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Appeals--Former Adjudication--The Law of the Case (Endurance Holding Corporation v. Kramer Surgical Stores, Inc., 227 A.D. 582 (1st Dept. 1930))

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RECENT DECISIONS

Editor—ROSE LADER

APPEALS—FORMER ADJUDICATION—THE LAW OF THE CASE.—Plaintiff brought this action to foreclose a mortgage. The defendants in their answer asked that they be relieved of their default which was caused by erroneous information as to the due date of the instalments. Plaintiff moved to strike out the affirmative defense or for judgment on the pleadings, which motion was granted, with leave to the defendants to serve an amended answer. The defendants in their amended answer set up an affirmative defense similar to that found in the original answer. Plaintiff again moved to strike out the defense which set up the inadvertent default as a bar to plaintiff's action. The motion was denied and the defense sustained and labelled a counterclaim, to which the plaintiff served its reply. Subsequently, plaintiff made a second motion for judgment on the pleadings and the Court held that the decision and order on the prior motion was binding and that plaintiff's relief was by way of appeal or a motion for a reargument. The appellant contends that the Court was in error in holding that the denial of a prior motion addressed to the sufficiency of the amended answer was controlling on a motion subsequently made for judgment on the pleadings after a reply had been interposed by the plaintiff to a counterclaim set forth in the answer. On appeal, *held,* the Court having passed upon the question of the sufficiency of the answer upon the prior motion, another Justice would not be justified in reviewing that decision which was the law of the case. Endurance Holding Corporation v. Kramer Surgical Stores, Inc., 227 App. Div. 582, 238 N. Y. Supp. 377 (1st Dept. 1930).

In Barber v. Rowe,[1] one of the authorities upon which this Court bases its decision, it was held that an order overruling a demurrer could not be reviewed upon appeal from the judgment entered in the action where it was not appealed from and the notice of appeal did not specify that the appellants intended to review it upon appeal; the fact that a motion was made at the trial to dismiss the complaint on certain grounds covered by the demurrer, which motion was denied, could not indirectly permit the review of the order overruling the demurrer. Such order, since it could not be reviewed, was the law of the case on all questions which might have been litigated, for an order is as conclusive when not reviewed as if reviewed and affirmed. This ruling has been followed repeatedly, the courts holding that one Justice at Special Term may not review and set aside an order made

[1] 200 App. Div. 290, 193 N. Y. Supp. 157 (3rd Dept. 1922).

by another Justice.[2] But see Ansorge v. Kane,[3] wherein an intermediate order was made denying defendant's motion for judgment on the pleadings. The motion was on the ground that the complaint failed to allege a cause of action. Such order was not mentioned in the notice of appeal as being brought on for review to the Court of Appeals. Pound, *J.*, writing the opinion for the Court, found no merit in respondent's contention that by virtue of these facts the Court of Appeals was foreclosed from considering the sufficiency of the complaint. The decision was followed by the Court of Appeals in the later case of Vogeler v. Alwyn Improvement Corp.,[4] where the opinion of Lehman, *J.*, states the following on this subject: "It is urged at the outset that the decision in favor of the plaintiff upon the motion to dismiss the complaint stands as the law of the case, since the notice of appeal from the subsequent judgment does not bring up the earlier order for review. In the case of Ansorge v. Kane (244 N. Y. 395) we have held otherwise. We may consider the pleadings as if no motion for judgment dismissing the complaint had been made and denied before the answer was interposed."[5] It is interesting to observe that Kidder v. Hesselman,[6] referred to by the Court in the principal case, was cited by counsel in their brief to the Court of Appeals in the Vogeler case, *supra*,[7] in support of the contention which Judge Lehman refused to uphold. The holding in the principal case merely reaffirms the general rule that an order by a Justice at Special Term may not be reviewed upon a renewal of the same motion.

R. L.

BANKS—CORPORATIONS—CONSTRUCTION OF STATUTES PROHIBITING CORPORATIONS FROM EXERCISING BANKING POWERS.—Plaintiff is a corporation organized under the Business Corporation Law. By its charter it was given the power "to hold, own, sell, assign, deal in, pledge and otherwise dispose of * * * notes and other securities, obligations, contracts and evidences of indebtedness of corporations of the state of New York or any other state of the Union." It did not engage in the business of loaning or advancing money to its customers, deducting interest in advance, and maintained no office for that purpose. In the regular course of its business, plaintiff purchased, before maturity, at less than their face value, two

[2] Aldrich v. Newburgh News Printing & Publishing Co., 70 Misc. 126, 128 N. Y. Supp. 51 (1910); Kidder v. Hesselman, 119 Misc. 410, 196 N. Y. Supp. 837 (1922); Rieser v. L. Prager, Inc., 157 N. Y. Supp. 118 (1916); Rawll v. Baker-Vawter Co., 167 N. Y. Supp. 931 (1917).

[3] 244 N. Y. 395, 155 N. E. 683 (1927).

[4] 247 N. Y. 131, 159 N. E. 886 (1928).

[5] *Ibid.* at pp. 134–35.

[6] 119 Misc. 410, 196 N. Y. Supp. 837 (1922).

[7] *Supra* Note 4.