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Supreme Court Decisions

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CEMETERIES—REAL ESTATE—RULES, REGULATIONS AND RESTRICTIONS—*Gasser, et al. vs. Crown Hill Cemetery Association*—No. 14174—*Decided October 24, 1938—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed.* EN BANC.

FACTS: Plaintiff, a corporation owning and operating a cemetery, sold a plot to one B. At the time of the sale there were in effect certain rules and regulations concerning the type of monuments or markers permitted and providing that they must be approved by the superintendent. A manufacturer of a marker not approved by the superintendent, with alleged permission of the superintendent, but without the required written approval of the association, proceeded to dig a hole and place a cement foundation upon the grave space owned by B. The plaintiff brought suit for injunctive relief, which was granted.

HELD: 1. The rights of the owner of a cemetery lot in a cemetery owned and operated by a private corporation are subject to the established rules and by-laws of the corporation, in so far as they are not in violation of any law, and are not discriminatory and arbitrary.

2. Every owner of real estate, in fee simple, has the legal right to dispose of it either absolutely or conditionally, or to regulate the manner in which it shall be used, provided that conditions and restrictions imposed are not violative of the public good or subversive of public interests.

3. Where it appears that regulation is reasonable and for the best interests of the party in favor of whom it is imposed and does not materially prejudice the interests of the public, the law upholds it.

Opinion by Mr. Justice Bakke.

CONSTITUTIONAL LAW — TAXATION — CHARITABLE PURPOSE — *Spears' Free Clinic and Hospital vs. Wilson, etc.*—No. 14329—*Decided October 24, 1938—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed.* EN BANC.

HELD: 1. Where a free clinic and hospital for children, a non-profit corporation, organized for strictly charitable purposes, owns two apartment houses in Denver and the two lots upon which they stand, as well as an adjacent lot, which is vacant and is alleged to be held for the

purpose of constructing a hospital thereon as soon as the corporation's financial condition will permit, and where the property is not used by the corporation itself, but is rented to tenants in the usual way, although the income from the rentals is devoted to carrying out the corporate purposes, it would be a violation of the Colorado Constitution (Section 5, Article X) to exempt it from taxation.

2. "Inasmuch as the corporation does not occupy the property, it was not entitled to the exemption" provided by the Constitution, "even under the liberal interpretation of that provision heretofore given by this court."

Opinion by Mr. Justice Bouck.

CONSTITUTIONAL LAW—INITIATIVE AND REFERENDUM—CONSTRUCTION—*Brownlow, et al. vs. Wunsch, et al.*—No. 14439—*Decided October 13, 1938—District Court of Denver—Hon. Robert W. Steele, Judge—Affirmed.* EN BANC.

FACTS: Plaintiffs in error seek a review of the decision of the Secretary of State, upheld by the District Court, arising under their protest, and holding sufficient a petition for the initiation of a proposed constitutional amendment.

HELD: 1. Article V, Section 1 of the Constitution relates to the initiative and referendum and by it the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independently of the General Assembly. Although by express words it is declared that this section in all respects shall be self-executing, it is clearly contemplated by its terms that legislation may be enacted to further its operation.

2. It has generally been held by the courts of all jurisdictions that a constitutional provision for the initiative and referendum and statutes enacted in connection therewith should be liberally construed.

3. The constitutional right reserved to the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

4. Neither the Secretary of State nor any reviewing court should be concerned with the merit or lack of merit of a proposed constitutional amendment.

5. Where a petition has been filed within the six-months period required by law and is subsequently amended and the amended petition is filed within the 15-day period provided by law for amendments, the amended petition has the legal effect of the original petition, although it was filed after the expiration of said six-months period.

6. The statute contemplates that a sponsor of a petition has the specified six months within which to secure signatures and file the petition and in the event of protest and rejection of the petition, at their election, they are entitled, as a matter of course, to refile the petition within 15 days, even though the refiling date may fall beyond the six-months period.

7. It was intended by the Constitution and the legislature that the identity of the affiant, who swears that each of the persons signing the petition was, at the time of signing, a qualified elector, and was himself a qualified elector, might be established prima facie by a recital to that effect in the affidavit.

8. It is certain under the express words of the Constitution that a petition so verified shall be prima facie evidence that the signatures thereon are genuine and the persons signing the same are electors.

9. The burden of establishing the grounds for protest rests with the protestants and the benefit of the prima facie presentation upon the filing of the original petition is carried over to the filing of the amended petition.

10. Our statutes relating to administrative and judicial procedure are replete with the provisions in which the prima facie probity of an instrument is established by verification or affidavit without the requirement that the identity of the affiant be independently established.

11. Supreme Court measures the pages upon which the petition was printed and finds that the requirements as to the size of the pages and the margin at the top of the page have been substantially complied with.

12. It is not necessary that the affiant certifying the signatures on the petition have a personal acquaintance with the signer of the petition.

13. The statute makes no provision for an amendment of the protest and a protest which fails to state the name, section number or line number by means of which either the Secretary of State or the sponsors could ascertain the names protested is not sufficient.

14. Protestants may not make the actions of an affiant a basis for fraud where the petitions notarized by her were rejected in toto by the secretary.

15. It is not necessary to have attached to each set of signatures an affidavit; it is sufficient that the affidavit is attached to each petition.

16. A notary public who administers the oath to the signers of the petition is not shown to be disqualified on the grounds of personal interest merely because he gave up 15 days' time without compensation in an effort to obtain additional names and affidavits.

Opinion by Mr. Justice Knous.

WORKMEN'S COMPENSATION—WITHDRAWAL FROM PROVISIONS OF ACT—*Sechler vs. Pastore, et al.*—No. 14342—*Decided October 17, 1938—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed in part and reversed in part.* EN BANC.

FACTS: E, the claimant, sustained compensable injury while engaged as an electrician in the employ of the S Company, making installments of electric outlets in a house being constructed by P, who had previously let contract for same to S Company. Neither employer nor contractor carried Workmen's Compensation insurance. The Industrial Commission ordered both the contractor and the employer to pay compensation to the claimant. P, contractor, instituted present action in District Court and it entered a decree affirming the award of the commission in all respects and with the further adjudication that the liability for the payment of compensation as between the employer and the contractor was therein fixed as a primary liability against the former and a secondary liability as against the latter.

HELD: 1. Employer, once coming under the provisions of the Workmen's Compensation Act, must comply strictly with the provisions of the statute as to withdrawal from the obligations thereof. He must give proper notice to the commission and keep his premises posted, even though at the time of his attempted withdrawal, there were no employees interested in his status.

2. Where it appears that after his purported rejection of the Act, the employer from time to time employed workmen, consistency, as well as the express terms of the statute, require him to keep his premises posted with notices proclaiming his alleged status with reference to the Act.

3. "It is likely that where a business, subject to the Workmen's Compensation Act, is conducted by an individual under a firm name, the statute requiring notice of withdrawal from, or rejection of, the provisions of the Act cannot be circumvented as to such individual by an internal change of ownership where he continues as a partner and the business proceeds under the previous name and style."

4. There is no express statutory legislative or judicial authority giving the commission, or any court reviewing the proceedings of the commission, the power to determine or fix a comparative degree of liability for the compensation as between the subcontractor employer and the contractor.

5. The question of who is liable for the compensation payments is determined under the Act; and questions between those held to be liable as to the degree of liability must be worked out among themselves in such proceedings as may be brought for the purpose.

Opinion by Mr. Justice Knous.

NEW BOOKS IN LIBRARY

Miss Sechrist, of the District Court Law Library, reports receipt in the library of Federal Procedure by Simpkins; Titles by Patton.