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Supreme Court Decisions

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Supreme Court Decisions

PLEADING—DEMURRER—COMPLAINT FOR DAMAGES AGAINST CITY OFFICIALS FOR DEATH OF PRISONER—*People v. Guthner*—No. 14574—*Decided September 18, 1939—District Court of Denver —Hon. George F. Dunklee, Judge—Affirmed in part and reversed in part.*

FACTS: Action brought by the people on the relation of Coover against named officials of Denver and their bondsmen to recover damages for the death of son of Coover, occurring while he was confined in the city jail, and occasioned, as it is alleged, by the wrongful, unlawful and wanton conduct of said officials. The amended complaint charged the sheriff personally with the alleged wrongs. The trial court sustained a demurrer to the complaint.

HELD: 1. The amended complaint charging the sheriff personally with the alleged wrongs is not vulnerable to a general demurrer, and he should be required to answer.

2. The judgment as to the warden and his bondsman is affirmed, but as to the other defendants it is reversed.

Opinion by Mr. Justice Bakke. EN BANC.

MOTION TO QUASH SUMMONS—AGENCY—SERVICE OF PROCESS ON FOREIGN CORPORATION—*Junior Frocks, Inc. v. District Court of Denver and Joseph J. Walsh as District Judge*—No. 14256—*Decided September 11, 1939—Original proceeding. Writ of prohibition granted.*

FACTS: A. Petitioner, a corporation of Missouri, sued out a writ of certiorari, or prohibition in the Supreme Court against the District Court of Denver and Hon. Joseph J. Walsh as judge thereof on the ground that the District Court erroneously overruled a motion to quash a certain summons issued in a case in which one V was plaintiff.

B. Petitioner's affidavits in support of its motion to quash, as uncontradicted, show that the summons was served on one A, that the auto driven by him (and which allegedly caused the accident, injuring V) was driven by A, belonged to him personally, that the petitioner neither owned any interest in it nor operated or in any way controlled it or attempted to interfere with or direct the operation, or even suggested the use, or the manner of the use, of it, or required A to provide any motor transportation, etc., so that the relation of principal and agent could not have existed in the running of the car, or rendered the petitioner responsible for the collision.

HELD: 1. The facts negative any liability on the part of the petitioner and the motion to quash should have been sustained.

2. Where it appears that A, the driver of the car, was an independent, itinerant solicitor of sales, in numerous states, of merchandise manufactured by petitioner and by other manufacturers, that he had no established place of business, that he solicited orders from merchants with the aid of samples, that he merely obtained orders which he sent by mail to petitioner, that the latter accepted or rejected them and assumed all credit responsibility as to those accepted, that it paid A 7½% of purchase price of accepted orders as a commission, that A paid all his own expenses, chose his own method of transportation, that the goods on accepted orders were shipped from outside Colorado, etc., A was not the agent of the petitioner so as to permit service of process on the petitioner by serving A.

3. Interstate business which consists of or results from the mere solicitation of orders from prospective purchasers cannot lawfully be interfered with by a state.

4. The petitioner was not engaged in business in Colorado to the extent that it was subjected to the local jurisdiction for the purpose of service of process upon it.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Hilliard and Mr. Justice Bock and Mr. Justice Burke not participating.

CRIMINAL LAW—STATUTORY RAPE—KNOWLEDGE OF AGE—ASSIGNMENT OF ERROR—COMMON LAW MARRIAGE—*Efsiever v. People* —No. 14378—*Decided September 18, 1939—District Court of Denver—Hon. Henry S. Lindsley, Judge—Affirmed.*

HELD: 1. One who has sexual intercourse with girl under 18 at the time of the act charged is guilty whether he did or did not know that she was under the statutory age of consent, unless they were then and there husband and wife.

2. Motion for directed verdict of not guilty on ground that defendant and prosecuting witness were man and wife, properly overruled where there is no competent evidence in record that a common law marriage existed at the time of the act.

3. The Supreme Court will not of its own motion exercise its discretionary power to consider errors, not properly assigned, where the record reveals that the defendant has unconditionally admitted the act which constitutes the crime for which he was convicted.

4. The admission of evidence brought out by counsel for plaintiff in error on cross-examination cannot later be used as a ground for reversal.

5. Conduct of defendant in procuring is inconsistent with the bona fide intent required to constitute common law marriage.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Hilliard, Mr. Justice Bakke and Mr. Justice Bock dissenting. EN BANC.

ARBITRATION—AWARD—SUIT TO SET SAME ASIDE—*Twin Lakes Reservoir and Canal Co. v. Platt Rogers, Inc.*—No. 14323—*Decided September 25, 1939—District Court of Pueblo County—Hon. Harry Leddy, Judge—Reversed with instructions.*

FACTS: In a dispute upon a contract between the parties, the matters were submitted to the arbitrators and judgment entered in the District Court upon their awards. The plaintiff herein then instituted in the District Court the instant matter for the purpose of setting aside and vacating the award and the judgment rendered thereon. The court sustained a demurrer to the complaint.

HELD: 1. Where it appears that the board of arbitrators failed to give reasonable notice in writing of the time and place their hearings were to be held, and where it appears that each of the parties was not given reasonable opportunity to promptly present to such board the evidence it desires to offer in support of its position with reference to claims of defendant, such conduct on the part of the board affords a sufficient ground for setting aside the award.

2. Although the arbitration agreement provides that the arbitrators shall have power to make such independent investigation of the matters in controversy as to them may seem necessary in order to arrive at a correct solution of the matter, no authority is thereby conferred upon them to adopt the conclusions of outsiders who may be consulted, without a considered determination of their own upon the information so obtained. They may not delegate their powers.

3. Awards, even though valid on their faces, may be set aside in equity for misconduct on the part of the arbitrators, and extrinsic evidence is admissible to prove such misconduct. The demurrer is to be overruled.

Opinion by Mr. Justice Knous. Mr. Justice Bock and Mr. Justice Burke not participating. EN BANC.

TEACHER'S CONTRACT — CONDITION PRECEDENT — LICENSING — SCHOOL DISTRICTS—STATUTES—*Union High School District v. Paul*—No. 14438—*Decided September 25, 1939—District Court, Prowers County—Hon. John L. East, Judge—Reversed.*

FACTS: Suit on teacher's contract to recover salary. Defense asserts that teacher (plaintiff) was not properly licensed, although she had letter signed by President and Secretary of High School District granting her the "privilege to teach the commercial courses in our high school for three years, * * *." The trial court directed a verdict for plaintiff.

HELD: 1. Under Sec. 219, Chap. 146, '35 C. S. A. the law requires the proper licensing of a teacher as a condition precedent to teaching and recovery of salary for such services.

2. A contract employing a teacher who does not possess a valid license is void ab initio.

3. The Union High School Board did not have the authority to grant a teaching license.

4. The governing body of a school district has in general only such powers as are expressly conferred upon it by constitutional or statutory provisions, or powers which are incidental to those expressly conferred.

5. "Statutes conferring powers or investing duties must be strictly construed and must be treated, not merely as grants of powers, but also as limitations thereon."

6. Where a new board takes over the duties of the predecessor board in operation of a *"continuing pre-existing district,"* the new board might have the power to issue licenses, if the old board had it; but where a new and distinct entity is created, it does not have, by implication or otherwise, the powers of the component pre-existing districts included within its boundaries which, after the formation of the union district, still continued to exercise their integral functions under the management of their respective district boards.

7. The existence of the power in the union district to license teachers may not be implied from the circumstance that it provided vocational instruction in its high school.

8. A school district may not by ratification legally accomplish a result which it could not bring about by its direct action in the first instance.

9. The protection of a statute requiring discharge of teacher only upon good cause shown after a specific charge and opportunity to be heard thereon before the school board is available only to a duly licensed teacher.

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

NEGLIGENCE — PERSONAL INJURIES — AUTOMOBILE ACCIDENT — EVIDENCE — WITNESSES — JURORS — VERDICT—*Ison et al. v. Stewart* — No. 14430 — *Decided September 25, 1939* — *District Court of Denver—Hon. Henry S. Lindsley, Judge—Affirmed.*

FACTS: Suit for damages, brought by S., driver of car against K. and I., the latter as agent of and driver of truck for K., resulting from collision between car and truck.

HELD: 1. It is proper to permit mechanics, who have had years of experience in repairing wrecked automobiles, who have had full opportunity to make inspection, and who are acquainted with the con-

ditions resulting from an auto accident, to give in evidence their opinions of what occurred at the time of the collision.

2. The unauthorized viewing of the premises by members of the jury has been held in some jurisdictions as grounds for a new trial, but the rule must be given a reasonable operation and not be applied where there is only a possibility that the result was influenced by the alleged misconduct.

3. The case is not one justifying an exception to the general rule that affidavits of jurors are inadmissible to impeach their verdicts.

4. Admitting the possibility that newly discovered evidence would have impeached a witness, where his evidence is merely corroborative, and where there is no probability that it would have changed the result of a trial, and where there is no showing of diligence on the part of the defendants in discovering this evidence, the Supreme Court cannot believe defendants were prejudiced by refusal of trial court to grant new trial on such ground.

5. There was no error in court's refusal to separate the causes of action because I. was the servant and K. the employer. "The relationship being admitted, the inclusion of I. as a defendant in the only substantial cause of action arising out of the accident, if error, was entirely harmless."

6. Instructions examined and found to contain no error.

7. Where suit is brought for $15,000.00 damages, and actual damages proven amount to $2,600.00, a verdict for $5,000.00, including about $2,400.00 for damages for pain and suffering is clearly reasonable, and affords no basis for a charge of passion and prejudice on part of the jury.

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

BLIND PENSION—JURISDICTION—MANDAMUS—*Colorado Public Welfare Board v. Viles*—No. 14591—*Decided October 2, 1939—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed in part.*

FACTS: Plaintiff brought mandamus to compel Board to allow him pension because of blindness. An alternative writ was issued and Board demurred on ground that court had no jurisdiction of "person of respondent or the subject of the action." Demurrer overruled and Board stands.

HELD: 1. Mandamus is the proper remedy "to compel the performance of an act which the law specifically enjoins as a duty resulting from an office."

2. The District Court, under its general jurisdiction, may review the acts of any board or commission where it is contended that legal

rights have been denied, or that such body is vested with a discretion which it refuses to exercise.

3. The refusal of the board to exercise discretion neither vested the court with the discretion nor entitled plaintiff to maximum allowance. The mandate of the court should have been to act, and the court should not have attempted to set the amount of the allowance.

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

WORKMEN'S COMPENSATION—REVIEW OF COMMISSION'S AWARD—*Condon, et al. v. Williams*—No. 14624—*Decided October 2, 1939*—*District Court of Gunnison County*—*Hon. George W. Bruce, Judge*—*Reversed.*

HELD: 1. A direct review of Industrial Commission's award may not be had by an action instituted in the district court; under Section 377, Chapter 97, 1935, C. S. A., unless there is application to the commission for review of its own award, predicate for judicial review is lacking.

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

PROMISSORY NOTE—APPEAL AND ERROR—BILL OF EXCEPTIONS—CREDITS—*Viles, et al. v. Jackson, etc.*—No. 14644—*Decided October 2, 1939*—*County Court of Denver*—*Hon. E. J. Ingram, Judge*—*Affirmed.*

HELD: 1. Litigants may not properly be precluded from submitting a draft of bill of exceptions of their own production, but they proceed so at no little risk.

2. Where litigants do not let court reporter prepare bill of exceptions, and prepare their own, and the trial court refuses to allow and sign the bill, they must follow Section 420, Code of Civil Procedure, strictly; and the affidavit of one that the bill "is true and correct, in substance, as to my testimony given at the trial," is not sufficient, without stating that he was present when the exceptions were taken.

3. Where in a suit on a promissory note, a defense is raised to the effect that in an earlier proceeding—replevin to recover possession of chattels mortgaged to secure the note—the verified complaint stated the value of the chattels to be $750.00, the defendants may not insist upon having credit for such sum on the note in the absence of evidence as to the value of the goods. "Only on evidence as to the value of chattels taken in replevin, is there basis for judgment."

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

QUIET TITLE—TAXES—PRIORITY—STARE DECISIS — PLEADING — TAX TITLES—*Fishel v. City and County of Denver*—No. 14391 —*Decided October 9, 1939*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Reversed.*

HELD: 1. Where motion for judgment on the pleadings is made, all material allegations of complaint and replication, properly pleaded, must be accepted as true.

2. A tax deed is not necessarily prematurely issued merely because less than 3 years and 3 months intervene between date of plaintiff's certificate and that of his tax deed.

3. The Supreme Court has previously construed Section 3, Chapter 142, Vol. 4, 1935 C. S. A., page 712, and has held that a lien created by a sale for general taxes was superior to that of special taxes for earlier dates.

4. The defense of the City to the quiet title suit based on tax deed for General taxes, on the ground that it had prior liens for special improvement taxes is not good.

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

WORKMEN'S COMPENSATION—AGENCY—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT—*Whitney, et al. v. Mountain States Motors Co.*—No. 14629—*Decided October 9, 1939*—*District Court of Denver*—*Hon. Floyd F. Miles, Judge*—*Reversed.*

HELD: 1. "Whether or not one is an employee (under Section 288 (b), Chapter 97, 1935 C. S. A.) is a question of fact to be determined by the commission. * * * If, however, there is no evidence to support the finding of the commission that claimant was an employee, it becomes a matter of law, for judicial determination."

2. Evidence considered and found to be sufficient upon which commission could make reasonable inference that contract hiring claimant was one of employment, contemplating only labor on the job, and nothing else.

3. The company's contention, that even if claimant is an employee, nevertheless his employment was but casual and not in the usual course of the business of the company, is not tenable—the law on this point has been settled adversely to company's contention.

Opinion by Mr. Justice Bock. Mr. Chief Justice Hilliard and Mr. Justice Bouck concur. IN DEPARTMENT.

PERSONAL INJURIES—HOTEL KEEPERS—EVIDENCE—CUSTOM—RES IPSO LOQUITUR—*Rudolph, et al. v. Elder*—No. 14313—*Decided October 9, 1939—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed.*

FACTS: Trial by jury resulted in a recovery of judgment against defendants in sum of $2,439.28 as damages for personal injuries resulting from negligence of defendants. Defendants were lessees and operators of hotel. Plaintiff sustained injuries when she fell into a freight elevator shaft adjacent to rear entryway to the hotel.

HELD: 1. It is a hotel keeper's duty to keep his premises reasonably safe for the use of his patrons, and that extends to all portions of the premises to which a guest might reasonably be expected to go.

2. It was a question of fact for the jury to determine whether the defendants might have reasonably expected plaintiff, as a guest of the hotel, to use the rear entryway.

3. Evidence that rear passageway had been regularly and freely used by guests of the hotel for some years in going to and from the garage, is admissible to show custom and practice from which it well could be inferred that defendants might reasonably expect other guests to so use this portion of the hotel.

4. An invitation to a customer or patron to go to certain parts of business premises may arise by implication from a known customary use; and a " 'business invitation includes an invitation to use such part of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his business is to be transacted'."

5. The jury by its verdict for plaintiffs concluded that within the rear passageway the legal relationship of the defendants and plaintiff was that of a hotel keeper and guest. "As a result of this relation the defendants would be liable for any bodily injury suffered by her as a result of defects in the hotel premises known to them or which in the exercise of reasonable care they could discover."

6. It is apparent that the automatic lock on the door to the shaft did not operate at the time of the injury. " 'The owner of the elevator must account for the results of all defects which he might have discovered by due inspection and investigation, but which he failed to discover and repair'."

7. "Under the doctrine of res ipso loquitur proof of the fact that an accident resulted from a defect in a mechanical device within the control of the defendants and which could not have occurred but for such defect, raises a presumption of negligence sufficient to require the submission of the case to the jury."

8. " ' * * * Where facts are disputed or inferences therefrom are reasonably disputable,' the question of contributory negligence is for the jury."

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Young concur. IN DEPARTMENT.

REAL ESTATE—DEEDS—COVENANTS AGAINST ENCUMBRANCES—*Wheeler v. Roby*—No. 14376—*Decided October 9, 1939—District Court of Pueblo County—Hon. Harry Leddy, Judge—Affirmed.*

HELD: 1. A covenant against encumbrances runs with the land and inures to subsequent purchasers.

2. Where purchaser of property by deed covenanting against encumbrances including taxes, has to pay taxes, he may sue grantor of deed, and recover; and this is so although grantee conveyed property to a third party and then re-took title, since he had it at the time of suit and at the time the taxes in question were paid.

3. Defendant in counter-claim contended for $1,650.00. He claimed the property that he got from plaintiff in the exchange was supposed to have been fenced and that only about 5,000 of 18,000 acres was actually fenced. The claim was properly dismissed for it was so indefinite and uncertain that without resort to speculation it would have been impossible for the court to have determined the amount claimed, or any other amount that would have had any reasonable basis of support in the testimony.

Opinion by Mr. Justice Young. Mr. Justice Knous and Mr. Justice Bakke concur. IN DEPARTMENT.

CRIMINAL LAW—CAUSING DEATH OF PERSON WHILE DRIVING MOTOR VEHICLE WHILE UNDER INFLUENCE OF INTOXICATING LIQUOR—INSTRUCTIONS—*Rinehart v. People*—No. 14478—*Decided October 9, 1939—District Court of Adams County—Hon. H. E. Munson, Judge—Affirmed.*

HELD: 1. Supreme Court will not interfere with verdict of jury where there is ample evidence to sustain it. The jury is the judge of the credibility of the witnesses and is to determine the weight of the testimony.

2. Instructions given considered together and found to contain the law.

3. In a criminal action for causing death while driving a motor vehicle while under the influence of intoxicating liquor, it is proper to give the following instruction:

"The court instructs the jury that when a driver is so under the influence of intoxicating liquor that his capacity to operate an automobile is impaired, he is intoxicated within the meaning of the law."

Opinion by Mr. Justice Bouck. Mr. Chief Justice Hilliard, Mr. Justice Knous and Mr. Justice Bock dissent. EN BANC.

INJUNCTION—INTERFERENCE WITH USE OF PREMISES USED FOR OIL AND GAS PRODUCTION—*Mountain States Oil Corporation v. Sandoval*—No. 14636—*Decided October 9, 1939*—*District Court of Las Animas County—Hon. David M. Ralston, Judge—Affirmed.*

HELD: 1. Under evidence in case, it appears that no injunctive remedy is desirable, and that only an accounting is advisable. Evidence examined in light of referee's findings and court's decree and no reversible error found.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Young and Mr. Justice Knous concur. IN DEPARTMENT.

CONTRIBUTIONS UNDER COLORADO'S UNEMPLOYMENT COMPENSATION ACT—INSURANCE AGENTS—CONSTITUTIONAL LAW—*Equitable Life Insurance Company v. Industrial Commission*—No. 14515—*Decided October 16, 1939*—*District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed.*

FACTS: The controversy raises the question of whether or not a life insurance company is required to make contributions under the Colorado compensation act (S. L. '36, 3rd Ex. Sess., c. 2, '35 C. S. A., '37 Supp., c. 167A), as amended, with respect to compensation payable to general, district, special and soliciting agents. Trial Court entered judgment in favor of the commission for contribution by the insurance company under the act. The insurance company seeks to reverse such judgment.

HELD: 1. This case is controlled by the case of Industrial Commission v. North Western Mutual Life Insurance Co., 103 Colo. 550, 88 p. (2d) 560.

2. The insurance company raises the question of the validity of the application of the act to its agents under the due-process and equal-protection clauses of the 14th Amendment of the Federal Constitution. Such Constitutional questions are not controlling in this case, since they are based solely upon the premise that the agents of the insurance company are independent contractors and bear no relation to the insurance company as servants. Under the act as construed in the Northwestern Mutual Life Insurance case, supra, the activities of the company's agents are within the legislative definition of "employment".

3. In view of the fact that the contracts of employment between company and agent called for the exclusive service of the agent or for a fixed portion of his time and efforts, for continuous employment, and not for a specific piece of work, and in view of the fact that the company determines who may assist, and who shall supervise, the activities of the agent, and the company controls the agent's offices, and the con-

tracts are not assignable by the agents, and call for their personal performance of service, it is unnecessary to determine the constitutional questions raised.

Opinion by Mr. Justice Bock. Mr. Justice Burke specially concurring. EN BANC.

SALARY FOR STATE DIRECTOR OF VOCATIONAL TRAINING—STATUTORY CONSTRUCTION—*Bedford, etc. v. People, ex rel. Tiemann*—No. 14451—*Decided October 16, 1939*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Reversed.*

FACTS: A. T was employed by the State Board for vocational education as State Director. The Board fixed his salary at $4,500.00 per annum, and directed that $3,600.00 be paid out of a particular legislative appropriation; and issued its vouchers accordingly. The auditor refused to issue warrants for the vouchers. T brought mandamus and the auditor demurred. The lower court overruled the demurrer.

B. The federal government contributed funds for the work of the board and the latter had full discretion in their expenditure. Sec. 4, Chapter 264, S. L. 1937, empowers board to fix salary of T. Chapter 53, S. L. 1937 makes an appropriation for $3,600.00 annually for the Director. "(Less any amount received from the federal government or agencies, it being the intention that the total salary of said director shall not exceed $4,000.00 per year.)" Both chapters were approved on the same day and $900.00 per annum, prorata, of T's salary was accordingly to be paid out of said federal funds. The auditor contends that because of the above parenthetical clause, T could only draw $3,100 out of the State appropriations.

HELD: 1. Where statutes must be considered *in pari materia*, apparent inconsistencies must, if possible, be reconciled.

2. The Board had full power to fix T's salary.

3. The parenthetical provision is clear "as the noon-day sun", and is not void on the ground of ambiguity and unintelligibility.

4. The act is not unconstitutional on the ground that it is an appropriation bill which fixes a salary since the clause is merely a simple condition attached to an appropriation which may reduce but cannot increase the sum.

Opinion by Mr. Justice Burke. Mr. Justice Young and Mr. Justice Knous dissent. Mr. Justice Bock not participating. EN BANC.

FOREIGN JUDGMENTS — PROCESS — JURISDICTION — SERVICE ON AGENT—AGENCY—*General Benefit Ass'n v. Bell*—No. 14447—*Decided October 16, 1939*—*District Court of Denver*—*Hon. Henry S. Lindsley, Judge*—*Reversed.*

HELD: 1. Where suit is brought in Colorado on a judgment obtained in Missouri, the question of proper service of process in original

suit (and jurisdiction over the defendant in personam) may be raised.

2. Where it appears that a Missouri beneficiary of a Colorado non-profit benefit association caused process to be served in Missouri upon a former solicitor for the association, but who had not sold any certificates for the company for three years, and had been dropped by the association as a solicitor over a year before service of process, and where it appears that said purported agent told the sheriff that he was not an agent of the company and hadn't been for some time prior to sheriff's leaving of the summons with him, such service is not valid.

3. The agent upon whom process is served must occupy that relation to the corporation at the time of service.

4. The service of process is jurisdictional and the return made by the sheriff is not conclusive.

5. Service of process upon an agent for a foreign corporation doing business within the state must be upon an agent representing the corporation with respect to such business. It may not be upon a mere servant or employee whose authority and duties are limited to a particular transaction. There was no "fair and reasonable inference of a duty" on the agent to communicate the fact of service upon him to the company.

6. It is not necessary that the agent have express authority to receive process, but his relationship with the company must be of such representative capacity that it would be fair to say that the delivery of the summons to him constituted a valid service of process.

7. An agency, once existing, is presumed to have continued, in absence of any thing to show its termination, unless such a length of time has elapsed as destroys the presumption.

Opinion by Mr. Justice Bock. EN BANC.

CRIMINAL LAW—MURDER—INSTRUCTIONS—PENALTY—*Leopold v. People*—No. 14603—*Decided October 16, 1939*—*District Court of Denver*—*Hon. Robert W. Steele, Judge*—*Affirmed.*

HELD: 1. Instructions considered, and the use of the word "homicide" rather than "murder" found to be proper.

2. A homicide is the killing of a human being by another, and may be justifiable, and therefore, not unlawful.

3. A tendered instruction (refused) was improper since the trial court has no duty to, and should not, select the salient points in the evidence, and specifically call them to the attention of the jurors.

4. Proof of specific intent is not a prerequisite to a conviction for first degree murder where a homicide is committed in the perpetration of a robbery.

5. An instruction which permits the jury unlimited consideration of defendant's intent in connection with fixing the penalty for the crime, is patently favorable to the accused and he may not complain.

Opinion by Mr. Justice Knous. EN BANC.

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