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Colorado Supreme Court Decisions

Dicta Editorial Board

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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 the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

JUDGMENTS—MOTION TO SET ASIDE—NECESSITY OF FILING AFFIDAVIT IN SUPPORT OF MOTION—FAILURE TO INCLUDE AFFIDAVIT IN BILL OF EXCEPTIONS—No. 12522—*Nash vs. Gurley—Decided Sept. 21, 1931.*

1. The granting or denying of an application to set aside a judgment taken against a defendant through alleged mistake, inadvertence, surprise, or excusable neglect, is discretionary with the trial court, and will only be considered by higher court where a gross abuse of discretion appears.

2. Applications of this nature must be supported by affidavit.

3. Such affidavit must be made a part of the bill of exceptions before Supreme Court can review ruling.—*Judgment Affirmed.*

WORKMEN'S COMPENSATION—INJURIES WHILE ON WAY TO WORK—EXCEPTION TO GENERAL RULE AGAINST LIABILITY OF EMPLOYER—No. 12883—*State Compensation Insurance Fund vs. Industrial Commission, et al—Decided Sept. 21, 1931.*

1. No compensation is recoverable by a workman who is injured while on his way to or from work.

2. But there are exceptions to this general rule.

3. Where employe did not reside at his place of work and was requested by his employer to bring his truck from his home to his place of work for use by employer, and while on his way to work, was injured, which resulted in his death, such injuries were sustained and arose out of and in the course of his employment.—*Judgment affirmed.*

WORKMEN'S COMPENSATION—JURISDICTION—DISCRETION OF COMMISSION—WHEN SIX-MONTH'S STATUTE OF LIMITATIONS DOES NOT APPLY—No. 12891—*Industrial Commission vs. Lockard—Decided Sept. 21, 1931.*

1. Where claimant for industrial compensation for injuries was in a hospital two and one-half years after accident, and where within thirty days after accident, employer furnished medical services and where claimant filed claim as soon as he was released from hospital, the statute providing that claim must be filed within six months after accident does not apply.

2. Where the Commission entertains a petition for review, and denies it, not in the exercise of its discretion, but because of the erroneous belief that it is without jurisdiction to review the case on its own motion, the claimant has a right to a judicial review of such ruling.—*Judgment modified and remanded.*

UNLAWFUL DETAINER—LEASE—ORAL AGREEMENT OF SALE AND PURCHASE MADE SUBSEQUENT TO LEASE—*Babnik v. Culig, et al.*—No. 12910—*Decided September 28, 1931.*

1. Where in an action in unlawful detainer the answer puts in a general denial, and further defense claiming that the relation of landlord and tenant did not exist, but that the relation was that of vendor and purchaser under a contract of purchase, the decision of the lower court on conflicting evidence that the relation of landlord and tenant existed is to be conclusive.

2. While an action for unlawful detainer will not lie where the status of the defendant is that of a vendee in possession and not that of a tenant, yet in this case, on conflicting evidence, the Court below found that the relationship was that of landlord and tenant and not that of vendor and vendee, and such evidence is conclusive.—*Judgment affirmed.*

APPEAL AND ERROR—ERROR IN GRANTING MOTION FOR NEW TRIAL—PREJUDICE—WAIVER OF ERROR—*Crosby v. Canino, et al.*—No. 12509—*Decided September 28, 1931.*

1. In a suit for damages for personal injuries, where the case was once tried and defendant's motion for non-suit was granted, and case reversed by Supreme Court, and on second trial where the evidence was substantially the same, which resulted in a verdict for the plaintiff, and thereafter the lower court granted a motion for a new trial, the action of the lower court was erroneous.

2. Remarks of the trial judge during the course of the trial that he was not in sympathy with the former decision of the Supreme Court in the former appeal, but notwithstanding his personal opinion followed the law as announced by the higher court and refused to grant a non-suit, which he granted in the first trial, does not indicate any prejudicial state of mind to the litigants, but only against the law of the case as pronounced by the higher court.

3. Such prejudice should not be imposed upon a litigant, who had fairly won a decision.

4. After motion for new trial was granted, the act of the attorney for the plaintiff, in acquiescing and resetting the case for trial is not a waiver of his right to prosecute error where at the same term, with leave of Court he made formal application to be allowed to stand on the case already made, which was granted.

Judgment reversed with directions that the order granting the new trial be vacated, the verdict restored, and judgment entered thereon.

WORKMEN'S COMPENSATION—FINALITY OF COMMISSION'S DECISION ON WEIGHT OF EVIDENCE—WAS DEATH RESULT OF ACCIDENT OR SICKNESS?—*Public Service Company of Colorado v. Industrial Commission of Colorado, Tittes, et al.*—No. 12886—*Decided September 28, 1931.*

1. The decision of the Industrial Commission on the weight of the evidence upon a hearing for compensation is final.

2. It is only where there is no competent evidence to support the finding of the Industrial Commission that the Court can interfere with its awards.

3. The question of whether the employe died of pernicious anaemia or as a result of the accident is a matter exclusively for the Commission to pass on.

4. The testimony of a chiropractor admitted without objection was entitled to such weight and consideration as those charged with the duty of determining this case might see fit to give it, and there is nothing to indicate that this evidence was not properly accepted and considered.—*Judgment affirmed.*

FRAUD AND DECEIT—ACTION TO CANCEL CONTRACT—DEATH OF PLAINTIFF—NECESSITY OF RELIANCE ON REPRESENTATIONS—DEALER'S TALK —*Brannan, as Executrix, vs. Collins*—No. 12454—*Decided September 28, 1931.*

1. In an action to rescind a contract on the ground of fraud, it is incumbent on the plaintiff to establish not only the fraudulent statements, but also the reliance thereon by the plaintiff.

2. Where the evidence shows that the plaintiff, before executing the contract, made a careful and diligent investigation of his own, extending over a period of about thirty days and ascertained from experts the nature of the product, that it was one of the inducements to execute the contract, the plaintiff cannot rely upon the statements of the defendants in regard to the same matter as a basis for decision.

3. Dicta: Where the plaintiff in a fraud action dies pendente lite, the action does not abate by reason of his death, but can be prosecuted by the personal representatives.

4. Dicta: Statements merely descriptive of the operation and utility of an invention or patented article are usually regarded as mere expressions of opinion or dealer's talk, and even a misrepresentation that experiments have been made with the invention and have proved successful is merely an expression of opinion, and so not actionable, although put in the form of a statement of a past fact.—*Judgment affirmed.*

APPEAL AND ERROR—NECESSITY OF FILING MOTION FOR NEW TRIAL—SUBSTANTIAL JUSTICE DONE—*Walters, et al. vs. The Dillon Hardware Co.*—No. 12903—*Decided September 28, 1931.*

1. Where no motion for a new trial was filed in the Court below, and no order dispensing with the necessity thereof, filed, the errors assigned will not be considered by the Supreme Court.

2. In this case, an examination of the entire record shows that substantial justice was done and that no prejudicial error was committed.—*Writ of Error dismissed.*