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Supreme Court Decisions

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Supreme Court Decisions

INTERPLEADER—MOTION FOR JUDGMENT ON THE PLEADINGS PROPERLY DENIED—FINDINGS OF FACT NECESSARY BEFORE DISMISSAL OF CLAIM—*E. G. Vanatta vs. Grant McFerson, as State Bank Examiner of the State of Colorado in charge of the Yampa Valley Bank; The Board of County Commissioners of Lake County, Colorado, and John Dubovsky, Intervener*—No. 13594—*Decided November 18, 1935*—*Opinion by Mr. Justice Holland.*

One John Dubovsky deposited money in Yampa Valley Bank and received time certificate No. 3513. He lost that certificate and the bank, in lieu thereof, issued certificate No. 4012 to one Katie Dubovsky for $1,500. John Dubovsky was in financial difficulties and the bank officer suggested that the new certificate be issued in the name of his sister. The bank became insolvent and was placed in the hands of the Bank Commissioner for liquidation.

County Commissioners of Lake County filed claim with the Bank Commissioner on a judgment obtained against John Dubovsky. Vanatta, as assignee of Katie Dubovsky, also filed a claim with the Bank Commissioner.

Then the Bank Commissioner filed his complaint in interpleader and asked permission to pay the money represented by the certificate into the registry of the court and be discharged.

County Commissioners filed answer, setting up estoppel, based on its judgment against John Dubovsky and claimed the District Court was without jurisdiction. To that answer Vanatta filed a demurrer, which was sustained. Judgment in interpleader was entered, the Bank Commissioner directed to pay the money into the registry of the court and then the County Commissioners filed an amended answer and cross-complaint against Vanatta. Vanatta also filed an answer and cross-complaint against the County Commissioners, to which the commissioners demurred. Vanatta then moved for judgment on the pleadings, which motion was overruled and his claim dismissed.

John Dubovsky intervened, alleging that the certificate held by his sister belonged to him and that his sister had no interest in it whatsoever and prayed that the court order the money represented by the certificate, subject to the equity of the County Commissioners, be paid to him.

Held—That the motion for judgment on the pleadings was properly overruled but Vanatta's claim was erroneously dismissed. The certificate stood in the name of Katie Dubovsky, assignee of Vanatta, but it is alleged that she had no interest in and to the certificate, which was merely taken in her name for purposes of concealment and hindrance of

John's creditors. This presents an issue upon which a determination is to be had of the facts. The claim should be restated and further proceedings had to determine the facts.

AUTOMOBILES—SUFFICIENCY OF EVIDENCE UNDER GUEST STATUTE —*Schlessinger vs. Gertrude Miller by Her Next Friend Sam Miller* —No. 13612—*Decided November 18, 1935*—*Opinion by Mr. Justice Burke.*

Plaintiff, riding in the back seat of an automobile as a guest of the defendant, sustained personal injuries in an automobile accident and brought suit to recover damages. Testimony showed that the defendant was driving between 40 and 45 miles per hour on one of the principal streets in Denver, Colorado, at about 11:00 or 11:30 P. M.; that the defendant was driving with his left hand, his right arm about his girl companion in the front seat and was in the act of kissing the girl "a split second before accident occurred." Prior to accident, the defendant had been warned repeatedly by his passengers of the danger incurred by his conduct, but he "just laughed." Verdict and judgment for the plaintiff in the sum of $2,000.

Held, Affirmed—The evidence justified a finding that the defendant was guilty of negligence, consisting of a "willful and wanton disregard of the rights" of the plaintiff. The court points out that when one is too intoxicated to drive safely, "puts himself at the wheel," and "takes the road," he is guilty of "willful and wanton disregard of the rights of all persons" regardless of the guest statute concerning intoxication; that "The common knowledge and experience of mankind makes this language equally applicable to one so intoxicated with love-making as to drive with one hand at an excessive rate of speed on a thoroughfare and greet repeated warnings with indifference and laughter."

CONTRACTS — TORTS — ELECTION BETWEEN TWO INCONSISTENT REMEDIES—DISMISSAL WITHOUT PREJUDICE OF TORT ACTION BARS ACTION ON CONTRACT SAME TRANSACTION—*Florence G. Wheeler vs. Frank J. Wilkins*—No. 13634—*Decided November 18, 1935*—*Opinion by Mr. Justice Holland.*

Plaintiff filed an action to recover on an alleged fraudulent stock selling deal. Defendant's demurrer to the complaint was sustained and plaintiff filed an amendment to her complaint to which defendant moved to strike on the grounds that plaintiff had changed her cause of action from tort to contract. Motion granted and the action dismissed without prejudice. The plaintiff did not seek a review of that judgment, but in about ten days started a new suit based on the promise of the defendant to refund the money paid for the worthless stock. The defendant set up several defenses, including a general denial, statute of limitations,

election of remedies, etc. At the close of plaintiff's case, the court granted the defendant's motion for a non-suit.

Held, Affirmed—The original action in tort was dismissed without prejudice and, since plaintiff failed to have that judgment reviewed, the matters there involved became res adjudicata. Plaintiff's election to sue in tort is irrevocable and a bar to the present suit on an alleged contract. Mr. Chief Justice Butler, Mr. Justice Burke and Mr. Justice Bouck vigorously dissent. Mr. Chief Justice Butler and Mr. Justice Bouck rendered written dissenting opinions.

ORIGINAL PROCEEDINGS—CONSTITUTIONALITY OF CHAPTER 118, SESSION LAWS OF COLORADO, 1933—No. 13787—*Decided November 18, 1935—Opinion by Mr. Justice Hilliard.*

This is an original proceeding before the Colorado Supreme Court wherein Governor Edwin C. Johnson, pursuant to authority contained in Section 3, Article 6, of the Constitution, submitted six interrogatories to the Supreme Court relative to the constitutionality of Chapter 118, Session Laws of Colorado, 1933, which, among other things, provides for regulations, restrictions and conditions under which food may be prepared and sold for human consumption.

Certain merchants of Colorado claimed that the act in question contravened their constitutional rights to conduct restaurants and prior to the effective date of the statute filed their bill of complaint in the United States District Court of Colorado against the Governor and Attorney General and the State Board of Health seeking to enjoin the enforcement of the statute. A three-judge Federal court was convened to consider the matter. After a hearing, the court issued its restraining order, by a decision of two to one; Judge J. Foster Symes, one of the three judges, opposed the restraining order. Then the Governor of the State of Colorado submitted his interrogatories to the Supreme Court of the State of Colorado.

Held—The statute is constitutional. It is the expression of the representative branch of the government which has authority to determine what is requisite to promote and preserve health, safety and morals. The sovereign, under its police powers, may fairly and reasonably restrict the use of property. The unrestricted privilege to engage in business or to conduct it as one pleases is not guaranteed by the Constitution.

Mr. Justice Burke and Mr. Justice Holland dissent.

FALSE IMPRISONMENT—PHYSICAL FORCE NOT NECESSARY—*The Crew-Beggs Dry Goods Company, a Corporation vs. Lea Bayle*—No. 13601—*Decided November 12, 1935—Opinion by Mr. Justice Holland.*

Plaintiff sued the defendant (plaintiff in error) for damages on account of false imprisonment. Plaintiff claimed that she was in de-

fendant's department store as a customer when an employee of the defendant stopped her and charged that plaintiff was a shoplifter. Verdict and judgment for plaintiff.

Errors assigned: (1) Overruling demurrer to complaint; (2) overruling demurrer to evidence at close of plaintiff's case; (3) denial of motion for a directed verdict.

Held, Affirmed—Physical force not required to complete a false imprisonment; any restraint, either by force or fear, without justification, is sufficient.

AUTOMOBILES—PROXIMATE CAUSE—EXCESSIVE DAMAGES—NEGLIGENCE OF DRIVER NOT IMPUTED TO THE PASSENGER—VERDICT ON CONFLICTING EVIDENCE NOT DISTURBED—*Fred Knaus vs. Lois Yoder, by Fred Yoder and Grace Yoder, as Her Father and Mother and Next Friends Herein*—No. 13613—*Decided November 12, 1935*—*Opinion by Mr. Justice Holland.*

Plaintiff sued the defendant (plaintiff in error) to recover damages for personal injuries sustained in an automobile accident. The automobile in which the plaintiff was riding, travelling west, was struck by the defendant's automobile east of the intersection of a north and south street. The defendant had been travelling north but made a wide right turn to go east just before the accident occurred. Evidence was conflicting as to whether or not the collision occurred on plaintiff's or defendant's side of the street.

Plaintiff's injuries consisted of nervous shock, lacerations of the face, permanent disfigurement, broken nose with permanent injury to nasal passages and likely to become worse. Verdict and judgment for plaintiff in sum of $8,750.

Errors assigned: (1) Erroneous instructions, and (2) excessive damages.

Held, Affirmed—Proximate cause of the accident on conflicting evidence is for the jury. Amount of compensation to be awarded for such serious injuries also for the jury; the amount awarded does not reflect prejudice or corruption on the part of the jury. Negligence of driver not imputed to the plaintiff who was a passenger. Mr. Justice Bouck dissents.

MINES—CONFLICTING CLAIMS—LANDLORD AND TENANT—*Kenney vs. Eccker*—No. 13615—*Decided November 4, 1935*—*Opinion by Mr. Justice Campbell.*

This is a controversy between the parties concerning the ownership of certain mining claims, particularly over conflicting locations. The trial court in its findings held that the only question in controversy was whether the defendants were estopped from claiming the right to loca-

tion as against the plaintiffs by reason of an alleged relationship as landlord and tenant. The trial court held for the plaintiffs:

1. Where there is a conflict as to priority of mining location the defense that the relation of landlord and tenant existed at the time the tenant made an adverse location is good, provided the evidence shows that the relation of landlord and tenant existed.

2. There was competent evidence to sustain the finding of the trial court that the relation of landlord and tenant did not exist.

3. There was competent evidence to prove that the defendants located the mining claim before the relation of landlord and tenant came into existence and hence they are not estopped.

4. Evidence examined and sufficient to sustain the judgment of the lower court.—*Judgment affirmed.*

INSURANCE—FIDELITY BOND—SUFFICIENCY OF EVIDENCE TO RECOVER ON—MOTION FOR NON-SUIT—*American Surety Company vs. Capitol Building and Loan Association*—No. 13479—*Decided October 21, 1935—Opinion by Mr. Justice Holland.*

The Capitol Company sued the Insurance Company below upon a fidelity bond, claiming that an employee had embezzled monies. Defendant made motion for non-suit below, which was denied and defendant stood on the motion and judgment was entered for plaintiff.

1. The motion for non-suit should have been granted.

2. The plaintiff failed to establish the alleged cause of action.

3. Where a fidelity bond provides for liability through any dishonest act of the employee, it is incumbent upon the plaintiff seeking to recover to show that a loss occurred through a dishonest act.

4. The evidence wholly failed to show such.

5. Mere negligence producing a loss will not establish liability under the bond.—*Judgment reversed.*

WORKMEN'S COMPENSATION—REOPENING CASE ON COMMISSION'S OWN MOTION AND AWARDING ADDITIONAL BENEFITS—FINDINGS OF COMMISSION CONCLUSIVE ON CONFLICTING EVIDENCE—SUPREME COURT RULE 32—*Moffat Coal Company and the Employer's Mutual Insurance Company vs. Pete Cometa and The Industrial Commission of Colorado*—No. 13827—*Decided November 12, 1935—Opinion by Mr. Justice Burke.*

Employee injured in an accident arising out of and within the scope of his employment awarded 15% permanent partial disability benefits. Later the case was reopened on the Commission's own motion and disability benefits increased to 20%. Still later the Commission

again reopened the case, took additional testimony and on the grounds of changed conditions increased disability benefits to 25%.

Held, Affirmed—The evidence is conflicting and the Commission's findings are sufficient and conclusive. The court directs attention to Supreme Court Rule 32 to effect that each alleged "error should be separately alleged and particularly specified."

AUTOMOBILE—MANSLAUGHTER—CAUSING DEATH WHILE UNDER INFLUENCE OF INTOXICANTS—*Stevens vs. People*—No. 13761 —*Decided November 4, 1935*—*Opinion by Mr. Chief Justice Butler.*

Stevens was convicted under Chapter 95, Session Laws of 1923, of causing death of another while driving an automobile under the influence of intoxicating liquor.

1. The word "intoxicated" in title is synonymous with the words "under the influence of intoxicating liquor" as used in body of act.

2. Hence, the title covers the body of the act.

3. Evidence sufficient to support verdict.

4. Not improper to show that defendant ran away and rendered no assistance to the injured.

5. Experiment made after the accident, made under like condition, admissible.

6. Proper to show that defendant's attorney tried to change testimony of defendant by making improper suggestions in regard to not drinking.

7. Rejection of certain evidence was proper.—*Judgment affirmed.*

Mr. Justice Bouck dissents.

INSURANCE—CONTRACTORS BOND—EVIDENCE—MOTION TO STRIKE —ASSIGNMENT OF ERRORS—TRUSTS—*Ohio Casualty Company vs. Colorado Portland Cement Company*—No. 13505—*Decided November 4, 1935*—*Opinion by Mr. Justice Burke.*

The Cement Company recovered judgment below against the insurance company upon a bond given by a contractor to pay for materials used on highway construction contract, the contractor having defaulted in payment.

1. It was proper to strike from the answer portions of application where the bond itself provided that the application was no part of the bond.

2. It was proper to strike from the answer all reference to other contracts and bonds not involved herein.

3. An assignment of error that "the judgment is contrary to and against the evidence and the law applicable thereto" is not a proper one and does not comply with Rule 32, which requires the specific assignment of each error.

4. The bank account of the contractor was his property, not subject to any trust.—*Judgment affirmed.*

INSURANCE—ACCIDENT POLICY—OCCUPATIONAL DUTIES—EXCESSIVE VERDICT—INSTRUCTIONS—*Federal Life Insurance Company vs. Lorton*—No. 13604—*Decided November 4, 1935—Opinion by Mr. Chief Justice Butler.*

Lorton, as administrator, recovered $1,400 for death of one Busby on accident policy which provided against liability if death occurred while performing occupational duties.

Deceased was killed in wrecking a building on a ranch. He was only employed as a ranch hand to feed cattle and do chores.

1. Deceased was not engaged in an occupational duty when he was killed.

2. Instructions not set forth in abstract of record will not be considered.

3. Verdict is not excessive. While the policy was for $1,000 face, still it provided for an increase of 10% each additional year after the first year and the evidence shows it had been in force for four successive years; hence $1,400 was the proper measure of liability.—*Judgment affirmed.*

MURDER—ACCESSORY AFTER THE FACT—SUFFICIENCY OF EVIDENCE—*Howard vs. The People*—No. 13755—*Decided November 4, 1935—Opinion by Mr. Chief Justice Butler.*

Howard was convicted of being an accessory after the fact to the murder of Charles Rubin by Sam Jones. He seeks a reversal of the sentence.

1. Under the Colorado statute, a person can be prosecuted as an accessory after the fact even before the principal has been convicted.

2. It is no defense to charge of being accessory after the fact in a murder case that the murderer himself had not been formally charged with the murder.

3. The findings of the court were amply supported by the evidence.

4. Where one is charged with murder and is acquitted, such acquittal does not bar a prosecution against him as accessory after the fact. —*Judgment affirmed.*

Mr. Justice Hilliard dissents.

WORKMEN'S COMPENSATION — OCCUPATIONAL DISEASE — ACCIDENTAL INJURY—USING DOPE ON AEROPLANE—*Industrial Commission of Colorado et al. vs. Ule*—No. 13668—*Decided August 19, 1935—Opinion by Mr. Chief Justice Butler.*

Ule was employed as a woodworker at Denver Municipal Airport. He worked principally in the dope shed where dope was applied to bodies and wings of aeroplanes by means of a spray gun. At various times he showed evidence of dope poisoning which did not interfere with his work, but at one time he was subjected to an unusual and excessive exposure from the dope due to use on a hurry-up job from the effects of which he died.

The Commission held that the death was not due to accident but to occupational disease and on appeal to the District Court the District Court vacated the award and remanded the case to the Commission with directions to enter an award.

1. An occupational disease is one contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incident to a particular employment.

2. The evidence shows that the serious disability which resulted in claimant's death was not the natural and reasonably to be expected result of his employment; nor that his disease was contracted in the usual course of events. The exposures the claimant was subjected to were double those previously used and produced effects that were not intended, foreseen or expected, and hence it was an accident.—*Judgment affirmed.*

STATUTE OF LIMITATIONS—CONTRIBUTION BETWEEN PARTNERS—FOREIGN JUDGMENT—*Davison et al. vs. Tucker*—No. 13548—*Decided October 7, 1935—Opinion by Mr. Justice Holland.*

Plaintiffs below contend that this is an action for contribution between partners, while defendant insists that it is an action on a foreign judgment and is barred by the statute of limitations. The trial court adopted the latter view.

1. Where the action is brought by partners for contribution against another partner on a foreign judgment that the plaintiffs have been compelled to pay, the action is one for contribution and is not an action upon a foreign judgment.

2. Hence, the statute of limitations with reference to bringing suit upon a foreign judgment does not apply.—*Judgment reversed.*

WORKMEN'S COMPENSATION—AVERAGE WEEKLY WAGE—MINIMUM —COMPENSATION—*Roeder as Trustee vs. The Industrial Commission*—No. 13739—*Decided June 17, 1935*—*Opinion by Mr. Justice Burke.*

Claimant, while employed by the company, was injured in an accident arising out of and in the course of that employment, and was totally disabled for approximately seventeen weeks. At the time of injury he was earning $18.48 per week, but due to unemployment his average weekly wage for the year preceding the injury was only $1.67 per week. The Commission awarded him compensation at the rate of $5 per week, which award was affirmed by the Court below.

1. Section 4445, C. L. 1921, as amended, provides, among other things, that the injured employee shall receive 50% of his average weekly wages so long as the disability is total, not to exceed a maximum of $14 per week, and not less than a minimum of $5 per week, unless the employee's wages shall be less than $5 per week, in which event, he shall receive compensation equal to his average weekly wages.

2. The clause "unless the employee's wages shall be less than $5 per week" means wages at the time of the accident and not average weekly wages.

3. The word "wages" means the money rate which employee was actually earning at the time of the accident and where this money rate was not less than $5, but his average weekly wages for the year were $1.87, the employee was entitled to an allowance of the minimum of $5 per week.—*Judgment affirmed.*

UNAUTHORIZED PRACTICE

Chairman Schaetzel requests:

"Will you please put an item in an early edition of the DICTA asking the attorneys to be sure to sign their names as such in all matters in which they appear, such as foreclosures through the Public Trustee, appearances before the Industrial, Public Utilities and Banking Commissions, also on all incorporations filed with the Secretary of State.

"Our Unauthorized Practice of the Law Committee is making a check of the activities of laymen before all boards, commissions, and the Public Trustee and the Secretary of State's office. A check is now being made of the Public Trustee's office, and from cursory examination, less than twenty per cent of the total number of foreclosures have lawyers' names attached to the proceedings. It makes it much more difficult for our committee to investigate any unlawful practice* when the attorneys' names are not connected with the proceedings."

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*J. P. courts excepted, Jake.

CODE OF LAWS, U. S. A.

By F. D. STACKHOUSE, *Clerk, District Court*

The Library of the District Court is today in receipt of a "Code of Laws of the United States of America, in force as of January 3, 1935."

This makes a volume of more than 3,000 pages and we are indebted to Congressman Lawrence Lewis for his thoughtfulness in sending this book for our library. Very truly yours,

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A Denver ordinance prohibits distribution of handbills which will probably be thrown in the street and "frighten or injure or endanger horses or other animals." Very truly yours,

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