

FOUR ARE AFFIRMED

Supreme Court Hands Down Seven Opinions.

DAVIS' BONDSMEN ARE FREE

Action to Recover for Defalcation of School-Land Clerk Barred by Statute of Limitations—Dunphy Verdict Reversed.

SALEM, Jan. 12.—(Special)—The Supreme Court today handed down seven opinions, of which four are affirmed, while three are reversed and remanded. Following are the cases decided:

State vs. Davis et al. The State of Oregon, appellant, vs. George W. Davis, E. P. McCormack and George G. Hincham, respondents, from Marion County; G. H. Burnett, Judge, affirmed. Opinion by Justice Bean.

This was an action commenced by the State on June 22, 1901, against George W. Davis and his bondsmen, E. P. McCormack and G. G. Hincham, to recover \$500 on Davis' official undertaking as School Land Clerk, who defaulted the state of about \$30,000. The case was tried on an agreed statement of facts and without any pleadings on the part of the defendant's sureties. The statement admitted that Davis was clerk of the board from August 8, 1891, to July 31, 1895, and that for the period ending December 31, 1894, he collected as such clerk about \$29,000 more than he paid over to the State Treasurer; that from the period December 31, 1894, to July 31, 1895, he made all payments to the State Treasurer, as required by law, all money collected by him; that prior to January 14, 1895, he made a full report to the board of all money collected and disbursed by him. From the agreed statement of facts, it appeared that Davis had to have occurred some time prior to January 1, 1895, more than six years before the commencement of the action to recover on the bond. The lower court held that the action was barred by the statute of limitations, and the Appellate Court affirms the judgment of the trial court. Supreme Court holds that question was entirely a statutory one, and not a contract under seal.

In disposing of the case, the opinion says: "For the state, the contention is that the action is brought on a sealed instrument and, therefore, is not barred, it having been commenced within 10 years (B. & C. Comp., Sec. 5), while the defendant's position is that it is an action on a liability created by statute, and barred after the lapse of six years. (Id., Sec. 6) It has twice been held by this court that an action on the official undertaking of a public officer for a breach thereof, on account of the delinquency or nonperformance of an officer, is an action on a liability created by statute, and must be commenced within six years. It was so held as early as 1877, in Howe vs. Taylor, 6 Or. 284, and in Multnomah vs. Multnomah County vs. Kelly, 37 Or. 1. But, inasmuch as the state maintains that the question was not involved in either of the cases referred to, we have been constrained to re-examine it in the light of the decisions in other states under similar statutes.

The theory upon which the adjudications proceed is the obvious fact that a bond or undertaking of a public officer creates no obligation in itself, but is in the nature of a collateral contract, simply furnishing a security against the neglect of duty or the dishonesty of the officer, and that an action thereon is for the breach of such duty—on, therefore, in effect, although not in form, an action against the officer for misfeasance or nonfeasance in office, which when barred as to him is barred as to his sureties.

After citing a number of authorities, the opinion continues: "So that there seems to be no basis under the authorities for the contention that the action is barred by the statute of limitations. The liability of the parties thereto. It still remained as a security for the faithful performance by Davis of the duties of his office, and the liability of the parties thereto. The effect was, if any, of adding seals to the signatures of the obligators. It is not now necessary to consider. It clearly did not change the instrument from a statutory contract to a contract under seal, nor did it change the statutory liability of Davis for a defalcation to a liability on a contract.

Davis Was Not a Trustee. It is said that, because the school fund made a trustee of the fund, by act of the Court, Or. Art. 3, Sec. 2, the statute of limitations did not commence to run in favor of Davis until the expiration of his term of office. He was not a trustee of the fund, however, holding under an express and continuing trust, but was simply the clerk of a board vested by the constitution with the control and management of the fund, with power to collect, disburse and report thereon to the State Treasurer. His duty was to receive, receipt for and make immediate payment to the State Treasurer of such money (Hill's Ann. Laws Or., Sec. 272), and when he collected it, correctly charged himself therewith on his books and reported the same to the board, but failed to pay it over, a cause of action, therefore, accrued against him immediately. Where an agent receives or has a fund under an express and continuing trust, no right of action will accrue until the trust is ended by the terms of its creation, or by act of the parties. (Quintoe vs. Gross, 24 Or. 147; Shepherd vs. Shepherd's estate, 106 Mich. 83.) But, where there is no such trust, and his only duty is to collect the fund and pay it over to the owner or some other authorized person, and he reports the collection, but fails to make such payment, the statute commences to run immediately. (A number of authorities are here cited.) The position of the state upon which this case was tried recites that Davis correctly charged himself with all moneys collected, and at once reported to the board, but did not pay over to the State Treasurer, as by law required, all that he received prior to the 1st day of January, 1895, but did so pay after that date. Therefore, no basis under the agreed facts, for an argument that the statute did not begin until the expiration of Davis' term of office because he concealed the fact of his collection, or failure to pay over, according to the stipulation, the true facts were all reported by him to the board, and the defalcation was a mere matter of calculation. It follows, therefore, that this action is barred by the statute of limitations, and the judgment of the court below must be affirmed, and it is so ordered."

State vs. Dunphy. State of Oregon, respondent, vs. Bradley F. Dunphy, appellant, from Multnomah; Alfred F. Sears, Judge, reversed. Opinion by Justice Wolverton.

were in the meantime lawfully divorced and the fact should appear in the information: State vs. McCrum, 26 N. W. 102." Continuing, the opinion is as follows: "Now, to analyze the information, it is manifest that the pleader did not intend to charge a crime by alleging that the defendant did unlawfully and feloniously marry Margaret Ryan in the State of Illinois, because the act would not be an offense against this commonwealth, but that the gravamen of the information is contained in the allegation that he lived and cohabited with Margaret Ryan, in Multnomah County, State of Oregon, and hence, the information does not charge the commission of two offenses. The former allegation was meant no doubt, as an inducement to the latter, by showing the second marriage of the defendant and to whom, namely, Margaret Ryan, the latter making reference to her as 'the said Margaret Ryan.' The words 'and while she (S. S. Bosworth) was still

PRESIDENT OF THE STATE SENATE.



GEORGE C. BROWNELL, OF CLACKA MAS COUNTY.

SALEM, Or., Jan. 12.—(Special)—George C. Brownell, of Oregon City, was born in the State of New York in 1859. When a very young man he moved to Kansas, where he was admitted to the bar, and engaged in the practice of law. He manifested a keen aptitude for politics, and occupied a number of responsible positions. In 1891 Mr. Brownell moved to Oregon, settling in Oregon City, where he has been a prominent figure in legal and political circles. He has been elected to the State Senate three times by the Republicans of Clackamas County, and has often been mentioned as a candidate for Congressional honors.

his wife, relates, and was intended by the pleader, to the time of the defendant's marriage to Margaret Ryan, in the State of Illinois, and not to the time of his living with her in said County of Multnomah. So that if the indictment is to be eliminated, these words must go with and the information charged, and be undoubtedly bad. It would be unwarrantable, it seems to us, to thus change the relation of a clause of the information, thereby giving it an entirely different significance; or, rather, to so transport the clause with reference to the context as to make it apply to the gravamen of the offense, when its natural position, and as designated by the pleader, it could have no such relevancy. Such a rule would be promotive of irregularity and perhaps injustice, as it might be misleading as to the specific crime charged, and the defendant be left without adequate preparation for his defense. Hence, we are impelled to hold that the information does not charge the crime of polygamy under the statute. We have examined the case of State of Oregon vs. Abrams, 11 Or. 199, and others cited by the state, but they do not reach the vice attending the present information.

The judgment of the trial court will, therefore, be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

Cullison vs. Downing, Hopkins & Co. J. E. Cullison, respondent, vs. F. O. Downing and F. H. Hopkins, partners doing business as Downing, Hopkins & Company, appellants, from Multnomah; Alfred F. Sears, Judge, reversed, and remanded for new trial; opinion by Chief Justice Moore.

Quatsoe et al. vs. Eggleston. F. L. Quatsoe and J. E. Quatsoe, partners doing business under the firm name of the Manufacturers Advertising Company, appellants, vs. W. H. Eggleston,



Mr. Brownell and Dr. Smith waiting the result of the caucus.

HOW BROWNELL GOT IT

ON EIGHTEENTH BALLOT SENATE DEADLOCK IS BROKEN.

Tie Vote With Dr. Smith for Fifteen Ballots—Contest in Good Spirit.

SALEM, Jan. 12.—(Staff correspondence).—The victory for Brownell for President of the Oregon State Senate came only after a prolonged contest in which the leaders of the opposing factions exerted their effort in their power to win the fight.

At 10:15 A. M. the Republicans went into caucus, each side confident of victory on the first ballot. Neither Smith nor Brownell participated in the caucus, so that there were only 22 Republicans in the party deliberations. The first ballot created a small sensation when the count showed 11 votes for each candidate. Seven ballots were taken without a change, and then the caucus adjourned until 1:30. The Republicans returned to their seats in the Senate chamber and adjourned the Senate until 2 o'clock.

During the recess the leaders worked continually to hold their own forces solid and to make a gain of one vote from the opposition. When the Senators returned from lunch the Brownell leaders whispered to confidential friends that a change had been accomplished by which Brownell would win. The first three ballots in the afternoon showed no change, and those who had anticipated a change began to think there would be a deadlock which would prevent organization and therefore the first Senatorial ballot over for a week. On the 13th ballot one of the Smith men voted for Stelzer, but on the 14th ballot the vote stood 11 to 11 again. The 16th and 17th ballots showed one vote for Stelzer, but on the 18th ballot the Stelzer vote changed to Brownell and the contest was over.

As soon as he learned of the result, Senator Smith hastened to the caucus-room and asked that the nomination of Brownell be made unanimous. This was done, and Brownell made one of his felicitous speeches, thanking the Republicans in the Senate for the favor and honor conferred upon him.

The Senate Republican caucus then took up the work of selecting candidates for the minor offices. S. L. Moorhead, of Cottage Grove, was chosen for chief clerk; D. H. Jackson, of Roseburg, journal clerk; Frank Middleton, of Portland, calendar clerk; A. W. Gowen, of Multnomah, sergeant-at-arms; J. J. Calvert, of Marion, door-keeper; William Smith, of Yamhill, mulling clerk.

The caucus then adjourned and the Senate convened, when the nominees were elected by a party vote in opposition to the Democrats hereafter named.

The Democrats in the Senate held a caucus at 2:15 o'clock, the same hour the Republicans went into caucus and in half an hour they had a full list of candidates named for the various offices. Having chosen their own candidates, they whispered around among the Republicans that they were ready to "do business." The Democratic members had not been besieged with applications for places, so they went hunting for candidates. None of the men named by them were applicants, but they received the honorary vote of the six Democrats. The Democratic nominees were:

President, Justin Wade; chief clerk, J. E. Lathrop; assistant clerk, Ira Campbell; calendar clerk, L. A. Long; reading clerk, Burd Hoffman; sergeant-at-arms, General H. B. Compton; mulling clerk, F. W. Durbin; doorkeeper, J. W. Virtue.

After his election Brownell was escorted to the president's chair by a committee composed of Senators Croston of Marion, Smith of Multnomah and the Republicans. After taking the oath of office, President Brownell made a brief address in which he expressed his gratitude and high appreciation of the honor conferred upon him, and said that he would perform the duties of the position to the best of his ability and in such a manner as would command the respect of the members of the Senate. Realizing the importance of the position and the weight of the responsibility, he would rely upon the support and assistance of all the Senators, regardless of committees. The president assured the Senate that he would disregard factional lines and consider only the welfare of the taxpayers interests of the State of Oregon.

The fight over the presidency of the Senate was characterized by no bitterness. Senator Booth, who was one of the prominent figures among the Brownell forces, remarked during the noon hour that the contest differed in this respect from most of the organization fights with which he has been familiar. Senator Daly, who was the leader of the Smith forces, laughed over the situation, and said he would not lose a moment's sleep whether he won or lost. Members of the opposing forces greeted each other most cordially, and talked very pleasantly of everything but politics.

IN THE SENATE. How the Preliminary Organization Was Effected. SALEM, Jan. 12.—(Staff correspondence).—The Senate was called to order at 10

AFTER NINETEEN BALLOTS

HARRIS DEFEATS EDDY AND DAVEY FOR SPEAKER.

Tillamook and Marion Men With drew in Favor of Lane County Candidate.

SALEM, Or., Jan. 12.—(Staff correspondence).—Mr. Eddy's defeat was caused by the division in the Multnomah ranks. This is admitted by the Eddy supporters and conceded by the Harris men. The caucus was at all times harmonious. When it ended the best of feeling prevailed. Mr. Eddy saw that his election was impossi-

ELECTED SPEAKER OF THE HOUSE OF REPRESENTATIVES.



LAWRENCE T. HARRIS, OF LANE COUNTY.

SALEM, Or., Jan. 12.—(Special).—Lawrence T. Harris, who was elected Speaker of the House of Representatives, is a native Oregonian. He was born in Lane County, September 13, 1873. He was educated in the public schools of Albany and Eugene, and afterwards at the University of Oregon, from which institution he was graduated in 1893. He then entered the law department of the University of Michigan, finishing his course with the class of 1896. Since that time Mr. Harris has practiced his profession at Eugene with pronounced success, and has served continuously as Deputy Prosecuting Attorney for the Second Judicial District. He has been a member of several Republican state conventions, and is at present a member of the State Central Committee. Mr. Harris was first elected to the lower house of the Legislature in 1900, running 300 votes ahead of his ticket in Lane County. Last June he was re-elected by an increased majority.

order, and the report of the credentials committee received. The report recommended the seating of the hold-over Senators and the members heretofore declared elected at the last election. There being no contest, the report was adopted. The Republican caucus not having agreed, the Senate adjourned until 3 P. M.

At 3 P. M. the Republicans having agreed upon an organization, the Senate was called to order by Temporary President Daly, and, on motion of Senators Fulton, Booth and Mulkey, were appointed a committee to ask the Chief Justice of the Supreme Court to administer the oath of office. The Chief Justice was escorted, and, after the new Senators had taken the oath, the Senate proceeded to effect a permanent organization.

The Republican nominees were elected in opposition to the Democratic nominees, the names of all the candidates being given elsewhere.

The rules of the last Senate were adopted as the rules of this Senate. On motion of Senator Fulton, the Senate adjourned as a token of respect for the late Congressman Thomas H. Tongue.

To Talk 1905 Fair at Boise. BOISE, Idaho, Jan. 12.—(Special).—C. H. Melissac, special commissioner for the Lewis and Clark Centennial Exposition, to be held in Portland in 1905, arrived in the city yesterday. He is here to interest the Legislature in making an appropriation for the great fair, and is meeting with much encouragement. He will remain in the city several days.

from Clatsop, Washington and Clackamas Counties.

Table with 2 columns: Name, Votes. Lists names like Davey, Eddy, Harris, etc. and their respective vote counts.

Toward 1 o'clock the solons grew hungry from their hard labors in caucus, and adjourned for lunch. When they met again at nearly 2 o'clock, Mr. Eddy at once withdrew from the contest in favor of Harris. In a recent speech he said that after an honorable endeavor for the Speakership he regarded as a privilege the opportunity to give way to Mr. Harris. Mr. Davey promptly followed suit, and the election of Harris as the Republican candidate came by unflinching vote.

The caucus then chose the following candidates for clerks and other officers of the House. The nominees were elected by a straight Republican vote in the afternoon session of the House, which began at 4 P. M.:

- Chief clerk—A. C. Jennings (re-elected), of Lane.
Journal clerk—W. F. Drager, of Marion.
Reading clerk—L. A. Ronda Pierce, of Washington.
Calendar clerk—Frank O. Northrup, of Multnomah.
Sergeant-at-arms—W. R. Bishop, of Multnomah.
Doorkeeper—T. W. Wann, of Multnomah.

The Democrats held a caucus in the afternoon, and nominated the following candidates:

- Speaker—W. R. Blyue, of Linn.
Chief clerk—J. J. Whitney, of Linn.
Journal clerk—Dexter Rice, of Douglas.
Reading clerk—James Stewart, of Medford.
Calendar clerk—E. B. Schow, of Union.
Sergeant-at-arms—Thomas Profit, of Baker.
They were not elected.

IN THE HOUSE.

Emmett Harris for Temporary Speaker.

SALEM, Or., Jan. 12.—(Staff correspondence).—The House was called to order at 10:22 by A. C. Jennings, of Lane County, chief clerk of the last House.

Whendon of Wasco nominated Emmett of Clatsop for temporary speaker, who was elected by acclamation. Eddy of Tillamook nominated A. C. Jennings of Lane, for temporary chief clerk. Mr. Jennings was the only nominee, and was elected.

On motion of Shelley of Lane, seconded by Eddy of Tillamook, a committee of five on credentials was appointed, as follows: Shelley, Eddy, Hume, Burgess of Klamath, Hale of Josephine, and Claypool of Lane.

On motion of Judd of Marion, a committee on organization was appointed, as follows: Judd of Marion, Blyue of Linn, Hawkins of Polk, Reed of Multnomah, and Miles of Yamhill.

On motion of Judd of Marion, the House adjourned until 2 P. M.

The House was called to order at 4 P. M. by Speaker Emmett.

Report of the committee on credentials was read, and on motion of Whitney of Lane was adopted.

Report of the committee on organization was submitted, and on motion of Gault of Washington was adopted.

L. E. Harris was nominated for speaker by Edwards of Lane. The nomination was seconded by Eddy of Tillamook and Davey of Marion.

New Lewis County Officials.

CHEHALIS, Jan. 12.—(Special).—There was a change all around today among the Lewis County officers. Retiring County Assessor S. E. Grimm took charge of the Treasurer's office. A. T. McDonald, formerly Deputy Assessor, will be chief deputy in the Treasurer's office, and David Rogers will be second deputy. Peter Summersett, the new Assessor, will have no deputy for the present. Auditor Albert Schooley, who is entering on his second term, has no regular deputy. The new Sheriff, Henry Irubart, has selected Howard Darrach, of Winlock, as his chief deputy. M. A. Langhorne succeeds David Stewart as County Attorney, Charles Geiger is the new Surveyor, and will have Wesley Beach as his deputy. County Clerk B. H. Rhodes is entering on his second term, and will retain his present deputy, Miss Josie Schooley. County Superintendent George A. Spencer will not relinquish his office until next August. Albert Sears succeeds himself as Commissioner in the First District; in the Second District, Henry Foster holds over; and in the Third District J. W. Ferrier is succeeded by W. A. H. Birley. Politically, the Auditor and Attorney are Democrats, and the rest of the county officials are Republicans.

New Trial in Montana Sheep Case.

BUTTE, Mont., Jan. 12.—A Helena special says that the Supreme Court has granted a new trial in the celebrated Broadbent and Donaldson sheep-stealing case from Dawson County, on the ground that the lower court committed errors during the trial. Donaldson and Broadbent were two of the best-known stockmen of Dawson County, both being wealthy. Each received sentences of eight years for alleged theft of bands of sheep.

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