Fordham Law Review

Volume 1 | Issue 4 Article 1

1914

Recent Decisions

Fordham Law Review

EDITED BY FORDHAM LAW STUDENTS

RECENT DECISIONS.

ALIMONY — DIVORCE — JURISDICTION. Under a Separation Agreement executed by two residents of New York, the husband promised to pay his wife Five Dollars a week during her coverture. The wife instituted divorce proceedings in Nevada. The husband remained a resident of New York, did not appear in the Nevada action, nor was any personal service had upon him. After obtaining an absolute divorce by the husband's default, the wife returned to New York and sues for alimony due under the agreement. HELD, that she was bound by the Nevada divorce, although her husband might have attacked it. Hence, he is not liable. (*Felberbaum v. Felberbaum,* N. Y. Law Journal, Jan. 12, 1915.)

The decision serves to illustrate the attitude of New York toward foreign divorces. It is the settled law of this State that a decree of divorce granted in any State against a resident of New York is void for want of jurisdiction, unless (1) the defendant was served with process within the jurisdiction of that court or (2) has appeared in person or by answer and thus submitted himself to that jurisdiction. (*People v. Baker,* 76 N. Y., 78; *Matter of Kimball,* 155 N. Y., 62.) Of course, to take cognizance of any proceeding, it is essential that the court have jurisdiction, i. e., an authority validly to adjudge the rights and obligations of the parties to the controversy. In divorce, separation or annulment proceedings, the law of the actual bona fide domicile of the parties, gives jurisdiction to alter the marital status. 2 Bishop, Marr., Div., & Separ., § 48.

Under statutory provisions, each State prescribes a certain period of residence as necessary before a party may seek relief before its courts in divorce proceedings. (See N. Y. Code §§ 1756, 1763.) Mere residence, i. e., a temporary abiding, is not sufficient It must amount to a domicile: a bona fide residence accompanied with an intent to remain indefinitely. (*Campbell v. Campbell,* 90 Hun, 233.) A party then, who has complied with the statutory requirement may apply to the court of the domicile to have his or her marital status altered or dissolved.

The question then arises, how far is the decree rendered binding. It is settled in New York that such a decree "is valid so far as it affects the marital status of the plaintiff, if granted by a court, pursuant to its statutes, to one of its resident citizens in an action brought by such resident against a citizen of another State, though defendant never appears nor is served within that jurisdiction. Yet the marital status of such non-resident defendant is in no way changed thereby." (*Rigney v. Rigney,* 127 N. Y., 408; *Starbuck v. Starbuck,* 173 N. Y., 503.) In other words, a divorce granted by another State against a New York resident who has not submitted to the foreign jurisdiction, is of no effect in New York, even though all statutory requirements of that State as to residence, substituted service, etc., have been observed. (*People v. Baker,* supra; *O'Dea v. O'Dea,* 101 N. Y., 23; *Hunt v. Hunt,* 72 N. Y., 217; *Jones v. Jones,* 108 N. Y., 415.) "The process of courts run only within the jurisdiction which issues them. They cannot be served without the jurisdiction which issues them and the courts of one State cannot acquire jurisdiction over citizens of another State, under statutes which authorize a substituted service or which provide for actual service without the jurisdiction, so as to authorize a judgment in personam against the party defendant." (*Jones v. Jones,* supra.) "A State may adjudge the status of its citizens toward a non-resident; and may authorize to that end such judicial proceedings as it sees fit. Other States must acquiesce, so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effects over the borders of another State to the subversion of its laws and the defeat of its policy, and fix upon a citizen thereof a status, against his will and without his consent and in hostility to the laws of the sovereignity of his allegiance." (*People v. Baker,* supra.)

Is this a violation of the provision in the United States Con-

stitution requiring that "full faith and credit shall be given in each State to the judicial proceedings of every other State?" New York seems to answer that such a decree is of no binding force but a "mere arbitrary prescription" and as such entitled to no recognition. Nor is there any principle of comity which "demands that another sovereignty shall permit the status of its citizens to be affected" by a foreign divorce "when contrary to its own public policy or its standard of morals." These words hint at the reason for New York's attitude. The "standard of morals" of New York is shown by the fact that but one ground is sufficient to warrant a divorce, viz., adultery. New York stands perhaps alone in thus strictly limiting the grounds for divorce, and, when we realize that in many States there are no less than sixteen—scarcely any State runs below five grounds, we may conclude that a foreign divorce is very likely to tend to the subversion of our laws and the defeat of our policy,—although if it were granted for adultery it seems it would not run counter to our "standard of morals."

While the decision in the principal case may fairly be based on the ground of estoppel, yet it is submitted that the language used is inexact. We have the defendant "ratifying" a decree absolutely void as to him. True, there is an estoppel by record against the plaintiff. Having invoked the jurisdiction of Nevada, she cannot be heard to question it—not because of the fact that her husband "ratified" the decree, but because of the estoppel.

The New York attitude toward foreign divorces has been severely criticised because of the uncertainties and hardships resulting therefrom. Yet, we believe, with Folger, J., that "it is better, by an adherence to the policy and law of our jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict," by Federal supervision.

CORPORATIONS—LIABILITY OF DIRECTOR FOR NEGLECT. The complaint alleged that defendant, a director of plaintiff corporation, neglected to inform it of a continued misapplication of the funds of plaintiff's subsidiary corporation by its general manager. HELD, that a cause of action was stated, the damages being the diminution in value of plaintiff's stock. (*General Rubber Company v. Benedict*, 164 A. D., 332.)

Directors must use ordinary care and prudence in the management of the corporation—the same degree of care and prudence that

men prompted by self-interest generally exercise in their own affairs. (*Hun v. Cary,* 82 N. Y., 65.) What constitutes a breach of this duty depends of course upon the particular facts involved. But applying the test of the New York courts to the principal case, it cannot be doubted that the decision is sound. If the defendant, instead of being a director in the holding corporation, had individually held the shares of the subsidiary company, it seems self-evident that he would have taken steps to stop any misapplication of the latter's funds. Whether or not the action is properly brought by the plaintiff corporation, which is a stockholder in the defrauded corporation, presents a different and more difficult question. The law regards an injury done to a corporation by a director as done to the corporation itself and not to the stockholders. Hence the action is one which must be brought in the corporate name. (Cook on Corporation, Sec. 701.) It is only after demand upon and refusal by the corporation to bring the action or without demand when the directors who committed the wrongful act continue to act as such, that a stockholder in behalf of himself and others may sue. (*Hanna v. Lyon,* 179 N. Y., 107.) Even then, the money recovered belongs to the corporation, in whose right the action is brought. It is to the corporation itself that directors are liable for the breach of their duty. (*Niles v. New York Central and Hudson River R. R.,* 69 A. D., 144, 176 N. Y., 119.) For directors are the agents of the entity and not of the stockholders or individuals. Thus, in *Niles v. New York Central,* supra, a stockholder of a corporation sued in his own behalf, alleging an injury done to the corporation by the defendant. Upon demurrer, it was held that the injury done was to the corporation itself and not to the stockholders; hence an action for damages must be brought in behalf of the former. Upon this authority two judges dissented from the principal case, holding that a right of action lay only in the defrauded subsidiary corporation. Yet the distinction seems clear. The plaintiff here does not sue in its own behalf as a stockholder in the wronged company for injury done to the latter. It is suing as a corporation for injury done to itself by reason of the unfaithfulness and neglect of its own director. Hence it is submitted that the decision is sound.

INSURANCE—CONDITIONS—BURDEN OF PROOF. Action brought by plaintiff as surviving parent of one Feinman, a deceased member

of defendant lodge, to recover the sum of $500 as a death benefit. HELD, that in actions upon policies of insurance the allegation that all of the conditions were fulfilled by the insured, even when denied by the answer, does not place upon the plaintiff the burden of proving that each particular condition or agreement was fulfilled. (*Feinman v. United States Grand Lodge,* 149 N. Y. S., 862.)

A plaintiff suing on a contract must plead and prove performance of conditions precedent. (*Newton Rubber Works v. Graham,* 171 Mass., 352; *Work v. Beach,* 59 Hun., 625.) An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the assured. (*McLoon v. Commercial Mutual Ins. Co.,* 100 Mass., 472.) Plaintiff must allege in his pleadings the truth of all the statements in the application and assume the burden of proof as to such of them as are denied. (*Fell v. Hancock Mut. Life Ins. Co.,* 76 Conn., 494.) While Rhode Island recognizes that conditions precedent must be proven by the plaintiff, and holds that this rule applies to all contracts including the contract of insurance, yet realizing the difficulty of proving many details which in life insurance lie peculiarly within the knowledge of the applicant himself, and that it would be unduly burdensome, if not impossible, for another to prove them after the applicant is dead, it has evolved the rule that the burden of proof may be lifted, not shifted, by a presumption in favor of honesty and against fraud, until something appears to rebut it. (*Sweeny v. Met. Life Ins. Co.,* 19 R. I., 171.) Although logically all conditions precedent should be pleaded and proved, it is impracticable in insurance law for plaintiff to prove all conditions precedent, warranties and representations. The number of questions in the applications is usually very great, relating to habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove after the death of the insured. (*Chambers v. Northwestern Mut. Life Ins. Co.,* 64 Minn., 495, 497.) Some courts in order to justify placing the burden on the defendant have construed warranties and conditions which are not "conditions precedent to the making of the contract," as conditions subsequent. (*Port Blakeley Mill Co. v. Hartford Fire Ins. Co.,* 50 Wash., 657.) The principal case is in accord with the great weight of authority in favor of the practicableness of placing the burden on the defendant, and with previous holdings in New York. (*Piedmont Life Ins. Co. v. Ewing,* 92 U. S.,

377; *Globe Mut. Life Ins. Ass'n. v. Ahearn,* 191 Ill., 167; *Jones v. Brooklyn Life Ins. Co.,* 61 N. Y., 79; *Rau v. Ins. Co.,* 50 N. Y., A. D., 428; *Liesny v. Met. Life Ins. Co.,* 147 N. Y., A. D., 253.)

PLEADING—FAILURE TO PLEAD FOREIGN STATUTE. In an action brought upon a promissory note, executed, delivered and payable in the State of Illinois, evidence of a statute of Illinois not alleged in the pleading was admitted over the objection of the plaintiff. HELD, the statute of Illinois not having been pleaded it should not have been received in evidence. (*Peterson v. Fowler,* 162 A. D., 21.)

"It is a well settled rule, founded on reason and authority, that the lex fori, or in other words the laws of the country to whose court a party appeals for redress furnish in all cases, prima facie, the rule of decision." (*Monroe v. Douglas,* 5 N. Y., 447.) "And if either party desires the benefit of a different rule or law as, for instance, the lex domicili, lex loci contractus; or lex loci rei sitae; he must aver and prove it." (*Monroe v. Douglas,* supra, 447.) It is not sufficient merely to set forth the title of a foreign statute, there must be allegations showing what the provisions of such statute are. (*Howlan v. New York & N. J. Telephone Co.,* 131 A. D., 443.) Foreign law may however be pleaded according to its legal effect. (*Berney v. Drexel,* 33 Hun, 34.) If the defendant desire a fuller statement of the facts as to the foreign law pleaded in the complaint his remedy is not by demurrer but by a motion to make more definite and certain. (*Gleitsmann v. Gleitsmann,* 60 A. D., 371.) The point is well settled in New York. (*Southwork v. Morgan,* 205 N. Y., 293), and the majority of the States concur with New York. (*Swank v. Hufnagle,* 111 Ind., 453; *The Great Western Railway Co. v. Miller,* 19 Mich., 305; *Smith v. Mason,* 44 Neb., 610.)

PROPERTY—TRADE FIXTURES—WHEN REAL PROPERTY. More than four months before Kesner Company went into bankruptcy, claimants obtained a judgment against it, on which, however, execution was never issued. Since then, trade fixtures annexed by Kesner Co. to the building it leased (which lease had some ten years to run) were sold by the Trustee in bankruptcy. Claimants claim

lien on proceeds of sale. HELD, that, although as between Kesner Co. and its landlord, the trade fixtures were removable as personalty, as between Kesner Co. and third persons they were real property, being attached to a leasehold that had over five years to run at the time of judgment, and were as real property subject to lien of judgment although no execution was ever issued, under Code Sec. 1251. (*Matter of J. L. Kesner Co.,* Bankrupt, U. S. Circuit Court of Appeals, Second Circuit, December, 1914.)

The decision, it should be noted, holds these fixtures the real property, not of the owner of the building to which they were annexed, but of the Kesner Co., whose lease on the building had some ten years to run. The prevailing opinion of Ward, Circuit Judge, in which Coxe, J., concurs, reaches its conclusion by analogy from the cases in New York holding that when an owner of land, who has annexed fixtures to it, either sells or mortgages it, the fixtures pass though not mentioned, (*Walker v. Sherman,* 20 Wend., 636, 655; *Day v. Perkins,* 2 Sandf. Chan., 359), and cases holding that the same rule applies in proceedings to take land under the right of eminent domain (*Schuchardt v. Mayor,* 53 N. Y., 202, 208). The objections that naturally present themselves to this line of reasoning, namely, that the one annexing the fixtures here was not the owner of the land to which they were annexed, and that if they did become real property they would be the property of the owner of the building, are answered by the Court on the theory that as Kesner's leasehold was, under Sec. 1430 of the Code, real property, he annexed the fixtures to his own real property, i. e., the leasehold, and that therefore the cases wherein an owner annexed fixtures to his land were in point; and that in becoming real property the fixtures remained in Kesner's ownership and did not pass to the owner of the building, as they were annexed to the leasehold which Kesner owned and not to the fee which was in his landlord. When it is considered that the result of all this is to give a decided preference to certain of the bankrupt's creditors, the distinction seems a rather fine one; but even granting the distinction a good one, there is still another and very pertinent objection. The New York cases are agreed that one of the important points to be considered in determining whether or not things personal in their nature, on annexation to the realty, become part of it, is the intent of the parties at the time of annexation to make a permanent accession to the freehold. (*Ford v. Cobb,* 20 N. Y., 344; *Voorhees v. McGinnis,* 48 N. Y.,

278; *Matter of Hawkstone Street*, 122 N. Y. Supp., 316.) That intent may be found readily enough when the one annexing owns the land in question; but in this case, can it be said that Kesner intended the accession here to be permanent? The majority of the Court admits that as between Kesner Co. and its landlord the fixtures were removable as personalty. It would seem that when Kesner annexed the fixtures he intended that the annexation be temporary, that he would remove them before the expiration of his lease. The dissenting opinion of Lacombe, C. J., holding that, because personalty in the beginning and nothing save temporary annexation as trade fixtures appearing to show an intent to make them real property, the fixtures remained personal property, seems better on principle than the prevailing opinion.