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Equity--Cancellation--Conditions Precedent (Rollin v. Grand Store Fixture Company, 231 A.D. 27 (1st Dept. 1930))

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dividend, there will be no interference by the courts with their decision, unless they are guilty of a wilful abuse of their discretionary powers, or of bad faith or of a neglect of duty.[2] And so deferring declaration of dividends in an effort to improve the condition of the company is permissible.[3] Of course where the accumulation of surplus is greatly in excess of capital and the directors' only motive in increasing the surplus is for the purpose of expansion with no thought of the rights of stockholders it may be deemed an abuse of discretion not to declare a dividend.[4] It is said that among the reserves which it may be prudent to establish before a surplus available for dividends is found are reserves for depreciation, repairs, bad accounts, unknown taxes and fluctuations in business conditions.[5] The facts in the instant case do not warrant the interference of the Court, if the rules laid down in the cases considered are to be followed, inasmuch as it does not appear that the powers of the directors have been illegally or unconscientiously executed or that their acts were fraudulent and destructive of the rights of stockholders.

H. L. B.

EQUITY—CANCELLATION—CONDITIONS PRECEDENT.—The defendant defaulted in its contract to install fixtures in plaintiff's store after it had partially performed. Plaintiff had given a series of twenty-eight notes to defendant's attorney to be held in escrow until completion of the contract, and in addition had given defendant a conditional sales contract and a chattel mortgage. After repeated efforts to get defendant to complete its contract plaintiff was finally compelled to have the balance of the work performed by a third party. The defendant somehow secured the notes from his attorney and subsequently negotiated one of the notes. Plaintiff brought suit in equity seeking cancellation of the notes, the chattel mortgage, and the conditional sales contract. Defendant counterclaims for the bal-

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[2] New York etc. R. R. v. Nickols, 119 U. S. 296, 7 Sup. Ct. 209 (1886); Williams v. Western Union Tel. Co., 93 N. Y. 162 (1883); Burden v. Burden, 159 N. Y. 287, 54 N. E. 17 (1899), wherein the Court held that so long as the directors are acting honestly, and within their discretionary powers in accumulating a surplus in an iron manufacturing corporation, a stockholder must abide by their decision and it is only when one can show that the directors are guilty of fraud and bad faith in accumulating a large surplus to the injury of the stockholders that a court of equity would interfere.

[3] Williams v. Western Union Tel. Co., *ibid.*

[4] Dodge v. Ford Motor Co., *supra* note 1; Reynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 60 Atl. 941 (1905), wherein it appeared that the surplus was employed exclusively in expansion of business and in increasing salaries. The Court there held that the directors must bear in mind the stockholders of the corporation and not accumulate a huge surplus which might in the end go to future creditors of the corporation.

[5] Ballantine, Private Corporations (1927) p. 507.

ance between the moneys expended by the plaintiff to complete the contract and the contract price, a matter of some $600. *Held,* that the plaintiff is entitled to cancellation of the notes, chattel mortgage, and conditional sales contract, and that the defendant is entitled to judgment in the sum of $569, the balance between the contract price and cost of completion, less an agreed amount of $200, stipulated damages for delay by defendant in performance. Rollin v. Grand Store Fixture Company, 231 A. D. 27, 246 N. Y. Supp. 371 (1st Dept., 1930).

Theoretically maxims of equity are guiding principles of justice. The difficulty lies in determining just which maxim to apply in a given instance. The Court in the instant case applies the maxim that "he who seeks equity must do equity." It is conceded that in a court of law the defendant would have no right of recovery for part performance.[1] The question arises then whether the plaintiff by coming into a court of equity has waived his technical legal defenses so that equity once having assumed jurisdiction of the action will dispose of the entire matter or whether this is an instance in which "equity follows the law." A related question arises as to whether "equity will permit one to profit by his own wrongdoing." No person shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to take profit by his own inequity.[2] Clearly, in the instant case, defendant was a wrong-doer first, when he breached his contract; secondly, when he negotiated the notes. Was the plaintiff to be compelled to defend twenty-eight actions on the notes, assuming each note was negotiated and became due? Was his remedy to pay out the sum demanded on each note, to holders in due course, and then sue the defendant for the sums paid out? This would involve a circuitous and expensive procedure, thrust on the plaintiff through no fault of his. And yet because he adopts the more reasonable method of protecting himself by securing an injunction restraining the defendant from placing the notes in circulation and for their cancellation, he is deemed to have assented to reimburse defendant wrongdoer. "Equity regards substance rather than form."[3] "The first principle of equity is justice."[4] The decision of the Court in the instant case appears to be a mechanical adoption of old principles in circumstances calling for their judicial destruction in the administration of justice.

S. E. C.

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[1] Frankel v. Friedman, 199 N. Y. 351, 92 N. E. 666 (1910).

[2] Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918).

[3] Zeiser v. Cohen, 207 N. Y. 407, 101 N. E. 184 (1913); Silverstein v. Touhenkimmel, 209 App. Div. 710, 205 N. Y. Supp. 241 (3rd Dept., 1924).

[4] Tompers v. Bank of America, 217 App. Div. 691, 217 N. Y. Supp. 67 (1st Dept., 1926).

HUSBAND AND WIFE—FOREIGN DIVORCE—SEPARATION—AFFIRMATIVE RELIEF.—Plaintiff and one Dalinsky, domiciled and resident in New York, intermarried. Plaintiff left New York temporarily for the sole purpose of securing a Nevada divorce. Although on her suit in the district court at Reno, Dalinsky was personally served in New York, he did not appear nor submit himself to that jurisdiction. Plaintiff returned and remarried defendant in this action in New Jersey. Defendant was and is resident and domiciled in New York. In an action for separation and alimony on the grounds of desertion, *Held,* the decree of divorce from Dalinsky being invalid here, the second marriage was never recognized as valid by the laws of this State. Fisher v. Fisher, 254 N. Y. 463, 173 N. E. 680 (1930).

It is well settled that a decree of divorce rendered in a foreign state will be recognized in New York, where the court rendering the decree *had jurisdiction* of the subject-matter and parties, even though the divorce was granted for a cause which is not recognized in this state.[1] If the defendant, in a foreign action, was domiciled in New York and served personally while here and he does not appear, then, although the divorce may have full force and effect in the state wherein it was decreed, it will not be recognized in New York.[2] Where a party seeks to avoid a divorce on the ground of want of jurisdiction, he must show that he was domiciled in New York and did not make an appearance at the action.[3] Where neither party to the foreign action is domiciled in New York at the time of the rendition of the decree, and the notice of the action is served by publication, this state will recognize the foreign divorce if the state wherein the defendant is domiciled recognizes it, but if the latter state does not recognize the decree, New York will not.[4] The instant case is in harmony with previous expressions of the Court of Appeals and is sound practically.

H. L. B.

INSURANCE—EXCLUSION OF EVIDENCE OF FRAUD REVERSIBLE ERROR.—Plaintiff purchased a farm for $11,500 and built a barn costing $10,000 thereon. Defendant insurance company's experts estimated the property's market value at $8,000. The buildings were insured for only $1,600. The farm did not yield a profit. No stock

[1] Stewart v. Stewart, 205 App. Div. 587, 200 N. Y. Supp. 168 (2nd Dept., 1922); Straus v. Straus, 122 App. Div. 729, 107 N. Y. Supp. 842 (1st Dept., 1907); Richards v. Richards, 87 Misc. 134, 149 N. Y. Supp. 1028 (1914).

[2] Hunt v. Hunt, 72 N. Y. 217 (1878); People v. Baker, 76 N. Y. 78 (1879); Olmstead v. Olmstead, 190 N. Y. 458, 83 N. E. 569 (1908); Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192 (1911).

[3] Percival v. Percival, 186 N. Y. 587, 79 N. E. 1114 (1905), *aff'g* 106 App. Div. 111, 94 N. Y. Supp. 909 (2nd Dept., 1905).

[4] Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921).