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Supreme Court Decisions

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MUNICIPAL CORPORATIONS—LIABILITY OF COUNTY TREASURER FOR FUNDS DEPOSITED IN INSOLVENT BANK—LIABILITY FOR SCHOOL DISTRICT FUNDS—*People on relation of the Board of County Commissioners of the County of Jefferson vs. Koenig, et al.*—No. 13823—*Decided November 30, 1936*—*Opinion by Mr. Justice Hilliard.*

An action by the people, on relation of the board of county commissioners of the county of Jefferson, to recover from the county treasurer and the surety on his bond, the sum of a balance to the credit of the county with Kountze Brothers, a failed New York banking copartnership, for which the treasurer and his surety disclaiming liability refused to account. The defendants had judgment below.

1. The county treasurer kept an account with Kountze Brothers from which the depositary paid school district bond obligations made payable there, whenever presented. The item was carried on the treasurer's books as a county deposit and was not carried in the names of the several school districts. The school districts had made their bond coupons payable at the banking house of Kountze Brothers. The mere fact that the school districts made their interest coupons payable at the banking house of Kountze Brothers did not obligate the treasurer of the county to keep funds on deposit with that institution to meet such obligations as they matured and were presented for payment.

2. The county treasurer was not concerned about the place, manner or fact of payment of school district obligations.

3. The county treasurer may not relieve the school districts by making a general deposit of county funds with some depositary to which the school district creditors may resort for payment and escape the consequences should the depositary fail.

4. The county treasurer was not legally justified in making the deposit of funds in the New York bank which later failed, nor in the interests of the school districts was he bound to do so.

5. In making the deposit in the New York bank the county treasurer acted gratuitously and is liable for the loss attending his unauthorized deposit.

6. The mere fact that the school districts made their coupons payable only at the banking house in New York and the further fact that the treasurer forwarded money to it for the purpose of taking care of such coupons did not justify the treasurer in escaping liability for the loss of the funds due to the failure of the bank.

7. A county treasurer is held strictly accountable for the public money collected by him, the failure of banks in which he has deposited

funds and with whatever faith, constitutes no defense for the loss of the funds.

8. The treasurer here must be held to bear the burden resulting from the failure of a banking institution which he trusted.—*Judgment reversed.*

Mr. Justice Butler concurs in part and dissents in part—Mr. Justice Bouck and Mr. Justice Holland dissent.

RECEIVING STOLEN PROPERTY—ACCESSORY—LIMITATION OF EVIDENCE—*The People vs. Spinuzza*—No. 13858—*Decided November 9, 1936—Opinion by Mr. Justice Holland.*

The People brought this case on assignment of error as to the law after the defendant had been convicted of receiving stolen property. The court below by its instruction limited the evidence to be considered by the jury to property which had been previously stolen by some other person and not to consider evidence of the value of the property received by the defendant in which the defendant participated in the stealing. By reason of this instruction the jury found the defendant guilty of receiving three sacks of sugar, only, and he was sentenced to 60 days in the county jail. The evidence disclosed that Spinuzza bought the three sacks of sugar from three parties who burglarized a store and was informed where the sugar was hidden. He told the burglars that he could use some more sugar and anything else that they could get ahold of. The burglars went back to the store and stole nine more sacks of sugar and a quantity of cigarettes, tobacco and other merchandise which they hid and they then called the defendant and he came to the place where the merchandise was hidden and received it. The defendant then told them he could use some coffee and the burglars a third time went to the store and stole coffee while Spinuzza was standing in the back of the store.

1. On this set of facts the defendant could have properly been charged as a principal on the second and third entries of the store, but not on the first. The evidence was sufficient to show that he was guilty of receiving stolen property, being the fruits of the first and second entries of the store.

2. The defendant not being present at the commission of the crime that he encouraged and having received stolen property from the commission of such crime, was subject to prosecution for receiving stolen goods which in this case not only included the three sacks of sugar taken in the first entry, but also included the nine additional sacks of sugar and other property taken on the second entry and the trial court was in error in limiting the amount of the value of the property stolen to the three sacks of sugar.—*Judgment disapproved.*

Mr. Chief Justice Campbell not participating.

WATERS—FLOODS—LIABILITY OF MUNICIPAL CORPORATIONS FOR CONSTRUCTING DIKE OBSTRUCTING WATER COURSE—*Venetucci vs. City of Colorado Springs*—No. 13638—*Decided November 30, 1936*—*Opinion by Mr. Justice Butler.*

Venetucci sued the City of Colorado Springs for damages on the ground that a dike constructed by the city diverted surface or flood water onto his property and injured the land and the improvements. Judgment below was for the city.

1. There was sufficient evidence to support the verdict and judgment. While there was evidence that the construction of the dike by the city did divert the flood waters from their natural course or channel so as to cause the damage to the plaintiff's property, likewise there was evidence that the waters which caused the damage came from an unusual and unprecedented flood or act of God and further that the construction of the dike or embankment did not divert the water onto the plaintiff's property and that even if the dike had not been constructed the volume of the water was such that it would nevertheless flow to cross and damage the plaintiff's land. Also the jury were permitted to inspect the property. Under these circumstances, it was purely a question for the jury and there was sufficient evidence to uphold the verdict.

2. It was proper to instruct a jury that if the waters were turned out of their natural course by artificial means or obstructions over the lands of another that the latter has the right to erect such barriers or construction as will return the waters to their natural course and that no cause of action arises for the erection or construction of such barriers, the only effect of which is to return waters to their natural course in the same quantity and manner as they would have flowed except for having been diverted. There was evidenc submitted to the jury that the dike constructed by the city was erected on its own land and that the purpose of it was to divert waters back into a natural channel so that this instruction was proper to submit to the jury.—*Judgment affirmed.*

AUTOMOBILES—LIABILITY—COLLUSION OF POLICYHOLDER PREVENTING RECOVERY—*Bagley vs. Lumbermens Mutual Casualty Company*—No. 13279—*Decided November 9, 1936*—*Opinion by Mr. Justice Bouck.*

Bagley sued the defendant insurance company to recover $5,000 on an automobile liability policy. His daughter sued him on the grounds of negligence which she alleged occurred while he was driving an automobile and she was a passenger and default judgment was rendered in her favor for $5,000. Bagley held a $5,000 liability policy indemnifying him in case of recovery. The court below found that Bagley had violated the terms of the policy in that he fraudulently colluded with his daughter to enable her to obtain a judgment against him in order that he might in turn collect against the defendant insurance

company and that he had wholly failed to cooperate with the insurance company in the suit that his daughter brought against him and that he refused to verify the answer, thus preventing the insurance company from making a proper defense and the lower court rendered judgment in favor of the defendant.

1. The conclusions drawn by the trial court from conflicting evidence are binding upon the supreme court where the evidence is sufficient to support the findings.—*Judgment affirmed.*

EJECTMENT—DAMAGES FOR DETENTION—INSUFFICIENCY OF ASSIGNMENTS OF ERROR—FALSE TESTIMONY—AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL—*Buchanan vs. Burgess et al.*—No. 14022—*Decided November 9, 1936—Opinion by Mr. Justice Burke.*

Burgess and Phillips, alleging ownership and right of possession, brought ejectment against Buchanan to recover real estate and damages for detention. Buchanan admitted their ownership but denied their right of possession. He claimed this right under oral contract for a ten year lease, on the faith of which he made valuable improvements and he counterclaimed for specific performance or for the value of the improvements plus the good will of the business established on the real estate. Judgment below was for the plaintiffs for possession and damages.

1. The first six assignments of error cannot be considered by reason of failure to comply with Rule 32 of the rules of the supreme court.

2. False testimony is not one of the grounds for a new trial enumerated by the code.

3. In this jurisdiction where the contention is that perjury has been committed the motion for a new trial must be grounded upon newly discovered evidence.

4. Affidavit in support of motion for new trial on the ground of newly discovered evidence must clearly set forth the evidence. The affidavits of the witnesses disclosing newly discovered evidence should be presented and where they are not presented, the defendant merely makes an affidavit on information and belief without disclosing how he learned what the witnesses would testify to nor where they lived and failed to explain why the affidavits of the witnesses alleged to have knowledge of the facts were not presented, the affidavit is insufficient.

5. Such affidavit must show why the evidence was not discovered in time to present at the trial and how it was finally discovered and diligence must be made to appear.—*Judgment affirmed.*

Mr. Justice Campbell not participating—Mr. Justice Holland dissenting.

TAXATION—DOUBLE TAXATION—LEASE FOR TERM OF YEARS LESSEE TURNING IN PROPERTY FOR TAXATION AS OWNER—*Board of County Commissioners vs. Boettcher, et al.*—No. 13817—*Decided December 7, 1936*—*Opinion by Mr. Justice Young.*

Boettcher and Foster brought suit to recover certain taxes paid by them and their predecessors in title on a twenty-five foot strip of ground which their predecessors in title had leased to the Denver Tramway Company in 1895 for use for station purposes at its central loop in Denver. The Denver Tramway Company year after year included this strip of ground in its return for taxes as being the owner thereof and over a period of years it paid the taxes assessed thereon as a part of its valuation as a public utility for taxing purposes. In 1920 the fee owners gave a ninety-nine year lease on this twenty-five foot strip of land with other property to Robert H. Fay subject to the lease or contract with the tramway company and this lease obligated the lessee to pay all taxes which lease was assigned to the plaintiffs herein in 1927. The plaintiffs below, Boettcher and Foster, recovered judgment on the theory of a double assessment.

1. Since interests in real property may be segregated for purposes of assessment for taxation to the respective owners of such interests, such interests, when so segregated, are taxable as such. However, if the owner of an interest in real property fails to exercise the right to segregate it and returns the whole property for taxation and voluntarily pays the tax, he cannot complain of a double taxation resulting from such failure.

2. We cannot say that the tax commission would have placed a lesser valuation on the property of the public utility, as a unit, had it been made to appear to them that the tramway company held merely a limited interest in the property instead of a fee simple title, nor that the value placed upon it by the tax commission with the property reported as owned in fee is greater by the amount of the value of the reversionary interest than it would have been had the tramway company correctly reported that it held merely a grant of the use of the property.

3. If the tramway company chose to report real estate as owned by it in fee, when it had only a grant of its use, the excess taxes paid by it cannot be utilized by the plaintiffs to establish double taxation on the reversionary interests which they retained in the property. The tax levied at most was excessive and not illegal and if excessive the complaint should have been made to the assessor to reduce the assessment.

4. There is a distinction between an excessive tax and a double or illegal tax. In the first instance there must be an allegation that the administrative remedy was invoked in an attempt to secure relief from an excessive tax by the proper application to the assessor taxing authorities.

5. Where the complaint and the evidence are silent as to invoking administrative remedies and the tax appears to be only excessive and not illegal the complaint fails to state a cause of action.—*Judgment reversed.*

SECURITIES ACT—REVOCATION OF LICENSE OF DEALER IN SECURITIES—LICENSEE NOT OF GOOD REPUTE—*H. L. Shaffer & Company vs. Prosser, as Attorney General*—No. 13822—*Decided November 2, 1936*—*Opinion by Mr. Justice Burke.*

Prosser, as attorney general, revoked the license of the Shaffer company as a dealer in securities. The district court sustained that action and to review its judgment this writ is prosecuted.

1. A license once issued under the securities act may be revoked if it is shown that the licensee is not of good business repute.

2. The reputation of one who controls a company, partnership or corporation, or is generally understood and believed to exercise such control, and the reputation of his concern, are inseparable.

3. A man's character is the thing he is, his reputation the thing others say of him; but "repute," "reputation," and "character" are words often used in ordinary conversation and writing as well as in legislation, and all too frequently in court decisions, very carelessly. Context and intent must generally be resorted to in their interpretation.

4. It is not conceivable that a certificate of good repute would be issued to an applicant under our statute merely because he had theretofore stood well in his community, in the face of a protest by a district attorney who imparted the information that the applicant had just been indicted for a vast securities fraud, and presented evidence conclusively showing him guilty thereof.

5. A law which prohibits the issuance of a security dealer's license to one not of "good repute" and the cancellation of such license theretofore issued, to such person, being clearly an act for the protection of the public, must contemplate as one "not of good repute" a person of such character that he cannot, with reasonable safety, be trusted in such matters.

6. This may be shown either by general reputation in the community, or among those personally familiar therewith, or evidence or transactions presumably revealing his character. Hence the objections that on the hearing specific instances and hearsay were considered are wholly without merit.

7. The objection that these instances, or this "repute" related to a time prior to the passage of the act is not tenable.

8. The securities act of 1931 does not violate section 21 of article B of the Constitution which provides that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. Particularity is neither necessary nor desirable, generality is commendable. If the legislation is germane to the general subject expressed in the title or if it is relevant and appropriate to such subject, it does not violate this provision of the Constitution.—*Judgment affirmed.*

Mr. Chief Justice Campbell not participating—Mr. Justice Holland dissents.

PLEADING—DISMISSAL OF COMPLAINT WITHOUT PREJUDICE—AT WHAT TIME SUCH DISMISSAL MAY BE MADE—*The Colorado Utilities Corporation vs. Pizor*—No. 13876—*Decided November 2, 1936*—*Opinion by Mr. Justice Holland.*

Defendants in error as father and mother of a minor child brought suit to recover for the wrongful death of said child by reason of the child being electrocuted through defective construction of a power transmission line. Demurrer to the complaint was sustained and plaintiffs filed an amended complaint. Defendant objected to the filing of the amended complaint for insufficiency of facts. The court treated this as a motion to strike which it sustained and gave plaintiff thirty days to elect as to further proceedings. Defendant filed a motion for judgment of dismissal and plaintiffs then filed their motion to dismiss without prejudice which latter motion the court granted.

1. An action may be dismissed by the plaintiff at any time before trial upon the payment of costs if the counterclaim has not been made.

2. No counterclaim had been made in this case and the plaintiffs' right to dismiss at any time before trial was absolute. Its order of dismissal, on plaintiffs' election, ended the proceedings at a time when there was nothing before the court upon which a judgment on the pleadings could be based. Plaintiffs still had time in which to present a sufficient complaint, and they could not be deprived of that right by an order of dismissal with prejudice, as was and is contended by defendant. The structure of the pleadings was not such that defendant could be entitled to judgment thereon, and it follows that the order of dismissal without prejudice did not destroy any right of defendant.—*Judgment affirmed.*

NEGOTIABLE INSTRUMENTS—CHANGE OF VENUE—ELECTION—DEMURRERS—*Cole, et al. vs. Hess, et al.*—No. 13855—*Decided December 7, 1936*—*Opinion by Mr. Justice Burke.*

Defendants under the authority granted in the note, confessed judgment. The defendants thereafter appeared by new counsel and moved to vacate the judgment and for leave to answer and for a change of venue. Change of venue was denied but otherwise the motion was granted and defendants filed an answer and cross-complaint to which demurrers were sustained, with leave to amend. Amendments were made and reply filed. When the case came on for trial, plaintiffs, contending that defendants relied upon both fraud and breach of contract, moved for a rule on them to elect. Under protest they stood on breach of contract. Plaintiffs then orally demurred for want of facts to support that defense. The demurrer was sustained, leave to amend denied and the original judgment was reentered.

1. Under Section 422 of the Code no exceptions need be taken to written motions for change in place of trial. Furthermore, under Rule 3 of the Supreme Court a party shall not be deemed to have waived

his right to place of trial by appearance or plea if his objection thereto shall be made in apt time.

2. The defendants residing in Alamosa County and the place of the performance of the contract being in Alamosa County, the change of venue to Alamosa County should have been granted.

3. New matter in the reply is taken as denied.

4. One may set forth by answer as many defenses and counterclaims as he may have, whether legal, equitable or both.

5. Motion to elect must be made in apt time. Ordinarily such motion must be made before trial and if not so raised is waived.

6. The answer pleads a breach of contract and failure of consideration and the cross-complaint charges false representations. The demurrer should have been overruled.—*Judgment reversed.*

CORPORATIONS—FAILURE TO STATE OBJECTS OF CORPORATION IN ARTICLES—MANDAMUS—REFUSAL OF SECRETARY OF STATE TO ISSUE CHARTER—*George E. Saunders as Secretary of State vs. The People, et al.*—No. 14006—*Decided December 7, 1936—Opinion by Mr. Justice Young.*

Petitioners tendered a certificate of incorporation to the secretary of state of a proposed nonprofit company. The secretary of state refused to accept the same on the ground that the certificate failed to comply with the statute in stating the business for which the nonprofit corporation was organized in that under such heading it stated that the corporation was formed to benefit the widows, orphans, heirs and devisees of its members through their mutual efforts through and by virtue of voluntary contributions being made by each surviving member upon the death of a member. Petitioners brought mandamus proceedings to compel the secretary of state to issue the certificate and the respondent demurred on the ground that the writ did not state facts sufficient to constitute a cause of action. The demurrer was overruled and respondent elected to stand on his demurrer and the alternative writ was made peremptory.

1. The demurrer was well taken.

2. While the tendered certificate sets forth the objects for which the corporation is to be formed it fails to state the particular business for which it is formed.

3. It is necessary in tendering a certificate of incorporation to clearly set forth the particular business for which the corporation is formed. A statement of the particular business in which the proposed corporation is to engage would require a setting forth of the manner in which such funds are to be managed and used to effect the intended beneficial purposes.—*Judgment reversed.*

Mr. Chief Justice Campbell not participating—Mr. Justice Holland dissents.