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Oil and Gas Law, Water Law, Equity

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OIL AND GAS

Our advance sheets contained only one case concerning oil and gas, which stems from a factual situation arising in Sterling. *Brown v. Kirk* * covers a situation which arises more frequently in oil areas than one generally imagines. The first grantor reserved one-fourth of the minerals in his deed to grantee. When that grantee (plaintiff here) conveys, he reserves one-half of the minerals, making no mention of his grantor's one-fourth reservation, but intends to reserve an additional and full one-half in himself. The contract of sale was no more specific than the deed. The Supreme Court affirmed the lower court, and held that when the deed is unambiguous, the intention of the parties is determined therefrom and extrinsic evidence may not be introduced to explain same; that the words "except" and "reserve" were synonymous as used in the conveyance; and that the grantee had reserved for himself, not one-half, but one-fourth.

The important statutes passed by the legislature in 1953, that is those statutes which are of interest to the general practitioner, were:

1. Severance tax (indexed under "Income Tax" in the 1953 Session Laws).
2. Authorities to counties to excute 5-year term oil and gas leases or for 10 years if lease carries non-drilling clause (indexed under "Counties" in 1953 Session Laws).
3. Authority to school boards to execute 10-year oil and gas leases (indexed under "Schools" in 1953 Session Laws).

WATER

Colorado Springs v. Public Utilities Commission [1] merely restates the holding in *Englewood v. Denver* [2] that a home rule city serving water outside its corporate limits is not a public utility under the jurisdiction of the P.U.C.

Downing v. Copeland [3] was an action to enjoin defendants' interference with plaintiffs' use of water. Plaintiffs, owning land and an appurtenant water right, diverted water from a stream. A channel was built 424 feet in the creek-bed upstream on defendants' lands. Defendants had a ditch with a junior right with a head-gate one mile upstream from plaintiffs. Defendants took water when plaintiffs wanted and needed it. The channel had been built several years prior to this action by plaintiffs. There was

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*.....Colo....., 257 P. 2nd 1045 (1953). 1952-53 C.B.A. Adv. Sh. No. 21, p. 325.
[1] .....Colo....., 248 P. 2d 311 (1952). 1952-53 C.B.A. Adv Sh. No. 1, p. 2.
[2] 123 Colo. 290, 229 P. 2d 667.
[3] .....Colo....., 249 P. 2d 539 (1952) 1952-53 C.B.A. Adv. Sh. No. 4, p. 51.

evidence that defendants at the time consented to the change. Judgment for defendants reversed and remanded. The Supreme Court held that original point of diversion had not been changed as the new ditch was dug from the old point along the bed of the stream and thus no application for a change was needed. Plaintiffs' right to use and divert included the right to make and change the necessary dams, channels or other diversion works within the stream bed which might be necessary to enable them to use their original headgate, where no additional burden on defendants results therefrom.

Williams v. Great Western Sugar Co.[4] was an action for breach of warranty and misrepresentation in a deed executed by the sugar company to one of plaintiff's predecessors in title. In a prior action, from which no appeal had been taken, the lower court decreed that ditch company stock may limit the use of water to a specific tract of land. In this case, the Supreme Court held that the entire question had been previously adjudicated, that all subsequent grantees of defendant had notice of the prior litigation and resulting decree, and upheld summary judgment in favor of defendant issued in lower court.

Quirico v. Hickory Jackson Ditch Company[5] was an action by the ditch company to enjoin defendants' use of water. Defendants had diverted water from their headgate since about 1914. The plaintiff Ditch Company set up a decree of 1919 to the Alamosa Ditch and also asserted a right to use water being used by defendants through a contract and filing of application for beneficial use. The original decree was re-opened in 1924 without notice to the defendants and plaintiff awarded water, and again in 1934 without notice to defendants, plaintiff had decree re-opened and water now in question adjudicated to it. Plaintiff stands on the 2 and 4-year statute of limitation (Chapter 90. Sec. 183, C.S.A.). In reversing the lower court, the Supreme Court held that the statute does not operate against one without notice where he knew nothing of the decrees nor had been molested in his use until after the 4-year limit; therefore, the statute does not start to run until he receives notice.

Peterson v. Water Conservation District[6] was presumably an action to adjudicate title to water. Defendants, junior appropriators, contend that plaintiff had no water right by reason of abandonment. "A", a corporation, owned land and certain decreed water rights. In 1915 a deed of trust covering the land and water rights was given to "B". "C", Ranch Manager, and majority stockholder of "A", testified that he abandoned said water rights in 1920. "B" foreclosed its Deed of Trust in 1923, and deed subsequently issued to "B". "B" sold to "D", the plaintiff, in 1929,

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[4] .....Colo....., 251 P. 2d 912 (1952). 1952-53 C.B.A. Adv. Sh. No. 6.
[5] .....Colo....., 251 P. 2d 937 (1952). 1952-53 C.B.A. Adv. Sh. No. 8.
[6] .....Colo....., 254 P. 2d 422 (1953). 1952-53 C.B.A. Adv. Sh. No. 11.

and by tax sale in 1929 said land and water rights vested in "E", who then conveyed back his interest to "D", the plaintiff, in 1930. Since 1930 there was no evidence of abandonment but only evidence of use of less water than originally decreed. Trial court held for defendants. Reversed and remanded by Supreme Court which held that even if you assume "C" had the right to abandon the rights of "A", the corporation, the equity owner, he could not abandon the rights of "B" in the position of mortgagee under their deed of trust, and that "B", mortgagee, must also abandon the rights under the mortgage. The equity owner has not more right to abandon mortgagee's rights than he does to sell such rights out from under the security of the mortgage.

Granby Ditch Co. v. Hallenbeck [7] was an action to adjudicate title to water. Plaintiff ditch company held decreed 1894 rights for 10 cubic feet per second from Dirty George Creek. Plaintiff asks to establish claim for water diverted and intercepted below its decreed headgate on the basis of adverse user for over 56 years. Defendants, subsequent appropriators, appeared at statutory appropriation proceedings where their priorities were established. Plaintiff did not appear at these proceedings to assert and establish their claim. Judgment of lower court was affirmed. The court held that abandoned water did not go to adverse user, but to subsequent appropriators in the order of their decreed priority; that one who openly and adversely diverts water for 56 years without a decree loses all rights if he fails to appear at statutory adjudication proceedings to assert his rights against subsequent claimants.

In *Holbrook Irrigation District v. Adcock* [8] the plaintiff irrigation district brought an action for declaratory judgment to determine defendants' rights to irrigation water. The plaintiff acquired the rights and facilities of a canal company subject to all contracts previously made by the canal company. Plaintiff then enlarged the system with additional dams, reservoirs and canals. Under water deed from original canal company to defendant a maximum cost of water was set at $37.50 for each 80 acres of land irrigated. Defendant elected to remain outside of the Irrigation District boundaries after same was organized, paid only the $37.50 for water while those in the district paid considerably more. The lower court held that defendant was entitled to water from *all* of the reservoirs of the district, but that the county commissioners could not set the amount of payments assessable against the defendants for water. Reversed and remanded. The Supreme Court held that defendants were entitled to water from only one reservoir existing at the time the original grant was made, that the county commissioners could not assess the payments, and that the defendants could only be charged $37.50 in accordance with the original deed. The effect of this holding establishes the rule that

[7] .....Colo....., 255 P. 2d 965 (1953). 1952-53 C.B.A. Adv. Sh. No. 14, p. 225.
[8] .....Colo....., 255 P. 2d 384 (1953). 1952-53 C.B.A. Adv. Sh. No. 15, p. 235.

when an irrigation district acquires the water rights and facilities of a canal company subject to all contracts previously made by the canal company, it must honor such contracts, even though they require delivery of water at a rate lower than the irrigation district must charge its own members.

Mendenhall v. Lake Meredith Reservoir Co[9] was an action to enjoin defendants' diverting water and for damages therefor, compliance therewith involving replacement of a dam in the stream. Judgment for defendants. The Supreme Court upheld the lower court and restated the well established principle that an appropriator of water from a natural stream has a vested right to the continued maintenance of conditions on the stream as they existed at the time he made his appropriation, but the court held that plaintiff failed to offer sufficient proof to establish his contention.

EQUITY

In *Lesser v. Lesser*[1] an action was brought to rescind a deed executed by 80-year-old plaintiff, violently ill, in favor of his son. The son died 14 months later, leaving defendant as sole and only heir at law. Plaintiff's testimony was discredited due to court interpreter's inabaliity to interpret his unusual German dialect. Evidence disclosed plaintiff was seriously ill at time of execution, and that the son was the only child of plaintiff who cared and advanced money for his father. The property was valued at $1,500, and the son spent $774.67 for his father.

Trial court judgment reversed in favor of defendant on basis that close relationship between father and son raised a presumption against the validity of the deed; however, defendant successfully assumed the burden of going forward and rebutting plaintiff's evidence. The burden of proof did not shift from the plaintiff. Plaintiff failed to offer proof beyond a reasonable doubt, and therefore failed to sustain his burden of proof. To defeat such a conveyance something more than exertion of the natural influence exerted on a father by a son must be shown, such as imposition, fraud, importunity or duress.

In *Sanger v. Larson Construction Company*[2] the plaintiff brought an action for damages of $15,000 for trespass to his land. State of Colorado entered an *ex parte* order of condemnation of certain lands of plaintiff for a road and the "Temporary Possession" order was served by plaintiff. Plaintiff knew of the intended condemnation, but had no notice of the hearing. The statute required none. After completion of the road by defendant with the consent of the plaintiff, who even leased defendant a camp site, plaintiff discovered a new Colorado case holding that notice had to be given in such condemnation proceedings.

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[9] .....Colo....., 257 P. 2d 414 (1953). 1952-53 C.B.A. Adv. Sh. No. 20, p. 319.
[1] .....Colo....., 250 P. 2d 130 (1952). 1952-53 C.B.A. Adv. Sh. No. 3, p. 44.
[2] .....Colo....., 251 P. 2d 930 (1952). 1952-53 C.B.A. Adv. Sh. No. 8.

The Court held that estoppel *en pais* or equitable estoppel operated to bar this plaintiff's claim even though plaintiff allowed defendant to enter his land under the belief that the temporary order was valid.

In *Ginsburg v. Zager* [3] the plaintiff brought an action for damages sustained in connection with her purchase of a new residence property in Denver, alleging numerous misrepresentations on the part of defendant sellers as to sufficiency of construction thereof. The lower court was reversed, with directions to dismiss. The Supreme Court held that the damage of which the plaintiff complained was a result of a condition which developed subsequent to the completion of her house and not from any defect in construction, but from causes not known to exist at the time she bought the property.

Chamberlain v. Poe [4] was an action for $12,000 damages for defendant's failure to procure flood insurance on plaintiff's house. The plaintiff purchased a home, financed same through defendant loan company. The defendant also wrote the insurance covering the house and assured plaintiff it was covered with flood insurance. A flood did extensive damage to plaintiff's house, but the insurance as written did not cover flood damage. Plaintiff refused to make monthly payments on his loan so the defendant started foreclosure. The plaintiff, by telegram, requested the defendant to dismiss foreclosure and agreed to repair the house at plaintiff's own expense. Defendant dismissed foreclosure and the plaintiff made monthly payments under a refinance plan. Plaintiff sued two and one-half years later.

The Supreme Court reversed the $9,333 judgment of the lower court with instructions to dismiss the action, holding that plaintiff is estopped from bringing his action when he obtained a valuable consideration (dismissal of foreclosure and refinancing) for an implied promise not to sue.

In *Sanders v. Gomez* [5] the plaintiff brought an action to quiet title on basis of adverse possession to part of three lots, the remaining part of which was occupied by record owners, the defendants. The plaintiff had fenced a portion of the lots. The jury, acting in this equity case in an advisory capacity, found the plaintiff did not have open, notorious, and adverse possession for the 18-year statutory period. The court approved the finding of the jury and ruled for defendants. The Supreme Court upheld the lower court and held that the verdict of jury is advisory only in equitable actions; however, judgment in quiet title action will not be disturbed if supported by the evidence.

In *Eitel v. Alford* [6] the plaintiffs, husband and wife, brought an action against the defendants, husband and wife, for foreclosure

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[3] .....Colo....., 251 P. 2d 1080 (1952). 1952-53 C.B.A. Adv. Sh. No. 9, p. 115.
[4] .....Colo....., 256 P. 2d 229 (1953). 1952-53 C.B.A. Adv. Sh. No. 12, p. 182.
[5] .....Colo....., 255 P. 2d 972 (1953). 1952-53 C.B.A. Adv Sh. No. 17, p. 261.
[6] .....Colo....., 257 P. 2d 955 (1953). 1952-53 C.B.A. Adv. Sh. No. 18, p. 277.

of two deeds of trust covering certain real estate. The defendants counterclaimed for rescission of the procedure contract and cancellation of the deeds of trust and notes, alleging wrongful delivery to plaintiff of note and deeds of trust by defendant bank.

The plaintiffs had sold real estate to the defendant under a contract presumably agreeing not to close the deal until the title was approved. Defendant closed the deal anyway and then the title was found defective. The defendant urges that defendant bank was to hold the papers until approval of title under the contract. The Court found no such agreement and that defendant made no complaint to the plaintiff upon discovery. The plaintiff alleged that he stood ready to clear title at any time. The defendant subsequently defaulted on the notes and deed of trust after making certain payments thereunder. The Supreme Court held for the plaintiff, against the defendant on the counter claim, and granted foreclosure. The Court held that parties to a contract must exercise reasonable business prudence. A contract will not be rescined because of ignorance of certain facts by one party when full information was readily available to him and he accepted the fruits of the contract for a long period. This principle applies even though the contract may be the result of mutual mistake or actual fraud.

Rogers v. Fitzsimmons [7] was an action for cancellation and rescission of contract of purchase. Plaintiff bought mountain lots from defendant. Jury found that defendant represented to plaintiff that the lots were of a certain size. Thhe lots were in fact smaller, resulting in a loss of a sale for plaintiff. Plaintiff paid two monthly payments under the contract after discovering the discrepency and and then brought this action.

The Court held: (1) Payment after discovery did not constitute waiver of the right to rescind—it was merely preserving the rights of both parties should decree go against plaintiff; (2) Plaintiff had the option of two remedies: (a) damages or (b) equitable rescission; (3) Misrepresentation is ground for rescission of a contract—one can continue payments required by a contract without waiving his right to rescission of the contract.

SUPREME COURT AMENDS RULE

"Rule 217 concerning admissions to the bar, be and the same is hereby amended to read as follows:

"217. *Subsequent Examinations.* Any applicant in Class C or D who fails on examination to obtain a passing grade may take the next succeeding examination. If he then fails he may be permitted to take a third examination upon a detailed showing which indicates systematic study, and then only by special permission of the court *en banc.*

"No further examinations will be permitted."

Adopted by the court *en banc,* November 23, 1953. Effective July 15, 1954.

[7] .....Colo....., 257 P. 2d 420 (1953). 1952-53 C.B.A. Adv. Sh. No. 19, p. 289.