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Supreme Court Decisions

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(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of a filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

SCHOOL DISTRICTS—CONTRACTOR'S BOND-LIABILITY TO MATERIALMEN—*School District No. 28 vs. Denver Pressed Brick Company*—No. 13,132—*Decided September 12, 1932.—Opinion by Mr. Justice Hilliard.*

1. The failure of a school board to require a bond from a contractor making repairs on a school building, in accordance with Sec. 9514, C. L. 1921, and Ch. 155, Laws 1923, is, at most, a tort, for which the school district, being an involuntary corporation and a subdivision of the state, is not liable to one who has furnished materials to the contractor.

2. The provisions of Ch. 148, Laws 1929, requiring the board to give published notice of final settlement with the contractor, are procedural and come into effect only in cases where bond is given by the contractor.

3. The indifference of the materialman, in failing to ascertain whether or not a contractor's bond had been given, is equivalent to negligence and precludes recovery.—*Judgment reversed and cause remanded.*

SCHOOLS—SCHOOL DISTRICTS—STUDENTS—TRANSPORTATION OF—ALLOWANCES FOR—*Stoops vs. Hale, et al.*—No. 12631—*Decided September 12, 1932.—Opinion by Mr. Justice Burke.*

1. Where a statute authorized the electors, at a special election, to provide for the transportation of children to and from school and where, pursuant to such statute, it was provided that, where transportation became unfeasible, the Board was authorized to use transportation funds to "pay the board of the school children" and where the various parents transported their own children to school and received compensation from the Board of Education in accordance with the prescribed mileage rates, the Directors cannot be forced to repay to the district money so expended.

2. There is nothing in the statute preventing parents from transporting their own children.

3. The provision of the statute that "the party employed to transport the children of any school district shall give bond" etc. applies only when a general employment is resorted to.

4. The fact that some of the children attended schools outside of the district did not preclude their parents from drawing transportation allowances. Especially is this so when it is proved that the school in the other district was closer than the school in the district that was paying the allowance, the road to the latter school being practically impassable during much of the school year.

5. Payments made to the parents of children attending a private school are not authorized, but cannot be recovered in absence of a showing that the money was paid and so used with the knowledge and consent of the School Board.—*Judgment affirmed.*

PUBLIC DOMAIN—RANGES—USE OF—DISPUTES ADJUDGED HOW—*Allen vs. Bailey*—No. 12881—*Decided September 12, 1932.—Opinion by Mr. Chief Justice Adams.*

1. It is entirely within the province of a state to pass such laws as are necessary for the regulation of cattle and sheep ranges on the public domain. This state function arises out of the police power.

2. The Colorado statute, providing for the separation of sheep and cattle ranges and providing further for the means of adjudicating disputes concerning the uses of such ranges, is valid and constitutional.

3. A statute granting injunctive relief under such circumstances is desirable. It is as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense of crime after it has been committed.

4. When matters are submitted to referees without instructions, if either of the litigants desires instructions, he should offer instructions at the time the matters are submitted, not later.—*Judgment affirmed.*

WORKMEN'S COMPENSATION — FEDERAL EMPLOYERS' LIABILITY ACT — NEGLIGENCE — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — ADMISSIONS—*Chicago, Rock Island and Pacific Railway Co. vs. Cline*—No. 12727—*Decided Sept. 12, 1932—Opinion by Mr. Justice Butler.*

1. Appellee recovered judgment against company for injuries sustained when he jumped from a gasoline car under orders of foreman.

2. An employee assumes only the ordinary risks of his employment and those extraordinary risks that are fully known to him, or are obvious and appreciated by him.

3. Contributory negligence does not bar an action under the Federal Employers' Liability Act, but merely affects the amount recoverable.

4. The court erred in instructing the jury that the payment of money to the plaintiff and taking a receipt constituted, as a matter of law, a conclusive evidence of liability.

5. The court erred in excluding evidence offered by the company in explanation of such receipt.—*Judgment reversed.*

PRINCIPAL AND AGENT—FRAUDULENT REPRESENTATIONS—PLEADING—ILLITERACY AS DEFENSE TO PRINTED CONTRACT—*Trujillo vs. Wichita Farm Lighting Co.*—No. 12997—*Decided Sept. 12, 1932—Opinion by Mr. Justice Alter.*

1. In an action by the company to recover judgment on two promissory notes of the defendants given to plaintiff for payment under a contract

of purchase, defendants alleged false and fraudulent representations by plaintiff's agent. Judgment on the pleadings was entered against the defendants.

2. The proper way to charge representations made by an agent is to allege that the principal made them, and then upon trial prove that the agent made them with the principal's knowledge, consent, or authority.

3. Where the contract expressly limits the agent's authority to make representations and agreements not stated in the contract, and sets forth that the agent has made no such representations or agreements, the defendants cannot relieve themselves of liability by simply pleading such representations in their answer.

4. Where the principal expressly limits his agent's authority in the printed contract, and does not have actual knowledge of any false and fraudulent representation by the agent, an illiterate person who fails to obtain proper advice will be bound by his written obligation.—*Judgment affirmed.*

CONTRACTS — CONSTRUCTION — AMBIGUITY — *Henry L. Doherty vs. Genevieve J. Short*—No. 12618—*Decided Sept. 12, 1932—Opinion by Mr. Chief Justice Adams.*

1. In an action for refund under a contract to purchase Cities Service Stock the defendant's demurrer was overruled, and, defendant electing to stand on his demurrer, judgment was entered accordingly.

2. The provisions in the contract that it should become automatically cancelled if the purchaser's payments due on the first of each month were not paid on or before the first of the following month, and that in such event the company would refund the amount of the difference between the contract price and the market price "of the fifteenth of the month preceding" were clear and unequivocal.

3. The stock market bid price under said contract should be determined as of the fifteenth of the month preceding the last day of grace. —*Judgment reversed.*

LANDLORD AND TENANT—TENANT HOLDING OVER—TRIAL—DIRECTED VERDICT—MOTION BY BOTH PARTIES—ERROR—*A. A. Wells vs. Leonard L. Blystad*—No. 13171—*Decided September 19, 1932—Opinion by Mr. Justice Hilliard.*

1. Where a lease was for a period slightly in excess of one year and the rental was payable monthly in advance and after the expiration of the term, the tenant continued his occupancy and paid rent which the landlord accepted unconditionally, the conduct of the parties operated to extend the lease.

2. The surrender of the premises some days subsequent to the date when payment for a given month was due, did not absolve the tenant from liability for the entire month.

3. The effect of motions by both parties for a directed verdict at the conclusion of the testimony was tantamount to withdrawing the case from the consideration of the jury and submitting the issue to the court.

4. Sustaining an objection to an inquiry made of landlord as to whether he was claiming the tenant was holding over under the lease was not error. —*Judgment affirmed.*

DEEDS—DELIVERY—EVIDENCE—*Henry Hammond, Heirs at Law of Mary Radcliff, et al, vs. Effie Hammond, as Administratrix of the Estate of George Hammond, Deceased, and Effie Hammond*—No. 12715—*Decided September 19, 1932—Opinion by Mr. Justice Moore.*

1. Where plaintiff, as sole heir at law of her husband, and as administratrix of his estate sued to set aside two deeds, purporting to convey certain real estate but which in reality were left with deceased's notary as his agent and over which deceased exercised control up to the time of his death, and where the trial court found there had been no delivery of said deeds to the grantees, and set them aside and quieted title in the plaintiff, the assignment of error concerning rejection of testimony offered to prove acceptance by the grantees is immaterial.

2. Depositing the deeds with agent, subject to such withdrawal, does not constitute a delivery thereof to the grantees named therein.—*Judgment affirmed.*

CRIMINAL PROCEDURE—EVIDENCE—SIMILAR OFFENCES—STOLEN GOODS NOT CHARGED IN INFORMATION—RES GESTAE—CREDIBILITY OF WITNESS—*Mrs. Bennie S. Andreen vs. The People of the State of Colorado*—No. 13117—*Decided September 19, 1932—Opinion by Mr. Justice Moore.*

1. Appellant was convicted of grand larceny, and charges that the court erred in admitting testimony concerning certain other articles found in her possession, and apparently stolen from the complaining witness, but not included in the information.

2. The admission of such testimony, if error, was cured by the court's instruction to the jury to the effect that such evidence was admitted solely because it was part of the res gestae and for the purpose of affecting the credibility of the witness, and that the defendant could not be convicted for the taking of said articles.

On Application for Supresedeas.—*Judgment affirmed.*

DAMAGES — TRESPASS — RIGHT TO DRIVE TRESPASSING CATTLE FROM LANDS—DEGREE OF CARE—*Phillips vs. The City of Golden*—No. 12723 —*Decided September 19, 1932—Opinion by Mr. Chief Justice Adams.*

1. Action in tort against the City of Golden, alleging that plaintiff's herd of cattle, without plaintiff's knowledge, had strayed upon the land of the city, and that the city, through its agents and employes, drove away a portion of plaintiff's herd maliciously and by use of malicious dogs, for a distance of many miles. Defense witnesses admitted driving the cattle from the water-shed and from the Golden reservoir, but denied malice and other allegations. The trial court found no evidence of malice, and dismissed the complaint.

2. It was the right and duty of the city to drive plaintiff's cattle from the source of its water supply.

3. Parties have the right to drive trespassing cattle from their own unfenced lands, exercising that degree of care to prevent injury that would be ordinarily observed by a prudent person.—*Judgment affirmed.*

CONSTRUCTION CONTRACTS—UNIT BASIS—SUBSTITUTION OF MATERIALS—*Platte Valley Ditch and Reservoir Company vs. H. C. Lallier Construction Company*—No. 12609—*Decided September 19, 1932—Opinion by Mr. Justice Campbell.*

1. Construction contract, including schedules and specifications in which appeared the heading "Quantities and unit prices", construed to be a unit basis contract and not a lump sum contract.

2. Under such a contract, the contractor may recover the extra cost of materials different from those specified in the contract, the parties having agreed that the substitution of materials was necessary because of physical conditions not apparent when the contract was let.—*Judgment reversed and remanded with instructions.*

ACTIONS—VARIANCE IN COMPLAINT AND SUMMONS—SPECIAL APPEARANCE JURISDICTION—*Kern vs. Wilson et al.*—No. 12722—*Decided Sept. 26, 1932—Opinion by Mr. Justice Burke.*

In an action wherein plaintiff claims fraud, misrepresentation and mutual mistake, and on his summons states "Damages for misrepresentation and breach of contract", held to be a variance between summons and complaint.

In an action for misrepresentation, fraud and mistake, when service is had on defendant in another state, held to be an action in personum and not in rem, and court is without jurisdiction unless defendant waives service by appearance.

Where defendant appears specially on motion to quash summons because of variance between complaint and summons, this is a special appearance since it does not go to the merits of the case, and the court is without jurisdiction.—*Judgment affirmed.*