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Supreme Court Decisions

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CONTRACTS—PAROL EVIDENCE TO CHANGE OR MODIFY—INSTRUCTIONS TO JURY—*Dilliard vs. Wilson*—No. 13131—*Decided April 23, 1934—Opinion by Mr. Justice Holland.*

Wilson brought suit against Mrs. Dilliard to recover for services rendered as an architect on several causes of action, first on a written contract. Second, on quantum meruit.

At the time the contract was entered into defendant, an elderly woman, was the owner of some lots in Denver with an old building upon them and with practically no equity above a mortgage of $12,500.00. The property was about to be sold for taxes. One Rodewald suggested to her that he could recommend to her an architect who could draw plans for a half million dollar apartment building and that he would attend to the financing of the building. He introduced her to the plaintiff, an architect, who entered into a written contract providing for an architect's fee of 4% of the cost of the building, which $350.00 was to be paid when the plans were completed and the balance when the building was financed.

The building was never financed and never built, but the plans were furnished, for which the defendant paid $250.00 and offered to pay the balance of $50.00. At the trial the recovery on the written contract was abandoned and recovery was had on the quantum meruit for $3750.00.

Defendant contended that the plaintiff had agreed to finance the building although it was not mentioned in the written contract.

1. Where a contract, although plain and unambiguous as to its terms, clearly shows that it does not embrace all of the agreements between the parties, it is incomplete and oral testimony is proper to show the real contract between the parties.

2. Where the meaning and purpose of the contract is open to conjecture the jury should have been placed by proper instructions, in a position as nearly as possible to that of the contracting parties so that they could properly determine the intention of the parties as well as the interpretation of the incomplete contract.

3. The abandonment of the first cause of action by the plaintiff on the written contract and his stand upon quantum meruit opened the door for the admission of what could otherwise have been considered as parol evidence varying the terms of a written contract. The defendant stood upon the contract as written by which she was not obligated to finance the undertaking. Had the contract, as written, remained a part of plaintiff's case, it would not have furnished him cause of action against defendant as to anything beyond the sum of $300.00. Any

balance ever to become due depended upon the final financing and completion of the building.

When plaintiff abandoned his first cause of action on the contract he abandoned the very basis for a claim on quantum meruit because the contract specifically fixed the limits of his compensation in the event the undertaking was never carried forward, for the refusal of the Court to give instructions requested by the defendant on defendant's theory of the case was reversible error. *Judgment reversed with directions.*

VENUE—PLACE OF TRIAL ON BREACH OF CONTRACT—*The Grimes Co., Inc. vs. Nelson*—No. 13471—*Decided March 12, 1934—Opinion by Mr. Justice Hilliard.*

Action for damages on breach of contract.

Defendant moved for a change of place of trial and on denial elected not to plead further and to stand on its motion. Default was entered, proof made by plaintiff and judgment given for plaintiff. Ruling on the motion is challenged.

1. Where plaintiff resides in one county and defendant in another, trial should be had in the county of defendant's residence unless service is made in the county of plaintiff's residence.

2. But regardless of residence or place of service, an exception is that actions upon contract may be tried in the county in which the contract was to be performed.

3. The place where a cause of action for a breach of contract arises is almost universally the place where the contract is to be performed.

4. In this case defendant contracted that the delivery of the bags at Center in Saguache County, Colorado, where the plaintiff resides and Saguache County was the proper place to bring the action.—*Judgment affirmed.*

SLANDER—AGENT'S STATEMENTS BINDING PRINCIPAL—VARIANCE—ACTUAL AND EXEMPLARY DAMAGES—*Kendall vs. Lively*—No. 13376—*Decided March 12, 1934—Opinion by Mr. Justice Bouck.*

Lively sued Kendall for slander and received verdict for $200.00 actual damages and $275.00 exemplary damages. The plaintiff was engaged in producing and selling milk and operating a dairy business in Arvada. The defendant was a competitor and alleged slanderous words were to the effect that the milk sold by plaintiff was filthy, dirty, unhealthful and taken from filthy and unhealthful cows, and contained bacteria.

1. In an action for slander, defamatory words spoken by an employee are properly admitted as against the employer, even though the complaint charges that the defendant made them himself.

2. There was no variance between the pleading and the proof.

3. Where words are actionable per se, which is the case here, injury is presumed without the pleading and proving of special damage and plaintiff is entitled to general damages as a matter of course.

4. Where exemplary damages are claimed, evidence of malice, wantonness or recklessness may be direct or circumstantial.—*Judgment affirmed.*

OIL AND GAS LEASES—QUIETING TITLE AGAINST—CHANGE OF VENUE—JUDGMENT ON PLEADINGS—*Spaulding et al. vs. Porter* —No. 13073—*Decided March 19, 1934*—*Opinion by Mr. Justice Bouck.*

Mary A. Porter brought suit in the Court below against Spaulding and O'Leary on two causes of action, one for rescission and cancellation of an oil and gas lease and the other, to quiet the title alleged to have been clouded by the same lease, which Mrs. Porter claimed is invalid and void. A demurrer to the first cause of action was sustained and the trial on the second cause of action to quiet title was to the Court whose finding and judgment were for the plaintiff.

1. In an action to quiet title the case is properly brought in the County where the real estate is situate, even though defendants reside in another County and are served in another County.

2. Where the Court denies motions to strike and to make more specific directed to the complaint, the defendants waive any error by answering.

3. Motion for judgment on the pleadings was properly denied even though plaintiff failed to file a replication within ten days after notice of filing of answer, where the defendants instead of requesting the clerk to enter a default, filed motion for judgment on the pleadings, and th replication was filed before the matter was heard by the Court.

4. An oil and gas lease which purports to be perpetually renewable at the option of the lessees by the annual payment of the paltry sum of $2.00 even though nothing be ever actually done or attempted to be done by the lessees to develop oil or gas in the tract under lease for a period of over six years, is revocable.

5. Diligence in the prosecution of development work is an implied condition of bona fide tenure, particularly, where the subject of actual and definite commencement of operations is dealt with as one of paramount concern.

6. In this case where the plaintiff after becoming owner of the land subject to the lease promptly declined to receive the $2.00 rental payment tendered, and made unequivocal attempts to terminate the lease, the Court should consider such attempts to be entitled to be effectuated by this Court.

7. Where the lessees include a covenant rendering them immune from any action for damages and an action for the recovery of the land or the possession thereof will not lie because the plaintiff herself is in actual possession and the defendants never had been, a suit to quiet title is the appropriate remedy.

8. Where the plaintiff claims title by conveyance from a surviving joint tenant, it is not necessary to prove her title in the particular manner provided for in Chapter 136, Session Laws of 1923. This statute is not exclusive and death and survivorship may be proven by direct evidence in the trial.

9. Where the evidence shows that the defendants would not have accepted any tender if one were made no tender is necessary as the law does not require one to do a vain and useless thing, nor was tender even necessary in the action to quiet title.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—OPERATION OF STREET SWEEPER—GOVERNMENTAL FUNCTION—NON-LIABILITY FOR TORT—*LeMarr vs. City of Colorado Springs*—No. 13199—*Decided March 26, 1934*—*Opinion by Mr. Justice Holland.*

Plaintiff below, LeMarr, was injured in a collision between an automobile and a street sweeper machine in Colorado Springs, which machine was being operated by the City of Colorado Springs at the time in cleaning the streets.

A general demurrer to the complaint was sustained and plaintiff stood on her complaint, and judgment was entered in favor of defendant, to which judgment the plaintiff assigns error.

1. Street cleaning is one of the allied sanitary measures of a municipal corporation and as such affects the welfare of all the public.

2. Ordinarily, when sweeping the streets, a municipality is exercising its discretionary powers to protect public health and comfort and is not performing a special corporate or municipal duty to keep them in repair, and in so doing is exercising a governmental function and is not liable for the acts or omissions of its agents performing such functions.

3. Street cleaning is a measure for the protection of health and is distinguished from street maintenance in which latter case the municipality is liable for the acts and omissions of its agents.—*Judgment affirmed.*

NON-SUIT—ERROR IN SUSTAINING MOTION FOR—LIABILITY OF OWNER FOR ICE ON SIDEWALK—*Robinson vs. Belmont-Buckingham Holding Co.*—No. 12933—*Decided March 26, 1934*—*Opinion by Mr. Chief Justice Adams.*

Miss Robinson brought an action against the Belmont-Buckingham Holding Co., the owner of an apartment house, for injuries sustained as the result of falling on a cement sidewalk in front of the Belmont Apartments in Denver, owned by the company, on the ground of negligence in permitting ice to remain on the sidewalk which created a dangerous condition and which was known or ought to have been known to the defendant. Motion for a non-suit made by defendant was sustained and plaintiff prosecutes error.

1. In a motion for non-suit, the evidence must be construed in the light most favorable to plaintiff.

2. It is only where there is an entire absence of testimony tending to establish the case that a non-suit may be properly ordered or a verdict directed. Where the question depends on a state of facts from which different minds may honestly draw different conclusions on that issue, the question must be submitted to the jury for determination.

3. Where the evidence is clear that the sidewalk was in a dangerous condition, the question of whether the defendant was guilty of negligence was a question for the jury.

4. The argument that the plaintiff knew or ought to have known of the dangerous condition of the walk and that she therefore assumed the risk of using it, is not tenable. She was a tenant in the apartment house, was compelled to leave the building to go to her work and she was not required to surmise that ice would be left on the sidewalk, which was concealed by snow which had later fallen over it.

5. The fact that the apartment house regularly cleaned the sidewalks gave the tenants the right to assume that it would be done in a workmanlike manner.—*Judgment reversed.*

ESCHEAT—PROPERTY OF DECEASED MEMBERS OF COLORADO SOLDIERS AND SAILORS HOME—*Estate of William McManis vs. Herrmann*—No. 13180—*Decided March 26, 1934*—*Opinion by Mr. Justice Butler.*

William McManis, an inmate of the State Soldiers and Sailors Home, died intestate leaving over $3,000.00 in cash. One of the commissioners of the Home was appointed as administrator and after paying the expenses of administratorship, amounting to over $400.00, had a balance in cash of over $2,800.00 in his hands, and by order of Court this was paid to the Soldiers and Sailors Home. Thereafter Herrmann, claiming to be his sole heir, filed proceedings to set aside the distribution and order the Home to refund the money so that she could obtain it as sole heir. A demurrer to the petition was overruled and the Court below granted the prayer of the petition as they stood on the demurrer.

1. The policy of our law is to have property descend to the heirs, subject to debts, in the manner provided in Section 5151 of the Compiled Laws.

2. Escheats and forfeitures are not favored by law.

3. A doubt as to whether property is subject to escheat is resolved against the state.

4. Section 708 of the Compiled Laws providing for the escheat of money not derived from the sale of personal property of the deceased under Section 707 is void because the subject thereof is not clearly expressed in the title of the act and is not germaine to the subject expressed in the title.

5. The act of 1917, Sections 707 and 708, was not intended to apply where the property left by a deceased inmate of a Soldiers and Sailors Home was sufficient to justify administration, particularly, where there are creditors.—*Judgment affirmed.*

VERDICT—DIRECTING JUDGMENT FOR PLAINTIFF AT CLOSE OF OPENING STATEMENT OF DEFENDANT—*Rock River Investment Co. vs. Mountain Finance Corp.*—No. 13137—*Decided March 26, 1934*—*Opinion by Mr. Justice Campbell.*

Mountain Finance Corporation sued Rock River Investment Co. upon a promissory note of $20,000.00. The answer admitted the execution and delivery but further alleged that the delivery was conditional in that the note should be paid only out of certain dividends which might thereafter be declared and paid by the Central Savings Bank and Trust Co., and that no dividends were ever declared or paid and that the note was accepted by the plaintiff with knowledge of such condition. The replication denied this allegation in the answer. At the close of the opening statement of defendant's counsel the trial Court, on plaintiff's motion, directed a judgment for plaintiff in the sum prayed for on the theory that the opening statement of counsel for defendant was an admission that the alleged condition was made prior to the execution and delivery of the note and, therefore, could constitute no defense.

1. A motion for a dircted verdict or for a directed judgment, based on the opening statement alone, should not be granted unless exceptional circumstances imperatively require it.

2. The answer of the defendant should be considered and if the opening statement and the answer combined state a good defense on their face, it was for the jury to determine the facts. Where there are two inconsistent statements of essential facts, one made in the opening statement of counsel and another in the answer, it is not for the trial judge, on a motion for a directed verdict, to pass upon the facts. That is the function of the jury.

3. While the general rule is that a written contract may not be varied by parol, this general rule does not apply to actions upon promissory notes, as in a promissory note the delivery may be shown to have been conditional or have a special purpose only, and this may be proven by parol evidence.—*Judgment reversed.*

WILLS—RIGHT OF ADOPTED CHILDREN CUT OFF BY WILL—*Neville et al. vs. Bracher et al.*—No. 13212—*Decided March 26, 1934*—*Opinion by Mr. Justice Burke.*

In 1905 Mrs. McHugh was awarded a final decree of divorce together with the custody of the two daughters, Beatrice and Genevieve.

The defendant's husband was served by publication. His whereabouts were then and have been ever since unknown.

On October 6, 1914, Mrs. McHugh was married to Mr. Neville and about one hour before the marriage ceremony they joined in a petition filed in the Juvenile Court at Denver, Colorado, and a decree was entered whereby Beatrice and Genevieve were adopted and it was stipulated in the decree of adoption that the petitioners were not to disinherit the children, which promise is one of the conditions of the decree.

Thereafter the Nevilles separated and a divorce followed and Mr. Neville made a will disinheriting Beatrice and Genevieve, and after his death the probate of this will was contested by Beatrice and Genevieve. The County Court held the will not void insofar as it violated the prohibition against disinheriting contestants and on appeal to the District Court the District Court held to the contrary, and that the will was void so far as it disinherited the adopted children and held them each entitled to one-seventh of the estate.

1. The contention that the decree of adoption is void because it falsely recited that Mr. Neville and Mrs. McHugh were husband and wife, and because it was not consented to by the father of the children is not tenable.

2. The adoption of these children was a part of a consideration for the marriage which took place within an hour after the adoption decree. The law does not ordinarily notice fractions of a day, hence the adoption and marriage are presumed to have been contemporaneous.

3. The consent of a parent to adoption is not required where that parent has abandoned the child.

4. A decree of adoption cannot be attacked collaterally.

5. A testator cannot disinherit an adopted child contrary to the specific prohibition of the decree of adoption.—*Judgment affirmed.*

JUDGMENTS—SUFFICIENCY OF EVIDENCE TO SUSTAIN—AMOUNT OF DAMAGES—RESCISSION—*North American Savings and Loan Assoc. et al. vs. Phillips*—No. 13218—*Decided March 26, 1934*—*Opinion by Mr. Justice Holland.*

Clarretta M. Phillips recovered judgment in the Court below against certain defendants for $2,230.00 together with body execution against certain of the defendants on a complaint for rescission and money demand, which was tried on the first cause of action on the ground that through false representations she delivered a certificate of stock of the Republic Bldg. and Loan Association of the alleged value of $2,000.00 in exchange for certificate for two hundred shares of Class A stock of the defendant company.

1. There is no evidence upon which a verdict for damages can be predicated for the reason that the plaintiff now has the stock she traded for and a judgment for more than the face value of the stock she parted

with, and if the judgment is sustained and collected she will be better off than when she made the trade.

2. At the trial she made no tender back of the stock she received and she offered no evidence as to the value of the stock she received.

3. The measure of damages is the difference in value of what plaintiff was induced to part with and the value of what she received in the transaction, and this difference, if any, could not be determined from the evidence in the case, for so far as the evidence is concerned, that which she received may be of greater value than what she gave up.—*Judgment reversed.*

PLEADINGS—SUFFICIENCY OF COMPLAINT — ACCOUNTING — CONVERSION—*Friedrichs et al. vs. The Midland Savings and Loan Co.* —No. 13194—*Decided April 2, 1934*—*Opinion by Mr. Justice Burke.*

Friedrichs with other plaintiffs sued for possession of real property and accounting of rents and profits in one cause of action, and in a second cause of action for $25,000.00 damages for the alleged wrongful conversion of personal property and $500.00 per month for its use.

The defendant demurred to each cause of action for want of facts and the demurrers were sustained and plaintiffs elected to stand, whereupon the action was dismissed and the plaintiffs prosecuted error.

1. An equitable cause of action for an accounting is presented in the first cause of action.

2. The contention of defendant that the first cause of action is one in ejectment and that ejectment will not lie under the circumstances cannot be urged because this question was not passed upon by the trial Court.

3. As to the second cause of action, complaint is based upon a claim that personal property was delivered to defendant under an express agreement for its return when certain payments were made, and that defendant elected to hold it as a special pledge for a particular portion of the amount due, and that it diverted rents and profits to the full payment of the sum due and failed to account. Under these allegations the pledge is redeemed and the allegations are sufficient to state a cause of action.—*Judgment reversed and cause remanded with instructions to overrule the demurrers.*

WORKMEN'S COMPENSATION—EMPLOYEE INJURED ON WAY TO WORK—*The Driscoll Construction Co. et al. vs. Industrial Commission of Colorado et al.*—No. 13442—*Decided April 2, 1934* —*Opinion by Mr. Justice Bouck.*

The Industrial Commission awarded compensation for temporary total disability to Ecker, an employee of the Driscoll Construction Co. The claimant was employed to work on road construction in which he

was required to furnish his own team and to hitch it to a fresno. The company made no arrangement for stabling the team, and on the day of the accident the foreman reprimanded Ecker for being late; and while he was driving his team to hook it onto the fresno he was injured.

The Commission awarded compensation which was affirmed by the Court below.

1. The contention was made that the accident did not arise out of or in the course of the employment because the claimant had not yet hitched his team to the fresno, and that the accident happened on his way to his work.

2. There are special circumstances in this case which render the injury compensable while the employee was on his way to work for the reason that it was necessary for him to bring his own horses from the stable, which was the customary way of getting the team upon the ground in order to prosecute his work, and at the time he was injured he was doing just what his employment demanded of him, and the case comes within the letter and spirit of the Workmen's Compensation Act and he was entitled to compensation.—*Judgment affirmed.*

CONTRACTS—PLEADINGS—SUFFICIENCY OF COMPLAINT—*Haldane et al. vs. Potter*—No. 13074—*Decided April 2, 1934*—*Opinion by Mr. Chief Justice Adams.*

Haldane and Walker brought suit against Potter to recover judgment in the sum of $20,000.00, alleging that in 1929 the owners of certain mining claims contracted with the plaintiff to pay plaintiffs as a commission any amount they could sell the claims for above $50,000.00. Plaintiffs further allege that in 1931 the owners of the claims sold the mining claims to Potter for $70,000.00 and that Potter assumed the payment of plaintiffs' commission of $20,000.00. Demurrer was sustained to the Court below for nonjoinder of the original owner of the claims who made the original contract for commission.

1. The original owners of the mining claims who made the original contract for the payment of commissions were not necessary parties as this suit was based upon the subsequent contract made in 1931 by the purchaser of the mining claims in which contract he assumed the payment of the commission.

2. The latter contract made with the purchaser, Potter, was only between the owners of the claims and Potter and the plaintiffs were not parties to the contract, but it was a contract made for the benefit of third parties, to-wit: the plaintiffs, and third parties may bring an action on such a contract.

3. The law disapproves of bringing in parties whose presence is neither necessary nor proper.

4. In the complaint, which is the only pleading involved, it does not appear that the original owners of the mining claims have any in-

terest in the controversy or that they would or could be affected by the judgment.

Judgment reversed and remanded with directions to overrule the demurrer.—*Mr. Justice Campbell dissents. Mr. Justice Holland not participating.*

CONTEMPT—*Munson vs. Luxford as Judge*—No. 13430—*Decided April 2, 1934—Opinion by Mr. Chief Justice Adams.*

Munson wrongfully collected the proceeds of two insurance policies belonging to an estate. Munson was cited into the Probate Court under Section 5378 Compiled Laws of 1921, and judgment was entered that Munson pay into the estate the proceeds of the policies and if not paid authorized the administratrix to bring suit. Suit was brought in the County Court and judgment entered for the amount, and no appeal was taken. After the judgment was entered the County Judge, sitting in probate, entered an order requiring Munson to pay the judgment by a certain date or in lieu thereof that Munson be committed to jail for contempt.

Munson applied to the District Court for a writ of certiorari and a demurrer thereto was sustained by the District Court. Plaintiff elected to stand. The action was dismissed. A few days afterwards Munson filed a motion to vacate the judgment and asked leave to file an amended petition, which was denied. Munson prosecutes error.

1. The order of the County Court made pursuant to proceedings under section 5378 C. L. 1921 being in the alternative was proper, said section being in the nature of a discovery it properly authorized a suit to be brought to recover the property belonging to the estate.

2. The judgment subsequently obtained in another action upon separate proceedings was the foundation for the order of commitment which was not resorted to until after such judgment had been rendered, which was proper.

3. The fact that the judgment was entered in a different numbered case in the County Court and that the commitment made at a later date and in a separate numbered cause is immaterial.

4. Munson did not incur an ordinary liability and the judgment entered is conclusive that Munson had tampered with a trust fund and was guilty of a civil contempt in flaunting the order of the County Court to pay the money into the registry of the Court.

5. The order of commitment upon failure to pay the judgment was equivalent to an order for a body execution.

6. There is no merit in the contention that the order for her imprisonment is void because there was no order for body judgment in the civil suit, because the order of commitment later made was as effective as though a body judgment had been entered in the prior cause. —*Judgment affirmed.*

CHATTEL MORTGAGES—PLEADING—WAIVER—*The Second Industrial Bank, a corporation, vs. Eva Surratt and George Surratt*—No. 12789—*Decided April 9, 1934—Opinion by Mr. Justice Holland.*

Plaintiff had given defendant bank a note secured by chattel mortgage on household furniture and equipment. Later plaintiff removed from the city leaving the mortgaged property in the possession of a tenant. The defendant bank subsequently declared default in the terms of the note and mortgage, took possession of the chattels and sold the same. Plaintiffs returned to the city and filed suit on two causes of action:

(a) for failure to use reasonable care and diligence in disposing of said goods, and selling for inadequate price,

(b) for conversion of chattels belonging to plaintiffs.

Judgment was rendered for plaintiffs on both counts. Defendant assigns error as follows: causes of action improperly united; second cause of action did not state a cause of action because of failure to allege ownership; and the findings on each cause of action were unsupported by the evidence. *Held:*

1. The objection for improperly uniting causes of action was waived when defendant answered to the merits, after its special demurrer was overruled.

2. Allegation that plaintiffs were entitled to the possession of the property was sufficient to enable them to maintain an action for conversion and the pleadings were aided by the testimony of plaintiffs at the trial that they were the owners of the property.

3. There was sufficient evidence to support the findings on both counts. Defendant could not prove default, in payment or by abandonment of the property, because these defaults were not specifically alleged by it.—*Judgment affirmed.*

SPECIFIC PERFORMANCE — SUFFICIENCY OF EVIDENCE — *Porter Thompson Co. vs. P. M. Kistler*—No. 13241—*Decided April 9, 1934—Opinion by Mr. Justice Campbell.*

Kistler brought suit in District Court against Porter A. Thompson for specific performance of a contract concerning real estate which was entered into between Kistler and Thompson. Later, and before final judgment upon application of plaintiff, Porter Thompson Co., a corporation, was also made a party defendant on the ground that certain real estate, regarding which, specific performance was sought, stood in the name of the corporation of which corporation the defendant, Porter A. Thompson, was president and owner of all of the capital stock.

The Court below decreed specific performance and error was prosecuted by Porter A. Thompson.

1. In an action for a specific performance on a contract to acquire interest in real estate where it appears that part of the real estate stands in the name of a corporation in which the individual defendant was the president and owner of all of the capital stock, it was proper to enter an order making the corporation a party defendant in order that a full determination of the entire matter might be had.

2. Evidence examined and was sufficient to sustain the decree of the lower Court, decreeing specific performance of the contract.—*Judgment affirmed.*

MANDAMUS—USE OF WRIT TO COMPEL ISSUANCE OF COLLEGE DEGREE—*The People vs. Lory et al.*—No. 13166—*Decided April 9, 1934—Opinion by Mr. Justice Bouck.*

A writ of mandamus to compel the Faculty Council of the Colorado Agricultural College to recommend him for the degree of Master of Arts, the District Court, on hearing, dismissed the case and Moore prosecuted error.

1. Where the Faculty Council of a college is invested with the power of deciding whether or not a candidate for a Master's Degree has complied with the necessary requirements to obtain same and after two full hearings on the matter have decided that the candidate is not entitled to such degree, their decision is conclusive on the question as to whether a student has performed the conditions entitling him to a degree where they act in good faith and within their jurisdiction.—*Judgment affirmed.*

MUNICIPAL CORPORATIONS—SUFFICIENCY OF CRIMINAL COMPLAINT FOR VIOLATION OF ORDINANCE—*Sronce vs. The City and County of Denver*—No. 13061—*Decided April 9, 1934—Opinion by Mr. Justice Burke.*

Sronce was convicted in the Municipal Court of Denver for reckless driving in the Municipal Park road belonging to the City and County of Denver, but actually situate in Jefferson County. He appealed to the County Court and on trial de novo he was again found guilty of the violation of the ordinance and he prosecuted error to the Supreme Court.

1. The complaint upon which he was convicted was wholly insufficient to charge the violation of the city ordinance, the complaint failing to allege the particular section and article of the ordinance which was claimed that he had violated.

2. The question involved was the question of the jurisdiction of the municipal Court of the City and County of Denver over the municipal parks system, which is located in another county, but as the Court was without jurisdiction for want of a proper complaint the fine imposed had nothing to support it.—*Judgment reversed. Mr. Justice Butler and Mr. Justice Bouck dissent.*

ASSGNABILITY OF TORT CLAIMS—FRAUD—PLEADING—*Frances Micheletti, and Frances Micheletti, as Executrix of the Estate of John B. Micheletti, Deceased, vs. Clara Moidel*—No. 13136—*Decided April 9, 1934—Opinion by Mr. Justice Butler.*

Plaintiff alleged that defendant owned the theatre; that during negotiations between plaintiff and her husband for the sale of the theatre defendant fraudulently represented the weekly rceipts and distributed free passes so as to make the attendance at the theatre appear larger than it ordinarily was, and concealed the fact that many patrons of the theatre during the negotiations paid no admission. Plaintiff alleged damages from this fraud and an assignment to plaintiff by her husband of his cause of action against defendant. Defendants demurred for a defect of parties plaintiff, which was overruled. Defendants then answered that they agreed to sell only the personal property situate in the theatre, and not the good will of the business. When the case came on for trial, defendants moved for judgment on the pleadings, which was denied. Defendants declined to participate further. Judgment was rendered for plaintiff. *Held:*

1. The claim of plaintiff's husband against defendants growing out of the fraud was assignable and there was no defect of parties plaintiff.

2. Motion for judgment on the pleadings was rightly denied, it appearing that the contract which plaintiff and her husband were induced to make by the fraud provided, in addition to the sale of the personal property, for the leasing of the theatre for five (5) years with an option of renewal and an option to purchase the real estate.—*Judgment affirmed.*

BILLS AND NOTES—CONDITIONAL DELIVERY—PURCHASE OF STOCK IN COMPANY—*Denison Clay Co. et al. vs. Pennock et al.*—No. 12931—*Decided April 16, 1934—Opinion by Mr. Justice Burke.*

Pennock bought stock in Denison Clay Co. and paid for part of it in cash and gave his note for the balance. He brought this action to compel delivery of all of the stock he had paid for and the return and cancellation of his note, and had judgment accordingly. He bought the stock and gave his note in 1927, and claimed that the conditions under which he gave the note were that the company should supply labor for him to the amount of the note, and the note was only to be paid for in that way, and that if the company failed to furnish such employment or furnish it in part only, Pennock should take stock only in the amount so furnished and his note would be cancelled and returned.

The company went into the hands of a receiver in 1930 but the receiver never made any demand for payment of the note until about the time this suit was brought in 1931.

1. Sections 2771 and 2301 Compiled Laws of 1921 which, among other things, make a stockholder liable for corporate debts to the extent of the amount that may be unpaid upon the stock held by him, are not applicable to this case because Pennock pleads and proves that no portion of the stock owned was unpaid for.

2. Here the express plea and proof is that only so much stock was in fact purchased as the work furnished by the company would pay for. The company had a perfect right to exchange its stock for necessary services if it obtained value received, and that it did so is undisputed.

3. Whether the parol contract to pay in work was in conflict with the face of the note, and its admission therefore a violation of the parol evidence rule, need not be considered because the note, including the endorsements made by the company, constituted the entire writing, and the parol evidence merely explains and conforms to it. All this is corroborated by the conduct of the company and the receiver. The company made no effort to collect during the sixteen months which elapsed between maturity of the note and the date of receivership and the receiver made no demand for more than a year after his appointment.

Strange forbearance, considering the company's financial condition and suggesting knowledge of a valid defense to the note.

4. The receiver does not stand in the position of a bona fide holder for value. He took the note more than a year after maturity and with all defenses against him, and it is clear that the note was never delivered as an unconditional promise to pay money, but as a memorandum fixing the maximum amount of the purchase which the company could enforce.

5. Where the promise to pay was in fact a promise to pay in work only, the furnishing of such work was a condition attached to the promise and delivery of the note. If the condition was within the control of the company and not by it fulfilled, or if it became impossible of fulfillment, the fact could be shown by parol.

Such evidence does not vary the terms of the writing but establishes the absence of unconditional delivery.—*Judgment affirmed.*

CONTRACTS—ACCORD AND SATISFACTION—NOVATION—*Pring vs. Udall et al.*—No. 13177—*Decided April 16, 1934*—*Opinion by Mr. Justice Holland.*

This action was brought in the Court below by Udall and Greer, as co-partners to recover a balance claimed to be due from Pring under a contract for the purchase and sale of cattle, dated August 8, 1929, at Phoenix, Arizona. The plaintiffs prevailed below.

1. Where a transaction for the sale and purchase of cattle was made by the plaintiffs on the one hand and by an agent of the defendant on the other hand, and the defendant denies the authority of the

agent to buy them, question of agency is a fact properly submitted to the jury.

2. Where after a contract is made by an agent for the principal and the principal thereafter pays a large portion of the purchase price, such payment would constitute a ratification of the contract made by the agent.

3. Where a defendant denies both the knowledge and existence of a contract and also claims the abandonment of a contract, he takes an inconsistent position. To sustain an abandonment or a novation, defendant had to and does admit a valid original contract.

4. Accord and satisfaction is sustained where the defendant sends a check to plaintiff for a less amount than is due where the plaintiff immediately upon receipt of the check advises the defendant that he cannot accept it in full payment. Proof of satisfaction must be clear. Meeting of the minds is essential. The acceptance, if a tender is made in full, must be in terms that will not admit a doubt and must be clear and unequivocal and acceptance may be specific or presumed from silence.—*Judgment affirmed.*

BANKS—CHECKS—FICTITIOUS PAYEE—LACHES—*Goodyear Tire and Rubber Co. of California vs. The First National Bank of Denver* —No. 12761—*Decided April 23, 1934*—*Opinion by Mr. Justice Butler.*

The Goodyear Tire and Rubber Company brought suit against the First National Bank of Denver to recover judgment for $7582.45 and interest upon a series of checks which the plaintiff claimed the bank had paid without authorization.

The Goodyear Tire and Rubber Company, whose place of business was in Los Angeles, California, kept a checking account with the defendant and between the years 1920 and 1921 its Denver manager of its Accounting Department fraudulently issued checks to fictitious payees, endorsing the checks himself, and collected the money.

The defendant Bank monthly sent all cancelled checks to the plaintiff together with a statement of the balance, for a period of over four years, when the account was closed, and two years thereafter the plaintiff by an audit discovered the irregularity and sought to hold the Bank on the fictitious checks. Judgment below for defendant.

1. The drawer of a check is not presumed to know and, in fact, seldom does know the signature of the payee.

2. But where the plaintiff is in the exclusive possession of sources of information which upon an audit would have revealed the fictitious character of the payee in the checks, and where an audit would have revealed the fraud practiced by plaintiff's agent, and where the bank, if notified of the fraud, before the Statute of Limitations barred the right, could have proceeded against the other bank endorsers, the

plaintiff is guilty of laches in not discovering that fictitious checks had been drawn against its account during a period of six years.—*Judgment affirmed.*

CRIMINAL LAW—ENDORSING ADDITIONAL WITNESSES ON INFORMATION—APPLICATION FOR CONTINUANCE—*Kloberdanz vs. The People*—No. 13293—*Decided April 16, 1934—Opinion by Mr. Justice Butler.*

Kloberdanz was convicted of operating a still for the manufacture of intoxicating liquor and was sentenced to imprisonment in the penitentiary. He asks a reversal of the judgment. There are two assignments of error, one that the Court erred in permitting additional witnesses to be endorsed on the information just before the commencement of the trial and two, that the Court erred in denying defendant's application for a continuance.

1. Where in a criminal case the District Attorney asks leave to endorse additional witnesses upon information and defendant objects thereto and the District Attorney makes no showing of any kind as to why the witnesses' names were endorsed at such a late date, and the defendant was given no opportunity to prepare to rebut such testimony, it was an abuse of discretion to permit such endorsement.

2. Where in a criminal case after additional names were permitted to be endorsed on the information right before the trial and at the close of the people's case, the defendant made application for twenty-four hour continuance to secure testimony in rebuttal of these additional witnesses endorsed, abuse of discretion to refuse such continuance.—*Judgment reversed.*

PLEADING—ESSENTIALS OF COUNTERCLAIM—*Amos vs. Triangle Motor Co.*—No. 13211—*Decided March 12, 1934—Opinion by Mr. Justice Burke.*

Triangle Motor Co. sued Amos to recover balance due on sale of gasoline and motor oil. Amos filed a general denial and two counterclaims. Motions to strike the counterclaims were sustained. At the trial Amos offered proof under his counterclaims which proof, on objection, was not received and judgment was entered for the plaintiff, and to review that judgment, this writ is prosecuted.

1. A counterclaim must arise either out of the same transaction as the principal demand, or if the latter be upon contract, must also be upon contract.

2. A counterclaim must be so complete in itself as to entitle defendant to judgment on the facts pleaded.

3. A counterclaim which alleges a conditional right but not the happening of the condition is insufficient.—*Judgment affirmed.*

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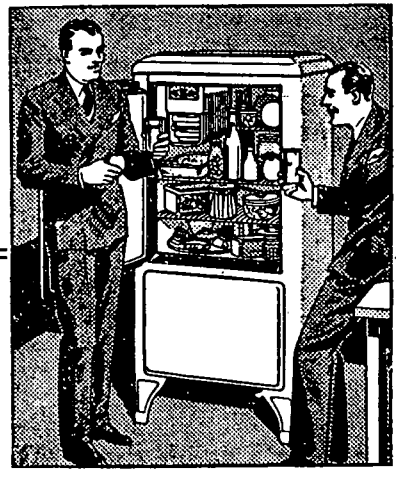

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