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Recent Case Notes

RECENT CASE NOTES

CONTEMPT—EVIDENCE.—In an original proceeding before the Supreme Court against respondent for contempt, he was found guilty and sentenced. A motion and a petition are now brought before the court. The motion, by the state, is to modify the judgment for inadequate sentence, because evidence is alleged to have been found to the effect that respondent attempted to get certain persons of great political influence to interfere and to talk to the personnel of the court in his behalf while the original proceeding was still pending. The petition, by respondent, is for a rehearing of his motion for new trial, on the ground that inadmissible depositions were allowed in evidence. *Held:* Motion overruled; petition denied. This is not a criminal proceeding in the sense that the rules of evidence for criminal cases apply. Depositions of witnesses residing in foreign jurisdictions are admissible. *State v. Shoemaker*, Ind. S. Ct., 162 N. E. 441.

Although it is now pretty soundly established that the power to punish summarily for indirect contempt is not inherent in our courts, Sir John Fox, *The History of Contempt of Court*, and III *Ind. L. Journ.* 751, still the courts have so long considered this power inherent and incapable of being taken from them that, for all practical purposes, the power is inherent. *In re Debs*, 15 U. S. 564, at 594, 595, 15 S. Ct. 900, at 910, 39 L. Ed. 1092, *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, at 782. The court holds that contempt is not a crime, and the holding seems to be right. The court procedure governing contempt cases was not developed along with the criminal law, but as a separate branch of the law for the protection of the court in its proper functioning. Jury trial is not required in contempt cases as in trials of crimes, *Garrigus v. State*, 93 Ind. 239, 24 Cyc. 146; and, as in the present case, not all rules of criminal evidence are enforced, *O'Neil v. The People*, 113 Ill. A. 195.

This case suggests the question of whether or not contempts are within executive pardoning power. If they are not crimes, but mere offenses against the court, it would seem that the executive branch of government has no power over them. But the Supreme Court of the United States has decided contra, *Ex parte Grossman*, 267 U. S. 87, 45 S. Ct. 332, 69 L. Ed. 527, 38 A. L. R. 131. D. J.

CORPORATIONS—ESTOPPEL—PROPER PARTY.—A corporation was organized with appellants as incorporators. Articles of incorporation were drawn up and filed with the secretary of state, the fee was paid and charter granted. The corporation thereupon contracted with the appellees who undertook to purchase all of its preferred stock. Appellees then required the corporation to deposit $25,000 with a bank as guaranty of performance of the contract which was signed by Sterne as president with authority of appellants as board of directors. The corporation found it was impossible to sell even one-fourth of the common stock it proposed to issue, and so could not pay into the treasury one-fourth of the subscription price. Appellants then bring action against appellees for recovery of the $25,000 deposited, less any costs of the transaction. *Held:* Appellants as individuals cannot claim a right under the contract so as to maintain this

action. *Sterne et al. v. Fletcher American Co. et al.* Appellate Court of Indiana, May 11, 1928. 161 N. E. 580.

This case involves an interesting interpretation of the Indiana law governing incorporation. When, under the statute, does a corporation come into existence as such and when may it assume all the rights and privileges incident to it? Burns' Ann. Statutes, Sec. 4826, provides that articles of incorporation may be filed with the secretary of state, who shall issue a certificate certifying that the corporation as named in the articles is authorized to do business. But Burns' Sec. 4842 requires that a corporation shall have no rights or privileges as such until one-fourth of the capital stock has been subscribed and one-fourth of subscription price paid into the treasury. If in the present case the latter statute entirely precluded corporate existence, then the corporation would have no capacity to bring action on any contract. Yet it is generally held a corporation comes into existence upon substantially complying with the statute requiring filing of articles and issuance of the certificate by the secretary of state. 22 A. L. R. 394; *Atherton v. Sugar Creek & P. Turnpike Co.*, 67 Ind. 334; *Chieppo v. Chieppo*, 90 Atl. 940. Under like statutes in other states it has been held that upon receiving certificate, a corporation is allowed to obtain necessary subscriptions to stock, but it must not transact business with other than stockholders until the requirement of having a certain amount of stock subscribed is met. *Standard Drilling Co. v. Slate*, 226 S. W. 377. The requirement is therefore a condition subsequent and not a condition precedent to corporate existence. 14 C. J. 154.

The appellants here bring the action as individuals on the theory that since one-fourth of the stock of the association was not subscribed to, the association had no rights or privileges as a corporation. However, appellants, if they contracted at all with appellees, did so through the corporation. In some cases contracts entered into even before the filing of articles of incorporation were held to be enforceable, the parties being estopped to deny corporate power when the contract was entered into assuming corporate power. *Whitney v. Wyman*, 101 U. S. 392. Also, persons contracting with organizations as corporations can not deny their legal corporate existence at the date of the contract, if there is no fraud. *Bradford v. Frankfort*, 142 Ind. 383; *Clark v. American Coal Co.*, 35 Ind. App. 73. The contract here was in the nature of a subscription to stock and was between the corporation and appellees who were to become stockholders, appellants being but directors of the corporation. Having acted through the corporation, they are not now proper parties to an action arising out of that contract, and are so estopped to deny corporate existence. Following the majority of the authorities, the corporation would have capacity sufficient to enter into such contract as this covering the guaranty along with the subscription of stock, so an action arising out of that contract could be properly brought by the corporation only, it being an entirely distinct entity from the appellants as incorporators or directors.

C. W. D.

CRIMINAL LAW—APPEAL FROM JUSTICE'S COURT—EFFECT OF AMENDMENT TO STATUTE.—Appellant, having been convicted of a misdemeanor in the city court of Decatur, fined, and sentenced to six months' confinement, prayed an appeal to the circuit court of Adams county and filed an appeal

bond, with proper sureties, which bond was approved by the court. The special judge dictated and prepared the bond, at the request of appellant or her attorney. The transcript on appeal, however, was not prepared or filed in the circuit court, and this action in mandamus was brought against appellee, special judge in the city court, to compel him to prepare and file it. He answered by general denial and the trial court found in his favor. The appellant assigned as error the overruling of the appellant's motion for a new trial on the ground that the judgment was not sustained by sufficient evidence. *Held:* Judgment reversed, with directions to the trial court to grant the motion for a new trial. *State ex rel. Ladd vs. Walters,* 162 N. E. 444.

This case may be taken as the interpretation of the Indiana Supreme Court of sections 2111 and 2113, Burns' Ann. St., 1926, as amended by Acts of 1927, c. 132, sections 1 and 3. In its original form, section 2111 (Acts of 1905, c. 169, section 81) provided in simple words for an appeal from a judgment of a justice of the peace to the criminal or circuit court of the county, within ten days after such judgment; and, "in case such prisoner enters into recognizance for his appearance at the next term of such court, such appeal shall stay all further proceedings." In the amended form (Acts of 1927, c. 132, section 1) the statute now reads "In case such prisoner enters into recognizance * * * *and causes to be filed in such court, within fifteen days, all other papers, documents and transcripts necessary to complete his appeal,* such appeal shall stay further proceedings," etc. Section 2113 (Acts of 1905, c. 169, section 83) before amendment, provided that "such recognizance, together with a transcript of the proceedings, and all papers in the case, shall be forthwith filed *by the justice* with the clerk of the proper court. In the amended form (Acts of 1927, c. 132, section 3) the words "by the justice" are omitted altogether. Appellee's contention was that the added words in Section 2111, and the ommission of the words "by the justice" in Section 2113, made it obligatory upon appellants to prepare and file their transcripts themselves, and relieved justices, mayors, and judges of city courts of any duty in the matter. This view the Supreme Court expressly denies.

As the appellee points out in his brief, it is a logical presumption that the motive of the makers of the amendments herein concerned was a desire to relieve the magistrates of these courts of limited jurisdiction from the burden of making transcripts in unimportant cases without remuneration, or even perhaps for the purpose of discouraging appeals in petty cases tried in these courts. Appeals in such cases are known to be, more often than not, trivial and contentious; prosecuted not so much as an honest effort to obtain any full measure of justice denied in a lower court, as an attempt to put an end to the whole transaction, and effectively prevent the very rehearing of the case which the appeal ostensibly demands. The Supreme Court to the contrary notwithstanding, the preparation of transcripts and other papers for appeal is a burden on the court concerned. In practice it often works out that an appeal drops the whole proceedings into oblivion, and a guilty defendant escapes justice by the artifice of throwing upon the court that convicted him the further task of preparing his (the defendant's) own case for appeal. Parenthetically, it may be remarked that in no other kind of court is the party found against excused from preparing his own papers on appeal.

The decision seems to leave the matter exactly as it was before the amendments were passed (with the probable exception that the new statute still hastens the time for trying such appeal); and upon the refusal of a justice, mayor or judge of a city court to prepare transcripts and other papers for appeal, he may be compelled by mandamus to do so. *State ex rel. Jacoby vs. Cressinger* (1883), 88 Ind. 499; *Yager vs. State* (1920), 190 Ind. 550. In view of the abuse of the privilege of appeal from petty courts, the Legislature might well consider giving the statutes concerned a thorough overhauling, placing the duty of preparing the appeal squarely upon the party desiring it, in direct and unmistakable language, interpretation of which need not be left to any implication or construction of added or omitted words.

H. C.

LARCENY—JURISDICTION—WITNESSES — CRIMINAL LAW — PROSECUTION FOR GRAND LARCENY.—Defendant charged with unlawfully, and feloniously taking and carrying away goods from one county into another. Defendant prosecuted in county into which he took goods. Question of jurisdiction in the court of the latter county raised but was held against defendant. Defendant's motion to quash affidavit overruled. Defendant was asked on cross-examination concerning an arrest and was made to answer his objection. Defendant assigns as error the overruling of motions to quash and for a new trial, on the ground that he should have been made to answer concerning the arrest. *Tosser v. State*, Supreme Court of Indiana, June 19, 1928, 162 N. E. 49.

Bill of Rights, Burns Ann. Stat. 1926, Act 65, provides that: In all criminal prosecution accused should have right to public trial by an impartial jury in county in which offense shall have been committed. Since early English history it has been settled that one stealing goods in one county might be indicted for larceny in any other county into which he carried the goods, on the theory that possession of goods by the thief is a larceny of the goods in every county into which he carried the goods, because the legal possession remains in the owner and every moment's continuance of felony amounts to a new caption. This is well settled in U. S. 17 R. C. L., p. 45; *Martin v. State*, 176 Ind. 317. Burns 1926 Ann. Stat. Sec. 2039 expressly provides that: When property taken in one county by larceny has been brought into another county, the jurisdiction is in either county. It is interesting to note also that to have grand larceny the goods stolen must be of one hundred dollars value or more instead of twenty-five dollars as required by Sec. 2451 Burns 1926. See 1927 Acts of Ind., Chap. 203, sec. 4.

Wigmore, Sec. 982, criticizes the admission by some courts, of the question on cross-examination concerning a previous arrest, on ground that it casts a suspicion on witness. Courts should understand that the only relevant circumstance is the actual conduct, i. e., the fact, not the charge of having misbehaved. Indiana, however, follows the rule that permits the question as to previous arrests, convictions, etc., within the discretion of the court and it does not appear here that the discretion was abused. *Parker v. State*, 136 Ind. 284; *Vancleave v. State*, 150 Ind. 273; *Shears v. State*, 147 Ind. 51; *Owen v. State*, 148 Ind. 401. *Denny v. State*, 190 Ind. 76, was a case of larceny of automobile tires and there a question

was allowed on cross examination concerning an indictment for liquor violation. Exclusive possession of property by defendant immediately after commission of alleged crime, if unexplained by the defendant, raises a presumption that he is the thief. *Isenhour v. State*, 157 Ind. 517; *Madden v. State*, 148 Ind. 183; *Campbell v. State*, 150 Ind. 74; *Johnson v. State*, 148 Ind. 522; *Rosenberg v. State*, 134 N. E. 856. Defendant may rebut the presumption and if on the whole evidence, there is a reasonable doubt as to accused's guilt he should be acquitted. *Blake v. State*, 130 Ind. 203; *Mason v. State*, 171 Ind. 78. A. L. B.

LIENS—CHATTEL MORTGAGES—RECORDING.—Plaintiffs seek to enforce an alleged equitable lien as against defendants, trustee for certain creditors and committee for certain creditors of John Totten and Frank Totten. It appears that the Tottens on October 16, 1925, obtained a loan of $3,938.86 from the Thompson State Bank, to enable them to purchase certain cattle. The Tottens gave their promissory note for the above sum, due in six months. At the same time and as a part of the above transaction, an agreement, denominated a "bill of sale" was executed by the said Tottens, covering 157 head of cattle, being the cattle paid for with the money loaned. The "bill of sale," however, recited that it was given to the bank as a pledge to secure the payment of the note. This agreement was not recorded. The note was, before maturity, duly indorsed by the bank to plaintiffs. In February, 1926, the Tottens entered into an agreement with a committee for the creditors of said Tottens, whereby the latter conveyed to Williams as trustee for certain named creditors "and such other creditors as should come in and accept such agreement" certain property including the cattle covered by the bill of sale to the bank. As a part of the consideration for this assignment the committee acting for the creditors agreed that the creditors would exempt certain designated property from their claims and would forbear to sue for any unpaid balance after distribution of assets coming into trustee's hands. Plaintiffs declined to join in the settlement but sue upon the bill of sale. The cattle were never in the possession of either the bank or the plaintiffs. Lower court held for defendants and plaintiffs appeal. *Held:* That the bill of sale was a chattel mortgage and that appellants, not recording the mortgage, can not assert their lien as against creditors giving valuable consideration for assignment by mortgagor for their benefit, in absence of showing that they had notice of the mortgage lien. *Powell et al. v. Totten et al.*, Appellate Court of Indiana, July 20, 1928, 162 N. E. 418.

A party may by agreement create a charge in the nature of a lien on his property which a court of equity will enforce as an equitable lien against him and volunteers or claimants under him with notice of the agreement. An agreement by which the maker incurs an obligation and pledges the property as security for performance creates such an equitable lien. 17 R. C. L. 604, sec. 13; *Ketchum v. St. Louis*, 101 U. S. 306; *Walker v. Brown*, 165 U. S. 654; *Farmers Loan, etc., Co. v. Penn Plate Glass Co.*, 103 Fed. 132; *Chase v. Peck*, 21 N. Y. 581. Although the instrument here was called a "bill of sale", it expressly stipulated that it was given as security for the payment of the money borrowed, hence it was simply a chattel mortgage, even as between the parties. If intended to secure an obligation, then the instrument, irrespective of its form or letter, must be

construed to be a mortgage. *Maynord v. Shaw,* (Pa.) 92 Atl. 204; *Harris v. Nixon,* 1 Howard 118; *Shillober v. Robinson,* 97 U. S. 68; 19 R. C. L. sec. 7. Sec. 8055 Burns' 1926, provides, in substance, that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not deliverd to th mortgagee, or assignee, and retained by him, unless such assignment or mortgage is recorded. In the present case the mortgage was not recorded, the creditors had no notice of the bank's lien, and furthermore the creditors were not volunteers. Therefore under the above well established rules of law and under the Indiana statute, the appellants can not assert their lien against the creditors. *Wolf v. Russell et al.,* 55 Ind. App. 660; *Ames Iron Works v. Warren et al.,* 76 Ind. 512; *Briggs v. Fleming et al.,* 112 Ind. 313; *Scorry v. Bennett,* 2 Ind. App. 167. H. C. L.