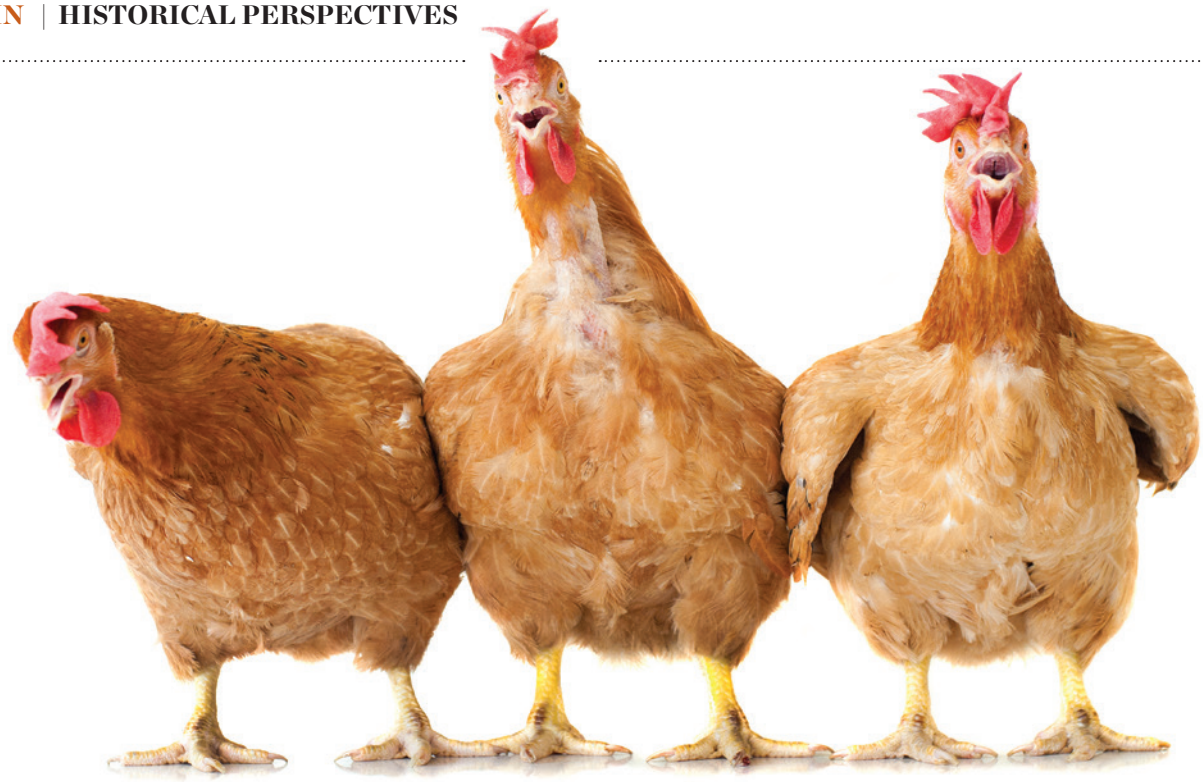

A Barnyard Chivaree in Pueblo

The Lottie Whitcomb Case

BY FRANK GIBBARD

In a scene from the 1980 musical comedy *The Blues Brothers*, a once popular rhythm-and-blues band is reduced to performing at a rustic venue called "Bob's Country Bunker." Among other indignities they encounter there, the band is pelted with an endless stream of beer bottles hurled by the audience in a rude form of musical critique. The musicians are only saved from serious injury by the chicken-wire fence surrounding the stage.

Ironically, when objects were similarly launched during a barnyard-themed musical act at Pueblo's Empire Theater in 1904, there was no chicken wire to shield the fowl impersonators. One of the co-stars, injured physically and in her dignity by the flying objects, sued her employer and received a verdict in her favor for $2,000. But the employer balked, and the case proceeded to the Colorado Supreme Court.

The Barnyard Act

The "Jake and Elwood" of the ill-fated barnyard act were plaintiff Lottie Whitcomb and her husband, whose name is lost to history. The Court later summarized their performance: "[it] consisted in the imitation by them of the action and noises of certain barnyard fowls, as the rooster and hen, interspersed with singing and dancing."[1] *Hamilton*, this was not. But the local critics loved it.

The plaintiff's and defendant's version of events on the night in question differed significantly. According to Mrs. Whitcomb, on the last night of her engagement in Pueblo, her employer and booking company, the Novelty Theater Co., decided to spice up her "Fun in a Barnyard" act. To accomplish this, unknown to her, it arranged what it referred to as a "charivari."[2] A "charivari" (usually called a "chivaree" in American English) is "a discordant mock serenade to newlyweds, made with pans, kettles, etc." or "a confused noise; din."[3] Neither definition quite describes what occurred at the Empire Theater on April 3, 1904.

Just before the unfortunate incident, at around 10:30 p.m., Mrs. Whitcomb was busy imitating a hen. Perhaps carried away with her performance, she had mounted a chair, something she usually did not do. Her husband danced around the chair, imitating a rooster.[4] Their act had reached its zenith. Then disaster struck.

Suddenly, the lights on the stage were extinguished. Then other performers on stage began pelting the Whitcombs with "oyster cans, old shoes, and other missiles."[5] One of the cans allegedly struck Mrs. Whitcomb in the ankle, injuring her.

Seeking compensation, Mrs. Whitcomb successfully sued the theatrical company in Pueblo County District Court.

Novelty Theater's Defenses

The defendant gave a very different account of the night's events. It claimed the performers,

including Mrs. Whitcomb, had arranged the chivaree for their own benefit, to amuse themselves. It also denied that any of the missiles thrown had hit or injured Mrs. Whitcomb. Adding insult to injury, the company asserted that Mrs. Whitcomb had caused her own injuries by jumping while obese. Her chair, defendant claimed, was "about twenty inches high from the floor of the stage" and Mrs. Whitcomb was "a very large and heavy person";[6] the impact of her jump sufficiently explained her alleged ankle injury.

To support its case, Novelty Theater cited several legal theories. Even if the injuries Mrs. Whitcomb suffered resulted from the acts she described, it contended, these actions were taken by her fellow employees outside the scope of their employment and the company therefore could not be liable for them. The company also asserted that Mrs. Whitcomb had full knowledge of what was happening on stage and therefore assumed the risk that she would be injured by the flying debris. Finally, it claimed that Mrs. Whitcomb herself had contributed to her injuries by voluntarily participating in the chivaree.

The Court's Ruling

The Colorado Supreme Court agreed with Novelty Theater on all grounds. First, Mrs. Whitcomb was guilty of contributory negligence. The Court noted her decision to climb up on the chair while imitating a hen, which it found an unnecessary embellishment to her act.[7] By this superfluous ascent, it opined, Mrs. Whitcomb had "placed herself in a position of increased danger."[8] Even worse, at the time she mounted the chair, her co-employees had already been engaged in "boisterous and unruly conduct" for some time, making her decision to present herself as a "special target" for their missiles the equivalent of jumping out of the trenches and blowing a trumpet during a firefight.[9] The Court speculated that "[h]ad she remained upon the floor . . . it is altogether possible that no damage would have been inflicted" upon her.[10]

The Court also pointed out that Mrs. Whitcomb may not have been merely an innocent victim. There was evidence that before she went on stage, she, too, had thrown things at other performers. Of course, Mrs. Whitcomb denied these allegations. But even so, the Court noted, she had continued to perform after her fellow actors started throwing things on stage rather than halting her act in mid-course, thus "assum[ing] all risk of injury to herself."[11]

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The Court also agreed with the theatrical company that the "fellow servant rule" barred Mrs. Whitcomb's action. It concluded that "[m]anifestly the whole affair was a frolic among the performers themselves for their own amusement, edification and diversion, and while the plaintiff now denies any knowledge of, or part in, that jollification, such denial is contrary to human experience, reason and observation, and is probably contrary to the fact[s], as we view the matter."[12] Moreover, the company's stage manager did not have the authority to authorize such actions, which fell outside both the scope of an actor's and a stage manager's employment, and it "would be absurd" to hold the company bound for such actions.[13]

The opinion suggests the Court was inclined to give the company the benefit of the doubt regarding some conflicting testimony. This is not typically how courts examine a verdict favorable to a plaintiff. Perhaps the Court found the key facts surrounding the company's defenses just too compelling to permit recovery. Though it stated it had "given the case full and careful consideration from every viewpoint" and had interpreted the evidence in the light most favorable to Mrs. Whitcomb, the Court concluded it found itself with an "unalterable conviction that the defendant is not legally liable" and that the verdict could not stand.[14] The Court therefore reversed the judgment in favor of Mrs. Whitcomb and remanded with instructions to dismiss her complaint.

The Show Must Go On

Her on-stage injuries do not appear to have ended Mrs. Whitcomb's thespian career, but they may have spurred her to become self-employed. Later in 1904, newspaper ads appeared for the "Lottie Whitcomb Specialty Co." promising "refined vaudeville acts."[15] Whether the refinement involved any change to the act's barnyard focus is unclear. CL

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NOTES

1. *Novelty Theater Co. v. Whitcomb*, 106 P. 1012 (Colo. 1909).
2. *See id.* at 1013.
3. https://www.collinsdictionary.com/us/dictionary/english/charivari.
4. *Novelty Theater Co.*, 106 P. at 1013.
5. *Id.*
6. *Id.*
7. This ruling seems unimaginative. Anyone who knows much about barnyards can attest that ladders are frequently provided there for the chickens to climb. The Germans even have a proverb about this: "Das Leben ist wie eine Huehnerleiter; kurz und beschissen." (Life is like a chicken-ladder; short and shi--y.").
8. *Novelty Theater Co.*, 106 P. at 1013.
9. *Id.* (Note: the military analogy is mine, not the Court's.)
10. *Id.*
11. *Id.*
12. *Id.* at 1014.
13. *Id.*
14. *Id.* at 1015.
15. *See, e.g.*, *Rocky Ford Enterprise* at p.5, col. 2. (Dec. 23, 1904).