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IMPORTANT CASES DECIDED BY THE COURT OF  
APPEALS OF KENTUCKY DURING THE  
MONTH OF SEPTEMBER.

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*Burley Tobacco Company v. Vest, et. al. (Decided September 29, 1915.)—Appeal from Kenton Circuit Court.*

In the year 1909, an agreement was entered into between the Burley Tobacco Society and 40,000 tobacco growers of Ohio, Indiana and Kentucky, by which the latter were to deliver all tobacco grown by them to this society to be handled and sold by it as their agent, and it was further agreed that 10 per cent of the gross sales of this tobacco was to be invested by the Society, in the name of the individual growers, in stock in the Burley Tobacco Company, which was to be organized later, each grower becoming a stock holder in proportion to the amount invested for him by the Society.

The stipulated 10 per cent realized from the sales was invested as agreed and the Burley Tobacco and Insurance Company was incorporated for the purpose of handling and manufacturing tobacco, by the individuals who were directors. The directors were to be elected upon the first Tuesday after the first Saturday in October, in each year. The stock was issued to the beneficial owners but the voting power was given to the directors of the Burley Tobacco Society. The incorporators of the Burley Tobacco Company were to act until their successors should qualify.

At an election in October, 1912, the persons composing the District Board of the Burley Tobacco Society elected themselves as directors of the Burley Tobacco Company, which had been operated by the incorporators, up to this time. After this election E. B. Stanisfer and W. L. Hudson, as stockholders of the Burley Tobacco Society and the persons acting as directors of the Burley Tobacco Company, alleging that they were stockholders in the company and that the directors were elected in violation of the articles of incorporation, no notice of election being given to stockholders; that these directors refused to allow an inspection of the books of said company and that the majority of stockhold-

ers of the corporation desired a dissolution. They then prayed the court to allow the stockholders to elect directors who should take in charge the property of the corporation and should manage its affairs. By an amended petition, the company was joined as plaintiff. Upon the trial the court decided that the provision of the charter concerning the election of directors was invalid and that the defendants were not directors of the corporation and appointed commissioners who conducted an election at which the stockholders elected the same persons who had been acting as directors, and at the same meeting expressed their disapproval of the acts of the plaintiffs. The attorneys for the plaintiffs, Vest, Tomlin and Byron moved the court to allow them a fee for their services and to adjudge that it be paid by the Burley Tobacco Company. It was adjudged that the Company pay them \$10,000 for their services. The company objected and excepted and appealed to this court.

The question to be determinee is: Are the appellees entitled to have the Burley Tobacco Company pay the fee for the services which were rendered by them for their clients?

Judge Hunt, in reversing the opinion of the lower court, said: "There is a difference, however, in the obligation resting upon a corporation to pay the costs of litigation and counsel fees, between the cause, where the litigation is instituted by its officers, and when it is instituted in its behalf by a stockholder. In the former case, if the officers think it a prudent thing to do, to institute the litigation, the corporation is bound for the costs, although it may turn out that the officers were mistaken.

In the latter case the corporation is not bound for the costs of the litigation, unless it results in a substantial recovery by the corporation \* \* \* \* The result of the litigation, in the case at bar, was the determination in favor of a stock holder, that he had the right, by reason of his ownership of stock, to vote in the election of directors of the corporation, and that the Board of Directors of the Burley Tobacco Society did not have the right to vote for him. This right of the stockholders to vote at the election of directors is a right personal to the stock holder. The corporation did not recover either money or property, as a result of the litigation. Before a corporation can

be held to have contracted to pay an attorney for his services, who has instituted a suit for a stock holder, in behalf of the corporation, it must appear that the officers of the corporation have refused to institute suit for the corporation upon proper demand or that their interests are such or relation to the subject matter of the controversy or to the adverse party are such, that it would be a vain thing to make a demand of them, and they could not be reasonably expected to take proper care of the rights of the corporation, and in such a state of case, if the stock holders set in motion the machinery of the law for the corporation and a successful suit is maintained and results in the recovery for the corporation, not for the stock holder, of something substantial, and the corporation receives the benefit of it, or the bringing into court a fund for administration or distribution, then a contract is implied that the corporation will pay the fees of the attorneys for the stock holder, because the suit was for the corporation and it received the benefits of it."

The judgment is reversed and the cause remanded.

*Commonwealth v. Spiller. (Decided September 29, 1915.)—Appeal from Franklin Circuit Court.*

F. M. Spiller, while acting as agent for the Ohio National Life Insurance Company, was indicted for violating Section 656 of the Kentucky Statutes which provides as follows:

"Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined in any sum not exceeding \$500., to be recovered by action in the name of the Commonwealth, and on collection, paid into the State Treasury."

The trial court sustained a demurrer to the indictment, upon the ground that the State could not obtain relief by prosecution under indictment, but only by a penal action in the name of the State. From this decision the Commonwealth appeals.

The question to be decided was: Is a proceeding, by way of indictment, an action within the meaning of section 469 of the Kentucky Statutes, which is as follows: "The term action, when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth."

Chief Justice Miller, in reversing the opinion of the lower court said: "Section 11 of the Criminal Code provides that a public offense for which the only punishment is a fine may be prosecuted by a penal action in the name of the Commonwealth. Under this section, the Commonwealth could have proceeded by a penal action. But the section is permissive in its terms, and does not exclude any other form of procedure that is authorized by law. Furthermore, section 9 of the Criminal Code provides as follows:

'All public offenses may be prosecuted by indictment, except:

'1. Offenses of public officers, where a different mode of procedure is prosecuted by law.

'2. Offenses exclusively within the jurisdiction of justices of the peace, or of police or city courts.

'3. Offenses arising in the militia, of which a military court has exclusive jurisdiction.'

Under section 9, the Commonwealth may proceed by indictment, or under section 11, it may institute a penal action.

In *State v. Carr*, 6 Oregon, 134, the court said: "A proceeding by indictment is an action at law." Furthermore, it will be noticed that section 656 of the Kentucky Statutes does not require that the fine shall be recovered by a penal action, but merely that it is to be recovered by action in the name of the Commonwealth. Judgment reversed.

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## GOVERNMENT CONTROL.

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BY CHARLES KERR, JUDGE FAYETTE CIRCUIT COURT.

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The established doctrine of charter contract, that is a valid and binding agreement between the state and corporation, the terms of which are the charter provisions, still obtains so far as that class of corporations which are strictly private is concerned, meaning thereby that class of corporations that exercise no public functions, as distinguished from that class denominated *quasi* public. Corporations which are wholly and essentially public, that is such political organizations as towns, counties, cities, and