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Supreme Court Decisions

Dicta Editorial Board

• Supreme Court Decisions •

(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.)

CONTRACTS—DAMAGES—SHIPMENTS OF POTATOES—FREEZING—CONFIRMING SALE—EFFECT OF—*The Jagger Produce Co. vs. Gylling*—No. 12619—*Decided April 11, 1932—Opinion by Mr. Justice Burke.*

1. Where a seller of potatoes sells through an agent, seller claiming a straight sale and buyer claiming the potatoes were sold through agreement with agent that they should be sorted at destination, and the amount of damages or worthless potatoes deducted, resolves itself into disputed question of fact as to what the contract was, and the verdict of the jury finding the contract to be as plaintiff alleged, will not be disturbed.

2. Where the seller resides at a different place than the agent and buyer, and the agent advises seller of a straight sale without deduction for damages or worthless or frozen potatoes and sends confirmation of sale by writing, advising seller of sale and price without qualification of deductions for spoiled potatoes, and send copy of confirmation to buyer, this was ample notice to buyer that seller was relying on a contract of sale without qualifications and imposed on buyer the duty to promptly protest if he did not acquiesce.—*Judgment affirmed.*

CONDEMNATION—RIGHT TO—TIME OF—NECESSITY OF—CONSTITUTIONALITY—*The Pine-Martin Mining Co. vs. The Empire Zinc Co.*—No. 12573—*Decided April 18, 1932—Opinion by Mr. Justice Butler.*

1. An application for hearing of the issue of the right to condemn land is made in apt time when it is made before the calling of a jury to assess damages.

2. Where a period of 11 years elapsed between the commencement of condemnation proceedings and the hearing thereon, it was proper for the court to consider the situation as it existed at the time of the hearing on the right to condemn.

3. Where the right to condemn existed at the time of the commencement of the action, the fact that later developments showed that the enterprise was a failure and was not feasible, and that the right of way was not needed, would not defeat the action, as the question of necessity is not for the court to determine, but is for the commissioners appointed by the court to determine.

4. Article XVI, Sec. 7 giving private persons a right of way across private lands for construction of ditches, flumes and canals is not in conflict with the Federal Constitution.—*Judgment reversed.*

QUIET TITLE—TAX DEED—EFFECT IF WITHHOLDING A DEED FROM RECORD—*Moore, as Receiver vs. The Chalmers-Galloway Live Stock Co.*—No. 12712—*Decided April 18, 1932—Opinion by Mr. Justice Burke.*

1. Where action is dismissed as to a receiver for a company and hearing proceeds, the party dismissing waives any error in the court having permitted the receiver to open up a judgment after three terms of court had elapsed.

2. Where the receiver to sustain his title, relies upon an unrecorded deed, executed prior to the passage of the recording act of March 28, 1927, as superior to the rights of one holding under a tax deed, without notice of the existing unrecorded deed, his rights are to be determined by the recording act of March 28, 1927, and he is without standing in court.

3. The recording act of March 28, 1927, applies to an unrecorded deed, executed prior to the date of the act.

4. The said act is not unconstitutional.—*Judgment affirmed.*

WITNESSES—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—OPINION BASED ON ALL THE EVIDENCE—*Callahan's Guardian vs. Callahan*—No. 12656—*Decided April 18, 1932—Opinion by Mr. Justice Campbell.*

1. It is not necessary in all cases that the opinion of an expert witness be based upon a hypothetical question.

2. Where the expert witness has been present through the trial, and heard all the testimony in regard to the alleged insanity of a testator, a hypothetical question can be dispensed with and the witness may be asked to state his opinion based upon the evidence he has heard, at least, where the evidence is not conflicting.

3. Where lay witnesses are permitted to testify as to their opinion concerning the mental condition of the testator, and differ as to their opinion, this does create a conflict in facts but merely a conflict in conclusions.

4. Where plaintiff in error, upon cross-examination of expert, asks his opinion based upon all or part of the evidence, he has waived the right to object to similar evidence elicited in the same manner by proponent of will.—*Judgment affirmed.*

WORKMENS COMPENSATION—INSUFFICIENCY OF FINDINGS OF COMMISSION—*Duras vs. Industrial Commission et al.*—No. 13013—*Decided April 25, 1932—Opinion by Mr. Justice Alter.*

1. It is the duty of the Industrial Commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts.

2. Where the Commission, in making an award, fails to make findings as to whether the employee was an employee within the provisions of Workmens Compensation; as to whether he accidentally sustained injuries growing out of and in the course of his employment; as to whether it was an accidental injury and the nature of it, the award is insufficient.—*Judgment reversed with directions to make specific findings.*

ELECTION OF REMEDIES—MORTGAGE LIEN—NO WAIVER BY DIRECT SUIT ON NOTE—*Greene vs. Wilson*—No. 12996—*Decided April 25, 1932—Opinion by Mr. Justice Butler.*

1. Where plaintiff brought suit at law upon a promissory note and obtained judgment, instead of foreclosing his lien on a trust deed securing said note, and thereafter brought suit against the judgment defendant and his wife to set aside a fraudulent conveyance to the wife in order to subject said real estate to his judgment lien, it was no defense to the action that the plaintiff should have first pursued his remedy in equity for foreclosure of his mortgage lien.

2. A mortgagee of land may sue on the note alone, or sue to foreclose alone, or join both proceedings in one action.

3. A mortgagee of land may sue on the note alone and after judgment sue to set aside a fraudulent conveyance which would defeat his judgment lien and he need not first exhaust his mortgage security.

4. In such a case, he has two liens, and it is for him to determine which he will enforce first.

5. The lower court erred in dismissing the suit on the ground that plaintiff had not exhausted the trust deed security before commencing suit.—*Judgment reversed.*

ADMINISTRATORS AND EXECUTORS—WIDOW'S ALLOWANCE—IN WHAT CLASS—*Eisenberg vs. Reininger*—No. 12932—*Decided April 25, 1932—Opinion by Mr. Justice Moore.*

1. The statutory widow's allowance is a claim of the Fourth Class.—*Judgment reversed.*

Mr. Justice Campbell, Mr. Justice Burke and Mr. Justice Butler dissent. The dissenting opinion holds that the widows allowance under the amendment of 1929 shall be allowed to her and retained by her as her sole and separate property and therefore it cannot be the property of the estate and likewise cannot be applied to the payment of any claims or demands against the estate or to the payment of expenses of administration.

INSURANCE—ACCIDENT—TORNADO—OCCUPATIONAL DUTIES—*Federal Life Insurance Co. vs. Hall*—No. 13068—*Decided April 25, 1932—Opinion by Mr. Justice Burke.*

1. Where a ranchman carried an accident insurance policy and was temporarily engaged in rough carpenter work on a shed and was killed by the

shed being overturned by an extraordinarily heavy wind, he did not come within the terms of the policy which excluded liability for death while performing occupational duties.

2. The term 'occupation' as used in accident policies refers to insured's ordinary and usual business, neither to recreational activities nor to incidental nor temporary employment.

3. Where the policy provided for payment of loss in case of death by "cyclone or tornado" it is no defense that the wind which overturned the building and caught the insured underneath, thereby killing him, might not be technically a cyclone or tornado. Where the evidence shows that the wind came suddenly in the form of a "twister" covering a distance of about 50 feet on the ground and when it struck the building it had sufficient violence to uproot the building, tear it from its foundation and hurl it a distance of 18 feet, such a wind was some form at least of a tornado and came within the terms of the policy.—*Judgment for beneficiary affirmed.*

PHYSICIANS AND SURGEONS—REVOCATION OF LICENSE—AUTHORITY OF STATE BOARD OF MEDICAL EXAMINERS—*Sapero vs. State Board of Medical Examiners*—No. 13029—*Decided April 25, 1932—Opinion by Mr. Chief Justice Adams.*

1. The State Board of Medical Examiners has no power to revoke the license of a physician on the ground that he is guilty of immoral, unprofessional and dishonorable conduct where such conduct consists simply in carrying advertisements in various town papers that he will visit the town at a certain time and that he treats various diseases successfully.

2. The State Medical Examiners Board has no legislative powers delegated to it by the general assembly.

3. The general assembly may not delegate the power to make a law but it may delegate power to a board of Medical examiners to determine some fact or things upon which the law depends.

4. The canons of ethics of medical association not being in the record, QUAERE, and with reference to professional advertising, would a mere breach of such ethics, constitute dishonorable or unprofessional conduct?

5. The statute is the sole source of the power of the board and the fact that it may be more capable than any one else of determining the standards of the medical profession cannot make it the sole judge of a physician's conduct. The courts still retain this power and cannot delegate their judicial duties.

6. A physician's license cannot be revoked merely for violating professional ethics or the rules of a board of health; to be actionable, it must amount to a breach of law.—*Judgment reversed. Mr. Justice Butler specially concurring.*

CRIMINAL LAW—CONFIDENCE GAME—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF EVIDENCE—*Arnett vs. the People*—No. 12750—*Decided April 25, 1932—Opinion by Mr. Justice Moore.*

1. Defendants were convicted in the court below of obtaining money by means of the confidence game. The information charged in substance that the defendant did then and there unlawfully and feloniously obtain and procure from one W. F. Cross the sum of $409 in lawful money of the United States by means and by use of the confidence game. Such information stated the crime of obtaining money by means of the confidence game.

2. It is not necessary in such information to allege ownership of the money.

3. Where the evidence showed that defendants received checks instead of cash, there was no variance between allegations and proof. It would be ridiculous to hold that such a variance constitutes reversible error.—*Judgment affirmed.*

CONVERSION—PLEADING—SUFFICIENCY OF COMPLAINT—MEASURE OF DAMAGES—*Barkhausen vs. Bulkley*—No. 12617—*Decided April 25, 1932—Opinion by Mr. Justice Campbell.*

1. A complaint, in conversion, alleging that plaintiff's stock certificates, representing capital stock of Cities Service Company, were properly in the possession of the defendant at the time of the alleged conversion and had been delivered by plaintiff to defendant as collateral security for the payment of her indebtedness to him as part of the purchase price of the stock, fails to state an action for conversion and was subject to attack by general demurrer.

2. Such complaint is defective in failing to allege a demand before suit was commenced or that defendant refused to comply with the demand.

3. The measure of damages is the market value of the stock on the day converted and complaint is defective in alleging as the measure of damages, the value at some other time.—*Judgment affirmed.*

CRIMES — MURDER — FIRST DEGREE — PREMEDITATION — EVIDENCE OF — *Maestis v. People*—No. 13019—*Decided May 2, 1932—Opinion by Mr. Justice Alter.*

1. Where defendant was convicted of first degree murder, "* * * the proof must establish deliberation and premeditation to support the verdict. Time, however, is not essential if there was a design and determination to kill formed in the mind of the defendant, previously to or at the time the mortal wound was given. It matters not how short the interval, if it was sufficient for one thought to follow another and the defendant actually formed the design to kill, and deliberated and premeditated upon such design before firing the fatal shot, * * *. Under these acts, premeditation and deliberation are matters of inference and presumption to be drawn by the jury from the facts and circumstances leading up to, surrounding and explanatory of the homicide."—*Judgment affirmed.*

TAXATION—POWER OF—RIGHT TO TAX COUNTIES—*People v. Board of County Commissioners of Weld County*—No. 12624—*Decided May 2, 1932—Opinion by Mr. Justice Campbell.*

1. The General Assembly did not intend to tax gasoline used in propelling motor vehicles on public streets or highways in the State of Colorado, when such vehicles are being used in constructing, maintaining or repairing the highways.

2. Power to tax municipalities and counties is established by statute. The statute does not contemplate, however, a gasoline tax when such gasoline is used by the county or municipality in the construction, maintenance and repair of its highways.—*Judgment affirmed in part and reversed in part.*

NEGLIGENCE—MALPRACTICE—MEDICAL DOCTORS—*Locke v. Wyke*—No. 12632—*Decided May 2, 1932—Opinion by Mr. Justice Moore.*

1. In an action alleging negligent diagnosis and treatment, when the evidence discloses that the diagnosis made by the Doctor was correct and that the treatment was the same as would have been followed by reliable practitioners, it is error to deny a directed verdict for the defendant.—*Judgment reversed and remanded.*

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