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Supreme Court Decisions

Dicta Editorial Board

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WILLS—EXECUTION—*Wagner vs. Heldt*—No. 12868—*Decided October 23, 1933—Opinion by Mr. Justice Campbell.*

What purports to be the last will of Hans Heldt was admitted to probate by the County Court. Petition was filed to set aside the probate and on hearing, petition was dismissed and case appealed to District Court and District Court denied probate for want of proper execution.

1. Our statute in regard to wills provides that in addition to the signing or acknowledgment, that the testator shall, in the presence of the witnesses, declare said writing to be his last will and testament and said witnesses, at his request, in his presence and in the presence of each other shall attest the same by subscribing their names thereto.

2. Where there is no evidence tending to show that the testator, either by words or by conduct, declared the writing in question to be his last will and testament, or that he even knew that the instrument in question purported to be his will, and the testimony is conflicting as to the other provisions that go to make up a proper attestation of subscribing witnesses to a will, such a will is not entitled to probate.—*Judgment affirmed.*

FORCIBLE ENTRY AND DETAINER—FAILURE TO FILE BOND—*Smith vs. Schreiber*—No. 13360—*Decided October 23, 1933—Opinion by Mr. Justice Burke.*

These parties appeared in reverse order in the trial Court. Schreiber sued John Smith in County Court to recover possession of real estate. Emma Smith, alleging that she owned the real estate and was entitled to possession, moved to be made a party, and Smith disclaimed. Emma Smith was made a party, trial had and Schreiber had judgment.

The Smiths appealed to the District Court, giving an appeal bond in the sum of $500.00 as ordered and Schreiber moved to dismiss for failure to file the additional bond required for payment of use and occupation pending appeal. The Court dismissed the action.

1. Our statute provides that when the judgment in the trial Court is for possession in forcible entry and on detainer, an additional bond, conditioned for payment for use and occupation pending appeal, must be given.

2. Where no forcible entry is claimed but unlawful detainer is claimed a failure to give such additional bond is fatal to the appeal.

3. The facts alleged in the complaint clearly bring this action within the unlawful detention statutes, and the additional bond on appeal was indispensable.—*Judgment affirmed.*

STATUTE—REPEAL—REVIVAL—"MAJORITY" DEFINED—APPOINTMENT OF OFFICERS IN CITIES OF THE SECOND CLASS—*People ex rel. Saunders vs. Hendrick*—No. 13355—*Decided November 6, 1933—Opinion by Mr. Justice Butler.*

G. L. 1877, Sec. 2667 (C. L. '21, Sec. 9171) provided that in all cities the appointment of all officers, such as city attorney, should be by a majority vote of the whole number of members of the council. By various subsequent acts which repealed all acts and parts of acts inconsistent therewith it was provided that in cities of the second class such officers should be elected by the qualified electors of the city. These in turn were repealed by subsequent acts again providing for appointment of such officers by the city council but not specifying the majority necessary to appoint, the latest such act being S. L. '33, p. 880. Respondent was appointed to succeed relator as city attorney of a city of the second class by a majority vote of those members of the council present but not by a majority of the whole number of members of the council. Relator brought *quo warranto,* and elected to stand on his demurrer to respondent's answer.

1. G. L. 1877, Sec. 2667, repealed by later acts inconsistent therewith.

2. Repeal of a repealing act does not revive the original act.

3. Where no specific majority is required, all that is necessary is a majority vote of those voting, there being a quorum present.

4. In cities of the second class, officers need not have a majority vote of the whole number of members of the council for a valid appointment.—*Affirmed.*

INSURANCE — REINSURANCE — CONSTRUCTION OF STATUTES — RIGHT TO WITHDRAW DEPOSIT MADE WITH INSURANCE COMMISSIONER—*Cochrane, as Commissioner of Insurance vs. Pacific States Life Insurance Co. et al.*—No. 13069—*Decided November 6, 1933—Opinion by Mr. Justice Campbell.*

The policies of one life insurance company were reinsured by another life insurance company, which then succeeded to all the business and assets of the reinsured company. Both companies had deposited the necessary securities with the Colorado Commissioner of Insurance as required by Secs. 2481 and 2495, C. L. 1921. The second company then sought an order of court, under Sec. 2481 as amended by Sec. 4, Ch. 117, S. L. 1925, authorizing the withdrawal of the securities deposited by the reinsured company.

1. The amendatory act of 1925 is not applicable here since the reinsured company had issued policies prior to the passage of the 1925 act.

2. The policy holders of a reinsured company cannot, without their consent, be deprived of their vested right to have the fund, estab-

lished under the provisions of the original act, held as security for the payment of their policies.—*Judgment reversed with instructions to dismiss the petition.*

LIENS—LIEN OF BANK COMMISSIONER ON REAL ESTATE—VALIDITY —*Fleming vs. McFerson*—No. 13038—*Decided November 6, 1933*—*Opinion by Mr. Justice Butler.*

McFerson, as Bank Commissioner, was in possession of failed bank and filed a lien against real estate of Campbell, a stockholder. While real estate was in Campbell's name, he held mere naked legal title and Fleming was real owner. Lower court sustained lien.

1. While the act of 1923, giving Commissioner a lien upon the real estate of any stockholder of a failed bank, a stockholder cannot escape liability for such lien, because he is not the actual owner of the real estate, so long as it stands of record in his name and Bank Commissioner has not notice of secret ownership in someone else.

2. The rights acquired by a bona fide purchaser of real estate without notice of an unrecorded deed, are not measured by the actual interest of the seller in the land, but rather by his apparent interest.

3. The Bank Commissioner's position is similar to that of a bona fide purchaser.

4. Such Act of 1923 does not deprive the owner of real estate or property without due process of law. The fact that such act attempts to create a lien upon the mere filing of the lien statement, without any preliminary notice or hearing, or provides no method for foreclosure, does not invalidate the act.—*Judgment affirmed.*

ELECTIONS — QUALIFICATIONS OF VOTERS — INMATES OF POOR HOUSE—*Israel vs. Wood*—No. 13297—*Decided November 6, 1933*—*Opinion by Mr. Justice Butler.*

Israel and Wood were rival candidates for sheriff and Wood was declared elected by two votes and on contest in County Court vote was sustained. Five votes were cast by inmates of County Poor House. There was no actual evidence introduced of place of residence.

1. Under Sec. 4, Art. 7, of our constitution, no person shall be deemed to have gained a residence by reason of his presence * * * while kept at public expense in any poor house.

2. If just prior to their becoming such inmates, the voters had a bona fide residence in the precinct in which such poor house is located, they did not lose their residence.

3. But their presence in such poor house, as public charges, raised a presumption against their right to vote in said precinct, and it requires evidence to overcome that presumption.—*Judgment reversed and remanded for evidence on residence.*

EVIDENCE—SUFFICIENCY OF—FORCE OF DEPOSITIONS IN APPELLATE COURT—*Gianella vs. Haffner*—No. 12785—*Decided November 6, 1933*—*Opinion by Mr. Justice Burke.*

Suit below for an accounting. Part of testimony was oral and part by depositions. Plaintiff prevailed and defendants assigned error (1) overruling demurrer, (2) admission of evidence, (3) insufficiency of evidence.

1. Since assignments (1) and (2) are not argued, and no merit in them, they will not be considered.

2. Where substantially all the material evidence is by depositions, the appellate court is as well qualified to pass upon its weight as the trial court and will do so.

3. Where the larger part of the evidence is oral, the rule is modified only as to that portion presented by depositions or writings.

4. Where proof of a particular fact depends upon depositions, the appellate court will not be bound by the rule that the findings of the trial court on conflicting evidence will not be disturbed.

5. Where the evidence concerning a particular issue is partly oral and partly by depositions, the general rule is abrogated only *pro tanto*. —*Judgment affirmed.*

FRAUD AND DECEIT—SUFFICIENCY OF EVIDENCE—*Otsuki vs. Yamuchi*—No. 12999—*Decided November 6, 1933*—*Opinion by Mr. Justice Campbell.*

Plaintiff sued below for judgment, claiming fraud and deceit in that she entrusted defendant with collection of certain moneys on life insurance policy of her deceased husband, and that he only collected the face of policy, whereas she was entitled to double that amount by reason of accidental death, and that after she discovered the deceit, she was compelled to expend sums in collecting it and lost the interest on it. Plaintiff recovered below.

1. Where briefs are submitted upon application for a supersedeas and supersedeas denied and thereafter the same typewritten briefs are printed for the final hearing, the court ought not to be put to the duty of re-examining the case, but they did it in this case, nevertheless.

2. Where the evidence upon which a jury renders a verdict is conflicting, the appellate court will not examine the sufficiency thereof if there is any evidence to support the verdict.—*Judgment affirmed.*

ROBBERY—SUFFICIENCY OF EVIDENCE—EXHIBITS—*Rowan vs. People*—No. 13362—*Decided November 6, 1933*—*Opinion by Mr. Justice Hilliard.*

Defendant below was convicted of robbery and assigns error (1) overruling motion to quash information, (2) insufficiency of evidence,

(3) failure of court on own motion to instruct jury to disregard an exhibit (gun) not introduced.

1. In robbery, the value of the thing taken is not the essential part, but in the manner of the taking.

2. It is not necessary in the information to charge the value of the property.

3. Where in the information the description of the money taken does not state that it was money of the United States or that it was money but describes it as "$49.81" the court will take judicial notice that it is money and that it has value.

4. Where a gun is marked as exhibit by District Attorney but not offered in evidence and the defendant fails to ask the court to instruct the jury to disregard it, it is not error for the court to refuse on its own motion to give such instruction.

5. Evidence examined and held sufficient.—*Judgment affirmed.*

CONTEMPT—JURISDICTION—HOLDING UNDER ACT OF CONGRESS—*Martin Blanc vs. The People of the State of Colorado, Ex Rel. J. A. Wilcoxson*—No. 13346—*Decided November 13, 1933*—*Opinion by Mr. Justice Hilliard. En Banc.*

Respondent, Blanc, on motion of relator, was found guilty of contempt of court for using cattle land for sheep grazing. The court in another case had adjudicated the land used by respondent as cattle land and not sheep land.

Respondent, by answer, set up that he had entered the land where he grazed his sheep and which had been adjudicated cattle land, under the stock raising homestead act and was residing there. Relator denied that respondent was a qualified entryman and alleged that he was not acting in good faith, that he had done what he had done with reference to the entry merely as a pretext for using the land to graze his sheep.

The evidence showed the applications for homesteading in the proper government offices together with the protests of relators and final action had not been taken by the government.

In this state of the record the trial court found respondent in contempt and fined him $300 and committed him until he paid.

The contempt finding was unwarranted, as respondent's possession is under an act of Congress.—*Judgment reversed and the trial court is instructed to discharge the respondent.*

AGENCY—REAL ESTATE BROKERS—COMMISSIONS—*Conway-Bogue Realty and Investment Co. et al. vs. John T. Burch and Donald J. Burch, Co-partners*—No. 12697—*Decided November 13, 1933*—*Opinion by Mr. Justice Butler.*

Defendants were the owners of a certain residence property which they had listed for sale with the plaintiffs and with several other real estate brokers. Plaintiffs admit that they did not have the exclusive

agency on the house. Defendants also had their own "For Sale" sign on the house during all of the time involved.

Plaintiffs showed one Bigelow several other properties, in the course of which they stopped in front of the house herein involved, and plaintiffs then showed Bigelow the house from the outside, the door being locked, told him the price, and claimed that they told Bigelow the encumbrances on the house were cleaned up so that a deal could be made. Plaintiffs made no further effort to sell the property and had no further contact with Bigelow, who testified that he got the impression from plaintiffs that the house was so heavily involved with encumbrances that no deal could be made.

Three weeks later Bigelow and his wife drove by the house and found defendants' own sales agent, who showed them through the house next door and suggested that they look at the house in question and also another house. Bigelow, having looked at both houses, came back to defendants with a proposition regarding the house in question. Negotiations were carried on and arrangements were made to take care of liens on the property, which in fact had not been cleared up, and a deal was made.

Plaintiffs, learning that a deal was about to be made, demanded a commission, which was refused. In the trial court plaintiffs were given a verdict for a commission.

Held: The verdict and judgment are unsupported by the evidence. Defendants remained neutral between rival agents and also reserved the right to sell. The evidence showed that defendant's own agent, and not plaintiffs, was the efficient and procuring cause in bringing about negotiations and deal with Bigelow.—*Judgment reversed.*

NEGLIGENCE—INSTRUCTIONS—RIGHT OF WAY—EVIDENCE—*Andrus vs. Hall*—No. 12916—*Decided November 13, 1933—Opinion by Mr. Justice Burke.*

Defendant in error recovered judgment by reason of husband's death caused by negligent driving of son of plaintiff in error. Plaintiff in error's son approached an intersection to the right of the deceased, but said approach was made at a very high rate of speed on the part of the son. The deceased was driving at a slow rate of speed. The Court found that the son was violating the law as to speed and control of car.

1. A driver cannot be required to yield the right of way when his inability to know and act is chargeable to the lawless conduct of him who claims it.

2. Where statements regarding insurance company are elicited from the defendant's own witness, he cannot thereafter complain that mention of insurance company was injected into the case.

3. Evidence tending to deny inference of physical disability is properly admitted, and argumentative instructions thereon are properly denied.—*Judgment affirmed.*

DEATH—DAMAGES FOR WRONGFUL DEATH—DISTINCTION BETWEEN SECTION 6302 AND 6303, C. L. 1921—*Friedrichs vs. Denver Tramway Corporation*—No. 13150—*Decided November 20, 1933*—*Opinion by Mr. Justice Bouck.*

The husband of the plaintiff was killed in a collision between his automobile and a street car of the defendant. While plaintiff was introducing her evidence defendant moved to require her to elect whether she would proceed under C. L. 1921, section 6302, the penal section, or section 6303, the compensatory section. She elected to stand on section 6303 and defendant moved for dismissal. Dismissal granted.

1. The dismissal below was granted on the theory that section 6303 does not apply to common carriers. This was based on a dictum in 6 C. 498.

2. A common carrier may be properly sued under either section.

3. If this were not so certain forms of negligence on the part of a common carrier, which are clearly not within the narrow limits of section 6302 could cause death without incurring any liability whatever, though any other kind of corporation would under the same conditions be held responsible under section 6303. The legislature never intended any such result.—*Judgment reversed.*

WILLS—DAMAGES—STATUTE OF FRAUDS—*Ward vs. Ward*—No. 12921—*Decided November 20, 1933*—*Opinion by Mr. Justice Butler.*

Ward sued Ward as trustee and Cowell as administrator under the will for damages, claiming that decedent failed to perform a contract to devise and bequeath certain property. The plaintiff alleged that in 1892 and thereafter he advanced money to his father, decedent, assisting him to establish and conduct a furniture business under a contract that his father would either devise and bequeath to him not less than one-fourth of his real estate and personal property or bequeath to him an amount of money not less than one-fourth of the total value of his estate, all of which was verbal. The father failed to perform and bequeathed him $1.00 only. The value of the estate left was $600,000.00.

Court below shut out verbal agreement on account of statute of frauds. Entered judgment for defendants.

1. A contract to devise land is within the statute of frauds, whereas a contract to bequeath money is not.

2. Where the contract is to devise and bequeath not less than one-fourth of all real estate and personal property of which he might die seized or to bequeath to him an amount of money equal to not less than one-fourth the value thereof, such contract is divisible and while unenforceable as to the real estate, under the statute of frauds, is enforceable as to the personal property. The statute of frauds does not bar the suit.—*Judgment reversed.*

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