knowingly, subjecting him to surgical treatment.

Judgment Reversed.

DENTISTRY—PRACTICE BY CORPORATION—No. 12050—*People vs. Painless Parker Dentist, Decided March 4, 1929.*

Facts.—The people brought this action against defendant, Painless Parker Dentist, a California corporation, for unlawfully usurping the franchise of practicing dentistry in Colorado without a license. The defendant demurred on the grounds that it appeared from the complaint that the defendant was a corporation, therefore could not practice dentistry, and that the complaint did not state a cause of action. In argument defendant counsel suggested that the actual work was done by dentists regularly licensed to practice in Colorado, but this does not appear in the pleadings.

Held.—The demurrer admits that the corporation had been practicing dentistry, which our statutes forbid. It is no defense that it is impossible, in the nature of things, for a corporation to pass an examination as to its character and ability. If the defendant desires to raise the point that the dental work is done by licensed practitioners it should do this by answer and not by demurrer.

Judgment Reversed and Case Remanded.

GASOLINE TAX—INJUNCTION—No. 12,043—*Rio Oil and Supply Company vs. James Duce, et al.—Decided February 27, 1929.*

Facts.—Plaintiff company, as a buyer, seller and user of gasoline, brought suit against the defendant state officials to enjoin them from assessing the gasoline tax, and also to have the act levying the tax declared unconstitutional.

Held.—This case is not equitable in its nature, because the statute provides a speedy and adequate remedy, namely; to pay the tax and then sue to recover it. This action, therefore, cannot be maintained.

Judgment Affirmed.

GASOLINE TAX—METHOD OF IMPOSITION—STATUTORY PENALTY—No. 12185—*People vs. Texas Company—Decided February 27, 1929.*

Facts.—The State brought this action against the Company to recover a balance claimed on gasoline sold by the Company in May, 1927, and for a penalty for an alleged failure to pay such tax according to law. The Company paid the tax on gasoline actually sold during that month, but objects to the payment of a tax on gasoline "offered for sale", claiming that the statute means "sold or used"; that it would otherwise be subject to double taxation; that the statute as attempted to be construed by the State is unconstitutional; that the gasoline should be measured at the time of sale and not beforehand; that the tax interferes with interstate commerce; that it is unfair to assess the tax on gasoline in the Company's tanks because of evaporation; that a tax cannot be levied on gasoline sold to the United States; and that the penalty should not be enforced in this case.

Held.—The statute means "offered for sale," whether actually used or not; there is no danger of double taxation; constitutional questions are not necessarily involved; the gasoline is at least impliedly offered for sale in the Company's tanks, and it is immaterial that most of it is actually sold at filling stations; the act specifically avoids interfering with interstate commerce; the State is entitled to a tax on all gasoline offered for sale and it is immaterial that part of this may dis-

appear through evaporation or otherwise; it is true that a tax cannot be levied on gasoline sold to the United States. The statutory provision for penalty is upheld but may not be enforced here because of the peculiar facts in this case.

Judgment Reversed.

MANDAMUS—STARE DECISIS—No. 12149—*Roberts, et al vs. Gross, et al.—Decided March 11, 1929.*

Facts.—Gross brought mandamus to compel the building inspector of the City of Pueblo to issue a permit for the erection of a building. On the authority of *Chamberlain vs. Roberts, 81 Colo. 83,* the trial court granted the writ.

Held.—The *Chamberlain* case is decisive of this one.

Judgment Affirmed.

PROMISSORY NOTE—ACCELERATION.—No. 12095—*Spears vs. Cook—Decided March 4, 1929.*

Facts.—Spears held Cook's promissory note dated November 12, 1925, payable three years thereafter, without providing for the acceleration of maturity in case of default. This note was secured by a deed of trust providing that the total of principal, interest, etc., should become due at the option of the holder upon any default in payment of principal or interest. There was a default in payment of the interest and Spears brought this action to obtain judgment for the entire amount of the note, but without asking for foreclosure of the mortgage.

Held.—When judgment on the note only is prayed, the acceleration clause in the mortgage does not apply. The lower court was right in entering judgment for accrued interest only.

Judgment Affirmed.

SCHOOL DISTRICTS—DIVISION—No. 12058—*Fanseleau vs. Harker—Decided March 18, 1929.*

Facts.—The president and board of directors of School District No. 4 brought suit against the president and board of directors of School District No. 10 to restrain the defend-

ants from interfering with the official functions of the first-named Board. School District No. 10 was attempted to be carved out of School District No. 4. There were three townships No. 12 in School District No. 4 at the time of the attempted change. The notice of election merely referred to Township 12, but did not designate what particular township 12 of the District would be effected. In the Petition for creation of the new district, the territory to be segregated was not described.

Held.—The election was void. The voters were entitled to know what territory was to be segregated from the old district and placed in the new district. The information given them in the notice of election failed to furnish the necessary information.

Judgment Affirmed.

VIOLATION OF ORDINANCE—INDUCEMENT BY PUBLIC OFFICER —No. 12293—*City of Canon City vs. Landen—Decided March 4, 1929.*

Facts.—Defendant is charged with violating an ordinance of Canon City. The evidence discloses that a municipal detective furnished money with which the defendant willingly bought liquor in violation of the ordinance. The trial court instructed the jury that the verdict should be for the defendant if it appeared that the officer had induced this violation of the law. The verdict was for the defendant.

Held.—There are no facts in this case making the above instruction applicable, because the defendant knowingly and willingly violated the law.

Judgment Reversed and Case Remanded.

WORKMEN'S COMPENSATION—REOPENING OF CASE—No. 12236—*Colorado Fuel and Iron Company vs. Industrial Commission and Medina—Decided February 4, 1929.*

Facts.—Medina, an employee of the Fuel & Iron Company, was injured December 10, 1924, and thereafter brought proceedings for Workmen's Compensation. On May 16,

1927, the referee entered an award setting forth that Medina had suffered no permanent disability. December 14, 1927, a letter was written to the Commission in behalf of the claimant, asking that the case be reopened. The Commission complied with this request without setting forth any reasons for doing so. On January 30, 1928, the Commission found that Medina had sustained 25% permanent total disability. The Company appealed to the District Court, where it was defeated.

Held.—The Commission had the power to re-open the case on its own motion, even though the award of May 16, 1927, was a final determination. The record in the case discloses that there was error, mistake or change in conditions.

Judgment Affirmed.