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Editorial & Recent Decisions

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EDITORIAL.

Owing to the war, the REVIEW will close the year with this number. Some of the Board of Editors are in military service, with national and state organizations. Others are at the training camps for reserve officers.

Special thanks are due to the West Publishing Company for permission to complete its advertising contract in this number. With this closing number the board desires to thank all the advertisers whose patronage has made possible the REVIEW's publication.

THE MARCH BOOK REVIEWS

The March book reviews were written by Mr. Saul Gordon, whose name was unfortunately omitted from the last number.

THE ANNUAL DINNER

The tenth annual dinner of the Fordham University School of Law, held April 14th, 1917, at the Hotel Savoy, was honored by the presence of the Hon. John Proctor Clarke, presiding justice of the Appellate Division of the First Department, and the Hon. Almet F. Jenks, presiding justice of the Second Department. Their presence to make addresses was a gratifying tribute to the standing of our law school.

The public press of the city devoted more space than at any previous time in our history to reports of the dinner, mentioning our distinguished guests of honor and featuring the timely and inspiring address of the Rev. Father Joseph A. Mulry, S. J., the honored president of Fordham University. The large alumni attendance was specially noteworthy.

RECENT DECISIONS.

PRINCIPAL AND SURETY — CONSIDERATION — SUFFICIENCY. — The defendant Gaines was president of the defendant Lake Austin Canal Company, and also principal stockholder. Prior to the execution of the notes in question the Canal Company had incurred an indebtedness to the plaintiff, and when called upon for payment the corporation gave its certain promissory notes executed by Gaines as president, and also signed by him individually. When the first note matured, he wrote to the plaintiff, asking for an extension of time in which to make payment, and also stated therein that he would re-indorse the notes. As a defence Gaines set up that the notes as to him were without consideration. Plaintiff contended that Gaines' execution of the notes was for the purpose of an extension of time being granted for the payment of the debt of the Canal Company. *Held,* it is not necessary that any consideration pass directly to the surety, but a consideration moving to the principal alone is sufficient to support a contract of suretyship, and further, that an extension of time of payment was sufficient to support the suretyship of the defendant Gaines. (Bonner Oil Company *v.* Gaines, 191 S. W. 552; affirming 179 S. W. 686.)

It seems that concurrently with this case in Texas, the Georgia Court of Appeals in the case of Jordon *v.* First National Bank

(91 S. E. 287) and also the Washington court in Farmer's State Bank *v.* Grey (162 Pac. 531), reached the same result.

There is an abundance of cases on this point in other States, but in New York they are few and far between, and there does not appear to have been any very recent adjudication on the point, although the law is undoubtedly well settled that to support a contract of suretyship it is not necessary that any consideration pass directly to the surety, but a consideration moving to the principal alone is sufficient. The courts all seem to hold that what is a sufficient consideration to support the promise of the principal will sustain the promise of the surety. (Green *v.* Shaw, 66 Ill. App. 74; Lackey *v.* Boruff, 152 Ind. 371; First National Bank *v.* Johnson, 133 Mich. 700; Bassett *v.* O'Neil Coal and Coke Co., 140 Ky. 346; Laingor *v.* Lowenthal, 151 Ill. App. 599.) In California, in Ray *v.* Borgfeldt (146 P. 679), the Court said that a loan of money to the maker of a note is consideration for the agreement of his sureties, signing as comakers, that the note shall be paid. In New York (Albany County Bank *v.* Scott, 4 St. Rep. 768; McNaught *v.* McClaughrey, 42 N. Y. 22; Penn. Coal Co. *v.* Blake, 85 N. Y. 230), the result reached is in accordance with the general trend of authority. In Erie County Savings Bank *v.* Coit (104 N. Y. 532), the New York court citing the aforementioned cases held that when a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter supports the former. As for the sufficiency of the consideration, an extension of time of payment is sufficient consideration for the promise of a third party as surety to pay the debt. (Dow-Hayden Grocery Co. *v.* Muncy, 24 Ky. Law Rep. 2255; White Sewing Machine Co. *v.* Fowler, 28 Nev. 94; Linton *v.* Chestnutt-Gibbon Grocery Co., 118 Pa. 385; Way *v.* Mooers, 160 N. W. 1014; Brown *v.* Peoples Bank of Searcy, 192 S. W. 900.)

We may go further and say that any indulgence extended to the principal is sufficient consideration for a contract of suretyship. (Broughton *v.* Jos. Lazarus Co., 78 S. E. 1024; Brandt on Suretyship and Guaranty, section 16.) The decision in the principal case is quite in accord with New York and other States and substantiates the law on the point.

THE SHERMAN (Anti-Trust) LAW.—Plaintiffs were members of a firm shipping from New York to South African ports. Defendants, common carriers between these points, entered into

a combination for the purpose of creating a monopoly of such trade, seeking to accomplish this purpose by granting rebates to shippers, on condition that they patronize, exclusively, the steamers of the combination, and by using so-called "fighting ships" to underbid and drive out competing vessels. The plaintiffs had patronized a rival carrier, and the amount of the previous rebates earned by them under the rebate agreement had been withheld by defendants. *Held,* verdict of the jury that defendants had charged an amount exceeding the reasonable freight measured by the rebates so withheld was proper. (Thomsen & Co. *vs.* Cayser, Irvine & Co., United States Supreme Court, New York Law Journal, April 3rd, 1917.)

The defendants' contention was that the rule, as laid down in the Standard Oil and Tobacco cases (221 U. S. 1, 106) and applicable to this case at bar, was to the effect that the "rule of reason" must be applied in every case "for the purpose of determining whether the subject before the Court was within the Statute" and that therefore by the decision of subsequent cases it is the effect of the rule that only such contracts and combinations are within the act as by reason of their *intent or the inherent nature* of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade.

The provisions of the Sherman Act governing the case at bar are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor. * * *"
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

These sections have been interpreted in numerous decisions of the Supreme Court; thus in The Trans-Missouri Freight Case, 166 U. S. 290, the Court construed the act to include

> "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among

> the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described."

Again, in the Standard Oil Case, 221 U. S. 1, at page 61, it was construed as follows:

> "Having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. * * * In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

In the Tobacco case, 221 U. S. 106, the Court approved the decision in the Standard Oil case, and summarized it (p. 179) as follows:

> "Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

In Standard Sanitary Mfg. Co. *vs.* U. S. (226 U. S. 20, at page 49) the Court declared the law to be settled, as to the interpretation of the Sherman Act, in a number of cases, so as to "demonstrate the comprehensive and thorough character of the law and its sufficiency to prevent evasions of its policy 'by resort to any disguise, or subterfuge of form' or the escape of its prohibitions 'by any indirection.' *Nor can they be evaded by good* motives. * * *"

As the Court indicates in its opinion, the arguments used by the defendants as showing the legal character of the combination

formed have a familiar ring. They amount, in effect, to a statement that the combination promoted trade, instead of restraining it; that it was beneficial instead of detrimental to commerce; that defendants were free to trade where they would; that the combination plan resulted in regularity of service and steadiness of rates. These arguments are met and their weakness shown by the well settled law, as above indicated, that neither good motives nor good results constitute an excuse or a justification, in law, for the existence of a monopoly or a combination operating in restraint of trade.

CARRIERS—LIMITATION OF LIABILITY—CONVERSION OF GOODS—AGREED VALUE.—Defendant received packages from plaintiff for interstate shipment. Clause in the express receipt stated that in consideration of the rates charged the company was not to be liable in any event for more than $50. per hundred pounds, unless a greater value was declared at the time of shipment. Defendant's employees stole some of the packages. *Held,* plaintiff could not recover more than the agreed value. (D'Utassy *v.* Barrett, Pres. Adams Exp. Co., 219 N. Y. 420.)

Aside from contract a common carrier of goods is liable for all loss not due to the act of God or the public enemy, the inherent nature or qualities of the goods or the act or fault of the owner or shipper. (6 Cyc. 376, 377; Price *v.* Oswego & S. R. R. Co., 50 N. Y. 213; Dorr *v.* N. J. Steamship Nav. Co., 11 *id.* 485.) A carrier may contract to limit this extreme liability. (6 Cyc. 386; Elliott on Railroads, Sec. 1500; Hart *v.* Penn R. R., 112 U. S. 331; Belger *v.* Dinsmore, 51 N. Y. 166; Dorr *v.* N. J. Steamship Nav. Co., *supra.*) Contrary to the great weight of authority including the Federal Courts, New York Courts have sustained contracts limiting the liability of a carrier for loss due to its own negligence or that of its agents and servants. (6 Cyc. 388; Elliott on Railroads, Sec. 1497; Camp *v.* Hartford S. S. Co., 43 Conn. 333; Mynard *v.* S. B. & N. Y. R. Co., 71 N. Y. 180; Nicholas *v.* N. Y. C. & H. R. R. R. Co., 89 *id.* 370; Cragin *v.* N. Y. C. R. R. Co., 51 *id.* 61.)

As stated in the principal case, there is a clear distinction between a contract to limit the liability of a carrier and a contract for an antecedent valuation of the goods at an amount beyond which the carrier is not to be liable. (6 Cyc. 401; Elliott on Railroads, Sec. 1510; Ga. Pac. R. Co. *v.* Heighart, 90 Ala. 36.) Con-

tracts for an antecedent valuation are enforced in the Federal and New York Courts, though the carrier is guilty of negligence. (Cleveland, C. C. & St. L. Ry. Co. *v.* Dettlebach, 239 U. S. 588, 593; Zimmer *v.* N. Y. C. R. R. Co., 137 N. Y. 460; Tewes *v.* North German Lloyd S. S. Co., 186 *id.* 158.) On this point, however, the decisions of the country are at variance. (Hart *v.* Penn. R. R. Co., *supra;* 6 Cyc. 399; Ga. Pac. R. Co. *v.* Heighart, *supra;* U. S. Exp. *v.* Backman, 38 Ohio, 144.)

There is also a distinction between a *bona fide* agreed valuation and an arbitrary limitation of liability to a stipulated amount. The former is generally enforced. (6 Cyc. 400; Elliott on Railroads, Sec. 1510; Rosenfeld *v.* P. D. & E. Ry., 103 Ind. 121.) Whereas the latter is not. (Moulton *v.* St. Paul &c. R. Co., 31 Minn. 85; U. S. Exp. Co. *v.* Backman, *supra.*) The New York Courts do not consider this distinction. (Cases above cited.)

The principal case is decided in accordance with the law in the Federal Courts as the transaction was interstate. The defendant was guilty of conversion by affirmative acts of its employees, whereas in previous cases the carrier was guilty of negligence. However, viewing the contract of agreed value as being distinct from the contract for limited liability the decision is undoubtedly correct, and would probably be similarly decided under New York law which allows the carrier to modify its common law liability as insurer to an almost unlimited extent.

WILLS—CHARITABLE TRUSTS.—Bequests of more than one-half of Testator's Property "in trust or otherwise" to a Religious Association.

Vreeland, a resident of New Jersey, died seized of New York real property worth $41,300, of real property in New Jersey worth $52,500 and of personalty in New Jersey worth $47,000. By will, he gave all the property in trust for the North New Jersey Baptist Association. He left him surviving a widow.

Sec. 17, Decedent Estate Law provides "no person having a husband, wife, child, or parent, shall by his last will and testament devise or bequeath to any benevolent, charitable, literary, scientific or religious association, in trust or otherwise, more than one-half part of his or her estate, after the payment of debts and such devise shall be valid to the extent of one-half and no more.

Held: That the provision in will was within Sec. 17, and therefore could not pass more than one-half of his estate. Vreeland *v.* Decker, 220 N. Y. 326.

The conclusion reached in this case is obviously in accord with the Statute and is in line with other New York cases (Jones *v.* Kelly, 170 N. Y. 401; Amherst College v. Ritch, 151 N. Y. 282), but there is matter in the opinion of great interest and importance.

As this was a foreign will, the question arose as to the effect the gift of all of Testator's property in violation of the New York statute would have upon New York real estate. In answer, it was said: "The value of all the testator's property, no matter where it is, must be taken into consideration. If the legal provision for charity outside the State amount to one-half or more than one-half of the entire estate, the property in New York State will go to the heirs and cannot be given to charity. If such provisions outside of New York are less than one-half, so much of the New York State property may go to the charity devisees as will make up 50 per cent. and no more. Applying the rule to this case, we have following, Estate over debts $140,000—$70,000 can go to charity. If the North New Jersey Baptist Association has received $70,000 of the Estate in New Jersey, it cannot have any part of the New York Real Estate, which will go to the heirs of the testator. If the association has received but $50,000, it can share in the New York Real Estate to extent of $20,000 and no more."

This method was adopted in California—Matter of Dwyer, 115 Pac. Rep. 242, 245 (1911), which followed Paschalo Acklin, 27 Texas, 173 (1863). Whereas the same rule is laid down in all three cases, the Texas case may be distinguished from the other two on its facts. The Law of Texas provided that a testator, leaving children, could not dispose of more than one-quarter of his property to other than his children. A testator, domiciled in Tennessee, after having devised to his wife and children more than three-quarters of his property left his Real Property in Texas, in trust for an educational association. The children attempted to procure three-quarters of property within Texas under the Statute, but the court refused to allow it to them since it said that the object of the law was to secure children a reasonable portion of parent's estate and they had received more than the legitimate portion safeguarded them by Texas, although the property was situated without the jurisdiction. This conclusion though not logical still is quite equitable.

Sec. 47, D. E. L. in effect provides that the testamentary disposition of Real Property in this State is regulated by the laws of the State without regard to the residence of the Testator

and the disposition of all other property is regulated by the law of State of his residence at time of death. The logical inference from this section is, that no regard should be had for the property situated without the jurisdiction in the determination of the validity of a testamentary devise of a non-resident, but that attention of the court should be confined to that within its own jurisdiction. Where a resident of another State makes a bequest of personal property upon trusts, valid by the law of his domicile, to be executed in this State, it will not be declared void by our courts though it would have been invalid had the testator been domiciled in New York. (Dammertos *v.* Osborn, 140 N. Y. 30.) Isn't the court, in fact, in the case under consideration, declaring the bequest of the personalty in Jersey invalid by taking the entire property into account instead of the real estate in New York only? If a testator, resident in foreign jurisdiction, may bequeath all his personalty in this State, for any purpose, subject to the validity of the bequest in his own domicile (140 N. Y. 30, *supra*), it is illogical to declare that he may not dispose, in the same manner, of property situated in his domicile. The decision in Vreeland *v.* Decker seems to be extra-territorial. The court is subjecting citizens of a foreign jurisdiction to our laws.

Vreeland *v.* Decker raises a very interesting question. Suppose the testator bequeathed and devised all his Jersey property to A, B and C and then devised his New York property in trust for charity. Let us now apply the rule laid down in the case: Taking all his property into consideration, the New York realty is less than one-half, and the devise should be maintained. To so hold, however, would render Sec. 17 D. E. L. (*supra*) nugatory and our citizens would be deprived of the very protection the Legislature intended to afford them.

CORPORATIONS—EFFECT OF NON-PAYMENT OF STATUTORY PERCENTAGE OF SUBSCRIPTION.—Defendant subscribed for stock in a corporation but failed to pay ten per cent. upon the amount subscribed as required by the Stock Corporation Law (Cons. Laws, Ch. 59, Sec. 53). The defendant thereafter acted as a director of the corporation, accepted dividends for a period of years, and then sold his stock. The corporation became insolvent and the trustee in bankruptcy sues to recover the amount of the unpaid subscriptions. Defendant pleaded noncompliance with the statute as invalidating the contract and thus barring recovery. HELD, the defendant is liable. (Jeffery *v.* Selwyn, 220 N. Y. 77).

Where a statute requires the payment in cash of a certain percentage of the amount subscribed, at the time of making the subscription, there is a division of judicial opinion upon the question whether this payment is necessary to give binding force to the contract. (10 Cyc. 395 and cases cited; 1 Cook, Corporations, 7 ed., Sec. 172-175). At common law and in the absence of statutory enactment, a stock subscription on credit was sufficient to pass title to the stock and to make the subscriber a stockholder when he had acted and been recognized as such by the corporation. (Wheeler *v.* Miller, 90 N. Y. 353). The bare fact of subscription, however, without any payment as required by statute has been held to void the subscription. (New York, etc., R. R. *v.* Van Horn, 57 N. Y. 473.) But subscriptions not accompanied by immediate cash payments and subsequently paid do satisfy the statutory provisions, even though same were paid through the medium of services rendered to the corporation. (Beach *v.* Smith, 30 N. Y. 116). The statute in effect in New York today (Stock Corporation Law, Sec. 53) neither prohibits nor forbids any other mode of subscription, and a contract of subscription good and valid at common law is still valid, notwithstanding this section. (Buffalo & J. R. R. Co. *v.* Gifford, 87 N. Y. 294, 300).

Early New York cases laid down the rule that a failure by the subscriber to pay a required percentage at the time of subscribing was a good defence to an action on the subscription. (Jenkins *v.* Union Turnpike Co., N. Y. 1804, 1 Caines Cas. 86; Van Schaick *v.* Mackin, 129 A. D. 335, 337) but there has been a very strong tendency to change these holdings and not to follow the statutory provision strictly, when to do so would injure the interests of third parties. Upon the same principles which defeat the defence of *ultra vires* when interposed to an action against a corporation in cases where, if that defence were to prevail, it would accomplish a legal wrong (Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; First Nat. Bank *v.* Cornell, 8 A. D. 427), or which forbid a stockholder of a corporation *de facto* to raise the objection that its organization is not strictly *de jure* (Buffalo & A. R. R. Co. *v.* Cary, 26 N. Y. 75) is laid the basis for refusing to permit the defendant in the instant case to plead the statute and thus deprive the corporation's creditors of the advantage which he has unduly obtained. (See also 3 Thompson, Corporations (2nd ed.), Sec. 2793). When, however, the rights of creditors are in no way involved the court has properly refused to allow a recovery by either party against the other when the