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Abstracts of Recent Decisions

ABSTRACTS OF RECENT DECISIONS

STATE v. DREW—SUPREME COURT OF MISSOURI, JUNE 3, 1919—CRIMINAL LAW—REMARKS BY COURT—COMMENT ON EVIDENCE.

In a prosecution for statutory rape it is improper for the trial court, by stating his opinion that there was no alteration in the girl's birth entry in her parents' Bible after the time it was made, to comment on the evidence and give his judgment as to its probative force, and the comment would have been improper had it been incorporated in the written instructions. 213 *S. W.*

ENGLE ET AL. V. WORTH COUNTY—SUPREME COURT OF MISSOURI, JUNE 2, 1919—APPEAL AND ERROR.

Where partition action was tried on theory that a sale in partition was proper, a defendant, having joined in the request for partition and sale, cannot for the first time on appeal assert that land is not subject to partition. 213 *S. W.*

DAVIS V. DAVIS (DAVIS, INTERVENOR)—SUPREME COURT OF IOWA, JULY 7, 1919—DIVORCE.

Where a wife, suing for divorce, attached corporate stock, claiming it to be the property of her husband, a judgment for divorce and alimony awarding the wife all the interest of her husband in such stock, was not an adjudication against the rights of one who filed an intervening petition, claiming to be the owner of the stock. 173 *N. W.*

BURNS V. CITY OF WATERLOO—SUPREME COURT OF IOWA, JULY 2, 1919—WITNESSES' PRIVILEGE.

In an action against a city for injuries from a fall on its icy sidewalk, testimony of a physician, called to attend plaintiff within a brief time after he had been brought home, that plaintiff was in an intoxicated condition, was inadmissible; observation of the fact by the doctor being privileged within the statute. 173 *N. W.*

TODOROFF V. CHICAGO & N. W. RY. CO.—SUPREME COURT OF WISCONSIN, JUNE 25, 1919—RAILROADS—GROSS NEGLIGENCE.

In an action for the killing of the driver of a popcorn wagon at a railroad crossing, evidence as to the engineer's acts or failure to act after seeing deceased was oblivious to danger held not sufficient to take to the jury the issue of gross negligence. 173 *N. W.*

ACTIONABLE FRAUD.

It is actionable fraud for one, with intention that it shall be acted on, as it is to represent a fact actually untrue to be true to his knowledge, when he does not know its truth or falsity, though he believes it to be true. *Rochester Bridge Co. v. McNeill*, 122 *N. E.* 662.

"NATURAL; PROXIMATE."

The damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency, and the term "natural" imparts such as might reasonably have been foreseen, such as occur in the ordinary state of things, and the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Justesen v. Pennsylvania R. Co.*, 106 *Atl.* 137.

ORDINARY PRECAUTION.

The ordinary precautions to be observed by one about to cross a railroad track include looking, listening, and if necessary, stopping and waiting until an approaching train has passed. *Kirkland v. Atchison, T. & S. R. Ry. Co.*, 179 *Pac.* 362.

PROCEEDING IN REM.

The probate of a will is primarily and essentially a "proceeding in rem" and has no direct effect upon property outside of the jurisdiction in which the will is probated.

"RENEWALS."

Notes given after maturity of other notes, which were paid by check drawn against proceeds of the new notes, by which a loan was to be carried through another discount period, were "renewals" within an agreement whereby payee agreed with an indorser on old notes that it would not accept and discount such old notes or renewals thereof until it had secured an indorsement by a certain other person. *Jenkins v. National Bank of Balt.*, 106 *Atl.* 174.

FOOT. v. L. C. SMITH & BROS. TYPEWRITER CO.—SUPREME COURT OF NORTH DAKOTA, MAY 28, 1919—SALES—SALES AGENCY CONTRACT CONSTRUCTION.

In an action in a dealer's contract to handle typewriters, which gives to the dealer the exclusive right to sell certain typewriters for a period of one year, commencing February 27, 1918, and which provides that the typewriter company shall deliver to the dealer twelve

machines each month during the life of the contract, it is held that the latter provision refers not to calendar monthly periods, but to monthly periods measured from the date of the inception of the contract. 172 *N. W.*

McLORTY v. RAYMOND—SUPREME COURT OF NORTH DAKOTA, APRIL 29, 1919—INSANE PERSONS—APPOINTMENT OF GUARDIAN AD LITEM—SUFFICIENCY OF COMPLAINT.

In an action for damages apparently based upon fraudulent representations made to secure the execution of certain notes and a mortgage for $1,000, and upon the wrongful connivance of the defendant, thereby securing the incarceration of the plaintiff, who was *non compos mentis*, in the insane asylum, it is held upon the record that the trial court was authorized to appoint a guardian ad litem, and that the complaint fails to state cause of action. 172 *N. W.*

McGREGOR v. GREAT NORTHERN R. R. CO.—SUPREME COURT OF NORTH DAKOTA, APRIL 30, 1919—RAILROADS—FEDERAL CONTROL—FEDERAL EMPLOYERS' LIABILITY ACT—ADMINISTRATOR'S RIGHT OF ACTION.

In an action by an administrator, brought under the Federal Employees' Liability Act (U. S. Comp. Set. Secs. 8657-8665) to recover damages occasioned by the death of the plaintiff intestate through alleged negligence of the defendant railway company, where the cause of action was begun subsequent to the assumption of Federal control and before the passage of the Rail Control Act of March 21, 1918 (U. S. Comp. Set., Secs. 3115¾a-3115¾p), is held: Under the Act of Congress, August 29, 1916, Sec. 1 (U. S. Comp. St., Sec. 197a) authorizing the assumption, in time of war, of control by the President of systems of transportation, and under the proclamation of the President issued in pursuance thereof, *prima facie* a cause of action for the alleged negligence arose and became vested in the plaintiff prior to the passage of the Rail Control Act.

CITY OF ST. LOUIS EX REL. AND TO USE OF HYDRAULIC PRESS BRICK CO. v. RUECKING CONST. CO. ET AL., NO. 20127—SUPREME COURT OF MISSOURI, DIVISION NO. 1, JUNE 2, 1919—APPEAL AND ERRORS—COURTS— DETERMINATION SUA SPONTE OF JURISDICTION.

As jurisdiction can neither be waived nor conferred by consent, it is the duties of the Appellate Court to determine sua sponte the question of its own jurisdiction at whatever step or stage of the proceeding it obtrudes itself. 172 *N. W.*

SCHOLL, PUBLIC ADMR., v. UNITED RYS. OF ST. LOUIS—SUPREME COURT OF MISSOURI, DIV. No. 1, JUNE 2, 1919—CAUSES—INJURY TO PASSENGER ON TRACKS—PRESUMPTIONS.

Where deceased got off car running on the north track and stood in the passageway between tracks while a car was approaching on the south track, and then stepped in front of it and was struck and killed, the motorman in charge of the car which struck had the right to presume that he would not leave a place of safety and thrust himself suddenly in front of the car, and an instruction to that effect, etc., was proper.

WADLOW ET AL. v. CONSOLIDATED SCHOOL DISTRICT No. 3, TP. 30, R. 23, GREEN COUNTY, ET AL.—SPRINGFIELD COURT OF APPEALS, MO., MAY 24, 1919—ESTOPPEL—JUDICIAL PROCEEDINGS—INCONSISTENT CONDUCT.

Plaintiffs, who with other citizens, sought to prohibit issue of bonds legally voted and the building of a high school on a site legally selected, and who took legal steps with that object in view, or were financial contributors in injunction suits prohibiting the issuance of the bonds, all of which prevented delivery of the bonds, are not in a position to maintain suit to enjoin collection of certain school levies and the delivery of the bonds on the ground that levies were illegal because bonds had never been delivered.

COMMERCIAL SECURITY CO. v. HULL ET AL.—COURT OF CIVIL APPEALS IN TEXAS—SAN ANTONIO, MAY 28, 1918—ALTERATION OF INSTRUMENTS—BILLS AND NOTES—INNOCENT PURCHASERS—MATERIAL ALTERATION—DETACHMENT OF ANNEXED CONTRACT.

Where a contract, attached to a note as part thereof, provides that the note is not to become a binding obligation until the contract is performed, the detachment of the contract from the note before performance is a material alteration, invalidating the note in hands of an innocent purchaser.