Denver Law Review

Volume 13 | Issue 5 Article 5

January 1936

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BRAVE DAYS IN WASHOE*

By ALBERT HILLIARD**

THE meeting of October 22nd was of unusual interest to the membership. Various persons contributed their share of information about an old Nevada case: On July 31, 1908, one Patrick Dwyer, along about dusk of that day, on the streets of Austin, Nevada, made an unfortunate mistake. Not so unfortunate as far as he was personally concerned, but his blunder on that evening resulted in other blunders or errors that could have been, and nearly were, the legal ruination of a district judge and a district attorney.

In this there was one fortunate man, one O'Brien, and the most unfortunate of all, a railroad conductor, who, by the greatest of all misfortunes, greatly resembled, in half light, the aforesaid one O'Brien. At least he did to Dwyer. Whether he would resemble one O'Brien to others is moot, because on the said July 31, 1908, Dwyer shot and mortally wounded A. C. Williams, the railroad conductor, on the theory that he was one O'Brien. And because of bad marksmanship, or just general recklessness, he shot, but did not kill, Henry Dyer, Lander County Recorder, who was strolling with Williams. Patrick Dwyer had neither ever seen nor even heard of Williams or Dyer.

Feelings in Lander ran high against Dwyer. It made little or no difference to the citizens that Dwyer had blundered, and had shot Williams and Dyer only because of the uncertain light. They could not get his somewhat selfish viewpoint, and without too much ado, tried and promptly convicted him before a home-town jury in Lander County. The case was vigorously prosecuted by the District Attorney, A. J. Maestretti, before District Judge Peter Breen. Dwyer was defended by P. A. McCarran, present United States Senator.

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*This article is part of one printed in 1 *Nevada State Bar Journal* 18, therein entitled "Typical Sessions of the Washoe County Bar." The others are not so good. Washoe is the name of Nevada's principal county. At one time all of Nevada constituted Washoe County, Utah Territory.

**Albert Hilliard is the Judge's other son. The Judge's *other* son (author of these footnotes—*Ed.*) says that his brother's profession is that of practicing what they call law in Reno.

After this conviction, Senator McCarran, having lost a case, came to the immediate conclusion that there had been a miscarriage of justice. A client of his had been convicted. There must be something terribly wrong with a law like that, and he was eminently correct, as will be seen. He respectfully demanded a change of venue on the ground that everybody in Lander had concluded prior to the trial that a fellow like Dwyer, who ran around shooting railroad conductors and county recorders, whom he didn't know, should be removed from circulation.

Judge Peter Breen, sitting in the District Court of Lander, failed to agree with defendant's counsel. He would grant no change. He was very positive about it. However, the Supreme Court could detect some degree of prejudice in Lander County against the defendant, and granted the change, whereupon the trial was had in Elko County, George S. Brown, judge.

Sometime after the removal to Elko County, Judge Breen, in the following classical language, paid his respects to the Supreme Court in his comments upon that tribunal's written opinion in granting the change of venue. It was, said Judge Breen, speaking in the record, "* * * an abnormally strange document * * * and * * * it was highly reprehensible for its author, or authors * * *." At this point the jurist feared, if fear was in the man, which seems doubtful, that maybe to speak of the Supreme Court as in any way reprehensible was skating on pretty thin ice, so he fixed it up by saying, "I say reprehensible—as a modification I shall say reprehensible if the court knew what it was doing, pitiful if it did not." As may easily be imagined, the Supreme Court failed to view Judge Breen's "modification" as bona fide modification. So they disbarred him. The district attorney, who had somewhat agreed with Judge Breen, drew a suspension. But these penalties never took effect, so all was well in the end.

This leaves us with A. C. Williams dead, with Henry Dyer in the hospital, the judge disbarred and the district attorney out of active practice, all because of the astigmatism of Patrick Dwyer!

So what happened to Pat? Exactly nothing. He was acquitted in his trial at Elko. Why, is not very clear, except perhaps that he had an "ould mither."

It is most interesting to note that at this meeting when the above matters were discussed there were present Mr. A. J. Maestretti, the aforesaid district attorney, now a leading member of the Washoe County bar, Mr. Henry Dyer, now out of the hospital, Judge George S. Brown, and Mr. C. A. Cantwell, who had been a witness at the first trial in Lander.

For complete details of the above see: Nevada vs. Dwyer, 29 Nev. 421; In the matter of Peter Breen, 30 Nev. 164.

GEMS FROM THE LAST BAR EXAMINATION

From New Jersey State Bar Association Quarterly

Question—Can a husband in an action against his wife for divorce on the ground of adultery, swear to non-access where the wife has borne a child?

Answers—The testimony of the husband showing that he had not had access to his wife since months before the normal period of gestation should properly be admitted where a child has been born.

The court should and will take judicial notice of such common natural phenomenon. In tort law this condition would be termed res ipsa loquitur.

One spouse cannot testify in an action against the other to a crude defect in the marital relationship.

Where children are born out of wedlock there is a conclusive presumption of legitimacy.

An allegation in a petition for absolute divorce on the ground of cruelty was "That suit has not been brought within six months next preceding the last act of cruelty."

On a question of estate limited over if first taker dies unmarried and contingent remaindermen die before first taker; the following procedure was outlined:

(1) The only thing that can be done is to ask Pheobe to get

married and let her and her husband sign the deed, which I would not advise simply to give a good title.

(2) Notice could be given to unborn children by publication.

Venue may be changed because of the impartiality of the judge and jury.

Testimony given by a party at a previous trial is inadmissible unless the party is dead and cannot testify.

WHAT WOULD YOUR ANSWER HAVE BEEN?

The following questions and answers were extracted from the examination papers at a recent Michigan Bar examination:

Question involved enforceability of infant's executory contract to marry accompanied by seduction in reliance thereon. *Applicant thought the contract could be enforced because of partial performance.*

In holding against liability of a vendor for misrepresenting important facts relating to the land sold, applicant said: *"And while this is no ordinary puffing—about all the defendant actually did was to lie about it."*

In treating of a divorce question where the husband was charged with adultery but the wife, unknown to the husband, had likewise been guilty of adultery—applicant said: *"As a pure matter of barbershop law—what he didn't know didn't hurt him."*

Another applicant said: *"The decree should be for the husband—one act of adultery on his part is not sufficient."*

In Constitutional Law one applicant defined the system of "Checks and balances" as that which *enabled the President of the United States to check over the accounts and balances of the government to see which way it was running.*

Another remarked that the trouble with that system was *"too many checks and no balances."* (From *Detroit Quarterly.*)