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Supreme Court Decisions

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TRUSTS—ESSENTIAL ELEMENTS—INSTRUMENT, TESTAMENTARY IN CHARACTER—*Smith, et al. vs. Simmons, as Administrator*—No. 14009—*Decided September 21, 1936—Opinion by Mr. Justice Holland.*

This was an action for recovery of two $1,000 liberty loan bonds brought by the administrator of the estate of Eliza A. Wade. Judgment below was for plaintiff. The deceased, in her lifetime, placed three $1,000 liberty loan bonds with the Colorado Springs National Bank, accompanied by a letter of instructions to collect and pay her the interest and in the event of her death to deliver the bonds to three different parties. She later withdrew one of the bonds and left the two remaining bonds with a new similar letter of instructions, except they were to be delivered to two people in the event of her death.

1. The effect to be given the written instrument is to be determined from its face and the circumstances relating to its execution and delivery as disclosed by the evidence.

2. The written words as well as Mrs. Wade's acts in retaining control of the bonds by withdrawing one, clearly supports the interpretation that she had not ceased to be the owner and in control of the bonds and that she retained the legal right thereto and did not part with such title or interest at the time of her written declaration.

3. To create a valid express trust, it was necessary that she do all things that could be done to pass the legal title by the transfer to the bank. Had the instrument been sufficient in form to create a valid trust, it could not have been revoked at her will. The fact that she requested and received part of the bonds from the bank under an instrument identical with the substituted one, demonstrates that she did not consider that she had divested herself of the title or control of the property.

4. Whatever might have been attempted as a gift to be effective at her death, was so imperfectly performed as to defeat such effect.

5. Not having disposed of the bonds during her lifetime, they became a part of her estate at her death.—*Judgment affirmed.*

Mr. Justice Bouck dissents. Mr. Justice Young not participating.

SUMMONS—SERVICE ON CORPORATION — SUFFICIENCY — SETTING ASIDE JUDGMENT—*Younge vs. Sutton*—No. 13750—*Decided September 21, 1936—Opinion by Mr. Justice Holland.*

Sutton instituted this action to clear the title to certain real estate which had been sold under execution upon a judgment obtained by Younge against the Pueblo Industrial Company, a holding corporation

for Sutton and family. He claimed title by virtue of an unrecorded deed, and attacked the judgment against the Pueblo Industrial Company on the ground of defective service of summons, alleging also that Younge, the judgment creditor, knew that Sutton was the owner and in posession, and that the levy, execution and sale, was with full knowledge of these facts. Plaintiff prevailed below.

1. Service of summons made upon the assistant secretary of a corporation, where there is no secretary, and where it further appears that the assistant secretary signed annual reports filed in the office of the Secretary of State and it further appeared that such assistant secretary was in charge of the office of the corporation, such person is a general agent of the corporation so far as the service of process is concerned, especially where the corporation has immediate notice of such service and recognizes the service without complaint or protest within the time afforded therefor.

2. Where the plaintiff claimed title by an unrecorded deed it was the plaintiff's duty to disclose all knowledge immediately after the commencement of the suit by Younge against the corporation which resulted in the judgment, execution, sale and deed. There was nothing inconsistent with the possession by Sutton, after he claimed the deed to him was delivered but not recorded, to the possession which he enjoyed of the real estate as the vice president of a family corporation owning the real estate. Furthermore, the plaintiff, as an officer of the corporation, was a party to the annual report made to the Secretary of State wherein the real estate was represented to the public as being owned by the corporation subsequent to the time that Sutton claimed title under an unrecorded deed. Under the circumstances Younge was a bona fide purchaser of the real estate at the execution sale without notice of the claims now asserted by Sutton and his title is superior to that claimed by Sutton through the unrecorded deed.—*Judgment reversed.*

CRIMINAL LAW—CROSS-EXAMINING DEFENDANT WITH REFERENCE TO INDEPENDENT CRIME—ERROR.—*Munfrada et al. v The People*—No. 13,943—*Decided August 10, 1936*—*Opinion by Mr. Justice Butler.*

Munfrada and one other were convicted of larceny of seed potatoes. The district attorney, over objections of defendant, was permitted to cross-examine Munfrada with reference to the alleged theft of automobile tires from the Speedway garage.

1. Evidence is not admissible which shows, or tends to show, that the accused has committed a crime wholly independent of the offense for which he is on trial.

2. Such cross-examination was improper and prejudicial to both defendants.—*Judgment reversed.*

DEEDS—SETTING ASIDE FOR MENTAL INCAPACITY TO EXECUTE—SUFFICIENCY OF EVIDENCE—QUALIFICATIONS OF JURORS—*The Seventh Day Adventist Association, et al. vs. Underwood*—No. 13674——*Decided July 20, 1936—Opinion by Mr. Justice Hilliard.*

In an action to recover real property defendant in error prevailed before a jury and had judgment setting aside certain conveyances of real estate made in 1929 on the ground that the deceased lacked mental capacity to make, acknowledge and deliver the conveyances.

1. The question of the mental capacity of the grantor was properly submitted to the jury upon conflicting evidence and there was sufficient evidence to sustain the finding of the jury.

2. Where it appears that three of the jurors were also jurors on a previous case involving the mental capacity of the same grantor but that in the examination of the jury on voir dire the counsel for plaintiff in error failed to ask the jurors if they had served on a previous case involving the question of mental capacity of the same grantor, this shows a lack of diligence on the part of the complaining party, which amounts to a waiver.

3. Parties have the right to interrogate persons who are called to sit as jurors for the purpose of ascertaining their qualifications before they are sworn, and if this is not done the right to challenge is waived. —*Judgment affirmed.*

MINES AND MINING—LIABILITY OF MILLING COMPANY ON BOND FOR FAILURE TO PAY PURCHASE PRICE OF ORE—*Robinson vs. The Aetna Casualty and Surety Company*—No. 13786—*Decided July 27, 1936—Opinion by Mr. Justice Butler.*

Robinson sued the Aetna Company to recover on a bond given by the Chain O'Mines, a corporation, as required by Section 3366, Compiled Laws 1921. Robinson's assignors sold ore to Chain O'-Mines at an agreed price and upon failure to pay the agreed price the suit was brought, judgment obtained and after execution was returned wholly unsatisfied Robinson sued the Aetna Company on the bond.

1. The bond required under Section 3366, Compiled Laws of 1921, to be given by milling and ore treating companies, is conditioned that the obligor will not violate any law relating to such business.

2. No provision of the act of 1915 was violated.

3. The penalty provided by Section 3366, Compiled Laws of 1921, provides for fine and imprisonment for neglect or refusal to account for all the proceeds to the owner of the ore.

4. This penalty statute is criminal in its nature and does not cover a case of failure to pay the price for the purchase of ore, but is limited to cases for failure to account for the proceeds of ore delivered for treatment.

5. A mere violation of the common law duty to pay the purchase price does not come within the terms of Section 3366, Compiled Laws of 1921, as that section only refers to statutory law relating to such business.—*Judgment affirmed.*