

COURT OF FINAL RESORT

The City Gets a New Trial in the Suit of W. F. Whitaker for Damages.

Contributory Negligence of the Driver Acts Against the Injured Man.

Surety on a Contractor's Bond Held Liable for His Failure to Pay for Labor and Material.

The supreme court yesterday handed down three decisions, one of which is of special interest to Helena. It is in the case of W. F. Whitaker, plaintiff and respondent, versus the City of Helena, defendant and appellant. Whitaker brought suit to recover damages for personal injuries sustained by him by being thrown from a buggy in the street. Among other things the complaint alleged that on Aug. 30, 1893, the city wrongfully and negligently authorized and permitted a show to be maintained and conducted in a tent or canvas-covered wagon on Grand street; that the show was such an obstruction as to render travel along the street unsafe and dangerous, and was of such character as to frighten and well broken horses; that on Aug. 30 he was riding in a buggy drawn by a safe and gentle horse, which was being driven with due care and caution along Grand street, when the horse, without any fault or negligence of his, became frightened at the show tent or wagon, became unmanageable, and ran away, upsetting the buggy, throwing him to the ground with great force, whereby he was greatly injured; that in the lawful transaction of his business he had necessarily to pass along Grand street. The allegations of the complaint are denied by the answer. The case was tried in the district court of Lewis and Clark with a jury and resulted in a verdict for Whitaker for \$1,000. A new trial was asked and denied, and an appeal taken.

The supreme court says: "The evidence clearly shows that Whitaker, at the time of the accident, was riding with James S. Dunn, who owned the buggy and horse, and who was driving. Dunn, it seems, was on his way to lunch, and invited Whitaker, who lived in the same part of the city, to ride with him, as it seems he did almost every day. The evidence does not show that plaintiff knew of the existence of the alleged obstruction to travel on the street. But Dunn agrees that he knew of it. Dunn was at the time an aide-man of the city. It appears from the evidence that the accident occurred at about one o'clock p. m. As soon of that day there was a meeting of the city council. Dunn was at the meeting, and in an earnest and excited manner called the attention of the council to the fact that this show in the tent or wagon was doing business on Grand street, and also called attention to its dangerous character; that the mayor stated that he would see to its removal at once; that thereupon the council adjourned, and that he went immediately to Edwards street, got his horse and buggy, drove to Main street, took Whitaker into his buggy, as he was in the habit of doing every day, and started up Grand street, and in attempting to pass the tent or wagon on one side of the street, and a pile of rock the city was using was on the opposite side; that in attempting to pass between the tent or wagon and the pile of rock, the horse became frightened, ran the buggy over the rock pile, turning it over and throwing the occupants out.

"This evidence of Dunn is in no way questioned. That he knew the obstructed and dangerous condition of Grand street (if it was in such condition) when he drove upon it is beyond dispute. Under this state of facts could Dunn recover if he were prosecuting this suit against the city? If he could not recover, can this plaintiff, who was voluntarily riding with him in his buggy, recover? Was Dunn guilty of such contributory negligence as would deprive him of his right to recover, when he drove upon the street, knowing the condition of the street? If so, was his negligence imputable to the plaintiff so as to defeat a recovery on his part?"

The supreme court quotes a number of authorities on the point and continues: "These authorities all hold that if the negligence of the party injured, or of his driver, which is imputed to him, has contributed to the injury, he cannot recover, although the party complained of has not been free from negligence. In the case at bar it seems clear that Dunn was not only guilty of contributory negligence, but that he was reckless in driving into a street which he swears to know to be dangerously obstructed. His negligence must be held as imputable to the plaintiff, and he cannot recover under the facts and circumstances of the case, neither could Whitaker, although the city may have been guilty of negligence on its part, which it is not necessary in this case to determine.

"The court below recognized the law as stated above as applicable to this case, and so declared it to the jury in the instructions given. But the verdict seems to us to have been rendered in disregard of the law as given by the court, as well as of the evidence in the case. We think the court should have granted, for these reasons, the motion of the defendant for a new trial. The judgment is therefore reversed, and cases remanded for new trial." Opinion by Chief Justice Pemberton.

Another decision was in the case of W. M. Cockrell, respondent, vs. E. H. Davis, John Renner and J. W. Cornelius, appellants. Appeal from Cascade county. Cockrell entered into a contract with Davis, whereby the latter agreed, for a consideration, to provide and furnish all material, and do all labor, necessary to the erection and completion of a two story frame dwelling house for Cockrell, according to certain plans and specifications, made part of the contract. To guarantee fulfillment of contract, a bond was executed by Renner and Cornelius for \$2,000. The building was constructed by Davis, and Cockrell paid him a considerable portion of the contract price, but Davis failed to pay for certain labor and material, used in constructing the roof. Letters were applied and enforced against the property, which Cockrell was obliged to pay. Cockrell then sought to recover from Davis and his bondsmen the amount he was thus compelled to pay. The trial resulted in judgment against Renner alone for \$1,011.50, and he appealed from this, as well as from an order granting his motion for a new trial. It was claimed that bond was void, because Davis, the principal, did not sign it along with the sureties. But after much consideration of this subject, and the authorities, the supreme court says it cannot sustain that view. It was further contended that because there was no provision in the building contract specifically requiring Davis to pay for the labor and material, but in the construction of the building, his obligation was fulfilled by furnishing the same, and not broken by his failure to pay therefor, and in view of the building, and also the lot on which it was erected, subject to be easily demanded for materials and labor. This interpretation of the contract the supreme court thinks untenable. It says when Davis merely obtained and used the material, leaving upon Cockrell the burden of paying therefor, he fell short of furnishing the material, so the contract called for. It was also contended that Cockrell should have withheld payment of the installments for the building, until he had received bills for all labor and material used were delivered to him. The supreme court finds no force in this proposition when considered in the light of the facts, and the terms of the contract. According to the contract Cockrell was required to pay certain installments, as the erection of the building progressed; and the last installment of upwards of \$500 was to be paid when the house was completed entire and

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accepted by Cockrell and receipted bills for all material and labor furnished to him by Davis. It appears that Cockrell did withhold payment of the last installment and applied it on the lien. During the trial the court granted a motion to dismiss the case as to Cornelius, leaving it to proceed against Renner. This ruling was made because Cockrell was unable to prove that Cornelius signed the bond with the understanding that it should be delivered and have effect without the signature of Davis. In the opinion of the supreme court it was not necessary to show an express understanding to that effect, outside of the bond. Both parties on appeal insisted that the court erred in dismissing Cornelius and giving judgment alone against Renner. "Cockrell's counsel," the court says, "may be right in their position that under the law and the terms of the obligation sued on, they have a right to proceed against one surety alone. Not in this case they have proceeded against both sureties, and it has been adjudicated and determined in this action that the liability of his co-surety to share the burden of loss by reason of Davis's default, has been removed by this adjudication, and while such determination stands, appellant would be unable to compel contribution from his co-surety, which would not be the case if one surety had not proceeded against severally. There is no showing that the case was dismissed as to Cornelius without prejudice; indeed, the tendency of the record and rulings, is to show that no suit in effect was entered as to him, because the proof offered was insufficient to support judgment against him. In some instances we think the court erred, and therefore the judgment must be reversed and the cause remanded for new trial." Opinion by Justice Harwood.

The smallest newspaper in the world is published in Guadalajara, in Mexico. Its title is El Telegrafo, and underneath is the announcement that the paper is an independent weekly periodical of politics and varied news. The monthly subscription is 4 cents, by mail 5 cents, for this weekly is a cent publication. It is printed in eight columns, each 4 1/2 inches long and 1 1/2 inches wide, on thick manilla paper. And yet the staff includes an editor and director, an administrator, or business manager, a responsible man, or capitalist, and a printer. Among newspapers this tiny Sunday journal certainly occupies a unique position.—San Francisco Call.



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