St. John's Law Review

Volume 6, December 1931, Number 1 Article 14

Corporations--Jurisdiction--Interference with the Internal Affairs of a Corporation

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(exclusive of Sundays) which the plaintiff's company might give in New York, it was not possible for her to perform elsewhere in New York without a violation of her contract with the plaintiff, *and a negative clause was unnecessary* to secure to the plaintiff exclusively the services of the defendant." In *Hoyt* v. *Fuller*[29] where the services performed by the defendant were special, unique, and extraordinary, in that she had invented an attractive specialty known as the "Serpentine Dance" and through which act she had gained a great reputation, the court again dispensed with the necessity of an express negative covenant. Based on the contract for services, to run "not exceeding August 1, 1892," the court granted an injunction prohibiting other appearances. "The contract was intended to give the plaintiffs, not the divided, but the exclusive, services of the defendant, and where that is apparent a *negative clause is unnecessary* to secure the result."

Clearly, the court recognized a right arising out of the contract in these cases. But the agreement must be certain and definite as to the obligations imposed on the other party to the contract, before the court should imply an obligation by injunction.[30] However, when the contract is conscionable, a right arises from the defendant's positive covenant; and, though in England the stricter rule prevails, in New York if there is the possibility of enforcing this right *in personam* by injunction, our courts will decree one.

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CORPORATIONS—JURISDICTION—INTERFERENCE WITH THE INTERNAL AFFAIRS OF A CORPORATION.

Despite the fact that Section 224 of the General Corporation Law provides that an action against a foreign corporation may be

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[29] 19 N. Y. Supp. 962 (1892).

[30] Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922). "What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant"; Lawrence v. Dixey, 104 N. Y. Supp. 516 (1907), where there was no positive arrangement between the parties as to the subsequent seasons, or the salary of the defendant, the court considered an injunction inequitable. "But whether or not a court of equity will grant equitable relief in an action of this character is always addressed to the sound discretion of the court, and could never be enforced unless the parties seeking to enforce it are specifically bound by the contract, so that there are enforceable reciprocal obligations, which are definite and enforceable; Harry Hastings Attractions v. Howard, 119 Misc. Rep. 326, 196 N. Y. Supp. 228 (1922), where the defendant took the leading role in a burlesque performance, and his ability was such that his services were unique, special, and extraordinary, he was enjoined from performing for any person other than the plaintiff during the term of his contract. "The situation here warrants the intervention of the court."

maintained by a resident of this state, or by a domestic corporation, for any cause of action,[1] Judge Cardozo once said that: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture." [1a]

In a recent New York case [2] an action was brought by the plaintiffs against the defendant, a foreign (Indiana) corporation. The relief prayed for in the complaint was for a judgment on behalf of the plaintiffs and similar stockholders that the defendant be directed to redeem shares of its stock at par value with accumulated interest or in the alternative to declare a dividend out of the surplus of the defendant corporation at an equitable rate. To entitle the plaintiffs to this relief, the complaint alleged that the defendant operated stores and transacted business in a number of cities in the states of Indiana and Michigan; that the plaintiff acquired by assignment twenty shares of the preferred stock of the defendant corporation on or about the 7th day of January, 1921, which were duly transferred on the books of the defendant, and that a new certificate was issued to the plaintiffs; that the stock was "redeemable in any event by said company within ten years after date at par value and accumulated interest"; that no dividends have been declared by the defendant notwithstanding the fact that financial reports have shown the defendant to have an average surplus of $100,000 and that the average net profit of the defendant is $100,000 per annum; that the directors of the defendant corporation "have refused and in bad faith neglected to comply with the demand of the plaintiffs that dividends be declared or that the stock be redeemed," and that the plaintiffs have no remedy at law. *Held,* that the courts of this state will not assume jurisdiction, in ordinary cases, to regulate the internal affairs of a foreign corporation.[3] The opinion also stated that consideration of convenience, of efficiency and of justice [4] points to the courts of Indiana as the appropriate tribunals to regulate the internal affairs of the defendant corporation.

It would appear that in this case the Court refused to attempt to decide how a foreign corporation should obey the laws of the state or county under which it exists. There are other decisions by

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[1] New York Gen. Corp. Law, §224, L. 1909, c. 28.

[1a] Travis v. Knox Terpezone Co., *infra* note 3 at 264, 109 N. E. 250.

[2] Cohn and Tubow v. Mishkoff Costello Co., 256 N. Y. 102, 175 N. E. 529 (1931).

[3] Marshold v. Sherman, 148 N. Y. 9, 42 N. E. 419 (1896); Southworth v. Morgan, 205 N. Y. 293, 98 N. E. 490 (1912); Muck v. Hitchcock, 212 N. Y. 283, 106 N. E. 75 (1914); Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250 (1915); People v. Brotherhood of Painters, Decorators, *et al.*, 218 N. Y. 115, 112 N. E. 752 (1916); Tompkins Loring v. Schwartz, 249 N. Y. 206, 163 N. E. 735 (1928); Butler v. Standard Milk Flour Co., 146 App. Div. 735, 131 N. Y. Supp. 451 (1st Dept. 1911).

[4] See Plimpton v. Bigelow, 93 N. Y. 592, 602 (1883).

the New York courts to the effect that special remedies provided by foreign laws must be applied by the courts of the state wherein the corporation is domiciled.[5]

In an earlier New York case,[6] the plaintiffs were stockholders in a foreign corporation. Subsequent to their becoming stockholders, one of the individual defendants became the owner through himself and his associates of a majority of the stock of the corporation and caused himself and his associates to be elected directors. The directors then passed a resolution to increase the capital stock of the corporation from $50,000 to $100,000 and issued the increased stock without consideration. Later the defendant directors caused the corporation to execute a mortgage of $100,000 and announced their intention to issue bonds secured by that mortgage to said amount. The plaintiff claimed that the capital stock of the corporation was $50,000 and that it had no power to mortgage the property to a greater amount and sued to compel cancellation of the stocks and bonds and to have the capital stock declared as $50,000. The Court held for the defendant and stated in part:

> "* * * If this were an action simply to compel an accounting and restoration, by parties within the jurisdiction, of property taken or withheld, and to restore it, even to a foreign corporation, the power of the court to entertain jurisdiction could not be questioned. * * * This action gives a court of equity jurisdiction of the subject matter whenever it can obtain jurisdiction of the persons of the defendants, * * * even though the subject matter is outside the state."

This indicates to some extent that one test of whether or not the Courts will declare jurisdiction is the ability to enforce the decree and not whether or not it involves interference with the internal management of a foreign corporation.

In another New York case [7] an action was brought against a foreign (Connecticut) life insurance company by a resident member of the company, holding one of its certificates, to restrain the company from making an assessment against him of more than a certain amount named in the member's certificate. The Court held that to compel the company to account for monies paid by it in excess of the amount stated in the certificate relates to the internal affairs of the company, and its method of assessment against members for the various purposes for which they are liable is governed by local laws and regulations and should be adjusted in an action brought

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[5] Christenson v. Eno, 106 N. Y. 97, 12 N. E. 648 (1887); Lowry v. Inman, 46 N. Y. 119 (1876).

[6] Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116 (1904); Ernst v. Rutherford and B. S. Gas Co., 38 App. Div. 388, 56 N. Y. Supp. 403 (2nd Dept. 1899).

[7] Sauerbrunn v. Hartford Life Ins. Co., 220 N. Y. 363, 115 N. E. 1001, 1004 (1917).

in the home state of the company. The Court also held that when a company, its officers and accounts, are without the state and the order and decree of the Courts of this state could not be enforced against the corporation without its consent, the jurisdiction of the Court over the defendant acquired by its appearance in the action, does not necessarily extend to the subject matter.

The Court in its opinion quoted *dicta* from a Massachusetts case [8] to the effect that:

> "Rights of third parties, whether they happen to be stockholders or not, if the rights are such as are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the state or county to which it owes its existence."

The Court went on to say:

> "That our courts might entertain jurisdiction of an action brought against defendant to recover for the death of a member and in such action to determine whether or not the policy was in force, the validity of an assessment made for non-payment of which forfeiture was claimed, cannot be questioned. Such an action does not correspond to the action at bar wherein the court is invoked to exercise visitorial powers to review and decree how the acts of a corporation which derives its authority from the law of another state shall exercise such power."

The Court then proceeds to explain why the law of the state under which the corporation exists should govern:

> "We may assume that the membership of the defendant corporation extends throughout a number of states, and while it may be said that the present action affects the plaintiff alone, we cannot overlook the fact that if the various states assume jurisdiction in like actions the decisions of the courts may be divergent, different rules of law would prevail and a corporation might be called upon to account in various states and relieved therefrom by the decrees of courts in other states. Likewise it might be held legal for it to increase assessments in certain jurisdictions and illegal to increase and collect the same in other jurisdictions. Uniformity of decision is preferable." [8a]

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[8] Andrews v. Mines Corporation, 205 Mass. 121, 123, 91 N. E. 122, 123 (1910), as quoted by Cardozo, *J.* in Travis v. Knox Terpezone Co., *supra* note 3, at 371, 109 N. E. at 251.

[8a] *Supra* note 7 at 372, 109 N. E. at 251.

Probably the best known case [9] involved the right of a resident stockholder in a foreign (New Jersey) corporation to maintain an action to compel the foreign corporation to register the transfer of stock and to issue new certificates. The plaintiff was the owner by assignment of transferable certificates. The stocks were surrendered to the proper corporation official who had offices in New York, but the corporation refused to make the transfer or to return the certificates. The Court maintained that the plaintiff had two remedies: a suit in either *trover* or *assumpsit* on the grounds of conversion, or a suit in specific performance. The defendants were subject to the process of the New York Courts because they had appropriated shares of stock which belong to a resident of New York and the New York Courts will protect his ownership.

In another New York case [10] the Court again compelled the transfer of shares on corporate books and the delivery of certificates. In this case the Court refused, however, to annul the election of directors by the stockholders of the corporation which the plaintiff alleged was illegal because he had been unable to vote his stock due to its not having been transferred on the books of the corporation. The defendant claimed as a defense that the New York Courts had no jurisdiction because stockholders were members of the corporation, and to compel a transfer of stock would cause the plaintiff to be admitted as a member which would involve the internal management of the corporation.[11] But the Court held that the transfer of stock was a contractual obligation that could be enforced and not interference with the internal management of a foreign corporation.

It would appear, therefore, that even though interference with the internal affairs of a foreign corporation is involved, the Courts of this state will assume jurisdiction,[12] when:

1. Jurisdiction can be obtained of the person or thing in respect to which the jurisdiction is to be exercised.[13]

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[9] Travis v. Knox Terpezone Co., *supra* note 3; Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324 (1894); West Nat. Bank v. New England Electric, 73 N. H. 465, 62 Atl. 971 (1893).

[10] Butler v. Standard Milk Flour Co., *supra* note 3.

[11] People v. Brotherhood of Painters and Decorators, *et al.*, *supra* note 3.

[12] Note (1929) 29 COL. L. REV. 968, 977: "* * * it seems that the rule of non-interference with the internal affairs of a foreign corporation developed as a result of a desire by courts of equity, for reasons of comity, not to supervise or regulate the legal creation of another jurisdiction. However, due to the growth of a practice of organizing a corporation in a state where little or no actual business was done, there has been a tendency to narrow the scope of the rule. And most courts will no longer refuse to entertain jurisdiction of suits against a foreign corporation unless it appears that the courts of domicile can more properly effectuate relief between the litigants."

[13] Guilford v. Western Union Tel. Co., *supra* note 9; Travis v. Knox Terpezone Co., *supra* note 3; Plimpton v. Bigelow, *supra* note 4; Butler v. Standard Milk Flour Co., *supra* note 10.

2. The decree of the Court could be enforced with convenience, efficiency, and justice.[14]

3. Special remedies provided by the laws of the state or county to which the foreign corporation owes its existence are not involved.[15]

4. There would be no attempt to adjudicate the power given to the foreign corporation by the state to which it owes its existence.[16]

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EVIDENCE—PRESUMPTIONS—PRESUMPTION OF SUICIDE—PRESUMPTION OF INNOCENCE.

The force of *dicta* as judicial authority is irregular and uncertain. Sometimes it has almost the binding authority of settled law; again it will be referred to only to be distinguished.[1] The weight given to it is determined in part by the court which issued it, the personal eminence of the Justices in that court, and the force and certainty of the rule to which it relates.

In *People* v. *Miller*[2] the New York Court of Appeals, speaking through its Chief Judge, expressed dissatisfaction with, and an intention to abandon, a rule of the law of evidence, which this same Court, not ten years prior thereto,[3] had found occasion to acknowledge and affirm. While it is true that this expression of disapprobation was unnecessary to the decision, and hence only *dictum,* there are, we think, few students of the law who would not view this case as overruling the former decision. Assuming therefore, if we may, that this is true, it behooves us to examine the rule of law which the Court has seen fit to repudiate.

In *People* v. *Creasy*[4] the defendant was tried for the murder of his fiance; the defense was suicide. The facts were such that only one of two possibilities could have occurred. Either he murdered her or she committed suicide. The jury was instructed as

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[14] *Supra* note 2.
[15] *Supra* note 5.
[16] *Supra* note 7.

[1] 5 Amer. & Eng. Cyc. of Law 661; 15 C. J. 950, §344; Rush v. French, 1 Ariz. 991, 25 Pac. 815 (1874).
[2] 257 N. Y. 54, 177 N. E. 306 (1931).
[3] People v. Creasy, 236 N. Y. 205, 140 N. E. 563 (1923). It will be noted that of the seven judges then sitting, three are on the court which decided People v. Miller, *viz.* Cardozo, Pound and Crane, *JJ.* Since Pound and Crane dissented, and voted to affirm the conviction, only the present chief judge can be construed to have assented to that holding.
[4] *Ibid.*