

CASE AND COMMENT

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(By JOHN P. TIERNAN)

In a Maine case, *Stenert & Sons, vs. Reed*, 108 Atl. 334, the court held that where, in a note given for a piano, title was reserved in the seller until note was fully paid, recovery of a judgment thereon did not pass title in piano to buyer in the absence of satisfaction. The decision is absolutely sound in principle and in accord with the intention of the parties. Clearly it is not a case where the doctrine of election of remedies applies, since action on the note is a personal remedy, whereas replevin is proprietary.

In a Vermont case, *Ex-Parte St. Augl*, 108, Atl., 203, the Vermont court held that in habeas corpus to recover custody of infants, damages for their detention are not recoverable since habeas corpus is a proceeding to determine solely the status of the parties affected and not to provide a compensatory remedy to person deprived of their custody. Obviously the proper remedy for such relief would be an action for loss of services.

In an Indiana case, *Christlieb vs. Christlieb*, 125 N. E. 486, the court held that on the particular facts alleged, the marriage could be annulled for fraud. This is the first Indiana decision that determines the sufficiency of fraud that would justify a dissolution of the marital status, holding that it must be such that "affects the essentials and fundamentals" of that relation.

In a Michigan case, *Krolilcos Kazmarek*, 175, N. W., 239, the court held that where a sale is made in violation of the Bulk Sales Statute and is successfully set aside by creditors of the seller, the buyer can recover the price paid in an action against the seller, since there is a failure of consideration and the seller cannot plead his own violation of the statute as a defense. With the greatest deference, it is submitted that this decision is unsound. There is no failure of consideration since title and possession passed to the buyer and the sale was absolutely valid between the original parties as the court itself expressly states. Further, the buyer is making his own violation of the statute the basis of his cause of action and the position of a defendant is the more advantageous where both parties are equally at fault. The statute imposes the duty of observing its mandates not upon one but upon both of the parties and hence where a statute is violated by the plaintiff he does enter with the metaphorical "unclean hands" and should be denied relief from a situation he himself helped to create.

In a South Carolina case, *Wilson vs Palmetto Nat. Bank*, 101 S. E. 841, the court held that a bank is liable for temperate damages for failure to honor a depositor's check. There was no loss shown upon the trial but a substantial award of damages was returned by the jury. Where no loss is shown, the verdict should be limited to nominal damages. The court was certainly conscious of the distinc-

tion between nominal and substantial damages but in its desire to allow the verdict to stand and at the same time do no violence to the principle itself held that "temperate damages" are proper in such a case.

The Georgia case, *Weayherbt vs. Pittman*, 101 S. E., 131, presents several interesting questions. In this case the court held that a note given to attorneys to defend a person charged with crime was based on a sufficient consideration, although the attorneys had previously been assigned by the court to perform this duty. The court further decided that oral ratification of an unauthorized signature to a note was valid. It is to be observed with respect to the first point decided, that there was no statute compelling attorneys to defend a person charged with crime, but the judge referred to it as being a legal obligation arising out of his relation to the court and originating in the common law. Here is dictum, if not decision, that an attorney is under a legal obligation when assigned by the trial court, to defend a person in a criminal prosecution. But he is entitled to no compensation for his services unless a statute expressly provides therefor. There was no such statute in the state. Hence, the court reasoned when such services which the attorneys were legally bound to render, were rendered, it created a moral obligation on part of defendants to pay therefor. This, the court held, was sufficient to validate the note in view of the fact that there is in force a Georgia statute, Civ. Code, 1910, See 4243, expressly provides that 'a good consideration is such as is founded on a strong moral obligation.

7. In *Myers vs. Fortunate*, 108, Atl., 678, the Delaware court holds invalid a city ordinance which provided that no permit shall be granted by the inspector of buildings for the erection of a public garage in the residential section without consent of property owners. The court draws a distinction between an ordinance that confers arbitrary power upon a public official and an ordinance giving such absolute power to a portion of the people, observing that "it cannot be assumed that the official will act arbitrarily or otherwise than in the exercise of a sound discretion." The court is evidently unmindful that all the decisions hold invalid an ordinance giving an official arbitrary power in this class of cases. The distinction made by the court, however, was not necessary to the decision in the case and the majority of cases hold that an ordinance of the variety under consideration is entirely valid. There is a strong judicial tendency to sustain ordinances if it is possible to do so in order to give effective operation to the municipal police power that modern conditions demand.

8. In *State ex rel. Schafer vs. Spokane*, 186 Pac., 64, the Washington court held valid an ordinance prohibiting operation of jitney busses on the public streets without a permit from the City Council. Here is an important decision on a timely question. It holds that a city can not only regulate the industry but prohibit it absolutely within its municipal limits. The court makes a sound distinction between cases in which an ordinance can merely regulate and cases where its police power can be exercised prohibitively. Speaking with reference to the facts in the case the court said:

"But the use to which the appellant purposes putting the streets is not their ordinary or customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed. As to such users, we think the power of the municipality is plenary. It devises reform of regulation pertaining to business of this character, even to the *prohibition of the business entirely*.

9. The Supreme Court of Louisiana in *Brown vs. Giullot*, 83 So., 373, rendered an interesting decision. The case was an application for a writ of mandamus by the defendant in a criminal prosecution to recognize the right of one Mundy to represent the relator as his counsel in the trial court. Court issued the writ, holding that the right of a person to practise law can not be questioned collaterally. The principle involved here is of course not decisive of a case where the court inquires into the authority of a person to represent a party as his attorney, this being merely a question of agency, and presupposing the legal right of the person to practise law generally. The unauthorized act of an attorney in representing a client, however gives the court no jurisdiction of the party's person although a few courts hold it to be a mere irregularity.

10. The Texas case of *Richmond vs. Sangster*, 217, S. W., 723, strikes a fatal blow at transient divorces. It presents a flagrant case of perjury and imposition upon the Illinois courts by a party who deserted the domiciliary state and located temporarily in Illinois in order to obtain the decree. The decree was held void for lack of jurisdiction therefore, not only in Illinois but in Texas. It merited no extraterritorial recognition in other states on the principle of comity and could demand no operation by virtue of the full faith and credit clause of the Constitution, citing *Haddock vs. Haddock*, 26 S. W. Rep. 525, and a host of decisions from leading states of the Union. This instructive case, sound in its reasoning, just in its decision and commendable in its doctrine, brings once more to the forefront the subject of foreign divorces. As to how a divorce granted in one state can be rendered conclusive, valid not only as to the merits of the case, but jurisdictionally in other states, is a legal question that is believed to be incapable of solution. But apart from this rigid adherence to principle as is clearly evidenced by the courts in an inexorable demand that jurisdiction is indispensable to the validity of the judgment, the courts render society itself a noble and a lasting service in discouraging the divorces that are scandalizing American life.