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JUDGES--MOTION FOR NEW TRIAL--DEATH OF TRIAL JUDGE BEFORE HEARING ON MOTION FOR NEW TRIAL

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JUDGES—MOTION FOR NEW TRIAL—DEATH OF TRIAL JUDGE BEFORE HEARING ON MOTION FOR NEW TRIAL—Judgment was entered upon a jury verdict for the plaintiff. Defendants thereupon filed their intention to move for a new trial, but before the motion could be heard the trial judge died and assignment was made for hearing before another judge of the same court. Section 661 of the California Code of Civil Procedure[1] directed that, "The motion for new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by another judge of the same court." Plaintiff's objections to the jurisdiction of the court or of any judge thereof to hear and determine the motion for new trial were overruled, and an order was made granting a new trial. Upon the clerk's refusal to issue a writ of execution on the original judgment, plaintiff petitioned the district court of appeals for a writ of mandamus requiring the issuance of the writ. *Held,* demurrer to the petition overruled and a peremptory writ of mandamus to issue. *Telefilm, Inc. v. Superior Court,* (Cal. App. 2d Dist., Div. 2, 1948) 194 P. (2d) 542.

Prior to the adoption of the above section of the Code of Civil Procedure it was the rule in California,[2] as elsewhere, in the absence of statute,[3] that no litigant had an affirmative right to have the motion for new trial heard by the original trial judge. Although the motion for new trial is a procedure technically separate from the original trial,[4] the judge who presided at the trial is obviously better equipped to hear and determine the motion than one who must rely solely upon the reporter's record. The effect of the common-law rule was often to force upon the parties a judge who was unacquainted with the peculiarities of the trial of the action, although the trial judge was only momentarily unavailable. The California legislature, however, did not see fit to require that the trial judge and none other should in all circumstances entertain a motion for new trial. It would seem to follow that the intended general purpose of section 661 was to limit the situations in which judges other than the trial judge could hear and determine the motion, but not to preclude substitution where unnecessary hardship would result from such preclusion.[5] Such an interpretation was given to the section in question by the California Supreme Court in asserting; ". . . we think that the very essence of this enactment is that the motion for new trial shall be heard and determined *whenever practicable* by the judge who had heard the evidence at the trial of the case."[6] Although death would appear to exemplify the ultimate in such impracticability, the court in the principal case strictly construed the section and

[1] Cal. Civ. Proc. and Prob. Code (Deering, 1941) § 315.

[2] Altschul v. Doyle, 48 Cal. 535 (1874); Wilson v. California Central Ry. Co., 94 Cal. 166, 29 P. 861 (1892); and principal case at 549.

[3] Roberts v. Bellew, 229 Ala. 333, 157 S. 216 (1934); Penn Mutual Life Ins. Co., (C.C.A. 6th, 1906) 145 F. 593; 20 STANDARD PROC. 582.

[4] 20 STANDARD PROC. 582.

[5] Cf. Western Dredging & Improvement Co. v. Heldmaier, (C.C.A. 7th, 1901) 111 F. 123 at 125, where a similar statute was said to be intended, ". . . to provide for an emergency where there would be a failure of justice unless the extraordinary remedy could be employed."

[6] Francis v. Superior Court, 3 Cal. (2d) 19 at 28, 43 P. (2d) 300 (1935). (Italics supplied).

decided that the terms "inability" and "absence" necessarily infer the existence of a living person and are therefore inapplicable where the judge has died. The cases cited by the court in support of its position are decisions on facts clearly distinguishable from those in the principal case.[7] The court accepted the dictionary definition of "inability": "The quality or state of being unable; lack of ability; want of sufficient power, strength, resources, or capacity." It would seem that illness or other partial inability, which would apparently fall within the precise terms of the California statute, is merely a degree of the total inability, physical, mental, and legal, occasioned by death. The court's stringent limitation of the meaning of "absence," is similarly open to question in view of the ambiguity and the broad scope attributed to the term by other decisions under comparable circumstances.[8] Thus, this decision is not required by judicially recognized definitions, and it would seem that acceptance of the broad interpretations available in precedent would be more in accord with the history and probable purpose of the section construed.[9] A comparison of the wording of this and similar statutes[10] indicates that the legislature was merely unartful in its selection of words and probably would have been more specific if the result reached here had been contemplated. This decision has the anomolous effect of giving relief to litigants where a trial judge is temporarily absent or unable to hear the motion for new trial, while denying it in cases where inability to secure audience of the trial judge is unequivocally permanent.

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[7] Principal case at 548, citing Biederzycki v. Farrel Foundry and Machine Company, 103 Conn. 701, 131 A. 739 (1926); and Bishop v. Morrison-Knudsen, 64 Idaho 806, 137 P. (2d) 963 (1943) (both cases under Workmen's Compensation Laws, plaintiffs contending that death should fall within "disability" under provisions for apportioning claims for aggravation of disease prior to injury); Cline v. Hammond, 48 Ohio App. 228, 192 N.E. 869 (1931). (Torrens Act. Held, death permits vacation of judgment under statute denying vacation for "absence, infancy, and other disability.") And People v. Rosenwald, 266 Ill. 548, 107 N.E. 854 (1915). (Criminal prosecution. Held, another judge may extend time for signing bill of exceptions where trial judge is absent from jurisdiction, under statute permitting substitution in case of "death, sickness, or other disability.")

[8] " 'Disability' is a word of scarcely less ambiguity, as generally used in common parlance, than 'absence.' " Watkins v. Mooney, 114 Ky. 646 at 653, 71 S.W. 622 (1903). See also Dark Tobacco Growers' Co-op. Assn. v. Wilson, 206 Ky. 550 at 551, 267 S.W. 1092 (1925), where it is said that, ". . . when the judge is disqualified he is judicially absent from the county."

[9] See People v. Schirmer, 55 Hun (62 N.Y. Sup.) 166, 8 N.Y.S. 76 (1889), where it was held that illness in the judge's family, or his participation in the removal of his family from their summer home rendered him "unable" under a statute similar to the one in question. See also Engeman v. State, 25 Vroom (54 N.J.L.) 247 at 251, 23 A. 676 (1892), where the court said, " 'Absent,' within the statute, means nonpresence in the courts."

[10] Minn. Gen. Stat. (1913) § 160; 34 Minn. Stat. Ann. (1945) § 547.01; Mich. Stat. Ann. (1938) § 27.3658.