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Recent Decisions

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RECENT DECISIONS

CONDITIONAL SALES—WAIVER OF STATUTORY PROVISIONS BY VENDEE. Defendant sold a milk drying machine to one Heim under a conditional sale contract, the price being $12,000. When some $6,000 had been paid thereon, the vendee went into bankruptcy. A number of conferences thereafter between the trustee in bankruptcy and defendant were held by the Court to constitute an implied waiver of the provisions of Sec. 65 of the Personal Property Law. The trustee then disposed of his interest in the machine to the plaintiff, a purchaser with notice. Defendant subsequently retook the machine, but failed to sell within 60 days. Plaintiff sued to recover the amount paid on the machine. HELD, that he could not recover; that he was bound by the trustee's waiver of the statutory benefits, and that a conditional vendee or his trustee in bankruptcy, after default by the vendee, could waive the provisions of Sec. 65 of the Personal Property Law. (*Breakstone v. Buffalo Foundry & Machine Co.*, Appellate Division, First Department, April 1915.)

The vendor, in a conditional sale contract, upon retaking the goods after default by the vendee, must hold the same for 30 days to enable the vendee to complete his contract, and if the vendee does not so complete, must sell the goods within the 30 days next following; and if the goods are not sold within the second 30 days, the vendee or his successor in interest may recover back the amounts paid on the contract. (*Personal Property Law*, Sec. 65.) Consti-

tutional and statutory rights may be waived (*Matter of Cooper*, 93 N. Y. 507); but a provision in an executory contract to waive a statutory benefit will not be enforced when against the public policy of the state. (*Kneettle v. Newcomb*, 22 N. Y. 249). If the contract is really one for the sale of goods, a provision that the amounts paid are to be charged as rent until the whole sum is paid will be disregarded as an attempt to defeat the statute. (*Hoffman v. Sewing Machine Co.*, 123 App. Div. 166; *Hurley v. Gas Co.*, 144 App. Div. 300). It has been held that an agreement in the conditional sales contract to waive the provisions of Sec. 65 of the Personal Property Law is invalid as against public policy (*Crowe v. Carbonic Co.*, 208 N. Y. 396; *Hurley v. Gas Co.*, Supra); but this objection, it would seem, does not hold where the waiver is made after default by the vendee, and the principal case expressly distinguishes *Crowe v. Carbonic Co., Supra*, on this point. The statute is for the protection of the vendee, and a clause in the contract waiving its benefits is held void to prevent the imposition of harsh terms by the vendor. Where, however, the matter has reached the stage of default by the vendee, this reasoning is no longer applicable, and the general rule that a man may waive his statutory rights should prevail. In this the principal case appears sound.

INCHOATE RIGHT OF DOWER—LEGISLATIVE CONTROL. The plaintiff did not join in her husband's conveyance to the defendants. The defendants drilled and are drilling wells for gas and oil. The husband is still alive. HELD, the plaintiff cannot enjoin the defendants from so drilling (*Rumsey v. Sullivan et al.*, 150 N. Y. S. 287). In a dictum in this case it is said, "Dower does not result from any contractual relation between husband and wife, either express or implied, and the legislature has the power to alter, abolish or diminish such right while it remains inchoate, (*Moore v. New York*, 8 N. Y. 110; 59 Am. Dec. 473; 14 Cyc. 887)."

In view of the tendency to abolish dower, this is important. The great weight of authority seems to be that the legislature may abolish the inchoate right of dower. (*Morrison v. Rice*, 35 Minn. 436; 29 N. W. 168; *Chapman v. Chapman*, 48 Kan. 636; 29 Pac. 1071; *Magee v. Young*, 40 Miss. 164; 90 Am. Dec. 322.) Dower is not founded on contract within the meaning of the Constitution

which prevents the passage of laws impairing obligations of contracts (*Magee v. Young*, Supra). Shankland, J., writing in the case of *Lawrence v. Miller*, 2 N. Y. 245 at p. 250, seemed to believe that legislation attempting to abolish the inchoate right of dower would be contrary to the 10th section of Article I of the Constitution of the United States. The Supreme Court of the United States however, seems to follow the case of *Magee v. Young*, Supra. (See *Randall v. Krieger*, 90 U. S.; 23 Wall. 137).

The dictum quoted from the main case seems to be sustained by the citation of the learned Court. In *Moore v. New York*, Supra, the plaintiff was the wife of a man who received compensation from the defendant for land taken for a public use. A statute authorized the defendant to take title and to make a just estimate of the damage of everyone interested in the land. The question was whether the possibility of dower was an interest in the land within the purview of the statute and the Court held it was not. *Moore v. New York*, Supra, has been limited in the case of *Simar v. Canaday*, 53 N. Y. 298 at p. 304, to cases in which the State is a party exercising the right of eminent domain. This however does not deny the power of the legislature to abolish the inchoate right of dower, for, it is submitted, that the very limitation of *Moore v. New York* as stated in *Simar v. Canaday*, admits of such a power.

SALES—ACTION FOR PURCHASE PRICE. The Borough Bank agreed on April 1, 1909, to repurchase from plaintiff $100,000 worth of bonds at par, which plaintiff had received in part payment of a debt due it from the Borough Bank, taking back bonds of the par value of $25,000 on April 13, 1911, and of the par value of $75,000 on April 13, 1912. Plaintiff reserved a right to sell the bonds at any time. Before the dates for repurchase the Borough Bank went into liquidation, and tender was made to the Superintendent of Banks. Before the date of tender plaintiff turned over all its assets including these bonds to the Metropolitan Trust Company as security for a loan. By this transfer the Metropolitan Trust Company was empowered to make any and all sales of the assigned property. This advance was to be repaid August 12, 1912, but it was then renewed for a year longer. In a suit for the purchase price, HELD,

that plaintiff was entitled to recover the full contract price (*Brooklyn Bank in the City of New York v. Borough Bank of Brooklyn,* App. Div. 2nd Dept., April 1915).

"The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (A) He may store or retain the property for the vendee, and sue him for the entire purchase price; (B) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (C) He may keep the property as his own, and recover difference between the market price at the time and place of delivery, and the contract price." (*Dustan v. McAndrew,* 44 N. Y. 72; *Hayden v. Demts,* 53 N. Y. 426; *Mason v. Decker, 72* N. Y. 595; *Moore v. Potter,* 155 N. Y. 481; *Ackerman v. Rubens,* 167 N. Y. 405; *Gross v. Ajelo,* 132 App. Div. 25.) It would seem that the plaintiff by pledging the bonds to the Metropolitan Trust Company, as security for a loan, and giving to the Trust Company a power of sale, and renewing the loan agreement after the tenders, treated the bonds as its own, and was therefore entitled to recover only the difference between the market price and the contract price, and not the purchase price. (See cases cited supra, and compare *Oklahoma Vinegar Company v. Carter,* 116 Ga. 140.) If a stockbroker in a margin transaction gives a power of sale to any party making him a loan upon his customer's stock, he is guilty of a conversion (*Strickland v. Magoun,* 119 App. Div. 113; *Mayer v. Monzo,* 151 App. Div. 866). The giving to a third party, the Metropolitan Trust Company, a power of sale over the bonds, seems inconsistent with the notion that plaintiff was retaining the bonds for the vendee, and thus entitling itself to recover the purchase price.

SEPARATION AGREEMENTS—VALIDITY—STATUTES. Husband and wife were living apart. They entered into an agreement, by the terms of which the wife was to receive a sum found to be one-sixteenth of the husband's income. The wife was unable to maintain herself and child according to the standard adopted by her husband before separation. In an action to set aside the agreement,

HELD, that when a wife is living apart from her husband under a decree or a separation agreement, she has a right to obtain an amount which will permit her to maintain a standard of living commensurate with the husband's income and the mode adopted by him when the parties lived together. (*Ducas v. Ducas,* New York Law Journal, April 8, 1915.)

At common law the unity of husband and wife was so complete as to render void contracts made between them; there were not two contracting parties. By Chap. 381, Laws of 1884, the wife was given power to contract but was expressly denied the right to contract with her husband. More enlightened views came to prevail after this act was passed and another step forward was taken when equity specifically enforced contracts between husband and wife, even though void at law, when some equitable consideration was shown either upon the face of the instrument or by extraneous proof which would warrant equity's interposition. (*Lawrence v. Lawrence,* 32 Misc. at p. 505; *Dean v. Metropolitan R. R.,* 119 N. Y. at p. 547). Finally, by Sec. 21, Chap. 272, Laws of 1896, it was provided that "a married woman has all the rights in respect to property, real and personal, and to make contracts in respect thereto with any person, including her husband, * * * as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support the wife." (Dom. Rel. Law Section 51.) This last clause was very properly calculated to preserve the marital relation free from the contractual whims of the parties. Consequently, it has been uniformly held in this State that an agreement by a husband and wife to separate is essentially a contract to alter the marriage and hence void within this statutory inhibition. (*Poillon v. Poillon,* 49 A. D. 341; *Winter v. Winter,* 191 N. Y. 462.), Either party may at their pleasure, revoke such an agreement. (*Gilbert v. Gilbert,* 5 Misc. 555.) If, however, the parties are actually living apart, an agreement for the maintenance of the wife will be upheld by the Courts, if it is in all respects fair and the free act of both parties. (*Duryea v. Bliven,* 122 N. Y. 567; *Pettitt v. Pettitt,* 107 N. Y. 677; *Johnson v. Johnson,* 206 N. Y. 561). Where the separation exists as a fact and is not occasioned or produced by the contract, and the provisions are equitable, the contract will be upheld; the consideration of the husband's agreement to pay being his release from liability to support his wife. *Pettitt v. Pettitt,* supra. It must ap-

pear on the record that the parties have actually separated and are living apart. (*Lawrence v. Lawrence,* supra). The consideration for a separation agreement fails when the parties are reconciled or resume cohabitation with an intent to reestablish the marital relation. (*Zimmer v. Settle,* 124 N. Y. 37). So long as it is observed by the husband, the agreement is a bar to the maintenance of an action for separation by the wife and binding upon her as to the amount to be paid. (*Galusha v. Galusha,* 116 N. Y. 643.) Consequently, when the wife thus binds herself and waives her statutory remedies, it is necessary that "she should be in possession of every material fact affecting her act and it is the duty of the husband, he being in a position of trust, to disclose such facts." Such agreements must be free from the taint of fraud or duress and must be fair and adequate, considering the husband's circumstances. (*Hendrick v. Isaacs,* 117 N. Y. 411). Because these requisites were not observed and the wife had been overreached, the agreement in the principal case was set aside. It was further held that the money received by the wife during her observance of the agreement, need not be returned as a condition precedent to maintaining the action, since it had been spent in providing for herself and child. (*Hingerford v. Hingerford,* 161 N. Y. 550).

The policy of the law in sustaining separation agreements fairly entered into is probably correctly stated in *Besant v. Wood,* 12 Ch. D. 605. "After all it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits for divorce by settling their differences quietly, by the aid of friends out of Court, although the consequences might be that they would live separately." The theory of the English judges was that since a wife could institute or defend a suit for divorce, she might also enter into an agreement whereby such a suit might be avoided. Hence we find in *Pettitt v. Pettitt,* supra: "In the pending action for divorce, the plaintiff would have been entitled, if successful, to a decree of separation and a suitabble allowance from the estate of her husband for her support and maintenance. It is difficult to see how it could be in accord with public policy to award such relief and yet against public policy for the husband to concede it in advance of the decree and as a compromise of the existing litigation. Public policy does not turn on the question whether the husband fights out the quarrel to final judgment." True enough, yet Courts should never authorize or sanction separations "except on proof of

a dereliction legally defined and declared sufficient and never on the admissions or consent of the parties." (Bishop, Marr., Div. & Separ., Vol. I, p. 1265). In the absence of proof of the plaintiff's allegations, the Court is forbidden to grant the separation. Yet "the parties may make an agreement, which will become an order of the Court, to do without sentence the thing prayed, or enter into any other reasonable form of separation and the Court will specifically enforce it." This is precisely the nature of separation agreements, and, strange as it may seem, they will be upheld on the ground of public policy above alluded to, or will be set aside under the tests set out in the cases cited.

BOOK REVIEWS

"A TREATISE ON THE LAW OF WAIVER," by Renzo D. Bowers (The W. H. Courtright Publishing Co.)

This work does not, like so many others, thresh old straw. While the law of waiver has served as the subject of some admirable essays (see 28 *Am. & Eng. Encyc. of Law* (1st Ed.), 524, title "Waiver"; 29 *Am. & Eng. Encyc. of Law* (2nd Ed.), 1089, title, Id.), this is the first book, we believe, which is devoted exclusively to that topic. Hence, it is somewhat of a pioneer, and, as such, naturally excites the keenest interest. As a treatise, however, it must be confessed that the book is a disappointment.

Whether wisely or not, it has become customary for reviewers to refrain from commenting upon the style displayed in a treatise. But, at the risk of being accused of pedantry, we cannot forbear alluding to the carelessness in composition, which is evidenced in this work. The perspicuity of almost every page in the book might be improved, by the judicious elimination of pleonasms. Frequently, the sentences in the work rival in length, but not in brilliancy of construction, those of Burke, as the following one (Sec. 196) well indicates: "Privileged communications between a patient and his physician may be waived by the patient, or by his attorney, personal representative, though not by an executor in an action to revoke a will, heir at law, this however, being denied under a statute prohibiting a physician from testifying without the consent of

his patient, assignee of an insurance policy beneficiary, guardian of a minor, parents of a child treated by the physician; but not, however, by the husband of the patient, and it is even held that only the patient can waive the privilege."

Even more serious, perhaps, than the long and redundant sentences, which are so constantly indulged in, is the violation of the King's English (see *e.g.*, p. 21, where "either" is used instead of "any"; and p. 23, where a sentence in Sec. 8 seems meaningless, and p. 219, where two sentences in Sec. 220 are printed as one).

A distinguished jurist wisely has observed that "definitions are dangerous" (*Andrews Bros. Co. v. Youngston Coke Co.*, 86 Fed. Rep. 585, 588 *per* Lupton, J.). The truth of his observation is sustained by this work. In it (Sec. 1), "waiver" is defined as "the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit." Notwithstanding its length, this definition is too narrow; it ignores the qualification that an agreement to waive a right is void, if it is contrary to public policy (see *e. g., Mabee v. Crozier*, 22 Hun. 264, where an agreement to waive usury, and not to set it up as a defense, was held void).

Again, the author falls into a curious error, by asserting (Sec. 2) that a waiver "may be shown . . . by the doing or forbearing (*sic!*) to do something inconsistent with the existence of a right or an intention to rely upon it." It is not a little surprising, at this late day, to note a writer apparently doubting (Sec. 4) that consideration is a detriment suffered by the promisee, at the request of the promisor. In dealing with waivers contained in bills and notes (Secs. 74, 75), the author ignores the section in the uniform Negotiable Instruments Law (Sec. 81 of the New York act relating thereto). Indeed, a careful examination of the chapter on commercial paper (p. 79, *et seq.*,) fails to disclose a single reference to the uniform Negotiable Instruments Law, although, curiously enough, the works of Ryles and Chitty are referred to.

On page 342, the author states (Sec. 343), without qualification, that "a party cannot waive a tort and bring an action in *assumpsit* against the tort feasor, except where the property has been converted into money or its equivalent." At page 348, however, this is shown not to be the universal rule.

SAUL GORDON.