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One Year Review of Property Law

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Approximately fifty-five cases bearing some direct relation to the law of property were handed down by the Supreme Court of the State of Colorado during the year 1960. From these, twenty-five cases have been selected to be included in this year-end review of property law. It is well nigh impossible to select a happy medium in the approach to such a review. If one is academically inclined, the resulting product delights the scholar but fails the busy practitioner. If the format is one of simple digest, then neither the practitioner nor the scholar is pleased. An effort has been made in this writing to digest the digestible and to chew for a time on the indigestible.

I. PERSONAL PROPERTY

Bank of Denver v. Legler[1] should be of substantial interest to banks and other institutions dealing in personal property purchase money loans. Here application was made to a bank for a loan to purchase a service station. The purchase price being $5,500, the bank agreed to loan $4,000 to the prospective purchaser. The about-to-be purchaser executed and delivered to the bank a chattel mortgage, and in turn received from the bank a check for $4,000. The bank promptly recorded its mortgage. The purchaser delivered this check, plus his note for $1,500 to the vendor. The vendor then executed his bill of sale to the property and promptly took back a chattel mortgage to secure the purchaser's $1,500 note. Almost a year passed before the vendor recorded his chattel mortgage. The purchaser defaulted on both mortgages and the resulting contest involved the bank and the vendor as to the priority of their liens. The Supreme Court decided in favor of the vendor. The court reasoned that the execution of the bill of sale and the return of the chattel mortgage to the vendor being practically simultaneous acts, the title to the property never rested in the purchaser unencumbered by the vendor's mortgage. Thus, the vendor was entitled to preference over all other claims and liens through the mortgagor even though those other liens were prior in time and in recordation. Financial institutions should take heed from this case and make a definite part of their procedure some communication with the prospective vendor in order to determine his willingness to subordinate any claim he might have for a purchase price balance to that of the financial institution who advances the larger part of the purchase price.

One of the most common legal misconceptions is the mistaken notion that a bailee has a duty to return the object bailed in its original condition, and that if he does not, he will be absolutely liable for the damage to the property. *Johnson v. Willey*[2] could further this notion if the opinion is not read carefully. In the case, which finds in favor of the bailor, this statement appears: "Since in law the duty to return bailed property in an undamaged condi-

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1 350 P.2d 1059 (Colo. 1960).
2 351 P.2d 840 (Colo. 1960).

tion is the same whether the bailment is for hire or for the benefit of the bailee . . ."[3] A careful reading shows clearly that the bailee defendant failed to put on any evidence and for this reason the prima facie case made by the showing of a bailment and by the showing of the damage to the bailed article was sufficient to support a judgment for damages. The rule governing such situations in Colorado is laid down in *Nutt v. Davison*,[4] cited by the court in the *Johnson* case, and it is this:

> [I]n cases where the evidence shows that the property was delivered to the bailee in good condition and returned damaged, or not at all, the presumption of negligence on the part of the bailee instantly arises, making a *prima facie* case in favor of the bailor, and thereupon the bailee is under the necessity, if he would escape liability, of showing that the damage or loss was not due to his negligence. This may be done, *inter alia*, by showing that he exercised a degree of care, under all the facts and circumstances, sufficient to overcome the presumption of negligence.

In this day of form contracts governing the conditions of bailments, attorneys tend to overlook classic bailment arrangements. The attorneys in the *Johnson* case should be commended for recognizing a bailment in a far from typical situation.

II. BROKERS

Witherspoon v. Pusch[5] called upon the court to examine arrangements between a broker and a potential purchaser of real property and to determine the consequences of these arrangements to the vendor. The potential purchaser orally agreed with the broker that the $1,500 check handed to the broker at the time of signing the offer to purchase and the signed offer to purchase were merely conveniences designed to make it unnecessary for the parties to get together again if the purchaser should decide the property was suitable for her purposes. Very shortly thereafter the purchaser stopped payment on the check. The court allowed the showing of these circumstances not because they were offered to vary the terms of a written contract, but to show that there was no contract at all. The vendor contended, however, that such agreements made between the potential buyer and the broker could not be binding on the vendor because the contract was only between the vendor and the purchaser and the broker was not a party to the contract. The Supreme Court answered this contention by saying:

> This contention is answered in *Wehner v. Schrader*, 119 Colo. 518, 205 P.2d 225, 9 A.L.R. 2d 489, wherein the role of a real estate broker, who has a listing to find a purchaser for a seller, is well defined. Here we have a finding of the trial court, amply supported by the evidence, that Kelly was, in fact, the agent of [the vendor].[6]

A reading of the *Wehner* case, referred to by the court, does not clearly disclose any answer to the question raised by the vendor in

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3 *Id.* at 841.
4 54 Colo. 586, 588, 131 Pac. 390, 391 (1913).
5 349 P.2d 137 (Colo. 1960).
6 *Id.* at 138-39.

this case.[7] But there can be no question that the principal case holds that in Colorado a broker is capable of binding his principal when he, acting within the scope of his apparent authority, agrees to accept an offer to purchase conditioned upon the happening of subsequent events. Whether this is new law, or old law affirmed, depends on your interpretation of the *Wehner v. Schrader* case.

That the duty of a broker to "produce" a ready, willing and able buyer does not mean only a casual causal relationship is made clear in *Fistell v. Thomas*[8] and *Pyles v. Colorado Land and Investment Co.*[9] handed down by the court in 1960. Both cases add their weight to a long series of Colorado cases that spell out in no uncertain terms that real estate brokers will not be allowed to collect a commission on the sale of real property in the absence of a genuine effort which actually results in the production of a buyer who negotiates with the vendor as a direct result of the broker's efforts. As was said in *Hayutin v. De Andrea*,[10] the broker must be the predominating effective cause of the sale, and not merely "one of the links in a chain of causes."[11]

III. ZONING LAW

Two zoning ordinance cases decided by the court in 1960 are worthy of some consideration.

The first of these cases, *Nelson v. Farr*,[12] involves a finding by a trial court that certain zoning ordinances adopted by the city of Greeley are invalid or unconstitutional. After so finding, the trial court declared the ordinances null and void and then enjoined the enforcement of any ordinance contrary to certain restrictive covenants found by that court to be imposed on the land in question. The Supreme Court found nothing illegal or irregular in the adoption of the ordinances by the city. The court then said:

> The court's order, in effect, re-zoned the property as Residential A and prohibited the city from altering such zoning in conflict with the court's determination that the property be devoted exclusively to single family dwellings. *This is a usurpation of a legislative function.*[13]

The Supreme Court quoted with approval 62 C.J.S. Municipal Corporations, §228(1), 557-558, to the effect that judicial review of municipal zoning and building regulations is generally limited to their validity and the courts may not substitute their judgment for that of the municipality by an attempted control of the zoning power or by directing that zoning ordinances be repealed, enacted or amended.

Another facet of the *Nelson* case merits discussion. The grantor of a tract of subdivided land sold each building site with a restriction in the deed limiting building thereon to single family dwellings. This particular tract had been annexed to the city, but no restrictions were made in the plat. The grantor retained another tract of land contiguous to, but not encompassed within, the annexed

7 The Wehner case does allow the principal to take advantage of any contract terms added by his agent-broker, but the case does not discuss the other side of the coin, i.e., whether the principal would be bound by such terms if made without his knowledge or actual authority.
8 355 P.2d 105 (Colo. 1960).
9 355 P.2d 953 (Colo. 1960). See Dunklee v. Shepherd, 358 P.2d 25 (Colo. 1960).
10 139 Colo. 40, 337 P.2d 383 (1959).
11 355 P.2d at 956.
12 354 P.2d 163 (Colo. 1960).
13 *Id.* at 166 (Emphasis Supplied).

tract, and this retained tract gave birth to the controversy. The purchasers of sites in the annexed tract attempted by this case to impose the restrictions placed on their property against the retained land. The Supreme Court said there was nothing in the record or recorded instruments restricting the use of the retained, non-annexed tract, and that the conduct of the grantor demonstrated clearly that such was not his intent. The court cited numerous authorities for the proposition that a restriction on the use of land is to be construed most strongly against the grantor and in favor of the free use of the property. No mention was made in the opinion of the court of the presence of a scheme or of the doctrine of reciprocal negative easements. If Colorado accepts the doctrine of reciprocal negative easements,[14] then clearly the land retained by the grantor *within* the subdivided tract would be restricted to the same extent as the granted land. If the grantor conveyed away any of this retained land, his successors in title might be subject to equitable servitudes co-extensive with the restrictions placed on the granted land. From here it is but one step to extend this reasoning to encompass other lands retained by the grantor which were a part of the original "scheme of development." Thus, had there been a showing in the principal case of a general scheme which included the retained non-annexed land, the absence of any statement in the recorder's office of such a plan would not prevent the imposition of the restrictions desired by the plaintiffs in this case. This is not intended as a criticism of the principal case. It is offered only as a suggestion as to a possible approach to the problem should some future plaintiff's attorney find himself faced with the need to show restrictions on retained land where none appear of record.

A second zoning case considered by the court in 1960, *Trailer Towns, Inc. v. Board of Adjustment*,[15] involved land zoned under local ordinance as R-C Residential Commercial. This R-C land is limited in the resolution thus: "No building or land shall be used and no building shall be hereafter erected . . . except for one or more of the following uses." There followed a long list of uses, including "Any use permitted in any Residential District." Another separate section of the resolution set up the category described as "R-T Residential Trailer District" wherein provision was made for lands to be used as trailer parks.

Application was made to construct a trailer park on land zoned as R-C Residential Commercial. The board denied the application, and this ruling was upheld by the trial court. The Supreme Court reversed the trial court and held that an R-T Residential Trailer District is embraced in the language "any Residential District" appearing in the above quoted portion of the Residential Commercial section. On this point the court said, "It may be that such was not intended by the planning commission, but the plaintiff was and is justified in being guided by the wording of the resolution rather than by a secret or unexpressed intent of the commission."[16] By this holding the court has emphasized the word "any" in the phrase "any Residential District" and has, in keeping with a vast majority

14 A case which gives rise to the belief that Colorado does recognize reciprocal negative easements in principle is Judd v. Robinson, 41 Colo. 222, 92 Pac. 724 (1907).
15 356 P.2d 251 (Colo. 1960).
16 *Id.* at 253.

of cases from other jurisdictions, construed "any" to mean "all" or "every." A different result might have been reached had the court emphasized "Residential."

IV. MINING LAW - TAXATION

Rummel v. Musgrave[17] raises a question of substantial importance to holders of leases of United States land when the lease is a mine or mining claim. C.R.S. 137-5-4 (1953) reads, in part:

> All mines and mining claims bearing . . . valuable minerals and possessory rights therein classified under the laws of this state as producing mines shall be assessed annually for the purpose of taxation . . . . (3) In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable . . . then the possession shall be the subject of the assessment. . . .

Under this section a tax was charged to the lessee of producing uranium lands under a lease from the United States. The lessee contends that: (1) The statute above quoted does not apply, and (2) if it does apply, it amounts to an unconstitutional taxation by the State of Colorado on real estate owned by the United States. The court, in an exceptionally well reasoned opinion, rejected both of plaintiff's contentions. The court said that a leasehold interest is a possessory interest, separate and distinct from ownership. Further, that by this tax on the lessee's possesion, no burden, direct or indirect, has been placed on any part of the bundle of rights which makes up the United States property in the leased land. The court upheld the assessment as one on possession, not on ownership, and denied its unconstitutionality. The opinion is Hohfeldian in quality.[18]

V. WATER LAW

McKinley v. Dunn[19] resolves any doubts as to a seeming conflict between C.R.S. 149-3-23 to 33 (1953) and C.R.S. 149-3-55 to 66 (1953). C.R.S. 149-3-23 (1953) reads, in part: "The board of directors of any irrigation district may sell or dispose of any part or all of the irrigation works, franchises, water rights or other property of the district . . ." C.R.S. 149-3-55 (1953) reads "Any irrigation district . . . may be dissolved in the manner provided in sections 149-3-55 to 149-3-65." (The sections referred to make provision for sale of the assets of the irrigation district.)

The court said these sections must be construed to be harmonious, if at all possible, and that to do otherwise would amount to judicial repeal of legislation. To achieve this desired end the court held that sections 55 to 66 govern the procedure to be followed when complete dissolution of the irrigation district is sought (as in the principal case). If the assets of the district are to be sold without dissolution of the district, then sections 23 to 33 govern the procedure to be followed. Thus, it is possible under sections 23 to 33 to sell all of the assets of the irrigation district and still not dissolve the district, but it is not possible to dissolve the district under sections 55 to 66 without making some disposition of all of the district's

17 350 P.2d 825 (Colo. 1960).
18 Wesley Newcomb Hohfeld. See, e.g., Hohfeld, W. N., Fundamental Legal Conceptions as Applied in Judicial Reasoning (1923).
19 349 P.2d 139 (Colo. 1960).

assets and this is to be done only according to the provisions in sections 55 to 66. Because the difference in procedure set forth in these separate groups of sections is substantial, the resolution of the apparent conflict by the court will be welcomed by attorneys involved in irrigation district problems.

A rule of law, long supposed to be true but never specifically decided in Colorado, was spelled out in *Town of Genoa v. Westfall.*[20] The court held that "appropriation of water to beneficial use" is not confined to appropriation by mechanical devices, ditches or other artificial methods of removing water from a stream. The only indispensable requirements, in order that a valid appropriation be made, are that the appropriator intends to use the waters for a beneficial purpose and that he actually applies them to that use. The conclusion seems quite sound.

VI. CONDEMNATION

Welch v. City and County of Denver[21] involved a so-called "give away" of park lands held in trust by the city. The "give away" was actually a sale of park lands by the city to the State of Colorado for the purpose of widening a state highway. Welch, a citizen and taxpayer of the city, based her claim on a provision of the city charter which provided that "No portion of any park land now belonging to or hereafter acquired by the City and County of Denver shall be sold or leased at any time."[22] The court held that such a charter provision does not prevent the state, under its power to condemn lands for highway purposes, from acquiring such land. The court says that there are no limitations on the type of property that can be acquired by the state, through condemnation proceedings or otherwise, for highway purposes. The court goes on to point out that where a mutual agreement is reached between the city and the state through arms length negotiations, then there is no need for actual condemnation proceedings. The court cites an earlier Colorado case, *Chitwood v. City and County of Denver,*[23] for the proposition that such negotiations eliminate the delay, expense and uncertainty of such litigation when the fact of condemnation is certain. In his dissenting opinion, Mr. Chief Justice Sutton points out that the land was held in trust for the people of Denver, and these people had a special, as distinguished from a general, interest

20 349 P.2d 370 (Colo. 1960).
21 349 P.2d 352 (Colo. 1960).
22 *Id.* at 353.
23 119 Colo. 165, 201 P.2d 605 (1949).

in the property. He reasons that the people, as trust beneficiaries, should have been given their day in court in an actual condemnation proceeding. "It is their equitable right, not that of the mere legal title holder, which is involved."[24] Though Justice Sutton does not dissent from the proposition that the city charter provision against the sale of park lands must fall before the power of the state in condemnation proceedings, he points out the very important fact that if these citizens were given their day in court they might well show the taking to be unnecessary, or show that arrangements other than those proposed by the state and accepted by the city were more desirable, or show that the amount proposed for payment for the land is not adequate in light of the damage done. The logic of such a position seems inescapable. Why should the city be allowed to sit as judge, jury and advocate on its own trusteeship?

VII. LAND DESCRIPTION

In *Town of Cherry Hills Village v. Shafroth*,[25] a case involving a petition to disconnect twenty-one acres of agricultural land from a village, the petitioner was required to show that no part of such area had been platted into lots or blocks as a part of, or an addition to, the village.[26] The particular land was bounded on the north and on the east by roadways. These roadways were in existence prior to the platting and were not dedicated as a part of the platting. No other streets or avenues touched the tract. The court held that under these circumstances the land had not been platted into lots or blocks within the meaning of the statute and that the disconnection was properly allowed.

A boundary line dispute arising from the relocation of the north boundary line of a township faced the court in *Marr v. Shrader*.[27] The change was caused by a resurvey by the United States. Defendant claimed under a patent based on the original government survey. Plaintiff claimed on the basis of the amended survey. The court quoted 43 U.S.C.A. §772 (1952) giving the Secretary of the Interior power to resurvey government lands which provides: "[N]o such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." The court held that this enactment means precisely what it says, "If one of two innocent parties must suffer a loss of land due to boundary line readjustments called for by later official surveys, it must fall upon the plaintiff here who is later in time and who has never been in actual possession of the eighty acres in question."[28] The court did not intimate what the result might have been had neither party been in actual possession, i.e., one party in "constructive" possession. No reason can be seen why the result would not have been the same, especially since the code provision seems clearly to favor the party first in time.

Another aspect of the *Marr* case should be mentioned. An abstract and supplemental abstract of title were offered in this case to show "title" and to show "color of title" The court distinguished

24 Chitwood, *supra*, note 23 at 356.
25 349 P.2d 368 (Colo. 1960).
26 Colo. Rev. Stat. § 139-13-2(4) (1953).
27 349 P.2d 706 (Colo. 1960)
28 *Id.* at 710

an early case, *Parks v. Roth*,[29] where it was held that a tax deed offered solely as color of title could not be used to prove title itself. The court said that the *Parks* case does not hold that the same instrument may not serve both as color of title and as evidence of title itself. They go on to point out that if an instrument is offered for both purposes, then opposing counsel should be afforded the opportunity to object to any lack of requisites necessary to prove "title" at the time the exhibit is offered. "We can, however, conceive of no circumstance under which a document tendered as proof of title itself and so admitted in evidence could be objectionable as proof of the *lesser* status of mere color of title."[30] The lesser may not be used to prove the greater, but the greater may be used to prove the lesser—a neat and useful distinction for the practicing attorney.

Another problem of land description was brought to the court's attention in *Wallace v. Hirsch*.[31] A conflict between course and distance and the call for the termination point gave rise to the dispute. The erroneous description was: "thence South 63° 05′ West 2910 feet, more or less, to the SW corner of the NW 1/4 SW 1/4 of said Section 20."[32] Here, if the course 63° 05′ West is followed, it will never intersect the SW corner of the fraction section described.

Plaintiff contended that the true boundary line is that line which intersects the corner regardless of angle. Defendant's position was that the course and distance should prevail. The court recognized that when there is a misdescription in a deed the court must ascertain the true intent of the parties. Then the court announced that an examination of the plaintiff's deed "leads to the inescapable conclusion"[33] that the boundary line should terminate at the SW corner. The court cites the rule of construction (rules of construction always lead to "inescapable conclusions") that monuments will generally control over conflicting calls for course and distance. Do you wonder where there has been any mention of a monument? The court continues:

> True, there may not be a monument, as such, at the 'SW corner of the NW 1/4 SW 1/4 of said Section 20', although there was some evidence that a pile of rocks had been placed at this point. Nevertheless, the 'SW corner of the NW 1/4 SW 1/4 of said Section 20' describes a specific point which is capable of being determined with absolute certainty.[34]

Then the court cites a Washington case, *Matthews v. Parker*,[35] for the principle that a point capable of being mathematically ascertained is a monument in the legal sense.

In the absence of a pile of rocks, what is the "SW corner of the NW 1/4 SW 1/4 of said Section 20"? To raise it from the mere termination point of a line drawn due north 1320 feet along the west side of Section 20, into the higher status of the intersection of two lines drawn by means of courses and distances, it is necessary to describe it as that point where a line drawn due west from the

29 25 Colo. App. 296, 137 Pac. 76 (1913).
30 349 P.2d at 709-710.
31 350 P.2d 560 (Colo. 1960).
32 *Id.* at 561.
33 *Id.* at 563.
34 *Id.* at 564.
35 163 Wash. 10, 299 Pac. 354.

center of the SW 1/4 of Section 20 (a point capable of being mathematically ascertained) intersects with a line drawn from the NW corner of Section 20 to the SW corner of Section 20.

The rule that courses and distances established by Government Surveys are monuments and thus prevail over other courses and distances will be of great benefit to lawyers and abstract companies in Colorado who are frequently faced with the need for more precise methods of determining the true intent of parties who have erred in the description of property boundary lines.

Isenberg v. Woitchek[36] brings to Colorado a generally well established rule of law. In the case the court cites numerous authorities to support the proposition that when a conveyance describes an easement only in general terms, leaving uncertain the scope and location of the easement, the practical location in use by the grantee and the grantor's acquiesence in that use at the time of the grant and a long time subsequent thereto will locate the easement and will be deemed to be that which was intended.[37]

VIII. LIENS

Stinnett v. Modern Homes, Inc.[38] involves the problem of the priority of a mechanic's lien under C.R.S. 86-3-3 (1953), which reads in pertinent part:

> When the lien is for work done or material furnished for any entire structure, erection or improvement, such lien shall attach to such building, erection or improvement for or upon which the work was done, or materials furnished, in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected. . . .

Here a deed of trust on certain residential property was recorded in 1954. A mechanic's lien for remodeling of the same property was recorded in 1956. The holder of the mechanic's lien relied on the above statute to support his claim that his lien was superior to the prior recorded trust deed. The trust deed had no connection with the remodeling except that it was against the same real estate as was the mechanic's lien. The court distinguished *Darien v. Hudson*[39] and *Longton v. Husung*,[40] two earlier cases which have caused some confusion in this area, by pointing out that both cases involved construction loans placed upon the property for the purpose of financing the remodeling and repairing of existing structures, and that in these cases the mechanic's liens grew out of the remodeling done pursuant to these loans. In the principal case, since there was no real connection between the trust deed and the mechanic's lien, the prior recorded trust deed remains superior to the junior, later recorded, mechanic's lien. By this holding the court re-affirms the interpretation of the statute given in *Atkinson v. Colorado Title & Trust Co.*,[41] wherein the court says:

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36 356 P.2d 904 (Colo. 1960).

37 Another problem of proof brought to the court's attention in 1960 is worthy of brief mention. In Arch A. Edwards Post No. 252, Reg. Vet. Assn. V. Gould, 356 P.2d 908 (Colo. 1960), an effort was made to have the court construe a deed to be a mortgage. The court stated that the burden was on the party desiring this construction to make a showing by clear and convincing evidence. Further, the single fact that the property sold for $72,000 when the original offering price had been $210,000 is not enough to sustain the burden of proof required. The court noted that such was sufficient only to arouse some suspicion. Thus, while such a showing will not carry the burden of proof required, it might assist in the showing when coupled with other more positive evidence.

38 350 P.2d 197 (Colo. 1960).

39 134 Colo. 213, 302 P.2d 519 (1957).

40 91 Colo. 501, 16 P.2d 423 (1932).

41 59 Colo. 528, 151 Pac. 457 (1915).

> The phrase 'for an entire structure' is not used to designate a completed from an uncompleted building, but to distinguish new structures, not before existing, from betterments, repairs, improvements, and the like on previously constructed or existing improvements.[42]

In *Pull v. Barnes*,[43] the court's equitable powers were called upon for relief when a house had been erected upon another's property. "The evidence clearly discloses that neither party knew or even suspected at the time of the construction of the cabin that it was being built upon land belonging to defendants."[44] The court noted the principle that a house built on land belongs to the owner of the land, but they went on to say that such a situation furnishes strong reason for a court of equity to interpose and grant relief. They directed the trial court to inquire into the practicality and feasibility of removing the improvements from the land, and if it be determined practical and feasible, to specify the conditions under which it be done. If the trial court determines that removal is not feasible, then the value of the cabin is to be determined and the land is to be subjected to an equitable lien in favor of the trespasser in an amount equal to the value of the cabin. The second part of the court's directive to the trial court might, if used in some later case, prove inequitable. It is not difficult to imagine a situation where a very expensive structure, but one which adds little or no value to land or perhaps even detracts from the value of land, is innocently erected on another's land. If it is not practical or feasible to remove this structure, why should the owner of the land be subjected to a lien against his land in an amount equal to the value of the structure? A more equitable solution to such problems as presented in this case would be to give to the erector of the structure a lien equal to the amount of the increase in the value of the land upon which the structure was erected. If that were done, then an expensive but useless structure, which did not increase the value of the land, would not be allowed to detract from the value of the land by creating a cloud on the title. If the land were materially benefited by the structure, then the builder of the structure would have a substantial lien against the property.

An interesting example of the inequities that can arise in face of strict adherence to law was brought to the court's attention in *Handy v. Rogers*.[45] In this case the vendor of certain improved real property sold the property and accepted a note secured by a mortgage on the property as a part of the purchase price. Default having been made shortly thereafter, the vendor sued on the note and recovered a judgment for its full amount. Then the trial court ordered sale of the mortgaged property to help satisfy the judgment. Sale was had and the vendor purchased the property at the sale for approximately one-fortieth of the amount of the judgment. Thus, the vendor wound up with a judgment for the value of the land and the land itself. The result so shocked the court's conscience that the

42 *Id.* at 537, 151 Pac. at 461.
43 350 P.2d 828 (Colo. 1960).
44 *Id.* at 829.
45 351 P.2d 819 (Colo. 1960).

trial court was ordered to set aside the sale, to supervise any future sale, and to refuse to confirm any sale producing a price having no realistic relation to the actual value of the property. The court quoted a United States Supreme Court opinion written by Mr. Justice Bradley, wherein he said:

> It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.[46]

The case does not introduce any new or novel principle of law, but it does illustrate the manner in which the court, using its equity powers, can prevent the occasional sharp practice that adheres to the letter, but not the spirit, of the law. A vigilant court can eliminate reams of curative legislation.

IX. Assorted Fish and Fowl

In 1960 the Colorado Supreme Court re-affirmed its allegiance to a position taken by a minority of other jurisdictions by holding that an unqualified power of disposition of property devised to a life tenant enlarges the life estate to a fee simple title. The case, *In Re Zell's Estate*,[47] is one of several Colorado cases to the same effect.[48]

Another doubtful area for title attorneys was clarified by the court in *Morley v. Gieseker*[49] concerning the question of whether a title, quieted by decree against non-appearing defendants, who were served by publication and who had yet six months within which to appear and defend, was a merchantable title. The court held the title not marketable and stated the general rule to be: "(A) quiet title decree does not convert a defective title into a good or merchantable title until the judgment becomes impervious to attack."[50]

In *Nelson v. Van Cleve*,[51] the court again[52] spells out the rule governing the type of proof to be offered in causes in the nature of quiet title actions or ejectment actions. It is this:

> A person not in possession asserting title to real property and seeking to enjoin others from claiming an interest therein or possessing the same has the burden of furnishing evidence which would enable the court to rest its decision on the strength of his title, rather than on the supposed weakness of the title of others claiming interests in the property.[53]

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46 Graffam v. Burgess, 117 U.S. 180, 186 (1886).
47 351 P.2d 272 (Colo. 1960).
48 See Davey v. Weber, 133 Colo. 365, 295 P.2d 688 (1956).
49 351 P.2d 392 (Colo. 1960).
50 *Id.* at 393.
51 352 P.2d 269 (Colo. 1960).
52 For other cases involving the same principle see Goodrich v. Union Oil Co., 85 Colo. 218, 274 Pac. 935 (1929) and MacKay v. Silliman, 84 Colo. 220, 269 Pac. 901 (1928).
53 352 P.2d at 271. Mr. Chief Justice Sutton's concurring opinion lays bare what seems to be a major flaw in the process by which the majority opinion reached its conclusion. Namely, in this case the plaintiff was clearly in possession. By stipulation the parties had agreed that plaintiff had installed concrete footings, I beams and a septic tank on the narrow strip of land in dispute. Chief Justice Sutton comments—"If this isn't possession, what is it?" 352 P.2d at 273.
The majority opinion in this case was cited in a still later Colorado case, Colorado Corp. v. Huff, 355 P.2d 73 (Colo. 1960) where the court concluded that marking a cow pasture by placing surveyor's red flags on it (along with other efforts at possession) did not constitute a diesseisin of the land. This decision will come as a blow to law students who have been taught for years that the disseisor must not only claim adversely but must "keep his flag flying." See Romans v. Nadler, 217 Minn. 174, 14 N.W.2d 482 (1944).

A new addition to the Colorado law of co-tenancy was made by the court in *Thomas v. Thomas.*[54] The court announced the rule that a co-tenant, improving jointly owned realty, will be allowed the full amount by which the improvements enhanced the value of the property, but not the cost of the improvements, or the amount spent in making the improvements. The rationale behind allowing recovery of the full amount is that the non-contributing co-tenant should not be permitted to take advantage of improvements which enrich the common property, but to which he has contributed nothing.

Land conveyed to the City and County of Denver "for park purposes" by quit claim deeds containing no defeasance clause or provision for forfeiture, cannot be recovered by the grantor for failure of the city to establish or maintain a park on the lands. In so holding, in *D. C. Burns Realty & Tr. Co. v. City & County of Denver,*[55] the court used again the principle laid down in the famous Colorado case, *Brown v. State,*[56] where an effort to reclaim the ground upon which the state capitol now stands was similarly denied.

Brice v. Pugh[57] brought before the court a claim that the recording of an oil and gas lease by a prospective lessee amounted to an acceptance of the lease and a waiver of any objection to the title. The court answered this claim by saying: "Recording alone is not, as a matter of law, an acceptance of title nor does it necessarily constitute 'exercising dominion over' a lease."[58]

Exactly what constitutes an acceptance has always been one of the most troublesome problems facing the courts. When reading this case, a large red lantern should be hung over the words "as a matter of law" for most assuredly one of the best evidences of acceptance is the recording of an instrument. It should take more than slight evidence to overcome a presumption of acceptance arising from such a recording.

Another interesting point contained in the *Brice* case involved an oil and gas lease which was of record but which had terminated automatically when the lessee failed to perform the conditions necessary to extend the lease. The court held that when such a lease terminated as between the parties for failure to pay delay rentals or failure to drill the termination does not show of record automatically, and therefore the lease constitutes a cloud on the title. This being so, third parties, who must rely on the record to determine the status of the title, may presume such lease to be in full force and may use it as a valid objection to the title. Moral: Have the lessee, holding under a lease with such a clause, execute a release upon the termination; then record the release so that the records will reflect the true status of the title to the land. Needless to say, this may be easier said than done in some cases.

54 352 P.2d 279 (Colo. 1960).
55 354 P.2d 150 (Colo. 1960).
56 5 Colo. 496 (1881).
57 354 P.2d 1024 (Colo. 1960).
58 *Id.* at 1027.

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