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Recent Trial Court Decisions

Dicta Editorial Board

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the law and under all of the Sections above referred to, may not legally exceed 4 mills.

Judgment Reversed. _____

TROVER—FRAUD AS DEFENSE—RIPENED FRUIT AS SUBJECT.—
No. 12252.—*Koerner et al. vs. Wilson*—Decided January 14, 1929.

Facts.—Wilson brought suit against Koerner, who was the Sheriff of Fremont County, and against Chillino, who was a judgment creditor of the plaintiff's father, in trover for the wrongful seizure by the defendant of certain property in the possession of the plaintiff, which belonged to the plaintiff to-wit: apples and apple boxes, some of the apples being on the ground and some on the tree. Judgment was entered for plaintiff and defendant appealed.

Held.—That the defense of fraud in an action of trover must be affirmatively pleaded and proved.

Ripened fruit, though still on the tree, is under the circumstances of this case *fructus industriales* and properly the basis of an action in trover, being personal property.

Judgment Affirmed.

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of Dicta to note any interesting decisions of the United States District Court, the Denver District Court, the County Court, the Juvenile Court, and occasionally the Justice Courts.)

DENVER DISTRICT COURT—No. 99562, Div. II.—*City and County of Denver vs. William S. Lail and Federal Surety Company*—*James C. Starkweather, Judge.*

Facts.—Action by City to recover, on Lail's bond as Public Trustee, moneys received by Lail and not paid over in the sum of \$7,233.60, and a penalty of 25% thereon, together with interest. On and prior to July 23, 1924, Lail was Clerk and Recorder, Ex-officio Clerk of the City and County of Denver, appointed thereto by the Mayor at a salary of \$2500.00 a year, as fixed by the Charter. On that date, the Mayor in writing appointed Lail to be "Public Trustee of the City and County of Denver". Lail and the Federal Surety Company as surety executed a bond reciting Lail's appointment "to the office of

Public Trustee" and conditioned upon the faithful performance by Lail of all official duties required of him by law and the payment of all moneys that came "into his hands as such Public Trustee of the City and County of Denver". From July 23, 1924, to June 15, 1927, when he resigned, Lail had performed the duties of Clerk and Recorder and also of Public Trustee, and had been paid the Clerk and Recorder's regular salary of \$2500.00 per year. During this period, he collected, as Public Trustee, the sum of \$44,368.89, and had paid over this amount to the treasury of the City, except \$7,233.60, which he withheld as the balance of salary due him as Public Trustee. Lail's answer included a counter-claim for \$7,233.60 on the basis that he was entitled to \$2500.00 a year as Clerk and Recorder and \$5,000.00 a year as Public Trustee.

Held.—Lail, as Clerk and Recorder, was entitled to receive the salary of \$2500.00 per annum attached to that office under the City Charter, but was not entitled to any additional compensation for performing the services required of the former county officer known as Public Trustee. Under Article XX of the Colorado Constitution and *People vs. Cassidy*, 50 *Colo.* 503 and other cases cited, there exist in the Municipality of the City and County of Denver no county offices or officers as such, although the duties and functions appertaining to county offices remain intact, and under *Chambers vs. People*, 70 *Colo.* 496, and *Walsh vs. People*, 72 *Colo.* 406, the office of Public Trustee is a county office. *People vs. Sabin*, 75 *Colo.* 545, thus held that the Governor had no power to appoint a Public Trustee for the City and County of Denver and that, as the Charter failed to designate an officer of the City and County of Denver who should perform the acts and duties required of the county officer known as Public Trustee, as contemplated by Sec. 2 of Article XX of the Constitution,*

* Sec. 2. OFFICERS.—The officers of the city and County of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments.

the power of appointment was in the Mayor under the provisions of the Charter. It thereupon became the duty of the Mayor to appoint some person to perform the acts and duties required of the former county officer known as the Public Trustee. In doing so, the Mayor could either have appointed some person who was not already a municipal officer of the City and County of Denver to perform such acts and duties, and a person so appointed would thereby have become a municipal officer of the City and County of Denver; or, on the other hand, the Mayor could appoint, as he did, some person who already held a municipal office of the City and County of Denver to perform, in addition to the duties of his office, the acts and duties required of the former county officer known as the Public Trustee. The latter course would be in strict accord with the purpose of sec. 2 of Article XX. The Charter definitely fixes the compensation of Clerk and Recorder at \$2500.00 per annum, and this Lail received. There is no provision, however, allowing additional salary in the event that the Clerk and Recorder, or anyone, should be appointed, as a municipal officer, to perform the acts and duties of the former county officer known as the Public Trustee. Ordinarily where an officer holds two offices, he is entitled to receive the compensation attached to each, but under the provisions of Article XX and of the City Charter, a different rule prevails, and a municipal officer of the City and County of Denver is entitled to only a single salary. To hold that Lail was entitled to a salary of \$5,000.00, or any salary, for the services rendered as Public Trustee, would be in violation of secs. 108, 304, 311 and 312 of the City Charter, and would be contrary to the end sought to be accomplished by the enactment of Article XX of the Constitution. The action being on the bond, the condition of which does not cover the 25% penalty, judgment is entered against the defendants for \$7,233.60 with interest.—*Judgment for Plaintiff.*

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