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Supreme Court Decisions

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Supreme Court Decisions

AUTOMOBILES—COLLISION—NEGLIGENCE—PROVINCE OF JURY—NEGLIGENCE OF DRIVER NOT IMPUTABLE TO GUEST—*Forsythe vs. McCarthy*—No. 13707-8—*Decided March 16, 1936—Opinion by Mr. Justice Holland.*

Forsythe owned an auto truck which, at the time of the accident, was loaded with merchandise and being operated on a public highway. A collision occurred between this truck and an automobile in which the daughter, a minor, was riding as a guest. The automobile was following the truck and the truck made a lefthand turn and the automobile collided with it, negligence being alleged the failure to give any signal of a lefthand turn. Judgment for plaintiff.

1. The evidence being sharply conflicting and resolved in plaintiff's favor by the jury, no complaint being made as to the amount of the verdict, such a verdict properly withstands an attack on review, if the instructions to the jury were not erroneous.

2. Instruction No. 10, while not a model for excellence, fairly instructed the jury that negligence of the driver of the automobile in which plaintiff was a guest is not imputable to the plaintiff. Such is the law unless negligence is the sole cause of the accident.

3. While the court should have instructed the jury with a definition of proximate cause, the absence of such definition resulted in no confusion when the other plain instructions are considered together as a whole.—*Judgment affirmed.*

NEW TRIAL—DIRECTED VERDICT—CONFLICTING EVIDENCE—*Barr vs. Aarons*—No. 13623—*Decided March 9, 1936—Opinion by Mr. Chief Justice Campbell.*

Plaintiff, Barr, in her complaint charged that she held a second trust deed on certain real property. The defendant's attorney came to her home when she was sick and falsely told her that he had a deal by which he was to get the first trust deed paid off and also her second trust deed paid. Relying thereon, she signed a release of her second trust deed. At the close of the evidence produced by the plaintiff the trial court denied defendant's motion for a directed verdict. Thereupon, Aarons produced evidence which directly contradicted the evidence of the plaintiff. The trial court took the case from the jury and gave judgment for the defendant.

1. Where the evidence is in direct conflict it is error for the court to take the case from the jury. The matter should have been submitted to the jury.—*Judgment reversed.*

MANDAMUS—MUNICIPAL CORPORATIONS—FRANCHISE OR REVOCABLE PERMIT—USE OF STREET BY BUSSES—*The People on relation of Foley vs. Begole et al.*—No. 13563—*Decided March 9, 1936—Opinion by Mr. Justice Burke.*

The City of Denver, by ordinance, granted the Tramway Company a "revocable permit" to operate passenger busses on Marion Street. Foley brought mandamus to compel the cancellation thereof. The city demurred for want of facts, defect of parties, and want of jurisdiction. The demurrer was sustained by the trial court.

1. Under Section 281 of the City Charter the council may grant a license or permit at any time, in or to any street, alley or public place, provided such license or permit shall be revocable at any time, and such right to revoke shall be expressly reserved in every license or permit which may be granted hereunder.

2. The city in granting the permit acted under said Section 281.

3. Such right to use the streets for busses was a revocable permit and was not a franchise requiring a vote of the qualified taxpaying electors.

4. Anyone may use the streets and highways for ordinary purposes. This right extends even to conducting such business thereon as does not permanently occupy and obstruct the highway to the exclusion of others. If the business permanently occupies and obstructs the highway, as by the laying of car tracks, the right to do so can only be granted by franchise.

5. There was a want of jurisdiction below. Mandamus will not lie. The writ may be issued only to compel the performance of an action which the law specially enjoins.

6. The department of the city here proceeded against is the legislative and the only action sought is the repeal of legislation, and this can only be accomplished by the passage of legislation; that is, a repealing ordinance, and this the courts are powerless to command.—*Judgment affirmed.*

Mr. Justice Butler not participating.

WILLS—CONTEST—FRAUD—DESTRUCTION OF LETTERS BY BENEFICIARY OF WILL—DIRECTED VERDICT—*Huber vs. Boyle et al.*—No. 13801—*Decided March 9, 1936—Opinion by Mr. Justice Butler.*

This is a contest over the will of Samuel Holmes. In his will he named as his sole devisees and legatees his nieces, Daisy M. Holmes and her sister, Florence Holmes Soule. Miss Holmes filed petition for probate in which she stated that she and her sister were the only heirs at law. At that time she knew that there were other heirs which she failed to list. The will was admitted and thereafter Mrs. Huber filed a motion

to vacate the order of admittance. Thereupon, Miss Holmes filed a petition to reprobate the will, including Mrs. Huber as an heir. Mrs. Huber filed a caveat and in the County Court the will was sustained. On appeal to the District Court the will was sustained on a directed verdict.

1. Where it appears that at the time the testator executed the will he labored under the mistake and belief that his sister was dead and such mistake and belief was caused by false representations knowingly made by the beneficiaries in his will, with the fraudulent purpose of inducing the testator to make his will in their favor, to the exclusion of his sister, and he so made the will in reliance upon such representations, the will would be void.

2. If such representations were made by one of them, the other not participating, the devise and bequest to the wrongdoer would be void.

3. The devise and bequest of the innocent beneficiary would be valid in the absence of a showing that such devise and bequest were affected by the representations.

4. There was sufficient evidence of fraud to submit the case to the jury.

5. Fraud is never presumed. The one asserting it must prove it by evidence that is clear, precise and indubitable.

6. Where it appears that the beneficiaries under the will destroyed letters wilfully with the intention and for the purpose of making it impossible to prove the contents in any will contest, the jury should be permitted to infer that the letters if produced would have supported the case of the contestor. Miss Holmes having admitted the destruction of the letters by her, the burden was upon her to repeal the inference of fraudulent intent and her explanation was for the jury to consider.

7. The court erred in directing the verdict.—*Judgment reversed.*

RAPE—PRINCIPAL AND ACCESSORY—DIRECTED VERDICT—PHOTOGRAPHS — RECENT COMPLAINT — CROSS EXAMINATION — *De Salvo vs. The People*—No. 13806—*Decided March 9, 1936*—*Opinion by Mr. Justice Butler.*

De Salvo was found guilty of forcibly raping Matilda Zupancic. A motion for a new trial was denied and the defendant was sentenced to imprisonment.

1. The evidence supports the verdict of guilty.

2. Where the information charges two persons with having committed the crime of rape and one fled and the other is tried alone and it appears from the evidence that the one who fled stood by and aided, abetted and assisted the other, he was therefore an accessory during the fact and they were properly jointly charged.

3. Photographs taken of the girl two days after the alleged

assault coupled with testimony that they showed the condition of the girl's body as it existed immediately after the assault were properly admitted.

4. Where the girl complained to her family on the morning of the assault and later on the same morning complained to officers of the commission of the act, such testimony was admissible. Prosecution is not limited to one recent complaint.

5. The court properly curtailed the cross examination of the girl where it appears that counsel was continuing and repeating the same lines of questions that he had already asked many times.—*Judgment affirmed.*

TAXATION—MOTOR FUEL TAX LAW—DEMURRER—INTERSTATE COMMERCE—CONSTITUTIONAL LAW—*The State of Colorado vs. Tolbert et al.*—No. 13596—*Decided March 23, 1936—Opinion by Mr. Justice Bouck.*

The State of Colorado applied for an injunction to restrain defendants from using motor fuel imported by them from the State of Kansas upon which no tax was paid and which was so imported with a plan and design to avoid the payment thereof. A violation of the act constituting a misdemeanor. A demurrer to the complaint was sustained below and suit was dismissed.

1. The complaint stated a cause of action.

2. Continuous and flagrant violation of the motor fuel statute, the violation of which is a misdemeanor and not a crime, warrants the issuance of an injunction to prevent such continuous violation where the defendants are execution proof and financially irresponsible.

3. The title of the act is broad enough to include all that is involved in this injunction suit.

4. The act does not contravene section 7 of article X of the Colorado constitution.

5. The act in no manner violates the United States constitution with reference to interstate commerce. The statute specifically states that it shall not apply to motor fuel used in interstate commerce.—*Judgment reversed.*

Mr. Justice Campbell dissents.

WORKMEN'S COMPENSATION—METHOD OF DETERMINING AVERAGE WEEKLY WAGE WHERE EMPLOYEE WORKS FOR HIMSELF PART TIME—*Imperial Coal Company et al. vs. Holland et al.*—No. 13892—*Decided March 23, 1936—Opinion by Mr. Justice Young.*

Claimant was allowed compensation for a compensable injury based on his total earnings in a mine divided by 26 weeks. The evidence showed he worked in the mine approximately half the time during the

preceding year of his injury and the other half of the time for himself as a farmer.

1. In estimating average weekly wages earned the number of weeks the employee was in business for himself during the year preceding the accident should be deducted from the total number of weeks in the year and his average weekly earnings determined by dividing the total amount so earned by the remaining number of weeks.—*Judgment affirmed.*

Mr. Justice Bouck not participating.

WORKMEN'S COMPENSATION—CONSTRUCTION OF SECTION 73 OF INDUSTRIAL ACT—*Leyden Lignite Company et al. vs. Buddy et al.*—No. 13906—*Decided March 23, 1396—Opinion by Mr. Justice Burke.*

Buddy was awarded compensation on ground of permanent partial disability equivalent to 20 per cent of a working unit and instead of a weekly allowance for 88 4/10 weeks he was allowed a lump sum of $3640.00, payable in installments until the full sum of $3640.00 shall have been paid. The award of the commission was affirmed by the district court.

1. Section 73 of the workmen's compensation act provides that in case of loss or partial loss of *use* of a member, compensation may be determined by a comparative estimate or the commission may award compensation under the permanent partial disability section which is Section 78.

2. Compensation was properly allowed under the above.

3. Injuries specifically covered by Section 73 refer not only to loss of a member but also to loss or partial loss of the *use* thereof.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—ELECTION OF REMEDIES—SUIT BY EMPLOYEE TO COLLECT COMMON LAW DAMAGES—*Industrial Commission of Colorado vs. Schaefer Realty Company*—No. 13832—*Decided March 23, 1396—Opinion by Mr. Justice Bouck.*

Rosetta, an employee who suffered a compensatory injury in the course of his employment, elected to bring a suit at common law against his employer for damages for personal injuries. He lost the suit and he thereafter filed a claim for compensation under the workmen's compensation act. The defense was that he, having elected in the first instance to bring a suit for damages, that he was not entitled to recover compensation under the act. The district court sustained this contention.

1. Where an employee elected to bring suit against his employer for damages for injuries sustained and is unsuccessful in the suit, he is

precluded thereafter from claiming compensation under the workmen's compensation act.

2. The two remedies are so entirely different that an election to proceed under one bars an action under the other.—*Judgment affirmd.*

Mr. Justice Holland not participating.

BOUNDARIES—DISPUTE OVER—APPOINTMENT OF COMMISSIONER—JURISDICTION — METHOD OF APPOINTING — INSTRUCTIONS — REPORT OF COMMISSIONER—*Gibson et al. vs. Neikirk et al.*—No. 13545—*Decided March 16, 1936—Opinion by Mr. Justice Bouck.*

This was an appeal from a judgment entered by the district court of Yuma county in proceedings to establish disputed boundaries.

1. Where commissioner was appointed by the court to survey and establish disputed boundary lines after service of summons on part of the defendants, but before all defendants were served, and before trial of the action, the defendants who had not theretofore been served made a general appearance and it appears that their rights were not prejudiced by the premature appointment, no prejudicial error was committed.

2. Where defendants failed to request the court to give any specific instructions to the commissioner, but it appears that the commissioner proceeded in the proper manner, no prejudicial error occurred.

3. Where the commissioner sent out a notice to the parties stating the time and place of beginning his work and defendants made no objections to him and it appears that he attempted the ordinary method of surveyors for doing the work, the defendants cannot complain.

4. After the report of the commissioner was received the court below gave all parties an opportunity of correcting any mistakes or errors by a hearing in open court. The objections to the report are overruled.

5. Where, after the incoming of the report the court permitted the appellants to raise the issue of over 20 years recognition of, and acquiescence in, certain boundaries alleged to be the true ones and thereupon made a finding that certain of the boundaries had been so acquiesced in, this modified the findings of the commissioner in favor of the appellants and they cannot complain.

6. Rule 32 of this court requires an error to be "separately alleged and particularly specified," and merely specifying that the court erred in receiving certain testimony tendered by plaintiffs over objection of the defendants is an insufficient allegation of error.—*Judgment affirmed.*

TAXES—DISTRAINT WARRANT—LEVY—LIABILITY OF SHERIFF—LIABILITY OF DEFENDANT—*Robeson vs. Bennett*—No. 13630—*Decided March 16, 1936—Opinion by Mr. Justice Burke.*

Bennett brought this action against Robeson, owner of a theater building and against the county treasurer and against the sheriff claim-

ing that under pretense of issuing and serving a distraint warrant for the collection of taxes against a moving picture machine located in the building that instead of removing the personal property that they closed the theater and padlocked it, thereby ruining the plaintiff's theater business carried on there. Judgment was entered below in favor of the plaintiff.

1. The provision in written lease providing against assignment against the lessee without the written consent of the lessor is for the lessor's benefit and can be waived by parol or implied from the facts.

2. The plaintiff's loss is undisputed. The plaintiff did not owe the taxes, nor did the personal property which was located in the theater and against which the taxes were assessed belong to the real estate and this personal property consisting of a moving picture machine could have been removed under the distraint warrant without padlocking the theater. Instead of so doing, under the guise of this tax levy, the plaintiff's place of business was closed and padlocked, his lease ignored and he lost his business. The judgment below returns to him only his purchase price.—*Judgment affirmed.*

ATTORNEYS—SUSPENSION—ORIGINAL PROCEEDINGS—FORGERY—*Melville vs. Wettengel*—No. 13931—*Decided April 21, 1936*—*Opinion by Mr. Justice Hilliard.*

This was an original proceeding brought in the Supreme Court by the petitioner, Melville, against Wettengel, a member of the bar and district attorney, praying that a citation issue commanding the respondent to show cause why he should not be disbarred and punished for contempt of the court for having committed perjury before the committee on grievances of the Colorado Bar Association at a hearing before it upon charges preferred against him by the committee on order of the court. Citation to show cause was issued and respondent filed a return to which petitioner replied and the issues were tried before the Supreme Court en banc, Mr. Chief Justice Campbell not sitting or participating.

The petitioner alleged that the respondent had sworn falsely before the committee in that he had produced and vouched for a photostatic reproduction of an asserted registration card of Hotel Dixon, Kansas City, Missouri, bearing serial number 14001, and in the handwriting of the respondent, which, on its face, showed that the respondent and his wife registered at that hotel on April 19, 1933, whereas in fact said card was a fabrication in which respondent connived for the purpose of defending himself against a charge of perjury, before a grand jury, being investigated by the committee. In support of these allegations there were annexed to the petition the photostatic reproduction aforesaid, and a like reproduction of an asserted registration card of said hotel, also bearing serial number 14001, of the same date, and alleged not to be in the handwriting of the respondent. In the first of these cards, identified as Exhibit 2, the registrants' names and addresses appear as "Mr. & Mrs. Harold Proctor, 1195 South Ogden St., Denver, Colorado,"

while in the second card, Exhibit 3, the names and addresses are "Harold Proctor & Wife, St. Louis, Mo." In his return the respondent admitted that he had produced and vouched for Exhibit 2 as substantiation that he had in fact registered at the hotel on the date indicated. He further alleged that Exhibit 3 was not a genuine registration card of the hotel, and that if such a card was found in the records of the hotel, as the petitioner averred, it was "necessarily a fabricated, spurious registration card, forged and fabricated since respondent testified before said committee."

1. Exhibit 3, the original of which was produced on the trial, was clearly and conclusively proven to be a genuine registration card of Hotel Dixon.

2. Exhibit 2, the original of which the hotel's manager testified could not be found or produced, was clearly and convincingly shown to be a forgery, fabricated by and for the respondent with intent on his part to mislead and deceive the committee.

3. It is not necessary to pass upon respondent's motion to strike a part of the petition upon the ground that it is abusive, although it seems clear no issuable fact was presented by the part in question.

4. It is not necessary to determine whether the respondent's conduct before the committee was contemptuous. If it was, the judgment entered herein is sufficient punishment; if it was not, the judgment would be no less severe.

5. Ordered, that the respondent be indefinitely suspended as a member of the bar of the court.

6. The question whether this order works a forfeiture of respondent's office as district attorney of the second judicial district is not before the court. Therefore, as doubt may arise concerning the effect of this order upon the right of the respondent to continue in office and as to the validity of his acts as such official, with resultant uncertainty and litigation, it is further ordered that the suspension of the respondent shall not forbid his performance of the duties of the office until the expiration of his present term.—*Rule sustained and respondent indefinitely suspended.*

PLEADING—AMENDED COMPLAINT—DEMURRER—DEPARTURE—*Ahart vs. Barrett et al.*—No. 13747—*Decided March 30, 1936*—*Opinion by Mr. Chief Justice Campbell.*

This action was determined below on motion of defendants to strike an amended complaint on the ground that the amended complaint departed from the original complaint to which a demurrer had been sustained for want of facts. The motion was sustained and judgment of dismissal entered.

1. Where, after demurrer to a former pleading has been sustained and the losing party files an amended pleading, he may not assign error to the ruling holding his original pleading insufficient.

2. The court below had the right to compare the amended com-

plaint with the original in order to determine whether there was a departure.

3. The amended complaint clearly departed from the original complaint and the ruling of the court below was right.—*Judgment affirmed.*

ELECTIONS—CONTEST—INMATES OF POOR HOUSE—RESIDENCE—ABSENTEE VOTES—*Israel vs. Wood*—No. 13874—*Decided April 6, 1936*—*Opinion by Mr. Justice Butler.*

At the November, 1932, election Israel, the contestor, and Wood, the contestee, were rival candidates for the office of sheriff of Ouray county. On former proceedings in error to the supreme court, the supreme court held that in counting four votes of inmates of the poorhouse for the contestee that the court erred, because it was not shown that the voters were residents of the precinct in which the poorhouse was situated and the cause was remanded for evidence and finding concerning the last place of residence of the poorhouse voters prior to their becoming inmates of the poorhouse. The county court thereupon took evidence and found that the last place of residence of three of such voters was in the precinct where the poorhouse was situated and that their votes should be counted for the contestee, but two other votes were rejected by the court, which resulted in a tie and judgment was entered in accordance therewith.

1. The contestee requested a dismissal on the ground that the term of office for which the parties were candidates has expired. The motion cannot be sustained. Compensation is an incident to the office of sheriff and the contestor had such an interest in the compensation as to be entitled to prosecute the case, because if he should be held to be elected to the office he would be entitled to recover the compensation that the contestee received.

2. Mere temporary absence from a precinct during the cold weather, coupled with an intention to return to the precinct where one lives coupled with the actual fact of the returning thereto does not change the place of residence of the voter.

3. Where the only question referred to the supreme court on a former hearing was the question of a witness' residence just before his admission to the poorhouse it is too late to raise the additional question that the voter had not resided in the state for one year.

4. Where inmates of a poorhouse cast absent voters' ballots and the trial court found that the voters were too seriously ill to attend the polls and there was sufficient evidence to support the same, such finding will not be disturbed.

5. Where a voter is blind the judges and clerks are not the only ones entitled to render him assistance in marking his ballot, as the blind person may select any other elector to assist him.

6. No questions not mentioned in contestor's verified statement of contest will be considered.—*Judgment affirmed.*

NEW BOOKS

(*Courtesy of* CLERK F. D. STACKHOUSE)

New books received in the District Court Law Library consist of Cooley on Torts, 3 volumes; Newell, 4th Ed. on Slander and Libel; volumes 1 and 2 American Jurisprudence—this is a new edition to supplement Ruling Case Law.

A new edition of Corpus Juris will be out soon, title of which will be Corpus Juris Secundum.