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Supreme Court Decisions

WILLS—AGREEMENT TO DEVISE OR BEQUEATH—*Ward vs. Ward et al.*—No. 12921—*Decided February 5, 1934*—*Opinion by Mr. Justice Butler.*

Andrew C. Ward sued Estelle B. Ward as Trustee and Don F. Cowell as administrator with the will annexed for damages for breach of contract on the ground that he had advanced certain money to his father, Calvin Tracy Ward, to assist him in starting a business and that his father had thereafter verbally agreed to devise and bequeath him one-fourth of his estate, or in lieu thereof, to bequeath him cash equivalent to one-fourth of his estate on the consideration that the son would forgive the debt and would work for his father for a nominal wage so long as the father stayed in business and that the plaintiff accepted the offer and performed his part of the agreement, but the father bequeathed him $1.00 only and that the value of his father's estate was $600,000.00. The main defense was the Statute of Frauds. The verdict was directed below for the defendant.

1. The complaint stated a cause of action.

2. A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant and this negative conclusion can often be established without determining all the terms of the agreement with exactness.

3. In order to make the agreement binding it was not necessary that the father expressly agree not to revoke the will. No matter how many wills the father should make or revoke or change, the agreement obliged him to devise and bequeath by his last will and testament, property to the plaintiff.

4. Such agreement is not void as against public policy on the ground that under its terms the widow would be deprived of her right of inheritance of one-half of the husband's estate. The plaintiff's right would be subject to the widow's right to her statutory share. The agreement could not deprive the widow of her statutory right.

5. A contract to devise land is within the Statute of Frauds but a contract to bequeath money is not within the Statute of Frauds.

6. In the present case the contract is divisible as to the promises. They are naturally separable and holding them to be divisible would cause no injustice to anyone and the promise to bequeath is good, but the promise to devise is not good as being within the Statute of Frauds. —*Judgment reversed.* *Mr. Justice Bouck dissents.*

WORKMEN'S COMPENSATION—WHOLLY DEPENDENT—PARTIALLY DEPENDENT—METHOD OF DIVISION—*Central Surety and Insurance Corporation vs. Industrial Commission*—No. 13399—*Decided February 13, 1934—Opinion by Mr. Justice Butler.*

J. B. Lard was killed in an accident arising out of and in the course of his employment. The Commission found his widow was wholly dependent and that his father, mother and sister were partially dependent to the extent of 20% and awarded to the widow $43.14 per month until the sum of $3,106.25 should be paid. The widow later remarried and the Commission ordered her right to the compensation terminated and awarded 20% of the entire $3,106.25, or $621.25. to be paid to the father, mother and sister, payable $43.14 per month.

1. The statute providing that where there are persons both wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation, the widow was solely entitled to it until she remarried, when it terminated.

2. The statute providing that death benefits shall terminate upon the happening of any of the following contingencies and shall thereupon survive to the remaining dependents, if any, to-wit; (a) upon marriage; (b) upon death of any dependent; the words "shall thereupon survive to the remaining dependents" do not apply only to those who are wholly dependent.

3. After marriage of widow, those partially dependent should have been allowed 20% of what was left of gross award after deducting what had been paid the widow before her remarriage and not 20% of the original award.—*Judgment reversed.*

BOUNDARIES—STATUTE OF LIMITATIONS—WHEN COMMENCES ON HOMESTEADS—*Prieshof vs. Baum, Admr.*—No. 13138—*Decided February 13, 1934—Opinion by Mr. Justice Holland.*

Baum brought ejectment to recover 40-foot strip of land lying between the NE¼ Sec. 11, which he owned, and NW¼ Sec. 11, owned by Prieshof. Originally when Baum filed a homestead on this quarter section, in 1912, he set his fence in 40 feet, expecting that a road would later be laid out but as this was never done, he sought possession of this strip of land from Prieshof, who defended on ground that he had possession for over 20 years under adverse possession and also under the 18-year statute. Prieshof originally in 1908 filed on the NW¼ as a homestead, later relinquished one-half of it and his wife filed on this as a desert claim and later in 1913 they both relinquished back to the U. S. and he re-filed on it under the homestead act. Baum was successful below.

1. The statute of limitations in favor of an adverse claimant in possession begins to run when the entryman is legally entitled to a patent and does not begin to run when he filed on the land as a homestead.

2. In order for a fence to become a boundary line between two parties, it must have been placed there as a boundary line and recognized and acquiesced in as such. There must be mutuality in the fixing of and the acquiescence and the boundary must be actual.

3. Where a homesteader relinquishes title back to the United States the continuity of possession before that time was broken, the fact that he re-filed on the same land on the same day he relinquished it, does not give him the right to take the former possession to the latter possession after re-filing.

4. A relinquishment of an entryman under the United States laws, turns the land back to the United States and with it every possessory right or otherwise that the entryman enjoyed.—*Judgment affirmed.*

BROKERS—PROFIT AND LOSS ACCOUNTS—LIEN—*Hopper vs. Marschner*—No. 12919—*Decided February 13, 1934*—*Opinion by Mr. Justice Campbell.*

1. A stockbroker has, in the absence of a special agreement to the contrary, a general lien on securities of the principal which come into his hands in the course of business.

2. Even where two accounts are kept, and one account shows a loss and the other a profit, the broker, in order to ascertain the amount either due or owing as between him and his customer, may set off the profit in one against the loss in the other, and pay or receive only the net difference.

3. In the pleadings fraud was asserted and that defendant agreed to keep two separate accounts, one a savings account and the other a speculative account but the evidence fails to sustain such averments.—*Judgment affirmed.*

ASSESSOR—DEPUTY—APPOINTMENT BY COLORADO TAX COMMISSION—*The Board of County Commissioners vs. Davis*—No. 13142—*Decided February 13, 1934*—*Opinion by Mr. Justice Holland.*

Davis was appointed a deputy assessor by the Assessor of Washington County, under authority of written order by The Colorado Tax Commission and the County Board refused to recognize the appointment or pay the salary and on appeal to District Court, claim for salary was allowed.

1. Sec. 8820 C. L. 1921 has not been superseded by Sec. 7940.

2. These two statutes are consistent with each other and there is no repeal by implication.

3. A later general statute will not repeal by implication an earlier special statute if the two are not inconsistent.

4. This statute does not delegate judicial power to the Tax Commission.

5. The legislature, without violation of the guaranty of due process of law, may prescribe the qualifications of public officers, the method of their election or appointment and their powers and duties.—*Judgment affirmed.*

Mr. Justice Butler specially concurs in the result but not for the reasons in the majority opinion but on the ground that the judgment should be affirmed because the deputy was a de facto officer at least and the county commissioners are not entitled to question the legality of her appointment, except by Quo Warranto proceedings.

ESTOPPEL—FRAUD—*The Bankers Building & Loan Association vs. Watson*—No. 13039—*Decided February 13, 1934*—*Opinion by Mr. Justice Holland.*

Watson, who could not read English, arranged to trade her property to Harris and Scott by the latter assuming an $800 mortgage to The Midland Savings and Loan Company, to pay $400 in cash together with 58 shares of stock in Paramount Life Company, and Watson signed a deed, without reading it or reading any of the transfer papers, and Harris thereupon applied to The Bankers Building and Loan Association for a loan of $2,200 and secured the loan and later Watson brought suit to cancel the deed and deed of trust on ground of fraud and the court below found that Watson never had knowingly entered into the transfer and that the Bankers Association was an innocent party, and ordered cancellation of the deed and deed of trust and repayment to the Bankers Company of $178 for taxes and other expense.

1. Where the court found that the Bankers Building and Loan Association was an innocent party, it should have decreed that it be made whole and the sum of $178 does not make it whole nor cover monies legally disbursed by it or include any possible damages it may have suffered.

2. Where one of two innocent parties must suffer from the fraud of another, he who enables the fraud to be perpetrated will be held responsible for the results.

3. Where one who cannot read signs a contract without having it read, and has her own employee there who has formerly done the reading for her, but still does not have it read, she is estopped from avoiding the deed on the ground that she was ignorant of its contents. —*Judgment reversed.*

ATTACHMENT—INTENT—INSTRUCTIONS—*The First National Bank of Fort Collins vs. Poor*—No. 13059—*Decided February 13, 1934*—*Opinion by Mr. Justice Butler.*

The Bank sued on a promissory note for $2,500.00 and attached livestock and farming equipment on ground "that the defendants have fraudulently transferred or assigned their property or effects so as to hinder and delay their creditors or someone or more of them or to

render process of execution unavailable when judgment is obtained." Traverse of affidavit tried to jury. Verdict for defendants and judgment entered dissolving attachment.

1. To sustain the attachment, burden was on the plaintiff to prove by a preponderance of the evidence the allegations in the attachment affidavit.

2. The giving of a chattel mortgage was not sufficient of itself to prove an intent on the part of defendants to hinder or delay plaintiff in the collection of its debt.

3. If a mortgage is given with such intent the property of the mortgagor is subject to attachment even though the mortgagor has no purpose eventually to defeat the creditor in the collection of his demand, and even though the debt secured by the mortgage is a valid and subsisting liability.

4. The question of intent is for the jury; such intent may be proved by circumstance as well as by direct proof, and the Court erred in refusing to give such instruction that it was not incumbent upon the plaintiff to prove intent by direct evidence.—*Judgment reversed.*

GARNISHMENT — TORT — *Black, Administrator, vs. Plumb* — No. 13092—*Decided February 13, 1934—Opinion by Mr. Justice Campbell.*

1. An unliquidated claim for damages or an account sounding in tort in favor of the judgment debtor against a third party cannot be properly tried or reached through garnishment proceedings.

2. A garnishee by operation of garnishment proceedings cannot be placed in a worse position than if the defendant's claim were enforced against him directly.

3. The Trial Court should have dismissed the garnishment when it appeared beyond question by the testimony of the plaintiff himself, that the action sounded in tort.—*Judgment reversed.*

INTOXICATING LIQUORS—SEARCH WARRANT—SALE OF AUTOMOBILE—MORTGAGEE'S RIGHTS—*People, for the use of the Protective Finance Corporation, vs. Kinnison*—No. 13908—*Decided February 19, 1934—Opinion by Mr. Justice Holland.*

The Protective Finance Corporation was mortgagee of a Plymouth car. This car was seized under a search warrant issued by one Justice of the Peace, while being used for the unlawful transportation of intoxicating liquors, by not the owner of the car, and without the knowledge of the mortgagee. After seizure a complaint was filed before another Justice of the Peace charging the parties in possession of the car with possession and transportation of intoxicating liquor, and upon the parties being found guilty the car was sold by the constable and this

action was brought against the constable and his bondsman by the mortgagee for the value of the car. Judgment below for the constable.

1. The courts are uniform in holding that proceedings for the issuance of a search warrant are strictly construed and that every constitutional and statutory requirement must be observed or the search will be illegal.

2. A search warrant issued in blank is a nullity. It must be directed to some officer. Searches cannot be made by anyone who might chance to have a blank warrant in his possession.

3. Where a seizure is made return must be made before the Justice of the Peace who issued the warrant and not before a Justice of another precinct.

4. Where an automobile is seized under a warrant issued by one Justice of the Peace it cannot be ordered sold by another Justice of the Peace before whom a complaint for unlawful possession and transportation of intoxicating liquors was filed.

5. Where the search is illegal the seizure thereunder is illegal for the same reason.

6. The second Justice of the Peace was without jurisdiction and, hence, his proceedings were without validity and the constable who sold the car under such proceedings cannot protect himself against liability for his acts thereunder.—*Judgment reversed.*

FRAUD AND FALSE REPRESENTATIONS—REPRESENTATIONS AS TO VALUE AND QUANTITY—*Lesser vs. Porter*—No. 13037—*Decided February 19, 1934*—*Opinion by Mr. Justice Butler.*

Lesser sued Porter and wife for damages for inducing him by false representations to enter into a contract for the purchase of a farm. At the close of plaintiff's evidence, the Court granted a non-suit and dismissed the case.

1. Where the false representation charged is that defendants represented that a farm contained ninety acres whereas in truth and fact it contained less, and the evidence shows that the owner filed tax schedules in which the acreage was given as sixty acres, this was sufficient to go to the jury on the question of falsity of representation that the farm contained ninety acres.

2. Representations of value, if made with the purpose of having them accepted by the party to whom they were made, as a fact, and so relied upon, are to be treated as representations of fact.

3. The question of whether or not the representation was one of fact was a jury question.—*Judgment reversed.*

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