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Supreme Court Decisions

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EVIDENCE—CONSPIRACY—OTHER CRIMES—REPUTATION—SEVERANCE—CRIMINAL INTENT—INFORMATION—INSTRUCTIONS—MISDIRECTION—NONDIRECTION—*Smaldone, et al. vs. People of the State of Colorado*—No. 14231—*Decided December 19, 1938*—*District Court of Denver*—*Hon. Henry A. Hicks, Judge*—*Affirmed.*

FACTS: The plaintiffs in error are three of the four defendants in a criminal action instituted in the District Court of Denver. They were found guilty by a jury on each of two counts in an information charging an assault with intent to kill and murder, and a conspiracy with one Stephens to kill and murder Leo Barnes.

On December 8, 1936, at about 7 P. M., Leo Barnes entered his car and stepped on the starter. An explosion followed, shown by expert evidence to have been produced by dynamite, which wrecked the car and seriously injured Barnes. At the time, his car stood at the curb on Grant Street in front of Barnes' apartment.

HELD: 1. One who, as Stephens did, consents to participate in, and authorizes the initiation of, an illegal project and counsels with those engaging in it, then demands a cut in the illicit gains, even though he for a time remained quiescent in the project, cannot rightfully object to the history of the enterprise being presented by the evidence, even though it involved the commission of a crime by one or more of those who are defendants with him, if the history of such enterprise otherwise throws light on the motive he or his co-defendants might have for committing another crime, and which constitutes a chain of circumstances throwing some light on the probability of their having entered into a conspiracy with him to commit another crime in this case to kill Barnes.

2. Evidence of reputation, a purely personal matter, admissible against one defendant, but not against another, is not a ground for severance where two or more are charged jointly.

3. Evidence of the motive of one defendant which is admissible on the question of his criminal intent, which, like reputation is a purely personal matter, should not entitle another defendant to a severance.

4. In a conspiracy case, or in case of a crime proceeding out of a conspiracy, the several criminal intents of the participators are ingredients of the crime of conspiracy and of the crime constituting its objective. Hence, evidence admissible to prove the criminal intent, including the motives of each individaul participant, is properly admissible against all whether tried jointly or severally.

5. "Experience has taught that in conspiracy cases an unusual

latitude must be permitted in the admission of evidence and this rule is almost universal."

6. "It is not necessary that an information should charge a conspiracy, but although no conspiracy is charged, if it is made to appear that there was concerted action between co-defendants, the acts and declaration of one are admissible against the other."

7. Error is assigned to the refusal of the court to give a tendered instruction which informed the jury that a conviction on circumstantial evidence alone was proper only when the circumstances relied upon were consistent with guilt and inconsistent with any reasonable hypothesis of innocence. It would have been proper to give this instruction; however, the failure to give it amounted to nondirection merely and not misdirection.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke, Mr. Justice Bakke and Mr. Justice Knous concur. Mr. Justice Hilliard and Mr. Justice Bouck dissenting. Mr. Justice Holland not participating. EN BANC.

CONTRACTS—PUBLIC BUILDING AND CONSTRUCTION CONTRACTS—STATE HIGHWAY ENGINEER—BIDS—PREVAILING WAGE RATES

—Denver Building and Construction Trades Council vs. Vail—No. 14499—*Decided December 30, 1938*—*District Court of Denver—Hon. Henry S. Lindsley, Judge—Reversed.*

FACTS: Denver Building and Construction Trades Council sought injuction to restrain Vail, the State Highway Engineer from opening certain highway construction bids on the ground that the accurate prevailing rates of wages for the work required were not included in his published invitation for bids. The complaint stated that the question should, under Chap. 124 of S. L. 1933 (1935 C.S.A. Chap. 97, Sec. 257), be referred to the Industrial Commission of Colorado before the contracts are entered into, in order that the correct prevailing rates of wages might be determined by that body.

The plaintiff in error is a voluntary association composed of 23 labor organizations, the membership of which consists of mechanics, draftsmen, and skilled and unskilled laborers, who are engaged in the building and construction industry. It and its constituent member organizations were organized and function for the purpose of engaging in collective bargaining with employers and contractors engaged in the building and construction industry. The lower court sustained a demurrer to the complaint.

HELD: 1. The evident purpose of the statute requiring the advertising for bids and the inclusion of prevailing rates in the notice is to avoid the practical disadvantages, delays, and losses which the public, the employers, and the employees naturally suffer by reason of wage controversies that arise during the construction of highways and other public works of the State.

2. It is desirable to ascertain at the very outset the correct amount of the rates questioned; and an opportunity for their early determination by the Industrial Commission, as the ultimate and authentic fact finding body, will tend to save unnecessary cost of time and money, and in addition will supply a solid basis on which intending bidders can understandingly calculate their bids.

3. The Trades Council has a sufficient interest in the subject matter to enable it to institute the proceedings in the case at bar.

4. Selection of the Industrial Commission as the fact-finding body to determine the prevailing rates of wages under the act in question is entirely consonant with the commission's other duties.

5. A "dispute" has arisen in the correct sense of the word as used by the statute and the Industrial Commission is vested with the power, and charged with the duty of determining the actual prevailing wage rates to be inserted in the invitation for bids.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Bakke dissent. Mr. Justice Holland not participating. EN BANC.

MURDER—ABORTION—EVIDENCE—HEARSAY RULE—DYING DECLARATIONS—RES GESTAE—*Clark vs. People*—No. 14314—*Decided December 30, 1938—District Court of Denver—Hon. Henry S. Lindsley, Judge—Reversed.*

FACTS: Defendant convicted of murder in the second degree for allegedly committing an abortion upon one, B. P., after she had become pregnant by one, J. J. M.

HELD: 1. It constituted prejudicial error to admit testimony of J. J. M. that a week before the date of the alleged operation, B. P. told him "she was pregnant and was going to have an abortion performed by Dr. Clark." Being held out of the defendant's hearing and prior to the time she first met or talked with him it was clearly hearsay and came under no exception to the rule. It cannot be qualified as a declaration of a co-conspirator.

2. Evidence of another doctor examined and found to be hearsay and insufficient to connect up the defendant.

3. Evidence examined and found that death might have occurred from subsequent medical attention.

4. Evidence found insufficient to specifically identify defendant as one performing abortion.

5. Statements made by B. P. days after alleged operation are not part of the res gestae.

6. Intention to have operation performed by defendant is not proof that it was so performed by him.

7. Where there is no indication that the doctors had given up

all hope for recovery, statements made by deceased are not dying declarations.

8. Statements made to a doctor by way of history of her case are admissible only insofar as they relate to the patient's symptoms and condition and are not admissible on the question of responsibility for an injury or physical condition.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Bakke dissent. EN BANC.

ESTATES — CLAIMS FOR FUNERAL EXPENSES — ADMINISTRATOR'S FEES AND ATTORNEY FEES—*In re: Estate of Cheney. Cheney, et al. vs. Corbett, etc.*—No. 14427—*Decided December 19, 1938—District Court of Lake County—Hon. William H. Luby, Judge—Affirmed.*

HELD: 1. In the absence of a showing that the County Court and the District Court abused their discretion in entering judgments of $852.50 for funeral expenses, $1,084.99 for administrator's fees and $1,084.99 for attorney's fees against estate of decedent, the appellate court will not declare that they are unreasonable where the estate is valued at $18,000.00.

2. Where the administrator's fees as fixed by the County and District Courts are within the 6% fixed as a maximum by the statute it will not be changed.

3. The statute as to fees for administrators has no application to attorney fees, and this is another reason why the Supreme Court will not question the reasonableness of the amount allowed for legal services.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke dissents. EN BANC.

APPOINTING AND REMOVING POWERS OF THE GOVERNOR AS TO MEMBERS OF THE HIGHWAY ADVISORY BOARD—*People vs. Downing*—No. 14311—*Decided December 27, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.*

HELD: 1. The Governor of the State may remove from office a member of the Highway Advisory Board without serving upon the officer removed a notice of charges setting forth a cause for removal and without holding a hearing before removing him.

2. The power of removal of such officer depends entirely upon Section 100 of Chapter 143, 1935 C.S.A., as follows: "Members of the board may be removed by the governor for cause."

3. Had the statute provided that members might be removed by the Governor for one or more specified causes, the member would probably have had the right to demand a hearing.

Opinion by Mr. Justice Bouck. Mr. Justice Bakke and Mr. Justice Holland not participating. EN BANC.

WILLS—CONSTRUCTION—ATTORNEY FEES—CLAIMS OF SECOND CLASS—JURISDICTION—*In re: Estate of Curtis. First National Bank vs. Strickler, et al.*—No. 14486—*Decided December 27, 1938—District Court of El Paso County—Hon. John M. Meikle, Judge—Affirmed.*

HELD: 1. " 'As a general rule, where a testator has expressed himself so ambiguously as to make it necessary or advisable to institute an action or suit to obtain a construction of the will, it is proper to order payment out of the estate, of the reasonable fees of attorneys of the party instituting the action or suit.' " "This rule can with propriety be extended to include fees for services rendered at the instance of one of the beneficiaries who responds to a citation that a hearing on the proper construction of the will is to be had."

2. Such expenses for attorney fees come within the second classification enumerated in Section 195, Chapter 176, 1935 C.S.A., the original reading, "all expenses of proving the will * * *, shall compose the second class."

3. Both county and district courts had jurisdiction over the subject matter of the litigation.

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

SHAM PLEADINGS—GOOD FAITH—*Greager vs. Kittleson*—No. 14469—*Decided December 19, 1938—District Court of Montrose County—Hon. George W. Bruce, Judge—Affirmed.*

FACTS: Kittleson sued Greager on two promissory notes for $200 each, and had judgment after the trial court struck Greager's answer as sham, and sustained a motion for judgment on the pleadings.

HELD: "The only safe rule for Courts to adopt as a guide in disposing of motions of this character, is not to strike out answers as sham on the ground of falsity, unless the defendant * * * while denying its falsity in general terms, yet by his own showing demonstrates that the denial is not in good faith, and that the answer is in fact false."

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

WORKMEN'S COMPENSATION—*Golden, et al. vs. Sanderson, et al.*—No. 14408—*Decided December 27, 1938—District Court of City and County of Denver—Hon. Henry S. Lindsley, Judge—Reversed.*

HELD: 1. Where claimant was engaged as helper to employer who bought stacked hay from farmers and baled and marketed it, and where there was no evidence that employer hired as many as four men, industrial liability did not attach.

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

TAXATION—SALES TAX—TAX UPON RESALE OF TRADED-IN ARTICLE—*Homer F. Bedford, Treasurer of the State of Colorado vs. Hartman Bros., et al.*—No. 14437—*Decided December 27, 1938—District Court of Denver—Hon. Henry S. Lindsley, Judge—Reversed.*

FACTS: Defendant accepted in part payment a used car, and collected 2% sales tax on full purchase price of new car. He later sold the used car to C. Ray Bass and State Treasurer seeks to enforce the collection of the 2% tax on this sale also.

HELD: 1. "There is no limit to the number of times a particular article of merchandise may be subject to a sales tax so long as it remains in the stream of commerce and goes through the regular channels of trade and the dealer must collect the tax, unless the property falls within the exemptions."

2. The tax is not imposed on the dealer, nor is the buyer subjected to double taxation. The dealer is merely the state's agent to collect and is compensated for that service.

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

DISBARMENT—REINSTATEMENT—*People vs. Ellis*—No. 14140—*Decided December 27, 1938—Final order reinstating respondent.*

FACTS: Previously respondent had been suspended from the bar until further order.

HELD: The court having examined the record submitted by respondent, and having procured and read a transcript of the testimony given by respondent and his co-defendants at the District Court trial on charges of a misdemeanor—eavesdropping—and having noted his conviction, and having noted the period of his suspension, orders his reinstatement effective on announcement.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke specially concurring. Mr. Justice Bouck and Mr. Justice Holland concur in the conclusion. EN BANC.

QUIET TITLE—BOUNDARIES—MONUMENTS—*Clark, et al. vs. Pueblo Quarries, Inc.*—No. 14421—*Decided January 9, 1939—District Court of Pueblo—Hon. W. B. Stewart, Judge—Reversed.*

HELD: 1. The conformity of the boundaries of a placer claim with the lines of the United States Government survey, by description of a placer location as covering recognized units or subdivisions of such survey, is sufficient to satisfy both the Federal and state statutes requiring the tieing of the claim to natural objects or permanent monuments.

2. A description of a placer claim by quarter-sections, sections, township and range is a sufficient description upon which to rely for ownership.

Opinion by Mr. Justice Bouck. Mr. Justice Holland not participating. EN BANC.