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FORDHAM LAW REVIEW

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Recent Decisions

SPECIFIC PERFORMANCE—MARKETABLE TITLE—ENCROACHMENTS ON STREET. Plaintiff and defendant entered into a contract for the purchase by defendant from plaintiff of a seven-story apartment house on Manhattan Avenue and 116th Street, Borough of Manhattan. The apartment house was so constructed that several rows of bay-windows and the store show-windows extended beyond the building line, each one foot, and the stoop four feet, said encroachments being under express permission from the building department which permission was still in full force. On the closing day, defendant refused to accept the deed tendered by plaintiff on the ground that these encroachments into the street line made the title unmarketable. In a suit brought by plaintiff for specific performance, HELD, that, as the City authorities could at any time rescind the permission under which these encroachments were made and compel their removal, they rendered plaintiff's title unmarketable, and defendant could not be forced to take it (*Acme Realty Co. v. Schinasi*, 215 N. Y., 495.)

The purchaser in a sale of real estate is entitled to a marketable title (*Burwell v. Jackson*, 9 N. Y., 535; *Delevan v. Duncan*, 49 N. Y., 485), and if the title is unmarketable specific performance, of course, will not be decreed. A marketable title is one that will enable the vendee to hold his land in peace, and if he wishes to sell it to be reasonably sure that no flaw or doubt will arise to disturb its market value. (*Vought v. Williams*, 120 N. Y., 253; *McPherson v. Schade*, 149 N. Y., 16). Conflicting views of the New York Courts concerning the validity and effect of municipal ordinances allowing street encroachments under certain restrictions (*Wormser v. Brown*, 149 N. Y., 163; *Broadbelt v. Loew*, 15 App. Div., 343, affd. on opinion below in 162 N. Y., 642; *Ackerman v. True*, 175 N. Y., 353; *City of New York v. Rice*, 198 N. Y., 124; see also opinion below in *Acme Realty Co. v. Schinasi*, 154 App. Div., 397) need not be considered here. Granting that the encroachments in this case were constructed lawfully and that they are lawful at the present time (Code of Ordinances of The City of New York, Chap. 23, Sec. 163), still the City can require their immediate removal at any time by rescinding the permission given, and if not unlawful at the present time they would become so at once upon such rescission (Code of Ordinances, *Supra; City of N. Y. v. Rice, Supra;* Greater New York Charter, Sec. 50; *Deshong v. City*, 176 N. Y., 475). Recent action by the city government in similar cases, confined at present however to principal thoroughfares, renders such action reasonably to be anticipated. It would appear then that the Court was right in refusing to compel specific performance.

The decision of the Court of Appeals in the principal case reaches a directly contrary result from that of the same Court in *Broadbelt v. Loew, Supra,* decided in 1900. The facts in the two cases were similar with this exception: in the Broadbelt case it was stated that action by the municipal authorities to compel the removal of street encroachments was too remote a possibility to be considered, while in the Acme Realty case the Appellate Division made a finding that such action was reasonably to be looked for; and Werner, J., writing for the Court, explains the two cases on this ground. Loew in 1900 was compelled to

accept a title which today he could not force on an unwilling vendee. We have here an example of predicating property rights on a variable basis such as the policy of a city government. When it is considered that a great majority of the buildings within the city limits have street encroachments similar to those in the principal case, it seems that the decision may have considerable effect upon real estate transactions.

FOREIGN CORPORATIONS—ILLEGAL DIVIDENDS—RIGHT TO SUE. Plaintiff, a New Jersey Corporation, transacts its principal business in New York, having obtained its certificate pursuant to Sections 15 & 16 of the N. Y. General Corporation Law. In its corporate name it sues a director who participated in the declaration of dividends out of the capital stock. HELD, the corporation could sue in its own name in this state, though New Jersey, where it was chartered gave the right of action to the stockholders (*German American Coffee Co. v. Diehl*, 216 N. Y., 57).

The Legislature has the power to impose conditions under which a foreign corporation shall transact business within this state (*Sinnott v. Hanan*, 214 N. Y., 454; *Lockwood v. U. S. Steel Corp.*, 209 N. Y., 375). Foreign corporations may be excluded altogether, unless they be federal instrumentalities (*Phoenix Mutual Life Ins., Co. v. McMaster*, 237 U. S., 63) or be engaged in foreign or interstate commerce (*People v. Wemple*, 131 N. Y., 64). The internal affairs of a foreign corporation must be left to the state of its origin (*Southworth v. Morgan*, 205 N. Y., 293).

The General Corporation Law of New Jersey prohibits directors from declaring dividends except from the surplus or net profits arising from the business of their corporations. For a violation, the directors are made jointly and severally liable to the stockholders, or in case of insolvency, to the corporation or its receiver (Section 30). The New York statute prohibits the same act, but gives the right of action to the corporation

or its creditors (Stock Corporation Law, Sec. 28). This section applied only to domestic corporations. (*Vanderpoel v. Gorman*, 140 N. Y., 563; *Lane v. Wheelwright*, 69 Hun, 180). But Sec. 70, as added by the Laws of 1897, Ch. 384, extends the privilege to foreign corporations. It provides that "the officers, directors and stockholders of a foreign corporation doing business in this state, except moneyed or railroad corporations, shall be liable under the provisions of this chapter in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation (1) for the making of unauthorized dividends * * * Such liabilities may be enforced in this state in the same manner as similar liabilities imposed by law upon officers, directors and stockholders of a domestic corporation." Whether the dividend is unauthorized depends upon the law of the state which chartered the corporation (*Hutchinson v. Stadler*, 85 A. D., 424). If the dividend is unauthorized by the law of the corporate origin, the directors are made liable under the statute of New York and this liability may be enforced in the same manner as similar liabilities upon directors of domestic corporations. This liability is enforced by the domestic corporation or its creditors. Section 70 does not merely declare a rule of comity; it extends to foreign corporations, doing business in this state, the prohibition against illegal dividends in favor of domestic corporations set forth in Section 28 and it provides a new remedy by which foreign corporations may enforce this prohibition; it reinforces the New Jersey prohibition with a new sanction and a new remedy (reversing 167 A. D., 928, and overruling *de Raismes v. U. S. Lithographic Co.*, 161 A. D., 781). This conclusion is confirmed by a reference to the Penal Law, Section 664, which makes it a misdemeanor for directors to declare dividends except from surplus profits. Section 667 provides that it is no defense that the corporation is a foreign one, if it is engaged in business or keeps an office therefor in this state.

MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE IN TUNNEL BY FALLING ROCK—WHEN DOCTRINE OF SAFE PLACE TO WORK NOT APPLICABLE. The defendant had a contract for the construction of the Catskill Aqueduct. Plaintiff was a "mucker"—one whose duty it was to load cars with loose and broken rock from the floor of the tunnel for removal therefrom. In the course of this occupation he was injured through the fall of a piece of rock from the roof of the tunnel, after a squad appointed for the purpose had "scaled" the said roof of loose rock subsequent to the detonation of a trimming-blast. The trial judge in his charge submitted to the jury the question of the defendant's negligence in not providing for plaintiff a safe place to work: under the instruction that failure so to provide rendered it liable: The jury returned a verdict for plaintiff. On appeal. HELD: That the Common Law Doctrine of safe place to work does not apply to the facts of the case, and that the error of the Trial Court in submitting the question to the jury required reversal. (*Mekki v. Halbrook, Cabot & Rollins Corporation,* 168 App. Div., 719.)

The Common Law Doctrine that a master cannot avoid or delegate the responsibility of providing for his servant a safe place to work, is well supported by decisions throughout the United States. (*Dumas v. Walville Lumber Company,* 64 Wash., 381, 116 Pac., 1091; *Graaf v. Vulcan Iron Works,* 59 Wash., 325, 109 Pac., 1016; *Bernheimer Bros. v. Bager,* 108 Md., 551-561; *White v. Nutriline Milling Co.,* 63 So., 385; *Raxworthy v. Heisin,* 191 Ill. App., 457.)

Courts in the State of New York, however, have strictly declined to permit the application of that rule, where the inherent dangers obtaining in the work, render evident an assumption of risk on the part of the workman (*De Vito v. Crage,* 165 N. Y., 378, also 74 App. Div., 33), or where the very prosecution of the work itself, creates the place and causes the danger. (*Citrone v. O'Rourke, Engineering Construction Co.,* 188 N. Y., 339; *Henry v. Hudson & Manhattan R. R. Company,* 201 N. Y., 140.)

The Appellate Court distinguishes the principal case from one of its recent decisions, wherein a successful plaintiff in similar

employment was injured by falling rock, while removing debris from the tunnel sixty feet back from the heading. (*Bitolio v. Bradley Contracting Company,* 166 App. Div., 836.)

Unfortunately for purposes of review, the Court assigned no reason whatever for such distinction. It would seem that to draw an anology between the Bitolio case and the principal case, would not have been as forced a construction as the ruling of the Court by which it placed the principal case on the side of the Henry case and the Citrone case (*Supra.*). Since the doctrine that "When the work makes the place and creates the danger" has received herein application to a set of facts distinguishable from those cases which it has formerly governed, it is submitted that the decision is unsound.

REAL PROPERTY—TENANCY BY THE ENTIRETY—ATTEMPT TO CREATE. A husband, in order to avoid a transfer tax on his estate, conveyed his real property directly to himself and his wife, as tenants by the entirety. HELD: that such a conveyance merely created a tenancy in common. (*Matter of the transfer tax on the estate of John C. Klatzl, deceased,* New York Court of Appeals, N. Y. Law Journal, Oct. 20, 1915.)

At common law a conveyance by a third person to a husband and wife creates a tenancy by the entirety. (*Jackson v. Stevens,* 16 Johns., 110.) This estate exists by virtue of the common law principle of the unity of husband and wife. (2 Kent's Comm., p. 132.) That principle was not abrogated by Sec. 56 of the Dom. Rel. Law permitting husband and wife to convey directly to each other, or by the other statutes removing married women's disabilities: any statute having that effect would simultaneously destroy the estate of tenancy by the entirety. (*Stelz v. Shreck,* 128 N. Y., 263, 266.) Nor can it be a joint tenancy merely because it fails to be a tenancy by the entirety. Though both have many similar attributes, they are not the same either in substance or in form (*Stelz v. Shreck, Supra*). A conveyance to two or more persons unless expressly declared to be a joint

tenancy, creates a tenancy in common (Real Property Law, Sec. 66). The time honored unities would appear to be violated in such a conveyance as this, as the husband always continued to own the property. Accordingly it has been held in a lower Court (*Saxon v. Saxon,* 46 Misc., 202) that the statute enabling husband and wife to convey to each other, abrogates the rule of marital unity, in regard to conveyances made under it. Judge Collin's dissenting opinion in the principal case presents the interesting proposition that the husband conveyed from himself as one legal person to himself and wife as another, but this distinction appears to be somewhat fine-spun. Judge Bartlett's concurring opinion seems to misapprehend the true nature of tenancy by the entirety. The prevailing opinion would appear to be the sounder, and it is certainly more in accord with the established law. (*Bertles v. Nunan,* 92 N. Y., 152, 159.)

HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES—CONSTRUCTION OF CONTRACT. A husband and wife contracted in writing, that in consideration of the husband's refraining from attempting to obtain a place on the police force (to which the wife was strenuously opposed) the wife would pay to her husband, during his lifetime, quarterly installments of an annual income which she was receiving, amounting to $10,000. The agreement further provided that nothing therein contained should obligate the husband to pay the debts or other obligations of the wife, which she agreed would be paid by her out of her property. In an action by the husband to recover two installments which had fallen due under the said agreement, HELD, that the contract imported a good consideration, was valid, and that the plaintiff might recover. (*Werner v. Werner,* Appellate Division, 154 N. Y. Supp., 570.)

It was contended on the part of the defendant that the agreement by its terms, relieved the husband from the duty imposed upon him by the law to support his wife. This construction, if correct, would invalidate the contract, being contrary to Section

51 of the Domestic Relations Law (chapter 14, Consol. Laws; chapter 19, Laws 1909), which provides that "a husband cannot relieve himself from his liability to support his wife by contract with her."

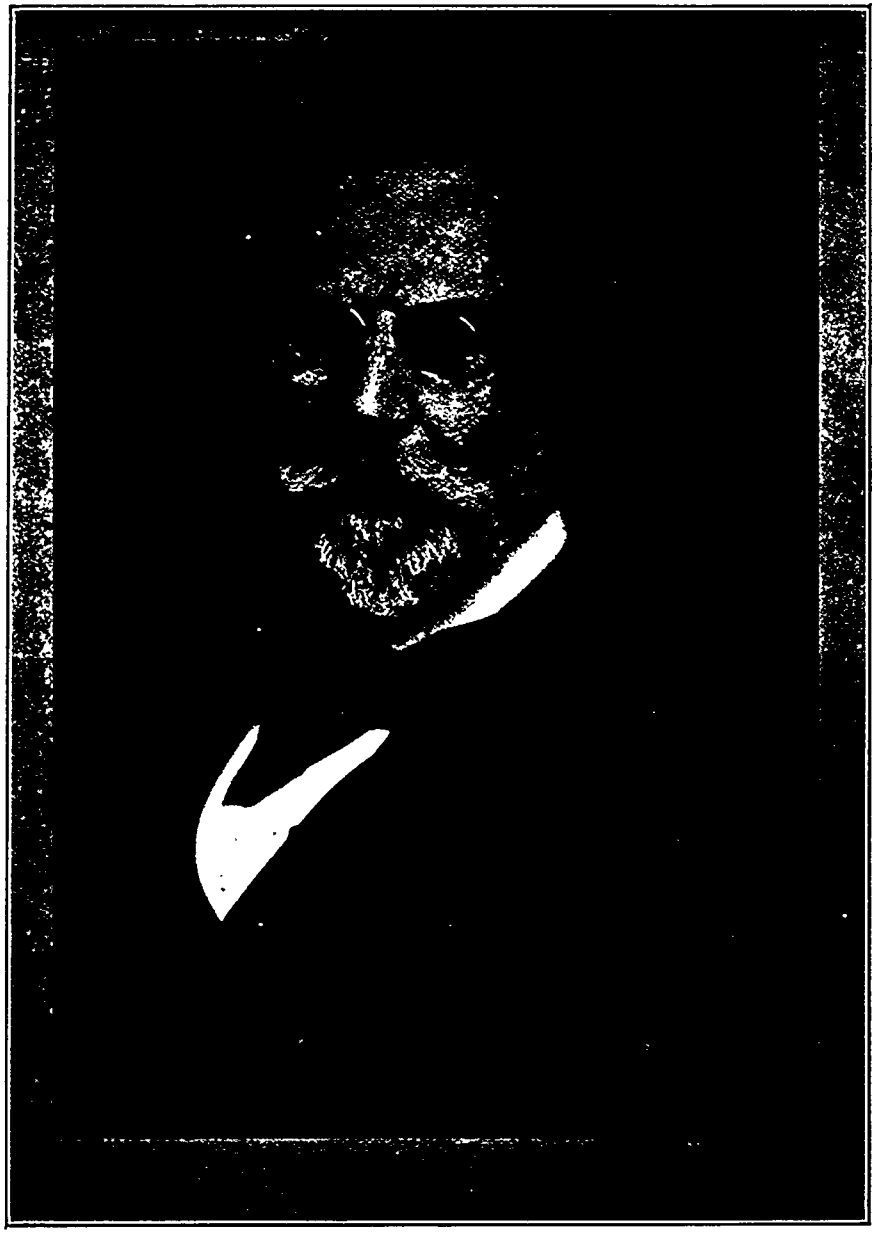
A husband is obliged to supply his wife with necessaries, which are his own debts; but he is not obliged to pay any debts contracted by his wife which are not for necessaries and which he has not expressly authorized her, as his agent, to contract. (*Cromwell v. Benjamin,* 41 Barb., 558; *Wanamaker v. Weaver,* 176 N. Y., 75.) The husband was not legally obligated to assume the liability for his wife's personal debts. The agreement by its terms did not obligate him to assume them. The husband's obligations to supply his wife with necessaries, being his own personal debt, the contract did not affect that obligation. The contract affected only the debts and obligations of the wife. The liability of the husband for debts incurred for his wife's support, being his, and not the wife's, she clearly could not contract with him, to relieve him, of obligations never legally incurred by her. It is submitted that the decision herein is sound.

CARRIERS—LIABILITY OF CONSIGNEE—LAWFUL RATES. Plaintiff, a common carrier, delivered goods to defendant, under a bill of lading which designated defendant as consignee. Defendant paid the charges asked, which, in fact, were erroneously computed by plaintiff. Fifteen months later the plaintiff discovered its mistake and demanded the additional sum, as the lawful charge under the Interstate Commerce Act. Held: that plaintiff could recover; that defendant was the presumptive owner and could not prove his agency to the consignor. (*Pennsylvania R. R. v. Titus,* 216 N. Y., 17.)

A consignee is the presumptive owner of goods consigned to him, if he receives them without communicating to the carrier his true relation of factor or agent. By accepting the goods he becomes bound to pay the unpaid legal charges of transportation. (*Sweet v. Barney,* 23 N. Y., 335; *White v. Schweitzer,* 147

A. D., 544.) The obligation arises from the presumptive ownership, the acceptance of the goods and the services rendered and benefits conferred by the plaintiff for charges made and to be paid.

Payment of freight charges was made by the bill of lading, a condition precedent to delivery to the consignee. By his acceptance, the law implies a promise on his part to pay the lawful charges. He made himself a party to the contract with the consignor or entered into an original contract to pay, which took the place of the right of the plaintiff to retain the property until charges were paid. (*Hinsdell v. Weed*, 5 Den., 172; *Davidson v. City Bank*, 57 N. Y., 81.) The rates fixed by the Interstate Commerce Act are arbitrary, and immutable by agreement or mistake of the parties. (*Louisville & Nashville R. R. Co. v. Maxwell*, 237 U. S., 94.) Hence there can be no estoppel against the plaintiff: it could not, by its act, intentional or unintentional, relieve the defendant from the compulsory direction of the Statute. The decision in the principal case seems a sound one.



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