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Colorado Supreme Court Decisions

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(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

CONDEMNATION—COMMISSIONERS TO VIEW PROPERTY—No. 12,316—*Jennings vs. Board of County Commissioners—Decided April 22, 1929.*

Facts.—County Board sought to condemn land for a highway. Land was condemned in Court below without the appointment of commission for the purpose of viewing the property.

Held.—The request for a commission must be made before steps are taken to ascertain the compensation and damages. Where the parties fail to make such request and cause is tried to a Jury, the right to have a commission, if any exists, is waived.

Judgment Affirmed.

MOOT CASE—LANDLORD AND TENANT—No. 12,233—*Kahnt vs. Caldwell—Decided April 22, 1929.*

Facts.—The issues involved the date of expiration of the tenancy of Caldwell, tenant on Kahnt's farm. This case was formerly before the Court and Writ of Error was dismissed for the reason that there was no final judgment. Final judgment was then entered in the Court below and the case was again brought to the Supreme Court. The lease expired March 1, 1929.

Held.—That the lease, having expired March 1, 1929, which was prior to the submission of the case to the Supreme Court, the case has become moot and it is now too late to do the parties any good.

Writ Dismissed.

DAMAGES—ACT OF GOD—NEGLIGENCE—No. 12,077—*Barlow vs. The North Sterling Irrigation District—Decided April 22, 1929.*

Facts.—Barlow sued the defendant for damages sustained by reason of the flooding of his land. Judgment was for the defendant. During a violent rain storm, the defendant's irrigation ditch broke and the water therefrom flowed over plaintiff's land causing damage.

Held.—To constitute a defense, the Act of God must be the sole cause of the damage, and if negligence of the defendant contributed to or cooperated with the Act of God in causing the damage, the defendant is liable. The Court below should have instructed the Jury that, in order to constitute a defense, the Act of God must have caused the damage without any contributing negligence on the part of the defendant.

Judgment Reversed.

TRESPASS—EASEMENT FOR DITCH—No. 12,115—*Abrams vs. Calwell—Decided April 22, 1929.*

Facts.—Abrams sued Calwell for damages for trespass. Judgment for defendant below. Calwell claimed a right of way over Abrams' land for two ditches to carry water. In a former suit, title was quieted, but the description of the ditch in controversy herein does not correspond with the description of the ditch in which title was quieted.

Held.—The Jury must have found that the easement described in the Decree quieting title in the ditch was along the line of the ditches claimed by Calwell and not as claimed by Abrams. Although the evidence was somewhat unsatisfactory, it is sufficient to support the verdict.

Judgment Affirmed.

DETERMINATION OF HEIRSHIP—MARRIAGE—INSANITY—No. 12,323—*Williams vs. Williams—Decided April 29, 1929.*

Facts.—This is a statutory proceeding for the ascertainment and determination of heirship. The issue raised at the

trial was the validity of the marriage of defendant in error on account of insanity of other party.

Held.—After the death of the other party to this marriage, the county court admitted the will to probate and by so doing necessarily found the deceased to be of sound mind and memory. The subsequent marriage revoked the will. The court found below that the decedent at the time of the marriage was mentally capable of contracting a lawful marriage and the evidence is sufficient to support the findings.

Judgment Affirmed.

FRAUD AND DECEIT—BODY JUDGMENT—No. 12,100—*Clark vs. Giacomini—Decided April 29, 1929.*

Facts.—Plaintiff had a verdict and judgment for $3,120.00 upon a complaint charging false representations in the sale of stock. Upon a finding in the verdict that, in committing the tort complained of, defendant was guilty of fraud and willful deceit, the court ordered defendant incarcerated for a period of four months or until the amount of the judgment was paid.

Held.—Defendant, having given immaterial testimony, is not in a position to object to testimony rebutting the same. Instructions given to Jury were proper. Included in the judgment was $870.00, which was allowed as interest upon $2,250.00, the sum alleged and found to have been paid out by the plaintiff as a result of said false representations. Allowance of interest was not within the Colorado Statute; judgment modified by deducting the interest.

Judgment Modified and Affirmed.

SCHOOL DISTRICTS—TEACHERS—DIRECTORS' MEETINGS—No. 12,054—*Consolidated School District vs. Angus—Decided April 29 1929.*

Facts.—Angus, a teacher, recovered judgment against the school district for wages due herself and upon two assigned

causes of action for wages due others. Contract was made during a time when the right of one of the directors to his office was being questioned and at a time when the board meeting was informally held.

Held.—The director was at least a de facto officer and his act is as binding as that of a de jure officer. The board, having adopted no by-laws and not having any formal rule with reference to the manner of calling special meetings, where the members of the board had actual notice that a meeting was to be held at a certain date, it was their duty to attend and under such circumstances the same would be a legal meeting.

Judgment Affirmed.

FORECLOSURE—LOST NOTE—DEMURRER—No. 12,135—*Murray vs. Ready—Decided April 29, 1929.*

Facts.—Murray sued Ready to recover judgment on a promissory note and to foreclose a Deed of Trust. The trial court sustained a general demurrer to the complaint.

Held.—The demurrer is a general demurrer and should not have been sustained. The fact that the note was lost or stolen does not bar a suit on the note as plaintiff could be required to give an adequate indemnity bond. Plaintiff is entitled to a personal judgment even though in the same suit a foreclosure of the Deed of Trust is sought.

Judgment Reversed and Remanded.

NON-SUIT—SALE OF STOCK—EVIDENCE—No. 12,008—*The Tax Service Corporation vs. Shoff—Decided April 29, 1929.*

Facts.—Plaintiff below, a stock salesman, recovered judgment against the defendant, The Tax Service Corporation, and C. W. Savery, in the sum of $10,000.00, said amount claimed to have been earned as 20% commission for the sale of 4,000 shares of the capital stock of defendant corporation. Defendants claim error in refusal of the Court to grant Motion for non-suit and to direct a verdict for defendants.

Held.—Plaintiff below failed completely to prove the material allegations of his complaint. It was, therefore, error to deny defendant's motion for a non-suit and to direct a verdict for the defendant.

Reversed and Remanded.

CONVERSION—AUTOMOBILE INSURANCE—EXEMPLARY DAMAGES No. 12,098—*The Pennsylvania Fire Insurance Company vs. Levy—Decided May 6, 1929.*

Facts.—Levy brought an action in trover against the insurance company for the conversion by defendant of plaintiff's automobile, and recovered actual and exemplary damages. He carried a theft insurance policy. The car was stolen and was recovered about a month later in damaged condition, and the company retained possession of the car, refusing to deliver it to the plaintiff until the amount of damages was agreed upon and holding the car for a period of several months.

Held.—The company had a right to retain possession of the car for a reasonable time in order to ascertain the damages, but it had no right to create unnecessary delay nor to hold the car for the purposes of forcing a settlement on terms dictated by the insurer. The insurer held the car in this case for an unreasonable length of time and was guilty of conversion. The facts were sufficient in this case to sustain the award of exemplary damages also.

Judgment Affirmed.

JUDICIAL SALE — CAVEAT EMPTOR — No. 12,181 — *Kreps vs. Webster—Decided May 6, 1929.*

Facts.—Judgment was rendered against plaintiff in error, a defaulting bidder at a Sheriff's sale on execution, for $900.00, being the difference between his bid and the amount realized by the subsequent sale. He sought to avoid liability, claiming that the sale was void, because the execution debtor had no title to the property.

Held.—The doctrine of caveat emptor applies to a pur-

chaser at an execution sale when the debtor has no title to the property sold. A bidder at a Sheriff's sale cannot refuse to pay his bid and take the property on the ground that the sale will convey no title.

Judgment Affirmed.

WORKMAN'S COMPENSATION—MEDICAL TREATMENT—LIMITATION No. 12,229—*The John Thompson Grocery Stores Company, et al vs. Industrial Commission of Colorado—Decided May 6, 1929.*

Facts.—Employee was injured and necessarily expended more than $200.00 in medical treatment. This was caused by several operations, the result of which operations was that he wholly recovered. The Court Below found that, had he not expended this additional amount for his recovery, he would have lost the use of his leg below the knee; it allowed compensation for one hundred thirty-nine weeks.

Held.—Since the Legislature has fixed the period of time as sixty days and the amount at $200.00 for medical attention, it is beyond the power of the Commission or the Court to change this. While the employee incurred additional expense above the $200.00 and is thereby fully restored, the Commission is without power to make a finding that had he not had the medical attention he would have been entitled to compensation on the ground that he might have lost his left leg at the knee. Such a finding is not supported by the facts.

Judgment Reversed with Directions.

EQUITY — INJUNCTION — ADEQUATE RELIEF AT LAW — No. 12,235—*Building Laborers International Protective Union of America vs. International Hod Carriers Building and Common Laborers Union—Decided May 6, 1929.*

Facts.—Plaintiff in error brought suit below because of defendant's alleged, unlawful interference with plaintiff's ownership and possession of its real and personal property, and prayed for restoration of its property and an injunction

enjoining the defendants from interfering with the property. Demurrer to the Complaint was sustained below.

Held.—The Complaint on its face showed that the plaintiff had an adequate remedy at law, in that the plaintiff, if the proof supported the allegations, could get back its personal property in an action of claim and delivery or common law replevin, and could get back its real estate in the code action to recover possession, which is common law ejectment. The Demurrer was properly sustained.

Judgment Affirmed.

WORKMAN'S COMPENSATION—METHOD OF COMPUTATION—No. 12,280—*The Employers' Mutual Insurance Company vs. The Industrial Commission—Decided May 6, 1929.*

Facts.—Deceased was a coal miner. Industrial Commission awarded his widow compensation based on earnings of deceased for one year preceding his death as a standard in computing his average weekly wage. It was contended that the six months' period should be used instead of one year.

Held.—Coal mining is a seasonable business and computing award on average weekly wages for wages earned during the preceding six months would not be fair in a seasonable industry. The commission was authorized to use one year as a period instead of six months in this class of industry.

Judgment Affirmed.

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of Dicta to note any interesting decisions of the United States District Court, the Denver District Court, the County Court, the Juvenile Court, and occasionally the Justice Courts.)

DENVER DISTRICT COURT—Division 2, No. 104,432—*People of the State of Colorado on the Relation of M. H. Spiegleman and Simon Spiegleman vs. Jay T. Williams, as Chief Building Inspector of the City and County of Denver—J. C. Starkweather, Judge—Decided May 6, 1929.*

Mandamus for building permit.