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Supreme Court Decisions

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WORKMEN'S COMPENSATION—JURISDICTION—INTER and INTRA-STATE—*Consolidated Freight, et al. vs. Walker*—No. 14285—*Decided May 9, 1938—District Court of Denver—Hon. George F. Dunklee, Judge. Affirmed.*

HELD: 1. Where the facts show that the claimant was injured while handling a shipment in intrastate commerce and not in interstate commerce, although 35 to 40% of the shipments his employer carried were in interstate commerce, he is entitled to the benefits of the Workmen's Compensation Act.

2. "Carriers conducting a business that has the aspect of both interstate and intrastate operations, cannot claim to be engaged in either, to the exclusion of the other."

3. The determination of the character of a carrier's business, for jurisdictional purposes under the act, depends upon the specific engagement and work at the time involved. EN BANC.

Opinion by Mr. Justice Holland.

AUTOMOBILE GUEST STATUTE—WILLFUL AND WANTON NEGLIGENCE—*Pupke vs. Pupke*—No. 14221—*Decided May 9, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.*

HELD: 1. Where it appears that the daughter of plaintiff was driving car carefully and at 12 miles an hour, and in order to go around a rock slide on part of the road, got too close to the opposite side of the road, the ground gave way, and the car tumbled into a ravine, injuring all of the parties in the car, there is no showing of willful and wanton disregard of the rights of the others such as to make the daughter responsible to the mother for injuries thus occasioned.

2. This is so, although the defendant took off her glasses while driving, was "peevish" and "pig-headed" because the others in the car induced her to give up her desire to go farther on the same road.

3. Willington vs. Hiedloff, 96 Colo. 581, 586, 45 P. (2nd) 937, is controlling. EN BANC.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck dissents.

MUNICIPAL CORPORATIONS—NEGLIGENCE—DUTY TO NON-RESIDENTS OF CITY—EVIDENCE—*City and County of Denver vs. Pilo*—No. 14204—*Decided May 9, 1938—District Court of Adams County—Hon. Charles E. Herrick, Judge—Reversed.*

FACTS: Plaintiff secured a verdict of $3,870 for damages to his crop of celery, beets, turnips and to the land on which they grew,

alleged to have been caused by defendant's negligence in excavating above and along a five foot pipe running into the South Platte River through a dyke, and in leaving the excavation open on Saturday afternoon with no intention of doing further work until the following Monday morning, during which interval flood waters coming down the river, the excavation being open, overflowed plaintiff's land.

HELD: 1. The City was under no duty to improve or maintain the channel of the river or the dyke, hence, negligence cannot be predicated on any such failure.

2. As long as the City did not subject plaintiff's land to a greater burden or hazard from flood than that to which it was subject with the channel in its natural state, it could improve, maintain or change the channel without liability to plaintiff.

3. The facts show that plaintiff's land would have been inundated by the flood even if the channel of the river had been left in its natural state. Plaintiff did not show that the interference with the natural flow of the river or the failure to maintain the improvement increased the flood hazard to plaintiff's land.

4. It is not incumbent on the City to show the extent of inundation by direct evidence. Competent circumstantial evidence is admissible to show that the flood waters were of such proportion or height that it would have overflowed the plaintiff's lands even if the dyke had not been broken. EN BANC.

Opinion by Mr. Justice Young.

HABEAS CORPUS—PAROLE—VIOLATION—COMPUTATION OF TIME —TRUSTY PRISONERS—*In re: Weir*—No. 14333—*Decided May 2, 1938—District Court of Fremont County—Hon. James L. Cooper, Judge—Affirmed.*

HELD: 1. Where a prisoner has been released on parole, he is entitled to the deduction of time from his sentence for performing faithfully the duties assigned him during his imprisonment, as under section 73, 1935, C.S.A., C. 131.

2. But he is not entitled to the credit of time off for being a "trusty prisoner." Such time off is granted only upon approval of the warden where the prisoner conducts himself in accordance with the rules of the prison and performs his work in a creditable manner, under the terms of section 74, 1935 C.S.A., C. 131.

3. Where a parolee violates his parole, he may not claim that his sentence was fully served at the time of such violation by contending that his original sentence had expired, if, in so computing the time, he includes the time off contemplated by the statute allowing good time to "trusty prisoners." EN BANC.

Opinion by Mr. Justice Holland.

QUO WARRANTO—CODE OF CIVIL PROCEDURE—CONSTITUTIONAL LAW—WATER CONSERVANCY DISTRICTS—PUBLIC CORPORATIONS—TAXATION—DUE PROCESS—*People ex rel. Rogers, Attorney General vs. Letford, et al.*—No. 14254—*Decided May 2, 1938—Original Proceedings in Quo Warranto—Writ Discharged.*

FACTS: Attorney General instituted original proceeding in quo warranto to try the right of respondents to occupy the office and exercise the duties of directors of Northern Colorado Water Conservancy District.

HELD: 1. Such action is permissible under Sec. 3, Article VI of the Constitution, is of the nature of a common law proceeding searching the entire record, and is not limited by sections 321 to 330 of the Code of Civil Procedure.

2. Where the plea and answer of the respondents is a justification of the right to exercise and hold their office as directors of the conservancy district, a decision requires the judicial determination of the validity and constitutionality of the water conservancy act, Chap. 266, S.L. 1937.

3. When an act of the legislature is attacked on the ground of unconstitutionality, the question presented is not whether it may be voided, but whether it is possible to uphold it.

4. Every presumption will be indulged in favor of the legislation and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action.

5. While a legislative declaration that the contemplated conservancy district "shall be a political subdivision of the State of Colorado and a body corporate with all the powers of a public or municipal corporation," is not conclusive upon a court, it must be seriously regarded in the construction of an act.

6. The Court must also consider the purpose of the law, not only as disclosed by its words, but also in the light of the physical conditions of the State, its needs and the character and extent of the projected benefits.

7. The objects of the act are of sufficient public benefit and advantage to the people of Colorado as a whole to constitute a public purpose and the water conservancy districts authorized thereby are state agencies and public corporations.

8. " 'Public corporations are all those created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants and promote public welfare.' "

9. The water conservancy districts sanctioned by the act are "quasi-municipal corporations."

10. " 'In the absence of constitutional limitations, the state legislature may create any kind of a corporation to aid in the administration of public affairs and endow such corporation and its officers with such powers and functions as it may deem necessary.' "

11. The public character of the water conservancy district is the occasion for the difference under the rule which permits it to impose and collect taxes, and prohibits irrigation districts from so doing.

12. It is the general rule that special assessments cannot exceed the benefits conferred, but it is erroneous to assume that the district created by the act is a special assessment district for a local purpose, and that such tax in reality is a special assessment.

13. The power of general taxation for public purposes does not infringe upon the due process clause of the federal or state constitutions.

14. "As a general proposition special assessments are permitted by authorized governmental agencies upon the theory that the property against which they are levied derives some peculiar benefit by reason of the projected improvement different from that enjoyed by other property in the community in which the improvement is to be made."

15. The special taxes which may be imposed under the act are unique in character and are not directly analogous to special assessments as they are generally known in ordinary local improvement districts. The difference is that under the act, the liability for the assessment can arise only by the voluntary act of the persons affected; whereas, in ordinary cases, the special assessments are imposed upon the property owners involuntarily on the basis of the benefit fixed by some public board or authority.

16. Even if assessments provided by the act are deemed to be special assessments, there is still no violation of the due process clauses, for such clauses are fully complied with when the property owner is afforded an opportunity to be heard and test the validity of a special assessment and the proportion of the general cost of the improvement which shall be assessed against his property.

17. If the contract creating the liability for special taxes included a provision to the effect that the applicant will also answer for deficiencies and defaults in the district, the subsequent imposition of assessments to cover these items against such an applicant is not a violation of due process of law since the liability arose through the voluntary act of the party charged.

18. Section 21 of the act grants to the property owners the right to appeal from a decision of the board fixing annual assessments. The function of the Court in the determination of this question is purely judicial, and this provision of the act does not contravene the constitutional requirement of the separation of the three departments of government.

19. The district Court's jurisdiction, in creating a district under the act which extends beyond the limits of the Court's judicial district, cannot be successfully attacked, since no territorial limit is fixed by the constitution.

20. The act is not unconstitutional because it provides that the government of the conservancy district reposes in a board of directors to be appointed by the District Court. The constitution does not

guarantee that every citizen residing within the district is entitled to vote for corporate or quasi-municipal officers. The legislature may create a quasi-municipal corporation and provide for the manner of its administration and the personnel of its officers in any manner it may see fit.

21. The Board of Directors governing the district is not such a "special commission" within the provisions of the constitution prohibiting the general assembly from delegating the power to levy taxes to any special commission.

22. Sec. 8, Article XI of the Constitution does not apply for it relates only to cities and towns and prohibits them from contracting loans or debts without submitting the questions to its electors; it has no application to an independent entity such as this conservancy district.

23. Debts contracted by municipalities for the supplying of water to a city or town are excepted by the constitutional provision prohibiting the contracting of loans or debts without a vote of the electors.

24. The question of the priority of tax liens is for legislative determination and it is permissible for the legislature to place the district taxes on a parity with the general, state, county, school district and municipal taxes.

25. The act does not transgress the rule that the district may not enter into a partnership with a private or public corporation.

26. There is nothing in the Constitution which prohibits the legislature from conferring upon the district, in the first instance, the right to determine the charge to be made for the sale or leasing of water. EN BANC. Opinion by Mr. Justice Knous.

ALIMONY—*Curry vs. Curry*—No. 14302—*Decided May 2, 1938*—*District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.*

HELD: Where Court orders defendant to pay wife $55.00 per month alimony, and it appears that the wife has been thrifty and not extravagant, and still needs the $55.00 per month, it is error for the trial Judge to reduce the required payments to $30.00 per month upon a showing that defendant remarried, purchased a car, owes bills, and that plaintiff earns $25.00 per month. IN DEPARTMENT.

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

FINDINGS—JUDGMENT ON CONFLICTING EVIDENCE—REPLEVIN—PRAYER—EVIDENCE—*Melnick, et al. vs. Bowman, etc.*—No. 14316—*Decided May 2, 1938—District Court of Denver—Hon. Joseph J. Walsh, Judge—Affirmed.*

HELD: 1. Where findings and judgment of the trial Court are based upon conflicting testimony, and there is sufficient competent testimony to sustain the findings, the judgment will not be set aside.

2. It is proof of the facts under the allegations of the complaint, and not the prayer, that determines the relief to be given, and Court was not in error in granting a money judgment for conversion of property where the prayer was for judgment of possession of the property or for value thereof.

3. A stipulation, signed by the respective counsel for the same parties in a bankruptcy proceedings, dealing with the same property, was admissible here as cumulative evidence.

4. Whatever may have been the deficiencies of proof at the time defendants' motion for a nonsuit was interposed, such deficiencies were supplied by evidence offered by defendants in their own behalf.

Opinion by Mr. Justice Bakke. Mr. Justice Young and Mr. Justice Knous specially concur.

PLEADINGS—DEMURRER—CROSS-COMPLAINT—*Security Stores, Inc. vs. Colorado Milling and Elevator Company*—No. 14296—*Decided May 2, 1938*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Reversed.*

HELD: It is error to dismiss a cross-complaint upon demurrer where the former sets up that defendant purchased certain products from plaintiff at a price which included the factor of the Federal Government's "processing Tax;" that the tax was held unconstitutional; that it was only to be a part of the purchase price if the tax proved to be constitutional. EN BANC.

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

JUSTICE OF THE PEACE — JURISDICTION — COGNOVIT NOTES — EQUITY—PROCESS—*Sarchet vs. Phillips*—No. 14327—*Decided May 2, 1938*—*County Court of Larimer County*—*Hon. Albert P. Fischer, Judge*—*Reversed.*

HELD: 1. Where suit is brought on note before justice of the peace, and a member of the Colorado Bar confesses judgment in accordance with the provisions of the note, judgment may be entered against defendant without the issuance of summons.

2. The justice had the right to issue execution and garnishment and have paid into Court the amount due defendant from garnishee defendant, although such amount was in excess of $300.00.

3. If the defendant had defenses such as statute of limitations, payment, etc., he still has his remedy in equity. EN BANC.

Opinion by Mr. Justice Hilliard. Mr. Justice Bouck concurs in the conclusion.

GARNISHMENT—TRAVERSE—FINAL ORDER—APPEAL AND ERROR—*Steele vs. Revielle, et al.*—No. 14319—*Decided April 25, 1938*—*District Court of Weld County*—*Hon. Frederic W. Clark, Judge*—*Writ of Error Dismissed.*

FACTS: Plaintiff in error was served in Denver with a garnishee summons issued by the District Court of Weld County. She answered in proper time denying any indebtedness. Defendant in error traversed the garnishee answer but did not file traverse until after statutory 10 day period elapsed. Plaintiff in error then moved the Court for an order discharging her as garnishee and for an order striking the traverse. On denial of both, exceptions were taken, the proceedings stayed pending a review to determine whether or not the denial of the motion to discharge as garnishee was a final judgment which she was entitled to have reviewed on writ of error.

HELD: 1. The code provision states: "If the plaintiff fails to reply within the time aforesaid (ten days), he shall be deemed to have accepted the answer of the garnishee as true, and judgment may be entered accordingly."

2. No final judgment was entered against the garnishee, and nothing exists at this time which would subject her to any loss, for it may be that no judgment will ever be entered against her. IN DEPARTMENT.

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

CONFESSION OF JUDGMENT—MULTIPLICITY OF SUITS—JOINDER OF CAUSES OF ACTION—*Norton vs. Ray*—No. 14326—*Decided April 25, 1938*—*County Court of Weld County*—*Hon. Robert G. Strong, Judge*—*Affirmed.*

FACTS: Attachment suit brought in Justice Court to collect $300.00 for delinquent rent. Plaintiff obtained judgment and was successful in reaching $300.00 in the hands of the garnishee defendant. On appeal to the County Court, the same judgment was entered. Defendant contended that plaintiff was indebted to him on a promissory note in the sum of over $800.00; that there was due him on open account for monies advanced and for merchandise $840.00; that there was an action pending in the District Court in which this defendant had sued plaintiff and her husband on said note. The evidence disclosed that defendant had made payments on rent and had sold plaintiff merchandise on open account, but he admitted that he had not paid plaintiff rent for the three months involved.

HELD: 1. Where one maintains that he has made payments on rent and has sold merchandise on open account to landlord, but admits that he had not paid the rent for the months involved in the suit, such admission amounts to a confession of judgment.

2. While it is desirable to avoid the multiplicity of suits, Colorado is recognized as a state liberal in the construction of its code provisions relative to the joinder of actions, and under these circumstances, the plaintiff should not be compelled to rely on application to amend the answer in the District Court after the issues therein were joined.

3. It is doubtful that the defendant could have been compelled to join this cause of action with her defense in the District Court for the case in the latter Court was against the husband and wife jointly, while this action is by the wife alone. "A cause of action which accrues to a husband and wife jointly cannot be joined with one which accrues to one or the other alone."

4. The Code provision (1935 C.S.A., Vol. 1, c. 4, p. 158, sec. 76) concerning the joinder of causes of action is not mandatory. It says plaintiff "may" unite, not he "must" unite. IN DEPARTMENT.

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

NEGLIGENCE—AUTOMOBILES—GUESTS—STATEMENTS AS TO RESPONSIBILITY MADE BY DRIVER OF CAR—*Bashor vs. Bashor, et al*—No. 14154—*Decided April 25, 1938*—*District Court of Boulder County*—*Hon. Frederic W. Clark, Judge*—*Reversed.*

FACTS: Plaintiffs procured judgment for damages occasioned by reason of the death of their son resulting from injuries sustained by the latter while a guest in the automobile which defendant was driving.

HELD: 1. Where it appears: that the driver of a car was a close friend and relative of the deceased; that he was on friendly terms with all the occupants of his car; that no protest was made by anyone as to the speed or manner in which he was driving; that no one of the passengers felt any apprehension of danger; that the driver steered the car with his left hand and operated the dial of his radio with his right hand while driving about 45 miles per hour at night on a state highway; that his inattention to the road was incidental to his attempt to locate a radio station broadcasting a program; that an accident occurred while he was so doing, the most that may be made out is negligence, and certainly not "wilful and wanton disregard to the rights of others," such as to make driver responsible under the Guest Statute.

2. The statement of the defendant that he was responsible for the accident; that it was caused by his recklessness; that he was indifferent to the consequences while engaged in driving the car; etc., are mere conclusions as to legal effect of his conduct and therefore not properly taken into consideration as evidence. EN BANC.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke specially concurring. Mr. Justice Bouck dissenting. Mr. Justice Holland not participating.

APPEAL FROM JUSTICE COURT—DOCKET FEE—*Bullington, et al. vs. Root*—No. 14317—*Decided April 18, 1938*—*County Court of Moffat County*—*Hon. J. W. Self, Judge*—*Reversed.*

FACTS: The plaintiff, Root, recovered a judgment against the defendants in the Justice Court and the latter appealed to the County Court, paying a docket fee of $8.50. Plaintiff moved to dismiss the appeal because the required docket fee had not been paid within twenty days after the approval of the appeal bond, contending that the statutory docket fee was $13.50.

HELD: 1. Appeals from justice and county court are "not specifically mentioned," in the statute, and the last provision for a docket fee of $7.50 covers that class. IN DEPARTMENT.

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

CRIMINAL LAW — OBJECTIONS—INFORMATION—JURY—STATUTES —STIPULATION—*Miller vs. The People in the Interest of Verna Edwin and Helen Hendrickson*—No. 14247—*Decided April 18, 1938*—*County Court of Pueblo County*—*Hon. Hubert Glover, Judge*—*Reversed.*

FACTS: These parties appeared in reverse order in the trial Court where Alex H. Miller was joined with plaintiff in error.

Ruth Park, a probation officer, filed a petition against defendants alleging that they "encouraged, caused and contributed to the delinquency" of said Verna Edwin and Ellen Hendrickson, minor girls. Defendant was tried to a jury of six which found her guilty.

At every proper stage of the proceedings, defendant duly objected on the grounds that the charge should have been brought by information and that defendant was entitled to a trial by a jury of 12. These objections were overruled and those rulings were assigned as error.

HELD: 1. Action should have been brought by information filed by the District Attorney and there should have been a jury of 12, because the action is brought under section 67, Chapter 33, 1935 C.S.A., which is a criminal statute.

2. The present action is civil, and these assignments, plus the confessions, are equivalent to a stipulation. IN DEPARTMENT.

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

PERSONAL PROPERTY—CREDITORS—SALE OF CHATTELS—TRANSFER OF CONTROL—FRAUD—STATUTE—*Reed, et al. vs. The Ordway State Bank*—No. 14307—*Decided April 18, 1938*—*District Court of Crowley County*—*Hon. William B. Stewart, Judge*—*Reversed.*

FACTS: A code action by the bank to recover possession of personal property, which was adjudged.

Malone was the owner of two certain mules which, in June, 1935, were delivered to Boget living in the country, who undertook to care for them in exchange for their use on his ranch. Said arrangement and possession continued until December 31, 1936, when in an action before a Justice of the Peace, for debt against Malone, Reed brothers caused the mules to be attached by a constable.

July 30, 1936, Malone was indebted to the bank on an overdue obligation for $150.00, in payment of which he gave the bank a bill of sale for the mules; possession continued in Boget as theretofore, neither Malone nor the bank doing or saying anything to indicate a change in ownership had taken place, nor did Reed or Boget or the constable have knowledge thereof.

The question is, was the sale of the mules to the bank "fraudulent or void" as to Reed.

HELD: 1. Section 14, Chapter 71, 1935 C.S.A., reads as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." At the time of the sale the chattels were not in the physical possession of the vendor, but were under "his control." The sale was not "accompanied by an immediate delivery," nor was it "followed by an actual and continued change of possession of the things sold," and therefore the sale was void. IN DEPARTMENT.

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

BANK COMMISSIONER—REVIEW OF HIS DECISION—STATUTE-TIME FOR REVIEW—*McFerson vs. The Western Colorado Power Company*—No. 14298—*Decided April 18, 1938*—*District Court of La Plata County*—*Hon. John B. O'Rourke, Judge*—*Reversed.*

FACTS: McFerson, as State Bank Commissioner, sued out a writ of error to review a judgment entered against him by the trial Court in which it allowed preference of a claim of the Western Colorado Power Company, claimant, to be paid from the assets of a defunct State Bank.

Plaintiff in error contends that inasmuch as no suit or action had been commenced within six months from the date of rejection of the claim for preference, the Court was without jurisdiction to review the action of the bank commissioner.

HELD: 1. Section 96, Chapter 18, Vol. 2, 1935 C.S.A., requiring action to be brought within six months after rejection, is controlling of the situation here involved.

2. Section 96 was passed for the benefit of the claimant, and Section 97 for other parties in interest, and therefore claimant was required to commence suit within the six months' period. EN BANC.

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard dissents. Mr. Justice Knous not participating.

CRIMINAL LAW — MURDER — TESTIMONY — EVIDENCE—*Bray vs. People of the State of Colorado*—No. 14259—*Decided April 11, 1938*—*District Court of Jefferson County*—*Hon. Samuel W. Johnson, Judge*—*Affirmed.*

FACTS: Plaintiff in error, hereinafter referred to as defendant, was sentenced to the penitentiary for a term of 10 to 12 years on a verdict of murder in the second degree for killing her husband.

HELD: 1. The evidence would have supported a verdict of first degree murder, and therefore, its sufficiency to support a second degree murder cannot be questioned. Conduct which would sustain a finding of deliberation and premeditation must perforce sustain a finding of malice.

2. Questions that are remote and indefinite are clearly immaterial and should be excluded from the record. EN BANC.

Opinion by Mr. Chief Justice Burke.

ESTATES—STATUTES—WIDOW'S ALLOWANCE—*In re: Estate of Charles G. Sheely*—*Corinne V. Sheely vs. Arthur C. Sheely and Harry C. Davis*—No. 14160—*Decided April 11, 1938*—*District Court of Jefferson County*—*Hon. Samuel W. Johnson, Judge*—*Affirmed.*

FACTS: Plaintiff in error asks the Court to reverse so much of a judgment as denied her petition for leave to renounce under her husband's will and to take one-half of his estate instead; and defendants in error ask the Court to reverse, on their assignment of cross-error, so much of the judgment as granted a widow's allowance.

HELD: 1. 1935 C.S.A., Vol. 4, Chapter 176, Sec. 37, providing that a surviving spouse may make an election to take under the statute and not the will, providing this is done within six months after the will is admitted to probate, is a mandatory provision and not a directory one, and therefore, an election to take under the statute, having been made nine months after the admission of the will to probate, is too late.

2. The widow's election does not depend either directly or indirectly upon the time of filing an executor's inventory.

3. The lower Court is the fact finding tribunal and its decision binds the higher Court as to the widow's allowance. EN BANC.

Opinion by Mr. Justice Bouck. Mr. Justice Bakke, Mr. Justice Knous, and Mr. Justice Holland concur in so much of the opinion as approves the District Court's ruling on the widow's allowance, but dissent as to the remainder.

FRAUD—CAUSE OF ACTION—COMPLAINT—AGENCY—CANCELLATION OF INSTRUMENTS—STATUS QUO—CONSTRUCTIVE TRUST —*Longworthy vs. Republic Mutual Insurance Company, et al.*—No. 14208—*Decided April 11, 1938*—*District Court of Denver* —*Hon. Frank McDonough, Sr., Judge*—*Affirmed.*

FACTS: Action in equity to cancel a deed and for reconveyance of certain real estate on ground of fraud.

HELD: 1. Every reasonable intendment on matters in doubt must be resolved in favor of the judgment of the trial Court.

2. All insufficiencies appearing in the Complaint must be resolved against the pleader.

3. Before it may be concluded that a cause of action has been stated against a defendant, it must affirmatively appear on the face of the complaint that he was a party to the fraud or, second, that the fraud was a result of his procurement, or was perpetrated with his knowledge and authority.

4. A principal is not bound by false representations of his agent made without his knowledge, consent, or authority, nor is an officer of a company bound by representations of the company's agent so made.

5. The Court will not grant the relief of cancellation of an instrument without the offer to restore the parties to the status quo at the time of the execution of the instrument sought to be cancelled.

6. Mere inadequacy of consideration will not give rise to a constructive trust.

7. Cancellation will not be allowed unless the improvidence or inadequacy of the price is so great as to furnish of itself convincing evidence of fraud.

8. An unauthorized alteration of a deed by the grantee or his privy is not ground for an action by the grantor to set it aside. EN BANC.

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Young, dissent.

DECLARATORY JUDGMENT—PUBLIC REVENUE SERVICE TAX ACT—INTERPRETATION OF REVENUE LAWS—EJUSDEM GENERIS—NOSCITUR A SOCIIS—*Bedford, as Treasurer of the State of Colorado, and Rogers, as Attorney General of the State of Colorado, vs. Johnson, et al.*—No. .....—*Decided April 11, 1938*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: The question for determination is whether the general warehouse business of defendants in error is subject to the Public Revenue Service Tax Act of 1937. The District Court decided that the 1937 act had no application to the business of defendants in error

and its finding and decree are brought here for review by the State Treasurer, who is charged with the duty of enforcing the act, and the attorney general, who was made a party by reason of the provisions of the Declaratory Judgment Act. The general warehousing business is *not included* by name in any part of the act.

HELD: 1. It is a settled rule in the interpretation of revenue laws that in case of doubt as to their application, the construction must be in favor of the tax payer and against the taxing power.

2. The rule of ejusdem generis, to the effect that where words of general import follow specific designations, the application of the general language is controlled by the specific, does not apply where the specific words signify subjects differing greatly from one another.

3. The doctrine of noscitur a sociis is to the effect that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. EN BANC.

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

TAXATION—EXEMPTION—CHARITABLE ORGANIZATIONS—*Hanagan et al vs. Grand Lodge, Knights of Pythias of the Domain of Colorado*—No. 14103—*Decided January 10, 1938*—*District Court of Otero County*—*Hon. William B. Stewart, Judge*—*Reversed.*

HELD: 1. Property laterally adjacent to other property used strictly for charitable purposes is subject to taxation when such property is used solely for producing revenue and such revenue is not being produced merely incidentally from property which otherwise is necessary to effect the objects of the organization. EN BANC.

Opinion by Mr. Justice Young. Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Holland dissent.
