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Supreme Court Decisions

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WORKMEN'S COMPENSATION—EVIDENCE—No. 14449—*Decided December 5, 1938—Schwab vs. Industrial Commission—District Court of Weld County—Hon. Frederic W. Clark, Judge—Affirmed —In Department.*

HELD: 1. Evidence examined and found to sustain finding of commission and district court that it was insufficent to prove the physiological or anatomical sequence between injury to kidney and the pain of which claimant complains.

2. Where the record does not disclose any sale at which claimant acted as auctioneer, his statement, that he cannot act as auctioneer because he cannot take a deep breath and therefore, his earning capacity is diminished, is "hardly convincing."

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland, concur.

AUTOMOBILES—NEGLIGENCE—GUEST STATUTE—WILFULNESS AND WANTONESS—No. 14154—*Decided December 5, 1938—Bashor vs. Bashor, et al.—District Court of Boulder County—Hon. Frederic W. Clark, Judge—On Rehearing—Original opinion reversing judgment adhered to.*

HELD: 1. Where it appears that the driver of an automobile, which was involved in an accident resulting in the death of one of the occupants and injuries to the others, was on friendly terms with all of the occupants of the car, that no protest was made by anyone as to the speed or manner in which he was driving, that there was no evidence that any one of the passengers felt any apprehension of danger, that he was engaged in locating a radio station broadcasting a program by operating the car radio dial which was on the steering wheel post while he drove with only his left hand, that he was driving at a speed of 45 to 55 miles per hour at 2:00 o'clock in the morning, that he didn't see the car in front of him until someone in the car directed his attention to it, that it was then only 50 feet in front of him, that he then swerved to avoid a collision and lost control of his car, that he could have avoided the accident had he not negligently withdrawn his attention from the road to dial the radio, but that there was nothing he could do to avoid the accident other than what he did do after he became aware

of the situation, there is not enough to show that the accident resulted from the driver's "negligence consisting of a wilful and wanton disregard of the rights of others" as required by the Colorado Automobile Guest Statute. (Chapter 118 S. L. 1931, Chap. 16, sec. 371, C. S. A. 1935.)

2. Mere unconscious inattention, under such circumstances, and up to the amount of warning by the passenger in the front seat is not an omission of such character as to justify a finding that one could not be guilty of such inattention and at the same time have a natural and normal concern for the safety of others who might be harmed as a result of it. It was not wanton.

3. Where the driver states after the accident that he was responsible for it, that it was caused by his recklessness, that he was indifferent to consequences while engaged in driving the car, in the light of the undisputed evidence as to what all the parties in the car did and did not do, such statements are but mere conclusions as to the legal effect of his conduct and therefore not properly to be taken into consideration as evidence.

Opinion by Mr. Justice Young. Mr. Justice Hilliard and Mr. Justice Bouck dissenting. Mr. Chief Justice Burke and Mr. Justice Holland not participating.

INSURANCE—DEATH BENEFIT CERTIFICATES—DEATH OF INSURED WHILE VIOLATING CRIMINAL LAW—EVIDENCE—DIRECTED VERDICT—No. 14394—*Decided December 5, 1938—International Service Union Association vs. Martinez—District Court of Denver—Hon. Henry S. Lindsley, Judge—Affirmed—En Banc.*

FACTS: Plaintiff as beneficiary under a death benefit certificate issued by defendant upon the lives of the members of plaintiff's family, brought suit to recover on the certificate upon the death of one of the family. The defense was that the policy did not cover "death occurring while violating any criminal law," and that the deceased received the wound from which he died while committing a criminal assault upon a third party. The decedent had been engaged in an altercation with a third party, and after separating, a scuffle took place in which another person picked up the third party's gun and shot. The third person and his friend were tried for murder and acquitted. The trial court after hearing all the evidence refused to direct a verdict in this case.

HELD: 1. There was enough evidence to go to the jury upon which it might have found that the third party was the aggressor or that even if the decedent was the aggressor the jury might reasonably

infer in the light of a situation well calculated to induce a reasonable man so situated to be apprehensive of danger, that in taking the aggressive he acted in self defense.

2. The acquittal of the third parties of murder is not conclusive that the decedent was engaged in violating a criminal law so as to deprive the beneficiary from recovery under the policy.

Opinion by Mr. Justice Young.

LIFE INSURANCE—ASSIGNMENT—No. 14308—*Decided December 5, 1938—Rahe vs. Prudential Insurance Company—District Court of Pueblo County—Hon. William B. Stewart, Judge—Reversed—In Department.*

FACTS: Decedent, insured under insurance policy made payable "to executors or administrators of the insured," wrote and signed an instrument requesting that the policy be paid to her father (plaintiff). There was no provision in the policy for assignment. When she died, plaintiff brought action in the county court asking that the administrator be adjudged without claim and that the company be ordered to pay him the proceeds. By stipulation, insurance company paid money into court and was discharged. The demurrer of the administrator was overruled and upon trial there was verdict and judgment for plaintiff. On appeal to the district court, the demurrer was sustained.

HELD: It is immaterial whether the document was an assignment or an attempt to change beneficiaries. The policy was a chose in action and subject to all the conditions of such. It was the property of the insured and no one had any rights therein. The restriction in the policy as to changing terms without consent of company was for the sole benefit of the company. No other could take advantage of it.

2. Where the insured names no beneficiary in her policy, except her legal representatives, the insured was free to do as she pleased with it.

Opinion by Mr. Chief Justice Burke, Mr. Justice Hilliard, Mr. Justice Bakke and Mr. Justice Holland, concur.

WORKMEN'S COMPENSATION—No. 14365—*Decided September 19, 1938—Rogers et al vs. Solem et al.—District Court, Denver—Hon. Otto Bock, Judge—Affirmed.*

FACTS: Claimant alleged that he suffered an injury to his right eye while drilling in a mine, when pieces of steel and rock struck the eyeball. Later the eye had to be removed. The mine was owned by

two women who employed L. as their agent in the management of the property. L. took his instructions from R. who was son of one of the owners and nephew of the other. R. claimed that he acted only for his mother although the functions which he performed were equally as beneficial to the other owner. When apprized of the injury to claimant, R. gave L. his personal check for $200.00 to be used by L. for the benefit of claimant in any manner he saw fit. Actually, $150.00 of this sum was expended for claimant's relief. The owners claimed a leasing arrangement between L. and the claimant.

HELD: 1. The legal relationship of all the parties was such as to make the owners of the property liable to claimant for compensation under the Act. '35 C. S. A., Vol. 3, C. 97, Sec. 328, C. L. 4423.

2. The purpose of this section of the law is to prevent evasion of the insurance requirements of the act by leasing.

3. The payment of the $150.00 was "payment of compensation" within the meaning of Section 363, Chap. 97, supra.

4. Evidence considered and found to be sufficient upon which to base finding that removal of eye was necessitated by the accident.

Opinion by Mr. Justice Bakke. Mr. Justice Burke, Mr. Justice Hilliard, and Mr. Justice Holland concur.

PLEADING—REPLICATION—DENIALS—No. 14407—*Decided December 5, 1938—Zuckerman vs. W. E. Guthner—District Court of Denver—Hon. Henry A. Hicks, Judge—Reversed—In Department.*

FACTS: Plaintiff sued in replevin to recover certain automobiles alleged to belong to him but which the defendant took into his possession from one, G. The defendant as sheriff, levied upon the chattels and took them into his custody by authority of an execution issued upon a judgment against G. Under the assignments of error the decisive question for determination is whether or not the replication put in issue certain controlling allegations of the third and separate defense. The replication stated as follows:

Plaintiff denies the allegations contained in paragraph three in said third, further and separate defense in the manner and form as therein alleged and set out and plaintiff alleges that said automobiles in question were delivered to the said Gerick to be sold by the said Gerick as the property of the plaintiff herein and the proceds from said sale to be delivered to the plaintiff herein by the said Gerick and that the said Gerick

would be entitled to a certain commission upon his selling the said automobiles."

The trial court sustained a demurrer to the replication and plaintiff elected to stand upon his pleading.

HELD: 1. "Under section 62 of the Code of Civil Procedure, denials must be either general or specific and, further, must be positive unless in the form of the statutory denial upon information and belief. The fact that section 77 of the Code provides inter alia, that: 'The replication may be general in terms denying all new matters set up in the answer,' does not alter the situation where that method of pleading is not adopted."

2. " 'The denials must, however, be clear and unequivocal. Evasive denials are not sufficient. Hence literal and conjunctive denials, or denials merely in manner and form, or which fail to deny the averment in the complaint intended to be controverted in its substance and intent, are insufficient to raise an issue.' "

3. "Standing alone, therefore, the denial, 'in the manner and form' merely, does not controvert the allegations, * * *" but in "addition to making this ineffective denial, plaintiff in the same paragraph pleads affirmative matter in the nature of avoidance, alleging an agency, or bailment of the automobiles inconsistent with the situation disclosed by the allegations" in the paragraph of the answer relied upon by defendant as forming the basis of the estoppel he seeks to assert.

4. "Such affirmative averments of fact contrary to, or inconsistent with those alleged in the pleading of the adversary to which they are directed are equivalent to a denial."

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Young concur.

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—No. 14426—*Decided August 31, 1938—In re: Harry Schechtel—Original proceeding for a writ of habeas corpus—Petition for writ denied—In Department.*

FACTS: Petitioner, while serving sentence to imprisonment imposed 10-5-35 by Federal District Court had indictment returned against him by a grand jury in state district court on an alleged offense distinct from that involved in the federal conviction. The state district attorney requested the warden of the federal reformatory to detain the petitioner upon completion of the federal sentence, for delivery to

a Colorado officer, for return to this state for trial on the state indictment. Petitioner filed a motion to dismiss the state indictment on the ground that he had been denied the right to a speedy trial of the charges in it. The motion was dismissed.

HELD: 1. No constitutional right of the petitioner to a speedy trial was violated by failure of the state to put him on trial while he was in the custody of the United States and serving a sentence in her prisons for a violation of her laws.

2. There is no obligation, under such circumstances, upon the state's prosecuting authorities to make application to the federal government for the return of a federal prisoner to the state for trial on state charges.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard, Mr. Justice Young, and Mr. Justice Bakke concur.

WORKMEN'S COMPENSATION—FARM AND RANCH LABORERS—COMMERCIAL AND BUSINESS ENTERPRISES—No. 14446—*Decided December 12, 1938—Hill, et al. vs. Bunker—District Court of Saguache—Hon. J. I. Palmer, Judge—Reversed—In Department.*

FACTS: Workmen's compensation case in which the claimant alleges that while employed by defendant in error, as a hay stacker on July 7, 1937, he was knocked from a stack of hay by a mechanical stacker and suffered the injuries which form the basis of his claim. Defendant in error was engaged in the business of farming. When not occupied on his own premises, he undertook the cutting and stacking of hay for others for hire. While thus engaged he employs the services of more than four employees. He did not carry workman's compensation insurance. Hill was one of the men employed by defendant in error. The question involved is whether Hill, the employee and claimant, was not a "farm and ranch laborer" and, hence, entitled to compensation.

HELD: When Bunker, defendant in error, year after year, with extensive and special equipment, with a crew of 15 or more men set out to serve the public generally, he engaged in a commercial or business enterprise, distinguished from his own farming operations, and his employees were not farm laborers within the stautory exception, so as to exempt him from the provisions of the act.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland, concur.

QUIET TITLE—TAX DEED—NOTICE—No. 14388—*Decided October 3, 1938—Brown vs. Davis—District Court of Logan County—Hon. H. E. Munson, Judge—Reversed.*

HELD: 1. Notice preceding the issuance of tax deed (as prescribed by section 255, chapter 142, C. S. A., 1935) although given to record owner of lots, *must* also be given to party in actual occupancy or possession of the lots, although the latter is tenant of record owner—otherwise tax deed is void.

2. It is not for the Supreme Court to determine the necessity of requiring the tenant to be personally served, in such instances, where the owner has been personally served—the statute requires it.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke not participating. Mr. Justice Bouck, dissenting.

PARENT AND CHILD—CUSTODY OF CHILDREN—No. 14414—*Decided October 3, 1938—In re: People ex rel. McChesney vs. McChesney—Juvenile Court of Denver—Hon. Eugene J. Madden, Jr., Judge—Reversed—En Banc.*

HELD: 1. Where it appears that the District Court in divorce action, upon proper hearing awarded child to father, that child was being sent to school, that he was provided with suitable and sufficient clothing, that he was properly fed, it cannot be said that a "controversy" exists as to the custody of the child within the sense in which such word is used in the dependency statute (Sec. 1, Chap. 33, 1935, C. S. A.) although the mother objects to father's custody and child prefers to be with mother.

Opinion by Mr. Justice Young. Mr. Justice Hilliard dissents.

EQUITY—RIGHT-OF-WAY—ADVERSE POSSESSION—RATIFICATION OF CONTRACTS—No. 14420—*Decided December 12, 1938—Perry, et al. vs. Bunten—District Court of Montrose—Hon. Straud M. Logan, Judge—Affirmed—En Banc.*

HELD: No reversible or prejudicial error was found in the above entitled case wherein an action was brought to restrain plaintiffs in error from using a strip of land claimed by defendent in error, and from breaking and tearing down gates and fences thereon, and for damages. The

parties hereto have been neighbors for many years, both deriving title from the same grantor. Defendant in error claimed to have acquired a right of way over plaintiffs' in error land by an express agreement which their father had with plaintiffs' in error grantor, further strengthened by adverse use which had been continuous, uninterrupted, exclusive, open and notorious for over 26 years. Also, that after defendant in error acquired his property he agreed to the prior agreement as to the right-of-way, therefore ratifying the same. As to this latter alleged ratification, it was held that there was not sufficient consideration to sustain the same. However, the case was affirmed because of no prejudicial error.

Opinion by Mr. Justice Bouck. Mr. Justice Knous not participating.

MISCELLANA

THE LAW'S DELAY

"About 560 years before Christ, Solon made reference to the slowness of justice; Horace in the year 24 B. C. announced that justice was still 'moving slowly;' Shakespeare in 1601 had Hamlet include 'the law's delay' among those things that justified suicide; a third of a century later George Herbert complained that 'lawsuits consume time,' said Frank J. Hogan, President of the American Bar Association in a recent address.

"A century passed during which the changes were rung on this ancient complaint until Bishop Burnet, in his 'History of His Own Times,' in 1723, set it down that 'the law of England is the greatest grievance of the nation, very expensive and dilatory.'

"Dickens devoted a volume to the subject, and Walter Savage Landor, in his 'Imaginary Conversations,' gave us the since overworked phrase 'delay of justice is injustice.'

"We are at death grips in America with this age-old problem of government. Progress, gratifying progress, has been made. Let us tighten our hold and go on until the history of our time will record as its great achievement justice, sure and speedy, for all." *The Cleveland Bar Association Journal.*

Colored Mammy—"Ah wants to see Judge Harding."

Office Boy—"Judge Harding is engaged."

Colored Mammy—"Ah don' want to marry him honey, Ah jus' wants to see him."