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Supreme Court Decisions

BANK CHECKS—ACCEPTANCE—CONSTRUCTIVE—DISCHARGE OF DRAWER—*Roberts vs. School District No. 1 of Kit Carson County, Colorado*—No. 13695—*Decided December 21, 1936—Opinion by Mr. Justice Holland.*

Roberts brought suit against the school district, the county commissioners, Boggs as county treasurer, and Rose, his successor, and Stockgrowers State Bank and McFerson as bank commissioner to recover on a check issued by Boggs as county treasurer in payment of certain warrants of the school district held by Roberts. Roberts deposited the check in a Colorado Springs bank and in turn the check went through several banks for collection purposes, consuming a number of successive days and was lost in transit, whereupon on September 26 payment was stopped and the county treasurer issued a duplicate check which took the same course through the various banks and reached the Stockgrowers Bank at Burlington, Colo., on October 1 in the morning and this bank remained open all that day and until noon on October 2, when its doors were closed and possession taken by the bank commissioner. The check was retained by the bank and bank commissioner for more than 24 hours before it was returned and payment refused. The county treasurer had on deposit in the bank on the day the check arrived sufficient funds to take up the check. Judgment was rendered below against the Stockgrowers bank and the bank commissioner but dismissed as against the other defendants, including the school district. Proceedings in error to review the judgment against the bank and bank commissioner was dismissed by the Supreme Court and the plaintiff is now prosecuting error to review the dismissal of his action against Boggs, the county treasurer.

1. The recovery of judgment by the plaintiff against the bank and the bank commissioner was upon the theory of constructive acceptance of plaintiff's check by the bank.

2. Boggs, the county treasurer, as drawer of the check, was discharged from his liability thereon by such acceptance.

3. The judgment obtained by the plaintiff against the bank and the bank commissioner, the full benefits of which he may now enjoy, precludes him from proceeding against the county treasurer.

4. The plaintiff procured the constructive acceptance of the check by the bank. Plaintiff therefore cannot pursue a further remedy against Boggs, the drawer, in the same matter upon which there is a positive statutory discharge as under Sec. 4005, C. L. 1921, where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon.—*Judgment affirmed.*

Mr. Justice Young and Mr. Chief Justice Campbell not participating.

CONTRACT—REFORMATION OF CONTRACT—WHEN NOT REFORMED —*Muchow et al. vs. Central City Gold Mines Company*—No. 14079—*Decided February 1, 1937—Opinion by Mr. Justice Holland.*

Defendant in error was plaintiff below. Plaintiff sought reformation of a contract to deposit tailings on defendant's land.

1. In order that equity may grant reformation of a contract there must exist mutuality in the mistake.

2. Where plaintiff had opportunity, before entering into a contract, to acquaint itself with information and failed to acquire same, it cannot complain that it entered into a contract with lack of knowledge.

3. Where plaintiff entered into a contract with defendant to deposit tailings from its mill upon land not then owned by the defendant but which defendant was in process of acquiring from a railroad company and plaintiff had the opportunity of ascertaining exactly what this land was, it is estopped from claiming mistake where plaintiff failed to avail itself of such accessible information, when it later developed that the land it expected it was getting the right to deposit tailings upon was not in accordance with its expectations.

4. The contract between the defendant and the railroad company being duly recorded, plaintiff had this source of information available, which it failed to exercise.

5. Where plaintiff partially performs, it should not expect a court of equity to reform a contract it had already recognized and partly performed, because plaintiff discovered later that the contract was not profitable.

6. The contract gave plaintiff what it wanted, that is, the right to deposit tailings on the land involved. The defendant made no misrepresentations as to the location or extent of the land and under such circumstances, equity will leave the parties where it found them.

7. The court below erred in decreeing reformation of the contract.—*Judgment reversed.*

LIMITATIONS—STATUTE OF—PAYMENTS—EFFECT OF—AGENCY—*Dodge vs. East*—No. 13846—*Decided February 1, 1937—Opinion by Mr. Justice Knous.*

1. Where an agent is allowed to collect for principal with authority to credit collections on an open account owing to agent by principal, such collection, within the six years period of limitations, tolls the statute.

2. Such application of collection has the same effect as voluntary payments made by debtor.

3. Absence from the state, under Sec. 6417, C. L. 1921, tolls the statute of limitations.—*Judgment affirmed.*

FRAUD—PLEADING—DEMURRER—APPLICATION OF STATUTE OF LIMITATIONS TO FRAUD—*The First Mortgage Securities Company et al. vs. Fader*—No. 13825—*Decided January 25, 1937—Opinion by Mr. Justice Holland.*

Action to quiet title was brought by Fader in the district court of Yuma county, Colorado, and a judgment and decree entered in his favor. The Platte Valley Loan and Investment Company, a corporation, prior to 1926, was indebted to the United States National Bank of Denver in the sum of approximately $100,000, which indebtedness was guaranteed by Ferguson and others, and while so indebted Ferguson, guarantor, conveyed all his real estate in Yuma county to a firm of which he was a member, which firm conveyed the same property to Fader, who was an employee of the company. The United States National Bank transferred its indebtedness to the First Mortgage Securities Company, which brought suit in the Denver district court against the maker and endorser and attached land in Yuma county which had been conveyed to Fader. Fader was not a party to this action. Judgment was had and attachment sustained, execution issued and the land was sold by the sheriff and bought in by the plaintiff in that action. Thereafter, Fader, brought this action to quiet his title. The answer in this action set up, among other things, that the conveyance to Fader was made to defraud the creditors. Fader demurred and particularly demurred to the counterclaim on the ground that it was barred by the three year and five year statute of limitations. Demurrer sustained. Judgment on the pleadings in favor of Fader was entered quieting his title.

1. The court obtained jurisdiction in the prior attachment action and its judgment therein carries every presumption of regularity.

2. Even though Fader was not a party to that action it does not avail him where the land attached was fraudulently conveyed to him to hinder and delay or defraud the attaching creditor.

3. Where fraud tainted the conveyance then so far as a judgment creditor is concerned the property remains subject to attachment as much as though the fraudulent deed had never been executed.

4. If the allegations of defendants' answer and counterclaim are true, then the conveyances from Ferguson and finally to Fader are void as to creditors.

5. This would be true even if the conveyance to Fader was a voluntary one without knowledge on his part of the intent of the grantor.

6. However, the answer alleges that he did have knowledge and participated in the furtherance of the scheme of his grantor to defraud.

7. The statute of limitations did not apply in this case. The trial court erroneously sustained the demurrers to the answer and counterclaim and the motion to strike.—*Judgment reversed.*

FIRE INSURANCE—ATTEMPT TO CANCEL—NECESSITY OF FIVE DAYS' NOTICE OF CANCELLATION TO INSURED—FAILURE TO GIVE NOTICE—LOSS—*Royal Exchange Assurance of London vs. Luttrell*—No. 13759—*Decided December 22, 1936—Opinion by Mr. Justice Butler.*

Luttrell and another sued Royal Exchange Assurance of London on a policy of fire insurance and recovered judgment below. The policy was written and delivered December 6. On the following March 2 the insurance carrier, through its agent, wrote to the insured that the Royal Exchange did not wish to further continue the policy in force and requested insured to return the policy for cancellation and at the same time enclosed to insured another policy in another company to take the place of the policy cancellation of which was sought. This letter did not reach the insured until subsequent to a fire loss. Insured refused to return the policy but retained the policy issued in lieu thereof.

1. The policy contained a clause that it could be cancelled by the insurance company at any time by giving notice to the insured a notice of cancellation in writing at least five days before cancellation would be effective.
2. Such notice was not given in this case five days before the loss.
3. The policy was in full force and effect at the time the loss occurred.
4. There was no evidence that assured either consented to cancellation before loss occurred or waived the notice of such cancellation provided for in the policy.
5. There was no ratification upon the part of the insured of the act of the agent in the attempted cancellation.—*Judgment affirmed.*

Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Holland dissent.

MALICIOUS PROSECUTION — INSUFFICIENCY OF COMPLAINT — DISMISSAL FOR INSUFFICIENCY—WAIVING RULE WHERE CAUSE IS PROSECUTED BY LAYMAN INSTEAD OF A LAWYER—SPECIAL APPEARANCE—*Viles vs. Symes et al.*—No. 13807—*Decided January 25, 1937—Opinion by Mr. Justice Young.*

Viles, plaintiff, brought an action for malicious prosecution against the defendants. The plaintiff was a layman who prosecuted the case without legal counsel. Two of the defendants, L. B. Johnson and Percy A. Robinson, were dismissed under special appearances, the first being sustained on the ground that it was a personal action and as to Johnson, service was made in California where he was a resident. Special appearance of Robinson was sustained on the ground that he was later included as a defendant in an amended complaint without leave of court first obtained. As to the complaint, the court sustained a motion to make it more specific and an amended complaint was filed and to the

amended complaint a motion was filed to make it more specific, which was sustained and the plaintiff filed a bill of particulars which on motion was stricken because insufficient and judgment of dismissal was entered. The plaintiff then orally moved for leave to file another amended complaint, which was denied.

1. In view of the fact that the plaintiff is a layman and appeared without counsel, we apply Rule 35 of this court providing that the court may in its discretion notice any error appearing of record but not properly assigned.

2. In the exercise of a sound discretion the court below should have given the plaintiff leave to again attempt to file a further amended complaint as to matters clearly within the plaintiff's knowledge.

3. In making such ruling it is not determined whether the complaint states a cause of action or whether a cause of action can be stated.

4. The ruling of the court dismissing the defendants, Johnson and Robinson, was correct.

The judgment, insofar as it quashed the service of summons as to defendants, L. B. Johnson and Percy A. Robinson, is affirmed. In all other respects it is reversed and the cause remanded for further proceedings.—*Mr. Justice Bouck dissents.* Mr. Justice Bakke and Mr. Justice Knous not participating. Mr. Justice Bouck files dissenting opinion.

WORKMEN'S COMPENSATION—CAUSE OF DEATH—NECESSITY OF CAUSE BEING ACCIDENTAL—HEART DISEASE OR OVEREXERTION—*The Industrial Commission et al. vs. Wetz et al.*—No. 14057—*Decided January 11, 1937—Opinion by Mr. Justice Holland.*

The Commission denied any award to compensation to the widow of Wetz on the ground that his death was not the result of accidental injury, but was due to heart failure. The District Court reversed this.

1. The burden is upon a claimant to show by sufficient substantial evidence that the death was caused by an accident arising out of and in the course of the employment and that it had a direct causal connection therewith and that it must be traceable to a definite source.

2. The matter of "overexertion" is the only question here presented for solution. There is no testimony to the effect that deceased overexerted himself in any way. The necessary link connecting heart failure with the employment is not established by the evidence.

3. To make its finding setting aside the award of the Commission, the District Court must have based it upon inferences drawn from the evidence, in violation of the rule that such inferences and conclusions are solely for the Commission and not for the courts.

4. The question of whether the deceased died of heart failure or from overexertion while repairing a tractor was a controverted question before the Commission, thus leaving the question one of fact for the Commission and not one of law for the court.—*Judgment reversed.*

REPLEVIN—CHATTEL MORTGAGE—DURESS—QUESTION FOR JURY —*Walker vs. Dearing et al.*—No. 13867—*Decided January 25, 1937—Opinion by Mr. Justice Holland.*

This is a replevin action brought by Walker to obtain possession of personal property covered by delinquent chattel mortgage. The plaintiff was successful in justice court and on appeal to the county court jury brought in a verdict for the defendants. Walker represented one E. R. Powell, who obtained a judgment in justice court. Walker had himself appointed special constable and proceeded to make a levy on defendants' household furniture and represented to them that he had acquired a mortgage against the furniture and unless they gave him additional security he would take their furniture under the levy. Walker had already levied upon an automobile under the judgment. Under these circumstances the Dearings gave a second mortgage to Walker and in consideration Walker satisfied the judgment and released the automobile. Defendants failed to pay the mortgage and replevin action was brought by Walker and redelivery bond given by defendants.

1. There was not sufficient evidence to submit to the jury the question of duress.

2. While the methods of Walker in obtaining the second mortgage might be looked upon with disfavor, yet he was only pursuing a right that the law gave him and the evidence is not sufficiently convincing to support the alleged duress.

3. While the position of the Dearings was an embarrassing one and Walker took advantage of the situation, all the circumstances of the case finally operated for the present relief of the debtors. Under these circumstances, the claim of defendants that the second chattel mortgage was without consideration is without foundation.

4. The verdict was contrary to law.—*Judgment reversed.*

MONEY LENDERS ACT OF 1913—LOANS—CHARGING INTEREST IN EXCESS OF LAWFUL RATE—EFFECT—*Waddell vs. Traylor*—No. 13979—*Decided January 25, 1937—Opinion by Mr. Justice Young.*

Traylor recovered a judgment below for an unpaid balance of promissory note. Defendant's first defense was payment of more than sufficient to satisfy the note providing they were only charged lawful interest. Second defense was that part of the principal expressed in the note was in truth and fact unlawful interest and included in the face of the note. Third defense was that Traylor as a money lender failed to comply with chapter 108 of the 1913 Session Laws. Fourth defense was that the interest charges were unconscionable and oppressive. The court sustained general demurrer to the second, third and fourth defenses.

1. The Money Lenders Act of 1913 above referred to is constitutional for the title is sufficiently broad to cover the act.

2. The exceptions made in the act are reasonable.

3. The provisions of the act that treble the interest paid, if in excess of twelve per cent, may be recovered and that a violation of the act shall be a misdemeanor is a declaration of public policy. A contract for payment of interest of more than twelve per cent shall not be enforceable as to such excess.

4. To permit the plaintiff to recover the interest claimed would allow a consideration for the use of the money received greatly in excess of rate fixed by the 1913 act.

5. Courts will not lend their aid to the enforcement of terms of a contract which will result in the consummation of a criminal act, or one contrary to the public policy of the state.

6. Even where unlawful interest is charged a recovery can be had for the amount of the money actually loaned, together with such consideration for its use as might lawfully have been contracted for under the act, because the act does not make the note void by reason of excessive charge of interest but specifies the penalty for charging excessive interest. —*Judgment reversed and remanded for further proceedings.*

ELECTIONS—PETITION FOR RESTRAINING ORDER AGAINST ELECTION OFFICIALS AND OTHERS—SUFFICIENCY OF—*The People of the State of Colorado on the Relation of Raymond L. Sauter et al. vs. Monson et al.*—No. 14055—*Decided October 28, 1936 —Opinion by Mr. Justice Hilliard.*

Original action for restraining order against respondents for interfering in any way with a free, fair and open election, from threatening to discharge or to reward any employees of the City and County of Denver for giving or withholding his support in favor of or against any candidate and for appointment of watchers in polling places in Denver and in two precincts in Grand county.

1. The petition fails to state a cause of action.

2. The petitioners have failed to charge facts sufficient to bring them under the rule announced in People ex rel. Attorney General vs. Tool, 35 Colo. 225, 86 Pac. 224.

3. Where there is no charge of fraud, wrongdoing, conspiracy or confederation against the election commission or any of the election judges, the petition states no cause of action.

4. As to Grand county, the petition fails to show that the ordinary processes of the law are not sufficient to detect and defeat fraudulent registrations if they exist.—*Petition dismissed.*

Mr. Justice Bouck, Mr. Justice Holland and Mr. Justice Young concur.

Mr. Chief Justice Campbell and Mr. Justice Butler not participating.

Mr. Justice Burke dissents.

PUBLIC UTILITIES—POWER OF STATE UNIVERSITY TO OPERATE BUSSES FOR STUDENTS—*Burnside et al. vs. Regents of the University of Colorado*—No. 13842—*Decided February 1, 1937—Opinion by Mr. Justice Bakke.*

Plaintiffs in error, plaintiffs below, sought to enjoin the regents of the University of Colorado from operating certain motor busses for the use of students during the summer school on the ground that they had not complied with the Public Utilities Commission of Colorado laws. Judgment denying injunction.

1. The university was operating these busses during the summer school session exclusively for the use of its students under special authority from the P. U. C. authorizing it so to do and the P. U. C. had the right to make such exception as long as only university students were served by the busses and the general public was not transported.

2. It further appears that the university carries public liability insurance on the busses it operates and further that the busses while operating in the Rocky Mountain National Park are specifically exempted by the Department of the Interior from their rules and regulations governing commerical vehicles.

3. Under the Constitution, the university, through its board of regents, has the exclusive control and direction of all funds of and appropriations to the university and such board having determined that the operation of the busses were a necessary incident to the operation of the university it does not lie with the court to interfere with their discretion in deciding what methods they adopt to accomplish what they deem necessary for the university and it is not for the court to substitute its opinion as to the necessity thereof.

4. The university was within its legal rights in so operating the busses.—*Judgment affirmed.*

INSURANCE—LIFE—SERVICE OF SUMMONS—WHAT CONSTITUTES DOING BUSINESS WITHIN THE STATE—WHAT CONSTITUTES AN AGENT—*Union Mutual Life Company of Iowa vs. Bailey*—No. 13872—*Decided January 25, 1937—Opinion by Mr. Justice Holland.*

Bailey, the beneficiary in life insurance policy on his wife, recovered below after the death of his wife. The insurance company was an Iowa company, had not complied with the laws of Colorado, but solicited the application of the deceased by broadcasting over the radio. The application was mailed from Denver, received in Iowa and the policy issued in Iowa. After the death of insured the insurance company sent an agent to Denver with power to adjust or reject the claim and this suit was started and service procured on this agent. The court below held that the service was good and that the company was doing business in Colorado and therefore subject to the Colorado law.

1. Service of summons may be upon any agent of a foreign corporation doing business in this state.

2. When a foreign corporation invests its agent with broad powers to settle, adjust or reject its claims, service upon such an agent is proper.

3. Foreign insurance company which solicits business in Colorado over the radio and receives applications for insurance resulting from such solicitation upon which it delivers policies in Colorado, is doing business in Colorado and is subject to the Colorado insurance laws.

4. Under such circumstances, the Colorado law provides that the policy shall constitute the entire contract and is incontestable after having been in force two years from its date and it was unlawful for the insurance company to deliver a policy in Colorado without incorporating such provision.—*Judgment affirmed.*

UNLAWFUL DETENTION—REDEMPTION OTHERWISE THAN BY STATUTE—LIS PENDENS—*Scott vs. Weimer*—No. 13998—*Decided October 5, 1936—Opinion by Mr. Justice Hilliard.*

This was an unlawful detention suit. Judgment below for plaintiff. Plaintiff has foreclosed a deed of trust and at sale became the purchaser. Certificate of purchase was issued and after period of redemption, received trustee's deed and then brought the action for unlawful detainer.

1. It is no defense that subsequent to foreclosure that defendant could have procured a Home Owners' Loan payable in bonds for the full amount of the judgment and costs. The status of debtor and creditor had closed. To effect redemption, defendant was required to make payment to the public trustee. Plaintiff was not obliged to accept the offer.

2. Plaintiff is not required to file a notice of lis pendens so far as defendant is concerned.—*Judgment affirmed.*

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