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CURRENT DECISIONS

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ADMIRALTY—NO LIEN ON SHIP FOR NON-ACCEPTANCE OF FREIGHT.—The plaintiff chartered the *Saigon Maru* from the defendant. Her captain refused to accept a full load, and the plaintiff libelled the vessel. *Held,* that an action *in rem* could not be maintained for non-acceptance of freight. *Osaka Shosen Kaisha v. Pacific Export Lumber Co.* (Jan. 2, 1923) U. S. Sup. Ct., Oct. Term, 1922, No. 129.

The cargo owner's admiralty "privilege" or lien is not dependent upon possession. It is a right *in rem* giving a power to proceed "against the ship" to recover damages. See *The Yankee Blade* (1856, U. S.) 19 How. 82; NOTES (1915) 15 COL. L. REV. 343. The lien of the shipowner, being a privilege to detain, is inseparably associated with possession. See *The Eddy* (1866, U. S.) 5 Wall. 481. But the liens of the shipowner and the cargo owner are reciprocal, and the lien of the latter upon the ship does not arise until the lien of the former upon the cargo has attached. See *The Lady Franklin* (1869, U. S.) 8 Wall. 325; *The Keokuk* (1870, U. S.) 9 Wall. 517. Accordingly, while an affreightment contract is entirely executory, neither vessel nor cargo is generally held subject to such lien as can be enforced by a libel *in rem.* See *The Freeman* (1856, U. S.) 18 How. 182; *The Yankee Blade, supra.* In the instant case, this principle is applied to the unaccepted portion of the freight. *The Thomas P. Sheldon* (1902, D. R. I.) 113 Fed. 779.

ADVERSE POSSESSION—TENANCY IN COMMON—EXPRESS OUSTER.—For a writ of entry by one co-tenant against another the defendant pleaded title by adverse possession. *Held,* that proof of exclusive possession for the statutory period did not establish such a defense, although within the period the defendant had paid taxes assessed in his name and had occasionally leased the premises. *Smith v. Libby* (1922, Me.) 119 Atl. 195.

To acquire title to land by adverse possession, a co-tenant must prove an ouster of his fellow tenants by showing notorious and unequivocal acts of exclusive ownership, continuing for the statutory period. *Hover v. Hills* (1922, Pa.) 117 Atl. 346; 1 Tiffany, *Real Property* (1920) 672. Payment of taxes assessed in the name of the claimant, though coupled with exclusive possession, is usually considered of little significance. *Schoonmaker v. Schoonmaker* (1911) 154 Iowa, 500, 133 N. W. 741; *Humphrey v. Seale* (1921, Miss.) 87 So. 446.

BANKRUPTCY—TITLE OF TRUSTEE—RIGHT TO RECOVER GAMING LOSSES.—A trustee in bankruptcy sued under a statute, (1835) 5 & 6 Wm. IV c. 41, secs. 1, 2, to recover sums paid by check to the defendant bookmaker for betting losses. *Held,* that the plaintiff could recover. *Scranton's Trustee v. Pearse* (1922, C. A.) 127 L. T. R. 698.

In England a trustee in bankruptcy, being an officer of the court, is held to a higher ethical standard than the ordinary plaintiff. Thus he is not permitted to retain money paid under mistake of law. *Ex parte James* (1874) L. R. 9 Ch. App. 609; see *Carpenter v. Southworth* (1908, C. C. A. 2d) 165 Fed. 428; *Gillig v. Grant* (1897) 23 App. Div. 596, 49 N. Y. Supp. 78. The court refused to extend this doctrine to a statutory right of action.

BANKS AND BANKING—DUTY OF BANK AS DEPOSITARY OF TRUST FUNDS.—One E deposited in his personal account, marked "special," checks of a trust fund made out to himself as trustee. He withdrew the funds for personal purposes.

The bank was sued for this misappropriation. *Held,* that the plaintiff could not recover from the bank. *Whiting v. Hudson Trust Co.* (1923) 234 N. Y. 394, 138 N. E. 33.

For a criticism of the decision of the lower court which was here reversed, see COMMENTS (1923) 32 YALE LAW JOURNAL, 377. On another point the instant decision sustained the lower court, holding that where an executor of the A and B estates misappropriated funds from the A estate and used them to replace in the B estate funds which he had previously diverted from it, the B estate could not retain the funds. See (1923) 32 YALE LAW JOURNAL, 293. It is regrettable that this decision was rendered without notice of an earlier case which decided flatly in favor of the policy of not disturbing such transactions after completion. *Nassau Bank v. National Bank of Newburgh* (1899) 159 N. Y. 456, 54 N. E. 66.

CARRIERS—CONSTRUCTION OF STATUTE REGULATING LIABILITY FOR NEGLIGENCE.—The plaintiff was a passenger on the defendant railway. In alighting from a car, her dress caught on a bolt and she was thrown down and injured. She then brought this action to recover damages. A statute provided that in all cases of personal injury caused by the "running" of the locomotives or cars, there should be a presumption that the company had been negligent. Fla. Gen. Rev. Sts. 1920, sec. 4964. *Held,* (two judges *dissenting*) that, since the statute applied only where the injury was caused by a car while in motion, the plaintiff could not recover. *Tampa Electric Co. v. Soule* (1922, Fla.) 94 So. 692.

The court construes the word "running" to be narrower in application than "operation." *Seaboard Air Line Ry. v. Bishop* (1908) 132 Ga. 71, 63 S. E. 1103. But a strict construction does not seem unreasonable since the statute in effect applies the somewhat harsh doctrine of *res ipsa loquitur.*

CONTRACTS—IN PARI DELICTO THEORY NOT APPLIED TO ATTORNEY AND CLIENT.—The defendant attorney, by false representations, induced the plaintiff to entrust him with a sum of money ostensibly for the suppression of criminal prosecutions. The plaintiff discovered the fraud and brought a bill in equity to regain the money. *Held,* that the plaintiff could recover. *Berman v. Coakley* (1923, Mass.) 137 N. E. 667.

Because of the confidential relationship of attorney and client, an attorney cannot ordinarily claim the benefit of the rule usually applied to parties to an illegal contract. *Ford v. Harrington* (1857) 16 N. Y. 285; *Belding v. Smythe* (1885) 138 Mass. 530; *contra: Schermerhorn v. De Chambrun* (1894, C. C. A. 2d) 64 Fed. 195; *Roman v. Mali* (1875) 42 Md. 513.

EVIDENCE—SEARCHES AND SEIZURES—ILLEGALLY OBTAINED EVIDENCE ADMISSIBLE.—In a prosecution for violation of the liquor laws, the defendant objected to the admission of evidence illegally obtained by a police officer. *Held,* that the evidence was admissible. *Commonwealth v. Wilkins* (1923, Mass.) 138 N. E. 11.

The Massachusetts Court, after reviewing and approving its own decisions, flatly rejects the federal rule as to the admission of evidence illegally obtained. See COMMENTS (1921) 31 YALE LAW JOURNAL, 518; COMMENTS (1923) 32 YALE LAW JOURNAL, 490; Wigmore, *Using Evidence Obtained by Illegal Search and Seizure* (1922) 8 A. B. A. JOUR. 479.

GIFTS—DEPOSIT OF BONDS TO BE DELIVERED AT DONOR'S DEATH.—The deceased enclosed in a sealed package certain negotiable bonds payable to bearer, and after writing the plaintiff's name thereon handed the package to A with instructions to deposit it in a safe-deposit box in the deceased's name and after her death

to deliver them to the plaintiff. She stated that her reason for not delivering the bonds to the plaintiff at that time was that she might use part or all of them during her life. A, by mistake, deposited the bonds in a box in her own name but delivered the keys to the deceased. After the deceased's death the plaintiff learned for the first time of the transaction, and brought suit against the administratrix. *Held,* that she could not recover. *Shea v. Crofut* (1922, App. Div.) 196 N. Y. Supp. 850.

Delivery to a third person for delivery to the donee at the donor's death constitutes a valid present gift if the donor intends thereby a final disposition of the property. *Innes v. Potter* (1915) 130 Minn. 320, 153 N. W. 604; 3 A. L. R. 902, note. But the decision in the instant case was correct. The transaction amounted to no more than a gift imperfect for lack of delivery and void also as a testamentary disposition because of failure to comply with the Statute of Wills. For further discussion see (1920) 20 COL. L. REV. 196; (1920) 18 MICH. L. REV. 550; (1919) 4 MINN. L. REV. 70; (1918) 27 YALE LAW JOURNAL, 956; (1920) 29 *ibid.* 549.

INJUNCTIONS—VIOLATION OF STATUTE ENJOINED BY ONE WHO INCURS SPECIAL DAMAGE.—The plaintiff was lawfully engaged in selling electricity in the city of Fulton. The defendant, without obtaining permission of the Public Service Commission as required by statute, set up a competing business in the same city. The plaintiff sought to restrain the defendant. *Held,* that an injunction should be granted. *Fulton Light, Heat and Power Co. v. Seneca River Power Co.* (1922, N. Y. Sup. Ct.) 119 Misc. 729.

What is essentially a public offense and primarily the concern of the state may be enjoined by a plaintiff who suffers special damage. 5 Fletcher, *Corporations* (1918) sec. 3321. The same result is reached in actions by street railway companies against unlicensed jitney drivers by extending the common-law doctrine of public nuisance. See COMMENTS (1919) 28 YALE LAW JOURNAL, 485; but see *Public Service Ry. v. Reinhardt* (1921) 92 N. J. Eq. 365, 112 Atl. 850.

MANDAMUS—WRIT TO COMPEL TOWN TO LEVY TAX.—The plaintiff Board of Supervisors, acting under legislative authority, established a drainage district and included therein certain parts of the defendant incorporated town. Contracts for improvements having been duly let and completed and the town having refused to levy a tax to pay the assessment, the plaintiff Board sued out a writ of *mandamus* to compel the levying of such tax. *Held,* that the plaintiff was entitled to the writ. *Board of Supervisors of Humboldt County v. Dakota City* (1922, Iowa) 191 N. W. 69.

The action was maintained by virtue of a statute permitting any citizen whether directly interested or not to be a relator when the matter concerned is of public interest. Iowa Ann. Code, 1897, sec. 4345. A similar result is now reached in a majority of jurisdictions, even in the absence of statute. See *Brewster v. Sherman* (1907) 195 Mass. 222, 80 N. E. 821; 11 Ann. Cas. 419, note; (1920) 6 VA. L. REV. 205. For further discussion of *mandamus,* see (1915) 63 U. PA. L. REV. 575; (1916) 64 *ibid.* 406; (1922) 31 YALE LAW JOURNAL, 554; (1923) 32 *ibid.* 503.

PERSONS—ADOPTION—CHILD'S WELFARE THE DETERMINING FACTOR IN A CONFLICT OF RIGHTS.—The defendant, a loose woman, left her infant child in the custody of the petitioner, a reputable person. Two years later, the mother, still a profligate, refused to sign adoption papers. The petitioner instituted adoption proceedings. *Held,* that the adoption should be permitted. *In the Matter of Miller* (1922, N. Y. Co. Ct.) 119 Misc. 638.

In balancing the impaired rights of a neglectful parent against the acquired

rights of a benevolent custodian, the courts make the child's interest paramount. *Kurtz v. Christensen* (1922, Utah) 209 Pac. 340; *Richards v. Collins* (1889) 45 N. J. Eq. 283, 17 Atl. 831; *Hickey v. Thayer* (1911) 85 Kan. 556, 118 Pac. 56.

REMOVAL OF CAUSES—RESIDENCE OF PARTIES—SUIT BROUGHT IN COURT OF STATE OF WHICH NEITHER PARTY IS INHABITANT.—The plaintiff, a citizen of Texas, was injured in Kentucky while traveling on the railroad of the defendant, a Virginia corporation. He brought suit in a state court of Kentucky. The defendant removed the cause of the federal district court and the plaintiff moved to remand, on the ground that the district court was without jurisdiction in that neither party was a resident of that district. *Held,* that the cause was properly removed. *Lee v. Chesapeake & Ohio Ry.* (Jan. 22, 1923) U. S. Sup. Ct. Oct. Term, 1922, No. 422.

The instant case settles a much disputed question. (1917) 27 YALE LAW JOURNAL, 567, 960; (1918) 28 *ibid.* 294. The court expressly overrules an earlier Supreme Court decision. *Ex parte Wisner* (1906) 203 U. S. 449, 27 Sup. Ct. 150; see COMMENTS (1917) 27 YALE LAW JOURNAL, 935.

TRUSTS—PRIVILEGES OF FIDUCIARY—PROFIT FROM DEALINGS WITH CESTUI.—The defendant, an officer of the plaintiff company, purchased and foreclosed a mortgage upon its property. At the sale he bought in the property. An action was brought to enjoin the issuance of a sheriff's deed under the foreclosure sale. *Held,* that the defendant had become a trustee for the company subject to a lien for his expenses. *White Earth Creamery Co. v. Edwardson* (1922, N. D.) 191 N. W. 622.

In order to relieve from execution the property of the defendant company, one Stover, an officer and promoter thereof, in his individual capacity, bought in a judgment against it. One of the promoters and stockholders who had paid a proportionate share of the liability under the judgment sued Stover and the company to recover such proportionate payment. *Held,* that he could not recover. *O'Keefe v. Eclipse Pocahontas Coal Co.* (1923, W. Va.) 115 S. E. 579.

A trustee is forbidden to make a profit from his fiduciary position irrespective of good faith. (1918) 28 YALE LAW JOURNAL, 192; Frost, *Rights of Trustees to Derive Indirect Profits* (1918) 52 Am. L. Rev. 895. The surety on the bond of a guardian who had the express permission of the court to borrow funds from his ward's estate has been held responsible for their loss. *Sowers v. Pollock* (1923, Kan.) 212 Pac. 103. The instant cases are not in conflict and are correct. In the first the fiduciary is denied his profit; in the second his act assisted the company, and he himself neither obtained nor sought profit, but was entitled to indemnity.

TRUSTS—REVOCATION BY SOLE BENEFICIARY.—A transferred personal property to T upon trust for A's sole benefit. No third party had any interest in the property, vested or contingent. A gave T written notice of a revocation of the trust. A's heirs objected and T, desiring to be neutral, filed this bill for instructions of the court. *Held,* that being the sole beneficiary, the settlor could revoke it at will. *Phelps v. Thompson et al.* (1922, Sup. Ct.) 119 Misc. 875.

It is well settled that a trust, once validly created, whether by a simple declaration or transfer in trust, cannot be revoked by the settlor unless a power of revocation is reserved. Scott, *Cases on Trusts* (1919) 817, note 1. It may be revoked by consent of all the *cestuis* if no power of revocation is reserved. N. Y. Cons. Laws, 1909, ch. 45, sec. 23; Perry, *Trusts* (6th ed. 1911) sec 104; (1916) 4 CALIF. L. REV. 354; (1915) 63 U. PA. L. REV. 816.