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Recent Decisions

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RECENT DECISIONS.

NEGLIGENCE—LIABILITY OF MANUFACTURER OF AUTOMOBILES TO PERSONS NOT IN PRIVITY OF CONTRACT WITH HIM.—Plaintiff bought an automobile of a retail dealer, who, in turn, had purchased it from defendant manufacturer. While giving the machine normal use, plaintiff was injured by the collapse of one of the wheels, due to defective wood. Defendant had bought the wheel from another manufacturer, but there was evidence that its defects could have been discovered by reasonable inspection. *Held,* defendant liable. (*MacPherson* v. *Buick Motor Co.,* N. Y. Court of Appeals, March 14, 1916.)

The Court of Appeals, in an exhaustive opinion by Cardozo, *J.,* dissenting opinion by Willard Bartlett, *Ch. J.,* affirmed herein *MacPherson* v. *Buick Motor Co.,* 160 App. Div. 55. For a discussion of the point involved, see article "Are Automobiles Inherently Dangerous to the Purchaser?" by Judge Pound of the Court of Appeals in 2 Fordham Law Review, page 57 (March, 1916),

wherein the Appellate Division decision of the principal case is cited.

WILLS—RIGHTS OF POSTHUMOUS CHILD—REPRESENTATION.—Testator left three children, Joseph, Mary and Lydia. Joseph died, leaving eight children and several grandchildren. By the testator's Will all the residue of his estate was left to his executors, in trust, to divide the same into two equal parts and to apply the income of one part to the use of Mary; and upon her decease, such interest to go to her issue and, if she should die without issue, to such persons as she should designate by her Will. Upon the failure of both contingencies, such share was to be assigned to Joseph and Lydia and in case of the death of either or both, then such share was to be assigned to their issue, such issue to take the share which his, her or their parent would have taken if living. In an action to remove the trustee and to set aside an instrument of division of the realty, the eight children of Joseph were cited. One, Lester, died subsequently, leaving a child *en ventre sa mere.* Upon motion to join as parties the grandchildren of Joseph and to stay the proceedings till the birth of Lester's child, *Held,* that the grandchildren of Joseph, whose living parents are parties, take by representation and are not necessary parties; that the unborn child has an interest in the proceeding and the stay should be granted. (*Kane* v. *Odell,* Appellate Division, First Department, March, 1916.)

A descendant or relative to the intestate, begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him. (Dec. Est. Law, Sec. 93.) Posthumous children become entitled, when born, to take in the same manner as if living at the death of their parents. (Real Prop. Law, Sec. 56.) A child *en ventre sa mere* shall be considered in *esse* for most purposes of property. (*Mason* v. *Jones,* 2 Barb. 251.) Hence, such children have rights which must be protected (*Monarque* v. *Monarque,* 80 N. Y. 320). Their interest cannot be concluded by judgment in any proceeding to which they were not parties or in which they were not represented (*Giles* v. *Solomon,* 10 Abb. Pr. N. C. 97, Note; *Downey* v. *Seib,* 185 N. Y. 427; *Smith* v. *Secor,* 157 N. Y. 402). A judgment binds only parties and their privies (*Adami* v. *Gercken,* 164 App. Div. 472). This maxim is subject to the rule "adopted partly from necessity and partly of considerations of

convenience" (*Mead* v. *Mitchell,* 17 N. Y. 210) that where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, such living owners of the estate, for all purposes of litigation in reference thereto and affecting the jurisdiction of the Court to deal with the same, represent the whole estate and stand not only for themselves but also for persons unborn (*Kent* v. *Church of St. Michael,* 136 N. Y. 10). Such persons must have a like interest with the children *not in esse,* and due provision must be made in the judgment for the unborn children by setting apart land or the proceeds of land to represent, in some form, their interests (*Mead* v. *Mitchell, supra; Tonnele* v. *Wetmore,* 195 N. Y. 446; *Adami* v. *Gercken, supra*).

The word "issue" usually means a *per capita* distribution (*Schmidt* v. *Jewett,* 195 N. Y. 486; *Matter of Bauerdorf,* 77 Misc. 663). But the intention of the testator governs (*Ferrer* v. *Pyne,* 81 N. Y. 281) and here the direction that the issue shall take the parent's share shows an intention that the residue should descend *per stirpes* (*Barstow* v. *Goodwin,* 2 Bradf. 413). It is, therefore, correctly held that the great-grandchildren take by representation, and since their parents are parties to the action, their interests are protected (*Matter of Farmers Loan and Trust Co.,* 213 N. Y. 168).

The child *en ventre sa mere* will also take by representation, but its father, through whom it claims, is not a party to this action. The rule in *Kent* v. *Church of St. Michael, supra,* would seem not to be applicable in the case of a child already begotten, since such child is regarded as living at the time of its father's death (*Cooper* v. *Heatherton,* 65 App. Div. 561). Since it is *in esse* and not represented in any manner, the stay, we submit, was properly granted.

It is apparent that in such cases it may be impossible to construe a will or determine conflicting claims to real property within reasonable limits of time. A solution of the difficulty may be found in a resort to Section 426, Code of Civil Procedure, as amended in 1913. Under this amendment it is no longer necessary to serve the infant under fourteen with process. A child *en ventre sa mere* is held, even in the principal case, a natural person. Being under fourteen years of age, its rights may be protected by service upon some competent person, designated by the Court on behalf of such infant. The appointment of a guardian *ad litem* may then be had, pursuant to Sections 469 *et seq.*

of the Code. "An infant *en ventre sa mere* may have a guardian assigned to it" (Blackstone's Comm. Bk. I *130). All the elements required by Section 426 would seem to be present so as to justify its application to this case.

FOREIGN CORPORATIONS—JURISDICTION OF STATE COURTS OVER A TRANSACTION NOT ARISING WITHIN THE STATE.—In an action by a resident against a foreign corporation doing business in the State, on a cause of action arising without the State, *held,* service of process upon the agent designated by the corporation for accepting service, is proper and should not be set aside. (*Bagdon* v. *Philadelphia & Reading Coal & Iron Co.,* N. Y. Court of Appeals, March 14, 1916.)

Sec. 1780 of the Code of Civil Procedure provides for cases where a foreign corporation may be sued in the courts of this State. That section gives a resident the right to sue "for any cause of action", while a non-resident is subject to certain restrictions therein enumerated. The constitutionality of Section 1780 has been questioned (*Grant* v. *Cananea Con. Copper Co.,* 117 App. Div. 576; *Sadler* v. *B. & B. Rubber Co.,* 140 App. Div. 367; *Fairclough* v. *Southern Pacific Co.,* N. Y. Law Journal, March 17th, 1916), but the Court of Appeals has expressly declared that the provisions of Section 1780 were not violative of any provision in the Federal Constitution. (*Grant* v. *Cananea Con. Copper Co.,* 189 N. Y. 241.) The Supreme Court of the United States has never passed upon the point.

The New York Courts and the Federal Courts have for many years been in conflict regarding the validity of service on a foreign corporation. In *Pope* v. *Terre Haute Mfg. Co.,* 87 N. Y. 137, it was held that service on the president of a foreign corporation while travelling through this State on his way to a seaside resort was good, and gave the New York Courts jurisdiction. In *Goldey* v. *Morning News,* 156 U. S. 518, under substantially the same facts, it was held the officer "must be here officially, representing the corporation in its business", and the service was set aside. In the *Grant* case *supra,* at page 249, the Court of Appeals recognizing the difference in the views of the two courts, declared that while the New York rule was safer and wiser it would recognize and attempt to follow the Federal rule. The *Grant* case, however, was one which fitted nicely into the Federal rule since the Court held that the president was here in his official capacity,

thus distinguishing it from the *Pope* case. However, in affirming without opinion the case of *Sadler* v. *B. & B. Rubber Co.*, 202 N. Y. 547, the Court showed clearly that it had not receded one iota from its position in the *Pope* case.

The principal case, while it involves Section 1780 of the Code, raises a question different from any in the preceding cases. Here service was made on a person designated by the corporation to accept service of process. Such designation is a condition precedent to the issuance of a certificate authorizing the corporation to do business in this State. (Gen. Corp. Law, Sec. 15.) The Appellate Division affirmed the order setting the service aside on the authority of *Old Wayne Co.* v. *McDonough*, 204 U. S. 22 and *Simon* v. *Southern Railway*, 236 U. S. 115-130. In the latter case the Court said, "But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law." The Court of Appeals, however, points out that, in both these cases, the corporation failed to designate any person upon whom service might be made. In the *Simon* case, a Louisiana statute required the corporation to designate a person to accept service, and in the event of failure to so designate, service on the Secretary of State would be effective. The Court held that such service could give jurisdiction only to business transacted within the state. It expressly refused to pass upon the question before the court in the principal case. (236 U. S., at p. 130.) In the *Simon* case, the Court held that the corporation, by doing business in the state and failing to designate any person to accept service, is estopped to deny the jurisdiction of the Court as to actions arising out of business transacted within the state. It is entirely conceivable that a court more equitably inclined might extend the doctrine to *any cause of action.* But the principal case, as Judge Cardozo points out, involves the construction of a contract. The State agrees to issue a certificate to the foreign corporation, if the corporation agrees to designate a person upon whom process against the corporation may be served. (Gen. Corp. Law, Sec. 15, 16.) "The actions in which he is to represent the corporation are not limited. The meaning must therefore be that the appointment is for any action which under the laws of this State may be brought against a foreign corporation. (Code Civil Procedure, sections 1780, 432.)" This distinction has been recognized by the Federal Courts in a decision subsequent to the *Simon* case. (*Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148.)

There is a statement in the opinion in the principal case which seems to indicate that the Court has abandoned its position in the *Pope* case and the *Sadler* case discussed *supra.* It said that the object of designating a person to accept service was to insure the presence in the state of someone with authority equal to the president's in respect of the service of process. "It is true that even the president of a foreign corporation may be here without bringing the corporation itself within the jurisdiction. He must be here 'officially, representing the corporation in its business' (*Conley* v. *Mathieson Alkali Works,* 190 U. S. 406; *Kendall* v. *American Automatic Loom Co.,* 198 U. S. 477; *Goldey* v. *Morning News,* 156 U. S. 518). To give judgment in violation of that rule is to condemn the corporation unheard, and to ignore the essentials of due process of law. Dicta to the contrary in *Grant* v. *Cananea Copper Co.,* 189 N. Y. 241 must yield to the later decision in *Riverside Mills* v. *Menefee,* 237 U. S. 189, 192." Not only the dicta in the *Grant* case, but the *decisions* in the *Pope* case *supra,* and the *Sadler* case, *supra,* are squarely contra to the *Riverside Mills* case, and whether these decisions will yield to the decision in the *Riverside* case is yet to be decided.

ATTACHMENT PROCEEDINGS—RECOGNITION BY NEW YORK COURTS OF FOREIGN STATUTORY TRANSFER OF PROPERTY WITHIN THIS STATE.—A Pennsylvania corporation, which had been duly transacting business in New York, was duly dissolved by a Pennsylvania court, and title to all its assets was, by such court, transferred to the Pennsylvania Commissioner of Insurance, pursuant to statute. As a result of such dissolution, refunds became due in New York from a reinsuring corporation to such Commissioner, and refunds also became due from such Commissioner to plaintiff's assignors. Plaintiff brought action, in New York, for his refunds, against the defunct corporation by name, attaching as its assets the refunds due from the reinsurer. The Pennsylvania Commissioner appeared specially on a motion to vacate the attachment. *Held,* the attachment must be vacated. (*Martyne* v. *Amer. Union Fire Insurance Co.,* 216 N. Y. 183.)

New York courts have consistently refused to recognize the title of a foreign assignee in insolvency or bankruptcy, as against any creditor attaching assets here, and have, with equal consistency, conceded their own limitations in such proceedings to affect assets not situated here, as against attachments in the place where the

assets are. (*Barth* v. *Backus,* 140 N. Y. 230; *Warner* v. *Jaffray,* 96 N. Y. 248.) On the other hand, they give full credit to a foreign assignment of assets here, provided the assignment operates under the common law. (*Ockerman* v. *Cross,* 54 N. Y. 29.) The Court in the principal case seems to have reached its decision on the theory that the growing tendency to recognize the sovereign acts of the various states justifies extending recognition in New York to the transfer, by judicial decree of a Pennsylvania court, of assets in New York from one Pennsylvania resident to another. The opinion states that the principle of the insolvency cases is not to be extended. It is submitted that a discussion of the doctrine of comity was not necessary here. There is nothing in the New York statutes which interferes with the dissolving power of the home sovereignty of a corporation, merely because such corporation is authorized to do business in this State. Although plaintiff's action was aimed at merely the attached assets, it was still an action only *quasi in rem.* (*Pennoyer* v. *Neff,* 95 U. S. 714.) The assets in every such case must be the property of the nominal defendant, answering for his personal wrong; and a dead defendant is no defendant. It would seem that the question of comity would not be squarely raised unless the action had been against the Pennsylvania Commissioner, by name; but the opinion, at least, shows the present tendency of the Court of Appeals.

EQUITY—CANCELLATION—OVERDUE NOTES OBTAINED BY FRAUD.—Plaintiff gave notes to one Garifalos for discount at a certain bank upon the latter's false representation that he had a line of credit there. Garifalos negotiated them to the defendants who took with notice of the fraud. The notes being now overdue, plaintiff sues for an injunction against their further negotiation and for their surrender and cancellation. *Held,* cancellation decreed. (*Warnock Uniform Co.* v. *Silver et al,* Appellate Division, First Department, 156 N. Y. Supp. 637.)

A court of equity has jurisdiction to cancel a writing obtained by fraud. (Kent, Ch., in *Hamilton* v. *Cummings,* 1 Johns. Chanc. 517.) But unless it is clear that there is grave danger of irreparable injury, New York courts have been slow to exercise this jurisdiction. (*Allerton* v. *Belden,* 49 N. Y. 373; *Globe Co.* v. *Reals,* 79 N. Y. 202.) Especially is this true where there is an adequate defence to the instrument at law, and the only danger

is loss of evidence of that defence. Where notes are overdue, so that the defence at law cannot be nullified by a transfer to a holder in due course, it seems settled in New York that equity will not give relief for mere fraud in obtaining the instrument. (*Geer* v. *Kissam,* 3 Edw. Chanc. 137, in which there is a dictum that the danger of transfer to a *bona fide* purchaser alone should afford ground for exercise of the jurisdiction.) The majority in the instant case cites *Fuller* v. *Percival,* 126 Mass. 281, which is squarely in point, and which represents the Massachusetts view. But the New York decision cited (*Springport* v. *Teutonia Bank,* 75 N. Y. 397) explicitly states (p. 403) that mere danger of losing evidence is not a reason impelling Equity to act, and has moreover the fact that in that case the notes were not due, and could be negotiated to an innocent buyer.

The fact that there were fifteen notes in this case should give no jurisdiction in order to prevent a multiplicity of suits, as the separate knowledge of each defendant would have to be proven, even after the establishment of the principal fraud. (*Hale* v. *Allison,* 188 U. S. 56.) In any view, the decision seems *contra* to the long established law of the state. If so, the change in the rule is beneficial. It appears inequitable to refuse relief to a person in the situation of the plaintiff, leaving him open to embarrassment to his credit by the very fact that the notes remain outstanding, unpaid and apparently valid. This it would seem influenced the Court to reach the conclusion it did.

DOMESTIC RELATIONS—HUSBAND AND WIFE—SEPARATION AGREEMENTS—ALIMONY—SUFFICIENCY OF A COMPLAINT.—A demurrer was interposed to a complaint, in an action brought by a wife for a separation, alleging acts of cruelty committed prior to and continuing up to the time she and her husband entered into an agreement, which provided for the payment of a weekly allowance for the maintenance of herself and child and an allotment of the husband's property, and which also provided that they should live apart and not interfere in any way or manner with each other. The demurrant attacked the complaint on the ground of its insufficiency, arguing that the agreement as to separation precluded plaintiff from bringing this action. *Held,* that while the agreement was binding with respect to the provisions for the payment of alimony, it was not valid as an agreement that the parties shall continue to live apart and it is not *per se* a bar to this action.

(*Landes* v. *Landes,* N. Y. Supreme Court, 54 N. Y. Law Journal 2099.)

Sound public policy forbids our courts giving validity to an agreement for the future maintenance of a wife, except where the agreement is made in contemplation of immediate separation, which separation in fact ensued, or after separation had actually occurred and still continued. (*Pettit* v. *Pettit,* 107 N. Y. 677; *Calkins* v. *Long,* 22 Barb. 97; Bishop on Mar. and Div., §§ 637-650.) But where the agreement is made under these conditions the courts will enforce the provisions for maintenance, even after a judgment for divorce has been obtained by the wife for the husband's subsequent adultery. (*Galusha* v. *Galusha,* 116 N. Y. 635, 6 L. R. A. 487; *Duryea* v. *Bliven,* 122 N. Y. 567.) The English courts hold agreements made under these conditions are valid and enforcible both as to separation and as to maintenance (*McGregor* v. *McGregor,* 21 Q. B. Div. 424, 1888; *Marshall* v. *Marshall,* 5 Prob. Div. 19), but the majority of the courts of this country support the holding in the principal case. (*Allen* v. *Allen,* 73 Conn. 54; *Albee* v. *Wyman,* 10 Gray 222; *Grinie* v. *Borden,* 166 Mass. 198; *Bixby* v. *Moor,* 51 N. H. 402; *Foote* v. *Nickerson,* 54 L. R. A. 554; *Randall* v. *Randall,* 37 Mich., 563; *Kremelberg* v. *Kremelberg,* 52 Md. 553, 563; *Andrus* v. *Raudon,* 34 Texas 536.)

It seems that a mutual undertaking that the parties shall live apart cannot be relied upon as furnishing any element of the consideration of a separation agreement; for "a husband and wife cannot contract to *alter* or dissolve the marriage". (Dom. Rel. Law, Sec. 51.)

BILLS AND NOTES—CERTIFIED CHECKS—LIABILITY OF DRAWEE, WHERE PAYMENT HAS BEEN STOPPED.—Plaintiff was payee of check drawn on defendant. Drawer stopped payment but the defendant subsequently certified check when presented by the plaintiff. The latter deposited check in another bank and payment was later refused by defendant. *Held,* plaintiff cannot recover as he has suffered no loss on the strength of the certification, the drawer being still liable for the amount because of the stop-order. (*Bladinger & Kupferman Mfg. Co.* v. *Manufacturers'-Citizens' Trust Co.,* Appellate Term, Second Department, 156 N. Y. Supp. 445.)

Where the holder of a check procures it to be accepted or

certified, the drawer and all endorsers are discharged from liability thereon. (Negotiable Instruments Law, Sec. 324.) And the drawee or acceptor is liable. (Daniel on Negotiable Instruments, Secs. 1603-1604; *First National Bank* v. *Leach,* 52 N. Y. 350; *Anglo-South American Bank* v. *National City Bank,* 161 App. Div. 275; *Meuer* v. *The Phenix National Bank,* 94 App. Div. 331, affd. 183 N. Y. 511). Where the stop order is given one hour after certification, though the payee has not changed his position, the drawee is still liable. (*Carnegie Trust Co.* v. *First National Bank, etc.,* 213 N. Y. 301.) Also a bona fide holder who procured the certification after stop order was given to bank was allowed to recover from bank. (*Meuer* v. *The Phenix National Bank, supra.*) The Court in the case last cited did not consider the fact that the stop order was given before check was certified and that plaintiff had not altered his position.

However, where a bank certifies a check to be good under the mistaken belief that the drawer has sufficient funds or any funds on deposit, or where the bank has been induced to certify check by fraudulent representation, the certification may be revoked before there is any inequitable change of circumstances. (Daniel on Negotiable Instruments, Sec. 1608; *Brooklyn Trust Co.* v. *Toler,* 65 Hun 187; *National Bank* v. *Steele & Johnson Co.,* 58 Hun 81; *Mt. Morris Bank* v. *23d Ward Bank,* 172 N. Y. 244.) The rule in the principal case appears to be an equitable extension of this latter exception to the general rule. The case is contrary on the facts to *Meuer* v. *Phenix National Bank, supra.*

CARRIERS.—WAREHOUSEMAN'S LIABILITY.—CARMACK AMENDMENT.—Plaintiff shipped goods over connecting lines from Denver, Col. to Cleveland, O., under a bill of lading, recommended by the Interstate Commerce Commission, which provided that the carrier was liable only for the declared value at the place of shipment, and that property not removed within 48 hours after notice of arrival was held subject to a warehouseman's liability. The plaintiff's agent declared upon the face of the bill that the value of the property did not exceed $10.00 per cwt., and the court found as a fact that the plaintiff received a consideration for the limitation through a reduction in freight charges. The goods reached their destination on defendant company's railroad on September 27, were not called for by the plaintiff, and on November 1, were

destroyed by the negligence of the defendant. Plaintiff brought action in the state court of Ohio, the case by successive appeals reaching the Supreme Court of the United States. *Held* that the Carmack Amendment to the Hepburn Act of 1906 applies not only to goods in transit but also to the liability of a carrier as a warehouseman, and that the reduced rate of carriage constitutes sufficient consideration for the limitation of the warehouseman's liability. (*Cleveland & St. Louis Ry.* v. *Dettlebach,* 239 U. S. 588.)

The question presented by this appeal arose in the Supreme Court prior to the present case, but the Court refused to pass upon the issue here involved. (*Boston & Maine R. R.* v. *Hooker,* 233 U. S. 97, 109.) That the reduced rate of shipment is sufficient consideration for the limitation of liability *as a carrier* is now too well settled to be questioned, however unsound this may be on principle. (*Adams Express* v. *Croninger,* 226 U. S. 491, 509; *Mo. Kans. & Tex. Ry.* v. *Harriman,* 227 U. S. 657, 668.) Moreover the instant case does not present any question of estoppel, the sole ground of the decision being the contract entered into between the parties, in line with former federal decisions, which decide cases of this nature on a contract basis. In the light of the cases last above cited, which all allow the limitation solely because of the reduced rate, the argument stated by the lower court for refusing to extend the limitation to the warehouseman's liability seems very strong. The lower court said "* * * The reduction, in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as a warehouseman, *because there is no reduction in warehousing charges provided or stipulated for in the transaction.*"

The Supreme Court, though recognizing the cogency of the lower Court's reasoning, overrules it on the ground that it is contrary to the spirit of the Carmack amendment (34 Stat. 584 c. 3591), which broadens the meaning of the word "transportation," as used in the original Interstate Commerce Act, and makes it as general as possible. The opinion holds that Congress intended by the passage of the above Act to exact uniformity in service and charges, to make the carriers' undertaking an entire one, and to do away with the common law distinctions between the liability of a carrier and that of a warehouseman. The case results, it would seem, in an important and very favorable position for modern carriers, but doubtful security for the shippers, so that