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Recent Cases

RECENT CASES

FOREIGN ATTACHMENT—ABATEMENT OF ACTION UPON DEATH OF DEFENDANT PRIOR TO TRIAL

Plaintiff bank, resident of Greece, brought foreign attachment proceedings under the act of 1836, June 13, P. L. 568, 12 PS §2861, *et seq.*, in the Court of Common Pleas of Allegheny County, against defendant, likewise a resident of Greece, summoning the Mellon National Bank of Pittsburgh as garnishee. General appearances were entered for the defendant and garnishee, and defendant filed an affidavit of defense. After the case was put at issue, but before trial, defendant died. The Union Trust Co. of Pittsburgh was appointed ancillary administrator, entered an appearance *de bene esse,* suggested defendant's death, and on that ground moved to quash the writ and dissolve the action. *Held,* In foreign attachment proceedings, death of defendant after entry of appearance and before judgment abates the action. *Ionian Bank, Ltd. v. Mamatos,* 340 Pa. 52, 16 A. 2d 397 (1940).

The Supreme Court justified its holding on the ground that a long line of cases had definitely established the rule in Pennsylvania that the death of defendant in foreign attachment proceedings, before final judgment against him was obtained, works a dissolution of the attachment, and for this reason the court was reluctant to depart from such, citing *Ludlow v. Bingham,* 4 Dall. 47 (1799); *Farmers & Mechanics Bk. v. Little,* 8 W. & S. 207 (1844); *Willing v. Bleeker,* 2 S. & R. 221 (1816); *Reynolds v. Nesbit,* 196 Pa. 636, 46 A. 841 (1900); *Hays v. Lycoming Fire Ins. Co.,* 99 Pa. 621 (1882).

The reason consistently given by the courts in these cited cases is that, the nature and intent of the foreign attachment being to compel an appearance, and that object having been accomplished by a general appearance by defendant or giving of bail, the hold upon the property attached is entirely gone; so that the process, in and of itself, is not the specific appropriation of the property attached, and there being no other claim upon the property attached to give a specific preference to the attaching creditor, it necessarily follows that, upon the death of defendant before judgment, the attaching creditor has no preference that can be enforced against other creditors, and hence, in the case of such death, the attachment is dissolved. It will be noticed that all these cases were decided before the passage of § 32 (A) of the Fiduciaries Act of 1917, P. L. 447, 20 PS § 771. That section specifically states that "No personal action hereafter brought . . . shall abate by reason of the death of plaintiff or defendant; but the executor or administrator of the deceased party may be entered as plaintiff or defendant, as the case may be." It is admitted that, prior to any appearance being made by the defendant, the nature of the writ is essentially *in rem,* solely for the purpose of compelling that appearance. Were the defendant to die at this stage of the proceedings, obviously the above Section of the Fiduciaries Act would not be applicable, since the "personal action" requirement would not be satisfied. But where the defendant does put in an appearance and files an affidavit of defense, which under § 64 of the Foreign Attachment Act of 1836, P. L. 568, 12 PS § 2966, has the

effect of henceforth treating the action as one "commenced by summons," though not disturbing the attachment, it certainly seems that the action is then a "personal action" within the meaning of § 32 (A) of the Fiduciaries Act.

However, the court, neglecting to mention this Section of the Fiduciaries Act, then points out that if a foreign personal representative be made a defendant in a foreign attachment, there would be an interference with our statutes regulating the distribution of decedents' estates, citing *East Bangor Cons. Slate Co. v. Badger,* 250 Pa. 422, 95 A. 559 (1915); *Mansfield v. McFarland,* 202 Pa. 173, 51 A. 763 (1902). The reason behind this statement is obviously that the courts of Pennsylvania are intent on protecting local creditors against the power of a foreign representative to take money outside the state and distribute it under foreign law to the prejudice of local creditors. However, it is hard to discover any likelihood of such danger when, as in this case, the non-resident is represented by an ancillary representative—a representative residing in the very jurisdiction of the local creditors and operating under the same laws. The court, in *Mansfield v. MacFarland, supra,* said, "It is the settled policy of our law that, when assets of a foreign decedent are subject to local administration, an ancillary administrator must be raised for the protection of the local creditors." That is exactly what was done in this case. The rule laid down in the *Mansfield* case was followed to the letter, yet the court seems to overlook that fact in refusing to substitute this ancillary administrator as a party to the attachment proceedings.

It would seem that the Supreme Court, being too intent on adhering to the "established law" as derived from the cases cited, loses sight of two very important points essential to the decision: First, the case falls squarely within the provisions of § 32 (A) of the Fiduciaries Act, which provides for the survival of a personal action brought by or against the decedent in his lifetime; Second, the appointment of an ancillary administrator avoids the "dangerous situation" pointed out and cited in the *Mansfield* case. J. E. M.

HOMICIDE—SENTENCE FOR FIRST DEGREE MURDER AT COURT'S DISCRETION

Defendant was indicted for the murder of her infant son, born of an extramarital relation following desertion by her husband. On a plea of guilty, the trial court imposed the death penalty despite the fact that the mother was of low mentality, in a reduced economic condition, and, prior to her present offense, of good reputation. *Held,* it was an abuse of the trial court's discretion under the Act of June 24, 1939, P. L. 872, 18 PS § 4701, providing for the reduction of sentence from the death penalty to life imprisonment where mitigating circumstances are present, to impose the death penalty when the defendant was shown to be a law abiding citizen and devoted mother, a person of low intelligence, and one who had led an extremely hard life coupled with desperate financial circumstances. *Com. v. Irelan,* ..... Pa. ....., 17 A. 2d 897 (1941).

Prior to the Act of May 14, 1925, P. L. 759, § 1, 18 PS § 2222, neither the trial court nor the jury had any discretion in fixing the penalty for first degree murder. *Com. v. Bishop,* 285 Pa. 49, 131 A. 657 (1926). As a consequence

the death penalty, when imposed upon a defendant, could not be attacked on the ground that the trial court abused its discretion in sentencing, despite the fact that the particular case presented a situation conducive to leniency. A defendant's only recourse in such instance was by petition for a commuted sentence to the Pardon Board.

To remedy this condition, the Act of May 14, 1925, *supra,* provided, "In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life." The Act of 1925 thus seems to recognize two classes of first degree murder, one punishable by death, and the other punishable by life imprisonment. Into which class any particular case falls depends upon the court's use of its discretion in view of the mitigating circumstances present. There are no fixed standards provided by the Act regulating the exercise of this discretion. *Com. v. Harris,* 314 Pa. 81, 171 A. 299 (1934); *Com. v. Sterling,* 314 Pa. 76, 170 A. 258 (1934). However, if a defendant who has been given the death penalty feels that the trial court has abused its discretion, he may appeal to the Supreme Court, which, by virtue of the Act of June 16, 1836, P. L. 784, § 1, 17 PS § 1, has the power "to examine and correct all manner or errors of the . . . courts of this Commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify or affirm, such judgments and decrees or proceedings as the law shall or doth direct . . ." If the court feels that the trial court has improperly sentenced the defendant in view of the circumstances, it may, under this power, change the sentence from death to life imprisonment—the amended sentence having the same effect as though it had been imposed originally. *United States v. Berz,* 282 U. S. 304 (1931).

As a consequence of the above mentioned statutes the Supreme Court of Pennsylvania was called upon in several instances to review sentences imposed by trial courts in first degree murder cases. In *Com. v. Garrome,* 307 Pa. 507, 161 A. 733 (1932), the trial judge, on the plea of guilty, imposed a sentence of death following evidence that the murder was not committed in cold blood or in the perpetration of any other grave crime, but was committed by an industrious man of good reputation who, excited by an account of the deceased's attack upon his son, took a shotgun and killed the decedent. In reviewing this sentence under the Act of May 14, 1925, *supra,* the Supreme Court stated: "The imposition of a sentence of death, instead of life imprisonment, was such an abuse of discretion as to require modification by resentence." Reviewing other sentences of death imposed by the trial courts in first degree murder cases, the Supreme Court held that it was not an abuse of discretion to require the death penalty where the defendant had killed in the course of a robbery. (*Com. v. Le Grand,* 336 Pa. 511, 2 A. (2d) 896 (1939); *Com. v. Sterling,* 314 Pa. 76, 170 A. 258 (1934)); or where an emotionally unstable man who knew the difference between right and wrong had killed a girl with whom he had had illicit relations (*Com. v. Hawk,* 328 Pa. 417, 196 A. 5 (1938).

The Act of June 24, 1939, P. L. 872, 18 PS § 4701, applied in the principal case (the first case decided under it), contains exactly the same language in regard to the trial court having the power to impose a sentence of life imprisonment instead of the death penalty in first degree murder cases at their discretion, as the Act of May 14, 1925, *supra.* Hence, it would seem that the decision in *Com. v.*

Irelan, supra, and the statute which the court cites as giving it the power to resentence, is a continuation of the policy adopted by the courts under the Act of May 14, 1925,*supra,* and the cases decided by virtue of it. It would therefore appear that the law is now well settled in Pennsylvania, due to two similar statutes that have been identically interpreted, that the trial court at its discretion may impose either the death penalty or life imprisonment in situations which fulfill the statutory definition of first degree murder, and that convicted persons may appeal to the Supreme Court for resentence if they believe that the trial court has abused its discretion in imposing the penalty of death. J. E. K.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN

Attorneys asserted a lien on property in their hands derived from a foreclosure proceeding conducted by them for appellee. The fees, to secure which the lien was asserted, were for services rendered appellee prior to and independent of the foreclosure. *Held,* the lien asserted was a *retaining lien,* not a *charging lien,* and hence could not be restricted to costs and fees arising out of the foreclosure proceeding. *Greek Catholic Union of Russian Brotherhoods of the U. S. A. v. Russin,* ..... Pa. ....., 17 A. 2d 402 (1941).

There are two classes of attorney's liens: first, the general, possessory, or retaining lien; second, the charging or special lien. The former is a lien which attaches to papers, documents, etc., of the client, connected with the litigation, which come into the hands of the attorney. The latter is a right to be paid out of a fund or judgment which the attorney has been instrumental in recovering for his client. *Smyth v. Fidelity & Dep. Co. of Md.,* 125 Pa. Super. 597, 190 A. 598 (1937); *Id.,* 326 Pa. 391, 192 A. 640, 111 A. L. R. 481 (1937); 5 *Am. Jur.* 388, 392. It has been long recognized that a charging lien extends only to services rendered in creating the fund and that it does not extend to services as counsel in any other proceeding unless the client has expressly agreed that the fund should be so appropriated. *Martin v. Throckmorton,* 15 Pa. Super. 632 (1901); *Aber's Petition,* 18 Pa. Super. 110 (1901); 7 *C. J. S., Attorney & Client,* § 211.

The authorities, however, are not in *accord* as to the basis of an attorney's claim upon *money* collected for his client for the payment of that client's indebtedness to him. 5 *Am. Jur.* 339. In the case of *Dubois's Appeal,* 38 Pa. 231, 80 Am. Dec. 478 (1861), Justice Strong enunciates the view that such right is not a lien but rather is a right to defalcate. *Accord: Zinsser v. Zinsser,* 83 Pa. Super. 461 (1924); *Lemington B. & L. Ass'n v. Weddell,* 115 Pa. Super. 114, 174 A. 673 (1934); *R. R. Co. v. Guarantor's L. I. Co.,* 206 Pa. 350, 55 A. 1033 (1903). As such it is general in scope and extends to the costs and fees due the attorney from other transactions. In the later decision of *McKelvy's & Sterrett's Appeals,* 108 Pa. 615 (1885), Justice Paxson states,

> "As a general rule an attorney has a lien for his services only upon what he has in his possession. If he has papers he may retain them until paid for his services in regard to the *particular* case to which they belong. If he has money in his hands which he had col-

lected he may deduct his fees in that *particular* collection and pay over the balance. Yet, according to *Dubois's Appeal,* 2 Wright 231, this right is one of defalcation rather than lien." (Italics added)

It would appear from the language in this case that a retaining lien was regarded in Pennsylvania as attaching to documents, etc., only for services rendered in the immediate or *particular* case in which they were involved in contrast to a right of defalcation which was general in nature, attaching to money in the hands of the attorney for services outside of those rendered in the immediate case.

Justice Schaffer, in the instant case, citing no prior Pennsylvania cases on this issue, expressly decides that retaining liens are as general in scope as the right to defalcation. Thus, in Pennsylvania we can now treat the two on the same basis and disregard the distinction set down in *McKelvy's & Sterrett's Appeals, supra.*

A. A. B.

JUDGEMENT BY DEFAULT OR CONFESSION AGAINST THE PRINCIPAL AS EVIDENCE AGAINST THE SURETY ON AN OFFICIAL BOND

An action of assumpsit by the Commonwealth for the use of one Ulshofer against the executrix of one Turner and the United States Fidelity & Guaranty Company, surety upon the official bond of the deceased, to recover for the deceased's alleged fraud in connection with a forged mortgage bond and warrant containing the deceased's official acknowledgement. Deceased was a notary public engaged in the real estate brokerage business to whom the use plaintiff entrusted the sum of $2000 to invest for her in a designated first mortgage. A month later deceased delivered to the use plaintiff a mortgage bond and warrant to which he had forged the name of the owner of the premises and which contained an official acknowledgement executed by the deceased. For eighteen months deceased paid "interest" on this mortgage to the use plaintiff. Then the death of the deceased revealed his fraud. Judgment *for want of an affidavit of defense* was entered against the personal representative. The defending surety filed an affidavit of defense admitting the essential facts but specifically denying that the use plaintiff suffered a loss because of the false acknowledgement, contending instead that her loss resulted from a breach of trust by the deceased as her agent. By way of proof, the use plaintiff introduced the official bond and the record of the *default* judgment against the personal representative. The surety offered no evidence. *Held*: When liability is predicated upon principal's default in both private and official capacities, and surety denies that damage resulted from principal's official misconduct, surety's denial inures to benefit of principal, and judgment by default against principal is no evidence against surety on official bond. *Com. to use of Ulshofer v. Turner,,* ..... Pa. ....., 17 A. 2d 352 (1941).

In awarding a new trial the court considered, without deciding, the evidential value to be attached to a default judgment or a judgment by confession against the principal when used against the surety on an official bond. The court cited *Com. v. Fidelity & Dep. Co.,* 224 Pa. 95, 73 A. 327 (1909) as a leading case expressing the accepted Pennsylvania view that a judgment *upon the merits* against

the principal, establishing official misconduct and the amount of damages sustained by the plaintiff, is *conclusive* against the surety in an action upon an official bond. Similarly, when the official bond is conditioned upon a recovery of a judgment against the principal, or upon the declaration of a forfeiture, the rights of the surety will be concluded by the entry of such judgment or by such forfeiture. *Com. v. Eclipse Literary and Social Club,* 117 Pa. Super. 339, 178 A. 341 (1935); *Com. v. McMenamin,* 122 Pa. Super. 91, 184 A. 679 (1927). The reasoning on which these decisions are based is that the plaintiff should not be compelled to prove a second time the established facts upon which the surety's liability is predicated. And admittedly, in most cases the surety would have an opportunity to defend in the action against the principal, and so, unless the first judgment is fraudulently procured, the surety is in no way harmed by the application of this rule. *Appeal of St. Paul Mercury Indemnity Co.,* 325 Pa. 535, 191 A. 9 (1937).

It is doubtful whether the same rationale can be applied when the judgment against the principal is by way of confession or default. The opportunity to defend, which sustains the Pennsylvania view, is not present in such cases. And it might well be that it is such cases that prove the inherent weakness of the rule which makes the judgment against the principal *conclusive* against the surety.

This weakness is not to be feared when the judgment is deemed no more than *prima facie* evidence against the surety on an official bond. And it is this *prima facie* evidential value which the majority of American courts attach to such a judgment against the principal. The majority rule recognizes a distinction between the natures of the contracts in the ordinary bond and the official bond and make this difference the basis of distinct rules for each. A leading case supporting the majority view reasoned:

> "The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable; and the fair construction of the contract of the sureties is, that they will pay all damages ascertained and liquidated in an action against their principal * * * Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment can work no hardship so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts." *Stephens v. Shafer,* 48 Wis. 54, 3 N. W. 835 (1879).

Still a third view supported by cases is the one adopted in California, which holds that the judgment against the principal is not admissible against the surety on an official bond. The California court, in the case of *Pico v. Webster,* 14 Cal. 203 (1859) argued thus in support of this rule:

> "In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained for official misconduct, nor to pay every such judgment. They are only

> held for a breach of their own obligation . . . As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense . . . . the fact that the principal has unsuccessfully defended, has *no effect* on their right." (Italics added)

Thus we see that Pennsylvania, in holding that the judgment against the principal is conclusive against the surety on an official bond, is not in *accord* with the view of the majority of the American cases, but rather, clings to one of two well-established minority views. However, when the judgment against the principal is on the merits there is little likelihood of Pennsylvania reaching a less equitable result than is assured under the majority rule. But when the judgment is obtained by default or confession, as Justice Drew expresses it in the instant case, "It may be questioned whether these cases stand upon the same foundation of equity and expediency that support those in which the adverse judgment against the principal is on the merits." Despite this *dictum* in the principal case, "conclusive" remains the Pennsylvania word describing the effect of all judgments against a principal when used as evidence against the surety. The holdings of *Eagles v. Kern,* 5 Wh. 144 (1840) (Judgment by confession against the principal) and *McMichen* v. *Com.,* 58 Pa. 213 (1868) (Judgment against the principal by default) still express the controlling Pennsylvania law. The present case is noteworthy in so far as it gives evidence of an awareness on the part of our court of the latent potentialities of injustice in the present rule and hints this rule will be changed when the proper case presents itself. In addition the court suggests the course to be chartered, if and when such a change is forthcoming—the adoption by our courts of the view adhered to by the majority of American jurisdictions, that *all* judgements against a principal are *prima facie,* rather than conclusive, evidence against the surety on an official bond. J. M. Q.