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Recent Decisions

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RECENT DECISIONS.

CONTRACTS—RIGHTS OF BENEFICIARY.—The bridge which carried Columbia Street, City of Rensselaer, on which plaintiff's premises abutted, over defendant's railroad tracks, being out of repair, defendant and the City entered into a contract under seal providing for the repairing of the bridge and the raising of the grade of the approaches thereto. Said contract provided among other things that defendant would pay any damages resulting to property from the change of grade of such street. The grade of Columbia Street was raised accordingly and plaintiff's property was materially damaged thereby. In a suit against the railroad company to recover compensation for such damage, *Held,* That, although he had no claim against the City therefor, plaintiff could recover such damages under the provisions of the contract between defendant and the City, on the theory of *Lawrence* v. *Fox.* (*Rigney* v. *N. Y. C. Railroad,* N. Y. Court of Appeals, Law Journal, February 5, 1916.)

It has been held in New York that a party may sue on a promise not made to him when the promisee owed him a legal duty to

do the thing promised. (*Lawrence* v. *Fox,* 20 N. Y. 268.) This doctrine applies equally to contracts under seal. (*Coster* v. *The Mayor,* 43 N. Y. 399.) "The party suing upon the promise, in cases like *Lawrence* v. *Fox,* is in truth asserting a derivative right". (*Dunning* v. *Leavitt,* 85 N. Y. 30, 35.) The adopted promise is subject to any assault which the promisor can make upon its validity. (*Arnold* v. *Nichols,* 64 N. Y. 117.) It has not been decided that the beneficiary's right in the contract vests before he brings suit upon it. (*Gifford* v. *Corrigan,* 117 N. Y. 257.) The legal or equitable duty which the promisee owes the beneficiary must relate to the subject matter of the contract. (*Durnherr* v. *Rau,* 135 N. Y. 219; *Vrooman* v. *Turner,* 69 N. Y. 280.) That line of obligation would seem to be lacking in the principal case. It was found distinctly that the plaintiff had no claim against the City for his damages. The opinion argues that the municipality is under some obligation to protect its inhabitants when it enters into a contract for public work, which may result in damage to one of them, for which otherwise he would be without remedy. But that is a moral obligation. Moreover, the duty of the city to protect its inhabitants here would appear to be rather to the inhabitants generally to provide a safe bridge and approaches, than to the particular class to which plaintiff belonged to compensate them for damages from a change of grade. The early tendency to restrict *Lawrence* v. *Fox* (see the odd case of *Wheat* v. *Rice, 97* N. Y. 296, never in terms overruled) has, it is true, been done away with by the later cases. (*Pond* v. *The Water Co.,* 183 N. Y. 330; *Gulla* v. *Barton,* 164 App. Div. 293.) But even in *Pond* v. *The Water Co., supra,* the line of legal obligation might be found. (*Smyth* v. *City of New York,* 203 N. Y. 106, 114, 115.)

A sole beneficiary is one solely interested in a pecuniary way in the performance of the promise. Not as to the whole contract, of course, but as to the particular promise under which he sued, plaintiff in the principal case was a sole beneficiary; he alone was pecuniarily interested in its being carried out. With one exception, no sole beneficiary has recovered in New York, except a dependent relative of the promisee. (*Buchanan* v. *Tilden,* 158 N. Y. 109.) That exceptional case stands apart in that on its facts and decision a sole beneficiary other than a dependent relative of the promisee was allowed to recover. (*Todd* v. *Weber,* 95 N. Y. 181.) The opinion, however, apparently went on the dependent relative theory, in that it cited *Dutton* v. *Poole* (2 Levinzs 210; since overruled in England by *Tweddle* v. *Atkinson,* 1 Best

& Smith 393), and it has been so explained in a later case. (*Smyth* v. *City of New York, supra,* at p. 113.) The principal case has the result, therefore, of allowing a sole beneficiary to recover under *Lawrence* v. *Fox.*

There is a third line of decisions in New York apart from either of the theories just discussed. It is what might be termed the public policy doctrine and is represented by *Little* v. *Banks,* 85 N. Y. 258, and noted as a second ground of decision in *Smyth* v. *City of New York, supra.* This renders contractors with the State, who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect. The principal case would appear sound under this last rule, apart entirely from *Lawrence* v. *Fox.* The opinion, however, does not discuss this point.

SALES—VENDOR'S LIEN—LOSS THEREOF BY TRANSFER OF NEGOTIABLE WAREHOUSE RECEIPTS.—Plaintiffs having by indorsement transferred negotiable warehouse receipts to vendees, who thereafter became insolvent, sue in replevin to regain the merchandise; *Held,* that the transfer of the warehouse receipts operated as a transfer of possession and title to goods therein described, divesting plaintiffs of their unpaid vendor's lien; hence replevin would not lie. (*Rummell* v. *Blanchard,* 216 N. Y. 348.)

At common law warehouse receipts and dock warrants were not fully recognized as documents of title and the indorsements thereof had not "any effect beyond that of a token of an authority to receive possession." (Blackburn, Sales, 2d ed., 415, 418; see also, *McEwan* v. *Smith,* 2 H. L. G. 309; *Griffiths* v. *Perry,* 1 E. & E. 680; *Sanders* v. *MacLean,* 11 Q. B. D. 327, 341.) By statute, however, no distinction is now made between warehouse receipts and bills of lading, both being equally recognized as documents of title. (Uniform Warehouse Receipts Act, secs. 37-41; *In re Reichheimer,* 221 Fed. 16.)

In many jurisdictions, and for some time prior to statute in New York, the transfer of a warehouse receipt, without the warehouseman's consent to become bailee for the vendee, had the effect of changing title only, the possession being left undisturbed and the warehouseman remaining bailee of the vendor. (Williston on Sales, p. 739 and cases cited; also, *Selliger* v. *Kentucky,* 213

U. S. 200, 205; *Union Trust Co. & S. W. Co.* v. *Wilson,* 198 *id.* 530, 536.) But since legislative enactment in New York (July 25, 1907), the warehouseman who issues a negotiable receipt agrees in advance to hold the goods for the account of any person to whom the receipt is negotiated and by the very act of negotiation loses his position as bailee for the vendor and is transformed without further assent, into bailee for the transferee. (General Business Law, sec. 125; N. Y. Consol. Laws, ch. 20.) Where the receipt issued is non-negotiable, the warehouseman does not become the bailee for the transferee of the receipt, until notice of the transfer. (General Business Law, sec. 126.)

Plaintiffs therefore, by transferring their negotiable warehouse receipts, completely divested themselves of both title and possession to the goods which they now seek in replevin, and with the passing of possession, lost their lien as unpaid vendors. (N. Y. Consol. Laws, ch. 41, Pers. Prop. Law, Sec. 137.) The decision, holding that replevin cannot be maintained, appears sound.

"SCINTILLA" RULE—WHEN CASE MUST BE SUBMITTED TO JURY.—In an action to recover for personal injuries caused by defendant's negligence the plaintiff had a verdict. The Court denied the defendant's motion for a new trial. On appeal, the Appellate Division dismissed the complaint on the ground that plaintiff was guilty of contributory negligence as matter of law. The Court of Appeals, upon examination of the evidence, *Held* that the questions of defendant's negligence and plaintiff's freedom from contributory negligence were properly submitted to the jury and therefore the dismissal of the complaint was error. But the appellant was entitled to have the Appellate Division pass upon the facts and the weight of evidence. Since this was not done the case must be remitted for that purpose. (*Rowe* v. *Hendricks,* 216 N. Y. Memo 76.)

It is apparent from this decision that the Court of Appeals has reaffirmed the doctrine of *McDonald* v. *Met. St. Ry. Co.* (167 N. Y. 66) which, it was believed, the Matter of Case (214 N. Y. 199) had intended to discard.

The early rule in New York, the "SCINTILLA" RULE, supported by a long line of decisions (*Stuart* v. *Simpson,* 1 Wend. 376; *Rudd* v. *Davis,* 3 Hill 287; *McMartin* v. *Taylor,* 2 Barb. 356; *People* v. *Cook,* 14 Barb. 259), had its last enunciation in *Linkhauf* v. *Lombard* (137 N. Y. 417), *Hemmens* v. *Nelson* (138 N. Y. 517) and *Laidlaw* v. *Sage* (158 N. Y. 73). "Where there is no

evidence upon an issue or the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit or direct a verdict as the case may require". Thus the right to nonsuit or direct a verdict was measured by the right to set aside the verdict as against the weight of evidence. This rule was changed by *McDonald* v. *Met. St. Ry. Co., supra.* "We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact that the Court may direct a verdict. So long as a question of fact exists, it is for the jury and not for the Court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the Court to determine it. But whenever the plaintiff has established facts which would justify a finding of fact in his favor, the right to have the issue of fact determined by a jury continues and the cause must ultimately be submitted to it". Under this rule, the fact that the weight of evidence clearly preponderates in favor of one side will not justify the Court in withdrawing the case from the jury, provided an actual issue of fact is raised. (See *McConnell* v. *N. Y. Central R. R.,* 63 App. Div. 548.) Yet it may be reversible error for the Court to refuse to set aside, as against the weight of evidence, a verdict based upon facts which it would have been reversible error to refuse to submit to the jury. "The learned trial Justice was justified in submitting to the jury the question of plaintiff's freedom from contributory negligence, but the jury was not justified in finding as a fact that she had sustained the burden of proof in that regard. The verdict of the jury should have been set aside by the trial Court upon this ground". (*Weill* v. *City of N. Y.,* 148 App. Div. 919.) The result of this rule is that the trial Court must set aside successive verdicts until the jury returns a verdict in accordance with the weight of the evidence. The folly of the rule has been recognized and somewhat remedied by holding that even where the Court still considers the verdict as contrary to the weight of evidence, if repeated verdicts are handed down for the same party on the same proofs, the Court will yield its opinion to the reiterated conviction of the jury. (*McCann* v. *N. Y. etc. R. R., 73* App. Div. 305; *Lachs* v. *Everards,* 95 N. Y. Supp. 25.)

The recent decision of *Matter of Case, supra,* intimates that the

McDonald case never changed the rule. It quotes with approval the words of Maule, *J.*, in *Jewell* v. *Parr* (13 C. B. 916), setting forth the English rule, which was in accord with the early New York rule. "'When we say that there is no evidence to go to a jury we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established.' Rightly read, the case of *McDonald* v. *Met. St. Ry. Co.* (167 N. Y. 66) holds nothing to the contrary". It adopts, as the prevailing rule, the language of cases prior to the *McDonald* case, holding that "insufficient evidence is, in the eye of the law, no evidence". (*Pollock* v. *Pollock,* 71 N. Y. 137.) The expression "insufficient evidence" as used in the *McDonald* case does not mean the same as was meant by Maule, *J.* In the former case, it means insufficient to raise an actual issue of fact; in the latter it means insufficient to satisfy twelve reasonable men that the fact sought to be proved is established. (*Ryder* v. *Wombwell,* 4 Ex. 32; Thayer's Cases on Evidence, p. 151.) The two are not the same test. If "rightly read", the McDonald case means by insufficient evidence what Maule, *J.*, means, then the rule never was changed.

The principal case (as also *Martin* v. *Crumb,* 216 N. Y. at p. 506) reaffirms the McDonald rule. The Court of Appeals expressly finds that the defendant's negligence and plaintiff's freedom from contributory negligence were properly submitted to the jury. This is a finding that there was "an actual issue of fact". The dismissal of the complaint was therefore error, but the weight of evidence was still for the Court's consideration. Hence, the case is remitted to have the Appellate Division pass upon the facts and the weight of evidence with a view to sustaining or setting aside the verdict. In other words, the Court applies the "actual issue of fact" test and declares that the right to nonsuit or direct a verdict is not measured by the right to set aside the verdict as against the weight of evidence. It would be hard to conceive a stronger application of the McDonald case. It is to be regretted that the hope held out by *Matter of Case* is not to be realized.

LIEN LAW—CHATTEL MORTGAGES—NOTICE.—One Fleming, retiring from a partnership with White, conveyed to plaintiff at White's request, a safe, by a bill of sale which, though absolute upon its face, was intended to operate merely as security for the payment of certain notes made by White to the plaintiff. The

instrument was filed pursuant to the provisions of Article 10 of the Lien Law. Nothing was filed therewith to indicate that it was intended to be a chattel mortgage and not an absolute bill of sale, and the agreement so to regard it was never reduced to writing. White thereafter traded the safe for a new one with the Carey Safe Company, through whom defendants derived title. In an action for conversion against the defendant purchasers, *Held,* that plaintiff could recover; that a bill of sale absolute upon its face, but intended to operate only as a mortgage, and filed pursuant to Article 10 of the Lien Law, is notice to a subsequent purchaser in good faith, it being unnecessary that any instrument expressing such an intention be filed therewith. (*Sheldon* v. *McFee,* New York Court of Appeals, N. Y. Law Journal, Jan. 26, 1916.)

A mortgage of goods may be valid between the parties without a writing. (*Bank of Rochester* v. *Jones,* 4 N. Y. 497.) So too, a conveyance, absolute upon its face, may be shown by parol or extrinsic evidence to be in reality merely a security. (*Barry* v. *Colville,* 129 N. Y. 302.) But a mortgage of personalty must be filed where the rights of creditors and purchasers in good faith are concerned. (*Bank of Rochester* v. *Jones, supra.*) By the provisions of the Lien Law (Chap. 33, Art. 10, Sec. 233), "every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article". The provision of the law is a salutary one made for the protection of creditors and subsequent purchasers in good faith. The object of the filing is to give notice of its existence to all persons who choose to inspect it, and when properly filed it is legal presumptive notice, binding on all persons interested. The case under review stands for the proposition that any conveyance filed pursuant to Article 10 of the Lien Law, is constructive notice to a subsequent purchaser, provided the parties intended to regard the instrument as a chattel mortgage. It does not matter whether the expression of this intention be filed or not filed, be written or oral. The extrinsic agreement forms no part of the instrument required to be filed. (*Preston* v. *Southwick,* 115 N. Y. 139.) The filing of a bill of sale, absolute upon its face, without any defeasance clause and without any accompanying instrument importing a defeasance, is held a good and fair filing so

as to convey to the world notice of the rights of the mortgagee. It is submitted that this is an extension of the doctrine of notice, bordering upon unfairness to subsequent purchasers in good faith. The requirement that there be filed with the conveyance intended to operate as a mortgage, not necessarily every writing explanatory of its being designed to have such an effect, but at least some writing indicative of such intention, would appear to be not unreasonable.

PRINCIPAL AND AGENT—PROVISIONS OF POWER OF ATTORNEY CONSTRUED—AUTHORITY TO EXECUTE NOTE—RATIFICATION BY AN ADMINISTRATOR OF AN ACT PREVIOUSLY DONE BY HIM AS AGENT.—Action brought to recover $20,000 on a promissory note signed by Alexander McDonald, by Edmund Stallo, as attorney, and payable to one Keyes. McDonald had given Stallo in 1907 a power of attorney which provided substantially as follows:

> "For me and in my name . . . to collect all debts due or to become due . . .; to collect and receive all dividends on stock, etc., held by me; to collect rents . . . and to give valid receipts, etc., for money received . . . for me; to make, sign, execute and deliver for me . . . all bills of exchange, promissory notes and other evidences of indebtedness; to sell, transfer and assign all personal property, etc., which I own . . .; to guarantee payment of promissory notes, etc., of any company in which I may be or become a stockholder; and generally in the sole management of my personal property and in other matters above mentioned to do and perform everything which I could do . . ."

In 1910 Stallo purchased for McDonald certain stock and gave McDonald's note in payment therefor. McDonald died and Stallo, while acting as sole administrator, included note on which this action is brought as a liability of McDonald's estate. Defendant was subsequently appointed co-administrator and on retirement of Stallo became sole administrator. Defendant refused to pay the note, setting up as a defense to the action that the power of attorney given to Stallo did not authorize him to execute the note in question. In the lower court plaintiff recovered; on appeal, *Held*, That Stallo under the power of attorney had no authority to execute the note, and the fact that Stallo, while acting as administrator, included the note in an inventory, did not make it an obligation of the estate. (*Keyes* v. *Metropolitan Trust Co.*, 169 App. Div. 765.)

A power of attorney must specifically set out each special power meant to be conferred and no power will be implied except those requisite for the complete fulfillment of the principal's declared intention, that is, to do those ancillary acts which it is natural to suppose the principal himself would do. (MacKenzie on Powers of Attorney (1913) page 33; *Lesem* v. *Mutual Life Insurance Company,* 164 App. Div. 507.) The power to give promissory notes and other evidences of indebtedness does not imply the power to create indebtedness not already existing (*Craighead* v. *Peterson,* 72 N. Y. 279; *Nash* v. *Mitchell,* 71 N. Y. 199), and the authorities show that the words relating to the issue of promissory notes and the general words at the end of the power of attorney are not to be construed so as to enlarge the substantive powers conferred on the attorney. (*Rossiter* v. *Rossiter,* 8 Wend. 494; *First National Bank* v. *Bean,* 141 Wis. 476.) Where one gives in the name of his principal a note which he was not authorized to sign as agent for the principal, the agent himself is personally liable (*Fulton* v. *Sewall,* 116 App. Div. 744; *Rossiter* v. *Rossiter,* 8 Wend. 492; *Heyman* v. *Caspery,* 117 N. Y. Supp. 966). Evidence of the acts and admissions of one of several co-administrators is not receivable to affect the others or the estate. (*Bailey* v. *Spofford,* 79 N. Y. 415; *Finnern* v. *Hinz,* 38 Hun 465; Greenleaf on Evidence, Vol. 1, Sec. 176.) We submit that the decision herein is sustained both on principle and authority.

JUDGMENTS—LIEN ON REALTY—ISSUANCE OF EXECUTION INEFFECTUAL TO CHANGE PARITY OF SIMULTANEOUS JUDGMENT LIENS. After the due docketing of three successive judgments against a single defendant, an estate in realty in that county descended to him, admittedly resulting in simultaneous liens thereon in favor of the three judgment creditors. Subsequently one of these three issued an execution under which the property was sold, whereupon the other two judgment creditors brought proceedings to establish their rights to respective thirds in the property, the judgment debtor being insolvent. *Held,* that, since the judgments were liens without the issuance of execution, the admitted parity of the three liens against the inherited realty was not affected by the subsequent issuance of execution, and that the proceeds of sale thereunder was a common fund for the three judgment creditors. (*Hulbert* v. *Hulbert,* 216 N. Y. 430.)

This decision changes the rule that has obtained for over a hundred years in this State. The law as announced in *Adams* v. *Dyer,* 8 Johns. 347, and *Waterman* v. *Haskin,* 11 Johns. 288, has been recognized and followed not only in this State but in many other jurisdictions. (*Elston* v. *Castor,* 101 Ind. 426; *Gimbel* v. *Stolte,* 59 Ind. 446, 451; *Smith* v. *Lind,* 29 Ill. 24; *Bruce* v. *Vogel,* 38 Mo. 100, 106; *Bliss* v. *Watkins,* 16 Ala. 229 (citing the two new York cases, *supra*), *Lippencott etc.* v. *Wilson,* 40 Iowa, 425 (held not to apply to after-acquired property in *Kisterson* v. *Tate,* 94 Iowa 665, although it is difficult to see any reason for the distinction). Leading text-writers have subscribed to the same doctrine. (2 Freeman on Judgments (4th ed.) Sec. 374; Rorer on Judicial Sales, Sec. 703; A. & E. Encycl. of L., 2nd ed., vol. 17, p. 796.) Thus it is clear that the doctrine is not peculiar to New York.

Judge Seabury writing the prevailing opinion in which Chase, Collin and Hogan, *JJ.,* concurred, reviewing the statutes and authorities, both English and American, relating to the acquisition and perfecting of judgment liens upon real property, concludes that prior to the enactment of Chapter 50 of the Laws of 1813, the law was not settled in this State as to the status of a judgment duly docketed. That statute was the first to *declare specifically* that "the said judgment shall be a *lien* on such land, etc." Hence, *Adams* v. *Dyer, supra,* and *Waterman* v. *Haskins, supra,* had under consideration judgments docketed before the enactment of that statute and the court was justified in deciding that something more than merely docketing the judgment was necessary before the lien would be perfected. Since the enactment of the statute it is clear that a judgment becomes a lien immediately upon being duly docketed, or in the case of after-acquired property when the property came into the hands of the judgment debtor and hence the performance by one judgment creditor of an unnecessary act should not give his lien priority.

Chief Justice Bartlett in a strong dissenting opinion, in which Cuddeback and Pound, *JJ.,* concurred, insists that there was no reason for reversing such a long established precedent. He calls attention to the *Adams* and *Waterman* cases, in both of which the Court *said* that the judgments were *liens.* While it is true that no statute before that of 1813 specifically *expressed* that a judgment was a lien, the preceding statutes necessarily *implied* that such was the law. The case of *Koning* v. *Bayard,* 14 Fed.