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Fordham Law Review

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RECENT DECISIONS.

BILLS AND NOTES—TRAVELLERS' CHECKS—NEGOTIABLE INSTRUMENT TO BE COUNTERSIGNED BY PAYEE—FORGERY OF PAYEE'S SIGNATURE—LIABILITY OF DRAWER.

A payee of travellers' checks, which upon issuance are required tc be signed by the payee and are to be paid by the correspondents of the drawer, the issuing bank, when countersigned with the signature of the payee, lost his travelling checks; the checks were subsequently paid by the drawer's correspondent on the forged signature of the payee. HELD that the drawer was liable to the payee for the value of the checks, the uncountersigned traveller's check being regarded as similar to an unindorsed check payable to the order of a designated payee. (*Sullivan v. Knauth,* 161 A. D. 148.)

Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. (*Frank v. The Chemical Bank,* 84 N. Y. 209.) Banks are not bound to know the handwriting or the genuineness of the body of the checks drawn upon them and paid by them (*N. B. of C. in N. Y., v. N. B. Bk. A. of N. Y.*, 55 N. Y. 211.)

Banks are bound at their risk to know the genuineness of the signature of the payee indorsed on a check payable to a designated payee, (*Morgan v. Bank of State of N. Y.*, 11 N. Y. 404.) Banks issuing traveller's checks, which are first signed by the payee and paid by the issuing bank's correspondents, when countersigned with the payee's signature are bound at their risk to know the genuine-

ness of the countersigned signature. *Samberg v. American Express Co.*, 136 Mich. 639, has been adopted in New York and seemingly is the only case upon the subject.

CORPORATIONS—RIGHT OF CORPORATIONS TO PURCHASE SHARES OF ITS OWN STOCK. A stock corporation in New York has express legislative authorization to repurchase shares of its own stock in but one instance i. e., where the stock is accepted "in complete or partial settlement of a debt owing to the corporation which by the board of directors shall be deemed to be bad or doubtful." (Stock Corp. Law, Sec. 28.) The transaction has implied statutory prohibition in but one instance, i. e., where the purchase price is paid out of other than the surplus funds of the company. In such a case, the directors are guilty of a misdemeanor. (Penal Law, Sec. 664.) Without further legislation but by a long line of decisions, it has become the well settled law of the State that a corporation acting in good faith, without intent to defraud either creditors or minority stockholders and employing only its surplus funds, has the undisputed right to purchase shares of its own stock, hold them unextinguished, and reissue them. (*City Bank of Columbus v. Bruce*, 17 N. Y. 507; *Vail v. Hamilton*, 85 N. Y. 453; *Booth v. Dodge*, 60 A. D. 27; *Strodl v. Farish-Stafford Co.*, 145 App. Div. 406; *Joseph v. Raff*, 82 App. Div. 47; *in re Fechheimer Fishel Co.*, 212 Fed. 357; *Moses v. Soule*, 63 Misc. 203; *Cullen v. Friendland*, 152 App. Div. 124; *Richards v. Wiener Co.*, 145 App. Div. 353; 207 N. Y. 59.)

There is no common law principle which prohibits such a transaction nor is it void as against public policy (*City Bank of Columbus v. Bruce*, 17 N. Y. 507). Nor does the transaction operate to diminish the capital stock of the corporation as a necessary consequence. Whether such an effect is wrought, becomes a question purely of intention (*City Bank v. Bruce*, supra; *Vail v. Hamilton*, supra; *Booth v. Dodge*, supra). Where the corporation has repurchased its stock with an intent and agreement to make an immediate resale, the courts have uniformly upheld the transaction. (*Joseph v. Raff*, supra; *Moses v. Soule*, supra.) Where a corporation had contracted to sell certain of its patent rights in exchange for shares of its own stock, the court held the contract void in the

absence of evidence either of a surplus equal to the value of the rights transferred or of an agreement of resale. (*Stevens v. Olus Mfg. Co.*, 72 Misc. 508.) By reason of Section 664 of the Penal Law, it is evident that in every contract in which a corporation agrees to repurchase some of its own shares, the law reads in a proviso that when the time of payment arrives, the company shall have a surplus out of which such payment may lawfully be made. This is a risk which any stockholder takes upon contracting to sell shares to the corporation which issued them. (*Richards v. Wiener*, supra; *in re Fechheimer-Fishel Co.*, supra). Both sound and well reasoned decisions. Such a contract, therefore, is presumptively legal at the time of its making, subject to certain limitations upon its enforceability. In a suit by the vendor for breach of the contract, the burden is on the corporation to show that when the payment was to have been made by it, it had no surplus and that hence the consummation of the contract had become illegal. (*Richards v. Wiener*, supra.) But in the Federal courts, the burden has been placed upon the vendor to the corporation to show that there was a surplus. (*Harmon v. Taylor-Rice Engineering Co.*, 84 Fed. 392.)

FIXTURES—GAS RANGES—TITLE ON FORECLOSURE.

Plaintiff installed one hundred gas ranges in an apartment house by means of the usual service gaspipe and a stovepipe flue. The gaspipe could be severed by unscrewing a coupling and the flue by lifting it out of the opening made for it. The contract under which they were installed had all the essentials of a contract for a conditional sale. The contract was not filed however as is necessary under the conditional sales statutes. The court therefore confined itself to the question whether the defendant as a bona fide purchaser at a foreclosure sale of the apartment house acquired any title to the ranges. HELD that such an attachment of the ranges was not sufficient to cause them to lose their characteristics as personal property. (*Central Union Gas Co. v. Browning*, 210 N. Y. 10; 103 N. E. 822.)

Chairs which are made to conform to plan of a Theatre and fastened to the floor and used only to seat the audience, are fixtures attached to the realty. (*Gould v. Springer*, 206 N. Y. 641; 99 N. E.

149.) Gaspipes running through the walls and under the floors are permanent parts of a building, but mirrors supported by hooks and screws driven into the walls and capable of being detached without injuring the walls remain chattels. (*McKeage v. Hanover Fire Insurance Co.*, 81 N. Y. 38.) Machinery which could be removed without injuring the real property, but not without materially impairing the efficiency of the plant becomes part of the realty. (*Union Bank & Trust Co. v. Fred W. Wolf Co.*, 114 Tenn. 255; 108 Am. St. Rep. 903; 86 S. W. 310.) If the owner of mortgaged lands agrees that a house to be built shall remain the property of the builder until paid for, it is valid as against the mortgagee, for it is no impairment of his security. (*Roberts v. Caple*, 8 Ala. App. 444; 62 So. 343.) The rule as to fixtures is laid down in Teaff v. Hewitt, 1 McCook's Ohio 511, that the three requisites are First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold. This has been followed in *Potter v. Gromwell*, 40 N. Y. 287; but in *McRae v. Central National Bank of Troy*, 66 N. Y. 489, the Court while reiterating the rule above stated says that, if the property has a determinate legal character, the manner in which the parties treat it would not change that character and the intention of the parties is only material when the character of the property is not fixed. It is readily seen therefore that the question in a particular case is a difficult one.

MARRIAGE—ANNULMENT—FRAUD. Defendant had been advised by physician that he was suffering from tuberculosis, upon inquiry made by plaintiff, defendant represented to her that the symptoms he displayed were manifestations of a cold. A few days after their marriage plaintiff discovered the misrepresentation and at once ceased cohabitation. In an action for annulment, HELD that this was "a misrepresentation of a fact of sufficient weight for the court of competent jurisdiction if either party thereto consents to void." (*Sobal v. Sobal*, N. Y. Law Journal, Dec. 7, 1914.)

A marriage is void from the time its nullity is declared by a court, from the standpoint of public policy, to declare the contract

such marriage by reason of force, duress, or fraud. Dom. Rel. Law, §7; Code Civil Pro. §1743.) This, because of the fact that marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential. (Dom, Rel. Law. §10.) The statute, however, declares it a civil contract to distinguish it from a religious sacrament and to make the element of consent necessary to its legal validity. (*Wade v. Kalbfleisch,* 58 N. Y. 282.) Marriage is, however, "more than a mere contract." It is a "status initiated by contract." (*Moot v. Moot,* 37 Hun. 288.) "It partakes more of the character of an institution regulated and controlled by public authority upon principles of public policy for the benefit of the community." (*Wade v. Kalbfleisch,* supra.) Marriage has been held not to be a contract within the meaning of Art. I, Sec. 10, of the U. S. Const., prohibiting the impairment of contract obligations by legislation. (*Maywood v. Hill,* 125 U. S. 190.) In ordinary civil contracts the general rule is, that any misrepresentation of a material fact going to the essence of the contract is fraud sufficient to vitiate the consent of the party defrauded. Does the same rule apply to marriage contracts? It does, if we bear in mind the essence of the marriage contract. "Companionship, with its reciprocal duties, is the basis of marriage." (*Keys v. Keys,* 6 Misc. 355.) Consequently, any misrepresentation as to the existence of a fact which would deprive either party of that companionship and consortium which is so essential to the preservation of the marital relation, will be sufficient to warrant an annulment, if cohabitation does not follow the discovery of the fraud and reasonable prudence could not have discovered it. Misrepresentations as to general health, fortune, position, previous conduct and such qualities, do not go to the fundamental elements of the marriage relation. (*Gumbiner v. Gumbiner,* 72 Misc.. 211.) It has been held that previous lapses from virtue are not grounds for an annulment, since the duties of consortium may still be discharged. (*Domschke v. Domschke,* 138 A. D. 454.)

In *Di Lorenzo v. Di Lorenzo,* 71 A. D. 509. The court sanctioned the rule laid down in *Fisk v. Fisk,* 6 A. D. 432 and *Wendel v. Wendel,* 30 A. D. 452: "If, when the relation is entered into the party is competent to make the contract, is mentally competent to do the duties which the contract involves and physically able to

meet its obligations, nothing more can be required." (See *Kujek v. Goldman*, 150 N. Y. 176; *Reynolds v. Reynolds*, 3 Allen (Mass.) 605.) On appeal (174 N. Y. 472) the court of appeals held that "there is no valid reason for excepting the marriage contract from the general rule"—i. e., of fraud, as above stated. In this we think the court erred. In *Svenson v. Svenson*, 78 A. D. 536; the court recognizes the general rule that "ill health although concealed or misrepresented will not itself justify an annulment." Yet the rule has no application to "a disease which involves contagion in the marital relation." (On appeal, 178 N. Y. 54.)

This reasoning is followed in the principal case. The court took judicial notice of the fact that tuberculosis is such a disease that "through the close tie of the marital relation grave and disastrous results from infection may be caused to the other party and possible evil consequences to the offspring of such a marriage."

It is imperative that this doctrine be not extended too far. The facts of the principal case are apparently strong. There was an actual misrepresentation to an inquiry. Whether the nature of his disease imposed a positive duty upon him to make it known, is not in issue. (Am. & Eng. Encyc. 14, p. 69-71.) A physician testified that defendant is incurable. The danger of annulling a marriage upon a physician's opinion is very obvious. Cohabitation lasted for a few days and ceased immediately upon discovery of the fraud. The court does not go into the question whether reasonable prudence could have discovered the nature of the disease.

The dangers of collusion are great. There was no defense offered in the principal case. There is, therefore, little likelihood of an appeal; the decision, though in its nature exparte, will serve as a precedent.

BOOK REVIEWS.

BRADBURY' PLEADING AND PRACTICE REPORTS, VOLUME 3, edited by Harry B. Bradbury (The Banks Law Publishing Co.).

Reviewers, we think, may be separated into two classes. The attitude of one class is typified by that of William Style, who, as long ago as 1658, wrote the "The Epistle Dedicatory," which is prefixed to his reports, that "the Press hath been very fertile in this our Age, and hath brought forth many, if not too many births of

this nature." The other class is imbued with the spirit of that great master of the intricate art of pleading, Baron Parke, who, as Serjeant Ballantyne informs us in his recollections, sacrificed promptness at dinner on the altar of a fine point of demurrer. As for us, we trust we are not so oblivious to the toil incident to the preparation of a book for the legal profession as to receive it ungraciously, after the manner, whether real or affected, of reviewers of the former class.

Mr. Bradbury's latest addition to his series of reports is one to delight the heart and mind of a Baron Parke. It is filled to overflowing, like " a gift-ship to Belgium," with decisions which adjudge points in pleading and practice that are of great interest and extreme nicety. The usefulness of the book is enhanced by the addition (*e. g.*, page 3, *et seq.*, and page 16, *et seq.*), of exhaustive notes. The work, of course, is designed purely for members of the bar. But we venture the opinion that familiarity with its pages will compensate the law-student for his labor, for, as it was anciently quaintly said (*Co. Litt.*, §534), "know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learn this."

We cannot but commend an undertaking such as this, that will put in enduring form many of the short decisions now preserved in *The New York Law Journal*, which illuminate the path to judgment. The utility of printing charges of trial judges is open to doubt. As a rule, they are extemporaneous, and lack, however accomplished the deliverer, that acute analysis which is the fruit of discriminating research and long meditation. On the other hand, we heartily approve of the idea of following an opinion with the peladings, orders and other forms, discussed by the court or used by counsel.

If Mr. Bradbury has erred in the discharge of his editorial duties, his failings may be said to be negative rather than positive. Perhaps we expect too much of him If so, his is the fault, and his admirable "Rule of Pleading" the proximate cause thereof.

Apropos of *Cape May Glass Co. v. Jetter Brewing Co.*, (City Ct., 1912), at page 34, which held that a denial of knowledge or information, etc., is frivolous, if interposed by a corporation sued

tor goods sold and delivered. Apparently, the learned editor has overlooked *Scranton & Lehigh Coal Co. v. Hetkin & Co.*, 78 Misc. 512, 138 N. Y. Supp. 617 (1912), a case where such a denial was declared to be proper by a court sitting, to use the dictum of MacLean, *J.*, across the "affluent East river, which often divides law and practice as did the Mahratta ditch, upon one brink of which the widow's suttee was commended to and of the pious, while on the other it was abhorrent to the law and religion." (*Baum v. Elias*, 64 Misc. 43, 44, 117 N. Y. Supp. 935 [1907].) While we think the *Cape May* case (supra) is impeccably correct, attorneys in the Second Judicial Department, we believe, will continue to treat the *Scranton* case (supra) as binding upon them, until it is overruled.

Is *Florsheim v. Berlinger* (City Ct., 1911), at page 40, sound? With us, the taint of usury will render a note void, as between the immediate parties thereto, to say the least. Where then a defendant tacitly admits the making and existence of a note (which means, to be sure, nothing less than a valid note), by omitting to deny the plaintiff's allegations thereof, logical consistency would seem to require that that defendant should be precluded thereby from thereafter setting forth the defense of usury (see *Fleischmann v. Stern*, 90 N. Y. 110 (1881), and *Banzer v. Richter*, 68 Misc. 192, 123 N. Y. Supp. 678 [1910]). Is not, therefore, the opposite result attained by the court in the *Florsheim* case (supra) untenable? It must remain a matter of regret that Mr. Bradbury has not favored us with his opinion on this question.

The head-note to *Speedwell Motor Car Co. v. Boyce* (Sup. Ct., 1913), at page 324, is misleading. It is true the court held that a motion for bill of particualrs may be based upon an attorney's affidavit. But the head-note is inadequate, because it omits to indicate that the court carefully limited its ruling to the "circumstances of this case." Indeed, the editor's failure to state the facts robs the case, as reported, of practical value. But in any event the true rule is, in our opinion, that "the affidavit of an attorney will only be received when it is shown that he is the only person who has knowledge of the subject-matter of the litigation, or that it is not possible to obtain the affidavit of the party, and that the attorney has received from the party full information of the subject-matter and makes full disclosure of what the information consists" (*Mungall v. Bursley*, 51 App. Div. 380, 64 N. Y., Supp. 674 [1910]).

SAUL GORDON.