OREGON SUPREME COURT DECISIONS

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Bowman v. Sherill and Sherill, Washington County.

Decided, October 3, 1911.

Benton Bowman, trustee in bankruptcy of the estate of W. E. Sherill respondent, v. W. E. Sherill and Lizzie M. Sherill appellants. Appeal from the circuit court for Washington county. The Hon. J. U. Campbell, judge. Argued and submitted Sept. 20, 1911. John A. Jeffrey (and M. B. Bump, on brief) for appellants. W. G Hare (Bagley & Hare,on brief) for respondents. McBride, J. Modified.

In January, 1909, W. E. Sherill was adjudged a voluntary bankrupt, and plaintiff was appointed his trustee in bankruptcy. Prior to this on October 28, 1908, Sherill without consideration, conveyed to W. P. Dyke certain land described in the complaint and hereinafter called for convenience, "a part of the Moore claim." On the same day Dyke conveyed the land without any actual consideration to Mrs. Sherill. On the 13th of November, 1908, Sherill traded a team of horses to one Weisenbeck for lot 6, in block 37, South Coast Addition to the City of Hillsboro, taking a deed therefor in his wife's name.

Plaintiff brings this suit to have the deed declared fraudulent as to creditors, and praying that the property be sold and the proceeds applied upon the proved debts of W. E. Sherill. Defendants answered, denying all allegations of intent to cheat or defraud creditors and further set up that the land situated in the Moore claim is a homestead and, therefore, exempt from execution and sale.

McBride, J. Where a party, fraudulently conveying land is insolvent or has been adjudged a bankrupt, the issuance of an execution is not necessary.

We are satisfied from the testimony that both the conveyances were made or procured with intent to defraud creditors and that Mrs. Sherill did not contribute anything toward the purchase of either tract. Either of the defendants had a right to claim a homestead in the property on the Moore claim and this right is not defeated by a conveyance from one to the other. A decree, such as is sought in this case, would operate practically as an execution and we see no reason why this exemption should not be claimed and urged in this proceeding. The decree should be so modified as to provide that plaintiff should have a lien upon the tract in the Moore claim for the amount of the proved debts, subject to the right of defendants or either of them to occupy it as a homestead, with leave to apply to the court for an order of sale whenever it shall cease to be so occupied. In all other respects the decree will be affirmed. Neither party will recover costs in this court.

Dowd, et al, vs. American Surety Co. of New York, Multnomah County.

Decided, October 10, 1911.

James Dowd, executor, and Kate Dowd, executrix of the last will and testament of James Barry, deceased respondents., v. American Surety Company, of New York, appellant. Appeal from the circuit court for Multnomah county. The Hon. Robert G. Morrow judge. Argued and submitted Sept. 28, 1911. John T. McKee and (Cake & Cale, on brief) for respondents. M. A. Zollinger (Kollock & Zollinger, on brief) for appellant. McBride, J. Reversed and remanded.

The complaint alleges that James Barry died on September 10, 1908; that plaintiffs are his executors; that in 1906 the Pence Company, a corporation, began an action to condemn a right of way for a ditch, flume or canal across the land of Barry, and, desiring to commence the immediate construction of the ditch made and executed with defendant as surety, the body of which, after stating the title of the action, is as follows: "Whereas, the above named plaintiff has brought an action in the above entitled court against the defendant for the purpose of condemning a right of way for its use in the construction of a ditch flume or canal across and over the lands of the said defendant; and, whereas, the plaintiff desires to commence the immediate construction, operation and maintenance of its proposed ditch, flume or canal and build the same at an early date, which is necessary for its use for the coming season: Now, Therefore, the plaintiff herein, as principal, and The American Surety Company of New York, as surety are hereby bound unto the defendant, his heirs and assigns, conditioned for the payment of any and all damages and compensation that may be awarded to the defendant in the above entitled action and to which the said plaintiff and the said surety hereby bind themselves, their heirs, executors and administrators firmly by these presents. In witness whereof we have hereunto set our hands and seals this 29th day of December, 1906."

That the undertaking was served on Barry on January 5, 1907; that immediately thereafter the Pence company took possession of the land necessary for the construction of the ditch, which it constructed across the land: that Barry filed his answer to the complaint of the Pence company in which he claimed $—— damages for taking the land: that thereafter in June, 1907, the parties to the action, through their attorneys of record, entered into an agreement of arbitration, which is as follows:

"In the Circuit Court of the State of Oregon, for Multnomah County.

The Pence Company plaintiff, v. James Barry, defendant.

Whereas, the plaintiff has instituted proceedings against the defendant to condemn a certain tract of land belonging to the defendant, situated in Multnomah county, Oregon and particularly described in the complaint herein, to which reference is hereby made as a part hereof, said condemnation to be for the use and occupation of said land for the purpose of construction thereon a ditch, flume or canal; and whereas, the parties are desirous of submitting the question of the value of said land and the damages to the remaining portions of defendant's property affected by the construction of said ditch, flume or canal to a board of arbitration.

Now, therefore, it is agreed by and between the parties hereto, acting by and through their respective attorneys of record as follows, to-wit:

(1) That for the purpose of this agreement, the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Oregon and among other things, the object and purposes for which said corporation was organized and which it proposes to engage in, were to divert and appropriate water from lakes, rivers and streams conveying the same in reservoirs, and to use the same for domestic purposes, sluicing, irrigation and developing electric power.

(2) That the defendant is the owner in fee simple and in possession of the southwest quarter of section 30, township 2 north, range 1, west of the Willamette meridian, Multnomah county, state of Oregon.

(3) That the plaintiff has done every and all things necessary under the laws of the state of Oregon to acquire the right to appropriate water to its use in order to carry into effect the object and purposes of its formation as a corporation, and it is necessary to conduct water by means of ditches, flumes and canals over and across the lands of the defendant.

(4) That the said ditch, canal or flume is now constructed upon the lands of the defendant and that the land actually taken is as described in paragraph 4 of the complaint herein, to which reference is hereby made for a particular description thereof.

(5) That the plaintiff and defendant have not been able to agree upon the value of the right of way as shown in the complaint and which is necessary for the use of plaintiff, nor have plaintiff and defendant been able to agree upon the damages sustained by defendant aside from the amount of land actually taken by the plaintiff.

(6) That in order to determine and fix the damages sustained by defendant on account of the taking of the land described in the complaint and the damages sustained by the defendant on account of the construction of said ditch, canal or flume, it is agreed that the same shall be submitted to a board of arbitration composed of three persons, one of said persons to be chosen by the plaintiff, another by defendant, and the third by the two persons so chosen as aforesaid by plaintiff and defendant, and that said three persons shall proceed to view said premises and said ditch, canal or flume, determine the damages sustained by the defendant on account of the taking of said land and the construction of said canal, ditch or flume, without the taking of testimony or the argument or assistance of counsel, except as the same may be requested by said board of arbitration, and said finding of said board of arbitration or a majority thereof, shall be final as to said damages sustained by defendant.

And it is further agreed that the selection of said three persons shall be concluded by Saturday the 8th day of June, 1907, and in case said three persons are not chosen on or before said last mentioned date this agreement shall be null and void and of no force or effect.

And it is further agreed that an award of said board of arbitration of a majority thereof shall be made on or before Wednesday, the 12th day of June, 1907, and that the same shall be immediately filed with the clerk of the above entitled court, and when so filed, it is agreed by the parties hereto that the defendant may take judgment against the plaintiff for the amount of said award, and said judgment may be entered upon the records of this cause as any other judgment rendered upon the verdict of a jury or the findings of the court, and the same as if said cause had been tried by the court and jury, and shall be final and binding upon the parties hereto as any other judgment rendered in this cause upon all of the matters referred to herein and in said complaint."

That pursuant to the agreement of arbitration, the Pence Company chose one arbitrator; Barry chose the second, and these two met and chose a third, who, after consideration, filed in the action an award in the amount of $3425; that since the filing of the award the company has been dissolved by proclamation of the governor and is wholly insolvent, and has no assets nor property; that, upon the death of Barry plaintiffs were substituted as defendants in the condemnation proceedings.

A demurrer to this complaint was overruled, and defendant filed an answer, which substantially admits the agreement of arbitration, the return and filing of the award, and the insolvency and dissolution of the Pence Company, and sets up that defendant had no knowledge or notice of the arbitration, nor of the meeting of the arbitrators, nor of the filing of the award, and did not consent to such proceedings in any way. The answer further alleges that James Barry died on September 10, 1907; that his heirs at law were not substituted as defendants within one year from that date nor have they ever been substituted; that after Barry's death an alleged award of arbitration was filed in the circuit court but no judgment was taken against the owners of the real property, vesting the occupation and right to possession of the property in the Pence Company.

At the time of filing the foregoing answer, the defendant also filed in the action a cross complaint in equity, setting up substantially the same facts that appear in its answer at law and claiming the privilege of being subrogated to any rights the Pence Company might have in the ditch across the land of Barry.

Plaintiff demurred to the answer in the action at law and also to the cross complaint in equity on the ground that the answer did not state facts sufficient to constitute a defense and that the cross complaint did not state facts sufficient to justify any equitable relief. Both demurrers were sustained. Judgment was rendered in favor of plaintiffs for the amount prayed for in the complaint. Defendant appeals.

McBride, J. The demurrer to the defendant's cross complaint was properly sustained. Every legitimate defense therein urged had been set up in its answer in the law action and the cross complaint set up no equity. It asks to be subrogated to any rights that the Pence Company have in the land, but does not allege that it has any such rights and, in fact, contends that it has not acquired any.

The court erred in sustaining the demurrer to defendant's answer. The submission being made in an action pending and being for the purpose of ascertaining a particular fact, namely, the amount of damages, the rights obtained under it could be no greater than stipulated in the agreement of submission. By that agreement the award was to be filed in the court and the court was then to enter judgment upon it. When this judgment was entered the award was complete. The defendant had his remedy by execution only when the judgment was entered pursuant to the stipulation. Here it is alleged in the answer that no judgment was ever rendered. The intent and purpose of the submission went no further than to substitute the decision of the arbitrators for the verdict of the jury and to dispense with the calling of witnesses.

If we treat this as a submission in an action pending, then before it can have the effect to create a liability against the plaintiff, there must be a judgment of the court in accordance with the stipulation. If, on the other hand, we treat it as a common law arbitration, to have effect irrespective of any action of the effected a discontinuance of the action and released the surety from any obligation on its undertaking given therein: (3 Cyc 605, and cases there cited.) The agreement by its terms required a judgment of the court before the award should become complete. These considerations render it unnecessary to discuss the other questions so ably argued by the respective counsel.

The judgment will be reversed and the cause remanded with directions to overrule the demurrer to defendant's answer.

Cole v. Willow River Land & Irrigation Co., et al, v. Cole, Malheur County.

Decided, October 10, 1911.

Leonard Cole, respondent, v. Willow River Land & Irrigation Company, a corporation, appellant, and North American Security Company, appellant, v. Leonard Cole respondent. Appeal from the circuit court for Malheur county. The Hon. Dalton Biggs, judge. On Petition for Rehearing. Motion to dismiss overruled July 5, 1911. John L. Rand and M. D. Clifford, for respondent. W. T. Slater, Geo. E. Davis, Wheeler & Hurley, and Richards & Haga, for appellant. Per Curiam. Appeal reinstated and motion to dismiss denied.

We will consider these two cases together since the question involved is the same in each case.

Per Curiam. On petition of appellant for a rehearing upon the motion to re-instate the appeal, and in resistance of the motion to dismiss. The motion of respondent to dismiss was allowed on July 5, 1911, and the motion to reinstate the appeal was denied on September 12. This petition was filed on September 29, 1911.

Upon reconsideration of the whole case, we are of the opinion that the appeal should be re-instated, and the motion to dismiss denied. It appears that the appellant was prosecuting his appeal in good faith and it is a case of great importance to it. The brief was filed within the time prescribed by the rules, as counsel interpreted or understood them, being confirmed in that understanding by the language of the statement in the case of Shafer v. Beecher, 54 Or. 273, namely, that the 30 days in which he must file the brief commenced from the time of the filing of the transcript. The time of filing the transcript had been extended until April 15, but it was actually filed April 10. The appeal was perfected on February 13 and the brief was filed on May 2. Counsel for the appellant mailed to the clerk of this court an application for an extension of time to file his brief, but later withdrew it, for the reason that he concluded his 60 days would begin to run on April 10. That circumstance cannot aid him now, but it tends to show diligence on his part. In Neppach v. Jones, 28 Or. 286, 289, it is said: "While the court expects and will require counsel to substantially observe the rules in the preparation and service of abstracts and briefs, yet if, through excusable neglect, the service is not made in time, the court may relieve the party in default, on a proper showing, from the consequence thereof. The rules were designed and intended to facilitate the business and simplify the practice, and are not so arbitrary or inflexible as to work an injustice, or prevent a hearing in this court, when the failure to comply therewith is owing to the excusable neglect of the party."

We are satisfied from the showing in this case that the default, in filing the brief within the time prescribed by rule 36, was by reason of excusable neglect and that appellant should be relieved from his default; Wood v. Fisk, 45 Or. 276; Johnson v. White, (Or.) 112 Pac. 1083; Kearney v. O. R. & N. Co. (Or.) 112 Pac. 1083.

The appeal will be re-instated and the motion to dismiss denied.

Bernard v. Hassan and Allin, Marion County.

Decided, October 10, 1911.

L. Bernard, respondent, v. Sarah A. Hassan and William R. Allin, appellants. Appeal from the circuit court for Marion county. The Hon Wm. Galloway, judge. Argued and submitted Sept. 20, 1911. J. G. Heltzel and John Bayne, for respondent. M. E. Pogue (and W. M. Kaiser, on brief) for appellants. McBride, J. Suit dismissed.

Suit to foreclose a mechanic's lien. Decree for plaintiff. Defendants appeal. The facts appear in the opinion.

McBride, J. Defendant Allin was the owner of a house and lot in Salem, Oregon, which were occupied by defendant, Mrs. Hassan. In the spring of 1908, Mrs. Hassan entered into a contract with plaintiff to make certain alterations and repairs on the dwelling house which consisted, substantially, in putting a second story and roof on a portion of the building; dividing it into four rooms with partitions; clothing, papering and finishing them, and painting the woodwork one coat; covering the roof with P. & B roofing; putting in doors and windows; building a porch on the second story and erecting a stairway from the ground floor to the porch. The contract price of this work was $150. Mrs. Hassan was to furnish all the materials for the work, including doors, windows and frames.

Plaintiff placed workmen upon the building and began the work, but Mrs. Hassan subsequently changed her mind and concluded to have six rooms instead of four, and continued to suggest changes and deviations from the original plan, until finally it was agreed that plaintiff should go

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