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Supreme Court Decisions

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RAPE—SEPARATE TRIALS—ADMISSIBILITY OF BIRTH CERTIFICATE —INSTRUCTIONS—MISCONDUCT—*Manship vs. The People*—No. 13734—*Decided June 1, 1936—Opinion by Mr. Justice Campbell.*

The information charged the defendants Manship and Vera Brinkerhoff with the statutory crime of rape of Dora Shelton. Each defendant was found guilty. Manship filed a motion for separate trial some time before the trial on the merits and the trial court denied the same on the ground that such a motion properly arises at and not before trial on the merits. At the trial on the merits the defendant failed to renew his motion for separate trial.

1. Where defendant files a motion for separate trial before trial on the merits and fails to renew the motion at the time of trial on the merits he cannot complain of the court's ruling denying such motion.

2. Where a motion for separate trial is denied such ruling will be affirmed where the bill of exceptions does not show the admission of prejudicial evidence.

3. Evidence examined and held sufficient to sustain the verdict of guilty.

4. Where it was material to prove that the age of a prosecuting witness in a rape case was under eighteen years it was error, without prejudice, to admit in evidence a so-called birth certificate merely signed by the attending physician, where no evidence was introduced to prove the signature or that the doctor was out of the state or otherwise unavailable as a witness. The error was cured where both the prosecuting witness and her mother testified that she was fifteen years of age at the time of the alleged crime.

5. It was error for the court to refuse a copy of the birth certificate of the prosecuting witness certified by the registrar of vital statistics on the ground that the doctor's original certificate was filed with the registrar later than ten days after the birth. The mere fact that the law makes it the duty of the attending physician to file the certificate within ten days does not affect the admissibility of copy thereof as such certified copy is prima facie evidence of the facts therein stated.

6. Where requested instruction contains two or more propositions of law and one of them is unsound, the court may properly refuse to give the instruction.

7. Where the court instructed the jury that as a matter of law neither misrepresentation by the complaining witness to the defendants as to her age, nor her appearance with respect to age, nor the fact that defendants, or either of them, actually believed that she was eighteen years of age, are material, if, from all of the evidence the jury believed

beyond a reasonable doubt that at the time of the alleged act of sexual intercourse she actually was under the age of eighteen years, such instruction was error without prejudice in excluding from the jury the right to determine the age of the prosecuting witness from an examination and an inspection of her where it appeared from the uncontradicted evidence that she was only fifteen years of age at the time the offense was committed.

8. It is too late to raise the objection of misconduct on the part of the district attorney when the objection is made for the first time by incorporating in motion for a new trial. It should be raised at the time the alleged misconduct occurs.—*Judgment affirmed.*

Mr. Justice Butler specially concurring by separate opinion. Mr. Justice Hilliard and Mr. Justice Holland dissent.

REPLEVIN—ELECTION OF REMEDIES—DAMAGES—LIEU OF POSSESSION—SUMMARY ACTION—*Summers vs. Mock*—No. 13926—*Decided June 1, 1936—Opinion by Mr. Justice Hilliard.*

This was an action in replevin before a justice of the peace of Montrose County to recover possession of a horse alleged to be of the value of $75. The property not having been taken under the writ, trial proceeded as for damages and the justice of the peace found right of possession to be in defendant. Plaintiff appealed to the county court. While the matter stood on appeal in the county court the plaintiff moved that the defendant be required to deliver the horse to the sheriff and order was accordingly entered thereupon. Thereupon, the plaintiff further moved that the defendant be confined in the county jail until the horse was turned over to the sheriff and the motion was granted.

The defendant by petition to the district court for a writ of certiorari challenged the jurisdiction of the county court to proceed and on hearing it was adjudged that the county court did not have jurisdiction to make the orders.

1. That the property in controversy was not in his county explains the constable's failure to seize and take the horse under the replevin writ.

2. Thereupon the plaintiff had a choice to proceed as for damages or for summary action looking to the incarceration of the defendant. Plaintiff elected to avail herself of the remedy for damages under Section 6154, compiled laws of 1921.

3. Having made such election the plaintiff was bound thereby.

4. Her only remedy after election was for damages.—*Judgment affirmed.*

LANDLORD AND TENANT—MISJOINDER—CAUSE OF ACTION FOR DAMAGES—*Henrylyn Irrigation District vs. O'Donnell et al.*—No. 13958—*Decided June 1, 1936—Opinion by Mr. Justice Butler.*

John O'Donnell and James M. O'Donnell brought a joint action against the Henrylyn Irrigation District to recover damages to land and crops by the alleged negligence of the defendants in the construction and maintenance of its canal. Complaint alleged that one of the plaintiffs was the owner of the land and the other plaintiff the tenant and in possession of the property, but there was no allegation that the plaintiffs were jointly interested in the crops. The court below rendered judgment for damages on the theory that one plaintiff had a fourth interest and the other plaintiff three-fourths interest in the crops and the judgment entered was in proportion thereto, after overruling a demurrer for misjoinder.

1. Landlord and his tenant cannot join in an action at law for damages for tort in injury to the crops unless they are jointly interested in the crops.

2. Where the complaint shows on its face that one plaintiff is the owner of the land and entitled to separate and distinct one-fourth interest in the crop and that the other plaintiff is a tenant and is entitled to a separate and three-fourth interest in the crop there was a joinder of two separate and distinct causes of action. Under the allegations of the complaint the landlord could recover for injury to the reversion only and the tenant for injury to the possession only.

3. Under these circumstances there was an improper joinder of parties plaintiff.

4. The finding of the trial court, upon evidence introduced on the sole question of damages, that the landlord and tenant are jointly interested in the crops did not have the effect of converting the complaint into the statement of a joint right of action.—*Judgment reversed.*

EJECTMENT—DISPUTED BOUNDARIES—CHANGING CAUSE OF ACTION BY ANSWER—*Brown, et al. vs. Fenton, et al.*—No. 13945—*Decided June 8, 1936—Opinion by Mr. Justice Burke.*

Fenton brought suit in ejectment in county court to recover possession of a quarter section of land and damages for wrongful detention. The answer admitted Fenton's ownership and right of possession; denied ouster and damages, and the answer further alleged that the boundaries of the tracts of land between plaintiff and defendant were in dispute and that numerous landowners would be affected by the establishment of the boundaries and demanded that they be made parties and the disputed boundaries established by a surveyor appointed by the court. Thereupon the cause was transferred to the district court and various demurrers and motions were sustained or overruled which

resulted in eliminating all of the parties save the original parties, and the district court thereupon declined to go into the question of disputed boundaries and the trial proceeded as a simple action for possession and damages and judgment was for the plaintiff.

1. In an action in ejectment for possession of real estate where ownership and right of possession are admitted, it is not permissible to defend on the sole ground of disputed boundaries and convert the cause into one for a survey of the lands of all persons presumably concerned, involving a survey of approximately half a township and the conflicting interests of countless parties.

2. While an equitable defense is permissible in a law action, it was not permissible here. As soon as defendants answered it clearly appeared that there was no matter in dispute. Fenton merely claimed that he was the owner and entitled to possession and his ownership and right of possession were admitted. Here there was an attempt to make a complete conversion of an action in ejectment into an equitable procedure for the determination of disputed boundaries. The complaint presented no action which could be so converted. Fenton gets nothing save what he already had and the defendants lose nothing they claimed. —*Judgment affirmed.*

FRAUD—SUIT ON CONTRACT—CAUSE OF ACTION—SOUNDING IN TORT—BODY JUDGMENT—SUFFICIENCY OF COMPLAINT—ALLEGATIONS OF FRAUD—AMENDMENTS—*Wheeler vs. Wilkin*—No. 13634—*Decided June 8, 1936—Opinion by Mr. Justice Butler.*

Florence G. Wheeler sued Frank J. Wilkin on contract. At the close of plaintiff's case defendant moved for a nonsuit. The court granted the motion and dismissed the case. The plaintiff seeks a reversal of the judgment of dismissal.

1. Where plaintiff alleged that the defendant, by false representations, induced the plaintiff to purchase 30 shares of corporate stock and pay $3,000 therefor and that upon discovering the fraud, plaintiff tendered back the stock and demanded the return of the purchase price and that the defendant admitted his liability and agreed to pay interest on the amount until the repayment of the principal and that if the officers of the company failed to repurchase the stock within one year, that the defendant would repurchase it at par; and that in inducing the purchase of stock, defendant was guilty of malice, fraud and wilful deceit and body judgment was prayed for, such complaint does not state a cause of action in tort, but is a cause of action for money had and received and is an action upon contract.

2. Where one has received money which in equity and good conscience he ought to pay over to another, the law creates a promise to pay, and if he refuses to pay, an action in assumpsit for money had and received will lie.

3. The allegation that defendant was guilty of malice, fraud and wilful deceit and the prayer for a body execution did not convert that action into a tort action.

4. A body execution may issue in actions founded upon tort. That does not mean in tort actions only. If an action grows out of a tort it is founded upon tort within the meaning of the statute.

5. The first suit that was dismissed without prejudice is not a bar to the present action on the theory that the first action was in tort and the second action in contract.

6. The present complaint states a cause of action.

7. It is not necessary for the plaintiff to allege that she accepted defendant's offer and agreed to forbear suit. It was not necessary for plaintiff to agree to forbear; it was sufficient that, in reliance upon defendant's request and promise, she did forbear to sue.

8. Another objection urged is complaint does not state positively that plaintiff relied upon the representations, but merely alleges "that relying upon such false and fraudulent representations," she bought the stock. When the participial form of verbs is used in stating such facts, instead of tenses conveying the sense of more positive statement, while such form of statement is not to be commended, still, if it is plain that the facts are intended to be positively stated and alleged, such mode of allegation will not render the pleading bad on demurrer.

9. Forbearance or a promise to forbear suit even upon a doubtful claim is sufficient consideration.

10. Amendments to pleadings are largely within the discretion of the court and no abuse of discretion is shown in the court's refusal for leave to amend.—*Judgment reversed.*

The former opinion is withdrawn. Mr. Justice Holland dissents. Mr. Justice Hilliard did not participate.

WORKMEN'S COMPENSATION—LIABILITY FOR DEATH FROM BURNS CAUSED BY DESTRUCTION OF BUNKHOUSE—*State Compensation Insurance Fund, et al. vs. The Industrial Commission of Colorado, et al.*—No. 13947—*Decided June 8, 1936*—*Opinion by Mr. Justice Burke.*

The company, which carried its industrial insurance with the fund, operated a mine near Alma, Colorado. Deceased was there employed and he and some of his companions were sleeping in its bunkhouse. During the night this building caught fire and Nerim incurred the burns which caused his death. Claim was made for compensation under the act and allowed by the referee and the commission and this award was affirmed by the district court.

1. Where the employee is required by the employer to sleep in its bunkhouse during his period of rest from his actual work in the mine

and his death is caused from burns incurred in a fire which destroyed the bunkhouse while he was so occupying it, such death was caused by an accident arising out of and in the course of his employment.

2. The fact that the room and board for the employee was not furnished by the company but he was charged $1.25 per day therefor, does not change the rule where it appears that the deceased was obliged to room and board at the bunkhouse as a condition of his employment and that this was not only a company regulation but a matter of stern necessity enforced by the location of the company's mine and the total absence of other available accommodations. The test is whether or not the workman is given a choice in the matter. Here the employee had no choice.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—PUBLIC UTILITIES—METHOD OF DETERMINING WHETHER A CORPORATION IS A PUBLIC UTILITY—*Colorado Utilities Corporation vs. The Public Utilities Commission*—No. 13481—*Decided June 22, 1936—Opinion by Mr. Justice Holland.*

Moffat Coal Company is a Colorado corporation organized as a coal mining company but with power under its charter to generate and furnish electrical energy. It had a surplus of electrical energy which it sold to the town of Oak Creek under a written contract which specifically provided that the coal company was not a public utility or service company and that it did not undertake to furnish electrical power or energy to the public nor to the inhabitants of the town but merely delivered electrical energy to the town and the town attended to the distribution thereof to its citizens. Application was made to the Public Utilities Commission to have Moffat Coal Company declared to be a public utility and to be required to take out a certificate of authority as such. The commission found that it was not a public utility within the meaning of the public utilities act and upon proceedings for review in the district court the district court affirmed this finding.

1. The mere fact that a corporation primarily engaged in the coal mining business has the power under its charter to construct a plant for the production of electricity and to furnish, sell and supply the same, does not in itself make it a public utility.

2. In addition to the power so conferred by its charter it must be actually engaged as such to be declared a public utility.

3. The fact that it generated more electrical energy than was required for its own business as a coal mining company and sold and delivered the surplus to a municipality, but had nothing to do with the distribution thereof, does not make it a public utility.

4. The contract between the Moffat Coal Company and the town of Oak Creek specifically excluded it as a public utilty.

5. Whether or not it is a public utility depends upon what it does and not upon the powers conferred upon it by its charter.—*Judgment affirmed.*

Mr. Justice Hilliard and Mr. Justice Bouck dissent.

WATERS—ADJUDICATION OF WATER RIGHTS—NOTICE OF HEARING —RIGHT TO REARGUMENT—REVIEW OF FINDINGS AND DECREE —*Martinez, et al. vs. The San Luis Power and Water Company, et al.*—No. 13934—*Decided June 15, 1936*—*Opinion by Mr. Justice Burke.*

This writ is directed to a judgment refusing a reargument and review of findings and decree in a water adjudication and was before the Supreme Court on an application to make the writ a supersedeas. Defendants in error failed to appear and the record is short and insufficient to determine the amount of a bond should the supersedeas be allowed.

1. Where no notice of hearing on the report of the referee in a water adjudication was served upon the plaintiffs in error and they had no knowledge of the hearing and were not present and had no opportunity to object to the entry of decree, the court below should have granted a review or reargument.

2. Section 1789, Compiled Laws of 1921, provides in this class of cases that the trial court for good cause shown is permitted to grant a reargument or review of such decree provided a petition therefor is filed within two years. Much discretion with relation thereto is vested in the trial court, but the difficulty here is that no such discretion was exercised for the reason that the judge concluded he had none. In this he was in error.—*Judgment reversed and cause remanded with directions to hear and consider the petition for review.*

BUILDING AND LOAN ASSOCIATIONS—LOAN—STOCKHOLDER—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—ULTRA VIRES —*The Silver State Building and Loan Association vs. Crump*—No. 13956—*Decided June 15, 1936*—*Opinion by Mr. Justice Burke.*

Crump brought this action to recover on an alleged loan. The association contended he was a mere stockholder. The jury returned the verdict for Crump and to review the judgment entered thereon the association prosecutes this writ of error and asks that it be made a supersedeas.

1. Crump bought stock in the association on monthly payments. Before completing these he became dissatisfied and he sought to withdraw, which under his contract he was entitled to do. An authorized agent settled with him for what he termed "a time certificate paying off in a period of one year." Later the agent attempted to substitute other stock by delivering the same to Crump's wife. This was returned when Crump demanded payment as per his receipt. The association thus claims an acceptance. The question was properly submitted to the jury, which resolved it against plaintiff in error.

2. In order for the defense of ultra vires to be available it must be pleaded.

3. Where a corporation has profited by a transaction and a party has dealt with the corporation relying on its power to do a certain act and by reason thereof has changed his position, the defense of ultra vires on behalf of the corporation is not available.

4. This was a case of conflicting evidence and the verdict of the jury is amply supported.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT DISTRICT BONDS —GENERAL OBLIGATIONS—NONLIABILITY OF CITY ON GUARANTY OF LOCAL IMPROVEMENT DISTRICT BONDS—*The City of Aurora vs. Krauss*—No. 13647—*Decided June 15, 1936—Opinion by Mr. Justice Holland.*

Krauss sued the city of Aurora to recover judgment on thirteen $1,000 bonds owned by him, payment of which was in default. For a first cause of action he alleged the bonds to be general obligations of the city. In a second cause of action he sought to hold the city by reason of its guaranty of the bonds. The plaintiff recovered judgment for the face of the bonds and interest.

1. Where it appears that the city adopted an ordinance creating an improvement district, known as water district No. 3, which embraced about one-fourth of the city and provided for the issuance of district bonds, and further provided that the city guaranteed the payment of the payment bonds, bonds issued in pursuance thereof were not general obligations of the city, but were the obligations of the particular water district.

2. The municipality was without power to guarantee the payment of the local improvement district bonds.

3. The bonds in this case having a maturity in six years after their issuance are void upon their face as a general obligation, because such bonds must mature in not less than ten years.—*Judgment reversed.*

Mr. Justice Butler and Mr. Justice Bouck concur in part and dissent in part.

CARRIERS—LIABILITY FOR FAILURE TO DELIVER FREIGHT—AGREEMENT OF CARRIERS TO DEFER DELIVERY—NO DEFENSE—*Union Pacific Railroad Company vs. Spano*—No. 13905—*Decided June 22, 1936—Opinion by Mr. Justice Hilliard.*

This was an action in damages for refusal of a common carrier to deliver a carlot shipment of grapefruit to the consignee. Delivery of the shipment, which arrived in Denver about 10:40 a. m., could have been made within from fifteen minutes to two hours, as the consignee

demanded, but was refused by the carrier during business hours of that day. In consequence, the market declining, the consignee suffered damage. The defense below was on the theory that an agreement previously entered into by all Denver delivering railroads to the effect that freight of the character involved arriving after 7:00 a. m. shall not be delivered before 5:30 p. m. of the same day, was such an agreement as absolved the railroad company from making delivery to the consignee. The plaintiff had judgment below.

1. The carrier was bound to convey the shipment to its destination and make delivery to the consignee on reasonable demand during business hours.

2. A failure to so deliver constitutes negligence with consequent liability for loss due to decline on the market during retention of the shipment.

3. An agreement between the carrier and all other railroads serving Denver not to make delivery between 7:00 a. m. and 5:30 p. m. is unreasonable and is not binding upon the consignee and constitutes no defense.—*Judgment affirmed.*

Mr. Justice Bouck dissents.

TAXATION—MUNICIPAL CORPORATION—EFFECT OF CERTIFICATE OF COUNTY TREASURER THAT ALL TAXES ARE PAID ON REAL ESTATE—LIABILITY OF MUNICIPALITY AND COUNTY TREASURER THEREFOR—*Burton vs. City and County of Denver, et al.* —No. 13808—*Decided June 22, 1936—Opinion by Mr. Justice Burke.*

Burton brought this action to have tax sales held void, certificates of purchase cancelled and claims based thereon adjudged invalid. He based his right to the relief prayed for on a certificate of taxes paid, issued by the county treasurer. He bought the property relying upon this certificate of the county treasurer that all taxes were paid. The taxes had not been paid and there was an outstanding tax sale. Judgment went against Burton below.

1. The suit was properly brought against the City and County of Denver. It was not necessary to bring it against the board of county commissioners and the treasurer.

2. The purpose of the statute requiring the treasurer to give a certificate of all taxes due cannot be construed as only requiring a certificate of taxes due and not to cover no taxes due. The statute covers both the affirmative and negative. This was the purpose of the act. They require the treasurer not only to certify as to taxes due, but also to cover a certificate that all taxes were paid or that no taxes were due.

3. The statute requiring the county treasurer to give such certificate is a valid statute and is not in conflict with Section 7179, C. L. 1921, which provides that taxes on real estate shall be a perpetual lien

upon such real estate until paid. While the two statutes seem to be in conflict, yet they must be read together and reconciled if possible. They can be and are reconciled and these statutes together mean simply that the taxes should be a perpetual lien upon the real estate until paid or until the treasurer certifies payment.

4. The two statutes can be further reconciled on the ground that the word "paid" is often very loosely used and is always liberally construed. Hence, the requirement of Section 7179 that the tax remained a lien until paid may well have been considered by the Legislature as met by the further provision that the loser, under a false certificate, was given, as payment, a claim for the amount against the treasurer's bond.

5. The statute under this construction does not conflict with Sections 3, 8, 9 and 10 of Article X and Sections 25 and 38 of Article V of the state constitution.—*Judgment reversed.*

Mr. Justice Campbell not participating.

OSTEOPATHS—PHYSICIANS AND SURGEONS—NECESSITY OF EXPERT TESTIMONY—NEGLIGENT TREATMENT—MOTION FOR NONSUIT—*Farrah vs. Patton*—No. 13693—*Decided June 22, 1936*—*Opinion by Mr. Justice Butler.*

Farrah sued Patton, an osteopath, for damages for alleged negligence. The evidence showed that the plaintiff consulted the osteopath for a stiff neck and that the defendant gave the plaintiff's neck a terrific jerk which paralyzed one side of his body, besides other injuries as a direct and immediate result therefrom, and that this condition had continued for over three years. A motion for nonsuit was sustained by the court below.

1. In ordinary malpractice cases the question of whether or not a physician was negligent must be tested by the recognized standards of his own school, and such standards must be established by the testimony of experts. In certain types of malpractice cases, negligence can be proved by nonexpert witnesses.

2. This is true where the recovery is sought, not for negligence in making an incorrect diagnosis or in adopting the wrong standard of treatment, but for the performance of an operation in a negligent manner, in which case any pertinent evidence having a fair tendency to sustain the charge of negligence is sufficient to take the case to the jury.

3. Here the plaintiff admits that the diagnosis was correct and that the proper standard of treatment was adopted, but contends that defendant applied that standard in a negligent manner and there was sufficient evidence to the jury as the plaintiff made a prima facie showing of negligence on the part of the defendant, and of a causal connection between that negligence and the plaintiff's injuries.—*Judgment reversed.*

INSURANCE—ACCIDENT—NOTICE OF DEATH—WAIVER—*Federal Life Insurance Company vs. Wells*—No. 13610—*Decided March 30, 1936*—*Opinion by Mr. Justice Butler.*

Katherine Wells, the plaintiff, recovered judgment against the insurance company on an accident insurance policy. The company seeks a reversal of the judgment. The insured was killed instantly by lightning on June 10, 1931, while the policy was in force. The policy provided for immediate notice. Written notice was given on May 25, 1933.

1. The question was properly submitted to the jury as whether or not the insurance company waived the requirements of the policy respecting the time of giving notice and also whether or not notice of death was given within a reasonable time and on these issues the jury found in favor of the plaintiff. The undisputed evidence shows that the plaintiff waived compliance with the provisions in question.

2. Where the insurance company, prior to filing its answer, assigned for its only reason for denying liability that the claim did not come within the coverage of the policy, it waived its right to insist upon all other grounds of objection, including failure to comply with the provisions concerning the time to give notice.

3. The word "coverage" means the sum of risks which the insurance policy covers. The word cannot be stretched to cover a failure to give notice within a specified time.

4. An attempted reservation in a letter that the letter was written without prejudice to or waiver of any of the defendant's rights or defenses is not available where the defendant definitely stated the specific ground upon which it based its denial of liability.

5. A denial of liability or a refusal to pay not predicated on the failure to furnish proofs is a waiver of any objection on that ground, irrespective of whether the denial precedes or follows the time within which proofs should have been furnished. The same rule applies to cases involving failure to give notice within the prescribed time. It is the general rule that before one can be charged with waiver there must be some change of position to the detriment of the other person and the present case meets the requirements for relying upon the fact that the sole reason assigned for denial of liability was that the claim did not come within the coverage of the policy. The claimant might have believed that the only defense would be that the policy does not cover death by lightning.—*Judgment affirmed.*

INSURANCE—ACCIDENT—SUICIDE—SANE—*North American Accident Insurance Company vs. Cavaleri*—No. 13862—*Decided March 30, 1936*—*Opinion by Mr. Justice Butler.*

The insurance company issued to Cavaleri a policy of insurance whereby it agreed to pay to the plaintiff Nettie Cavaleri a sum of money in case Cavaleri should die through external, violent and accidental

means causing his death within ninety days from the occurrence of the accident. While the policy was in force Cavaleri committed suicide by shooting himself in the head with a gun. There was no evidence of insanity. Plaintiff recovered below.

1. In order to recover on a policy insuring against accidental death, a plaintiff must prove that the insured died as the result of an accident.

2. Where a person commits suicide while insane, the death is accidental; where he commits suicide while sane, the death is not accidental.

3. Every person is presumed to be sane until the contrary appears.

4. The presumption of sanity is not overcome by the fact of suicide.

5. There being no evidence having the slightest tendency to show that Cavaleri was insane when he committed suicide and as plaintiff failed to prove accidental death, she failed to show a right of recovery on the accident policy.—*Judgment reversed.*

PLEADING—DEMURRER—AMENDED COMPLAINT—DEPARTURE—STATUTE OF FRAUDS—INSTALLMENTS—*Schildt vs. Topliss*—No. 13921—*Decided March 30, 1936*—*Opinion by Mr. Justice Burke.*

Topliss sued Schildt to recover an unpaid balance of $1000 on the purchase price of real estate, and to establish the same as a lien against the property. The plaintiff prevailed below.

1. To the original complaint, alleging a promise to pay on demand, a demurrer was filed on the grounds of want of facts and the bar of the statute. An amended complaint was filed alleging a promise to pay within three years. Motion was filed to strike on the grounds of departure. The motion was overruled and Schildt answered. By answering the defendant waived the departure, if any.

2. The date of the transaction alleged was August 30, 1926. The answer pleads and the evidence shows that the unpaid balance was to be met by annual installments, the last of which would fall due August 30, 1929. The complaint being filed March 20, 1935, and the amended complaint June 13 following, both the pleading and proof bring the cause within the six year statute.

3. The statute of frauds not being pleaded was waived. However, half of the purchase price was paid and the defendant had both the deed and possession of the property.

4. The allegation that the balance was to be paid in three years is not inconsistent with pleadings and proof that it was to be so paid in installments.—*Judgment affirmed.*