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Supreme Court Decisions

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BANKS AND BANKING—MERGER—LIABILITIES—ESTOPPEL—TAXATION—*Crosby, etc. vs. First National Bank of Holyoke*—No. 14175—*Decided February 14, 1938*—*District Court of Phillips County*—*Hon. Arlington Taylor, Judge*—*Reversed.*

FACTS: First National Bank of Holyoke took over business and assets of Citizens State Bank of same city as a result of negotiations between the two banks between 1930 and May 29th, 1931. In complying with the State Statute concerning voluntary liquidation of state banks, both banks submitted statements to the Bank Commissioner stating that the assets of the latter bank had been transferred to the former which assumed all liability of record under date of transfer of assets, etc. A bond was also furnished the Commissioner to protect the creditors of the Citizens Bank. The County Treasurer brought suit against the First National Bank to collect $1,526.38, being the tax on the capital stock of the Citizens Bank for 1931. It was contended by the defendant that its contract did not provide that it was to pay such an item. The plaintiff contended that the bank was estopped to raise such a question. The trial court ignored the question of estoppel and held for defendant.

HELD: 1. Where two banks effect a merger and each notifies the State Banking Commissioner of the transfer of the assets of one to the other, and a bond is deposited to insure the payment of all debts of the former, but refers to a contract between the banks which omit reference to the capital stock tax, the remaining bank is estopped to deny its liability for such tax where the terms of such contract are not conveyed to the commissioner.

2. The rule that "where there is no evidence that any of the representations were made to the treasurer personally, to his prejudice, he may not rely on the principle of estoppel" does not apply here. Where the representation is so general in its terms, or made under such circumstances, as to indicate that it was intended to reach and influence third persons or the community at large, the doctrine of estoppel is carried sufficiently far to protect everyone who has innocently acted upon or been governed by it.

3. The capital stock was subject to the tax for 1931 on the basis of its value as of April 1, 1931, and it is immaterial that at the time of the transaction, the amount of the tax had not been ascertained.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke, Mr. Justice Bouck and Mr. Justice Young concur.

WATER — POLLUTION OF — INJUNCTION — MINING — *The Slide Mines, Inc. vs. The Left Hand Ditch Company et al.—Decided February 21, 1938—District Court of Boulder County—Hon. Claude C. Coffin, Judge—Affirmed.*

FACTS: Defendant in error shall be referred to as the farmers and the plaintiff in error as the mining company. At the suit of the farmers, as appropriators for irrigation and domestic purposes, the mining company was permanently enjoined from polluting the waters with mill tailings and slimes developed in its milling operations.

HELD: 1. Where actionable pollution is found to exist at the time suit is filed and thereafter continued, an injunction properly cannot be denied because of arrangements which promise no future transgression but do not so insure.

2. If the system devised by the mining company to prevent the pollution of the stream by its mill tailings is not effectual in preventing such defined pollution in fact, the pollution may be enjoined.

3. Pollution is an impairment, with attendant injury, to the use of the water that plaintiffs are entitled to make. IN DEPARTMENT.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Young concur. Mr. Justice Bouck specially concurs.

TAX SALES—CERTIFICATES—REDEMPTION—*Roley vs. Creel et al.*—No. 14101—*Decided January 31, 1938—District Court of Pueblo County—Hon. John H. Voorhees, Judge—Affirmed.*

FACTS: Suit by Roley, fee holder of real estate, to enjoin County Treasurer from issuing tax deed. Property sold for 1930 taxes and certificate of purchase issued to County. Like defaults occurred in 1931, 1932 and 1933. These were endorsed on the certificate of purchase, making the total due thereon, $2,000.00. The 1934 taxes were also unpaid. The County Commissioners resolved on December 23, 1935, to sell the certificate for $670.86, provided, the purchaser would also pay the 1934 taxes, or a total of $1,000.00. M paid that sum and received an assignment of the tax certificate. Plaintiff contended Section 1, Chapter 217, S. L. 1935 (1935 C. S. A., Chapter 142, Section 209) precluded the County Commissioners from making sale of the tax certificate in question before December 31, 1935, until when, as said, the fee owner of the property was privileged to pay the taxes on his property, delinquent August 1, 1934, with abatement of interest and penalties. Plaintiff did not attempt to pay the taxes as provided by statute, but supplied his representative with $1010.00, who on the day the transaction with M was closed, but subsequent thereto, offered $1010.00 for the certificate. The offer was rejected because of the prior sale. The plaintiff then instituted this suit and paid into Court $1005.00 for M's use.

HELD: 1. The sum which the redeemer was bound to pay was considerably in excess of the amount tendered. The law does not provide that an owner may make purchase of outstanding tax certificates against his property. He can be relieved from tax defaults only by paying the sum required by law, mathematically ascertained, to the County Treasurer.

2. The owner had only his right to redeem, and this was open to him and was not impaired by the sale which the County Commissioners made of the tax certificate against his property. EN BANC.

Opinion by Mr. Justice Hilliard.

INSURANCE—DOUBLE INDEMNITY—*New York Life Insurance Company vs. Mariano*—No. 14273—*Decided January 31, 1938—District Court of Las Animas County—Hon. David M. Ralston, Judge—Reversed.*

HELD: 1. Where policy of insurance providing double indemnity for accidental death, contains a provision as follows:

"Double indemnity shall not be payable if insured's death resulted * * * from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury," double indemnity may not be recovered where death results from botulism contracted through eating home canned beans containing "bacillus botulinus." EN BANC.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Knous dissent.

WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—RECREATION—ACCIDENTS—*Industrial Commission of Colorado, State Compensation Insurance Fund, and Minnesota Mines, Inc. vs. Jerry J. Murphy—Decided February 14, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.*

FACTS: The sole question is whether the injury complained of by Murphy arose out of and in the course of his employment by the Minnesota Mines, Inc.

Upon suggestion by an employee of the company that a baseball team, to play on Sundays, be organized, the company, by one of its officers, offered to "match dollar for dollar" the expense of the organization. The team was known by the company name, but no one was obliged to play or attend the games, and no man was ever employed or discharged because of baseball only. Six of the players were employees of the company. Players usually furnished their own transportation. The team went to Colorado Springs to play, Murphy taking three men in an automobile belonging to the company which he borrowed for that purpose. On the return trip the Murphy car col-

lided with another in Vernon Canon and Murphy was permanently injured. District Court allowed the claim.

HELD: 1. Allowance of this claim could but serve as a warning to employers that they may concern themselves with the social life and recreation of their men, or permit their officers to do so or contribute to efforts to lighten life, only under penalty or liability for every accident and injury arising from such activities, however remote from the employment itself. IN DEPARTMENT.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Bakke and Mr. Justice Holland concur.

VAGRANCY—GAMBLING—POLICE COURTS—BURDEN OF PROOF—ORDINANCES—EVIDENCE—*Handler vs. City and County of Denver*—No. 14249—*Decided February 14, 1938*—*County Court of Denver*—*Hon. Osmer E. Smith, Judge*—*Affirmed in part and reversed in part.*

FACTS: Defendant convicted in Police Court on charges of vagrancy and gambling. He appealed to County Court where he was acquitted of the gambling charge, but convicted of vagrancy, fined $100.00 and sentenced to the County Jail for 30 days.

HELD: 1. Where the original process under which the defendant was arrested and convicted in Police Court recited sections 1345 and 1346 of the Municipal Code, charging defendant with vagrancy such is a sufficient allegation of violation of the ordinance.

2. One who leads an idle, immoral or profligate course of life, is guilty of vagrancy, under section 1345 of the 1927 Municipal Code.

3. Where a party litigant introduces into evidence the 1927 Municipal Code, such book of ordinances shall be taken and considered as prima facie evidence that such ordinances have been published as provided by law, and the burden of proof is on the other party to prove that the ordinance has been changed, and such proof requires more than merely casting a doubt or suspicion upon the validity of the ordinance.

4. A sentence of both a fine of $100.00 and thirty days in jail is not allowed under the ordinance. The provisions of the ordinance as to the sentence and fine are separable and distinct, and therefore, the judgment as to the fine stands.

5. Violation of municipal ordinances, being civil in their nature, does not require the strict proof of criminal prosecutions.

6. Where a preponderance of the evidence indicated defendant was guilty of vagrancy; that he had no visible means of support other than those which he had received from the course he had been pursuing over a long period of time; that he had been found guilty of gambling and vagrancy on previous charges no less than five times, the trial Court was correct in its finding of vagrancy under the ordinance.

Opinion by Mr. Justice Bakke, Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland, concur.