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Supreme Court Decisions

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EQUITY—SUIT TO SET ASIDE CONVEYANCE—FRAUD—AGENCY—CORPORATIONS—*Gutheil vs. Polichio*—No. 14268—*Decided January 16, 1939—District Court of Arapahoe County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: Suit brought to set aside conveyance of and trust deed on real estate owned in name of corporation on ground that it was transferred for the purpose of hindering, delaying and defrauding creditors.

HELD: 1. Where it appears that judgment debtor's association with corporation holding title to property was so close and exclusive that it strips the company of its corporate cloak and leaves the debtor standing in its place, holding in one hand the "accredited agency" of his wife to do whatever he deemed best for her and himself, and in the other hand the minute book of the corporation with the opportunity of making whatever entries were necessary to meet a given situation, the courts "will disregard the fiction of the corporate entity apart from the members of the corporation when it is attempted to be used as a means of accomplishing a fraud or an illegal act.' "

2. Once the corporate entity is dissipated, "the transaction becomes one of dealing between husband and wife, or even one of the husband, with the 'accredited agency' of his wife, dealing with himself, which, when it obstructs the collection of claims of creditors is presumptively fraudulent."

3. Assuming there was full consideration for the conveyances, there is no doubt they were made with the intent to fraudulently hinder and delay creditor from collecting his judgment.

4. Even though wife of judgment creditor "did not participate in the intent, she is estopped from urging such defense because of the investiture of her husband with the accredited agency."

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard, Mr. Justice Knous and Mr. Justice Burke concur. IN DEPARTMENT.

FORCIBLE ENTRY AND DETAINER—APPEAL—CERTIORARI—*West vs. Judd, et al.*—No. 14473—*Decided January 16, 1939—County Court of Denver—Hon. Osmer E. Smith, Judge—Affirmed.*

FACTS: Plaintiff brought F. E. D. action in Justice Court for nonpayment of rent after serving statutory three day notice. Defendant filed verified answer admitting that some rental was due but pleaded there was included in the lease, an agreement to transfer the property to defendant when "certain sums of money had been paid," and asked that matter be transferred to District Court. Before trial, defendant tendered an amended answer in which he amplified the issue, but its filing was denied. In a trial to Justice of the Peace, judgment was given against defendant for $75 rent and possession of premises and costs.

The contract to purchase attached to the lease provided that defendant could purchase property after paying $350, but defendant did not show or allege he paid such sum. The defendant sought review in the County Court by civil code certiorari, but writ was subsequently quashed.

HELD: 1. The action was grounded on 1935 C.S.A. Chapter 70, Section 4, opening paragraph and subdivision fourth, which permits only of appeal by observing special requirements as to bond and deposit of adjudged unpaid rental. Resort was not had to statutory certiorari (1935 C.S.A., Chap. 96, Secs. 132-139), permissible in unusual situations as a " 'substitute for an appeal.' "

2. The contention of the defendant "that regardless of the quality of the issue as tendered by the complaint before the justice, his answer and preferred amended answer operated to so change the issue as to require the justice to certify the case to the district court," is based upon 1935 C.S.A., Chap. 70, Sec. 9. This section is without application since it has only to do with actions brought under the sixth to ninth subdivisions of Section 4 of Chapter 70.

3. " 'It may be that defendants had the right to plead that they were in possession, not as tenants, but as vendees, but that would not permit the question of title to be tried, such pleading would only be one denying the tenancy alleged by plaintiff. * * *' "

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bouck and Mr. Justice Bock concur. IN DEPARTMENT.

CRIMINAL LAW—BURGLARY AND LARCENY—ACCOMPLICE—DECOY —INSTRUCTION—*Wilson vs. People*—No. 14385—*Decided January 23, 1939—District Court of Logan County—Hon. H. E. Munson, Judge—Reversed.*

HELD: 1. One who participates in a felony as a decoy or feigned accomplice, in order to entrap the other, is not criminally liable, and he need not take an officer of the law into his confidence to avoid an imputation of criminal intent.

2. An instruction which makes any assistance in the perpetration of an offense criminal, whether felonious or not, should not be given.

Opinion by Mr. Justice Bock. Mr. Justice Bakke and Mr. Justice Burke not participating. EN BANC.

WILLS—CONSTRUCTION—*Jones vs. Pueblo Savings and Trust Co., et al.*—No. 14484—*Decided January 23, 1939—District Court of Pueblo County—Hon. William B. Stewart, Judge—Affirmed.*

HELD: 1. Will construed and found to mean that daughter of testator had vested interest in one-half of estate at death of father, and therefore upon her death, her interest in estate goes to her heirs and administrator of her estate.

2. The intention of the testator controls, and his intention must, if possible, be ascertained from the will itself.

3. Where provision in will devises and bequeaths to the daughter directly and not to a trustee, and the bank is designated as "guardian" and trustee of her estate for the limitations of time mentioned, the use of the term "guardian" implies a vested interest in the daughter and a stewardship by the trust company until she reaches the age specified, inconsistent with intent to create a purely contingent estate.

4. The law favors the vesting of estates.

5. " 'An estate will vest at the death of the testator unless a later time for vesting is clearly expressed by the words of the will or by necessary implication therefrom.' "

6. An interpretation which avoids partial intestacy is preferred.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Young concur. IN DEPARTMENT.

NEGLIGENCE—MOTOR VEHICLES—STATE HIGHWAYS—RIGHT OF WAY—EVIDENCE—INSURANCE COMPANIES—HYPOTHETICAL QUESTIONS—*Johns, et al. vs. Shinall*—No. 14205—*Decided January 9, 1939—District Court of Denver—Hon. Robert W. Steele, Judge—Affirmed.*

HELD: 1. Evidence in automobile accident case examined and found to contain competent testimony from which a jury might find one of the drivers to have taken the right of way.

2. In accident occurring outside of the city limits of Denver, the pertinent right of way statutes provide that the driver of a vehicle approaching an intersection shall yield the right of way to a vehicle already in the intersection; and that when both cars enter the intersection at the same time, the one on the left shall yield to the one on the right.

3. Questions touching upon their connection with or interest in insurance companies may be asked of every prospective juror.

4. The mere statement of a witness, in answer to a proper question, which mentions "insurance company," is not sufficient ground for a mistrial. On motion, it should be stricken and the jury instructed to disregard it.

5. The decision to order a mistrial in such case rests within the discretion of the trial court.

6. Exclusion of photographs of car taken after the wheel damaged by the collision had been replaced by another did not constitute reversible error.

7. It was not error for the trial court to sustain objections to hypothetical questions propounded to a physician where the questions did not state all the facts which one testifying solely as an expert should assume.

Opinion by Mr. Justice Young. Mr. Justice Holland not participating. EN BANC.

FRAUD AND DECEIT—PLEADING—PARTIES—*Langworthy vs. Republic Mutual Insurance Corporation, et al.*—No. 14209—*Decided January 9, 1939—District Court of Denver—Hon. Frank McDonough, Sr., Judge—Reversed.*

HELD: 1. "If one in his complaint sets forth material false representations it might be proper, on motion, to require him to state how and in what manner the representations were false, but unless application is made in apt time that the complaint be made specific in such particulars defendants are not entitled to the information and cannot raise the issue by demurrer."

2. Where plaintiff seeks to have title to certain land returned to her and a note cancelled on the basis of alleged fraud and deceit, the court must have jurisdiction of all the parties affected and the land. There was no misjoinder of parties.

3. The receiver for the corporation defendant stands in the shoes of the corporation which was a party to the alleged fraud, and is therefore a proper party.

4. The one who holds the equity in the land and the one who holds the note and mortgage are also proper parties.

5. The plaintiff may follow the fruits of the fraud unless they come into the hands of one who has taken them for value without notice of the fraud.

Opinion by Mr. Justice Young. Mr. Justice Bakke, Mr. Justice Knous, and Mr. Justice Holland dissenting. EN BANC.

WORKMEN'S COMPENSATION—*Industrial Commission, et al. vs. International Mutual Liability Insurance Company, et al.*—No. 14404—*Decided January 9, 1939—District Court of Denver—Hon. Robert W. Steele, Judge—Reversed.*

HELD: 1. In determining which insurance carrier was to pay for death of employee occurring in Adams County, contract of insurance examined, and although stating, "Locations of all factories, * * * or other work-places of the assured to which this Policy shall apply, * * * are as follows: 'Within City Limits of Florence, Colorado, on East Main Street,' " held to cover accident.

2. The Manual of Rules of Industrial Commission, known to insurance company, provide that the term "risk" shall mean and include the entire operations in Colorado; and that "under no circumstances shall a compensation insurance policy be written covering any part of a given risk, leaving another part of the risk uninsured. * * *"

3. With all the evidence before it, the Industrial Commission, as a fact-finding body, had the right to place the liability on the insurance company.

Opinion by Mr. Justice Bouck. Mr. Justice Holland not participating.

AGENCY—REAL ESTATE—SPECIFIC PERFORMANCE—INTERVENORS —*Ramey vs. Gent. Craig Lumber Company, et al., Intervenors*—No. 14468—*Decided January 9, 1939*—*District Court of Moffat County*—*Hon. John R. Clark, Judge*—*Reversed in part and affirmed in part.*

HELD: 1. Where one attempts to convey property of another to a third person, but does not have proper authority, owner may refuse to ratify and, in turn, convey to his own grantee.

2. Where a contract for the sale of three parcels of property is entered into and it appears that the conveyance of parcels 1 and 2 depend upon conveyance of parcel 3, and it develops that the latter may not be conveyed, it is error for the court to decree specific performance of the contract as to the first two parcels.

3. The intervention of the judgment creditors of one of the parties to the contract falls with the main case.

Opinion by Mr. Justice Bouck. Mr. Justice Holland not participating. EN BANC.

MUNICIPAL CORPORATIONS—TAXATION—MISJOINDER—SPECIFIC PERFORMANCE—*Wellshire Land Company vs. City and County of Denver*—No. 14475—*Decided January 3, 1939*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: City of Denver brought suit for specific performance to enforce warranty of defendant company that land conveyed by latter to city was "free and clear from all former * * * liens, taxes, assessments and encumbrances." On the date of the deed the land conveyed, situate in Arapahoe County, was subject to 1936 tax lien in the sum of $1,261.24. After deed was made company was dissolved and $1,200 placed in hands of its president in trust to pay this tax. On sale for tax, Arapahoe County took certificate.

County commissioners of Arapahoe County were named as defendants, and part of prayer asked exoneration from taxes while lands were seized and possessed by city.

Demurrer lodged against complaint for want of facts and misjoinder of parties overruled by lower court and company elected to stand.

HELD: Against contention that Section 4, Article X of the state Constitution, exempting property of municipal corporations from taxation, there are two answers: (1) the lien of record, however, invalid, is cloud on title, removal thereof compellable; and (2) tax was, and is, due Arapahoe County, and warranty being for its benefit, is based on sufficient consideration.

Failure to serve commissioners and abandonment of that phase of case, misjoinder cannot be asserted.

Point made that judgment for $1,200 in suit for specific performance where sum is impounded in registry of court, is technically right, but trivial and one of form only, and since company benefited to extent of $61.24, it cannot complain.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke concur. IN DEPARTMENT.

PLEADINGS — MOTION FOR JUDGMENT ON PLEADINGS — EXHIBIT ATTACHED TO PLEADINGS—FORCIBLE ENTRY AND DETAINER—*Bailey, etc. vs. Wilkinson, et al.*—No. 14466—*Decided January 9, 1939*—*County Court of Denver*—*Hon. Osmer E. Smith, Judge*—*Reversed.*

HELD: 1. Pleadings in forcible entry and detainer suit examined and found to be insufficient upon which to base judgment on pleadings.

2. Where plaintiff relies upon sheriff's deed recorded in 1938 and defendant relies upon deed recorded in 1936, and nothing appears to show that the lien of the sheriff's deed of 1938 related back to a date prior to that of defendant's recording, the court could not decide for plaintiff.

3. Where a copy of the notice and demand served upon defendant is attached to complaint, only the allegations concerning it in the complaint are sworn to by the plaintiff in the verification of the complaint. The verification of the pleading does not cover the truth or falsity of the statements contained in the exhibit.

4. The pleadings should be amended. If the "defendant can show that he is a tenant of third persons, and if plaintiffs fail to show that these third persons held the properties subject to a valid lien which has legally ripened into a valid sheriff's deed, then judgment would of course be in favor of the defendant. The sheriff's deed has only prima facie effect."

Opinion by Mr. Justice Bouck. Mr. Justice Holland not participating.

TORTS — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — *Frances Wilson vs. Celia Hill*—No. 14046—*Decided January 3, 1939*—*District Court of El Paso County*—*Hon. John Meikle, Judge*—*Judgment reversed and remanded.*

FACTS: The defendant was the driver of a car and plaintiff was riding therein as her guest. Defendant's arm had previously been operated upon, as a result of which she was unable to properly drive the automobile. At a point between Canon City and Colorado Springs, the defendant, over strong protests from plaintiff, changed places with another guest who was driving and insisted on driving herself. The question involved is whether plaintiff was guilty of contributory negligence in remaining in the car when she knew of defendant's incapacity.

HELD: It was error not to instruct the jury that the plaintiff's remaining in the car might constitute contributory negligence. Contributory negligence can consist of an unreasonable exposure to risk. However, the passenger's duty to leave the automobile must be judged in the light of all the surrounding facts and circumstances, such as the time of the day or night, the place and surroundings, the availability of other means of transportation and other pertinent considerations.

Opinion by Mr. Justice Knous. EN BANC.

SEZ THE JEDGE:

"Maybe Leo Thompson was justified in asking a divorce from Dorothy Meaney Thompson and there might have been plenty of grounds in the case of Kruel vs. Kruel, but who busted the harp in Angel vs. Angel?" (Denver divorce records.)

HAVE YOU PAID YOUR DUES?