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Supreme Court Decisions

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VARIANCE BETWEEN PLEADING AND PROOF — VERDICTS — *The Marysville and Colorado Land Company et al. vs. Hyde*—No. 12889—*Decided November 13, 1933*—*Opinion by Mr. Justice Butler.*

Plaintiff brought action to recover possession of farm land, and for damages. Defendant pleaded a contract to sell the land to plaintiff, a failure by plaintiff to pay an installment, notice of forfeiture, and an entry for failure to pay. Plaintiff denied the forfeiture, and at the trial sought to prove an extension, which the court allowed over defendants' objection. Defendants then put in evidence tending to disprove any extension. Verdict for plaintiff in the sum of $4,076.40.

1. Assuming that it was a departure to prove an extension under a denial of a forfeiture, it was not reversible error, because defendant was as fully prepared to meet that testimony as if the extension had been pleaded.

2. Verdict of $4,076.40 for ouster of possession of farm land for eleven months, not so excessive as to indicate passion or prejudice on the part of the jury.—*Affirmed.*

RECEIVERSHIP—RECEIVER'S COMPENSATION—INTERLOCUTORY AWARD NOT SUPPORT WRIT OF ERROR—*Lee vs. First State Bank of Keenesburg, et al.*—No. 13154—*Tolland Company vs. Same*—No. 13155—*Decided December 4, 1933*—*Opinion by Mr. Justice Campbell.*

A tentative or interlocutory award of fees to a receiver, made during the progress of the receivership, does not constitute a final judgment and is not reviewable by writ of error.—*Writ of error dismissed without prejudice.*

REAL ESTATE BROKERS—FORBIDDEN SERVICE—WHAT CONSTITUTES—*Schwartz vs. Weiner*—No. 12913—*Decided December 4, 1933*—*Opinion by Mr. Justice Burke.*

1. Weiner, having no Real Estate Brokers' license, alleged that he was employed by Schwartz to assist in the purchase of an apartment house. Defendant contended that the failure of Weiner to have a license precluded recovery. Upon conflicting evidence a verdict was rendered for Weiner.

2. The contention of the defendant that (1) a suit cannot be maintained to recover for a forbidden service is sound, but (2) under the statute, one not licensed, even though not actually in the business, may not engage even in an isolated transaction is unsound.

The section of the statute which provided that two acts or offers

to act within any calendar year constituted the person so acting or offering a broker or salesman was repealed. The repeal of the statute did not prohibit a person, not in the business, from acting in even an isolated transaction, rather did it leave the right to act the same as if the statute had never been passed.

3. It was not error to permit the plaintiff to amend his complaint so as to seek greater damages than originally asked for when the verdict is within the amount originally sought, and the records disclose no possible influence of the amendment on the verdict.—*Judgment affirmed.*

CORPORATIONS—FAILURE TO PAY LICENSE TAX AS DISSOLUTION—*Bokel vs. Zitnik*—No. 13008—*Decided November 27, 1933*—*Opinion by Mr. Justice Butler.*

Plaintiff brought ejectment to recover possession of real estate. Complaint alleged that the property was conveyed to plaintiff by the last board of directors of a corporation which had previously been declared defunct under C. L. '21, sec. 2317, for failure to pay its annual license tax for over five years. To this defendant demurred. C. L. '21, sec. 2295, provides that upon "dissolution" of a corporation, its last board of directors has power to dispose of its property. Demurrer sustained by the trial court; plaintiff brought writ of error.

1. Since C. L. '21, sec. 2317, provides for reinstatement of a defunct corporation by payment of its delinquent annual taxes, it is not dissolved, but its operation is merely suspended until reinstated. Hence the directors had no title to convey to plaintiff.

2. In ejectment suits plaintiff must rely upon the strength of his own title.—*Affirmed.*

MOTOR VEHICLES—NEGLIGENCE—RIGHT OF WAY—INSTRUCTIONS TO JURIES—COMPETENCY OF JURORS—*Potts et al. vs. Bird*—No. 12911—*Decided November 27, 1933*—*Opinion by Mr. Justice Holland.*

1. Based upon contradictory evidence concerning an accident occurring in an intersection of two streets, a verdict was had for the plaintiff. The statute provides, "* * * the operator of a vehicle shall yield the right of way at intersection of their paths to a vehicle approaching from the right, unless such vehicle from the right is farther from the point of the intersection of their paths than first named vehicle."

2. The Court then instructed the jury that " '* * * unless such vehicle from the right is farther from the point of the intersection of their paths than such first named vehicle' are superfluous, meaningless, and should be considered by the jury."

3. The instruction was wrong. The statute was and is in full force and effect.

4. During the examination of the jury panel, plaintiff's counsel was permitted over the objection of the defendants' to ask individually whether the particular juror questioned was "an agent, employee, stockholder or interested member in the State Farm Auto Mutual Insurance Company." It is admitted that the question is a proper one if asked collectively. Any question that is proper to propound collectively certainly is a proper question to be propounded individually.—*Judgment reversed and remanded.*

DISSENTING OPINION BY MR. JUSTICE BURKE

Instruction as given is harmonious with the opinion of this Court in Hicks vs. Cramer. The part of the Pueblo ordinance held invalid in that case read, "In the event one or more of two or more vehicles shall have entered an intersection, the one nearest the center of the intersection shall have the right of way."

CONCURRING OPINION BY MR. JUSTICE BUTLER

The right of way provision in the statute is free from ambiguity and confusion. Words could not make it clearer. The criticism of the statutory provision actually is that a better or more reasonable regulation could be adopted. That is a question for legislative not judicial determination. "Reckless drivers, like the poor, shall be with us always. Such drivers will race for the intersection of the lines of travel of the cars or for the street crossing, whichever will give them the right of way." The statute does not give a license to race for intersections. Even when a driver has the right of way, he must be careful. "* * * the fact that he has won the race will be no protection to him. * * * The right of way won by negligent racing can hardly be considered a prize." It carries with it no profit; it reflects neither honor nor glory upon the victor.

NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY—*Denver Tramway Corp. vs. Mary R. Burke*—No. 12912—*Decided December 11, 1933*—*Decision by Mr. Justice Burke.*

Defendant in error testified that the driver of Tramway's bus stopped suddenly at an intersection, and that the bus stopped practically in the center of the street. No signal was given by the bus driver signifying an intended stop, nor was the red light flashed on in the rear of the bus.

1. Evidence of negligence of bus driver by reason of unreasonable abruptness of stop, and the unreasonable position near the center of the street was clear.

2. "Ordinarily a driver who collides with a car ahead of him, going in the same direction, is negligent, but not always so. Surrounding facts and circumstances are always relevant and material and may throw an entirely different light on the question."—*Judgment affirmed. Campell and Holland, JJ., dissent.*

HABEAS CORPUS—FOREIGN JUDGMENTS—FULL FAITH AND CREDIT —CUSTODY OF CHILDREN—*The People etc. on Relation of Fred Wagner vs. Emily Wagner Torrence*—No. 13047—*Decided December 11, 1933—Opinion by Mr. Justice Holland.*

Fred Wagner, father of two children, sought a writ of habeas corpus from a Colorado court to obtain the custody of his two children from the mother, his divorced wife. In 1927 the parties were divorced in Wisconsin and custody of the children went to the mother. The mother decided that the health of one child required removal to Colorado and she brought the children to that state.

The father, ex parte, obtained a judgment in the Wisconsin court on showing that the wife had violated the custody order by removing the children from Wisconsin, awarding him the custody.

1. The trial court denied the writ and the Supreme Court affirmed the ruling, pointing out that the children had acquired a Colorado domicile, and the interest of the children was the controlling consideration for the Colorado court. That court had decided that the best interests of the children were served by continuing the custody in the mother.

2. Recognition of the Wisconsin ruling by the Colorado court was not compelled under the full faith and credit clause for the reason that the Wisconsin judgment relied upon was in effect ex parte and for the added reason that the fundamental consideration is the interest of the children determined by the court of their domicile.

INSURANCE—TRIAL—*Equitable Life and Casualty Insurance Company vs. Brennaman*—No. 12947—*Decided December 11, 1933 —Opinion by Mr. Justice Holland.*

Beneficiary under accident insurance policy sued insurer for face amount of policy. The complaint alleged that insured died from bodily injuries sustained through accidental means by reason of having been shot through the head by a bullet from a firearm in the hands of party whose name plaintiff does not know. Defendant denied this allegation and further answered that insured came to his death by suicide within one year after issuance of the policy and that such death within one year after issuance of the policy, and that such death within said time was expressly excepted from the liability of defendant under said policy. Upon trial plaintiff recovered judgment for face amount of policy.

Held: The entire testimony offered was brief and not of an enlightening character. No error is found in admission or rejection of evidence. Trial court had opportunity to observe the witnesses and from that observation and the demeanor of the witnesses it was able, after a full consideration of case, to arrive at its conclusion based upon conflicting evidence, which was sufficient to sustain the findings and judgment. Such findings are conclusive on the Supreme Court.—*Judgment affirmed.*

PLEADING—SHAM PLEADING—DEMURRER—CHANGING CAUSE OF ACTION IN AMENDED COMPLAINTS—*Eastenes vs. Adams, et al.* —No. 12735—*Decided September 18, 1933—Opinion by Mr. Justice Bouck.*

Plaintiff in error, who was plaintiff below, sued in the District Court to recover damages for the death of her husband from a gunshot wound alleged to have been fired by some one of 20 persons who included the defendants, the particular one firing the shot not being known to the plaintiff. Six different amendments to the complaint were made, the original complaint practically charging that the defendants, including William H. Adams, then Governor of Colorado, and certain peace officers with entering into a conspiracy to murder plaintiff's husband and then by successive amendments, changing the cause of action to that of the Governor of Colorado, the peace officers and a mining company with unlawfully seeking to override a strike of coal miners by assuming military dictatorship in the course of which the plaintiff's husband was shot and killed by someone unknown during an altercation between striking miners and the peace officers. The original complaint and successive complaints were attacked as sham pleadings, which were overruled but demurrer was sustained to last amended complaint and plaintiff elected to stand and cause was dismissed.

1. A cause of action cannot, by amended complaint, be shifted to an entirely different basis.

2. Where a complaint is attacked as a sham pleading and is supported by affidavits clearly showing that it is sham and counter affidavits or showing is insufficient, such pleading should be summarily stricken, and it is error for the court to refuse to strike it.

3. The demurrer to amended complaint was properly sustained. It is apparent from the amended complaint that the defendant coal company had only exercised its rights in seeking the aid of the Governor and peace officers against the threatened onslaughts by persons trespassing on its property after they had been duly warned to stay away, but are shown to have been in the actual or attempted commission of crime when the plaintiff's husband was killed.—*Judgment affirmed.*

CRIMINAL LAW—CHANGE OF VENUE — CONFESSION — VERDICT CONTRARY TO EVIDENCE—*Saiz, Vigil and Montoyo vs. The People of the State of Colorado*—No. 13313—*Decided September 18, 1933—Opinion by Mr. Justice Hilliard.*

Defendants below were charged with the murder of one George Arnold. Upon a verdict of guilty, fixing the penalty at death, judgment was entered below.

1. Where application for change of venue on the ground that the feeling among the people of the county was such that the defendants

could not have a fair trial and same was not verified or supported, the evidence and record will be examined and held, in this case, that the court did not abuse its discretion in denying same.

2. When a written confession is offered and defendants object on the ground that they did not confess and that any alleged confession was obtained by duress and fear, the question of admissibility is primarily for the trial court. In this case, this issue was tried to the court out of the hearing of the jury, which was proper. After examination of the record, the trial court did not abuse its discretion in admitting the confession.

3. The record is without error.—*Judgment affirmed and defendants ordered executed during the week ending November 18, 1933*

DAMAGES—REVERSAL FOR INADEQUACY OF—FRAUD—WILLFUL DECEIT—*Lynch vs. The Kuhlmann Investment Co., et al.*—No. 12939—*Decided September 18, 1933—Opinion by Mr. Justice Burke.*

Parties are the same here as below; defendants as real estate brokers negotiated a trade of plaintiff's property and plaintiff thereafter brought suit, claiming that defendants were her agents and had defrauded her and asked for $1,500.00 actual and $2,000.00 exemplary damages and prayed body execution.

Jury returned verdict for $196.54 actual damages, and found defendants guilty of fraud and willful deceit. Plaintiff dissatisfied with small verdict prosecuted writ of error.

1. That the defendants were plaintiff's agents and that they defrauded her are settled by the verdict and special finding of the jury.

2. The sole remaining question is the amount of the damages. Even where the evidence is conflicting upon the amount of damages, the Supreme Court will examine the evidence, and where such evidence, viewed in its most favorable light as to conflicts, discloses damages exceeding the verdict, the cause will be reversed, especially where no possible interpretation of the admitted facts can bring them within reasonable range of the verdict.—*Reversed and remanded for new trial on amount of damages only.*

CRIMINAL LAW—MURDER—INSTRUCTIONS—FIRST OR SECOND DEGREE—*Jones vs. The People of the State of Colorado*—No. 13299—*Decided September 18, 1933.*

Jones and Nelson were charged with murder of the first degree in killing Hartford Johnson. The jury found them both guilty of first degree murder. Jones was sentenced to death; Nelson to life imprisonment. Jones alone seeks reversal on the ground that he requested the

court below to give an instruction on second degree murder which was refused, the court charging the jury that they might find the defendant guilty of first degree murder or not guilty.

1. Where the defendant fails to preserve the evidence by bill of exceptions lodged in Supreme Court, all presumptions are in favor of the regularity of the ruling of the trial court.

2. Where murder is committed by means of poison or lying in wait, or in the perpetration of, or in an attempt to perpetrate, one of the felonies specified in Sec. 6665, C. L. 1921, there is only one degree of murder, namely, murder in the first degree. If the uncontradicted evidence is to the effect that murder was committed in one of the ways specified and in no other way, the question of second degree murder is not in the case, and the defendant should be found guilty of murder in the first degree or he should be acquitted.—*Judgment affirmed with directions.*

DAMAGES—RAILROADS—VERDICT—NEWLY DISCOVERED EVIDENCE—*The Grand River Valley Railway Company vs. Murphy*—No. 12987—*Decided November 20, 1933*—*Opinion by Mr. Justice Burke.*

Mrs. Murphy recovered judgment below for $9,000.00 personal injuries and $200.00 damages to automobile in collision between automobile and interurban car. Defendant filed motion for new trial, one of the principal grounds of which was newly discovered evidence. It appeared that the newly discovered evidence consisted of proof that immediately before and immediately succeeding the trial she exhibited no evidence of injury, but that during the trial she appeared to be in constant pain, unable to use her right leg and required the assistance of two people in entering or leaving the Court room.

1. While the trial Court is vested with wide discretion in granting or refusing motion for new trial on grounds of newly discovered evidence it was an abuse of discretion in this case in failing to grant the motion.—*Judgment reversed.*

CONTRACTS—CONSTRUCTION—INTENT OF PARTIES—*The National Sales Corporation vs. Dennis*—No. 13403—*Decided November 20, 1933*—*Opinion by Mr. Justice Burke.*

The National Sales Corporation claiming, to own a mill and its equipment, alleged that one Lehman had pretended to sell to Dennis a separator connected with the mill and that Dennis was attempting to remove it and prayed for an injunction and damages. The Court below found that Lehman owned this separator and Dennis had title to it. Judgment was given for Dennis.

1. In interpreting a contract Courts must endeavor to ascertain and effectuate the intent of the parties to it.

2. Surrounding facts and circumstances when necessary should be resorted to in order to determine such intent.

3. Applying these rules to the present transaction the contract between the National Sales Corporation and Lehman in no manner involved the separator and that Lehman had full title to convey the same to Dennis.—*Judgment affirmed.*

MANDAMUS—WHEN PROPER—DISCHARGE OF CIVIL SERVICE EMPLOYEES IN DENVER—PROCEDURE THEREFOR—*Bratton et al. vs. Dice*—No. 13938—*Decided December 11, 1933*—*Opinion by Mr. Justice Holland.*

Mandamus was brought by Dice, a member of the classified service of the Denver Police force, against the Manager of Safety and Excise and the members of the Denver Civil Service Commission. He was summarily suspended for three days and deprived of his salary for that period by the Manager of Safety and Excise, without charges being filed, notice or opportunity to be heard, for failure to enforce a traffic rule. Dice appealed to the Civil Service Commission, which refused to give him a hearing on the ground that it had no jurisdiction. Denver Charter provided (Sec. 224) that the Commission had power to make rules; (Sec. 238) that "all persons shall retain their positions until discharged," and that discharges from the classified service should be only after written charges filed, notice to the person sought to be discharged with a copy of the charges, and a reasonable time for him to answer them in writing. The rules of the Commission provided for the various acts required by the Charter in case of discharge or demotion, but provided that the appointing officer might suspend a subordinate for any period less than a month as a matter of discipline, without notice or hearing. Dice contended that in so far as the Commission's rule failed to make provision for written charges, notice and hearing in case of suspension, the rule was invalid as being contrary to the Charter. Court below held for Dice.

1. Mandamus will properly lie. Remedy to bring ordinary action to collect pay is inadequate—what Dice wants is to have this blot expunged from his record, and for that mandamus alone is an adequate remedy.

2. Purpose of Civil Service Laws is stability to tenure.

3. Authority given by Charter to Commission to make rules is limited by provisions in the Charter as to what those rules must contain.

4. After probation, the tenure of Civil Service employees is permanent except upon discharge in the manner provided by Charter.

5. Although Charter does not expressly provide for a hearing, it does so impliedly, otherwise the written charges and opportunity to answer would be futile.

6. Charter intended as a protection to Civil Service employees from arbitrary action of their superiors.

7. Dictum that an employee may be suspended pending determination of charges against him, and full reinstatement if charges unfounded.—*Affirmed.*

UNLAWFUL ARREST AND IMPRISONMENT—EVIDENCE—EVIDENCE OF OTHER PROCEEDINGS, ADMISSIBLE WHEN—ABSENCE OF WITNESSES—CONTINUANCE WHEN—*Smith vs. Phelps et al.*—No. 12985—*Decided December 11, 1933—Opinion by Mr. Justice Hilliard.*

1. Suit for unlawful arrest and imprisonment. Plaintiff had been convicted of assault and battery. Having failed to pay his fine, a mittimus issued several days after his stay of execution had expired, and the plaintiff was confined to jail. This is the basis of the present suit against the District Attorney and several other officials. As evidence, plaintiff attempted to show alleged irregularities in his trial for assault and battery. The evidence was rejected. It should have been. Irregularities, if they existed, could be reviewed only in the Supreme Court upon writ of error. Nothing else shown would tend to prove that the prosecution was out of the ordinary.

2. It is not an abuse of discretion on the part of the trial court to refuse a recess because of the absence of witnesses, unless reason is shown for the absence of the witnesses and unless the court is advised of the matters about which the witness intends to testify.—*Judgment affirmed.*

FOREIGN JUDGMENTS—SUITS UPON—HOMESTEAD RIGHTS—*Duling vs. Salaz*—No. 12988—*Decided November 6, 1933—Opinion by Mr. Justice Holland.*

1. Plaintiff obtained a U. S. patent on a homestead entry. Approximately four years prior thereto, a New Mexico judgment was entered against the plaintiff for a breach of promise to marry, which judgment was sued upon in the district court and judgment thereon was entered against the plaintiff. A transcript of the Colorado judgment was filed in the recorder's office and an execution thereon was issued and the plaintiff claimed his exemption under his homestead. Plaintiff brought this action to restrain the sheriff of Las Animas County from selling the land which he claimed exempt. The injunction was granted and the defendant alleged error.

2. The Federal statute under which the exemption is claimed provides that no land acquired under the homestead law shall become liable to the satisfaction of any debt contracted prior to the issuance of patent. The contention of the sheriff that this is an obligation based upon tort is untenable. Whatever might have been the prior status of the promise to marry, it became merged into the New Mexico judgment and is "a debt contracted" within the meaning of the Federal statute.—*Judgment affirmed.*

EXECUTORS—ADMINISTRATORS—CLAIM AGAINST ESTATE—AGREEMENT OF DECEASED TO MAKE MONTLHY PAYMENTS TO CLAIMANT FOR LIFE—*Williams, Administrator vs. Miller*—No. 13202—*Decided November 20, 1933*—*Opinion by Mr. Justice Campbell.*

Miller filed his claim in probate court against estate of deceased for the allowance of $100 per month during claimant's life based upon alleged contract whereby the claimant conveyed certain farm property to deceased in consideration of the deceased conveying to claimant an apartment building in Denver and guaranteeing to claimant, an old man, that the deceased would pay the claimant $100 per month during the rest of claimant's life.

JUDGMENT BELOW FOR CLAIMANT.

1. There was sufficient evidence to justify verdict of the jury finding that the contract between claimant and deceased was that deceased was to pay claimant $100 a month during the lifetime of claimant regardless of whether or not the income from the apartment house equalled $100 per month.—*Judgment affirmed.*

APPEAL AND ERROR—CRIMINAL LAW—*C. H. Carlson and Charles Schupp vs. The People*—No. 13405—*Decided November 27, 1933*—*Opinion by Mr. Justice Bouck.*

1. Where no error is assigned as to the information or as to the rulings on evidence or as to the giving of instructions, the record shows no tendered instruction refused, the instructions given fully and fairly presented the law of the case, there is no complaint against the method of selecting the jurors and there was substantial conflict in the evidence and a verdict of guilty was rendered, the conviction of defendants upon a charge of burglary was affirmed.—*Judgment affirmed.*

PLEADING—DEMURRER—COMPLAINT LIBERALLY CONSTRUED TO SUSTAIN IT—*J. F. Musgrove vs. W. E. Brown*—No. 12964—*Decided November 27, 1933*—*Opinion by Mr. Justice Butler.*

Brown sued Musgrove, the Denver Motor Hotel Company and others for breach of contract, in that they failed to pay his moving expenses of $746.18 as promised and agreed.

At the trial, a demurrer on the ground that the complaint did not state a cause of action was interposed for the first time, orally and by objection to the evidence. The demurrer was overruled and judgment went for the plaintiff in the sum asked.

The general demurrer was not waived for failure to interpose it before trial, but if a cause of action by resorting to liberal construction can be spelled out of the complaint, the court will hold the complaint good against a demurrer interposed at the trial.

CRIMINAL LAW—INFORMATION—COURT'S CONFERENCE WITH JUROR—*Dill vs. The People of the State of Colorado*—No. 13190—*Decided November 27, 1933—Opinion by Mr. Justice Burke.*

Defendant was convicted of violating Sec. 6946, C. L. '21, by obtaining money for corporate stock by a swindling or cheating transaction. Defendant demurred because the information did not contain an allegation of criminal intent. Defendant also moved to quash on the ground that Sec. 3 of the statute alleged to be violated provided that the jury should determine the law and the fact, and that such section was contrary to the state constitution. Defendant also, on the day of the trial, filed a plea in bar raising the statute of limitations and asked for a directed verdict on the ground of no answer to the plea. Motion for a directed verdict was overruled and the district attorney was given leave to answer the plea, which was done after the jury had been sworn in, and a recess was thereupon taken until the next day, when the case was tried over the objection of the defendant.

When the taking of testimony was almost completed the district attorney in chambers in the presence of defendant's counsel, newspaper men and the court, stated that one juror had been in conversation with a friend of the defendant. The taking of the testimony was then completed, the jury instructed, sent to the jury room. Then the juror in question was summoned to the judge's chambers. After a conversation between the judge and the juror alone, in which the juror denied that he had talked with any friend of the defendant, the juror was sent back to the jury room with instructions not to say anything about the conference with the judge. In the meantime, the other jurors had seen a newspaper bearing headlines that a charge of jury fixing had been made in the case. Defendant alleges the conduct of the judge was prejudicial error and also urges the points made below by demurrer, motion and plea. Held:

1. In an information for a statutory crime, allegation of criminal intent is not necessary.

2. The section of the statute providing that the jury shall try the law and the fact is unconstitutional and void but the remainder of the statute is not affected thereby, and the case was tried in accordance with the constitution.

3. It was within the discretion of the court to allow an answer to the plea in bar after the jury had been sworn in, since the plea was not filed until the day of the trial.

4. There was no prejudice from the conduct of the trial judge in interviewing the juror. However, the trial judges are warned against such practice.

Judgment affirmed. Mr. Justice Hilliard dissents on the ground that the conduct of the trial judge regarding the juror was reversible error and it did not affirmatively appear that no prejudice resulted.