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One Year Review of Real Property

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The Supreme Court of Colorado, during 1958, ruled on a number of cases in the real property field; the most far reaching concern mineral law. The cases which are worthy of comment are discussed in this article and are classified under broad topic headings for organizational purposes.[1]

OPTION AGREEMENTS[2]

The parties to the action in *Moddelmog v. Cook*[3] entered into an option for the sale of real property. Approximately a month after execution of the option, the buyer notified the seller that the property was subject to an easement for an irrigation ditch, and demanded the return of the down payment. The option was silent as to the easement. The seller refused to return the down payment.

The supreme court reversed the decree of the trial court reforming the option, holding that a contract may only be reformed when there is a mutual mistake and that in this case there was no evidence of a mutual mistake. The fact that the buyer knew of the existence of the ditch before signing the contract, the court said, was no indication that the buyer intended to vary the terms of the written contract, or to accept a title subject to encumbrances other than those enumerated therein.[4]

FORECLOSURE[5]

Weber v. Williams[6] involved foreclosure and quiet title actions. In

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[1] Some of the opinions herein discussed are not final under Colo. R. Civ. P. 118 (c). The discussion of such decisions will be limited to a statement of the case, in particular the Radke and Corlett cases.

[2] The court decided another case which is pertinent to this topic which is here noted. In Rhodes v. Haberstitch, 326 P.2d 657 (Colo. 1958) the buyer brought an action to recover a down payment made under an option, on the basis that the agreement was void for lack of mutuality. Directed verdict for the buyer. The allegation of lack of mutuality was based on a provision which provided that if the sellers were *willing* and able to perform and the buyer refused, the deposit would be retained as liquidated damages, but, if the sellers refused to perform and the buyer was willing, the deposit would be returned. The buyer contended that under this provision he was bound and the sellers were not; therefore, there was lack of mutuality.

The court, reversing the judgment, held, in construing the agreement in its entirety, that the return of the down payment upon the sellers' refusal or failure was not an exclusive remedy and that sellers could not make a naked refusal and be relieved from all obligations. Therefore, since this provision constituted mutual promises, there was good consideration. This case should cause no concern as to the validity of the standard options since they are usually null and void only if the seller is *unable* to perform as distinguished from *unwilling*.

[3] 330 P.2d 1113 (Colo. 1958).

[4] See also, Erikson v. Whitescarver, 57 Colo. 409, 411, 142 Pac. 413, 414 (1914). These cases are in conformity with the weight of authority as to the situation where the easement interferes with the intended use of the property; see, 55 Am. Jur. *Vendor and Purchaser* § 263 (1946); American Law of Property § 11.49(b) (1952); Annot., 57 A.L.R. 1441 (1928).

[5] Three other 1958 cases primarily concern foreclosure. Although not worthy of comment as to foreclosure, they are noted here for other points considered. The first is Bishop v. Moore, 323 P.2d 897 (Colo. 1958), which involved foreclosure of a mechanic's lien. An employee of the principal contractor brought an action to establish and foreclose a mechanic's lien against the property of the owner for unpaid wages. The trial court, finding that the work of the employee was not completed and that which had been done was worthless, denied the lien. The court, in affirming, held that the prime requisite in establishing a valid mechanic's lien is that an indebtedness exist in favor of the claimant. The court distinguished the case, as to the subcontractor's right to a lien, from the problem presented in Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505 (1896) and Rice v. Rhone, 49 Colo. 41, 111 Pac. 585 (1910) where the contractor defaulted and the subcontractor's work was of value. These cases also set out the amount which the subcontractor can claim in the latter situation. In Richie v. Phillebaum, 324 P.2d 375 (Colo. 1958), the court held that payments in principal received by the mortgagee from an obligor of the mortgagor may be applied against the principal indebtedness as opposed to current installments, at the election of the mortgagee, in absence of agreement between the parties or direction of the mortgagor. Nolan v. Colorado Mortgage Co., 322 P.2d 98 (Colo. 1958) is a reminder that when a financial institution undertakes to pay out funds, as work progresses, to the contractor of the borrower, it has a duty to the borrower to determine that the contractor actually performs the work that the lender pays him for. The case holds that the lender is liable for any loss suffered by the borrower because of the contractor's failure to perform the work it receives payment for, at least if the lender is grossly negligent.

[6] 324 P.2d 365 (Colo. 1958).

the foreclosure action the plaintiffs, Williams and Taber, filed an action alleging that they were the legal and equitable owners of certain property, and one of the plaintiffs, Taber, sought foreclosure of a deed of trust which he held against the same property. The usual motion under Rule 4 was filed for publication of service which stated that the defendants' address was unknown. The foreclosure action culminated in sheriff's deed issuing to Taber. Presumably, Taber conveyed part of the property to Williams.

Approximately a year and a half later, the same plaintiffs brought a quiet title action against the same defendants. Again, their attorney signed and verified a motion for an order for service by publication using the usual language under Rule 4 and stating that the last known address was the Colorado address given in the deed of trust. Several years later the defendants filed a motion in both actions to have the decrees vacated. The plaintiff, Williams, testified at the hearing on the motions that at all times subsequent to a certain date, which date was prior to the bringing of the foreclosure action, he knew the address of the defendant which was in Chicago and that his attorney at no time questioned him about the address of the defendants. The supreme court reversed the trial court and remanded with instructions to vacate the foreclosure and quiet title decrees and to grant the defendant a reasonable time to answer, holding that one may not be deprived of his property except by due process of law. Due process under applicable rules requires notice by actual or substituted service of process. Notice to the plaintiffs is notice to their attorney, and the failure to disclose the known address to the court was gross fraud on the court. Therefore, the judgment is void and subject to collateral or direct attack at any time. In so holding, the court quoted from a Colorado case[7] as follows: "a judgment rendered without service . . . is . . . void, and that all sales, or other proceedings had thereunder, as to all persons, irrespective of notice or bona fides, are . . . absolute nullities. . . ."[8]

Weller v. Bank of Vernal[9] involved a foreclosure action against property owned by a person who had since died. The mortgagee filed a claim in the estate based on the note. After letters had issued in the mortgagor's estate, the mortgagee, in a foreclosure action, sought and obtained a deficiency judgment against the estate. The supreme court vacated the deficiency judgment against the estate, holding that the county court had exclusive jurisdiction to determine the liability of the estate for the deficiency.[10]

By way of dictum, *Denning v. A. D. Wilson & Co.*[11] serves as a warning that the usual charges and costs paid by the borrower in connection with a real estate loan might be considered interest under the 1913 Money Lenders Act.[12]

ADVERSE POSSESSION

In *Fallon v. Davidson*[13] the plaintiff brought an action to determine the ownership of certain land. He asserted a one-fourth interest as a

[7] Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 53-54, 20 Pac. 771, 775 (1888).

[8] There was no showing of a meritorious defense by the plaintiff nor a discussion of the necessity of such a showing. This case appears to keep Colorado squarely in line with the minority view that such a showing is not a condition precedent to bringing this type of action. Annots., 39 A.L.R. 414 (1925), 118 A.L.R. 1958 (1939).

[9] 321 P.2d 216 (Colo. 1958).

[10] The case follows Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956) as to the situation where no action has been commenced in another court before letters have issued.

[11] 326 P.2d 77 (Colo. 1958).

[12] Colo. Rev. Stat. §§ 73-3-1 to 11 (1953).

[13] 320 P.2d 976 (Colo. 1958).

tenant in common. In 1931, the defendant had received a sheriff's deed as a result of a sheriff's sale against the plaintiff's co-tenant, owner of a three-fourths interest. The sheriff's deed purported to convey the whole interest in the land. The plaintiff's action was commenced more than eighteen years after the deed issued and defendant took possession under the deed. The defendant had not recorded his deed until approximately five months before commencement of the action. The court affirmed a judgment in favor of the plaintiff. In so doing, the court noted that there is a division of authority as to whether a voluntary conveyance by a co-tenant purportedly conveying the whole estate to a grantee, who takes possession under the deed, constitutes an ouster.[14]

The court held that the judgment debtor did no act inconsistent with the rights of the co-tenants in permitting the sheriff's deed to issue; therefore, there was no ouster.[15] As a result, no adverse possessory right accrued to the defendant and his possession was possession of all the co-tenants. The court also held that the seven year statute of limitations does not begin to run until the deed relied upon as "color of title," has been recorded,[16] assuming, without deciding, that a sheriff's deed is color of title.[17]

EMINENT DOMAIN[18]

In *Town of Glendale v. Denver,*[19] Denver filed a petition to acquire by condemnation a right-of-way for a sewer line through the streets of Glendale. The lower court denied Glendale's motion for a temporary injunction and granted Denver temporary possession. Glendale by writ of error sought reversal of both orders.[20] The court held that an injunction will not lie to enjoin condemnation proceedings for the reasons that there is no injury to the property because of the filing of the complaint and that the grounds relied upon for an injunction may be urged in defense to the action.

Secondly, the court held that Denver can acquire a right-of-way for its utilities by condemnation without the consent of the municipality through which the right-of-way passes under the authority of the Colorado Constitution,[21] which grant cannot be limited by statute.[22]

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[14] The authorities are apparently unaware of the conflict. See e.g., American Law of Property, § 6.13, note 8 (1952); Annot., 32 A.L.R.2d 1216 (1953).

[15] For a good discussion of this case see 30 Rocky Mt. L. Rev. 370 (1958). The writer points out that the clear weight of authority holds that an involuntary conveyance constitutes an ouster. See also Annots., 27 A.L.R. 17 (1923), 32 A.L.R.2d 1222 (1953).

[16] Colo. Rev. Stat. § 118-7-8 (1953), contains no such express requirement. The cases cited by the court were based on a prior statute peculiar to tax deeds. See Colo. Rev. Stat. § 137-11-1 (1953), for the present statutory provision.

[17] There seems to be no doubt that it is in other jurisdictions, see 1 Am. Jur. *Adverse Possession* § 199 (1936).

[18] The city did not fare as well in People *ex rel.* Denver v. County Court, 326 P.2d 372 (Colo. 1958) as it did in the *Glendale* case. In this case, the County of Arapahoe brought an action to seek a decree declaring void an ordinance of the City and County of Denver annexing certain property to the City. Denver attacked the jurisdiction of the Arapahoe County Court. From an adverse ruling, Denver sought relief in an original proceeding under Rule 106. Affirming the trial court, the court held that Colo. Rev. Stat. § 139-11-6 (1953), which provides that "any person aggrieved by any annexation proceedings had under this Article may apply . . . (within time limit specified) . . . to the county court in which his land is situated for . . . relief," means that the proper forum is the county court of which the land was a part before annexation.

[19] 322 P.2d 1053 (Colo. 1958).

[20] The court held that an order granting temporary possession is interlocutory and not a final judgment; and, therefore, it is not reviewable by writ of error. The proper procedure is under Rule 106. Potashnik v. Public Service Co., 126 Colo. 98, 247 P.2d 137 (1952).

[21] Colo. Const. art. XX, § 1. The city was relying on Colo. Rev. Stat. § 139-52-2(2) (1953), which provides in part "but no sewerage facilities shall be operated in whole or in part in any other municipality unless the approval of such other municipality in the territory in which the facilities will be located is obtained."

[22] The court qualified the holding as follows: "the municipality traversed could withhold its consent unless proper, safe and healthful construction methods were followed . . . ." 322 P.2d at 1057.

In *Town of Sheridan v. Valley Sanitation District*,[23] the district sought to condemn a right-of-way across two public streets in the town of Sheridan. The town withheld its consent. Again, the court had occasion to construe the same statute.[24]

A construction of the above statute giving the city an absolute veto power would be irreconcilable with the statutory grant to the district of the eminent domain power.[25] The legislature merely intended to "recognize the inherent power of a municipality to exercise its police power reasonably to protect its inhabitants."[26] The court then went on to state that the record amply established that Sheridan was not concerned with the health, welfare or safety of the inhabitants of Sheridan in withholding its consent but its only desire was to "horse trade" with the district.[27]

CONSTRUCTION OF INTERESTS RESERVED OR CONVEYED[28]

In *Radke v. Union Pacific Railroad Company*[29] the plaintiff brought a quiet title suit to remove a cloud from his title, created by a reservation in a deed from the U.P. to the plaintiff's predecessor in the chain of title, which read as follows:

> "Reserving, however, to the said Union Pacific Railroad Company the exclusive right to prospect for coal and other minerals within and underlying said lands, and to mine for and remove the same if found, and for this purpose it shall have right-of-way over and across said land and space necessary for the conduct of said business thereon without charge or liability for damage therefor."

The action was brought some sixty years after the date of the U.P. deed. The supreme court reversed the decree of the trial court in favor of the railroad, adopting the view of the eleven page brief filed by amici curiae. The railroad had been assessed and had paid taxes on the mineral interest since 1920. The plaintiff had also been assessed and had paid taxes on the entire value of the land including the minerals. The plaintiff's tax notice did not reveal that a third party was being assessed and paying taxes on this mineral interest.

The court held that the railroad, by paying the taxes, was a mere volunteer, and no equity arose, nor did the payments work an estoppel

[23] 324 P.2d 1038 (Colo. 1958).

[24] Colo. Rev. Stat. § 139-52-2(2) (1953). The court referred to the *Glendale* case as follows: "We held that this section, if construed to authorize a veto of a constitutional grant of power to the City and County of Denver, would be of doubtful validity. We then gave force and effect to the language by limiting the vetoing power of a municipality to a *reasonable* exercise thereof consistent with the police powers . . . ." 324 P.2d at 1041.

[25] Colo. Rev. Stat. §§ 89-5-2, 13 (1953).

[26] 324 P.2d 1038, 1042, referring to Colo. Rev. Stat. § 139-52-2(2). In defining the police power, the court said, at page 1041, a city "may require reasonable, safe, and healthful construction methods, and can withhold its consent unless given insurance that injury to users of its streets will not result, or that its own sewer and water lines and water wells in the municipality will not be destroyed or contaminated."

[27] A third attempt was made to attack the power of eminent domain in Greenwood Village v. District Court, 332 P.2d 210 (Colo. 1958), in which case the city attacked the power of the State Highway Department and Arapahoe County to condemn property within its corporate limits. The city contended that its consent was required under a different statute, Colo. Rev. Stat. § 120-13-35(10) (1953). The court held that this section was only optional and that Colo. Rev. Stat. § 120-3-17 (1953), granted the highway department ample authority and held that the latter statute does not offend Colo. Const. art. V, § 25 (prohibition against special laws). The city contended that that part of Colo. Rev. Stat. § 120-3-17 (1953), requiring the city to maintain the highway built on the condemned property offends Colo. Const. art. X, § 7 (prohibition against legislative imposed tax on city). The court held that the subject part of § 120-3-17 has been superseded by Colo. Rev. Stat. § 120-13-3 (1953), but, apart from that, a duty imposed by the legislature upon a city is not a tax.

[28] See also North Sterling Irrigation Dist. v. Knifton, 320 P.2d 968 (Colo. 1958). In this case the landowner sought to bar the district from asserting a fee simple title to a hundred foot strip of ground conveyed by a predecessor in the landowner's chain of title to the district for an irrigation ditch right-of-way. The court, in holding that the deed conveyed only an easement, pointed out that the instrument was denominated a "Right of Way Deed" and conveyed "a strip of ground for the inlet canal . . . over, across and upon. . . ."

[29] 11 Colo. Bar Ass'n Adv. Sh. 80 (Oct. 27, 1958) (subject to possible rehearing at this writing).

against the plaintiff. Furthermore, the plaintiff was not guilty of laches since that doctrine can only be invoked by one in possession against one out of possession. The court concluded that the interest reserved was a "license . . . viz, an incorporeal hereditament"[30] which "cannot be used after the statutory eighteen year period without the consent of the landowner."[31]

In *Corlett v. Mark T. Cox III*,[32] the plaintiff brought an action to quiet title to certain land, which in effect was an action to determine the nature of a reservation by a predecessor in the plaintiff's chain of title. The reservation read as follows:

> "It is however further agreed and distinctly understood that Carl A. Holcomb hereby reserves six and one-quarter percent (6¼) of all gas, oil and minerals that may be produced on any or all the above mentioned land, *or in other words reserves one-half (½) of the usual ⅛ royalty.*"[33]

The trial court held that the defendant was the owner in fee simple of 1/16th of the mineral fee which judgment was affirmed by the supreme court. The plaintiff asserted that the reservation created a perpetual not-participating royalty interest, and that the court should overrule *Simson v. Langhof*.[34] Instead, the court chose to follow the *Simson* case. In addition, the court characterized the opinion in the West Virginia case of *Toothman v. Courtney*[35] as a well reasoned case "decisive of the present inquiry." In that case the grantor reserved "all the oil rental." The court quoted *Toothman*:

> " 'Though he did not reserve by name the oil in place or any part of it, his reservation of all the rental or royalty to be derived from it compels the court to hold, by construction of the instrument, that it vests in him the title to that thing, the beneficial use whereof has been reserved. . . . If there had been no lease on the land, I would be of the same opinion, for a reservation of all possible benefit of the oil is tantamount to a reservation of the corpus thereof.' "[36]

WATER RIGHTS

Means v. Pratt[37] concerned an action initiated by the petitioner to change the point of diversion of his adjudicated water right. The trial court dismissed the petition, which holding was reversed by the supreme court. The facts clearly showed that the petitioner or his predecessors had used the decreed water rights continuously for at least forty years. During this time, the petitioner used three different diversion points. The trial court's conclusion of abandonment, based on the fact that the diversion point as specified in the petitioner's adjudication decree could not possibly be utilized as a diversion point for the land of the petitioner, was erroneous.[38] The court held that non-use, coupled with intent not to repossess, constitutes abandoment,[39] and that one does not

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[30] *Id.* at 85.
[31] *Id.* at 87.
[32] Colo. Sup. Ct. #18109 (Dec. 15, 1958) (subject to possible rehearing at this writing).
[33] *Id.* at 2 (emphasis added).
[34] 133 Colo. 208, 293 P.2d 302 (1956).
[35] 62 W. Va. 167, 58 S.E. 915 (1907).
[36] Colo. Sup. Ct. #18109 at 9 (Dec. 15, 1958).
[37] 11 Colo. Bar Ass'n Adv. Sh. 87 (Oct. 27, 1958).
[38] Corey v. Long, 111 Colo. 146, 138 P.2d 930 (1943).
[39] Arnold v. Roup, 61 Colo. 316, 157 Pac. 206 (1916).

lose his water right by utilizing a diversion point other than the one decreed to him.[40]

The trial court's conclusion that the petitioner did not establish prima facie title because one of the deeds in his chain of title did not specifically mention the adjudicated water rights, was also incorrect since appurtenant water rights pass under a deed without specific mention if the facts, as here, clearly show that such was the intention of the grantor.

Finally, the court held that even if the protestants might be injured[41] by the proposed change in the diversion point, the court has authority under the statutes to propose conditions to prevent such possible injury.[42] In fact, it is mandatory for the trial court, if the evidence shows that the change cannot be made without injury, to "find that such injury cannot be prevented by the imposition of terms and conditions."[43]

MINERAL DISCOVERY

The next case, *Dallas v. Fitzsimmons*[44] involves an ejectment action by the plaintiff, who held a mineral lease from the state, against parties who claimed a valid mineral location on a part of the property covered by the lease. The lease was obtained subsequent to the location by the defendants. The defendants staked their claim and posted the required notice first in accordance with federal law, but, after discovering that the locations were on state land, they amended their claims. They then attempted to file their location certificates with the state board which had already granted the lease to the plaintiffs and therefore refused to accept the certificates. The assessment work was done within the required time. Geiger counter readings indicated the presence of uranium on each of the claims, but an assay which showed mineralization was

[40] See also Pouchaulou v. Heath, 137 Colo. 462, 326 P.2d 656 (1958).

[41] The court held that the record showed the respondent's claim of injury was without foundation.

[42] Colo. Rev. Stat. § 147-9-25 (1953).

[43] 11 Colo. Bar Ass'n Adv. Sh. 87, 90 (Oct. 27, 1958). This principle is well settled in Colorado. See, e.g., Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952).

[44] 323 P.2d 274 (Colo. 1958).

made of rock from only one claim. The supreme court upheld the judgment of the lower court in favor of the defendants. In so holding, the court stated:

> "Where as here the assay samples come from at least one of the claims, and all the claims are contiguous, and where the trial court could and did conclude from the evidence that the non-assayed claims lie in similar ground, it is not unrealistic to hold that competent radiometric reactions supported by a chemical assay as to a part of the claims, clearly show the presence of uranium on the adjacent claimed locations, showing the same or similar radiometric readings. The latter are then valid 'discoveries'. . . . Such other 'discoveries' however must be capable of competent radiometric delineation in similar rock in place or along the same vein or lode."[45]

The court also held that the location statutes must be liberally construed in favor of bona fide locations and that the leasing powers of the state are subject to the implied limitation that it cannot lease lands in possession under mining laws.[46]

[45] *Id.* at 279.

[46] Mr. Justice Hall dissented on the basis that the evidence showed that the assayed rock came from only one of the claims, that a geiger counter does not indicate mineralized rock in place or in float or in wash, and that discovery based on the geiger counter reading, "is to substitute for a proof of a discovery of mineral in place a mere possibility, probability or conjecture of mineral in place, and thus judicially legislates that there need not be an actual and proven discovery to have a valid claim." 323 P.2d at 280. For a good discussion of this case, see 35 DICTA 208 (1958). Also compare the dictum in Smaller v. Leach, 136 Colo. 297, 316 P.2d 1030 (1957), as to discovery of uranium by geiger counter, and see 30 Rocky Mt. L. Rev. 224 (1958) for a discussion of the Smaller case, and for a fuller discussion of both cases, see Waldeck, Recent Developments in Mineral Discovery Requirements, 31 Rocky Mt. L. Rev. 33 (1958).