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Supreme Court Decisions

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GENERAL DEMURRER—ULTIMATE FACT—CONCLUSIONS OF LAW—INJUNCTION—*Rozman vs. Allen et al.*—No. 13819—*Decided May 17, 1937—District Court of Gunnison County—Hon. George W. Bruce, Judge—Reversed.*

FACTS: Defendants in error were plaintiffs below, and plaintiff in error was defendant below. The parties herein will be denominated as they were in the trial court. Action was instituted by the plaintiff to enjoin the obstruction by fences of a road which crossed the defendant's stock-raising homestead. A temporary injunction was granted, and, after answer was filed, a general demurrer was interposed by the plaintiff which was sustained and the injunction made permanent. Defendant elected to stand on his answer as amended. In 1930 the defendant filed upon a tract of land which was traversed by a driveway which the plaintiff and others had been using for many years in moving cattle back and forth to the unappropriated public domain. The Gunnison County Cattle Growers' Assn. petitioned the Secretary of Interior to establish a new driveway, which petition was granted. The substance of the litigation was whether the defendant, under the circumstances, was entitled to fence off the old driveway, thereby compelling the plaintiff and others to use the new driveway in moving their cattle.

HELD: 1. Plaintiff's contention that the allegation in the defense that the second driveway was established in lieu and instead of all previous routes or trails used prior to its establishment is a conclusion of law is not correct. Under the facts and circumstances it was an allegation of ultimate fact which the defendant was entitled to prove.

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

WILLS—TESTAMENTARY CAPACITY—SIGNATURES—EXPERT WITNESSES—*Peterson, Executor of the Estate of Clara B. Stitzer vs. Frank A. Stitzer*—No. 13991—*Decided May 17, 1937—District Court of Denver—Hon. Otto Bock, Judge—Reversed.*

FACTS: On May 4, 1935, the 65 year old testatrix made her will; she died the next day. The will was lodged in the County Court for probate and was contested by her 95 year old husband, Frank A. Stitzer, who will herein be designated as the contestant, on the grounds of lack of testamentary capacity and undue influence. A jury found it to be her last will and testament. On appeal to the District Court a jury returned a verdict that the will was not her last will and testament. Robert W. Peterson, the proponent of the will, and Stitzer were named in the will as executors. Testatrix became ill and went to a sanitarium. The disease which she had does not affect the mind. The day prior to her death she told Peterson she wanted to make a will. She dictated

what she wanted, and when it was completed and read to her, she responded "yes" to the question if that was what she wanted. This all took place in the presence of disinterested persons, who state that she was mentally competent at the time. She attempted to sit up in bd so as to sign the will which was before her. The result of her attempt was an illegible scrawl. Contestant, for the purpose of comparison of the signature of testatrix on the will with her signature made under other conditions, introduced, over the objection of proponent, a check on the Colorado National Bank, signed by her in January, 1935. Proponent assigns error to the admission of this exhibit, contending that it was equivalent to telling the jury that testatrix did not sign her will and did not have mental capacity to make a will.

HELD: 1. If the testatrix's mental conception of what she was doing was clear, and she desired to sign the will, her participation in an attempt to sign it, however slight, renders the signature sufficient.

2. The opinion of an expert is entitled to but little weight when opposed to the facts and circumstances appearing at the time, and surrounding the making and execution of a will.

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

QUIET TITLE—NOTICE—KNOWN ADDRESS, WHAT CONSTITUTES—TAX DEED—MINING—TAX SALES—*Walter vs. Harrison*—No. 13885—*Decided May 24, 1937—District Court of Boulder County—Hon. Claude C. Coffin, Judge—Affirmed.*

FACTS: Action was brought by defendant in error as plaintiff below to quiet title to certain lode mining claims. Judgment was rendered in favor of the plaintiff, quieting title to him in the premises in dispute. Plaintiff's title is grounded upon a treasurer's deed based on a tax sale certificate for 1928 taxes. Application was made and the tax deed, which is conceded to be valid on its face, was issued in 1933. The principal attack on the validity of the deed is based upon the alleged failure of the County Treasurer to comply with the statutory requirements in not making diligent inquiry to ascertain the address of one Hallet, a prominent person in the county and state, in order that copy of the published notice of the application could be sent him by mail.

HELD: 1. A tax deed which is valid on its face is prima facie evidence of the regularity of all of the prerequisites necessary to its execution and delivery.

2. It is the duty of the County Assessor to prepare the tax rolls and give the names and addresses of the owners thereon, and such address is a *known* address within the meaning of the statute, and the Treasurer is entitled to rely on their being accurate.

3. Extrinsic evidence is admissable to augment the tax deed in ascertaining whether or not the Treasurer had complied with the statute.

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

STATUTE OF LIMITATIONS—DISCLOSURE—FRAUD—EQUITY—LAW —*Miller vs. Goff*—No. 13997—*Decided May 24, 1937*—*District Court of Denver*—*Hon. James C. Starkweather, Judge*—*Affirmed.*

FACTS: The parties will be mentioned as plaintiff and defendant, as they appeared in the trial court. Plaintiff and others were attempting to acquire the rights to prior locators on claims in oil fields in Wyoming. The Midwest Oil Company obtained a lease from the Federal Government including the above claims and was desirous of acquiring the rights existing by virtue of prior claims, its lease being subject to these rights under the provisions of the Federal "Leasing Act." Plaintiff and his then associates enlisted the aid of defendant in acquiring the claims and disposing of them to the Midwest Oil Company. Defendant was confident that he could accomplish the sale through F. G. Bonfils of Denver. To establish their interests the parties, including defendant, entered into an agreement whereby each was to share and share alike. A sale was made to the oil company through Bonfils, who, it is alleged by plaintiff, was paid $148,500, and who, with his attorney and the defendant, distributed the money on the basis of $125,000. Distribution was made June 1, 1924, and the entire matter so remained until August of 1931, when a widow of one of the parties learned that $148,500 had been paid in the settlement instead of $125,000. Plaintiff brought suit, joining with him the widow's interest, against Bonfils in equity for an accounting. Bonfils died and his executors paid plaintiff $7,500 in settlement. Plaintiff then sued defendant, who had received in excess of what he should have received, for a money judgment.

HELD: 1. The suit against Bonfils was in equity, and the action against Miller was one at law. The remedies plaintiff sought in the two actions were consistent and independent and the compromise in the Bonfils suit in no way prejudiced the defendant, Miller.

2. The three-year statute of limitations is not a bar to an action if the defendant is charged with the duty of a full and complete disclosure to plaintiff of all the details of the transaction. Failing therein, he will not be permitted to assert lack of diligence on the part of the plaintiff.

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

WATER RIGHTS—RES JUDICATA—DEPARTURE—STATUTES—STATUTE OF LIMITATIONS—ESTOPPEL—ADVERSE USE—OWNERSHIP—*Luxen vs. The Town of Rifle et al.*—No. 13961—*Decided May 24, 1937*—*District Court of Garfield County*—*Hon. John T. Shumate, Judge*—*Reversed.*

FACTS: Plaintiff brought suit in the trial court to enjoin the town of Rifle from using more than its alleged allotment of water from Beaver Creek in said county. Demurrers were filed by defendants, which were overruled and a temporary restraining order was entered, after which the defendants answeed, setting up the defenses of statutes of limitations, estoppel, and res judicata. The replication sought to void these de-

fenses by setting up the plea of acquisition by adverse use. The defendants then demurred to the replication on the grounds of departure, which was sustained. Under a decree of 1888, plaintiff was given 65 cubic feet of water per minute of time for irrigation from the Clausen Ditch No. 8; and Starke and the town, claiming under the Starke Ditch No. 15, were given 55 cubic feet. The decree further provided that in case of shortage the two ditches were to have all the water, share and share alike. In 1890 the decree was changed, giving each 60 feet. In 1906 the town, having acquired the Starke priority, filed a petition with court to change the point of diversion so the water could be used for town purposes. A decree was entered allowing the diversion, and a stipulation was entered into to the effect that no one's rights would be considered interfered with excepting that they shall all be subject to and subsequent in point of time and right to town's priority as changed by the proceeding. From 1906 to 1932 no one had any occasion to question the provisions of the 1906 decree because there wasn't any shortage of water, until in 1932 it became necessary for the town to use all of the water.

HELD: 1. A judgment on matters not litigated cannot be res judicata as to them. The plaintiff's alleged damages never having been litigated, he has a right to have them determined.

2. Sections 1784, 1785, 1789, C. L. 1921, urged by the town as the statute of limitations are not applicable, because these sections limit the power to question the decree only to the right and measure of diversion.

3. Estoppel is available only against one who consciously acquiesces in something being done to his detriment, the other elements of estoppel being present.

4. Acquisition of title by adverse user set out in the replication is not a departure from the plea of general ownership in the complaint, because evidence to prove adverse user would be receivable in proving general ownership.

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

ABSTRACT OF RECORD,—WHAT IT MUST CONTAIN—APPEAL AND ERROR—*Reuss vs. Raleigh Company, Inc.*—No. 14068—*Decided May 24, 1937—District Court of Denver—Hon. James C. Starkweather, Judge—Affirmed.*

FACTS: Action was on an open account, for goods and merchandise. Default judgment was entered May 2, 1933. More than three years later plaintiffs in error moved to vacate for want of jurisdiction because no summons was served. Their motion was denied and they brought error.

HELD: 1. The abstract of record must comply with Rule 36 to be a basis for a consideration of the assignments of error.

2. If the abstract does not set forth the substance of the summons in question, it is for all practical purposes no abstract.

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

DISBARMENT—PLEA OF NOLO CONTENDERE—PERJURY—DETERMINING CORRECTNESS OF CHARGES—*State of Colorado vs. Edison*—No. 14110—*Decided June 1, 1937—Original Proceeding in Disbarment—Dismissed.*

FACTS: It was charged in the petition that in the United States District Court for the Western District of Oklahoma, respondent, an attorney of the Colorado bar, was indicted for the crime of perjury; that to the charge she entered a plea of nolo contendere, upon which she was ordered committed to a federal institution for women for one year and a day, but the order was suspended during respondent's good behavior for one year. Answering, respondent admitted the return of the indictment, her plea of nolo contendere, the sentence imposed and suspension thereof, all as charged; but she denied her guilt of the crime of perjury in the matter of the indictment and said that she entered the plea of nolo contendere on the advice of counsel, themselves believing her to be innocent, but sensing what they conceived to be a menacing prejudice in the forum of her trial, and convinced there was grave danger she would fare illy at the hands of a jury, advised her to enter the plea. The Supreme Court being of the opinion that the law did not preclude, and justice required, inquiry in due course as to the truth of the charge of perjury against respondent, referred the matter to the District Court, with instructions to take testimony and make findings of fact. That court found that respondent entered the plea of nolo contendere on the advice of counsel, which, the circumstances considered, conforming to her answer in that regard, the court said was warranted and that the respondent was not guilty of perjury, and that she had not otherwise offended as a member of the bar.

HELD: 1. The plea of nolo contendere, when accepted by the court, is an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty, but has no effect beyond the particular case.

2. The Supreme Court, in an original proceeding in disbarment, is not precluded from determining whether or not the charge and conviction of the respondent, in a court of record, was correct.

Opinion by Mr. Justice Hilliard.

FUTURE INTERESTS—TAXES AND ASSESSMENTS—DUTIES OF HOLDER OF LIFE ESTATE—LIMITATIONS—PLEADING—MOTIONS—REMEDIES—*Dormer vs. Walker et al.*—No. 13773—*Decided June 1, 1937—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Reversed.*

FACTS: The parties appear here in the same position as in the court below; Dormer shall be referred to as plaintiff or "remainderman," and the defendants as such or as "life tenant" and trustee. Davis conveyed to the predecessor of the defendant trustee certain real property for the life of the defendant, Walker, with remainder in fee simple to the plaintiff and her co-tenant, Newton, who was not a party to the

proceeding. The life tenant and remainderman are children of the grantor. The deed gave to the trustee the power to rent or lease the said real estate and required the payment by him from said rental of "all taxes and assessments, including water tax, that may be levied or assessed against said property when the same are due," and further provided that in case said taxes and assessments "are not paid within six months after the same are due and payable, then and in that case the trust hereby created and all the rights and benefits of Newton (now Walker, the defendant) shall cease and terminate, and the title to said real estate shall vest immediately in fee simple, in the remainderman, * * * and they shall be entitled to the immediate possession thereof." Neither the trustee nor the life tenant paid the general taxes and assessments on the premises for the year 1930, nor the Moffat Tunnel taxes and interest for the years 1928, 1929, and 1930. After the elapse of more than six months after the taxes and assessments were due, plaintiff brought suit in ejectment to secure possession upon the theory that the alleged breach by the trustee and the life tenant terminated the life estate and entitled the remainderman to the immediate possession of the property. The trial court rendered judgment on the pleadings in favor of defendants on their motion. The life tenant contends that the relief to the plaintiff lies in other legal or equitable proceedings, and does not extend to the right to terminate the life estate. Also that the provision in the conveyance constitutes a condition subsequent in which case the original conveyor or her heirs, as owners of the reversionary interest as distinguished from a remainderman, are the only ones to have the power of termination upon breach of the condition subsequent.

HELD: 1. As a matter of law, even where the instrument creating the life estate is silent as to these items, it is the duty of the owner of a life estate, who is entitled to receive the rents, issues, and profits therefrom, to keep paid all current taxes and assessments which, if left unpaid, may result in a lien effective against the interests subsequent to the estate for life.

2. An estate for life can be created subject to a special limitation, a condition subsequent, or an executory limitation or a combination of these restrictions.

3. The provision terminating the life estate, upon default as was here provided for the payment of taxes and assessments, amounted to an executory limitation rather than a condition subsequent.

4. An "executory limitation" is defined as denoting that part of the language of a conveyance, by virtue of which the interest subject thereto, upon the occurrence of a stated event, is to be diverted, before the normal expiration thereof, in favor of another interest in a person other than the conveyor or his successor in interest.

5. The defendant's motion for judgment on the pleadings admits the truth of the allegations of the complaint.

6. If the conveyance is silent as to the duty of the life tenant with respect to the payment of taxes during the period of the life estate, if it merely imposes the duty or obligation to pay such taxes, then if the life

tenant fails to discharge his duty, the owners of the future interest in the land involved are generally limited, depending upon the circumstances of the case, to the following remedies:

(a) An action for damages against the life tenant or his personal representative;

(b) Mandatory injunction requiring the life tenant to perform his duty;

(c) Appointment of a receiver to manage and operate the land and perform the duty;

(d) To impress the life estate with a lien in favor of the remainderman where he has made payment of the item which it was the duty of the life tenant to pay, and,

(e) Compel the life tenant or his personal representative to reimburse the owner of the future interest for the sums he may expend in the payment of such taxes or assessments.

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

REPLEVIN—STIPULATIONS—INTENT OF THE PARTIES—JURY—FIXING OF AMOUNT OF LIEN—*Timpte Brothers vs. Kayser et al.*—No. 14020—*Decided June 1, 1937—District Court of Denver—Hon. James C. Starkweather, Judge—Affirmed.*

FACTS: The defendants claimed a mechanic's lien for work done on the motor truck of the plaintiffs, now defendants in error. The plaintiff tendered in full settlement the sum of $619.81, which was refused by the defendants. The plaintiffs thereupon brought action to replevy the truck. Defendants contend that the trial court disregarded the true nature of the action and erroneously permitted the jury to enlarge its proper functions by bringing in a verdict determining the amount of the lien, instead of determining whether the amount tendered by the plaintiffs was or was not insufficient to satisfy the lien. The parties entered into a stipulation whereby the replevin and redelivery bonds, or undertakings, respectively, given in a sum double the value of the truck were canceled and there was substituted a money deposit by the plaintiffs in a sum sufficient to satisfy a judgment for the maximum claim of the lien claimant together with the probable costs and expenses. Clear provision was made for applying the deposit to payment of such a judgment and for the return of any unused balance to the plaintiffs. The controversy arises because of the position taken by the lien claimant, namely, that the deposit is not to be used for the purpose of paying out of it the lesser sum fixed by the jury as the correct amount of the lien; that is, a little over $300 less than the amount claimed by the defendants.

HELD: 1. The intention of the parties was to make the deposit respond for whatever amount the jury should find to be due the defendants.

2. The stipulation conferred full authority upon the District Court to do what it did.

Opinion by Mr. Justice Bouck.