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Equity, Water, Oil and Gas

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objectionable parts of the instructions may have influenced the jury to compromise their verdict 'rests upon conjecture, merely, and cannot be entertained. We must assume that the jury performed their duty intelligently, and with a correct understanding of the charge of the court.'

In reading the case we find that at one point the Court does comment that a verdict of murder in the first degree would have been fully supported by the record so that there apparently were elements to justify the first degree murder charge, where the Tate case did not have the elements to justify such a charge.

From the reading of these cases together, it would appear that we now have a new and modified rule. If all the elements are present in the case justifying a first degree murder charge, regardless of the fact that there may be an error in the first degree instructions and a second degree murder verdict results, such error is harmless. On the other hand, if any elements of the first degree murder charge are lacking such instruction would be reversible error.

In *McBride v. People*, the Supreme Court extended the facts of confidence game as basically shown in *Munsell v. People*,¹³ to cover a series of checks given by the defendant wherein he knows that the checks are short and held that it was a part of a scheme to defraud, thus making the checks bogus, and coming within the confidence game statute. The Court held further that the intent of the defendant rather than the means used in obtaining the money is the primary issue of the offense.

EQUITY, WATER, OIL AND GAS

FRANK F. DOLAN

EQUITY

Rand v. Anderson:¹ The plaintiff, mother of the defendant, filed the action to rescind an alleged oral agreement whereby he had agreed to support and maintain her for the remainder of her life, and to set aside a deed of conveyance in joint tenancy to her son and herself. The defendant, among other defenses, denied the existence of the alleged oral agreement and alleged the execution of conveyance in joint tenancy to have been a voluntary gift on the part of the plaintiff and the expenditure of large sums by him in improving the property, and prayed for partition of the premises, or, in the alternative, if decree of rescission be granted, then that plaintiff be required to reimburse him for the monies he advanced and disbursed in reliance on his interest according to the deed. The lower court found generally for the plaintiff, however, it entered judgment for the defendant against the plaintiff for the monies paid out by him for improving the property less an amount charged against him for use and occupancy of a room occupied by him and his wife until the time they had removed from the prop-

¹³ 122 Colo. 420, 222 P. 2d 615 (1950).

¹ 1951-2 C. B. A. Adv. Sh. (Jan. 28, 1952).

erty on account of a disagreement between plaintiff and defendant, and gave the defendant a lien against the property for his judgment but ordered that defendant could take no steps to recover on it during the lifetime of the plaintiff.

The Supreme Court did not view either the pleadings or the evidence in the light of the trial Court and reversed the trial Court, holding, among other things: that plaintiff had burden of establishing the contract by definite and clear evidence, and, further, that when evidence relied upon is adduced for the purpose of cancellation of an instrument (in this case the deed in joint tenancy) it must be beyond a reasonable doubt, and that the plaintiff's evidence did not meet the test; and that any judgment for defendant should have been one open to the present benefit of the defendant without the above mentioned restrictions for its collection placed thereon. The Supreme Court in reversing the trial Court, directed the trial Court to dismiss plaintiff's complaint and vacate defendant's judgment, all without prejudice to the parties starting a new action.

On September 22, 1952, on rehearing,² the Supreme Court ordered that the opinion heretofore announced and above stated be withdrawn, the judgment reversed, and the cause remanded with directions for a new trial. The opinion on such rehearing continued the Court's position that the plaintiff had to establish her alleged agreement or contract, as well as its breach, not only by evidence that is definite and clear, but that it must be beyond reasonable doubt, and further that any judgment awarded the defendant should be immediately effective.

Fastenau v. Engel:³ In April, 1948 plaintiff brought suit to quiet title to land held by defendant under treasurer's deed issued in September, 1943. Separate defenses of defendant were that plaintiff's predecessors in title had abandoned the premises, failed to pay taxes thereon, and that plaintiff was "barred by laches from seeking relief in a court of equity." The Supreme Court held: that no statute of limitations barred plaintiff's action; that failure to pay taxes was not an abandonment of the property, nor did it constitute laches, and this, even though the land had been enhanced in value; and that courts will not invoke equitable defenses to destroy legal rights where statutes of limitation are applicable.

Stubbs v. Standard Life Ass'n.:⁴ Action for reformation of Mortgage Deed, the foreclosure proceedings thereof, and the Sheriff's Deed, to include as part of the property 290 acres that had been omitted from the description through inadvertence. After issuance of Sheriff's Deed the purchaser, holder of mortgage, went into possession of omitted acreage and continued in possession for period of more than ten years before there was any knowledge of the omission, and sixteen years before bringing action—paying taxes during all of such time. No third parties or adverse rights had inter-

² 1952-3 C. B. A. Adv. Sh. 11 (Sept. 27, 1952).

³ 240 P. 2d 1173, 1951-2 C. B. A. Adv. Sh. 183 (Feb. 9, 1952).

⁴ 242 P. 2d 819, 1951-2 C. B. A. Adv. Sh. 247 (March 22, 1952).

vened. The Supreme Court affirmed the judgment of the trial Court awarding the plaintiff the relief prayed, and stated that the action was properly maintainable under Rule 105, Rules of Civil Procedure.

Kerns v. Bank of Manitou:⁵ Action instituted June 18, 1948 by purchaser for rescission of contract to purchase real property on basis of mutual mistake as to what tract was intended to be sold and purchased. Tract conveyed by seller to purchaser by Quit Claim Deed in September, 1946. In March, 1948 a survey disclosed that tract conveyed was not the one intended to be sold and purchased, and in April, 1948 purchaser notified seller that he elected to rescind the contract and demanded return of consideration paid. Between May 19, 1948 and August 10, 1948 purchaser negotiated with third party for sale of tract (evidently the one that had been conveyed), such third party being advised of this litigation and that such proposed sale would have to be made with reference thereto. Purchaser also paid the 1947 general taxes on August 3, 1948. The trial Court held that the purchaser by his acts had ratified the Contract, and dismissed plaintiff's Complaint. The Supreme Court reversed the trial Court, holding: that mistake as to what tract was to be sold and purchased was a mutual mistake; that plaintiff's conduct after he brought the suit was not an assertion of ownership, he having specifically represented to prospective buyer that the rescission suit was pending and that a sale could not be consummated without consideration thereof, and the proposed sale price was for the identical price he paid his seller; and that it was plaintiff's duty to protect the land from tax sale so that he would be in a position to reconvey the title to defendant should his suit be successful and he be so ordered by the Court.

Smith v. Haertel:⁶ Action to obtain a judgment decreeing plaintiffs to be the owners of certain real property, free and clear of any right, title or interest of the defendants, awarding plaintiffs possession thereof, and for an accounting for rents and profits. Defendants defended on basis that a Deed previously executed by them was a mortgage. Supreme Court in affirming the judgment of the lower Court in favor of the plaintiff stated: that for the purpose of this case a mortgage may be defined as a conveyance of an estate or interest in land by way of pledge as security for payment of a debt, it becomes void upon payment in order to constitute a valid mortgage, it is not necessary that the instrument itself should contain a description of the debt, payment of which is intended to be secured, nor is it essential that there be a note or other obligation separate from the mortgage itself evidencing the indebtedness. However, it is necessary that there be a debt to be discharged, such indebtedness must be recited in the mortgage, and the nature and amount of the indebtedness secured by the mortgage must be so expressed that subsequent purchasers and attaching creditors need not look beyond the mortgage itself to ascertain both the ex-

⁵ 242 P. 2d 817, 1951-2 C. B. A. Adv. Sh. 263 (March 29, 1952).

⁶ 244 P. 2d 377, 1951-2 C. B. A. Adv. Sh. 285 (April 12, 1952).

istence and amount of the debt. It also must appear from the instrument, or the circumstances present at the time of the transaction, that the intention was that the property was to be held as security, and further, the intent to create an equitable mortgage must be clearly evidenced so that a prospective purchaser may be apprised of the fact that the transactions between the parties to the instrument have not been fully completed and all obligations thereunder fully discharged.

WATER

*The Brighton Ditch Co., et al. v. City of Englewood:*⁷ Action instituted by City of Englewood to change point of diversion some sixteen miles down stream of water rights acquired by it in connection with its purchase of ranch property, with change of use of the water from irrigation to domestic and municipal purposes. The trial Court granted the change sought by plaintiff subject to limitations and conditions imposed to protect the rights of other appropriators, such limitations and conditions being so numerous and technical in their nature that it is impossible for me to set them forth. The Supreme Court affirmed the decree of the trial Court on all points, thereby adhering to well defined rules concerning protection of the water rights of others when a change is granted, and holding that the evidence overwhelmingly justified the finding of the trial Court that no vested rights would be injured by the change.

*City and County of Denver v. Noble:*⁸ Action against City for alleged damages caused by it in construction and widening West Alameda Avenue whereby plaintiff's irrigation ditch was damaged and destroyed. Plaintiff recovered judgment against City for \$9,000 in trial Court. Supreme Court reversed judgment on basis of incorrect and incomplete instructions given jury concerning the measure of damages, giving its opinion as to proper measure under varying circumstances.

*The City of Colorado Springs v. Yust:*⁹ The City petitioned for change of point of diversion of certain water rights from several tributaries of the Blue River, decreed to the East Hoosier and West Hoosier Ditches, alleging that such change would not injuriously affect the vested rights of other appropriators. The defendants filed protests, and after hearing the trial Court found that plaintiff had failed to establish the fact that the proposed transfer and change of point of diversion would not injuriously affect the vested rights of others, and therefore denied the petition. The Supreme Court, after reviewing the greater part of the evidence and the law pertaining to such matters as previously laid down by the Supreme Court to the effect that a water owner has an inherent right to change the point of diversion without conditions, but with conditions if such change can be made without substantial injury to the

⁷ 237 P. 2d 116, 1951-2 C. B. A. Adv. Sh. 32 (Oct. 13, 1951).

⁸ 237 P. 2d 637, 1951-2 C. B. A. Adv. Sh. 44 (Oct. 22, 1951).

⁹ 1952-3 C. B. A. Adv. Sh. 10 (Sept. 27, 1952).

vested rights of others, reversed the judgment of the trial Court and remanded the case with directions to the trial Court to determine, upon the evidence already taken, together with any additional evidence the parties may see fit to introduce, whether the change of the point of diversion as prayed would injuriously affect the vested rights of protestants, and, if so, whether such effect may be prevented by the imposition of terms and conditions, and to enter the Decree accordingly. The Supreme Court also stated that the burden of proof on the petitioner in such a proceeding requires him to meet only the grounds of injury to protestants asserted by them, and that the evidence presented by the petitioner constituted *prima facie* evidence to satisfy the burden of proof resting on the petitioner.

OIL AND GAS

The only cases having to do with Oil and Gas are the cases of *Mitchell v. Espinosa*¹⁰ and *Johnson v. McLaughlin*,¹¹ and cover the manner of creating mineral reservations and the effect thereof, and I believe have been reported upon by Mr. Rubright.

DAMAGES FOR SUBSIDENCE ACCOUNT REMOVAL OF COAL

Colorado Fuel and Iron Corporation v. Salardino:¹² Action for alleged damages to plaintiff's land and buildings caused by the removal by the defendant, who owned the same, of coal deposits underlying plaintiff's land and adjacent land in a careless, wrongful and negligent manner. Defendant alleged that plaintiff's improvements were placed upon the surface property with full knowledge of defendant's right to mine and remove the coal adjacent to or underlying the same, and by so doing plaintiff assumed the risk of damage to his property. Plaintiff recovered judgment in the trial Court. The Supreme Court, in reversing the case, and ordering a new trial, held that a mine operator must leave support sufficient to maintain the surface in its natural state, but that negligence on the part of the mine operator must be proved to recover for damages to buildings erected upon the surface of the land.

REAL PROPERTY AND PROBATE

ROYAL C. RUBRIGHT

*Mitchell v. Espinosa*¹ is significant. A grantor reserved mineral rights in a deed. The mineral interest and the surface interest were not thereafter separately assessed, but continued to be assessed as a unit. A later Treasurer's Deed for unpaid taxes subsequent to the severance was held not to convey a tax title to the mineral interest. This case was commented upon in DICTA.² The case also caused the Real Estate Title Standards Committee to pub-

¹⁰ 243 P. 2d 412, 1951-2 C. B. A. Adv. Sh. 243 (March 22, 1952).

¹¹ 243 P. 2d 812, 1951-2 C. B. A. Adv. Sh. 259 (March 22, 1952).

¹² 245 P. 2d 461, 1951-2 C. B. A. Adv. Sh. 367 (June 7, 1952).

¹ 243 P. 2d 412, 1951-2 C. B. A. Adv. Sh. 243 (March 17, 1952).

² 29 DICTA 225 (June, 1952).