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Banking Law--Corporation Merger--Liability to Dissenting Stockholders (Matter of Cantor, 261 N.Y. 6 (1933))

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luggage therefore does not make out a *prima facie* case.[2] However, where the passenger's property is taken by the company into its custody and control, a failure, refusal, or inability to return same on demand, established a *prima facie* case.[3] But the burden of proof never leaves the plaintiff. If a *prima facie* case is made out, the coming forward with proof shifts to defendant to show lack of negligence and use of due care.[4] If the *prima facie* case is thus rebutted, then plaintiff must show by a fair preponderance of the evidence that defendant was negligent.[5]

The Court in the case at bar distinguished between this case and *Sneddon* v. *Payne*[6] in that in the latter case, "the plaintiff handed his bag to a 'red cap' porter *not in the employ of the defendant.*"[7]

V. G. R.

BANKING LAW—CORPORATION MERGER—LIABILITY TO DISSENTING STOCKHOLDERS.—In 1932 the Chatham National Bank and Trust Co. merged with the Manufacturers Trust Co., the respondents in this proceeding. At a meeting held prior to the merger, the appellant, a stockholder in the surviving corporation, had voiced his objection and demanded appraisal of and payment for his stock by virtue of the Banking Law, §496. This denied, he brought suit to enforce his claim, but the Supreme Court and the Appellate Division[1] similarly overruled the plaintiff's contention and held that the section applied only to the dissenting stockholders of the corporation being merged and not to those of the merging corporation. On appeal, *held,* Section 496 of the Banking Law (Laws of 1914, c. 369) applies to the dissenting stockholders of both or all the corporations involved in the merger. *Matter of Cantor,* 261 N. Y. 6; 184 N. E. 474 (1933).

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[2] Carpenter v. N. Y., N. H. & H. R. R. Co., *supra* note 1; Cohen v. N. Y. Cent. etc. R. Co., 121 App. Div. 5, 105 N. Y. Supp. 483 (4th Dept. 1907); Weingart v. Pullman Co., 58 Misc. 187, 108 N. Y. Supp. 972 (1908).

[3] Goldstein v. Pullman Co., *supra* note 1; Croll v. Pullman Co., 61 Misc. 265, 113 N. Y. Supp. 542 (1908); Sherman v. Pullman Co., 79 Misc. 52, 139 N. Y. Supp. 51 (1913); Holden v. Davis, 119 Misc. 492, 196 N. Y. Supp. 552 (1922); Irving v. Pullman Co., 84 N. Y. Supp. 248 (1903).

[4] Carpenter v. N. Y., N. H. & H. R. R. Co., *supra* note 1; Van Dike v. Pullman Co., instant case.

[5] *Ibid.*

[6] Sneddon v. Payne, *supra* note 1. In this case a station porter took plaintiff's bag into the Pullman car while plaintiff was delayed outside about two minutes in order to have his ticket inspected. On entering, his bag was missing. *Held,* defendant not liable without proof of negligence.

[7] Van Dike v. Pullman Co., instant case, at 460, 260 N. Y. Supp. at 301.

[1] Matter of Cantor, 236 App. Div. 356, 258 N. Y. Supp. 628 (1st Dept. 1932).

Section 496 states: "Any stockholder or shareholder not voting in favor of such agreement of merger at a meeting prescribed by §490 of this article, may at such meeting or within twenty days thereafter object to the merger and demand payment for his stock or shares. * * * If the merger takes effect at any time after such demand, such stockholder or shareholder may, at any time within sixty days apply to the Supreme Court * * *."

Section 490 provides for the submission of the merger agreement to the stockholders of *"each"* corporation at a meeting thereto to be called upon notice, and in the event of failure of at least two-thirds of the stockholders of *"each"* of the merging corporations to approve the merger, the transaction fails. If the approval of two-thirds of the stockholders of *"each"* corporation is obtained, the plan becomes operative, but the dissenting stockholders of *"each"* corporation have a right to an appraisal of their stock and payment therefor.[2] Section 496 (*supra*) in speaking of §490 (*supra*) says a dissenting stockholder within twenty days thereafter may object * * * etc., obviously intending the dissenting stockholders of *"each"* corporation if both these statutes are to be read together.[3] The statute was enacted to protect dissenting stockholders of both corporations to the merger. If it had been the intention of the legislature to limit protection to the dissenting stockholders of the merged corporation, it would have been a simple matter to have so provided.[4]

The rights and obligations of a corporation which continues in existence after a merger remain as before unless changed by legislative enactment, whereas the rights and obligations of the corporation which after the merger ceases to exist can continue only if transferred to the surviving corporation.[5] A corporation which continues in existence after a merger may have a new name, new directors and officers, and new by-laws; and there is nothing in the bank laws precluding the merging corporations from providing by the merger agreement that the name, directors, and by-laws shall be those of the corporation which in form has been absorbed by the surviving corporation.[6] In so far as the right of a corporation to exist is concerned as well as the exercise of such powers as can only be exercised by it as an existing corporation, the state has absolute control under its reservatory provision.[7] It is within this power that the Legislature allows corporations to merge with other corporations even at the expense of dissenting stockholders.[8]

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[2] N. Y. BANKING LAW (1914) §490 (amended Laws of 1928, c. 298).

[3] *Supra* note 1. Dissenting opinion per Martin, *J.*

[4] *Ibid.*

[5] Instant case.

[6] Matter of Bergdorf, 206 N. Y. 309, 99 N. E. 714 (1912).

[7] N. Y. GEN. CORP. LAW (1909) §5.

[8] Colby v. Equitable Trust Co., 124 App. Div. 262, 108 N. Y. Supp. 978 (1st Dept. 1908), *aff'd*, 192 N. Y. 535, 84 N. E. 1111 (1908).

The right of dissenting stockholders to payment, created by the Legislature, cannot upon any ground of assumed public policy be limited by the courts to the dissenting stockholders of the absorbed corporation. It follows that the appellant, as a dissenting stockholder of the merging corporation was entitled to the relief demanded.

S. B. S.

BONDS — RETIREMENT BY LOT — NATURE OF CONTRACT — BREACH.—Plaintiff is holder of fifteen-year gold bonds issued by the defendant in 1925, providing for retirement by lot of bonds in the sum of $5,000 every year from 1930 to 1939, at 105% of its face value and accrued interest. Defendant failed to pay interest or retire any bonds in 1930 and 1931. Defendant was voluntarily dissolved and taken over by a successor in 1928. Plaintiff brings action for value of his bonds on ground of breach of contract. Defendant contends that plaintiff can have no cause of action on the bonds until 1940. Appellate Division affirmed a judgment for plaintiff on the grounds of anticipatory breach and impossibility of performance. On appeal, *held,* the failure to retire the bonds constituted a present breach of contract giving plaintiff an immediate right of action. *Hall* v. *Nassau Consumers Ice Company,* 260 N. Y. 417, 183 N. E. 903 (1933).

A failure to perform some obligation or promise which is part of the contract constitutes a breach thereof.[1] One of the rights plaintiff paid for and which defendant obligated itself to perform was the yearly retirement of bonds by lot.[2] Upon defendant's failure to so perform a breach occurred and an immediate right of action accrued to plaintiff therefore.[3] Where the contract is for the payment of money only at a future time, there can be no anticipatory breach and no action can be maintained thereon until the specified time has arrived,[4] unless it contains an acceleration clause. It is not anticipatory where the alleged breach of the contract does not precede the time of performance or actual tender.[5] The time for defendant to perform its obligations had passed. In the instant

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[1] WILLISTON, CONTRACTS (1924) §1288.

[2] Weinman v. Blake & Knowles Steam Pump Works, 156 App. Div. 168, 140 N. Y. Supp. 1085 (4th Dept. 1913).

[3] *Supra* note 1.

[4] Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584 (1906); Werner v. Werner, 169 App. Div. 9, 154 N. Y. Supp. 570 (1st Dept. 1915); Bauchle v. Bauchle, 185 App. Div. 590, 173 N. Y. Supp. 292 (1st Dept. 1918).

[5] Wester v. Casein Co. of America, 206 N. Y. 506, 514, 100 N. E. 488, 490 (1912).