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Tennessee Judicial Highlights

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TENNESSEE JUDICIAL HIGHLIGHTS *

Administrative Law—Transfer of Incurrigible Minor to State Penitentiary

Harwood v. State ex rel. Pillars, 184 Tenn. 515, 201 S. W. 2d 672 (1947).

In a case of first impression in Tennessee the petitioner, a minor, while serving a felony sentence in the State Vocational School, was deemed incurrigible and transferred to the State Penitentiary by the State Commissioner of Institutions. The plaintiff petitioned the court for writ of habeas corpus, claiming unlawful restraint and alleging as unconstitutional statutory provisions permitting transfer to the State Penitentiary for completion of the sentence on the ground that such statute has the effect of imprisonment in the penitentiary without trial by jury and without an indictment.

The opinion by Justice Neil stated that constitutional provisions protecting a citizen against imprisonment without indictment and jury trial are not applicable to administrative control of penal or other corrective institutions; and that the act of the State Commissioner of Institutions was not a judicial act but purely an authorized administrative measure.

Agency—Status of Police Officer in Answering Call

O'Quin v. Baptist Memorial Hospital, 184 Tenn. 570, 201 S. W. 2d 694 (1947).

The deceased, an epileptic patient in the defendant general hospital, became unruly and dangerous during the night and began to roam the hospital causing disturbances. The hospital employees called the police who entered the cellar to restrain the patient and there shot him to death after one of the policemen had sustained a broken arm in a scuffle with the deceased and the deceased was advancing upon the other policeman with an upraised piece of water pipe. The plaintiff sought recovery from the defendant for the negligent death of the deceased alleging that the police were the agents of the defendant hospital.

The court, speaking through Justice Prewitt, held that the police officers were not the agents of the defendant; that such officers act in a governmental capacity and individuals or corporations enlisting their services to prevent a breach of the peace are not liable for their acts unless engaging with them in some unlawful plan or act.

* Cases of current interest and importance published between March 1, 1947, and March 1, 1948.

Contracts—Effect of Provision Later Declared Unlawful

American Federation of Labor v. Roane-Anderson Co., 206 S. W. 2d 386 (Tenn. 1947).

The plaintiff and defendant entered into a labor contract which provided, among other things, for a "closed shop." The agreement was signed on February 17, 1947, and was to become effective on February 24, 1947. On February 21, the governor approved an act which, in effect, outlawed contracts which provided for a "closed shop." Sec. 4 of the act stated "That the provisions of this Act shall not apply to any lawful contract in force on the effective date of this Act. . . ." This suit was instituted by the plaintiff for a declaratory judgment as to the effect of the statute upon the contract.

Chief Justice Neil, speaking for the court, stated that "the agreement between the parties was in force in the sense that it was duly signed on February 17, 1947. But the closed shop feature of the contract was not to become operative or enforceable until February 24, 1947;" and, while parties to a contract may bind themselves to some future transaction, "it is well settled that contracts are divisible and, if the thing to be done in the future is declared unlawful, the parties are excused from abiding by its terms."

Contracts—Misrepresentation as Basis for Rescission of Contract

Simmons v. Evans, 206 S. W. 2d 295 (Tenn. 1947).

In the course of negotiation for the sale of a house and lot, the defendants told the complainants that they could use all the water they wanted at the flat rate of two dollars per month. After purchasing the house and lot and taking possession, the complainants learned that the water was cut off each night at seven and not turned on again until seven the next morning. The complainants brought an action to have the sale rescinded alleging fraud by concealment of a material fact and by a material misrepresentation. The defendants contended that the fraud alleged was not actionable because "the water supply was no part of the real estate—they merely contracted to buy a house and lot."

Justice Tomlinson, in reversing a decree sustaining a demurer to the bill of complaint, pointed out that while the question had not been presented to the court before, the situation of this house and lot with reference to the availability of water was a situation affecting the quality and condition of the house and lot and that this was a material misrepresentation of particular facts affecting such quality and condition and therefore actionable.

Evidence—Facts Raising Presumption Against Innocence

Ford v. State, 184 Tenn. 443, 201 S. W. 2d 539 (1945).*

The day following his wife's disappearance, the defendant returned a .32 caliber pistol to his father. When discovered, the wife was dead and an examination of her body disclosed a bullet fired from a .32 caliber pistol. After his arrest and indictment for murder, the defendant sent a note to his father requesting him to bring in the pistol. The pistol was not produced and the father offered no testimony at the trial.

The opinion by Chief Justice Chambliss, in summarizing the incriminating circumstances, states that the failure of the defendant to produce the weapon or to account therefor by the clearly available testimony of his father, was a damaging circumstance raising a presumption against innocence.

Insurance—Cashing of Premium Checks Prior to Policy Approval

Arnold v. Locomotive Engineers Mutual Life & Accident Ins. Ass'n., 204 S. W. 2d 191 (Tenn. App. 1946), *cert. denied*.

The deceased, with knowledge of limitations upon the insurer's agent, submitted a policy application to the agent together with a check for the first premium payment and these were transmitted to the defendant's home office for requisite approval. Before the home office approved the application, having determined a physical examination was necessary, the deceased met his death. The defendant cashed the premium check subsequent to the death of the deceased but prior to any knowledge thereof. The plaintiff brought suit as beneficiary.

Judge Hickerson, delivering the opinion of the court, found that the contract of insurance was conditioned upon approval by the home office and was not approved prior to the death of the applicant. And further, that the customary cashing of premium checks prior to policy approval, and depositing payments in own bank account to be refunded if application for insurance is rejected, neither effected a waiver of the defendant's right to claim that no contract of insurance existed, nor estopped the defendant in any way where the defendant immediately refunded the premium price upon learning of the deceased's death.

Insurance—Interpretation of Exclusion Clause

Lunn v. Indiana Lumbermens Mutual Insurance Co., 184 Tenn. 584, 201 S. W. 2d 978 (1947).

The plaintiff had an insurance policy on his car which contained an ex-

* Designated for publication April 24, 1947.

clusion clause that the policy was not to apply to any damage due and "confined to" mechanical breakdown, unless such damage was the result of a loss otherwise covered by the policy. While the plaintiff was driving his car, the hood became unfastened as the result of a latch breaking and the hood was blown back causing extensive damage to the car.

The opinion by Justice Tomlinson in denying recovery states that the meaning of "confined to" in the exclusion clause includes not only the damage to the broken part but also all other damage to the car caused solely by the mechanical defect, i.e., where the mechanical breakdown is the proximate cause of such damage.

Insurance—Insurance Coverage Required of Municipal Corporation

Nashville Electric Service v. Luna, 204 S. W. 2d 529 (Tenn. 1947).

An electrical power wire which had been negligently exposed by an employee of the Electric Power Board of the City of Nashville resulted in the death of the plaintiff's horse.

The court, per Justice Tomlinson, allowed recovery, holding that this electrical distribution system was operated in a proprietary rather than in a governmental capacity; and that the provision in the special act (under which the defendant operated) requiring insurance to be carried to protect against "liability" which might arise in the operation of the system, included tort liability.

Insurance—Effect of Parol Agreement

Travelers Insurance Company v. Sides, 184 Tenn. 663, 202 S. W. 2d 815 (1947).

An insurance policy, providing for death and total permanent disability benefits, contained a provision that double indemnity would be paid only if accident causing death occurred before any benefit or value, other than a cash loan, was received. Upon total disability of insured, the plaintiff signed a release and received and cashed a check for a lump sum payment in settlement of the disability claim. After death of the insured the plaintiff brought an action to collect double indemnity and attempted to introduce parol evidence that when the release was signed, a contemporaneous agreement was entered into providing that the double indemnity clause was to be inserted in the policy when it was rewritten.

The opinion by Justice Prewitt states that the contemporaneous parol agreement between the plaintiff and agent that double indemnity clause was to be incorporated in the policy when rewritten was consistent with the tenor of

the written release and was competent and admissible. Chief Justice Chambliss and Justice Neil dissented.

Limitation of Actions—Meaning of "Creditor" Under Claims Statute

Collins v. Ruffner, 206 S. W. 2d 298 (Tenn. 1947).

Williams and Ruffner were both killed instantly in a collision of their automobiles on May 5, 1946. On May 2, 1947, Mrs. Collins, administratrix of the estate of Williams, sued the defendant, administrator of the estate of Ruffner, for damages for the wrongful death of her intestate and for damages done to his automobile in the said collision. The defendant filed a plea in abatement averring that the plaintiff failed to file her claim in the county court as required by Chap. 175 of the Acts of 1939 which provides in part that all persons holding "claims" against the estate of the decedent must file their claims with the clerk of the court in which the estate is being administered within twelve (12) months from the date of notice to the creditors or the claims shall be forever barred.

Speaking for the court, Justice Prewitt said that prior to the passage of the Act of 1939, the court had held that a person who has a right of action in tort against the personal representative of the deceased can not be deemed a "creditor" of an estate until he obtains a judgment, and that the Act of 1939 affects procedure only and makes no change in substantive law as to who constitutes creditors.

Pleading—Amendment of Declaration to Include Necessary Party Plaintiff

Mosier v. Lucas, 207 S. W. 2d 1021 (Tenn. App. 1947), *cert. denied*.

Following the death of his son in an automobile accident, the plaintiff, under survival statutes as next of kin, filed suit for damages for alleged wrongful death. He failed to name as party plaintiff his wife, who, with the plaintiff, constituted the sole next of kin. On motion for directed verdict the plaintiff moved to amend but was overruled on the ground that the action of his wife, a necessary party plaintiff, was barred by the statute of limitations.

Judge Hickerson delivered the opinion of the court and found that "Where a suit is commenced to recover damages for a wrongful death by a proper and necessary party before the suit is barred by the statute of limitations, an amendment offered after the statute of limitations has barred the suit, which adds a necessary party plaintiff, will relate back to the filing of the original summons if the addition of the new party did not change the original cause of action, nor introduce a new cause of action."

Real Property—Use of Technical Term in Deed by Layman

Carmody v. Trustees of Presbyterian Church, 203 S. W. 2d 176 (Tenn. App. 1947), *cert. denied*.

The validity of a deed was challenged on the ground that a clause which stated "In other words the parties of the second part does not take *title* or possession in and to the said real estate . . . until after the death of the party of the first part," makes the deed testamentary in character. [Italics added.]

Judge McAmis in his opinion upholding the validity of the deed concurs in the finding and holding of the Chancellor that where the draftsman of an instrument is a layman, not a lawyer, and uses an isolated technical term, viz., *title*, the meaning of which is at complete variance with the plain and fully expressed intent of the grantor, it can and should be ignored.

Real Property—Equitable Assignment of a Future Interest

Hobson v. Hobson, 184 Tenn. 484, 201 S. W. 2d 659 (1947).

A will provided for division of land among children of the testator living at the time of the death of a designated life tenant. Prior to the death of the life tenant one son, a contingent remainderman, executed without warranties a deed of trust in conveying what he thought was his vested interest in the land. Upon the death of the life tenant, a judgment creditor of the aforesaid son sought to have the title to the land cleared alleging that the executed deed of trust was a nullity.

Justice Tomlinson delivered the opinion of the court and stated that the will was subject to the "class doctrine" (Williams Code § 7598) and that no title vested in the contingent remainderman until the death of the life tenant; but even so, and even though the conveyance contained no warranties, it was not a nullity and equity will cause the deed to be operative as an equitable assignment of a future interest.

Search and Seizure—Basis for Arrest Without Warrant

Thompson v. State, 203 S. W. 2d 361 (Tenn. 1947).

A state police officer received information by telephone that the defendant would bring a load of whiskey from Kentucky into Henry County within the next day or two. The officer immediately went to Henry County and swore out a search warrant for the defendant. Shortly thereafter, the defendant drove into Henry County where he was arrested and his car searched. On being prosecuted for the transportation of intoxicating liquors, the defendant attacked the

validity of the search warrant on the ground that it was obtained before he entered the county.

The opinion by Justice Prewitt points out that it is unnecessary to consider the question of the validity of the search warrant as an officer can arrest without a warrant any person he has reasonable cause to believe is committing a felony and that a search made after such an arrest is lawful.

Torts—Liability of Municipality for Creation of Nuisance

Dixon v. City of Nashville, 203 S. W. 2d 178 (Tenn. App. 1946), *cert. denied*.

The city of Nashville, in improving a street, graded it in such a manner that surface water was channeled through a single drain onto the plaintiff's land, where formerly it was channeled through three drains. The accelerated flowage damaged the plaintiff's land.

An opinion by Judge McAmis states that this was a wrongful interference with the natural drainage of surface water which caused injury to an adjoining landowner and constituted an actionable nuisance; and although the defendant is a municipality, it is liable if it creates a nuisance even in pursuing a public work.

Torts—Degree of Care Required of Bottler

Graham v. Cloar, 205 S. W. 2d 764 (Tenn. App. 1947), *cert. denied*.

As the plaintiff was placing some bottled beverage in a container, one of the bottles exploded and a piece of glass caused the loss of sight in one eye. At the trial of the suit which plaintiff brought against the bottler, the court charged the jury that a bottler was held to a high degree of care.

The opinion by Judge Baptist states that a bottler is held to a high degree of care only for the protection of the *health* of the public; and that in a case such as this, a bottler is required to use only that degree of care exercised by an ordinary prudent person under the circumstances.

Torts—Remote Contributory Negligence and Jury Conduct

Sutherland v. Keene, 203 S. W. 2d 917 (Tenn. App. 1947), *cert. denied*.

The plaintiff and defendant had an automobile collision. The plaintiff recovered damages and the defendant appealed, citing as error, first, the submission to the jury of the problem of the plaintiff's admitted contributory negligence; second, the fact that one juror was related to the plaintiff within the sixth degree of kindred; and third, the failure on the part of the court to find

the jury guilty of misconduct in discussing the probability of the defendant carrying automobile liability insurance.

In an opinion by Judge McAmis the court held that where evidence is undisputed that plaintiff violated a traffic ordinance, it is still a question for the jury as to whether his negligence was a proximate or remote cause of his injuries; that the juror was not conscious of his relationship to the plaintiff until after verdict, and, there being no presumption of bias, the verdict can not be annulled in the absence of a showing of injustice suffered by defendant; and further, that the defendant had not been prejudiced by the jury's general discussion of insurance where there was a showing that the jurors decided the case on the law and the evidence presented.

Wills—Dissent from Agreement to Execute Companion Wills

Church of Christ Home for Aged, Inc., v. Nashville Trust Co., 184 Tenn. 629, 202 S. W. 2d 178 (1947).

A husband and wife executed wills on the same day with the same subscribing witnesses. Each testator provided that his or her property should be held in trust by an executor, and upon the death of the survivor that the property was to be divided equally between the complainant and another. After the husband's death, on her petition, a court granted the wife an allowance for a year's support. As this and the expenses of administration consumed the entire estate of the husband, the executor was thereafter discharged by the court. Before the wife's death she prepared another will naming relatives as devisees. Complainant brings this action for specific performance of the agreement between the husband and wife.

The opinion by Justice Neil states that although the agreement between the husband and wife deprived a survivor of the right to dissent, this did not render such agreement unenforceable; but the court further held that the trust was terminated when the court directed payment to the wife of the allowance and discharged the executor. As the cause of action of the complainant accrued at that time, relief was barred by the statute of limitations when this action was brought.

Workmen's Compensation—When Does Claim Arise Under Act?

Plumlee v. Maryland Casualty Co., 184 Tenn. 497, 201 S. W. 2d 664 (1947).

As a result of a chemical explosion the complainant's eyes were irritated and inflamed. He received treatment until he was apparently fully recovered. Over a year later, because of trouble with one eye, the complainant again reported for treatment and, after receiving treatment for some time, was advised

that as a result of the injury by the fumes and gases, he had lost sight of one eye. This bill was filed under the Workmen's Compensation Act and the defendant demurred on grounds that the statute of limitations barred the action.

The opinion by Justice Gailor states that the one year statutory limitation for the filing of a suit commences to run against a claimant, under the Workmen's Compensation statute, from the occurrence of the injury and not from the date of the accident.

Workmen's Compensation—Effect of Partial Loss of Member

Plumlee v. Maryland Casualty Co., 184 Tenn. 497, 201 S. W. 2d 664 (1947).

An employee suffered severe leg burns in the course of his employment, and, though the leg was not lost, it apparently was rendered useless. Compensation benefits were sought for total permanent disability.

The opinion by Justice Gailor stated that whereas loss of an entire member is compensable by statutory amount for the loss of a member, if there is partial loss, and evidence supports the employee's claim of total permanent disability, the award will be based on actual impairment of earning capacity and compensation benefits for total permanent disability may be allowed.

**CASES OF CURRENT INTEREST AND IMPORTANCE
PREVIOUSLY NOTED**

Baker v. State, 184 Tenn. 503 (1947), 1 Vand. L. Rev. 127 (1947). Accessory after the fact—when is felony complete?

Black v. Black, 202 S. W. 2d 659 (Tenn. 1947), 20 Tenn. L. Rev. 201 (1948). Effect of reciting an oral contract to sell land in an undelivered deed.

Churn v. State, 184 Tenn. 646 (1947), 20 Tenn. L. Rev. 195 (1948). Testimony of arresting officers.

Davis v. Beeler, 207 S. W. 2d 343 (Tenn. 1947), 1 Vand. L. Rev. 451 (1948). Prohibition of practice of naturopathy in Tennessee.

Elliott v. Fuqua, 204 S. W. 2d 1016 (Tenn. 1947), 1 Vand. L. Rev. 309 (1948). Special legislation—population as basis for classification.

Hamm v. Hamm, 204 S. W. 2d 113 (Tenn. 1947), 1 Vand. L. Rev. 161 (1947). Estoppel to challenge validity of void divorce decree.

Sepaugh v. Methodist Hospital, 202 S. W. 2d 985 (Tenn. App. 1947), 1 Vand. L. Rev. 153 (1947). Liability of charitable institution for negligent acts of interne.

Smith v. Mitchell, 202 S. W. 2d 979 (Tenn. 1947), 1 Vand. L. Rev. 123 (1947). Jurisdiction to legitimate.

Tennessee Title Company v. First Federal Savings & Loan Ass'n, 203 S. W. 2d 697 (Tenn. 1947), 1 Vand. L. Rev. 151 (1947). Substitution of words by court in construing statute.

Thones v. Thones, 203 S. W. 2d 597 (Tenn. 1947), 1 Vand. L. Rev. 143 (1947). Contempt proceedings for enforcement of judgment based on sister state alimony decree.