Foreign Judgments-Defense of Fraud

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Courts Commons, and the Jurisprudence Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol6/iss9/11

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
that which he has actually done. He knows from the indictment the particular transaction it involves; he knows equally well just what part he played therein; and he knows precisely what elements he must prepare to go to trial on under the indictment. How, then, can there be surprise by the introduction at the trial of those very facts which defendant has sufficient knowledge of either through the indictment of his own acts? The mere possibility of proving the requisite element of the lesser offense by an act which would not sustain the necessary elements of the greater should patently not control the legality of the conviction actually based on a finding of an act that proves an element of both crimes—in one of which it is necessary; in the other, not necessary, but nevertheless sufficient as an alternative to another kind of act not essential for conviction of the greater. And to set aside a conviction simply because of that possibility, if it never materialized in the trial, would not be to conform to the purpose and principle of the general rule; such a decision would hardly be colorable in the light of the reason for the rule.

So the better rule would seem to be that where a defendant is charged with one crime and convicted of a lesser, the elements of which do not necessarily, but may, fall within the elements essential to the greater, and where the facts developed at the trial do actually place the elements of the particular crime that he is convicted of within the elements of the greater crime charged, then a conviction of the lesser crime is lawful. For defendant, by virtue of the notice contained in the indictment or charge, cannot be surprised as to any element coming within the offense charged; therefore he cannot be surprised by proof of the very thing he did, if it is found both in the elements of the greater crime and in his own proved conduct in issue. Such a modification of the rule would give it a desirable degree of flexibility, so that it would more nearly bear out its purpose, and the ends of justice would thereby be more consistently attained.

H. W. J.

FOREIGN JUDGMENTS—DEFENSE OF FRAUD—Suit in United States District Court N. D. Indiana on a judgment rendered in United States District Court N. D. Illinois, eastern division, on a cognovit note made by defendant. Defense that note was obtained by fraud, and that an attorney in fact confessed judgment, when an attorney of a court of record was authorized to do so. Held, a good defense. Court not required under Art. 4, Sec. 1 of the Constitution to give effect to the foreign judgment because the Illinois court had no jurisdiction to render a judgment obtained by fraud. Also that attorney in fact could not confess judgment. Nardi v. Poinsette, 46 Fed. (2nd) 347.

The principal case can be supported on the ground that the attorney in fact had no power to confess judgment, Thomas v. Verden, 160 Fed. 418, 87 C. C. A. 370, Citizens Bank v. Brooks, 23 Fed. 21.

The other ground of the decision is more open to question. It seems plausible to say that no court has jurisdiction to render a judgment void because of fraud in obtaining the judgment and therefore because of this lack of jurisdiction other states are not required to recognize it under the full faith and credit clause, and will not recognize it as a matter of conflict of laws. The courts have not, however, adopted this
position. Hanley v. Donoghue, 116 U. S. 1; Christmas v. Russel, 5 Wall. 290 and Maxwell v. Stewart, 21 Wall 71, apparently require that full faith and credit be given to judgments of sister states where the court had jurisdiction over the parties and the subject matter, even though they were obtained by fraud. Other cases throw doubt on this position. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 397, 67 L. Ed. 719, 43 Sup. Ct. Rep. 458. As a result of the ambiguity of the Supreme Court's position there is much confusion among the state decisions. Freeman on Judgments, 661. Some cases flatly repudiate this principle, as applied to jurisdiction obtained over the person by fraud. Dunlap v. Cody, 31 Iowa 260, 7 Am. Rep. 129 and note, 136. The majority of the modern opinions allow the forum to give equitable relief for certain types of fraud. United States v. Throckmorton, supra. And in the code states, allow fraud in obtaining it to be pleaded as an equitable defense to the judgment where there was an equitable remedy available in the state where rendered. Levin v. Gladstein, 142 N. C. 482, 56 S. E. 371, 32 L. R. A. (NS) 904 and note; Joster v. Currie, 198 U. S. 144, 49 L. Ed. 988. These courts allow collateral attack when the judgment could be set aside where rendered (Ambler v. Whipple, 139 Ill. 311, but see Bell v. Bell, 181 U. S. 175, 45 L. Ed. 804) either because service on defendant has been obtained by fraudulent means (Abercronbie v. Abercronbie, 64 Kan. 29, 67 Pac. 539; Field v. Field, 215 Ill. 496, 74 N. E. 443) or because defendant did not have an opportunity on account of fraud, to present proper defense (Rogers v. Gwinn, 21 Ia. 58), Art. 4, Sec. 1, not requiring a sister state to give more credit to a judgment than it would receive at home. Motter v. Davis, 65 S. W. 969. The great majority of courts refuse to collaterally attack foreign judgments when the fraud consisted in the conduct of the litigation or the fabrication of the cause of action, since defendant had a chance to properly defend himself. Muscatial v. Mo. A. R. Co., 1 Dill (U. S.) 536; The Acorn Fed. Cases 29; Dathe v. Thomas, 109 Ill. App. 434; Motter v. Davis, supra.

The question in the principal case is further complicated by the fact that both were Federal cases.


The Federal Court of Indiana in looking to see whether the judgment was void where rendered, meets the further complication of whether the Illinois rule or Federal rule is to govern. Probably it would apply the Federal rule as to the kind of fraud that would make the judgment void where rendered. *First National Bank v. Liewer*, 187 Fed. 16; *Penn. R. R. v. Hummel*, 167 Fed. 89.

The fraud that was practiced seems to have been in obtaining the note, the judgment apparently being regular in form. In similar circumstances both Illinois and the Federal courts have refused collateral attack. *Muscantine v. Mo. R. R. Co.*, 1 Dill (U. S.) 536; *Whitcomb v. Schultz*, 223 Fed. 268, 13 C. C. A. 510; *Hollester v. Sobra*, 264 Ill. 535, 106 N. E. 507.

**Pleading—Appeal and Error—Theory of the Case**—The complaint alleged that the appellee was negligent in maintaining its rails so that they were higher than the street at a place where vehicles were supposed to cross them at an angle; that while the appellee was attempting to cross at that point with his auto the auto was held on the tracks; that while it was so held the appellant, by its servants, with knowledge of the appellee's dangerous position negligently ran its street car against appellee's auto and injured the appellee without making any effort to stop or to check the speed of the car and avoid the collision. The instructions given charged the jury that there could be a recovery if it was found that the track was negligently maintained as alleged and that such negligence was the proximate cause of the appellee's injury. The jury was also instructed that, if it found that the appellant operated its street car in the manner alleged in the complaint and that the conduct of the appellant in this regard was the proximate cause of the appellee's injuries, then the jury would be justified in finding for the appellee. There was a verdict and judgment for the appellee and the appellant appealed. Held, reversed, and a new trial ordered. The complaint was drawn upon the theory that the alleged injuries were caused by two dependent, concurring acts of negligence committed by the appellant, viz., the negligent maintenance of the crossing and the negligent operation of the street car, the proof of both of which is necessary to entitle the appellee to a recovery. The instructions were erroneous in that they departed from the theory of the complaint and should not have been given. *Southern Indiana Gas & Electric Co. v. Winstead*, Appellate Court of Indiana, March 25, 1931, 175 N. E. 281.

In the course of the opinion it was said, "That a complaint must proceed on some definite theory, which must be adhered to throughout the trial and upon appeal, is so thoroughly settled that the citation of authorities is unnecessary." In a recent case note appearing in 6 Indiana Law Journal 402 (March, 1931) it was sought to be shown that, in view of sections 725 and 426 of Burns' Annotated Indiana Statutes 1926 which provide that cases shall not be reversed for defects in the pleadings or where it appears that the case was fairly tried and determined upon the merits, and in view of the recent decisions giving effect to these statutes, it is doubtful whether or not the theory of the complaint is still law in Indiana. Apparently these statutes and decisions were overlooked in the principal case as no mention is therein made of them. These statutes were