Fordham Law Review

Volume 3 | Issue 2 Article 4

1917

Recent Decisions

Last year the REVIEW had only $3.78 in its treasury at the end of the year. The support of the alumni would have enabled the Board to have printed a bigger and better paper. The only thing which prevents the REVIEW this year from realizing its possibilities is lack of funds. Our REVIEW is now in the leading libraries of the land. It represents Fordham. It should be a matter of Fordham pride to have it as enterprising, as complete, as authoritative, as any other college law review.

The present enrolment of the law school is supporting the REVIEW loyally. With each alumnus doing his share, the circulation should soon reach the 1,000 mark. Once we are on a sound financial footing we can commence producing a REVIEW to which the profession generally will gladly subscribe. When the REVIEW becomes what we want to make it, a handy and accurate means for a practicing lawyer to keep abreast of new professional developments, every Fordham graduate will share in the prestige which it will attach to the Fordham name.

Please co-operate.

ANNOUNCEMENT

The Tenth Annual Dinner of the Fordham University School of Law, originally scheduled for February 10th, will be held on April 14th. The Hon. John Proctor Clarke, Presiding Justice of the Appellate Division, First Department, consented to speak on the earlier date, and it is sincerely hoped that he will find the new date convenient. The committee is arranging a brief, but distinguished, toast list. Tickets will be four dollars. Announcement of the place and further details will appear in the New York Law Journal.

RECENT DECISIONS.

DEBT OF LEGATEE TO TESTATOR, AGAINST WHICH THE STATUTE OF LIMITATIONS HAS RUN, NOT A DEFENCE.—In an action at law by a legatee against the executor of his testatrix for a legacy of $20,000, the executor pleaded a debt of $30,000 owing to the testatrix on promissory notes of the legatee. In his reply, the plaintiff set up the Statute of Limitations against liability on the notes. *Held,* the debt was barred by the Statute and recovery sustained by the plaintiff for the amount of his legacy. (*Kimball* v. *Scribner,* N. Y. Law Journal, Nov. 17, 1916.)

There are numerous authorities, originating mostly in the Surrogates' Court, arising on accounting proceedings for the judicial settlement of an estate, where it has been held that the executor has an equitable lien and a right to retain out of a legacy an amount due from the legatee to the testator, and that this right is unaffected by the fact that such debt is barred by the Statute of Limitations. (*Rogers* v. *Madock,* 45 Hun, 30; *New York Public Library* v. *Tilden,* 39 Misc. 169; *Leask* v. *Hoagland,* 64 Misc. 156.) These cases proceed upon the theory that the Statute of Limitations is a statute of repose. (*Hulbert* v. *Clark,* 128 N. Y. 295;) that the debt is part of the assets of the estate, and that the legatee—debtor in good conscience should contribute the amount of his indebtedness to the estate. Authorities in other jurisdictions hold that in an action to recover a legacy it is not a good defence that the legatee was indebted to the decedent on an obligation as to which the Statute of Limitations has run. (*Allen* v. *Edwards,* 136 Mass. 138; *Holt* v. *Libby,* 80 Maine, 329.)

The Court here follows 136 Mass. 138 (*supra*), and while it does not, of course, explicitly overrule the earlier decisions in Surrogates' Court proceedings, it rejects the reasoning therein, when offered as a basis of set-off in a common law action to recover a legacy, and suggests that the spirit of the decision shall hereafter guide the Surrogates' Court. This decision seems preferable in all respects to the rulings in the Surrogates' Court. Admittedly, the debtor would have a valid defence to a suit brought against him on the statute-barred debt by the executor. If the decedent did not see fit to prosecute his action or abate the bequest to the delinquent debtor, there seems to be no reason why the Surrogates' Court should disregard the Statute.

LANDLORD AND TENANT; LANDLORD'S COVENANT TO REPAIR; MEASURE OF DAMAGES FOR BREACH.—Plaintiff leased premises from defendant under a lease whereby the latter agreed to keep the premises, including windows, in repair and in safe condition; thereafter the windows became insecurely fastened, whereupon plaintiff notified defendant of that fact. Defendant promised to make the necessary repairs but failed to do so. A window fell out and injured a passerby, who sued plaintiff and recovered judgment, which the latter satisfied. Plaintiff brings this action to recover the amount of said judgment and the fee paid to his

attorney. *Held,* both plaintiff and defendant were joint *tort feasors;* they were in *pari delicto,* and defendant's motion for judgment on the pleadings was granted. (*Rubenstein* v. *Werbelowsky,* N. Y. Law Journal, Dec. 7, 1916.)

A mere breach by a landlord of his agreement to make repairs on demised premises renders him liable in damages only for the cost of the repairs. (*Schick* v. *Fleischhauser,* 26 App. Div. 210.) Plaintiff in the principal case, however, based his claim upon the theory that the landlord of premises abutting on a highway owes the public the duty of maintaining such premises in a safe condition; that this obligation does not shift to his lessee when the landlord expressly retains the duty to make repairs, that is, to keep the premises in a safe condition; that as between landlord and tenant the primary obligation is upon the former to maintain the premises in a safe condition as to the public. Hence, if the tenant is obliged to pay damages to a pedestrian because of injuries caused by the landlord's failure to fulfil his obligation, there is a right of recovery over, which is based not on the contractual obligation of the lease, but upon the landlord's breach of his primary duty to the public whereby a tort arose.

This appears to be a case of novel impression in this State, so far as the plaintiff's contention is concerned. It would seem that where there is active negligence—an affirmative act—on the part of the landlord, and entire freedom from participation in that negligence on the part of the tenant, the former is responsible for any damages incurred as a direct result of such negligence. (*Prescott* v. *Le Conte,* 178 N. Y. 585.) In the case under discussion, however, it was not claimed that defendant did any affirmative act whatever; on the contrary, it was found that plaintiff clearly concurred in the negligence. Also, the measure of the lessee's damage for the breach of the lessor's covenant is the amount of such damages as result as an immediate consequence of such breach. (24 Cyc. 922.) It could hardly be considered that the injury to the passerby in the principal case was such an immediate consequence of the landlord's breach as brought the case within the rule just cited. Unquestionably, therefore, landlord's liability, if any, must be predicated, not upon his breach, but upon his general duty to the public. While plaintiff's contention in this case is ingenious, we do not believe the present tendency of the courts is to enlarge upon the hitherto recognized duties owed by the owners of real property to the general public.

EVIDENCE—CRIMINAL TRIAL—COMPETENCY OF WITNESS IN FEDERAL COURT.—On the trial of two joint wrongdoers, indicted for tampering with the United States mail, a witness, who had also been jointly indicated but pleaded guilty, was called by the Government. Objection was taken on the ground that he was incompetent, having been convicted of forgery in New York. At the time of his trial the witness was under 18 years of age and was sent to Elmira Reformatory. *Held,* the witness was competent. (*Theo. S. Rosen and Abraham Wagner* v. *United States,* U. S. C. C. A., 2d Circuit, New York Law Journal, Nov. 29, 1916.)

The competency of witnesses to testify in criminal cases in the courts of the United States is determined by the common law of the State where the trial is had as it was when such courts were established, except in special cases where Congress may provide otherwise. (*Logan* v. *United States,* 144 U. S. 263; *Maxey* v. *United States,* 207 Fed. 327; *United States* v. *Sims,* 161 id. 1008.)

In New York a person who had been convicted of treason, felony or *crimen falsi* was incompetent. (*People* v. *Whipple,* 9 Cow. 707; *People* v. *Park,* 41 N. Y. 21.) Forgery was included in *crimen falsi.* (*Maxey* v. *U. S., supra*; Greenleaf on Evidence, Sec. 373; Wigmore on Evidence, Sec. 519, 520; Chamberlayne, The Modern Law of Evidence, Sec. 3663, note 1.)

In the principal case the court does not expressly contest these principles but holds that the facts do not require their application, as the witness had been sent to a reformatory which did not have the stigma of a prison sentence. On the contrary: "An examination of the adjudged cases in the various states of the Union where substantially the same laws are in force will show that it is not the commission of the crime nor the verdict of guilt, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court that renders the culprit incompetent." (*Faunce* v. *People,* 51 Ill. 311, 312; *Dawley* v. *State,* 4 Ind. 128, 129; *Blaufus* v. *People,* 69 N. Y. 107; *People* v. *Whipple, supra.*) On the exact facts of the principal case New York, under the common law, held the witness incompetent. (*People v. Park, supra.*) While these decisions are not binding on the court in the principal case, they are at least persuasive authority. (Thayer's Cases on Evidence, p. 1070, note.)

The tendency of modern thought is towards the abolition of the archaic rules which debarred criminals from taking the stand. (New York Code of Civil Procedure, Sec. 832; *United States* v. *Biebusch,* 1 Fed. 213; *United States* v. *Sims, supra;* Greenleaf on

Evidence, Sec. 378 a, Chamberlayne, *supra,* Sec. 3667, Wigmore on Evidence, Sec. 524, and cases cited by these authors.) In the principal case the dissenting opinion holds that Congress alone should make the change in the federal courts. (*Maxey* v. *United States, supra.*) The result reached by the prevailing opinion is undoubtedly correct, though the use of judicial legislation may be questioned.

EVIDENCE—COMPETENCY OF EVIDENCE TENDING TO SHOW THAT INSURANCE COMPANY IS DEFENDING ACTION.—In an action for personal injuries a physician who examined plaintiff was asked on cross examination in whose interest he acted, and replied, "The insurance company." The trial was interrupted and a juror withdrawn. Held, on appeal, that the inquiry was proper to show the bias or interest of the witness. (*Di Tommaso v. Syracuse University,* 172 App. Div. 34.)

In a negligence action evidence showing that the defence was conducted by an insurance company is incompetent and sufficiently dangerous to require reversal, unless it clearly appears that it could not have influenced the verdict. (*Simpson* v. *Foundation Co.,* 201 N. Y. 479.) But, that it is relevant to show the bias or interest of a witness cannot be doubted. (*Platner* v. *Platner,* 78 N. Y. 90.) This is told to us by the ordinary rules of logic, and not the law of evidence. (Thayer's Cases on Evidence, second edition, note p. 229.) In the principal case the question and answer clearly showed that the witness was interested in the defence and therefore were relevant. The inquiry being relevant, does any rule of the law of evidence operate to exclude it? It was immaterial that the character of the witness' interest was with an insurance company or that plaintiff's counsel expected the answer elicited. (*Odell* v. *Genesee Const. Co.,* 100 App. Div. 125.) The interest of a witness, as affecting his credibility, is always material to go to the jury. (*Schultz* v. *Third Ave. Ry. Co.,* 89 N. Y. 242; *Potter* v. *Brown,* 197 N. Y. 288), and it is our opinion that in the instant case the question objected to went directly to the credibility of the witness. Therefore, as the bias of the witness and his interest in the action were relevant and material, it cannot be resisted that the inquiry was a proper one. The admissibility of evidence is a question to be decided by the trial court in the exercise of its sound discretion, and a ruling admitting or rejecting evidence will not be reversed unless

there has been a manifest abuse of this discretion. (*Meyer* v. *Cullen,* 54 N. Y. 392; *People* v. *Ferrone,* 204 N. Y. 551.)

This case makes an exception to a hitherto well-settled rule in this State, and indicates that even where an inquiry reveals the fact that an insurance company is interested in the litigation it will be proper, if competent for any purpose, and that the trial court's action in permitting the withdrawal of a juror because of the asking and replying to a question indicating it is an abuse of its discretion. There are decisions in other jurisdictions which are in accord with this holding: (*Hedlum* v. *Holy Terror Min. Co.,* 92 N. W. [South Dakota], 31; *Day* v. *Donohue,* 62 N. J. L., 280; *Shoemaker* v. *Bryant Lumber Co., 27* Wash., 637).

We do not hesitate, therefore, to concur with the principal case, and it is submitted that it accords with both principle and authority.

SEPARATION—DUTY TO SUPPORT WIFE IMPOSED ON HUSBAND BY CONJUGAL RELATION.—Action by a wife for separation on ground of cruelty, abandonment and failure to support. Defendant's answer set up as counterclaim an abandonment on part of the plaintiff, for which a separation was asked. *Held,* where a man has entered into matrimonial relation, there is an obligation resting on him to support his wife and the issue of the marriage. The husband is not relieved from that obligation by the fact that wife is as much or more than he is to blame for uphappy relations which caused their separation. (*Finkelstein* v. *Finkelstein,* Appellate Division of the Supreme Court, First Department, reported in New York Law Journal, issue of November 11th, 1916, p. 539.)

It is elementary that "the conjugal relation imposes upon the husband the duty to support the wife." (22 Amer. & Eng. Encyclopedia of Law, 78.) In equity and under the statutes, the generally recognized grounds for the wife's right to an allowance for separate maintenance are desertion or abandonment of the wife by the husband without just cause, and cruelty, personal violence and drunkenness. (21 Cyc. 1599 and cited cases.) The living of a married woman separate and apart from her husband, in order to entitle her to a decree for separate maintenance, must be without her fault. (26 American Digest, Centennial Edition, p. 2844, and cited cases.) An action for maintenance cannot be brought by a wife who has separated from her husband without just cause. (7 Abbott's Digest, 707; *Noe* v. *Noe,* 13 Hun, 436.)

The decision in the principal case, to the effect that the husband is not relieved from the obligation of support by the fact that the wife is as much to blame as he, *or more,* for the unhappy relations which caused their separation, would seem to be a radical change from the generally accepted view as given above. Given the fact that the wife has left her husband without just cause, to say that under such circumstances the husband would be liable for her separate maintenance would seem to be unsound.

PRINCIPAL AND SURETY—LIABILITY ON BOND—RENEWALS.—Plaintiff seeks to recover an original bond, guaranteeing the fidelity of one of its employees, and on the several renewals thereof declaring that the bond and each renewal created separate liabilities, and that defendant is liable within the yearly limit provided for loss by defalcations of the employee during the designated period of time.

Held, that plaintiff could recover despite the provisions of the bond for losses through dishonesty of employee running from January 1, 1905 to January 1, 1906 and renewed each year, the last renewal being from January 1, 1911 to January 1, 1912 and the defalcation occurring in 1907 and 1909. *Chatham Real Estate & Improvement Company* v. *United States Fidelity & Guaranty Company* (Ga.), 90 S. E., 88.

For and in consideration of a premium the defendant herein executed its certain bond or obligation to reimburse plaintiff for any defalcation of one Garden, its Treasurer, for a period of one year, limiting its liability thereunder to $10,000. Subsequently additional premiums were paid and the defendant extended its liability under the said bond from year to year and up to and including January 1, 1912. As each renewal was made a certain certificate was annexed to the original bond reading as follows:

"CONTINUATION CERTIFICATE

"In consideration of the sum of thirty-five dollars, the United States Fidelity & Guaranty Company hereby continues in force bond No. 1052—5 in the sum of ten thousand dollars on behalf of F. W. Garden in favor of Chatham R. E. & Imp. Co., for the period beginning the first day of January, 1911, and ending on the first day of January, 1912, subject to all the covenants and conditions of said original bond heretofore issued, dating from the first day of January, 1905."

A proviso in the original bond as follows;

> "The company upon the execution of this bond, shall not thereafter be responsible to the employer under any bond previously issued to the employer on behalf of said employé; and upon the issuance of any bond subsequent thereto upon said employé in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time unless otherwise stipulated between the employer and the company."

indicated that at no time should the liability of the defendant exceed the amount limited in the original bond. In spite of this fact the Court held that each renewal was separate and distinct liability to the extent of the amount limited in the bond for each year, so that instead of being liable in toto for $10,000, the defendant was liable to the extent of $10,000 for each and every year. This decision reverses that of *John Church Company* v. *Aetna Indemnity Company,* 13 Ga. App., 826; 80 S. E., 1093, which was a suit upon a similar bond, and the court now construes such a bond with its renewals as extensions of liability and not as limitations.

Few of the States have as yet taken this view, but Georgia is now in accord with New York and Mississippi. In New York the first case on the point was that of *Hawley* v. *United States Fidelity. Company,* 100 App. Div. 12; affirmed 184 N. Y., 549, which reversed all prior decisions, and has now been followed by a more recent one in the case of *Alex. Campbell Milk Company* v. *United States Fidelity & Guaranty Company,* 161 App. Div:, 738, which substantiates the doctrine of the extension of liability rather than that of limitation.

Mississippi reaches the same conclusion and in the case of *United States Fidelity & Guaranty Company* v. *Williams,* 49 So. Rep., 742, says that each renewal stands upon its separate consideration and provides for its designated period of time and thus creates cumulative liability even against the express intention of the contract.

BANKRUPTCY—LIABILITY FOR OBTAINING PROPERTY BY FALSE PRETENSES NOT RELEASED BY DISCHARGE.—A bond was obtained from a surety company by false representations and the company, having been compelled to pay the bond, thereafter sued the in-

sured because of his false statements as to his financial standing and obtained judgment against him for the penalty and interest. *Held,* the discharge of the insured in bankruptcy does not cancel such judgment under Section 17 of the Bankruptcy Law, reversing the ruling of the Appellate Division in favor of the defendant Dunfee. (*Matter of Dunfee,* 219 New York, 189.)

Section 17 of the Bankruptcy Law provides that "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations."

The case turns on the interpretation of the word "property" as used in the above quoted section. The Court in the case of *Phelps* v. *People,* 72 New York, 334, in defining the words "personal property" as used in the revised statutes, said that "The term personal property (as used in this chapter), shall be construed to mean goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, disharged or diminished." A like interpretation was put on the above section of the revised statutes in *Bork* v. *People,* 91 N. Y., 5. The word "property" (in *People* v. *Warden,* 145 A. D., 861), was held "to embrace every species of valuable right and interest, and whatever tends, in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."

At common law no such liberal interpretation was apparently given. "Property" is defined by Blackstone (1 Comm., 138) as the "free use, enjoyment and disposal of all his (a man's) acquisitions, without any control or diminution, save only by the laws of the land." Bouvier's Law Dictionary defines "property" as an "exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them, or giving them away to any other person without consideration, or even throwing them away." These last definitions were quoted with approval in two early New York cases, *Wynehamer* v. *People,* 13 New York, 396, and *Sherman* v. *Elder,* 24 New York, 384. As indicated above, however, the subsequent New York decisions have given a much wider scope to the definition of the word "property," as have most jurisdictions.