Fordham Law Review

Volume 1 | Issue 1 Article 1

1914

Recent Decisions

FORDHAM LAW REVIEW

VOLUME I

1914

FOREWORD

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VOLUME 1
of
FORDHAM LAW REVIEW

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DENNIS & CO., INC.

Buffalo, N. Y.
December, 1947

Fordham Law Review

EDITED BY FORDHAM LAW STUDENTS

RECENT DECISIONS.

BILL OF PARTICULARS—RIGHT THERETO—DEFAULT—ORDER OF PRECLUSION, WHEN MADE.

The court required the defendants to serve a bill of Particulars, and in its order inserted a provision precluding them from giving evidence in respect to such particulars, in the event of a failure to serve the same. *Held*, provision for preclusion improper.—*Metropolitan Life Ins. Co.* vs. *Heinze*, 148 N. Y., Supp. 214.

When an account is alleged without its items being set forth, the adverse party becomes entitled, as a matter of course, to a bill of particulars of his opponent's claim, by the service of a written demand therefor (*Code Civ. Proc.* §531). In every other action, neither party thereto may insist upon particulars of the other's affirmative claim, before he obtains an order directing the service thereof (*Id.; Hein v. Honduras Syndicate*, 138 App. Div. 786, 123 N. Y. Supp. 731). The right, therefore, to particulars of an account, which is pleaded according to its legal effect, is acquired, when the prescribed demand therefor is served; but the right to a bill of particulars in other cases vests in the movement only when the court, without transgressing the bounds of sound discretion (*Peo. v. McClellan*, 191 N. Y. 341, 48 N. E. 68), grants his application therefor (*Badger v. Gilroy*, 21 Misc. 466, 47 N. Y. Supp. 669).

The duty to serve a bill of particulars may be violated in either of two ways. The person of incidence may deliver a bill that is insufficient, or he may serve no bill (*Loscher v. Hager,* 124 App. Div. 568, 109 N. Y. Supp. 562). In either case, a default necessarily ensues. If the bill of particulars is insufficient, the person of incidence thereby discharges his duty *pro tanto,* and is guilty, at the same time, of a partial default (but see *Reader v. Haggin,* 114 App. Div. 112, 99 N. Y. Supp. 681, where this distinction seems to have been overlooked). If not even an insufficient bill is served, there is, of course, a pure default.

When a defective bill of particulars of an account is served, the person of inherence, if not content therewith, must seek an order for a further bill of particulars, *i. e.,* one that will supply the omissions of the first (*Code Civ. Proc.* §531; *Yates v. Bigelow,* 9 How. 186; *McKinney v. McKinney,* 12 id. 22; *Schulhoff v. Co-operative Dress Ass'n,* 3 Civ. Proc. 412). If an insufficient bill is served of a claim not sounding in account, the court, it would seem from the language of the section under consideration (*Code Civ. Proc.* §531), must enjoin the person of incidence from offering testimony at the trial of the case in respect to those particulars which were not served. But this literal interpretation of the section in question has been rejected by the courts, in the interests of orderly practice (*Reader v. Haggin, supra*).

On the coming in of a defective bill of particulars of a claim not bottomed on an account, its recipient, in order to preserve his right to a proper bill, thereupon must elect, either to retain the same, and thereafter move for a further bill of particulars, or to return the bill to his opponent, with a demand for a proper one endorsed thereon (*Wade v. Littlejohn,* 17 Civ. Proc. 178; *Fallen v. Ranger,* 44 Misc. 424, 90 N. Y. Supp. 55, rev'd., on other grounds, 99 App. Div. 374, 91 N. Y. Supp. 205).

If the latter course is adopted, the person of incidence may secure an adjudication of the sufficiency of his bill, through the medium of a motion to compel its acceptance by the person of inherence (*Fallen v. Ranger,* 99 App. Div. 374, 91 N. Y. Supp. 205; *Reader v. Haggin, supra.*).

Where there is a total failure to serve a bill of particulars, or a further bill is not served as ordered, or the court denies a motion to compel the acceptance of a rejected bill, the person of incidence must be precluded by the court from giving any evidence at the

trial concerning the particulars which he omitted to furnish (*Code Civ. Proc.* §531).

If one may judge from the frequency with which appellate courts are required to pass upon the question determined in the principal case, there seems to be not a little confusion abroad respecting the manner of the assessment of the penalty imposed by §531 of the Code. Doubtless, this confusion has been promoted by an occasional unsound *dictum* (*e. g., Weston v. Weston,* 68 App. Div. 483, 74 N. Y. Supp. 38, where it is said that "it is proper that the order granting the bill of particulars should contain a provision to the effect that if the party fails to comply with such direction proof may not be given," etc.), and by the compilers of books of forms, who have relied thereon (*e. g., Bostwick's Lawyer's Manual,* pp. 355 and 356).

Under §158 of the old Code, which is the forerunner of §531 of the present Code, it seems to have been customary for one aggrieved by the failure to receive a bill, or a further bill, of particulars, to make a motion for an order of preclusion, in advance of the trial. It was held even then that the question of precluding evidence could not be raised properly at the trial, unless such an order theretofore had been entered (Gebhard v. Parker, 120 N. Y. 33, 23 N. E. 982). While usual, perhaps, the practice of addressing such an application to the court, after the occurrence of the default, does not seem to have been insisted on (see *Dwight v. Germania Life Ins. Co.,* 84 N. Y. 493, and *Wilson v. Fletcher,* 44 Hun. 89, where the orders which directed the service of the particulars fixed the penalty for a failure). But it now is settled, beyond cavil, that it is not proper to incorporate in the order commanding the service of a bill a provision for preclusion, in the event of a default (*Mason v. Clark,* 75 App. Div. 460, 78 N. Y. Supp. 327; *Foster v. Curtis,* 121 id. 689, 106 N. Y. Supp. 388; *Loscher v. Hager, supra*). If a default occurs, a motion to preclude should be made, and, unless the motion is made before the trial, the default will be deemed to be waived (*Gebhard v. Parker, supra; Loscher v. Hager, supra; Hein v. Honduras Syndicate, supra; Fischer v. Stierngranst,* 65 App. Div. 162, 72 N. Y. Supp. 593; *Smith v. Bradstreet Co.,* 134 id. 567, 119 N. Y. Supp. 487; *Cossman v. Ballin,* 141 id. 68, 125 N. Y. Supp. 647). It is submitted, therefore, that the principal case is suported by the weight of authority.

BILLS AND NOTES—HOLDER FOR VALUE—WHEN BANK UPON DISCOUNTING NOTE BECOMES HOLDER FOR VALUE. MERCHANTS NATIONAL BANK vs. SANTA MARIA SUGAR CO., 162 A. D. 248. Bank discounted Sugar Co.'s note, depositing proceeds to the latter's account; the Sugar Co.'s deposit, at all times up to the dishonoring of note, exceeded amount of note; sums in excess of original deposit were, however, withdrawn. HELD, that as first debits are to be charged against first credits, the bank was a bona fide holder for value.

Mere discount and credit do not of themselves constitute a bona fide purchaser for value. *Scott vs. Ocean Bank in City of New York,* 23 N. Y. 289.) The first debits must be applied to the first credits. (*National Park Bank vs. Seaboard National Bank,* 114 N. Y. 28.) It is immaterial that subsequent deposits maintain a continuous balance equal to or in excess of the amount of the note in favor of the depositor. (*Fox vs. Bank of Kansas City,* 30 Kansas 441.) The New York rule is in accordance with the Kansas, Minnesota, Michigan, North Carolina, and Oklahoma rule. (*Dreilling vs. First National Bank,* 43 Kansas 197. *Bank of Minneapolis vs. McNairy,* 142 N. W. 139. *Fredonia National Bank vs. Tommei,* 131 Mich. 674. *Bank vs. McNair,* 114 N. C. 335. *Morrison & Co. vs. F. & M. Bank,* 9 Okla. 697.)

COVENANTS—BUILDING RESTRICTIONS. In suit for specific performance defendant claimed title was unmarketable because of a restriction which would prevent the building of an apartment house. The restriction prohibited "Any building or erection other than brick or stone dwelling houses of at least two stories in height . . ." HELD that the erection of an apartment house does not violate a covenant forbidding the erection of anything except dwelling houses. (*South Church v. Madison Ave. Building Co. Inc.,* 163 N. Y. App. Div. 359.)

A restrictive covenant is in derogation of the common law right to use land for all the lawful purposes that go with title and possession, and is not to be extended by implication; it is to be construed strictly against the grantor. (*Duryea v. Mayor,* 62 N. Y. 592; *Blackman v. Striker,* 142 N. Y. 555; *Kitching v. Brown,* 180 N. Y. 414). A covenant not to erect any building other than of stone or brick, adapted for use as a family residence, is not violated

by the erection of a six story apartment. The structure does not cease to be a family residence, although more than one family reside therein (*Sonn v. Heilberg,* 38 N. Y. App. Div. 515); and a covenant not to erect any buildings except first-class dwelling houses is not violated by the erection of a well-built apartment (*Bates v. Logeling,* 137 N. Y. App. Div. 578). The decisions outside New York are in harmony with the principal case. An Illinois court has held a covenant to erect "only a single dwelling" does not prevent the erection of an apartment house. (*Hutchinson v. Ulrick,* 145 Illinois 336.) In Kitching v. Brown (*supra*) it was held that the erection of a modern apartment house did not violate a covenant prohibiting the erection of a tenement house. Doubtless economic considerations have had some weight with the Courts in the construction of these restrictive covenants; and this is hinted at in the opinion of Werner, J., in Kitching v. Brown (180 N. Y. 414, 426), where he says: "The housing of the middle classes in the city of New York is as much of a problem to-day as was the housing of the poorer classes prior to 1873, and the wishes of the few must give way to the welfare of the many, except when progress is effectually barred by explicit covenants or other paramount conditions."

LANDLORD AND TENANT—PARTIAL EVICTION BY MUNICIPAL COMPULSION—PAYMENT OF RENT. The case of Duhain v. Mermod, Jaccard & King Jewelry Co. (105 N. E. 657, 211 N. Y. 364), presents the question whether a partial demolition of the demised premises, due to the landlord's being forced so to act by municipal compulsion, but without detriment to the tenant's business, is such an eviction as would suspend the rent. The premiess were on Fifth Avenue in the City of New York and were formerly used as a private dwelling and had a high stoop as an entrance. The store leased by the defendant was a basement and he used the space under the stoop for display purposes. The landlord was compelled by municipal authority to remove the stoop so that the avenue could be widened. In an action against the tenant for rent the trial judge found as a fact that the lease contained an implied covenant that the defendant should have quiet possession of the premises, but yet rendered decision and gave judgment for the landlord, and the Court of Appeals, relying upon the case of Gallup v. Albany Ry. Co. (65 N. Y. 1), affirmed the judgment on the ground that the

conduct of the plaintiff involved no wrongful act but that he merely yielded to the paramount title of the city. In New York the rule is well settled that a wrongful eviction from the whole or any part of premises suspends the rent and prevents the landlord from ejecting the tenant for sueh non payment; see Edgerton v. Page, 20 N. Y. 283, Christopher v. Austin, 11 N. Y. 218, Hamilton v. Graybill, 19 Misc. 521 and cases cited at bottom page 523. This is in accord with the great weight of authority. See cases collected in Am. & Eng. Ency. Law, p. 298; Alabama in case of Roll v. Howell (62 So. 463), allows no recovery where tenant relinquishes the premises after a partial eviction. But if tenant still remains, a quantum meruit lies against him, see Am. & Eng. Ency. Law, p. 299. The case of Duhain v. Mermod, Jaccard & King Jewelry Co., supra, seems not to be at variance with the great weight of authority holding that a partial eviction under a paramount title is not such an eviction as suspends rent, but that the tenant remains liable for the payment of such proportion as the part which he occupies bears to the whole, see cases collected Am. & Eng. Ency. Law, p. 299. In the Duhain case, supra, no such apportionment was demanded, but the Court in dictum says it would be granted. Also since the facts show no loss to the tenant but in reality a benefit, the case is undoubtedly sound.

LAW BOOK REVIEWS.

A TREATISE ON ATTORNEYS-AT-LAW, by Edward M. Thornton (two vols.; Edward Thompson Company).

According to the publisher's foreword, this is a posthumous work. While the title-page bears only the name of Mr. Thornton, his death, before the last chapter was finished, necessitated its completion and revision by Mr. Hiram Thomas, lately, we believe, an associate editor of our contemporary, "Bench and Bar."

There has long been need of a new work on the law of attorneys. Mr. Week's standard treatise has suffered by the lapse of time. Since the publication of its second edition in 1892, there has been a marked increase in the number of cases defining the right and duties of attorneys.

The two volumes by Mr. Thornton contain a clear, and, as a rule, very satisfactory exposition of the law relating to attorneys, at common law, under legislative enactments and under court rules. That even so unyielding a subject as this is not ungraced by humor,

is admirably illustrated by the paragraphs (§40) treating of "Non-légal Arguments for and against Admission" of women to the bar. Particularly commendable, however, is the inclusion of foot-notes, which deal in detail with the law of New York without detracting from the usefulness of the book to practitioners in other states. Many of these notes (*e. g.*, pp. 76 and 1295) evidence a closer familiarity with the substantive and adjective law of New York than can be gleaned from a mere study of precedents, and indicate that Mr. Thornton's work is certain to gain recognition as a valuable aid to the members of the local bar.

It is too much, perhaps, to expect a work of such length as this to be barren of error. Hence, it is not surprising to find in it an occasional statement that is open to criticism. Thus, it is said (§852) that in this state a "disbarment proceeding is *quasi*-criminal in its character." Apparently, *In Matter of Randell*, 158 N. Y. 216, 219 (1899), where this doctrine was repudiated by the Court of Appeals, has been overlooked.

Again, we cannot concur in the opinion (§890) that in New York "depositions are not admissible over objection in disbarment proceedings." Nor, it is submitted, do the cases cited, *Matter of Eldridge*, 82 N. Y. 161 (1890), and *Matter of an Attorney*, 83 N. Y. 164 (1880), support the author's view. The former case is but an authority for the proposition that, upon the trial of a disbarment proceeding, the common law rules of evidence may not be disregarded—a rule subject to the limitation, of course, that they may be abrogated by the legislature. (*Howard v. Moot*, 64 N. Y. 262 (1876). The other case merely holds that a disbarment proceeding is not an action within the meaning of a statute permitting the issuance of a commission in an action.

At the present day, a commission may be issued either in an action or in a special proceeding (*Code Civ. Proc.* §888). And so, in the disbarment proceeding of *In Matter of Spencer*, 137 App. Div. 330, 122 N. Y. Supp. 190 (1910), the court ordered a commission to take the testimony of a witness residing in Paris, despite vigorous opposition by the respondent.

While undoubtedly important, these errors prove, not that Mr. Thornton has written unwisely, but that "to err is human."