Denver Law Review

Volume 15 | Issue 8 Article 3

July 2021

Supreme Court Decisions

Dicta Editorial Board

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TAXATION—IMPROVEMENT DISTRICTS—PAVING—STREET SURFACING—*Fredericksen, et al. vs. City and County of Denver*—No. 14338—*Decided June 27, 1938*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Reversed and remanded.* EN BANC.

FACTS: Plaintiffs, as citizens and taxpayers, within a Street Improvement District, instituted an action to have all proceedings had by certain officials of the City and County of Denver, relative to the establishment of the improvement district, declared unconstitutional and void and to enjoin any future action concerning the same by said officials. The defendants' general demurrer was sustained and plaintiff elected to stand upon the complaint.

HELD: 1. Where a complaint, such as here, shows by its well-pleaded allegations that the manager of improvements was without jurisdiction to proceed with the establishment of the district, that the plan of assessment would result in a tax levy in excess of the charter allowance and that it would be confiscatory of plaintiffs' property, either the question of lack of jurisdiction, or excessive and confiscatory assessment, provides a cause of action which may be presented and determined in equity, if an adequate remedy at law is not available.

2. It is a question of fact as to whether the nature of the improvement is a "paving proposal" or a "street surfacing project." This fact becomes an important matter since the city charter provides that "* * * except on petition, no paving district shall include more than 12 blocks of a street with intersections."

Opinion by Mr. Justice Holland. Mr. Justice Knous dissents. Mr. Justice Hilliard and Mr. Justice Bouck not participating.

CRIMINAL LAW—STATUTORY RAPE—DEGREES—INSTRUCTIONS—*Hoppel, Jr. vs. People*—No. 14346—*Decided June 27, 1938*—*District Court of Logan County*—*Hon. Arlington Taylor, Judge*—*Reversed.* IN DEPARTMENT.

FACTS: Defendant, under 18 years of age, was charged with having sexual intercourse with a girl also under 18, by force and violence. Trial court instructed jury on first degree rape, but did not instruct it on

third degree rape, which applies where both parties are under 18 and where no force or violence is involved. The defendant was found guilty.

HELD: 1. Under Colorado statutes, where the male perpetrator and the female victim are both under 18 years of age, unless the facts bring the case within one or more of the definitions of the first or second degree rape, the male, under no circumstances, can be convicted of a grade of crime of rape higher than the third degree.

2. Where both parties are under 18, the defendant could be convicted of first degree rape only where the female person resists, but her resistance is overcome by force and violence.

3. The court, therefore, should have given an instruction on third degree rape and on resistance.

4. Where counsel in appellate court were not counsel for defendant at trial, where no objections to given instructions were made, and where no other instructions were tendered, the court may, of its own volition, review the case and questions raised, where it appears that a seriously prejudicial error was made.

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

WORKMEN'S COMPENSATION—LACHES—CHANGED CONDITIONS—*Employers Mutual Insurance Company vs. Jacoe, et al.*—No. 14399—*Decided June 27, 1938*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Affirmed.* EN BANC.

FACTS: Claimant injured in 1918 while working in mine. In 1919, a hearing was had and he was awarded $88.00 for temporary total disability. He received the check and endorsed same under usual "payment in full" clause. Insurance carrier claims formal receipt signed by claimant was lost in fire and claimant says he never signed any separate receipt. From 1919 to 1937, claimant did nothing except call at the office of the insurance company several times and state that he was unable to go to work. The industrial commission reopened the case under provisions of Section 110 of the Compensation Act (1935 C. S. A., Vol. 3, c. 97, Section 389), which permits it to reopen case on its own motion and upon certain conditions. Trial court affirmed award to claimant.

HELD: 1. The defense of laches is not available where the commission of its own motion reopens the case and makes award to correct previous mistake or to take cognizance of changed conditions.

2. The commission may, in its sound discretion (determining as a fact that there was error, mistake or changed conditions) reopens a case whenever there has been a natural development of an industrial injury, uninfluenced by an independent intervening cause.

3. Where the commission on its own motion has entered a supplemental award, it must be assumed on review that it believed it had made a mistake, and an award without a specific finding to that effect has been sustained.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Holland dissent.

CRIMINAL LAW—LARCENY—TRANSFER OF CAUSE FROM ONE DIVISION TO ANOTHER—JURY PANEL—EVIDENCE—ELECTION AS TO COUNTS—INSTRUCTIONS—SENTENCE—*Smaldone vs. People*—No. 14237—*Decided June 27, 1938*—*District Court of Denver*—*Hon. Henry A. Hicks, Judge*—*Affirmed.*

HELD: 1. In a criminal case, where the judge assigned to try the cause transfers the cause to another division, the judge of which agrees to try the case for the convenience of both, no prejudice occurs where it appears that none is claimed, that no proper attempt was made by counsel for defendant for relief therefrom, if any existed.

2. Where the judge, to whom that duty falls, draws 38 out of a panel of 150 jurors, drawn for all divisions of the court, and sends them for service to the division in which defendant is to be tried, and the defendant was furnished with the entire list, he may not object that his jury was not drawn from the entire panel and because the 38 were not drawn in his presence. He had no right to be present when the 38 were drawn and assigned.

3. Evidence examined and, while largely circumstantial, found to be convincing and to support the verdict.

4. Where the same evidence is admissible as to each, no prejudice results from submitting a count for grand larceny and one for receiving stolen goods to the jury. The prosecutor is not required to elect. Counts for larceny and receiving stolen goods may be joined.

5. Motions to elect in such cases are addressed to the discretion of the trial court.

6. Where defendant's requested instruction stated a negative, and the affirmative was not even hinted at in the instructions given, that tendered was unnecessary and inapplicable.

7. Where second count was for receiving stolen goods and defendant was convicted only on the first (larceny), no possible prejudice appears from the submission of both.

8. Where a further paragraph of the same instruction clarifies a question raised by the wording of a prior paragraph, and any possibility that jurors were misled is thereby foreclosed, the assignment of error thereon is groundless.

9. Where prosecutor, in argument to the jury, remarks that defendant's counsel would probably explain certain conduct of a witness "on account of his record and notoriety of Smaldone," and was immediately stopped from saying more concerning "record" and "notoriety," and the trial court instructed jury to disregard such statements, there is no prejudicial error.

10. Where judge sentences defendant to a term to run consecutively with a sentence imposed upon defendant in another case in same court, such sentence is not void for uncertainty; and even if it were, the defendant stands convicted and unsentenced, and since he made no objection at the time and no effort to correct the error, he waived it.

Opinion by Mr. Chief Justice Burke.

CONSTITUTIONAL LAW—HAIL INSURANCE COMMISSIONER—ADMINISTRATIVE CODE—*People ex rel. Swaze vs. Bixby*—No. 14304—*Decided July 11, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed.* IN DEPARTMENT.

FACTS: Governor appointed B commissioner of hail insurance and when he appeared at the office of the board of hail insurance, the latter objected, alleging that he was making an unlawful intrusion into, and usurping the office, contending that the power to appoint such commissioner was vested in the board and not in the Governor. B had previously been certified to the office by the Civil Service Commission as a provisional appointee, and thereafter was appointed upon executive order of the Governor. This appointment was approved by the executive council and by the State Director of Agriculture.

HELD: 1. Under Chapter 111, S. L. 1929, the business of the department of the State hail insurance was to be administered by a board of three who were directed to appoint a commissioner, not a member of the board, to manage the business. Chapter 37 of the S. L. 1933, known as the "Administrative Code," created and established six administrative departments of State government without disturbing some de-

partments, by abolishing certain offices, modifying certain departments, etc.

2. The power to appoint a commissioner of hail insurance is vested in the Governor of the State of Colorado as the chief executive officer of the administrative department, in which the department of hail insurance was placed.

3. The power to appoint was given to the board in 1929 by the legislature, and by the same authority was given to the Governor in 1933. The later Act must and does prevail.

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

TAXATION—SALES TAX—USE TAX—STATUTORY CONSTRUCTION—DEFINITION OF TERMS: "ENTER INTO," "PROCESSING," "WHOLESALE SALE," "RETAIL SALE"—*Bedford, State Treasurer vs. Colorado Fuel and Iron Corporation*—No. 14246—*Decided July 11, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed in part and reversed in part and cause remanded.* EN BANC.

FACTS: Petition for declaratory judgment to determine the tax liability of the Colorado Fuel and Iron Corporation under the Colorado Sales Tax Act, and the use tax Act upon specific items of tangible personal property said to be necessarily purchased and used by it in its manufacturing and mining operations, and upon hospital and dispensary supplies and equipment purchased and used in conducting its hospital, which it claims is a charitable institution.

HELD: 1. Section 2 (n) of the Sales Tax Act provides that sales to and purchases of tangible personal property by a person engaged in the business of manufacturing, compounding for sale, profit or use, any article which enters into the processing of or becomes an ingredient or component part of the product shall be deemed to be wholesale sales and shall be exempt from taxation under the Act.

2. The State Treasurer, on proper authority, promulgated rules and regulations providing that sales of such property to manufacturers, producers or processors, which is used or consumed but does not enter into the actual processing and does not become an ingredient or component part of the product is taxable.

3. In construing a statute, the rule is that all the language of the Act must be considered and that construction is favored which gives effect to every part thereof.

4. "Mere awkwardness of expression, or an ill-advised choice of terms, do not necessarily make a writing ambiguous."

5. "* * * To enter into the processing of an article, substance or commodity, tangible personal property must of necessity become a constituent part of such final product in the series of continuous operations and treatment leading to this result."

6. Where the legislature re-enacts sections of a law, which have been construed and interpreted in the interim, without changing the language, it was presumptively aware of the construction theretofore given the previous statutes and was satisfied therewith. Such re-enactments, therefore, in effect amounted to a legislative confirmation of the prior existing rules of interpretation.

7. "In the interpretation of a statute the legislative purpose sought to be accomplished by the enactment is always to be borne in mind."

8. To be exempt from the operations of the sales and use tax Acts, tangible personal property purchased by a manufacturer and which enters into the processing of the manufactured product, must become a constituent part thereof wholly or partially, by either chemical or mechanical means.

9. The mining operation of the company, even though the products thereof be devoted exclusively and necessarily to the manufacture of the final products offered for sale by the company, is not manufacturing within the meaning of the Acts; and upon this ground the trial court correctly adjudged that the machinery and equipment purchased and used in the company's mining business are taxable under the Act.

10. A rule which contemplates the arbitrary determination of the liability of an institution for sales or use tax upon the basis of its *established* taxable status for ad valorem taxes is erroneous.

11. To the extent of the contributions made by the company to cover the operating deficits of the hospital which it maintains for the benefit of its employees and their families, the latter are the recipients of a purely voluntary and charitable gift from the company; and, therefore, the necessary purchases and uses of tangible personal property made by the company for the hospital operation should be exempt from the sales and use tax, but this exemption does not extend to purchases and uses made in the operation of the dispensaries and other parts of the medical department of the company, since the latter clearly are carried on for the benefit of the company in its own regular business activities.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Bouck dissent in part and concur in part. Mr. Justice Bakke not participating.

ORDINANCES—SUNDAY—AUTOMOBILES—CONSTITUTIONAL LAW—CLASS AND SPECIAL LEGISLATION—*Rosenbaum vs. City and County of Denver*—No. 14164—*Decided July 11, 1938*—*County Court of Denver*—*Hon. C. E. Kettering, Judge*—*Affirmed*—EN BANC.

FACTS: The defendant, Rosenbaum, was found guilty of the violation of an ordinance which forbids the sale of new or second-hand automobiles on Sundays and national holidays.

HELD: 1. The due process clause of the Constitution and Article V, Section 25, of the Colorado Constitution prohibiting special or class legislation are not so broad as to destroy legislative power to regulate property rights in pursuance of the public good by requiring an observance of Sunday as a day of rest.

2. Sunday ordinances are within the domain of the police power of the municipality enacting them.

3. An ordinance which forbids the carrying on of business on Sunday by all persons following that particular occupation is not class or special legislation, because it affects alike all persons following the particular vocation.

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

CRIMINAL LAW—MURDER—INSANITY—BURDEN OF PROOF—WEAK-MINDEDNESS—INSTRUCTIONS—*Arridy vs. People of the State of Colorado*—No. 14260—*Decided July 11, 1938*—*District Court of Pueblo*—*Hon. Harry Leddy, Judge*—*Affirmed.* EN BANC.

FACTS: Plaintiff in error, Arridy, defendant below, was convicted for the murder of Dorothy Drain, and the jury fixed the penalty at death.

HELD: 1. An adjudication of a person as a mental incompetent by a county court is not res judicata as to his insanity, and he can again be legally tried on that issue in the District Court.

2. The people are not required in the first instance to offer proof of sanity, sanity being presumed in the absence of evidence tending to show the contrary. But, when evidence tending to show insanity is introduced, the people have the burden of proving beyond a reasonable doubt the sanity of the defendant.

3. Weak-mindedness is not in itself proof of insanity.

4. The general rule as regards criminal responsibility is an individual's ability to distinguish between right and wrong.

5. Objections directed to a few words in a given instruction vanish when the instruction is read and considered as a whole and in relation to the other instructions given.

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

WILLS—JURISDICTION—PROBATE—RESIDENCE—*Fulton vs. Lathrop* —No. 14318—*Decided July 11, 1938—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed.* EN BANC.

FACTS: Action by plaintiff in error contesting the last will and testament of Catherine Wright, late a resident of Jefferson County. Petition for letters testamentary was filed by Mary F. Lathrop, executrix named in the will, in the County Court of the City and County of Denver, under the mistaken belief that testatrix was a resident of Denver. Citations were issued and waivers thereon signed by contestant, plaintiff in error, and an order was entered admitting the will to probate, no caveat having been filed. Upon the plaintiff in error's request, the proceedings were certified to the County Court of Jefferson County. Plaintiff in error then filed a caveat.

HELD: 1. When the entire proceedings were transferred to Jefferson County, the jurisdictional defect of residence was cured.

2. "The place of trial, and the right to have a change is a privilege, and not a vested right, and may be waived, and, if a motion for a change of venue is not made in apt time, the right, although mandatory, is waived."

3. Under the present facts an heir or legatee, having signed a waiver, cannot come in and successfully ask to have set aside the probate of a will.

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

WORKMEN'S COMPENSATION—*Frank vs. Industrial Commission et al.* —No. 14343—*Decided July 11, 1938—District Court of Denver —Hon. Henry S. Lindsley, Judge—Affirmed.* IN DEPARTMENT.

HELD: There being sufficient competent testimony to support the commission's award, and no error disclosed by the record, the judgment is affirmed.

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

WORKMEN'S COMPENSATION—PAYMENT OF COMPENSATION—FINDINGS OF THE COMMISSION—*Rogers et al. vs. Solem and the Industrial Commission of Colorado*—No. 00000—*Decided July 11, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed in part and reversed in part.* IN DEPARTMENT.

FACTS: Solem alleges that he suffered an injury to his right eye while drilling in a mine, when pieces of steel and rock struck the eye ball. Later the eye had to be removed. The commission's finding on this was: "Whether or not the loss of the eye can be attributed to the injury described cannot be determined."

HELD: 1. The payment of $200, by the agent of the employer, to the injured employee constituted "payment of compensation."

2. The case is sent back to the commission to determine whether or not the loss of the eye can be attributed to the accident, and in the event it finds it is unable to determine the question, then to return a finding as to the proportion of disability attributable to pre-existing disease and that resulting from injury.

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

RECEIVERSHIP—COLLATERAL SECURITY—REAL ESTATE—REDEMPTION—CONTRACTS—AMBIGUITIES—*Logsdon vs. Quiat et al. etc.* No. 14270—*Decided July 11, 1938—District Court of Denver—Hon. Frank McDonough, Sr., Judge—Remanded for instructions.* IN DEPARTMENT.

HELD: 1. Where one conveys property to a lien holder under a written agreement providing for the reconveyance of the property upon the performance of certain conditions, the holder of the title may not deal with it in such a way as to deprive the grantor of her right of redemption.

2. Where a contract contains ambiguities, the court will permit evidence dehors the contract to explain the intent and understanding of the parties with respect to such ambiguities.

3. Where the claim of the plaintiff does not arise against a company in receivership until after the time for filing claims has expired, the court will permit plaintiff to sue the receivers or permit the filing of a claim in the receivership proceedings.

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

WILLS—JOINT TENANCY—CONTRACTS—REVOCATION OF A WILL—ELECTION—*Estate of Tiden vs. Foster et al.*—No. 14383—*Decided July 11, 1938—County Court of Montrose—Hon. Earl J. Herman, Judge—Affirmed.* IN DEPARTMENT.

HELD: 1. If a will creates a situation inconsistent with a joint tenancy, the will must control.

2. The instrument revoking a will must be a will; therefore, a contract cannot revoke a will.

3. A surviving spouse who dies without making an election not to take under the will is conclusively presumed to have consented to its terms and such a right is a personal privilege, which does not pass to the heirs.

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

SALES—USE TAX—CONTRACTS—COMPUTATION ON MATERIAL AND ON LABOR—*Fifteenth Street Investment Company vs. People*—No. 14301—*Decided July 11, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed in part and reversed in part.* EN BANC.

FACTS: Suit to collect use taxes allegedly due on the purchase and installation of an elevator. The contract to furnish and erect the elevator was given to a St. Louis concern, and provided for the payment of a sum of money composed of two items: the materials and the labor for building the machines and installing them.

HELD: 1. The contract examined and found to be one for sale and purchase of elevators. The installation was but an incident to the sale and purchase.

2. "Any contract for an improvement of real estate by the erection upon, or the repair of a structure already upon it, presupposed use of materials. Materials that enter into such structure are tangible and before annexation to the realty are personal, not real, property."

3. The defendant purchased such elevators and became responsible for the payment for them prior to the time they were installed; and the purchase includes all the conditions requisite to the incidence of the use tax—tangible personal property purchased by defendant at retail, the purchase not subject to a sales tax, the article purchased brought into the State of Colorado and used in making an improvement on his real property.

4. The purchase is subject to the use tax and it matters not that defendant subsequently failed to use the completed structure.

5. That work and labor is to be done upon or in connection with the materials as an incident to or in connection with the transfer of title to the materials does not rob the transaction of its essential characteristics of a sale if the whole or any measurable part of the consideration for the performance of the contract is compensation for the materials.

6. Where the contract price includes $42,000 for materials and about $10,000 for labor, the latter is so large an expenditure that the maxim *"de minimi non curat lex"* may not properly apply, and the use tax on such a sum must not be collected. The tax may only be measured by the cost of the materials used in making the improvements.

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

JUDGMENT CREDITORS—ESTATES—TRUSTS—SPENDTHRIFT TRUSTS —COUNTY COURT—*Snyder et al. vs. O'Conner*—No. 14272—*Decided July 11, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.* IN DEPARTMENT.

FACTS: S was judgment debtor of O'Conner. He was also one of the beneficiaries under a spendthrift trust established in his deceased father's will. O'Conner obtained order of District Court directing the County Court, which was administering the father's estate, to apply the proceeds of S's interest in the estate on the judgment. The trust provided for the distribution of the income for 10 years and distribution of the corpus after 10 years to the beneficiaries then alive, etc.

HELD: 1. A spendthrift trust will be enforced according to the intention of the testator whose plain purpose was to insure the receipt of a periodical income by the beneficiaries.

2. "The idea of permitting the District Court to interfere in an independent action * * * with the administration of an estate is repugnant to the notion of fundamental judicial regularity. Until the County Court orders the trust fund distributed, the property is in a real sense *in custodia legis.*"

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

UNEMPLOYMENT COMPENSATION—EXEMPTIONS—AGRICULTURAL LABOR—*Great Western Mushroom Company vs. Industrial Commission*—No. 14295—*Decided July 11, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.* EN BANC.

FACTS: Industrial Commission of Colorado sues Mushroom Company to recover unemployment compensation contributions based

upon wages the company paid the employees. The company claims that it is exempt from the provisions of the Unemployment Compensation Act because its employees are engaged in "agricultural labor."

HELD: 1. Operation of mushroom "farms" analyzed and found not to use "agricultural labor" within the intent of the statute.

2. The farmer's crops are seasonal, he employs few laborers and usually for relatively short periods of time. It is such labor that the legislature intended to exclude from the operation of the law; and not the labor, such as here, in a commercial enterprise.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke and Mr. Justice Bouck dissent.

INSURANCE—DOUBLE INDEMNITY—SUICIDE—EXCEPTIONS—*New York Life Insurance Company vs. West*—No. 14228—*Decided July 11, 1938*—*District Court of Denver*—*Hon. Joseph J. Walsh, Judge.* EN BANC, *on rehearing reversed.*

FACTS: The policy of insurance issued upon the life of W and payable to Mrs. W upon her husband's death contained a double indemnity provision providing for payment of $6,000 in the event of death by accident, but included the statement that the double indemnity would not be payable if the insured's death "resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling gas, whether voluntary or otherwise." Lower court held poison exception invalid. The death was suicidal by taking poison while insane.

HELD: 1. A suicide while insane is an accident and the Colorado Statute providing that suicide may not be used as a defense against the payment of a life insurance policy expresses a public policy which cannot be nullified by any scheme or artifice.

2. The statute only takes away the defense of suicide, but does not attempt to deprive the company of the right to limit the class or classes of accidents covered by the policy.

3. The statute is a limitation on the general right of contract and must be strictly construed.

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

LIFE INSURANCE—PROVISIONS IN THE POLICY—*Pacific Mutual Life Insurance Company vs. Matz*—No. 14352—*Decided July 11, 1938*—*County Court of Denver*—*Hon. C. E. Kettering, Judge*—*Affirmed.* IN DEPARTMENT.

FACTS: Action to recover certain monthly payments for disability under the terms of an insurance policy. The company offered to prove, by two reputable physicians, that an operation which was not inherently

dangerous to life or health, if undergone by plaintiff, offered better than a 90% chance of complete recovery.

The question is, must plaintiff, as a prerequisite to recovery on his policy, undergo a surgical operation, and risk the dangers involved and failure of relief?

HELD: 1. In the absence of any stipulation in the policy requiring the insured to submit to a surgical operation, the plaintiff is under no duty to submit to an operation as a condition precedent to recovery under the terms of the policy.

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

INSANE PEOPLE—DISMISSAL OF CONSERVATOR—PRESUMPTIONS—JUDGMENTS—RECORD—*Leilinger et al. vs. Leilinger*—No. 14264—*Decided July 11, 1938—District Court of Pueblo—Hon. William B. Stewart, Judge—Affirmed.* EN BANC.

FACTS: Flowers, as next friend of plaintiff in error, an insane person, in the County Court moved to discharge the conservator. The motion was denied. Flower appealed to the District Court. The conservator moved to dismiss because the order appealed from was not final. The District Court so held and entered judgment accordingly.

HELD: 1. An order denying a petition for the removal of a conservator of an estate of an insane person is not a final judgment or decree, and is, therefore, not such an order as may be appealed from.

2. Since all presumptions favor a judgment, the duty devolves upon him who questions its legality to present the record which discloses the error.

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

QUO WARRANTO—INTEREST OF PRIVATE PARTY ENTITLING HIM TO BRING ACTION—PARTIES—PLEADING—STATUTE OF LIMITATIONS—*Norton et al. vs. People ex rel. Rudbeck*—No. 14358—*Decided June 20, 1938—District Court of Weld County—Hon. Claude C. Coffin, Judge—Affirmed.* IN DEPARTMENT.

FACTS: Quo warranto brought testing sufficiency of the incorporation of the town of Garden City in Weld County.

HELD: 1. Where the record discloses that the relator, seeking to test the sufficiency of the incorporation of a town, had operated a gasoline filling station in Garden City since 1932 under a long term lease; that he agreed to and did buy the property upon which he operated his business, that he paid the personal taxes assessed against the property in the station for several years, that he was in actual charge of the operation of

the business and subject to the town's license and police regulations, he has such a definite and substantial special interest in the town as to entitle him to institute the action as a private party when the district attorney neglects or refuses to act.

2. The allegation in the pleadings that certain things are illegal and not in conformance with the statute are mere conclusions of the pleader and do not tender any issues of fact.

3. But, allegations that signers of the petition for the incorporation of the town were not bona fide landowners, residents and electors are statements of ultimate facts.

4. Where it appears that the County Court, on September 1, 1936, entered a decree that all proceedings to that date had been in conformity with the law, and decreed that certain additional things be done, and thereafter, on September 17th, 1936, election of officers of the town was held, such decree does not state that it is adjudged that the incorporation is complete to start the running of the Statute of Limitations; and since the petition for quo warranto was filed September 8, 1937, the statute had not run.

5. The fact that the court gave permission to counsel for respondents to cross-examine some of the witnesses, as a favor to the court, gives the respondents no right to challenge the sufficiency of the evidence.

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

MANDAMUS—FIREMEN'S PENSION FUND—*People ex rel. Albright et al. vs. Board of Trustees of Firemen's Pension Fund*—No. 14188 —*Decided June 20, 1938*—*District Court of Denver*—*Hon. Robert W. Steele, Judge*—*Reversed.* EN BANC.

FACTS: The original Act, passed in 1903, provided for the establishment of a firemen's pension fund by a tax not exceeding one cent per hundred dollars valuation of the taxable property in the cities coming within the Act and an assessment of one per cent of the salary of each member of the department. The Act also provided for payment, among others, to widows of a certain class of firemen, of a pension of $30 per month and to children under 14 years of age, $6.00 per month. In 1935, the Act was amended to increase the class of recipients, the payments for widows to $40 per month and to children, until they attain the age of 16, $8.00 per month. The rate of taxation was raised to 2½c per one hundred dollars property valuation, and the assessment to 2% of the salary. Recipients under the old Act brought mandamus to compel the trustees of the fund to pay them the increased amount.

HELD: 1. Once the Board of Trustees exercised its discretion in determining the right of the widow or child to the pension, its duty to

pay under the statute was ministerial, and as such, could be compelled to pay the correct amount by mandamus.

2. While the amendment is not retroactive, it appears to have been the intention of the legislature to include in the payment of the increased sums, all the persons receiving the benefit of the pension at the time of the enactment of the amendment and, therefore, the recipients are entitled to the increased payment from the effective date of the amendment.

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

FRAUD—JUDGMENT CREDITORS—*Michell vs. San Juan Mining Co.*—No. 14263—*Decided June 20, 1938—District Court of San Juan County—Hon. John B. O'Rourke, Judge—Affirmed.* IN DEPARTMENT.

HELD: Where a corporation becomes unable to pay its obligations and one creditor, though a stockholder, brings suit and obtains judgment against the corporation, levies upon the property and purchases same at sheriff's sale for amount of judgment, and subsequently, another creditor, also a stockholder, obtains a larger judgment against the corporation, and being unable to find sufficient assets to satisfy his judgment, he may not, by merely crying "fraud" set aside the sheriff's certificate and have the property made subject to his own personal judgment.

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

DISBARMENT—*People vs. Brayton*—No. 13718—*Decided June 20, 1938—Original Proceedings in Disbarment. Respondent suspended for six months.* EN BANC.

HELD: 1. Findings of the trial court, advanced age of respondent, previous reputation for integrity and probity considered and respondent is suspended from practice for six months.

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

SCHOOL BOARDS—VACANCY—QUO WARRANTO—*Harris vs. People*—No. 14369—*Decided June 20, 1938—District Court of Las Animas County—Hon. David M. Ralston, Judge—Affirmed.* IN DEPARTMENT.

FACTS: H was a member and treasurer of a school board in a third class district. G, alleging that H had removed permanently from the district and that relator had been appointed by the County Superin-

tendent to fill the vacancy thus created, brought quo warranto. The lower court overruled a demurrer to the complaint.

HELD: 1. A school director of a third class district must be a resident of the district.

2. If the director removes himself from the district, establishes a new residence in another district, such removal creates a vacancy and calls for appointment just as finally and definitely as death or resignation.

3. No prior judicial proceeding to adjudge such vacancy is necessary and the appointee may secure the office by quo warranto.

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

NEGLIGENCE—MUNICIPAL CORPORATIONS—NOTICE—EVIDENCE—PLEADING—*City of Colorado Springs vs. Colburn*—No. 14143—*Decided June 20, 1938—District Court of El Paso County—Hon. John M. Meikle, Judge—Affirmed.* IN DEPARTMENT.

FACTS: Plaintiff, an elderly woman, slipped on polished floor of business office of light plant of the City of Colorado Springs and was injured. The lower court awarded her judgment against the city for $1,975.

HELD: 1. Where the allegation of negligence is not as to the construction of the floor, or that the same was polished, but that the accident was caused by its being "so highly polished," the allegation of negligence met the requirements of the rule on pleading.

2. The more reasonable and humane rule, and the rule in Colorado, is that under proper circumstances of mental and physical incapacity, giving of notice is excused. The sufficiency of the circumstances to work such excuse is properly submitted to the jury.

3. Evidence considered and found to be sufficient for the jury to find that the plaintiff was too incapacitated to give notice, and that the floor was maintained in a too highly waxed condition.

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

ESTATES—WIDOW'S ALLOWANCE—WILLS—ELECTION—INVENTORY—*In re Estate of Sheely et al. vs. Sheely et al.*—No. 14160—*Decided December 27, 1937—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed in Part and Reversed in Part.*

FACTS: Widow filed election not to take under Will and petitioned for Widow's Allowance about ten months after Will was ad-

mitted to probate. County Court denied the petition and her right to elect. On appeal, the District Court entered judgment in denial of the petition to elect and granted the petition for Widow's Allowance. The widow seeks to excuse the delay in filing the petition by stating she was not informed of her rights, and did file them upon obtaining knowledge of her rights. No inventory of the estate was filed until nine months after the will was admitted to probate. This was three months after the expiration of the period within which the widow was to file her election.

HELD: 1. Sec. 37, Chapter 176, Colorado Statutes Annotated, 1935, requires the widow to make her election not to take under the will within six months after the will is admitted to probate.

2. Sec. 145, Chapter 176, Colorado Statutes Annotated, 1935, makes it the duty of the Executors to file an inventory in the Estate within one month from the date of the testamentary letters. This Statute was on the books prior to the passage of the Statute setting the time for election.

3. It is apparent that the legislature contemplated that a five months period after the filing of the inventory was a reasonable time within which the widow was to be made acquainted with the assets of the Estate and to file her election.

4. In the absence of intervening rights of third parties, and where the contesting defendant has failed to comply with the inventory statute, he will not be now heard to complain of the extra time taken by the widow. He may not so defeat the right of the widow to make her election.

5. The trial Court's finding that the widow did not waive her right to claim the Widow's Allowance by her agreement to waive all claims against the Estate, will not be disturbed because made on conflicting evidence to the effect that the Widow's Allowance was not considered or in any way involved in the written agreement.

6. The judgment sustaining the Widow's Allowance is affirmed. The judgment denying the petition to elect is reversed.

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

WORKMEN'S COMPENSATION — DISCRETION OF COMMISSION — *National Lumber Co. et al. vs. Kelly et al.*—No. 14239—*Decided December 27, 1937—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.*

HELD: 1. Where Commission, upon competent evidence, found no clinical evidence of syphilis, and awarded compensation, it

did not abuse its discretion in refusing to compel claimant to submit to further tests.

2. Although there may have been a relationship between the delay in the operative treatment of the claimant's hand injury and his subsequent total disability, it is not to be held against him because he acted on the advice of his physician.

3. The Commission has the right to take into consideration, fear, anxiety, pain, excitement and shock.

4. It is not necessary that the Commission record all the conclusions nor is it necessary to recite all of the evidence upon which the findings or conclusions are based.

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

CONSPIRACY TO PREVENT COLLECTION OF JUDGMENT—BADGES OF FRAUD—*Isom vs. Isom et al.*—No. 14129—*Decided December 27, 1937—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.*

HELD: 1. Where plaintiff sues husband and latter's employer to enforce collection of judgment for unpaid alimony and alleges conspiracy to prevent the collection of the judgment, and calls husband and employer for cross-examination under the Statute and offers no further testimony, the Court may concede that there are certain facts which have been denominated "badges of fraud," and yet find that the testimony is conflicting and refuse to disturb the judgment of the trial Court.

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

WORKMEN'S COMPENSATION—*Martin vs. Industrial Com. et al.*—No. 14243—*District Court of Denver—Hon. Joseph J. Walsh, Judge—Affirmed.*

HELD: Evidence examined and found to sustain Commission's findings that claimant became totally disabled on March 11, 1937.

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