YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

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INSURANCE POLICIES—IMPLIED WAIVER OF CONDITIONS.

Vance in his work on Insurance, p. 346, says that, "probably no branch of the law presents more hopeless conflict and confusion among the cases that is to be found among those involving questions of waiver and estoppel in insurance law. The objection to allowing the insured to prove by parol that the insurer has waived by a prior oral agreement some material provision of the subsequently issued policy arises, of course out of the fact that it apparently violates the familiar rule that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written instrument. *1 Greenl. Ev.* (16th Ed.) Sec. 275. That all prior parol agreements are merged in a subsequent written contract embodying the same subject matter is a rule that is probably universally accepted. Therefore as a consequence of this rule it follows necessarily that any agreement which may have been made between the insured and the insurer prior to the issue of the policy can have no effect upon the rights of the parties unless evidenced by a written instrument. *Wells v. Ins. Co.*, 28 Ind. App. 620. It is equally impossible where this rule is in force to show by parol any facts which would, if they could be shown, estop the insurer from taking advantage of some particular clause in his policy.

In England the cases are clearly opposed to a parol waiver of any of the terms of an insurance policy. *Beggar v. Assurance Co.*, (1902) 71 K. B. 79. In this country there is a conflict of authority although the majority of the State courts undoubtedly favor the

doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the insurer is prevented from obtaining the benefit from a term of his written contract provided that term invalidates the policy in its inception. *Born v. Ins. Co.*, 120 Iowa 299; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Menk v. Ins. Co.*, 76 Cal. 51. Prior to the Northern Assurance Co. Case decided in January, 1902, the United States Supreme Court was also regarded as irrevocably committed to the doctrine enunciated in the case of the *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222. In that case the court had held that to permit parol testimony to show that the agent of the company of his own initiative had inserted a false representation in an insurance policy even though the insured had afterward signed the policy, did not contradict the written contract but simply estopped the insurance company from asserting that it was the misrepresentation of the insured. Great was the surprise therefore, when in a decision characterized by obscure reasoning and supported by unsatisfactory authorities the Supreme Court, by a bare majority, completely reversed itself and held that the knowledge of the agent at the time he insured the property that it was also covered by insurance in a second company did not operate as a waiver of a condition in the policy stipulating that the existence of concurrent insurance should avoid the policy unless such waiver should be indorsed on the policy. 183 U. S. 308. Apparently the decision was based on the theory that since the policy provided for a means whereby the terms of the policy could be waived, therefore the agent could not estop the company from setting up the provisions by any parol agreement which he might make. To state that the decision did not meet with approval is almost superfluous. The New York Law Journal characterized it as narrow in spirit and unjust in result. Likewise in the case of *Virginia Fire Ins. Co. v. Mica Co.*, (Va.) 46 S. E. 463, the court said that "while the pronouncements of this great court must always command the highest respect, its judgment in this particular case is deprived of such of its value as a precedent by the circumstances that it is not in harmony with many of its former decisions and that three judges dissented."

Viewing the situation in this light, it should be a source of considerable satisfaction, therefore, that in a recent controversy over the same policy and between the same parties the Supreme Court has in a unanimous opinion clearly obviated the effect of the former ruling and by a more circuitous route practically effectuated the doctrine laid down in the Wilkinson Case. *Northern Assurance Co. v. Grand View Bldg. Ass'n.*, 27 Sup. Ct. 27, Nov. 1906. In this case the court held, affirming a decision of the Supreme Court of Nebraska, that a suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract. Thus although the

court does not admit the doctrine of parol waiver it nevertheless does oviate the harshness of its former ruling by making it possible to the desired end by a suit in equity to reform the policy in accordance with the parol agreement.

In an article in the *Harvard Law Review* for *March, 1902*, criticising the doctrine laid down in the first decision of the Supreme Court in this case, an attempt was made to justify the doctrine of a parol waiver and to show that it did not violate the parol evidence rule so flagrantly as was supposed. The author argued that a binding contract of insurance is commonly made before the policy is issued; that the policy is merely the reduction of such contract to writing; and that as the limitations upon the agents powers contained in the policy could not affect the contract as previously made it was strained and inequitable to apply the parol evidence rule. The writer seems to have forgotten, however, that the policy must be taken as expressing the final understanding of the parties. *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544. It seems to us to be more logical to follow the tendency of the courts and to frankly admit that in recognizing the parol waiver theory the parol evidence rule is clearly violated and to establish an exception in the case of insurance policies *Welch v. Association*, (Wis.) 98 N. W. 227; *Spalding v. Ins. Co.*, 71 N. H. 441.

Such an exception seems to be founded on reason and justice and should meet with our approval. It is hard to find any substantial reason why the knowledge by an authorized agent of the company of facts affecting the validity of a policy at its inception should not be considered as the knowledge of the company and the company be estopped to set up such facts to defeat a recovery on the policy. *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y. 484; *Forward v. Continental Fire Ins. Co.*, 142 N. Y. 382. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the "Statute of Frauds," become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. *Vance on Insurance*, p. 358.

EJECTMENT—REMOVAL OF TELEPHONE WIRES.

Ejectment is a form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained. The action lies for the recovery of corporeal hereditaments only and cannot be maintained where the subject matter of the action is incorporeal or intangible; for the latter cannot be delivered in execution by a sheriff and are not subject to entry. These propositions are fundamental. *Sedgwick & Wait, Titles to Land*, Chap. IV. It is also elementry, that in its legal signification land has an indefinite extent upwards as well as downwards, the term including not only the face of the earth, but everything under it or over it as expressed by the maxim *cujus est solum, ejus est usque ad caelum, 2 Blackstone's Com., 18.*

In *Butler v. Frontier Telephone Co.*, 36 N. Y. Law Jour. 1139, the defendant had wrongfully stretched telephone wires across the land of the plaintiff without in any way physically touching the soil. The question presented was whether an action of ejectment would lie. The statutary action of that name in New York where the question arose being practically the same as ejectment at common law. The practical importance of the question being in the fact that there are certain advantages to the plaintiff peculiar to ejectment not to be had in other actions. By the application of the principle *cujus est solum* it was held that ejectment would lie on the ground that there had been an ouster from part of the land. "According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

The precise question here presented does not seem to have been before decided except as this case was presented to the lower courts. 109 App. Div. 217, Yale Law Journal, Vol. XV, p. 246. A similar question involving the same principle however has frequently arisen where ejectment has been brought because of overhanging eaves or cornices. Under such circumstances it has been held that the action might be maintained. *Murphy v. Bolger*, 60 Vt. 723; *McCourt v Eckstein*, 22 Wis. 153. This was denied however in *Aiken v. Benedict*, 39 Barb. 400, upon the ground that the defendant had taken possession of nothing of which the sheriff could put the plaintiff in possession. The question was not discussed at length in any of these cases.

The doctrine upon which the decision in the present case is based namely, that land embraces the space above and the soil beneath the surface of the ground, is undisputable. But has not the court in the present instance unwarrantably extended this doctrine when it says that the law regards the empty space as a solid inseparable from the soil? Is it not more in accord with reason and common sense that the principle *usque ad caelum* means that the owner of land has a right in the nature of an incorporeal hereditament? Corporeal property signifies property in possession. By possession is meant physical dealing; consequently there can be no actual possession of anything which is intangible. An owner of land cannot physically possess the space above it any more than he can physically possess an easement or a servitude. If then, as clearly seems to be the case, the incidental right to the space above one's lands is an incorporeal hereditament, it is difficult to see how an action of ejectment may be maintained when another appropriates this space to his own use. The proper redress could be had by an action on the case or by a proceeding to abate a nuisance.

It has been repeatedly laid down that ejectment will not lie for anything of which a sheriff cannot deliver possession, the subject matter must be something tangible, something which can be delivered. *Child v. Chappell*, 9 N. Y. 246. In *Jackson v. May*, 16

Johns. 184, it was said that ejectment would only lie for something attached to the soil. In an early case it was held that such an action would not lie for a water course or rivulet though its name be mentioned, because it would be impossible to give execution of a thing which is transient and always running. *Adams on Ejectment*, 18. Such possession as is required can be given of mines, quarries and upper rooms in a house, because in each of these cases there is something which may be physically possessed. But a sheriff can no more deliver such possession of obstructed space by removing the obstructions as suggested by the present decision, than he can give physical possession of an easement by removing a nuisance which interferes with its enjoyment.

POLICE POWER—CONSTITUTIONAL LAW—REGULATION OF EXPRESS COMPANIES.

In view of the many important enactments, state and Federal, of late years, prohibiting discriminations in rates and service by public service corporations, and which have been upheld by the courts, the recent holding of the Supreme Court of Indiana in the case of *American Express Co. v. Southern Indiana Express Co.* (78 N. E. Rep. 1021), is perhaps in line with the weight of authority on this point.

The statute of Indiana (Acts 1901, p. 149), provides that express companies shall grant to all consignors, including other responsible express companies as consignors, equal terms and accommodations in the carriage and continuance of carriage of goods and prohibits them from granting to any one carrier any privileges or accommodations not granted to all others.

The case under discussion arose on a statutory remedy of injunction sought by the appellee for a violation of the above statute, and upon the hearing the act was declared a valid exercise of the police power and not violative of the fourteenth amendment of the Federal Constitution on the ground that it is an attempt to deprive an express company of its rights and to take its property without due process of law; and further, that it attempts to take from an express company the common law right to contract. Although the court does not enter into a discussion of the police power of the state, its decision is fully sustained by the decisions of the same and other courts.

"Great interests which have grown up and which closely and seriously affect the commercial convenience and prosperity of all the people of the state.—interests which, in their present form and dimensions, were unknown to the common law—are both proper and necessary subjects of police protection, regulation and control. 'It cannot be safely admitted that these vast and powerful agencies, by and through which a large part of the carrying trade of the people of the state is conducted, are beyond the control of the legislature. The well-being of the people demands that they shall at all times be subject to the rein and curb of the law, and that their methods of conducting their business must

conform to those principles of fairness and justice with which the interests of the public are inseparably bound up. The relations of such agencies to the public and to each other, and an authoritative declaration and definition of their duties and obligations, are clearly within the scope of legislative authority wherever important public interests are involved." (*Adams' Express Co. v. State*, 161 Ind. 328.)

The act under examination belongs to that class of legislation which has been found necessary to prevent the destruction of competition, and exclusive possession by the few of the great fields of industry and enterprise. It has never been denied that in the exercise of the police power, property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away. However, as the public peace, safety and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common law rights of some of the citzens, or even deprives them of such rights. (*Railroad v. Jackson*, 179 U. S. 287.)

While the tendencies of these decisions, carried to extreme limits, would seem to subject the public to any and all sorts of legislation enacted under the guise of an exercise of the police power, yet this danger is not apparent when it is considered that review may be had by the courts of all such legislation where constitutional rights and guaranties are involved, thus limiting, in such cases, the otherwise sole and absolute legislative discretion in matters involving the public welfare.

MORTGAGES—INJUNCTION TO RESTRAIN FORECLOSURE UNDER POWER OF SALE—LIMITATIONS.

House v. Carr, 78 N.E. 176, decided by the Court of Appeals of New York, presents an unusual as well as difficult question of equity. The suit was brought by the successors of the mortgagor to restrain by injunction the foreclosure of a mortgage barred by the statute of limitations. For twenty years the original mortgagee made no effort to enforce his right against the mortgagor and for over seven years after the statute of limitations had run he made no demand upon the successors of the mortgagor in possession of the land. Satisfaction of the mortgage was not claimed in the complaint. The foreclosure was being sought by the administrator of the mortgagee. This court refused to restrain the foreclosure reversing the judgment of the Appellate Division. Vann, Haight and Werner, JJ., *dissenting*. The majority opinion delivered by Cullen, C. J., cites *Goldfrank v. Young*, 64 Tex. 432 as in point and follows its arguments considerably. In that case a sale under a trust deed was allowed, although the right of action secured thereby was barred by the statute of limitations. The creditors had urged their claims and no great time had elapsed as in this case of *House v. Carr*. There the very attitude of the debtor clearly showed a calculating inten-

tion to avoid payment of the debt which he had no reason to believe had been abandoned.

The principle that a statute of limitations affects the remedy but not the merits seems well established in New York. *Herlbert v. Clark*, 128 N. Y. 295; *Campbell v. Holt*, 115 U. S. 620. Cullen, C. J., says: "though the statute may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation will apply, a creditor may enforce his claim through that remedy." Applying that principle to this case the court held that the limitation did not bar the statutory foreclosure by advertisement, so no relief could be had, although the debt and mortgage had been barred for over eight years. This principle thus extended seems to violate that spirit of equity that frowns on stale claims and that equity will refuse to enforce a right when one by neglect has not asserted his right until its assertion would take the defendant by surprise and involve him in litigation which by acts of parties he was justified in believing had been abandoned. *Helen v. Yerger*, 61 Miss. 44. The fact that this man is entitled to relief by statute and yet is powerless to set up the defense simply by defendant's choice of mode of foreclosure seems unjust. The injustice is well argued by Vann, J., in the dissenting opinion. On examination of the cases the fault appears to be in the statute and not in the application of the law. By a peculiar state of facts the statute of limitations is avoided, its spirit rendered powerless. A statute allows a sale out of court to have equal presumptive force and effect as though executed by order of court. To the foreclosure in court the statute of limitations is a complete defense; to the foreclosure out of court reaching the same result there is no remedy. Cullen, C. J., states in the majority opinion that this statute has been practically the same for a century. The common law presumption of payment, after twenty years, the statutes of limitation, equity's attitude toward laches and equity's recognition of the statutes of limitation by analogy are all based upon the appreciation that great hardship is done in enforcing old claims and that the ends of justice require the encouragement of the diligent. The plaintiffs in this case are in a defensive position. Vann, J., in the dissenting opinion argues that equity should look to the substance and not the form and thus grant the relief sought. In *Butler v. Johnson*, 111 N. Y. 204, quoted by Vann, J., an injunction was allowed as in substance a defense, but there the result attained was the same as that to which the plaintiff would have been entitled if the executrix had been allowed to continue her purpose.

In the present case the defensive position of the plaintiffs is easily conceded, but the relief sought, by injunction, is primarily an affirmative relief. In the plaintiff's behalf equity could not relieve from the cloud of title, so here equity will not grant relief from the foreclosure by a defense, the instrument of which is affirmative action and which in effect would clear the cloud from the title. 1 *Pomeroy's Equity*, 421. Mr. Justice Miller says that

the defense of lapse of time to an obligation to pay money is no natural right. "It is the creation of conventional law." *Campbell v. Holt*, 115 U. S. 620. Aside from the theory of the right of a defense given to a party in a given instance it seems unjust that circumstances should be allowed to prevent his taking advantage of the defense. Strict following of technical principles, however, seems to warrant this decision under consideration. The remedy for the apparent injustice seems to depend on legislative action. But in this day of complicated difficulties in obtaining needed legislation it affords a good subject for serious consideration whether it would not be more practicable for equity to take the broad liberal attitude to promote justice, the spirit of which is expressed in the able arguments of Vann, J., in the dissenting opinion.

RE-DELIVERY OF DEEDS—CONSTRUCTIVE TRUSTS.

An abstract principle of law may be well recognized, yet in the application of it to concrete facts as they may arise in new and varying forms, there is often a source of considerable difficulty. And it is in this correlating of old principles and new facts that our interest is largely centered.

A decision handed down October 23, 1906, by the Supreme Court of Illinois in the case of *Crossman v. Keister*, 79 N. E. 58, is well illustrative of the foregoing. Two important questions are there discussed, one being as to the legal effect of a re-delivery of a deed by the grantee therein to the grantor with the intention of re-vesting title in the latter; the other relative to the creation of a constructive trust.

In regard to the first proposition, the Court holds that such re-delivery cannot operate to pass the legal title. 5 Ill. 452; 70 Ill. App. 185. This seems to be the rule except in three New England jurisdictions, where by invoking the aid of the *estoppel in pais* doctrine the purpose of the parties is effectuated. 24 Me. 311; 9 Pick. 105; 33 N. H. 487; Washburn on Real Property (VI Ed.) Sec. 1907. The Court proceeds to state, however, that such an act under certain circumstances will suffice to pass an equitable title to the property. This doctrine if carried out to its logical results would seem to be as effectual in precluding the rights of the grantee in the deed as the doctrine just previously noted. 112 Ill. 146; 159 Ill. 84; 42 N. E. 305; 156 Ill. 183; 41 N. E. 39.

Relative to the second proposition: the testator gave orders that a deed from his daughter to himself should be returned to her after his death, being induced thereby by the daughter's promise to convey to a third party (appellee). The proof adduced at the trial showed that the daughter at the time of making the promise had no intention of fulfilling it. The re-delivery of the deed in this case, not passing the title to her, the land descended was administered upon, and the daughter received a fifth part thereof as her share, for a conveyance of which this bill was brought by appellee. The Court, after a careful review of the authorities, holds that the daughter by her acts was constituted a constructive

trustee, and, as such, must convey the land which she had received to appellee.

The rule has been repeatedly laid down that where a party procures a devise of land upon a fraudulent promise to convey to another, equity, acting in the exercise of its almost plenary jurisdiction in cases of fraud, will decree such party a trustee. *Pomeroy Eq. Jur.* Sec. 1054; *Browne on Frauds*, Sec. 94. And it is not incumbent that the promise shall be in writing, it being a trust *in invitum* and falling specifically within the exceptions enumerated in the Statute of Frauds. It arises by implication or operation of law, being based on the ground of fraud. Under this head, the rules of equity are extremely flexible so as to meet and rectify any new form of imposition that may arise. Here no devise was procured by fraud, but by fraud the testator was procured to allow the land to descend instead of devising or deeding it. If it had not been for the fraudulent promise he would undoubtedly have had time to and would have disposed of it before his death in accordance with his wishes.

By parity of reasoning, the same rule applies as in the former cases. The reason for it is augmented by the fact that the parties stood in a confidential relation, the daughter having the ascendency over her father. To show the solicitude manifested by courts of equity in such cases, Lord Chelmsford says in his opinion in *Tate v. Williamson*, L. R. 2 Chan Ap. Cas. 55, "The jurisdiction exercised by courts of equity over the dealings of persons standing in fiduciary relations has always been regarded as one of a most salutary description The principles applicable to the more familiar relations of this character have been long settled by many well known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that confidence is necessarily reposed by one, and the influence that naturally grows out of that confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding party, the party availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation had existed."

Fraud is much more easily inferred where the parties stand in a fiduciary relation. The rule is generally recognized that where one party, standing in such relation, obtains or procures property from the other upon a parol promise to dispose of it to someone else or to hold it in trust for designated purposes, and has at the time no intention of doing so, the law will raise a constructive trust. 176 Ill. 478; 52 N. E. 58. Cases collected in *Brison v. Brison*, (Cal.), 17 Pac. 689. "Where a person by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party with a view to his own benefit, that is clearly within the first head of frauds as distinguished by Lord Hardwicke, viz : that arising from facts and circumstances of imposition; and the person so acting will be

decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded." *Hill on Trustees.* In this case the property was not obtained in the way anticipated. Nevertheless it was obtained, which would not have been the case had it not been for the fraudulent promise, and it is inequitable that the party should retain the fruits of her wrongs as an advantage of it.

IS A PERSON PROCURING A TICKET BY FRAUD A PASSENGER?

In the case of *Fitzmaurice v. N. Y., N. H. and H. R. R. Co.*, decided by the Supreme Court of Massachusetts and reported in 78 N. E. 418, it was decided that a person, who by fraud, procured a ticket at a reduced rate, was not a passenger. So to recover for an injury while on the train of the defendant company, nothing short of a wilful injury could be proved to support the plaintiff's action.

It is a well recognized principle of law that a trespasser on railroad property is protected only from wilful wrong on the part of the railroad. *Condran v. Chicago, Minn. & St. Paul Railway Company*, 67 Fed., 522. Another principle, supported by a great weight of authority, sustains the proposition that the duties of a railroad company to a person as a passenger only attach when that person has been *accepted* as a passenger. Such a relation can only be entered into by means of a contract between the railroad company and some person. This contract may be expressed or implied Hale, Bailments and Carriers, p. 493

It is also maintained by many authorities that this relation must have been entered into fairly, and fraud on the part of the passenger in evading fare avoids the contract to carry as a passenger and makes the latter a trespasser. *Toledo, Wabash and Western Railway Co. v. Beggs*, 28 Am. St. Rep., 613.

There appears to be nothing illogical in this doctrine and no stricter than is necessary to protect the railroad. But for a decision by the United States Circuit Court for New York reported in the case of *Robostolli v. N. Y., N. H. and H. R. R. Co.*, 33 Fed. 796, the decisions would appear to be almost unanimous in their general trend, holding that a person cannot become a passenger by practising a fraud on the railroad. That was a case where a person presented for passage on a train of the defendant company, a non-transferable commutation ticket issued to another. The trial judge instructed the jury that if he presented in good faith the ticket, and he was carried as a passenger upon it, he was then entitled to the protection afforded other passengers. This instruction was upheld on the ground that he did not represent himself to be Roehrs, the person to whom the ticket was originally issued. The Court said, "But here the intestate was in a passenger car, on a passenger train, claiming to be a passenger on the commutation ticket, and his claim was recognized." It is difficult to imagine how anybody could present a non-transferable ticket, issued to someone else, in good faith. Why

the mere presentation of the ticket issued to someone else was not an attempt to represent himself as Roehrs, does not seem clear.

There might seem to be some hardship in the case of a person who had paid all but a few cents of the price of his ticket, with knowledge of the fact, being precluded from an action for a broken leg, but the law applied logically would undoubtedly deny the holder of the ticket any remedy. In the principal case, the fact that the conductor had accepted the coupons in payment of the fare of the plaintiff could make no difference in the final result, as such only shows what a skilful unprincipled person can do. Surely no estoppel could be invoked where one's rights are not known. Or had the conductor accepted the coupons with knowledge of the facts, the company's liabilities and duties would not thereby be increased, as he would exceed both his actual and apparent authority; he could not waive the defendant's rights.

It is the fraud, in whatsoever form it may appear, that changes the apparent status of passenger to that of trespasser. This view maintained by the Supreme Court of Massachusetts certainly seems to be supported by logic and authority.