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Supreme Court Decisions

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MINES—LEASE AND OPTION—EJECTMENT—EQUITY—CONSTRUCTION AS MORTGAGE—*Rocky Mountain Gold Mines v. Gold, Silver, Tungsten, Inc.*—No. 14372—*Decided June 26, 1939*—*District Court of Boulder*—*Hon. Claude C. Coffin, Judge*—*Reversed.*

FACTS: Complaint in ejectment. Defendant sought equity, claiming as assignee of a "mining lease and option," under which it was in possession of the property. Defendant further set forth what it had paid and performed pursuant to the terms of the instrument, and contended the substantiality thereof evidenced its good faith, and worked such equity in its favor that plaintiff should be relegated to foreclosure. Defendant prayed for dismissal, or, that only as in foreclosure, with right of redemption saved to it, should plaintiff enjoy the fruits of the present proceeding. The case was tried as in chancery, but equitable relief was denied and ejectment adjudged.

HELD: 1. Where, under "mining lease and option," requiring the payment of $100,000 for the mine in cash or royalties, or both, and the accomplishment of certain work and improvements on the premises, the lessee pays $47,500 in cash, $5,648.62 in royalties, accomplishes certain work and improvements and expends $95,000 in reconstructing and revamping a mill and adding machinery thereto, and mined 8,200 tons of ore of a net smelter value of $27,777.21, at a cost of an additional $75,000 and where notice of default is given only as to failure to pay $7,500, the balance of payment due at that time, and where the contract is viewed in its entirety, it is a fair deduction that the sale of the property was the principal contemplation of the parties.

2. " 'Equity has to do with the substance and reality of a transaction—not the form and appearance which it may be made to assume. * * *"

3. Where it appears that the true intention of the parties is to sell the property, the papers will be construed as security, and the transaction will be given that effect no matter how many papers have been executed to cover up that purpose.

4. Where a vendee has substantially performed, the contract simply operates as an instrument of security as to the balance to be paid.

5. "* * * One, seeking at law to realize on such a contract, may, if his selection of remedy be challenged through interposition of an answer in equity, as here, find himself remitted to an equitable remedy."

6. "The expression 'time is of the essence' is not more controlling than are definite provisions of a contract which mean that time is of the essence."

7. " 'The fact that the contract expressly states that time is of the essence is not conclusive, other provisions of the contract may be so inconsistent with this as to lead to the conclusion that time is not essential.' "

8. Where the action between the parties becomes one for the construction of a contract and the relation of the parties (as here) there is no occasion for application of the rule " 'that requires the plaintiff (defendant here) to tender the amount due or allege his ability and readiness to pay it * * *.' "

9. The contention of plaintiff that defendant has already had as much delay as equity would require, is not forceful here, for the default occurred on July 22, 1936, and the next day notice of cancellation and demand for possession was served.

10. The fact that some delay occurred when the defendant sought relief under Section 77-B of the Federal Bankruptcy Act, which was finally denied, cannot be used by plaintiff to its advantage, for during such period it could have proceeded in equity at its pleasure.

11. Plaintiff may elect to have the court adjudge that from the date of its order, defendant may have six months within which to pay into the registry of the District Court, for benefit of plaintiff, the sum of $46,851.63 (the balance due plaintiff) plus interest from August 23, 1936. It would be inequitable to require plaintiff to take the time necessary to reframe his complaint and to continue with new proceedings. If plaintiff does not make such election in 30 days, the action to be dismissed at its costs.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bouck dissents. Mr. Justice Bock not participating. EN BANC.

ELECTORS—STATUTES—CONSTRUCTION—*Weybright v. Klein, etc.* —No. 14521—*Decided July 3, 1939*—*District Court of Otero County*—*Hon. Harry Leddy, Judge*—*Affirmed.*

FACTS: City was engaged in acquiring and constructing an electric plant. Plaintiff brought injunction to stop it. City's demurrer was sustained to plaintiff's complaint.

HELD: 1. To consummate its acquisition, the city had to adopt an ordinance embodying its plan, which ordinance required the approval of electors. "The statute says by 'a majority of the qualified property electors of such City or Town as shall in the next year preceding the year of election have paid a property tax therein.' "

2. It is immaterial under such circumstances that the ordinance was adopted by a majority of such electors *voting*, but not a majority of *all* such electors in the city, for "no instance, * * *, has been discovered where the lawmakers did such an absurd thing as to require a majority of all those qualified.' "

3. "Government by majorities does not rest upon the fact that majorities actually express themselves, but upon the necessary presumption that the silent electors approve what the articulate do, otherwise they would protest."

4. " 'A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency,

and the words are susceptible of another construction which will carry out the manifest intention.' "

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

CERTIORARI—PROFESSIONS—REVOCATION OF LICENSE—JURISDICTION OF ADMINISTRATIVE BOARD—EFFECT OF REVERSAL OF CONVICTION—*Nellie C. Hummel v. Board of Chiropractic Examiners*—No. 14344—*Decided February 6, 1939*—*District Court of Denver*—*Hon. Robert W. Steele, Judge*—*On Application for Supersedeas*—*Reversed.*

FACTS: The Board of Chiropractic Examiners revoked the license of Dr. H to practice chiropracty, which action was taken under Chapter 34 of the 1935 C. S. A. H took a writ of certiorari to the District Court, which writ was dismissed. She was charged before the board with the conviction of a crime involving moral turpitude (one of the grounds for revocation of license set forth in the statute). During the hearing the attorney general was granted leave to amend the complaint by adding the allegation that "Dr. H was guilty of unprofessional, dishonorable and immoral conduct" (another ground of revocation provided by the Act). The Act further provides that any person charged as aforesaid "shall be furnished with a copy of such charges at least 30 days before such charges are set for hearing." It further provides that charges shall be presented to the board under oath by any person having knowledge of the facts. At the hearing evidence was presented of a conviction of H for petit larceny in the District Court. This conviction was reversed by the Supreme Court.

HELD: 1. It is the conviction, not the commission, of certain offenses that is ground for discipline. When the Supreme Court reversed the judgment of the District Court in the petit larceny case the constitutional presumption of innocence was restored to H.

2. The attempted amendment to the complaint by the attorney general to add the additional ground above stated was illegal. The complaint must be under oath and must be served on the defendant at least 30 days before hearing. Further, the charge must be made by a person claiming knowledge of the facts. The attempted amendment conferred no jurisdiction upon the board to hear same.

3. Even if the amendment was proper, H's license could not be revoked because the acts complained of must bear a connection with the profession of the accused. In this instance, there is no connection between the offense and the practice of chiropracty.

4. Furthermore, the board exercised its powers in such a way as to abuse its discretion. The penalty was far too severe for the offense charged.

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

UNITED STATES—LAND CEDED BY STATE—TAXATION—AUTOMOBILES—USE OF HIGHWAYS—COLLECTION OF TAX—*Board of County Commissioners of Arapahoe County v. E. J. Morris*—No. 14403—*Decided March 27, 1939*—*District Court of Arapahoe County*—*Hon. Samuel W. Johnson, Judge*—*Reversed.*

FACTS: Morris paid the tax on his automobile under protest, claiming it as exempt on ground that he was stationed at Fort Logan, a military post of the United States, located in the county. Under the statute a car owner is required to pay the tax due on his car at the time of procuring his annual license. Morris brought action to recover the amount paid.

HELD: 1. Since the third assignment, to-wit: "That the trial court erred in overruling the motion for judgment on the pleadings," is good, it only will be considered.

2. The title of the Act ceding to the United States jurisdiction of state over a site for military post, also includes "to release the same and other property of the United States from taxation." The first section thereof grants jurisdiction over the tract "for all purposes whatsoever," but reserves jurisdiction to serve civil and criminal process. The second section thereof releases from taxation the tract and its improvements and all property therein or thereunto appertaining "belonging to the United States." If the first section divested the state of all, or any rights of taxation therein located, the entire second section was superfluous.

3. Morris complains of the refusal to issue a license to allow him to operate his car on the highways of the state unmolested, yet no authority is vested in the county clerk to issue such save for registered cars.

4. One who operates a registered and numbered car without such certificate of title is guilty of a misdemeanor.

5. One purpose of the Act is to add security to motor vehicle titles.

6. If clerk had granted Morris' demand, he probably would have been liable to fine and imprisonment.

7. Certain reciprocal interstate privileges are conferred by our laws.

8. So long as Morris operates car within military reservation, he is not required to have licenses, registration, certificate of title, or to pay any kind of fee or tax.

9. By reason of the character of the use and operation of automobiles, and under our constitution and statutes, the situs of a car for license and taxing purposes is where the legislature says it is and, clearly, the situs of this car is not Fort Logan.

10. As a property or a privilege tax, Morris must pay, and it is no concern of his what the state does with the money received therefor.

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

BURGLARY INSURANCE—COMPARTMENT, MEANING THEREOF IN POLICY—CONSTRUCTION OF POLICY—INTENTION OF PARTIES —*Commercial Casualty Ins. Co. v. Mapelli Bros., Inc.*—No. 14452—*Decided March 27, 1939*—*District Court of Denver*—*Hon. Henry S. Lindsley, Judge*—*On Application for Supersedeas* —*Reversed.*

FACTS: 1. Defendant wrote burglary insurance on plaintiff's safe. Safe was rifled and defendant refused to pay because the particular loss was not covered.

2. Both iron doors of safe were broken open. Inside were various drawers and pigeonholes, having no separate locks, and a steel "chest" having a separate "burglar-proof," but unused, lock. Policy specified that "doors of the safe are locked by combination locks as follows: (1) Outer safe door combination, (2) Middle door key lock, (3) Inner chest door combination." Insurance was limited to "inside the chest or compartment." Trial court held that loss from drawers and pigeonholes was covered, but otherwise as to loss from chest because it had been left unlocked.

HELD: 1. Word "compartment" in phrase "chest or compartment" is but another name for "chest."

2. If such were not the case, then notwithstanding provision in policy that required plaintiff to lock the chest, it could toss currency in the pigeonholes with identical protection.

3. "Compartment" must be deemed singular, else the policy becomes ambiguous. Construction of ploicy clearly indicates such.

4. Evidence showed that plaintiff, upon being advised of a 50% lower rate than on the pigeonholes and drawers, installed the chest, thus indicating the intention of the parties.

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

NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK—DAMAGES—*Denver & Salt Lake Ry. Co. v. Grainer*—No. 14399—*Decided March 27, 1939*—*District Court of Adams County*—*Hon. H. E. Munson, Judge*—*Affirmed.*

FACTS: G, employee, sued railroad for damages for personal injuries alleged to have been caused by negligence of railroad and obtained judgment for $15,000.00.

HELD: 1. " 'Every fact necessary to support the verdict will be presumed to have been found by the jury in favor of the prevailing party.' " The evidence as to failure to warn plaintiff, in not ringing the bell on the defendant's engine, is in conflict. The jury must have found that the bell was not rung.

2. The rule of the defendant company required the bell to be rung when the engine started to move, and the jury was justified in finding

that the failure to obey the rule was the proximate cause of plaintiff's injury.

3. Under the Federal Employers' Liability Act, contributory negligence of an employee cannot be a defense in the case at bar. Here the plaintiff was working as a section hand on a curved track, and there was a violation of a rule of the company by another of its employees who failed to sound the bell and give warning of the approach of the engine which struck plaintiff while he was working on the track.

4. The employee is entitled to rely on the long-standing rule that the bell would be rung.

5. Plaintiff assumes the ordinary risks of his employment, but there is no evidence that he knew or should have known the engine crew would violate the rule of ringing the bell.

6. Where it appears that injured person received permanent injuries, that he was in hospital two months, that his pain and suffering are practically constant, and where there is nothing in the record from which the court could presume that the verdict was the result of passion or prejudice, it will not be disturbed on the ground that it is excessive.

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

TAX SALES—BULK OR UNITARY SALES OF CERTIFICATES—JUDICIAL NOTICE OF DEPRESSION — CONSTITUTIONAL LAW — *District Landowners Trust Co. v. County of Adams, et al.*—No. 14440—*Decided March 27, 1939—District Court of Adams County—Hon. Otto Bock, Judge—Affirmed.*

FACTS: Suit to set aside a unitary or bulk sale of some two hundred tax sale certificates by the tax officials of Adams County, on alleged grounds of illegality, fraud, conspiracy and secrecy, to a predetermined purchaser at a flat percentage discount, and without regard to the actual value of the respective properties involved. Action dismissed.

HELD: 1. The court has, on occasion, taken judicial notice of the wide ramifications of the economic depression, one of which was the accumulation by the respective counties of a large number of tax certificates of purchase issued by them on tax sales with the result that the lands covered thereby were taken off the tax roll, with consequent loss of revenue and injury to the normal functions of government.

2. The legislature had in mind, in passing Chapters 94 and 105, S. L. 1935, a simplified procedure to be followed by county commissioners and directors of drainage and irrigation districts in disposing of the certificates, in order that thousands of acres of land sold for taxes might be again placed on the tax roll.

3. The people have all powers not taken from them by the Constitution.

4. Preambles may not be invoked apart from specific provisions of the Constitution to invalidate a statute.

5. The acts do not violate Section 21, Article V of the Constitution, since the language of the titles clearly embrace the subject of the acts.

6. The acts do not violate Section 24 of Article V of the Constitution. They are commendable for brevity, certainty and choice of language.

7. Evidence examined and found to be devoid of fraud or illegality in the sale of the certificates, and these are the only two grounds upon which the sale might have been set aside.

8. The sale may have been secret as to a prospective purchaser, but the board was under no legal obligation to notify him of its decision to accept less than face amount for the certificates from the first buyer who offered to pay the price decided upon.

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

QUIET TITLE—MEASURE OF DAMAGES—CONDEMNATION FOR PUBLIC USE—TAXATION OF EXPERT'S WITNESS FEES AS COSTS—*Union Exploration Co. v. Moffat Tunnel Improvement District, et al.*—No. 13879—*Decided March 27, 1939—District Court of Gilpin County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: Action by Moffat Tunnel District to quiet title to 50 acres of land occupied and used by it as a tunnel site and railroad right of way in the construction of a railroad tunnel and water tunnel through the Continental Divide. The plaintiff paid $15,200.00 into court as the value of the land and the timber used.

HELD: 1. It is not a proper measure of damages to take the figure of what would be the difference in cost between building the tunnel on defendant's land and the cost of building it on adjoining land. It is only one of the factors to be considered.

2. In determining the value of the land, the court should take into consideration every reasonable use to which the land could be put, and the highest value that could be put upon it for any reasonable use, and also take into consideration the fact that this land was located in a place suitable and desirable for the portal of a great trans-continental railroad tunnel.

3. The value placed upon the land for revenue purposes is not the proper measure of the value of property taken for public use.

4. What was paid for nearby land of different surface conditions and location could not be used in determining the value of the lands in question.

5. Where parties agree to submit the question of value of land to arbitrators and they cannot agree on the arbitrators, the matter may be decided by the court and the measure of damages to be applied is the same as in condemnation proceedings.

6. The most profitable and advantageous use to which the prop-

erty is adapted is the basis upon which fair compensation should be determined.

7. Speculative or prospective damages or values may not be considered except only as such evidence may bear upon or affect or assist in arriving at the present market value.

8. "While there can be no question that the adaptability to a special and advantageous use, including the use for which the property is being taken, is to be considered, and that evidence of such adaptability is admissible, it is to be considered only in so far as it affects the market value of the land."

9. Defendant is not entitled to compensation for use of the property from the time plainitff entered into possession, to date of judgment. When it was taken plaintiff was entitled to compensation. The claim has been unliquidated.

10. It is within the sound discretion of the court, in an equity case, to tax the plaintiff with fees paid by defendant to its expert witnesses.

Opinion by Mr. Justice Young. Mr. Justice Francis E. Bouck not participating. EN BANC.

CONFLICT OF LAWS—JUDGMENTS—FULL FAITH AND CREDIT—FRAUD—PROCESS—JURISDICTION—*Devereaux, etc., et al. v. Sperry, et al.*—No. 14529—*Decided March 27, 1939—County Court of Gunnison County—Hon. Clyde Welch, Judge—Affirmed.*

HELD: 1. Where fraud in the procurement of a defendant's waiver of summons in a suit brought in Kansas is alleged and proved, the judgment, though of a sister state, will not be given full faith and credit by the courts of this state.

2. "The wholesome and righteous doctrine of comity should never be used in aid of perpetration of fraud, * * *."

3. The disposition of the case on the basis of fraud renders unnecessary any consideration of the effectiveness of the attempted dissolution of the corporation in Kansas so as to constitute it incapable of being sued in this case.

4. Service by publication upon the corporation defendant was sufficient to give the trial court jurisdiction to support the attachment on property located within the county.

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

CONTRACTS—PUBLIC POLICY—*Mitchell v. Jones*—No. 14530—*Decided March 27, 1939—District Court of Denver—Hon. Henry S. Lindsley, Judge—Reversed.*

HELD: 1. It is not against public policy, nor is it improper, nor are there suggested dangerous tendencies for one, who was formerly with

the Public Works Administration, an agency of the federal government, to enter into a contract with an architect, whereby the former is, for a commission, to diligently seek out public boards or organizations which are desirous of obtaining grants and loans from said P.W.A. to erect public buildings, and to the best of his ability to endeavor to secure contracts for said architect, for architectural services, including study drawings, plans and specifications, together with supervision.

2. "Considering that an architect was necessarily to be employed, and that his compensation was standardized—not subject to favor, we cannot think it was morally wrong for defendant architect to employ plaintiff to present him and his claims to excellence as an architect to the governing boards of public entities undertaking work within the contemplation of the act of Congress and its administrative regulations."

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

WORKMEN'S COMPENSATION—CONSTRUCTION OF ACT—CASUAL EMPLOYMENT—*Royal Indemnity Company, et al. v. The Industrial Commission of Colorado, et al.*—No. 14601—*Decided September 11, 1939—District Court of Denver—Hon. Joseph Walsh, Judge—Affirmed.*

FACTS: 1. Review sought of affirmance by district court of an award of compensation by commission.

2. Claimant was a carpenter who was engaged by Morey Company, upon recommendation of Schillig-Scott Lbr. Co., to do some remodeling and repair work upon its warehouse, particularly to better the loading dock.

3. Claimant, as was the general custom of trade, went to the lumber company to use its power saw to cut some material to be used in the remodeling work, and in the operation of the saw was injured.

HELD: 1. The exclusion of "any persons whose employment is but casual and not in the usual course of trade, business, profession, or occupation of his employer," mentioned in the Compensation Act, is not applicable to the situation here, because (1) previous to the repairing and remodeling operations, and at the time thereof, Morey Company had been and was engaged in its established mercantile business, and (2) in the usual course and furtherance thereof had been and was utilizing the warehouse.

2. Lackey v. Industrial Commission, 80 Colo. 112, is distinguished; there a farmer decided to procure a site and build a filling station, and the question determined was: "Is the construction of a building to be used by the builder in a business *new* to him, within the usual course of *that* business?"

Opinion by Mr. Justice Knous. EN BANC.

CRIMINAL LAW—ILLEGAL USE OF PUBLIC FUNDS—JURORS—TESTIMONY BEFORE GRAND JURY—*Rogers v. People*—No. 14528—*Decided July 3, 1939—District Court of Las Animas County—Hon. Frederick W. Clark, Judge—Affirmed.*

HELD: 1. A grand jury may be summoned on open venire. In counties like Las Animas the calling of a grand jury is discretionary with the judge. Where it happens that when the term opens, no grand jury has been ordered or decided upon, the grand jurors can nevertheless be summoned by open venire as under the common law. This may be done "during the term" and it is immaterial that this be done on the first day or the third day of the term.

2. Our statute, Sec. 453, Chap. 48, 35 C. S. A., does not permit a motion in arrest of judgment or writ of error to be sustained by reason of the disqualification of any grand juror or grand jurors.

3. A motion to quash an indictment will not be sustained upon the ground that the defendant was "required by authority of the Grand Jury to appear before it," and "was thereby compelled to be a witness involuntarily against himself," unless it appears what testimony was given or called for, and unless facts are stated from which the court may determine that it was "by authority" or that defendant was "compelled," or that his testimony was "against himself."

4. Where it appears to the court that the defendant testified before the grand jury voluntarily, it will not quash the indictment flowing from such testimony.

5. There is no mandate compelling prosecution for all connected crimes. Proof of a crime often necessarily includes proof of a conspiracy to commit it and other violations. It is within the discretion of counsel for the people to determine which ones to press.

6. The statute does not require that in order for one to be convicted of illegal use of public funds, he be a custodian of the money.

7. One doesn't obtain title to property by theft or by criminal conspiracy, or by fraud equivalent thereto.

8. Where one acting "under pretense" of his public office obtains and converts to his own use, public monies, he is guilty of illegal use of public funds.

9. County warrants, shown in part to be fraudulent, to which defendant bore substantially the same relation as the warrant upon which the indictment was based, are admissible in evidence under the rule applicable to proof of intent, plan or design.

10. Remarks of the trial judge, though ill-advised, but not so couched as to especially reflect upon the defendant, and inspired by attempt of defendant's counsel to inject prejudicial matter into the record, are not prejudicial.

Opinion by Mr. Justice Burke. Justice Bouck not participating. Mr. Chief Justice Hilliard dissenting. Justice Bock concurs in the conclusion. EN BANC.

FENCE—CONTRACT TO MAINTAIN—TRESPASSING CATTLE—APPEAL AND ERROR—ABSTRACT OF EVIDENCE—*Read v. Micek, et al*—No. 14442—*Decided September 18, 1939—County Court of Huerfano County—Hon. Joseph A. Barron, Judge—Affirmed.*

FACTS: 1. Cause filed in one justice court, transferred to another, judgment therein entered and appeal to the county court, where judgment entered again in favor of plaintiff.

2. Action for damages sustained by trespass of defendant's cattle.

HELD: 1. Assignment of error based upon insufficiency of evidence must be disregarded where evidence is not abstracted.

2. Lower court's findings show parties to be occupants of adjoining premises; that agreement existed between them as to maintenance of fence; that defendant overstocked his premises and failed to maintain his portion of fence so that cattle entered thereat and damaged plaintiff's property. Findings presumed supported by evidence, and if so, judgment proper.

3. No question of free range or lawful fence involved where cause rests upon contract pertaining to fence maintenance.

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

TAXATION—STATUTORY CONSTRUCTION—RIGHTS OF PURCHASER—TAX DEEDS—NOTICE—REQUEST—PAYMENT—*Knutson, et al. v. Dickson*—No. 14579—*Decided September 18, 1939—District Court of Logan County—Hon. Arlington Taylor, Judge—On application for supersedeas, judgment reversed.*

FACTS: 1. Suit in ejectment, plaintiffs asserting title by virtue of tax deed. Findings for defendant on ground tax deed void on its face.

2. Invalidity determined because of omission from deed of statement that certificate of purchase originally issued to county on tax sale had not been duly assigned under authority of a resolution of board of commissioners in accordance with 1935 Session Laws, page 329, Section 1.

3. Error assigned on court's holding, and cross error assigned by defendant, asserting invalidity because the face of the deed shows request for its issuance and first publication of notice thereof was made a few days prior to expiration of three years from date of sale.

HELD: 1. The act of 1935 does not apply where taxes in full are tendered to the county treasurer. The purpose of the statute is fulfilled when county realizes the full amount of the taxes due on the property.

2. It is not province of the court to declare new policies in connection with possible uses of land in which the county, as a governmental agency, might be interested.

3. The three years mentioned concerns the period in which the taxpayer may redeem his land from sale by payment of taxes and penalties therein. No deed can issue prior to expiration thereof. This is the

protection assured; but then purchaser may set the machinery in motion to obtain the deed a short time before the expiration of the period.

Opinion by Mr. Justice Bakke. Mr. Justice Bock and Mr. Justice Burke dissent. EN BANC.

CONTRACTS—COMMERCE AND TRADE—VOID CONTRACTS—*Ringsby, et al. v. Timpte, et al.*—No. 14606—*Decided September 11, 1939—District Court of Denver—Hon. Henry A. Hicks, Judge—On application for supersedeas, judgment affirmed.*

FACTS: Action for damages for breach of contract in purchase of transportation equipment, asserted inducement of purchase being false representations to the effect that there existed agreement between packers and Timpte brothers for exclusive use of their products to carry meats between Denver and Chicago, and between Denver and California and intervening points.

HELD: 1. "There is nothing in the record to nullify the alleged representations as to the required exclusive use of Timpte Bros. equipment by the packers in their transportation activities, or to indicate that such requirement, if present, was not wholly arbitrary or that the named equipment was the only procurable one which would serve the needs of the packing companies. This being true, the alleged agreement unquestionably would be in violation of the provisions of the federal act." Sec. 2, Title 15, Commerce and Trade, U. S. C. A., having to do with monopoly of trade or commerce by persons among the several states.

2. No action will lie for violation of an illegal or void contract.

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

CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE—EXPERT WITNESS—OPINION—ELECTION OF COUNTS—CO-CONSPIRATOR—EVIDENCE—*Seth A. McPhee v. The People*—No. 14610—*Decided September 11, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—On application for supersedeas, judgment affirmed.*

FACTS: 1. McPhee convicted of larceny of automobile and sentenced. Record disclosed two previous convictions. Convicted largely on evidence of witnesses, M and S, with whom he had dealt in handling "hot cars."

HELD: 1. Refusal to grant new trial on ground of newly discovered evidence was proper, where affidavit was based on hearsay; lower court recalled witness for re-examination thereafter; and new evidence was cumulative.

2. Opinion of expert based on sources other than that submitted by attorneys for McPhee, when they sought his aid, was properly submitted to establish handwriting. Besides, direct and positive evidence had been submitted on the point.

3. It is incumbent on state to elect to rely upon either (a) receiving, or (b) larceny counts, where same evidence is admissible as to each, and the counts are properly joinable.

4. There being sufficient evidence to indicate one to be a co-conspirator with defendant, his testimony is admissible, regardless of motive.

5. Although conflicting, evidence was sufficient to sustain conviction.

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

MINORS—CLAIMS AGAINST ESTATE—CLASSIFICATION—*In re: Estate of Elaur. Elaur, etc. v. International Trust Co., etc.*—No. 14396 *Decided March 27, 1939—District Court of Denver—Hon. Robert W. Steele, Judge—Affirmed.*

HELD: 1. The rights of creditors, minors, etc., and the relative priorities of their claims become fixed at the time of the debtor's death, and the law then in force controls.

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

PUBLIC UTILITIES COMMISSION—TIME FOR FILING PETITION FOR REVIEW OF COMMISSION'S DECISION—CONSTITUTIONAL LAW—*Mayer, et al. v. Public Utilities Commission*—No. 14590—*Decided September 11, 1939—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed.*

FACTS: Trial court held that since the petition for review with relation to a decision of the Public Utilities Commission was not filed in the District Court within 30 days after denial of the application for rehearing by the Public Utilities Commission, judicial review of the commission's acts was barred. Petitioner contended that since the Supreme Court had previously considered the act (Sec. 52, chapter 137, 1935 C. S. A.) setting the time limit for review, and held that a provision giving the Supreme Court original jurisdiction in such matters was unconstitutional (Clark v. Utilities Commission, 78 Colo. 48, 239 Pac. 20), and had held that a provision depriving the District Court of jurisdiction in such matters was also unconstitutional (Greeley Transportation Co. v. People, 79 Colo. 307, 245 Pac. 720), that therefore the entire act was unconstitutional.

HELD: 1. It was the purpose of the General Assembly to work expedition in the determination of questions arising out of the administration of the act.

2. The limitation feature of the statute is severable from, does not depend on, and is not related to, the provisions concerning the jurisdiction of courts.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bouck not participating. EN BANC.

INSURANCE—PERMANENT AND TOTAL DISABILITY—*Guardian Life Ins. Co. v. McMurray*—No. 14518—*Decided September 11, 1939—District Court of Larimer County—Hon. Claude C. Coffin, Judge—Affirmed.*

FACTS: 1. Plaintiff insured under policy providing for payments to him in event he "became totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work or from following any occupation whatsoever for remuneration or profit, * * *".

2. Plaintiff had been operating a farm, but as his illness (multiple sclerosis) progressed, he became weak, tired and could not operate the farm or even look after the hired help. However, he did paint a little and drive a little.

3. Jury in trial court held for plaintiff and against insurance company and awarded judgment for disability payments plus the return of the premiums for two years paid by plaintiff while disabled.

HELD: 1. Evidence examined and found to be sufficient to sustain jury's finding.

2. Although insured is not in a condition where he can do no work at all, the disability clause of the policy does not require more than that he be "permanently, continuously and wholly prevented thereby from following any occupation whatever for remuneration or profit."

3. "Men do not employ permanent cripples to drive their cars or trucks, and assume the hazards of and responsibility for their incompetent acts."

4. Where one is unable to obtain work for which he is fitted because of his diseased condition, "or if, for the same reason after securing it, he could not 'deliver the goods,' to use a common expression, then his diseased condition prevented him from following any occupation that he could follow if not diseased for remuneration or profit."

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

CRIMINAL LAW—ACCESSORY AFTER THE FACT—SENTENCE—*Miller v. People*—No. 14599—*Decided September 11, 1939—District Court of Mesa County—Hon. George W. Bruce, Judge—Reversed as to sentence imposed.*

HELD: Where one pleads guilty to being an accessory after the fact, he may not be sentenced to serve his punishment by confinement in the penitentiary since the statute upon which the sentence is based fails to designate the offense as a felony and is silent as to the place of incarceration. Under previous decisions, the crime charged is a misdemeanor and the confinement may be only in the county jail.

Opinion by Mr. Chief Justice Hilliard. EN BANC.

ALIMONY—CONTEMPT FOR FAILURE TO PAY—LACHES—*Hamilton v. Hamilton*—No. 14356—*Decided September 11, 1939—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed in part and reversed in part.*

HELD: 1. Where wife obtains divorce in 1920 and husband, by agreement approved by court, agrees to make certain payments, and where he does make such payments to the best of his ability, and where it appears that the wife took no formal steps to enforce the judgment for alimony until 1937, and then by a contempt proceeding, the trial court did not err in ruling that the doctrine of laches should be invoked and refusing the contempt order.

2. The court erred, however, in ordering an annulment of the judgment for alimony, since it did not appear that husband had fully complied with the orders of the court, and since wife's right to attempt collection through appropriate processes and writs may not properly be foreclosed in a contempt proceeding.

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

WORKMEN'S COMPENSATION—*Ward and Co. v. Industrial Commission*—No. 14596—*Decided September 11, 1939—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed.*

HELD: 1. Where it appears that of 8 medical witnesses testifying before the Industrial Commission, 3 stated that claimant had no permanent injuries, 2 that she had a 5% disability, one that she had a 35% disability and one that she had a 30% to 40% disability, the finding of the commission that claimant sustained permanent injury and that her disability as a working unit was 25%, is a legitimate conclusion, which has substantial basis in the testimony.

2. Where there is sufficient competent evidence to support a finding and award of the Industrial Commission, neither the district nor the Supreme Court is authorized to disturb such finding and the award based thereon.

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

WORKMEN'S COMPENSATION—COMPLAINT AND DEMURRER—LIMITATIONS—*Gadbois v. Allen, et al.*—No. 14586—*Decided September 11, 1939—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed.*

HELD: 1. Where claimant files his complaint in the District Court, after order and award of the Industrial Commission, and a demurrer to same is interposed on two grounds: First, that it failed to state a cause of action, and secondly, that it "shows upon its face that this action was not commenced within twenty days after the final find-

ing, order or award entered by the defendant Industrial Commission of Colorado upon the review of the award by said action sought to be vacated," it is not necessary that the second ground of the demurrer be urged after the filing of an amended complaint.

2. The special demurrer was good because the twenty-day limitation of time as to filing the case in the District Court runs from the date the commission announced its adherence to its former award.

3. A so-called application for review is not in fact or in law the petition for review contemplated by the statute (Sec. 377, Chapter 97, 1935 C. S. A.) because it does not attempt to "specify in detail the particular errors or objections" as required by Section 376.

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

SMALL LOANS—NOTES—INTEREST—ENFORCEMENT OF PAYMENT—*Personal Finance Co. v. Baker*—No. 14364—*Decided September 11, 1939*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

HELD: 1. Under Section 10 of the Small Loan Act (S. L. 1935, Chap. 157) where $125.00 is actually loaned in cash, $15.00 is charged as a service fee, and $10.00 is charged for auto protection, and the lender takes borrower's note for $150.00, no interest may be charged on the $15.00, retained as service fee.

2. Under said section, action filed by lender against the borrower was properly dismissed since interest could only be charged on $125.00, and therefore, the note was unenforceable.

3. In loans of over $50.00 and not exceeding $300.00, insurance and service charges may be deducted from the loan in advance, but interest may be charged only on $135.00 (not including the service fee).

Opinion by Mr. Justice Bakke. Mr. Justice Bouck and Mr. Justice Bock not participating. Mr. Justice Young dissents.

QUIET TITLE—MINING PROPERTIES—LEASE—NOTICE OF FORFEITURE—JURISDICTION—*Shrewsbury, etc. v. Reynolds-Morse Corp.* —No. 14389—*Decided September 18, 1939*—*District Court of Gunnison County*—*Hon. George W. Bruce, Judge*—*Affirmed.*

HELD: 1. Where it appears under a lease that notice of forfeiture must be sent by lessor to lessee, and the lessee is a receiver, it is not necessary that the notice be addressed to lessee as "receiver."

2. Where the evidence shows that receiver and addressee of notice and his mother and uncle lived in the town to which notice was sent by registered mail, that the receiver left for parts unknown about three weeks after notice was sent and that the notice was returned to sender marked "Uncalled for. Not here. They were notified," and that no other address was given to lessor, the giving of the notice ceased to be a

question of law and became one of fact, which the trial court correctly resolved in favor of the lessor.

3. Although it appears that a petition in involuntary bankruptcy was filed against lessee in the federal court in Denver months prior to the sending of the notice of forfeiture, the jurisdiction of that court did not become exclusive for two reasons:

a. The trustee in bankruptcy sold all of the admitted assets of the bankrupt, and filed a disclaimer in this action.

b. There are exceptions to the general rule that bankruptcy courts have exclusive jurisdiction over all property which is claimed by the bankrupt.

4. Where lessee in confessing judgment in the receivership proceedings instituted against it, recites in its answer that it is "wholly insolvent, and unable to pay its debts and obligations," and the receiver is ordered to continue to operate the mines and conform to the lease, failure to pay for all labor and supplies and make reports and deliver statements to lessor, as provided for in the lease, is sufficient violation of such lease to permit lessor to declare a forfeiture.

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

GRAND LARCENY—EVIDENCE—*McLinden v. People*—No. 14566—*Decided September 25, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.*

HELD: 1. Evidence of case examined and found to be sufficient upon which jury was justified in bringing in a verdict of guilty on charge of grand larceny.

2. The jury evidently did not believe defendant's contention that he believed he had a legal right to the possession of the property taken.

3. Although on motion for directed verdict, at conclusion of the people's case, the court expressed some doubt concerning the value of the property involved, as to whether or not it was over $20.00, the denial, by him, of the motion is not error, particularly where there was no substantial basis for such doubt.

4. In the court's ruling upon the defendant's motion for a new trial there was some discussion as to the duty of the court in the event of a difference of opinion concerning the verdict, and it gave expression to the proposition that primarily the question of veracity was one for the jury and not for the court. While the Supreme Court has held that trial courts have certain discretionary powers to set aside verdicts and grant new trials, it has "never gone so far as to say that they may act as a thirteenth juror."

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