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# One Year Review of Corporations, Partnership, and Agency

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# ONE YEAR REVIEW OF CORPORATIONS, PARTNERSHIP, AND AGENCY

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## A. CORPORATIONS

### 1. *Application of the Securities Act of 1933 to Banking Activities*

*Central Bank and Trust Co. v. Robinson*,[1] raised important questions under the Securities Act of 1933.[2] The action was against the bank and other defendants to recover, pursuant to the Securities Act and The Colorado Securities Law,[3] the consideration paid for "participation certificates" each representing a 1/48 interest in a 3 per cent overriding mineral royalty. The opinion indicates that the action was predicated only on the alleged violation of the registration provisions of the Securities Act[4] and not on its anti-fraud provisions.[5] The bank alone appealed, contending that the trial court, in granting plaintiff's motions for summary judgment, improperly had attempted to decide material issues of fact and had decided them erroneously.

The pleadings and affidavits showed that the bank agreed to act as trustee and in that capacity acquired title to the 3 per cent royalty. The bank prepared, signed and issued forty-eight participation certificates, each for 1/16 of 1 per cent royalty, and sent the certificates through the mails to Colorado purchasers designated by the other defendants. The purchasers signed receipts for the certificates, mailed the receipts to the bank in envelopes furnished by the bank and paid the purchase price. The certificates were not registered under the Securities Act of 1933.

The Colorado Supreme Court first approved a finding that the bank had offered and sold securities as contemplated by the Securities Act, stating that the bank's actions "in making up, signing and delivering" the certificates violated the Act.[6] In this connection, presumably

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[1] 326 P.2d 82 (Colo. 1958).

[2] 48 Stat. 74, as amended, 15 U.S.C. § 77, as amended (Supp. IV, 1957).

[3] Colo. Rev. Stat. §§ 125-1-1 to -19 (Supp. 1957). The opinion does not discuss any questions arising under the Colorado Securities Law.

[4] Section 12 of the Securities Act, 48 Stat. 84, as amended, 15 U.S.C. § 771, as amended, (Supp. IV, 1957) provides: "Any person who (1) offers or sells a security in violation of Section 5 . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." Section 5, 48 Stat. 77, as amended, 15 U.S.C. § 77e, as amended, (Supp. IV, 1957), provides in part: "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

[5] Section 12 of the Securities Act (see note 3 *supra*) also provides: "Any person who . . . (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission. . . ." shall have the same civil remedies quoted in note 3 *supra*.

[6] 326 P.2d at 85.

there was no use of the federal jurisdictional means in "making up" and "signing" the certificates. The means were used only for their delivery. The opinion does not make clear, however, whether such delivery occurred before or after the time when the purchase price was paid or agreed to be paid, *i.e.*, before or after sale (in the ordinary commercial sense) of the securities. If after, the case is probably the first squarely to litigate the question whether delivery of securities constitutes a "sale" thereof within the meaning of section 12(1).[7] Section 12(1) creates a civil cause of action against any person who "offers or sells" in violation of section 5, which in turn distinguishes between offers, sales and deliveries, each of which is subject to registration.[8] The question arises, therefore, whether a delivery of securities in violation of section 5 in itself gives rights to any civil remedy under section 12(1). The same question can be stated in other ways: Does section 12(1) extend to all acts made unlawful by section 5 or to only some of them? Or, does the term "sells" in section 12(1) have a different meaning than the term "sells" in section 5? In this connection, although section 2(3) defines "sell" to "include" any "disposition" of a security for value, the definition is subject to the introductory clause, "unless the context otherwise requires. . . ."[9] The basic policy of the Act would appear to be best satisfied by a holding that the word "sells" in section 12(1) covers all acts made unlawful by section 5.[10] The supreme court adopted that view, relying, however, not on the policy considerations but on the holding of *Schillner v. H. Vaughn Clarke and Co.*[11] that delivery of a stock certificate constitutes "sale" of a security within the meaning of section 12(2), which relates only to fraudulent sales and not to sales in violation of section 5.[12]

The supreme court next held that a finding that the bank had made or participated in a public offering of securities was erroneous and, reversing the judgment below, remanded with directions to permit the bank to answer the complaint, stating that the bank could escape liability by proof that the offering was not public.[13] The opinion points out that the only fact pertinent to this issue which could be considered on motion for summary judgment was that the certificates had been sold to forty-eight purchasers. The court rejected any rule that existence of a public offering within the meaning of section 4(1)[14] could be determined mechanically solely on the basis of number of offerees or purchasers and, relying on *SEC v. Ralston Purina Co.*,[15] stated: "The real test is—

[7] See Loss, Securities Regulation 993 (1951 with 1955 Supp.).
[8] See note 3 *supra*.
[9] 48 Stat. 74, as amended, 15 U.S.C. § 77b(3), as amended, (Supp. IV, 1957).
[10] See Loss, Securities Regulation 993 (1951 with 1955 Supp.).
[11] 134 F.2d 875 (2d Cir. 1943).
[12] With respect to the section 12(2) question, there is a square split between the Second Circuit view, expressed in the *Schillner* case, and the view of the Seventh Circuit, expressed in Kemmper v. Lohnes, 173 F.2d 44 (7th Cir. 1949). The Fifth Circuit adopts the Schillner view. Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953), *cert. dismissed*, 347 U.S. 925 (1954). See also Loss, Securities Regulation 1001-03 (1951), 361-62 (1955 Supp.).
[13] It is not altogether clear from the opinion that the public offering question was properly before the trial court on the motion for summary judgment. Whether or not a public offering was involved is relevant only to availability to the bank of an exemption under the second clause of § 4(1) of the Act, 48 Stat. 77, as amended, 15 U.S.C. § 77d(1), as amended, (Supp. IV, 1957), exempting "transactions by an issuer not involving any public offering." As is stated in the opinion, the burden of claiming and proving an exemption under § 4(1) is upon the claimant. SEC v. Sunbeam Gold Mines Co., 95 F.2d 699 (9th Cir. 1938); see also SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953). In an action under § 12(1) existence of the exemption would be a matter of affirmative defense. Loss, Securities Regulation 990 (1951 with 1955 Supp.). The bank in the instant case had not answered, and the opinion does not state that the exemption had been claimed in the affidavits and admissions or arguments of counsel considered in connection with the motion for summary judgment. If not, it would appear that the question was not before the court on the motion for summary judgment. See 6 Moore, Federal Practice ¶ 56.17(4) (1953).
[14] 48 Stat. 77, as amended, 15 U.S.C. § 77d(1), as amended, (Supp. IV, 1957).
[15] 346 U.S. 119 (1953).

whether the particular class of persons affected need the information made available by registration."[16]

The court also approved a possible finding by the trial court that the bank participated in the sale of securities in a manner other than performing "ministerial and custodial duties," stating that the bank's admitted participation, "whether performing only ministerial or custodial duties, came within the inhibitions of the Act."[17] An eminent writer has advanced the view that there are "various kinds of mechanical activity . . . which quite clearly do not come within the ban of the statute," listing as an example "the mere distribution of prospectuses and securities by an agent or employee of the seller."[18] The Third Circuit Court of Appeals, relying on the foregoing statement, held that a Philadelphia bank was not a "seller" of collateral notes within the meaning of section 12(2) because the bank's functions were limited to such "mechanical activity."[19] The Philadelphia bank's activities consisted of acceptance of the note and accompanying negotiable warehouse receipts from a customer, issuance to the customer of a safekeeping receipt, the forwarding for collection of a draft drawn by the customer on the purchaser of the note, and the giving of immediate credit to the customer in the amount of the draft prior to actual collection. The Philadelphia bank, like the bank in the instant case, thus would appear to have acquired title to the securities sold.[20] Unlike the bank in the instant case, however, the Philadelphia bank did not create or issue the security. On the basis of the two cases, the question of when a bank is a "seller" for Securities Act purposes remains a complicated question of fact and law.

The Colorado court further approved a finding that the bank was an issuer, underwriter or dealer, stating merely that "it's conduct comes squarely within the term *issuer* . . ."[21] and quoting the first clause of the Securities Act definition of "issuer" ("The term issuer means every person who issues or proposes to issue any security. . . ."[22]). This holding, however, poses a further question which is not discussed in the opinion and which perhaps was not raised by counsel. If the securities involved are considered to have been issued by the bank, they are just as "squarely" within the exemption provided by section 3(a)(2) of the Act, which exempts "any security issued . . . by any banking institution organized under the laws of any State. . . . , the business of which is substantially confined to banking and is supervised by the State . . . banking commission or similar official. . . ."[23] If so, the judgment below should have been reversed with directions to dismiss the complaint.[24]

### 2. *Voting Agreements among Stockholders*

*Reilly v. Korholz*[25] raised interesting questions relating to internal affairs of corporations and among stockholders, but the questions were disposed of mainly on principles other than those of corporation law.

[16] 326 P.2d at 87.
[17] *Id.* at 88.
[18] Loss, Securities Regulation 341 (1951), 158 (1955 Supp.).
[19] First Trust & Savings Bank v. Fidelity-Philadelphia Trust Co., 214 F.2d 320 (3d Cir. 1954), *cert. denied*, 348 U.S. 856 (1954).
[20] The Court of Appeals stated that, under Pennsylvania law, any such credit was revocable, that the bank was not purely a "mechanical" forwarder or a seller (in the commercial law sense) or a broker. First Trust & Savings Bank v. Fidelity-Philadelphia Trust Co., *supra* note 19, at 324.
[21] 326 P.2d at 88.
[22] 48 Stat. 74, as amended, 15 U.S.C. § 77b(4), as amended, (Supp. IV, 1957).
[23] 48 Stat. 75, as amended, 15 U.S.C. § 77c(a)(2), as amended (Supp. IV, 1957).
[24] But see also note 12 *supra*.
[25] 320 P.2d 756 (Colo. 1958).

The action was to set aside stock transfers, assignments, and resignations and to restore the plaintiffs to their prior positions as stockholders and officers and directors, or, alternatively, to recover damages.

The most significant portion of the decision from a corporation law standpoint involved a contract in connection with which defendant *A* advanced $3,500 to the corporation to enable it to meet its payroll. In the contract, defendant *A* agreed with plaintiff *B* that at *A's* option, *A* would provide $100,000 in additional financing. *B* agreed to transfer certain shares to *A* in return for the advance and the financing and, in the event *A* exercised the option, to vote his stock or otherwise to cause election of *A* as a director. The contract was executed in New York. A New York statute provides that "A stockholder shall not sell his vote or issue a proxy to vote for any sum of money or anything of value."[26] The opinion does not disclose the state of incorporation.

On appeal, *B* contended that the entire contract was void and unenforceable. The supreme court stated: "By no stretch of the imagination can that law be construed to cover a situation . . . where Korholz, at Reilly's request, seeking to save other corporations from bankruptcy, wishes to be assured of authority to act to protect his own investment, protection of which necessarily inures to the benefit of all of the stockholders. Even if this portion of the agreement is contrary to public policy, it is severable and does not render the balance of the agreement void or contrary to public policy. Clearly the considerations are severable, and the valid portions of the agreement are enforceable."[27]

The quoted language indicates the basic holding of the case is that the contractual provisions were severable and not that the agreement was partially invalid. The opinion does not cite *People v. Burke*,[28] the leading Colorado case on voting agreements, which held that a contract granting an irrevocable proxy, unlimited in duration, to a rival corporation was void upon its face and contrary to public policy.[29]

*3. Foreign Corporations Doing Business Under Assumed Name*

*Admiral Corporation v. Trio Television Sales & Service, Inc.*,[30] presented the following situation: A foreign corporation sued the maker of a check. The trial court dismissed the action on account of noncompliance by the corporation with the Colorado trade name statute.[31] The statute provides that "Any corporation existing under the laws of this state" may transact business under an assumed name upon filing an

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[26] *Id.* at 760.

[27] *Ibid.*

[28] 72 Colo. 486, 212 Pac. 837 (1923).

[29] "It is not in violation of any rule or principle of law nor contrary to public policy for stockholders who own a majority of the stock of a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and it is not against public policy or unlawful per se for stockholders to agree or combine for the election of directors or other officers, so as to secure or retain control of the corporation, at least where the object is to carry out a particular policy with a view to promote the best interests of all stockholders, and the agreement is fair to all stockholders alike, and to the corporation." 5 Fletcher, Cyc. Corp. 249-252 (1952 with 1958 Cum. Supp.). The Supreme Court in the Burke case also stated: ". . . it is unnecessary to determine whether all separations of voting power from beneficial ownership, all irrevocable powers of attorney for the voting of stock, or all voting trust agreements, are invalid." People v. Burke, 72 Colo. 486, 501, 212 Pac. 837, 843 (1923).

[30] 330 P.2d 1106 (Colo. 1958).

[31] Colo. Rev. Stat. §§ 141-2-1 and -2 (1953).

appropriate affidavit of assumed name.[32] The corporation thereafter filed such affidavit and brought a second action on the same claim. The trial court dismissed the second action also, holding the first judgment was res judicata.

On appeal, the supreme court reversed and remanded the case for trial. The majority opinion by Mr. Justice Moore states that the failure to file the affidavit served only to abate the action until an appropriate affidavit had been filed, and that the trial court erroneously concluded that the first trial was on the merits. Mr. Justice Hall concurred in the result, without opinion. Mr. Chief Justice Holland dissented, stating that the rule of res judicata was applicable by virtue of Rule 41 (b) of the Colorado Rules of Civil Procedure.[33] Mr. Justice Frantz dissented, with opinion, on the ground that the statute permitted only domestic corporations to use an assumed name.

Neither the majority opinion nor the dissenting opinion of Justice Frantz comes to grips with the procedural point raised by Chief Justice Holland. The skirmish between the majority and Justice Frantz centers principally around the meaning of the term "existing" in the trade name statute, a somewhat metaphysical inquiry which, according to the majority, was not suggested to the trial court or in the appellate briefs. The majority points to the provisions of the pre-1959 Colorado general corporation statute which limit "corporate existence" of a foreign corporation of like character,[34] and to the provisions which subject foreign corporations to all the liabilities, restrictions and duties of domestic corporations.[35] The majority reasons to two conclusions: (a) that the Colorado general corporation statute specifically recognizes that a complying foreign corporation has a "corporate existence" in Colorado, and (b) that the Colorado legislature therefore clearly did not intend to permit only domestic corporations to use an assumed name. Justice Frantz emphasizes that the "existence" of a corporation is confined to the state of its incorporation and is something quite distinct from its authorization to do business in a foreign state. He concludes that the statute permits only domestic corporations to use trade names and that the trial court therefore lacked jurisdiction.

In the opinion of this author, Justice Frantz has the better of the argument in this bit of judicial logomachy, policy considerations aside. There is no obvious reason of policy, however, for legislative discrimination between foreign and domestic corporations in use of trade names. Consequently, the unfortunate wording of the trade name statute appears more to represent a drafting "bug" than an intentional limitation of the privileges of foreign corporations.

*4. Foreign Corporations "Doing Business" as a Basis of Jurisdiction*

*Hibbard, Spencer, Bartlett & Co. v. District Court*[36] is the latest Colorado addition to the myriad cases dealing with the quantum of "doing business" necessary to render a non-qualifying foreign corporation amenable to service of process. The defendant's activities in Colorado, which admittedly had been substantially curtailed at the time of

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[32] *Id.* § 141-2-1(2).

[33] Rule 41(b) provides: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under rule 3, operates as an adjudication upon the merits."

[34] Colo. Rev. Stat. § 31-10-8 (1953).

[35] *Id.* § 31-10-2.

[36] 332 P.2d 208 (Colo. 1958).

the action, consisted of selling its products through salesmen, at one time as many as five, over a period of fifty years with gross sales in the state approximating $200,000 annually. The plaintiff was a salesman of the defendant, suing to recover sales commissions. The supreme court held that the trial court did not abuse its discretion in holding that the defendant was subject to service.[37]

### B. PARTNERSHIP

None of the 1958 Colorado cases arose under either the Colorado Uniform Partnership Law[38] or the Colorado Uniform Limited Partnership Law,[39] but one case, *Lindsay v. Marcus*,[40] involved joint adventurers. The supreme court affirmed a decree that certain real estate purchased by the defendant was held by him as constructive trustee for the benefit of the plaintiffs, the purchase having been made pursuant to a joint venture agreement among the plaintiffs and the defendant having as its object subdivision, promotion and development of the land. To a great extent, the questions raised relate to evidentiary matters not relevant here (such as whether execution of the agreement was procured by fraud and whether the venture had terminated through mutual consent). Otherwise, the case reaffirms well-settled principles of the law of joint ventures: Joint adventurers stand to each other in the relation of partners and fiduciaries and are accountable as such; and title to property acquired in connection with a joint venture in the name of one of the parties is acquired as trustee of his associates.

### C. AGENCY

#### 1. *Master-Servant Relation and Scope of Employment*

*Milner Hotels, Inc., v. Spangler*[41] raised the questions whether a plumber was the defendant's servant and, if so, whether he acted within the scope of his employment. The opinion affirmed a judgment in favor of the plaintiff without reviewing the evidence and, consequently, will not be further discussed.

*Miller v. Denver Post*[42] involved a newspaper carrier boy who, after folding his papers preparatory to departing on his route, was injured while pursuing other carrier boys who had taken a radio aerial from his bicycle. The supreme court affirmed a finding of the Colorado Industrial Commission that, assuming the boy was an "employee" of the newspaper within the meaning of the Colorado Workmen's Compensation Act,[43] the claimant " 'stepped outside the scope of his employment and that the accident did not arise out of and in the course of his employment.' "[44] The Commission had also found that the radio aerial played no part in the newspaper delivery service and that there was no "causal connection" between the plaintiff's services and the incident in which he was injured.

Mr. Justice Frantz, dissenting, aptly poses the following question: "Does the employment of a number of boys create a condition in which

[37] See also International Shoe Co. v. Washington, 326 U.S. 310 (1945); Rogers v. Mountain States Royalties, 116 Colo. 455, 182 P.2d 142 (1947).
[38] Colo. Rev. Stat. §§ 104-1-1 *et seq.* (1953).
[39] *Id.* §§ 104-2-1 *et seq.*
[40] 325 P.2d 267 (Colo. 1958).
[41] 321 P.2d 625 (Colo. 1958).
[42] 322 P.2d 661 (Colo. 1958).
[43] Colo. Rev. Stat. § 81-2-7 (1953).
[44] 322 P.2d at 662.

the propensities for fun-making become an incident of the employment?"[45] He concludes that the Commission "should have first determined whether the relationship within the terms of the Act existed, and if it found the relationship did exist, should then have made findings and determination as to whether the skylarking was under the law an incident of the employment."[46]

### 2. *Implied Authority of Attorney of Record*

In *Schleiger v. Schleiger*,[47] a divorce action, it was urged on appeal that the trial court had erred in going to trial without a court reporter,[48] the appellant claiming that her former attorney had acquiesced in such procedure without her consent. In affirming judgment, the supreme court relied on the established rule that an attorney of record has implied general authority to act as he deems necessary in connection with matters relating to procedure, as distinguished from matters relating to the cause of action itself, and that his client is bound thereby.

### 3. *Auctioneer as Agent of Vendor of Property Sold*

In *Weaver v. First Nat'l Bank*,[49] an action to replevy stolen cattle, the operator of the livestock sales ring at which the defendant had purchased the cattle was joined as a third party defendant. The defendant claimed that the operator was liable for breach of warranty of title. The supreme court affirmed the trial court's holding that the operator was so liable, stating that the general rule that "a person employed as auctioneer at a sale of property is primarily the agent of the owner or vendor"[50] is inapplicable to the operator of a livestock sales ring. Such operator is "a creature recognized by and licensed under the statutes of this state," (Colorado Revised Statutes, 1953, sections 8-11-1 to 17), and he "must accept the limitations, duties, and responsibilities which the statutory law imposes."[51] The court interpreted section 8-11-14[52] as unequivocally requiring the licensed operator to warrant title to the livestock sold by him, with the operator also being statutorily liable to the "rightful owner" of the livestock for the net proceeds of the sale.

[45] *Id.* at 666.
[46] *Id.* at 667.
[47] 324 P.2d 370 (Colo. 1958).
[48] See Colo. R. Civ. P., Rule 80(a).
[49] 330 P.2d 142 (Colo. 1958).
[50] 330 P.2d at 146.
[51] *Ibid.*
[52] Colo. Rev. Stat. (1953).