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Default Judgment--What Constitutes--Appeal From (Jensen v. Union Railway Company of New York, 260 N.Y. 1 (1932))

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or to allow the defendant to receive the benefits of the contract without compensating for them. It chooses the lesser evil and calls the contract void. The defense is allowed not as a protection to the defendant but as a disability to the plaintiff for his unconscionable conduct.⁴

H. B. S.

DEFAULT JUDGMENT—WHAT CONSTITUTES—APPEAL FROM.—Judgment was recovered by plaintiff after an inquest at Trial Term, before which proceeding defendant had asked for an adjournment which was refused. After reversal by the Appellate Division of an order granted in Special Term vacating the inquest and granting a new trial, defendant appealed to the Court of Appeals. *Held*, no appeal lies from a final judgment to review an intermediate order refusing to vacate an inquest. *Jensen v. Union Railway Company of New York City*, 260 N. Y. 1, 182 N. E. 226 (1932).

Judgment by default may be entered upon defendant's failure to appear, after issue has been joined, when the case is called for trial.¹ However, is it a judgment by default when defendant appears on the day set for trial and requests an adjournment? The rule in New York is fairly well settled that defendant is in default² and that his remedy is to make a motion to vacate the judgment.³ However, if at the time of trial, defendant has his request put on record, the judgment is not by default.⁴ Though a mere technicality, the result is far-reaching. The right of appeal is not inherent and did not exist at common law, but it is purely a matter of statute.⁵ Accordingly, no appeal will lie from a default judgment since the right is denied by statute.⁶ If the defendant has his objection put on record, since the

⁴ *Holman v. Johnson*, 1 Cowp. 341, 343 (1775).

¹ *Pierce, etc. Mfg. Co. v. Kleinfeld*, 53 Misc. 260, 103 N. Y. Supp. 86 (1907); *Emmanuele v. Fruit Auction Co.*, 93 Misc. 493, 157 N. Y. Supp. 282 (1916).

² *Silverman v. Mark*, 148 N. Y. Supp. 259 (1914). See *Flake v. Van Wagenen*, 54 N. Y. 25 (1873) for reasons denying appeal from default judgment.

³ *White v. Sebring*, 228 App. Div. 413, 240 N. Y. Supp. 477 (3rd Dept. 1930).

⁴ *Citizens' Trust Co. of Utica v. R. Prescott & Son*, 221 App. Div. 426, 223 N. Y. Supp. 191 (4th Dept. 1927).

⁵ *Croveno v. Atlantic Ave. R. R. Co.*, 150 N. Y. 225, 228, 44 N. E. 968, 969 (1896).

⁶ N. Y. C. P. A. §557, subd. 1: "A party aggrieved may appeal in a case provided by law. He may not appeal from a judgment or order rendered or made upon his default unless an appeal therefrom be expressly authorized by law."

judgment is not one by default, an appeal may be taken to the Court of Appeals,⁷ after the Appellate Division has reversed an order granting a new trial.

R. L. L.

ELECTION OF DIRECTORS—RIGHT OF VOTING TRUSTEE TO VOTE BY PROXY.—The voting trustees of the Bellanca Aircraft Corporation held a meeting for the election of directors. The defendant, William Bellanca, cast the number of votes granted him by virtue of his trust and also voted for another trustee by proxy. The plaintiff attacked the validity of such proxy on the grounds that it violated the trust relation in depriving the beneficiaries of the trustee's judgment. The defendant in his answer sets up the principle that what a proxy does in the proper exercise of his power is the will of the principal.¹ *Held*, a voting trustee may delegate his unrestricted right to vote to a proxy if the terms of the trust so permit. *Chandler v. Bellanca Aircraft Corporation et al.*, — Del. Ch. —, 162 Atl. 63 (1932).

The chancellor in support of his decision declared there was no breach of trust. The instrument setting forth the rights of the trustees declared that they should "possess and shall be entitled in their discretion to exercise all the rights and powers as absolute owners of the shares * * * including the unrestricted right to vote. The trustees may act through a majority in person or by proxy * * * and said act performed either in person or by proxy shall be the act of the trustees." Therefore there has been no violation of the trust and no cause of action exists.

In New York two of the three recognized methods by which stock may be voted by one other than the owner are the voting trust and the proxy.² Voting trusts are based upon the recognized right of stockholders to use their property in any way not contrary to law.³ As a matter of legislative discretion this claim was later revoked in the instance of banking corporations.⁴ The right to vote by proxy not being an ordinary privilege requires legal consent, given by the New York Corporation Laws to all corporations except religious and bank-

⁷ N. Y. C. P. A. §588.

¹ *Hexter v. Colombia Baking Co.*, 16 Del. Ch. 263, 145 Atl. 115 (1929).

² *William Randall & Sons v. Lucke et al.*, 123 Misc. 5, 205 N. Y. Supp. 121 (1924); N. Y. STOCK CORP. LAW (1932) §50; GEN. CORP. LAW (1932) §19.

³ *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559 (1918); *Matter of Morse*, 247 N. Y. 290, 160 N. E. 374 (1928); *Harris v. Magril*, 131 Misc. 380, 226 N. Y. Supp. 621 (1928).

⁴ *Matter of Morse*, *supra* note 3; N. Y. STOCK CORP. LAW (1932) §50 (amended 1920, c. 120).