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Supreme Court Decisions

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WATER RIGHTS—TAXATION AS IMPROVEMENT UPON REALTY—CORPORATION STOCK IN MUTUAL DITCH COMPANY—CONSTITUTIONAL LAW—*Beaty vs. Board of County Commissioners of Otero County*—No. 14031—*Decided November 15, 1937*—*District Court of Otero County*—*Hon. William B. Stewart, Judge*—*Affirmed.*

Facts: From 1927 to 1932, plaintiff owned 458 acres of land, all lying under a canal owned by a mutual ditch company. For irrigation of the land, she owned 477.44 shares of stock in the ditch company. The by-laws of the company contemplated that one share of stock represented the amount of water required to irrigate one acre of land. During each of the years involved, part of plaintiff's land was not irrigated by reason of seepage or some other condition interfering with cultivation. The plaintiff, therefore, at all times owned more shares of water stock than she owned acres of irrigated and cultivated land. She, because of this, used and enjoyed the use of more water per acre than persons having only one share for each acre of land. During each of these years the irrigated acreage of plaintiff was assessed as irrigated lands, and at an amount equal to the valuation placed upon other like lands having one share of stock or less per acre for the irrigation thereof. Also, her right to the use of additional water was assessed as improvements on land on the basis of the number of shares of canal stock she had in excess of the number of acres of irrigated land assessed to her. These assessments appeared in that column of the plaintiff's tax schedule headed: "Improvements on land," using the descriptive words: "___sh. extra (or ex.) water," followed by the varying valuation fixed for the respective years. Plaintiff voluntarily paid the taxes so levied, except those for 1932, without protest, and took no action of any kind, until 1933, when she applied for a refund of taxes paid and an abatement of the 1932 tax. The County Commissioners denied the application, and she prosecuted this action in the District Court, which held the excess or extra stock was assessable.

HELD: 1. The proceeding could be disposed of adversely to plaintiff for her failure to avail herself of the administrative statutory remedies for relief from the allegedly illegal assessments, and for her failure to protest and refuse to pay the taxes.

2. The thing assessed for taxation was not corporate stock, but an improvement on real estate. Where a mutual canal company was organized for the convenience of its members in the distribution to them of their water for use upon their lands in proportion to their respective interests, the stock certificates are merely muniments of title to her water right and such is unquestionably real estate and not corporate stock.

3. That the assessor in assessing the excess water rights used the measuring stick (shares of stock) suggested by the by-laws of the corporation is not to be considered as changing the true character of the shares.

4. Sec. 3, Article X, of the Colorado Constitution, does not exempt ditches, canals and flumes used by individuals or corporations for irrigating land owned by them or it, from taxation, but only requires that they shall not be separately taxed.

5. Water rights are to be listed and valued for tax purposes as improvements on the land upon which the water is used.

6. "* * * Under Colorado's theory of taxation the tax value of farm real estate must vary in direct proportion to the worth and extent of the improvements to the land, whether they be building, structure, fence or water right." EN BANC.

Opinion by Mr. Justice Knous. Mr. Justice Bouck dissents.

TAX CERTIFICATES—SALES BY COUNTY COMMISSIONERS IN BULK—REDEMPTION—REPAYMENT OF FULL AMOUNT PAID UPON REDEMPTION TO HOLDER OF CERTIFICATE—*Board of County Commissioners of Moffat County, et al. vs. Utah-Colorado Land and Livestock Co.*—No. 14168—*Decided November 15, 1937—District Court of Moffat County—Hon. Charles E. Herrick, Judge—Affirmed.*

HELD: 1. Where an officer of a company, desiring to purchase tax certificates, appeared before the board of County Commissioners at a regular session with a list of various outstanding tax sale certificates belonging to the county, with the idea of acquiring at a discount a number of those certificates, and stated what the company would be willing to pay, certificate by certificate, and in each instance the board, after discussion of the matter, determined the specific amount for which they would authorize the treasurer to make the assignment, and where in many instances the price so fixed was in excess of the amount suggested, and where a resolution was prepared at the request of the board, which was in regular form with a separate assessment of the purchase price of each certificate and which did not name the purchaser or place any restrictions upon the transaction, and where over a period extending from two weeks to two months thereafter, and during which period any person could have purchased the tax certificates for the amounts mentioned in the resolution, the company did purchase certain certificates, there is no evidence of collusion, fraud, or bulk sales of tax certificates, or an attempt to prefer a particular purchaser.

2. Under these circumstances, the holder of the tax certificate, as assignee of the county, became vested with the same rights under the certificates as though it had been the original purchaser at the tax sale, and, therefore, upon the redemption of the certificates was entitled to the full amount paid for the redemption thereof. EN BANC.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Holland dissent.

MINORITY STOCKHOLDERS SUITS—MINING CORPORATIONS—RATIFICATION OF ACTS OF BOARD OF DIRECTORS—ENCUMBERING MINING PROPERTIES OF COMPANY—ESTOPPEL—*MacKenzie, etc. vs. Taggart, etc., et al.*—No. 14077—*Decided November 15, 1937—District Court of Teller County—Hon. John M. Meikle, Judge—Affirmed.*

HELD: 1. Where it appears that a meeting of the board of directors of a mining corporation was called and held to consider ways and means for securing a loan to pay off an indebtedness of the company secured by a trust deed then being foreclosed, and at such meeting it was provided that the vice-president and secretary issue a trust deed or use whatever means necessary to secure the amount of money required to avoid foreclosure, and where it appears that at a subsequently called shareholders meeting, the action of the board was ratified, and that later the plaintiff became a stockholder, and thereafter the deed of trust was executed, and where it appears that following that, a shareholders meeting was held, but not properly called, at which the plaintiff voted by proxy, together with over 76% of the shareholders to ratify, approve and adopt the acts of the directors, the plaintiff, as a minority stockholder, may not now bring a suit to set aside a public trustee's deed, certificate of purchase and the deed of trust issued to defendants.

2. " 'Stockholders who vote in favor of a transaction and their transferees cannot maintain a suit on behalf of the corporation and other stockholders to avoid such transaction * * * Where an act done by a private corporation is not per se illegal, nor malum prohibitium, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challenge its validity.' " EN BANC.

Opinion by Mr. Justice Young. Mr. Justice Bouck dissents.

TRUSTS—BONDS—PAYMENTS—LIABILITY OF TRUSTEE—*Union Deposit Co. and Union Trust Co. vs. Talbot, etc.*—No. 13899—*Decided November 15, 1937—District Court of Denver—Hon. George F. Dunklee, Judge—On rehearing, affirmed as to Union Deposit Company and reversed as to Union Trust Co.*

FACTS: District Court entered judgment for $2,634.33 against the Union Deposit Co. and the Union Trust Co. upon a $2,500 bond issued by the Deposit Company. It provided that it should be paid for by certain methods of payments in installments. The plaintiff contended that the bond matured some months before action was commenced and produced an expert and his memorandums showing how the payments made so matured the bond. The defendants contended that the suit was premature and produced an expert and memorandum setting forth their contention. The trial court decided in favor of the plaintiff and against both defendants. The Trust Company contends that it was the custodian of certain securities intended to safeguard the

holders of bonds against loss, and is not responsible for the full claim of the plaintiff.

HELD: 1. Payments made on the bond, including those for the first year, should be considered as "advance payments" under the provisions of the bond, and, therefore, the maturity date was prior to the institution of suit and judgment should be entered against the Deposit Company.

2. A new trial should be held as to the Trust Company, for there is no showing justifying a holding that a total depletion of securities entrusted to the Trust Company as custodian and trustee, occurred. The claim against the Trust Company is only because of alleged negligence resulting in loss of the securities by allowing their improper withdrawal. EN BANC.

Opinion by Mr. Justice Bouck.

ESTATES — HEIRSHIP — AGREEMENTS BETWEEN CONTENDING PARTIES — ESTOPPEL BY CONTRACT — PUBLICI JURIS — SETTLEMENTS OF FAMILY DISPUTES—*Estate of Schofield vs. Schofield*—No. 14179—*Decided November 15, 1937*—*District Court of Larimer County*—*Hon. Claude C. Coffin, Judge*—*Reversed.*

FACTS: G. S. died intestate and childless. The County Court had declared L. N. S., who claimed as surviving widow, to be the sole heir. On appeal, the District Court entered a judgment declaring A. F. S., father of the deceased, to be such sole heir. A. F. S. had filed, in the County Court, a petition for determination of heirship, naming himself and L. N. S. as the only two persons who were or claimed to be heirs. A month later, and two weeks before hearing in County Court, the two entered into a written agreement whereby the father, in consideration of certain items and conveyances to him, agreed not to contest the right of the widow and expressly recognized her as the lawful widow. Counsel for the father argued that it was the absolute legal duty of the County Court to decide the question of heirship regardless of agreements between the claimants.

HELD: 1. A contract is not against public policy where it merely involves the descent and distribution of property and its transfer.

2. Such contract is a formal acknowledgment that the other claimant's right is superior and amounts to an estoppel by contract, and the father is now estopped to deny such fact as long as the agreement stands.

3. The contract was intended as a means of settling the legal controversy between the only possible claimants to heirship. Settlements of family disputes are strongly favored. EN BANC.

Opinion by Mr. Justice Bouck. Mr. Justice Young dissents.

CONSTITUTIONAL LAW—*State of Colorado vs. La Plata River & Cherry Creek Ditch Co. et al.*—No. 14108—*Decided November 15, 1937*—*District Court of La Plata County—Hon. John B. O'Rourke, Judge—Affirmed.*

FACTS: Years after a suit between individuals, corporations, etc., had been commenced, and after trial to District Court, appeal to State Supreme Court and United States Supreme Court, the legislature of the State of Colorado passed an act giving the Governor, in his discretion, the right to direct the Attorney General to intervene and directing the Attorney General, in such cases, to intervene in litigation which involves the construction, validity or constitutionality of any compact between Colorado and other states. The act also provides, "that no money judgment, either for damages or costs, shall ever be entered against the State of Colorado in such litigation." One of the parties to the suit moved to dismiss the state's petition to intervene.

HELD: 1. The statute is unconstitutional as violating Article III and Section 1 of Article VI of the State Constitution, the former of which divides the powers of government and the latter vests the judicial power in the courts.

2. The statute may not forbid the court to give damages against the state, although it may attach certain limitations to its consent to be sued. "It may specifiy the courts in which the action may be brought, the officers who shall represent it, the procedure to be followed, and the method of satisfaction of judgments. But once it is in, the rights and remedies of the parties are judicial questions, controlled solely by the tribunal thus given jurisdiction."

3. The provision of the statute relieving the state from liability for costs is superfluous. EN BANC.

Opinion by Mr. Chief Justice Burke. Mr. Justice Bouck and Mr. Justice Young dissent. Mr. Justice Bakke not participating.

BAILMENTS—EVIDENCE—STATUTE OF LIMITATIONS—LACHES—*Estate of Max Schwartz, etc. vs. Silvey*—No. 14187—*Decided November 8, 1937*—*District Court of Denver—Hon. Otto Bock, Judge—Affirmed.*

FACTS: Trial court sustained claim of Silvey against estate of Max Schwartz before the latter's death.

HELD: 1. When the trial court heard competent conflicting evidence, and made a decision thereon, the Supreme Court must assume that the trial judge was familiar with the rule that testimony based upon recollection, and interpretation placed upon statements and admissions of a subsequently deceased person is to be scrutinized with care.

2. Under the facts in this case, the statute of limitations did not begin to run against the bailor until demand was made upon the administrator for the return of the diamonds and their return refused.

3. Alleged laches is not sustained by the evidence where it discloses the continued existence of the relationship of bailor and bailee and a recognition of that relationship by the deceased within approximately two years prior to demand for return of the bailed articles and that a claim against the estate was filed very shortly after the demand was made.

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

QUIET TITLE — FIXTURES — REALTY — TRUSTEE RELATIONSHIP — EVIDENCE — RES GESTAE — LACHES — BURDEN OF PROOF — *Seaton-Hayden Mines Co., etc. vs. Renshaw*—No. 14222—*Decided November 8, 1937—District Court of Clear Creek County —Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: Question arose as to whether an air compressor placed on certain leased mining premises belonged to the assignees of the lessor or whether it remained personalty and belonged to the lessees. The trial court held it was a trade fixture and belonged to the lessee.

HELD: 1. "It is true that conversations with a man, since deceased, are generally inadmissible, where the decedent is the sole adverse party (70 C. J. 278), but not always so. The evidence here shows, and it was not disputed, that Smith was the agent of the other trustees in dealing with Renshaw [lessee], consequently, Smith's statements made shortly after the termination of the extension of the lease and option were admissible in behalf of either party as part of the res gestae."

2. The defense of laches is not available to one whose position is not changed by virtue of delinquencies on the part of the opposing party.

3. There is a well-recognized exception to the general rule that personal property affixed to the realty becomes a part of the latter, that exception existing between landlord and tenant where the latter installs trade fixtures on the premises, removable at the expiration of the lease, or a reasonable time thereafter.

4. Where a heavy piece of machinery, such as a compressor, is set upon a cement foundation with removable bolts holding it in the cement, and where, in order to remove it from the building in which it is located, it is necessary to take out one of the buildings, but, where it is not disputed that the end could be replaced without particular damage to the building, and where there is an agreement in the lease that all permanent improvements shall become the property of the lessor and that "tools, movable mechanical equipment, etc." are to remain the property of the lessee, the burden is on the lessor to show that the compressor was included in that part of the general language of the lease making it a permanent fixture.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Knous and Mr. Justice Holland concur.

INTERPLEADER—ADOPTION WHERE CHILD IS OVER 21—EVIDENCE —INSURANCE—*Woods vs. Cook*—No. 14215—*Decided November 8, 1937—District Court of Denver—Hon. Otto Bock, Judge —Affirmed.*

FACTS: Pullman Porters Benefit Association, of which decedent was a member, interpleaded Cook, who claimed certain money as an adopted daughter of decedent, and Woods, a nephew of decedent, who also claimed the money, and paid the money into court.

Cook was adopted by the decedent and his wife, through a Juvenile Court proceedings, but after Cook was over the age of 21 years. There was testimony that Cook and decedent and his wife lived in the same premises, and that they were interdependent upon each other and helped each other out financially. The Illinois statute, controlling in the case, permits the beneficiary to be "a person or persons upon whom the member is dependent, a person or persons dependent upon the member." The trial court decided in favor of Cook.

HELD: 1. "Regardless of the lack of jurisdiction of the Juvenile Court to enter a decree of adoption of a person over twenty-one years of age, the decree is certainly good evidence of the intention of the parties to enter into a relationship, which was definitely established and continued over a period of fifteen years, and which was never questioned by any of the parties to the adoption proceedings."

2. There was ample testimony of dependency so that she came within the provision of the Illinois statute.

3. The trial court was justified in finding that Woods was not a nephew of the deceased, for the only evidence adduced to indicate that he was, was the recitation in one of the changes in beneficiary, which was repudiated by the decedent himself when the last change of beneficiary was made, in which the decedent named his estate as the alternative beneficiary.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Holland concur.

FORCIBLE ENTRY AND DETAINER — FORECLOSURE — NOTES — INSTALLMENTS—ACCELERATION CLAUSE—NOTICE—ACTIONS—PLEADING—*Hendron, et al. vs. Bolander*—No. 14076—*Decided November 8, 1937—District Court of Denver—Hon. Charles C. Sackmann, Judge—Affirmed.*

FACTS: Plaintiff held note and trust deed on defendant's property, which the latter occupied. The note provided for payment at the rate of $65 per month or more, and contained an acceleration clause, but did not require notice to the makers if and when the holders decided, upon default of any payment, to declare the entire principal due and payable.

The plaintiff, upon alleged default, commenced foreclosure proceedings, and bought the property in at the public trustee's sale for the full original amount of the note, interest and expenses. Subsequently, a

deed was issued to plaintiff and he instituted, in the Justice Court, a suit in forcible entry and detainer. The defendants answered, admitting service of a demand for possession, but denying the other allegations and pleaded certain matters of equitable character designed to show that they were entitled to retain possession. The case was certified to the District Court, and trial had. The trial court, after the plaintiff established a prima facie right to possession, refused the defendants' offer to prove that they were not in default of the monthly installments.

HELD: 1. "Clearly a judgment in a forcible entry and detainer suit cannot go beyond an adjudication of the right to possession as between the parties, except when suit is brought under subdivision 4, ch. 70, sec. 4, 1935 C. S. A., which this one is not, and no relief by way of accounting or for cancellation of the deed under any circumstances could be granted to the defendants in the instant proceeding."

2. Even if the tendered proof of payment of certain installments were allowed, the defendants would still be over $100 in default at the time foreclosure was commenced.

3. Waiver or estoppel, not being pleaded or suggested by the answer, and not being embraced in the offer of proof, such theory is not available to the defendants.

4. Unless the note so provides, no notice of election to accelerate the maturity of the note upon default of the payment of any installment is necessary, and the foreclosure proceedings and notice thereof is sufficient.

5. A foreclosure sale is not rendered invalid by the fact, if it be a fact, that it was made to satisfy an excessive claim. Debtor's relief lies in some other action.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Young concur.

DECLARATORY JUDGMENTS—POWERS OF MUNICIPALITIES—TAXING POWER—MUNICIPAL BONDS—LOCAL AND MUNICIPAL PURPOSE—RES ADJUDICATA—*McNichols, etc. vs. City and County of Denver, etc.*—No. 14229—*Decided October 27, 1937—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed.*

FACTS: City Council of Denver adopted an ordinance which provided for submitting to the taxpayers of Denver the question of incurring a bonded indebtedness of $750,000 to buy land for donation to the United States to be used by the Federal Government as a site for an air school and bombing field. The taxpayers approved the issuance of the bonds. Congress authorized the appropriation of a sum for the school and authorized the acceptance of the land in Colorado for the school and field. The City Council then adopted an ordinance providing for the issuance and sale of the bonds. The Auditor of the City and County of Denver, an elected official, charged by law with the duty of protecting the funds of the city and given general auditing powers over

all finances of the city, commenced an action under the Uniform Declaratory Judgment Act to have the court declare that neither the city nor its officers had the power to issue any of the bonds or to levy taxes for the payment thereof, and to determine that he was under no duty to recognize them. Issue was joined by the defendants in error, who requested the court to declare that the proper officials were empowered to issue the bonds in question and to declare that the levying of direct ad valorem taxes on the property of the City and County of Denver to produce sufficient revenue to pay principal and interest of the bonds was lawful.

HELD: 1. The auditor is a proper party to institute these proceedings, and one of the purposes of the Declaratory Judgment Act is to cover a situation of this kind in order to protect investors and others concerned.

2. A declaratory judgment is res adjudicata as to the validity of the bonds against all persons, including taxpayers, even though they are not parties to the suit.

3. The proposed bond issue must be sanctioned as being for a local and municipal purpose. One of the immediate motivating factors in the creation of the air school and bombing field here involved is the providing for employment for those otherwise unable to find gainful occupation in private industry and who otherwise would of necessity have to be supported through the medium of doles or direct relief. In addition, there are numerous incidental benefits. EN BANC.

Opinion by Mr. Justice Knous. Mr. Justice Burke and Mr. Justice Holland dissent.

TAXATION—DISTRAINT—ESTATES—PROPERTY IN CUSTODIA LEGIS —*McGuire vs. Martyn Schwartz*—No. 14181—*Decided October 25, 1937—District Court of Denver—Hon. Otto Bock, Judge—Reversed and remanded.*

FACTS: X pledged jewelry with S, who is since deceased. City found that jewelry had not been taxed and placed same on rolls for years 1933 to 1936, inclusive. In a suit between X and the administrator of S, the jewelry was deposited in court and X given 90 days to redeem. X failed to redeem and the property vested in the administrator. City issued a distraint warrant and served a copy on the clerk of the District Court. Administrator had a citation issue against city to show cause as to why the distraint should not be declared void.

HELD: The lien which attached on the discovery and assessment of the jewelry operated retroactively so as to be enforceable for the years 1933 to 1936. This is provided for by Section 3, Chapter 142, page 712, Volume 4, 1935 C. S. A. The burden was on the administrator to show that the property was properly omitted from the rolls, which burden the administrator failed to fulfill.

The fact that the jewelry was in custodia legis did not void the distraint warrant as to the taxes for 1937. This does not mean that the collector can forcibly seize the property in the hands of the court,

nor is such seizure necessary. The purpose of the distraint in the instant case was to notify the court of the taxes due on the property being held by it.

If the foregoing were not the law, a person could lift property out of the tax lists by the simple process of a mortgage. IN DEPARTMENT.

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

BUILDING AND LOAN ASSOCIATIONS—RECEIVERSHIP—ASSIGNMENTS —APPEAL AND ERROR—*Marker vs. City Savings, Building and Loan Association*—No. 14135—*Decided October 25, 1937—District Court of El Paso County—Hon. Arthur Cornforth, Judge—Reversed.*

FACTS: Receiver appointed for Building and Loan Association, and the trial court entered an order that each claimant "has an interest" in the net assets of the association. Thereafter one of the co-receivers became the assignee of a number of distributive shares of interest in the association. The court ordered that all persons claiming by assignment file with the court a verified petition, etc. The co-receiver complied with the order and upon hearing his claims under 34 assignments were disallowed. He petitioned for a rehearing, and the court, without taking evidence, denied the petition. The co-receiver thereupon filed a petition for leave to sue the co-receivers and original claimants for the purpose of establishing his rights in and to the claims which he held by assignment. This petition was heard instanter and denied. The plaintiff assigned error to the orders, disallowing the claims and denying leave to sue the receivers and assignors.

HELD: 1. The interest of a member of a building and loan association is assignable.

2. Where the trial court decrees that a claimant, who has presented allowable claims, has an interest in the assets of the association, such interests may be assigned after the interest has been adjudicated in a receivership proceeding; and this may be done without first having the assignment submitted to the court.

3. The primary concern of a receiver is the claim and its amount as a liability against the assets of the association, and the personnel of the claimants is a secondary matter, in the distribution of its assets.

4. The court may not displace a lien vested by a contract of assignment; neither could it prevent such a contract.

5. The order disallowing plaintiff's claims followed by one denying a rehearing on the matter of the allowance thereof, was a final determination by the trial court, and, of course, is subject to review. The order denying plaintiff's request to sue the co-receivers and original claimants was not a preliminary matter, but a final order.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, Mr. Justice Knous and Mr. Justice Bakke concur.

WORKMEN'S COMPENSATION—MINOR SISTER AS DEPENDENT—*Empire Zinc Company vs. Industrial Commission, et al.*—No. 14220—*Decided November 22, 1937*—*District Court of Eagle County*—*Hon. William H. Luby, Judge*—*Affirmed.*

1. The Workmen's Compensation Act contemplates that a minor sister may be a "dependent" under the terms of the act, and entitled to the benefits of it.

2. There is no presumption of dependency from the fact that the claimant is a sister and a minor; the burden is upon her to establish dependency.

3. Where it appears that the deceased was the sole support of the family, that the mother and father has predeceased him, that he had promised to assist her in obtaining training which would fit her to become a nurse, and that she relied thereon, the trial court's holding that she was dependent within the terms of the Workmen's Compensation Act will not be disturbed, although it is shown that death of decedent took place a month or two after her graduation from high school and he had made no payment to her during such period.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Bakke concur.

CONVERSION — NOTES — DEED OF TRUST — FORECLOSURE — REAL PROPERTY — PLEADING — SET-OFF — *Mangini vs. Dando Company*—No. 14131—*Decided November 22, 1937*—*District Court of City and County of Denver*—*Hon. Frederic W. Clark, Judge*—*Reversed.*

FACTS: Plaintiff brought suit for conversion of $3,000 note and trust deed, claimed by her to have been left with the president of defendant company for her protection under an agreement with the president of the company (who has since died) that it would be returned to her upon demand, since it had been paid. The trust deed had never been released of record. The defendant claimed ownership of the instruments and sought to foreclose the deed of trust, through its answer and cross-complaint. The trial court sustained defendant's motion for nonsuit and entered judgment of foreclosure of deed of trust on defendant's cross-complaint.

HELD: 1. Where plaintiff's action is one at law for conversion, in considering whether the evidence offered by her supports such a cause of action, the court is not concerned with the purposes that motivated plaintiff and president of the company in placing the note and deed of trust in the files of the company so as to give them the appearance of a valid and subsisting obligation.

2. Evidence examined and found, if believed, to sustain the allegations in the complaint.

3. Judgment of foreclosure must be reversed, for if plaintiff recovers on retrial, the legal right to note and deed of trust would be in plaintiff.

4. "The judgment of foreclosure must be reversed for the further reason that it is not based on a cause of action arising out of the transaction set forth in the complaint, as required by Section 63 of the Code. The complaint was in tort for conversion. The cross-complaint was based on contract." A demand founded on contract cannot be set off against damages proved in an action for conversion.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Knous concur.

FRAUD AND DECEIT—CONTRACTS—RESCISSION—STATUTE OF LIMITATIONS—LACHES—*Hall vs. Bankers Trust Company*—No. 13993—*Decided November 22, 1937*—*District Court of Denver*—*Hon. Charles C. Sackmann, Judge*—*Reversed.*

FACTS: In 1921, plaintiff paid moneys to defendant. He claims that in 1934 he discovered the fraud of the defendant which caused him to pay the money to the defendant in 1921. He brings suit to recover the money so paid, not on the theory of fraud and deceit, but on theory of rescission of the contract. Defendant demurred generally and specially. They were sustained and the case dismissed.

HELD: 1. The six-year statute of limitations begins to run, not when the money is paid over, but either when plaintiff discovered fraud upon which he based his rescission of the contract, or at the time of rescission. In this case that statute is no bar regardless of which date is used.

2. The three-year statute of limitations does not apply, for this is not a bill for relief on the ground of fraud. If it did apply, "the period during which the statute could have run would plainly be less than three years and so too short to constitute a bar thereunder."

3. The statute of limitations relating to trusts is inapplicable here.

4. Laches is a defense which must be affirmatively pleaded. EN BANC.

Opinion by Mr. Justice Bouck.

WORKMEN'S COMPENSATION—DISABILITY—MEASURING DEGREE—*Platt-Rogers, Inc., et al. vs. Industrial Commission, et al.*—No. 14158—*Decided November 22, 1937*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

HELD: 1. Where it does not appear, from the record, that corrective measures would in any appreciable degree enhance the working power of the particular employee beyond what it is without correction, in determining the degree of loss of vision, under a claim within the workmen's compensation act, the vision is not to be measured with the aid of corrective glasses. EN BANC.

Opinion by Mr. Justice Bouck.

INJUNCTION AND DAMAGES—WATER RIGHTS—PLEADING—DEPARTURE—EVIDENCE—*Young vs. Corey, et al.*—No. 14170—*Decided November 22, 1937—District Court of Montrose County—Hon. George W. Bruce, Judge—Affirmed.*

FACTS: Suit brought for injunction and damages alleging defendant had interfered with plaintiff's irrigation rights.

HELD: 1. The contention that the complaint does not contain a cause of action because the primary trespass complained of occurred before plaintiffs acquired title is without merit, since the trespass was in fact and of necessity a continuing one.

2. Where both parties in subsequent suit pray for identical relief, the objection by one party that property rights are involved and that they had been adjudicated in the previous suit, is waived.

3. "Since it first appeared by answer that defendant claimed through interests presumably foreclosed by the decree in question, no occasion to invoke it appeared prior to reply, and it was, of course, proper there."

4. Failure to formally introduce the decree in evidence is not vital where the judgment was in the same court, and had been pleaded, and where the record discloses no objection, and where it does not appear that court gave it any consideration.

5. Evidence considered and found sufficient to support trial court's judgment.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Bakke and Mr. Justice Holland concur.

EQUITY—EXCESSIVE DAMAGES AND VERDICTS—CHANGING OF VERDICT BY THE JUDGE—JURIES—TRIALS—WITNESSES—*Finch vs. McCrimmon*—No. 14121—*Decided April 4, 1937—District Court of Montrose County—Hon. John I. Palmer, Judge—Reversed.*

FACTS: Originally this was a suit by McCrimmon, administrator of the estate of Clark, defendant in error here, to recover from Finch, daughter of Clark, for allegedly wrongfully withholding certain property belonging to the estate. The judgment went against Mrs. Finch, but she was allowed compensation for the care of her father during the protracted illness preceding his death. Mrs. Finch died, and the administrator of her estate, L. J. Finch, was substituted in the litigation in her place and stead. On trial to a jury, a verdict was returned for Mrs. Finch in the sum of $9,698. In a motion for a new trial, the representative of the estate urged that the verdict was excessive. The court did not pass on the motion. Instead, predicating determination on the theory that the proceeding was in equity, it ignored both verdict and motion for new trial, and, sitting as in chancery, fixed the amount of recovery at its own appraisement—$4,217.71, and adjudged in that sum.

HELD: 1. Only the issue of the amount of Mrs. Finch's claim against her father's estate remained to be tried. That issue was properly submitted to a jury, and its verdict, subject to challenge on motion for new trial, was decisive.

2. The plaintiff being called and cross-examined by her adversary at suit, removes the bar and makes plaintiff a competent witness for all purposes.

3. The competency of a witness established at one trial obtains at subsequent trials of the same cause.

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

TRUSTS—REAL PROPERTY—*Beatty v. Fellows*—No. 14089—*Decided November 29, 1937—District Court of Denver, Hon. Charles C. Sackmann, Judge—Affirmed.*

FACTS: B sued F in an action termed "an action to impress a trust" upon a certain strip of real estate. The trial court found in favor of F and dismissed the action. F derived title from "J. B. Rush, Trustee," by quit-claim deed in 1935. In 1929, B entered into a contract with Rush, F's grantor, to transact the purchase and sale of certain property, not including the strip. No decree reforming the contract to include the strip was ever obtained. Rush, under the contract, was "to assume the responsibility of the sale or development of said property." B was only to finance the purchase.

HELD: 1. If the confidence of one person in another is abused, a suit may be brought for redress; but where the wrong, if any, is chargeable to one, not a party to the suit, and the suit is brought against the latter's grantee, the trial court properly dismissed the action.

2. In the light of Rush's plenary authority, there could be no constructive or resulting trust in favor of B.

3. The addition of the word "Trustee" to the signature signified nothing, for the word was purely description of the person.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

WORKMEN'S COMPENSATION—FACT FINDING AUTHORITY OF THE COMMISSION—*London Gold Mines Co., et al. v. Custer*—No. 14245—*Decided November 29, 1937—District Court of Denver, Hon. George F. Dunklee, Judge—Reversed.*

HELD: 1. Where it appears that there was ample testimony before the commission to support its findings that the claimant's disability was not due to industrial accident, but was caused by a ruptured artery which would have occurred regardless of claimant's employment, the finding of the commission on conflicting evidence will not be interfered with by the courts.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Bakke and Mr. Justice Holland concur.

CRIMINAL LAW—SALE OF BAD EGGS FOR HUMAN CONSUMPTION—REPEAL OF STATUTE BY IMPLICATION—PURE FOOD LAW—PLEADING—*Ferch v. People*—No. 14202—*Decided November 29, 1937—County Court of Denver, Hon. Homer G. Preston, Judge—Judgment Modified and Affirmed.*

FACTS: Defendant convicted of selling for human consumption, eggs unfit for human use. On appeal, he claims that the statute under which he was convicted had been repealed by implication, and offers as proof of this that he was fined $50 for first offense, whereas, the new statute imposes a $25 maximum fine for first offense.

HELD: 1. The law does not favor repeal of statutes by implication; and repeals by implication are never upheld unless there is a repugnancy or an irreconcilable conflict between the statutes under consideration. There is no such conflict between paragraph "Sixth," Sec. 7, Ch. 69, 1935 C. S. A. (1001 C. L. 1921), and Sec. 12, Chapter 128, 1935 C. S. A. (S. L. 1933, p. 774, Sec. 2).

2. A pure food act relating to food in general is not necessarily repugnant to an act relating to a specific food product.

3. "For Sale" includes " 'all articles, compound or single, not intended for consumption by the producer.' "

4. "Assuming that an attempted charge under the Pure Food and Drug Act was void, that did not nullify the warrant where it stated an offense under a valid statute. The affidavit and warrant must be construed together."

5. Motions to quash the complaint or information must be in writing.

6. The later statute is determinative of the fine and the trial court is directed to reduce the fine to not to exceed $25.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

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