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Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC.
P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

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DEBT OF LEGATEE TO THE TESTATOR, BARRED BY THE STATUTE OF LIMITATIONS, AS DEFENSE IN A SUIT FOR THE LEGACY.

A recent decision of the Appellate Division of the Supreme Court of New York¹ attracts attention because of the inherent interest of the above subject. The testatrix left \$20,000 as a legacy to her brother. He, with two other makers, was indebted to her in the sum of \$30,000 upon three promissory notes against which the statute of limitations had long since run. In an action by the legatee against the executor for the legacy it was held that the legatee was entitled to judgment, inasmuch as his was a distinct independent legal claim and as the statute-barred debt could no more be recovered by the estate than by any other creditor.

The court bases its conclusion upon the typical case of *Allen v. Edwards*,² but it is respectfully submitted that the more

¹ *Kimball v. Scribner* (1916) 161 N. Y. Suppl. 511.

² (1883) 136 Mass. 138; see also *Hesley v. Shaw* (1905) 120 Ill. App. 92, which is identical in its facts with the principal case. There the court

equitable rule is the one prevailing in the English Chancery and, heretofore, in the New York Surrogate Courts. The claim of the estate in the principal case had not in fact been paid, and no presumption of payment arises from lapse of time. Hence, these claims should be considered assets in the hands of the executor for which he should account. The right of the executor to retain out of the legacy an amount due from the legatee has been described in a Maine case³ as an equitable right of its own nature different from the technical right of set-off in common law actions. Now if this be an equitable right of its own nature, why should not equitable principles apply? It is, of course, established that equity follows the law to the extent of enforcing a statute of limitations in cases in which such a statute would be enforced at law.⁴ Yet how can the statute be said to run against one on whom there is no burden of asserting affirmatively his claim, as the case of *Rogers v. Murdock*⁵ squarely decides that "a legacy is impressed with an equitable lien for the legatee's debt, which the executor may satisfy despite the bar of the statute."

The *fons et origo* of the English rule is the case of *Courtenay v. Williams*⁶ which held on general principles of equity that the executor had the right of retainer despite the bar of the statute. The *Allen* case attempts to differentiate the *Courtenay* case from its own decision on the ground that the former holds a legacy not to be a debt; that when the estate of the decedent has claims against the legatee, no case of mutual debts is presented, as there is something due as such from the legatee, while nothing is thus due from the other. The *Allen* case entertains a different view of a legacy, holding that for many years a common-law action in Massachusetts could be maintained upon it, and that it could be attached on trustee process.⁷ Yet it is submitted that to say that the right remains in the executor and that his

said: "We are of opinion that whether the strict rules of law or equitable principles are applied in the determination of the question, the notes are in either case barred by the Statute of Limitations."

³ *Webb v. Fuller* (1893) 85 Me. 443.

⁴ *Nininger v. Norwood* (1882) 72 Ala. 277; *John v. Smith* (1899) 91 Fed. 827.

⁵ (1887) 45 Hun (N. Y.) 30.

⁶ (1844) 3 Hare, 539; see also *Cadwell's case* (1875) L. R. 20 Eq. 644; *Bates v. Coates* (1863) 33 Beav. 249.

⁷ *Vantine v. Morse* (1870) 104 Mass. 275.

remedy only is barred is precisely to say that the legatee has already in his hands, to the amount of his debt or more, those assets of the testator which he seeks by his suit. The executors may admit the legatee's right to his legacy of \$20,000. But they can in all justice say to him he has \$30,000 belonging to the testator in his possession. Is it going too far to require him to pay his legacy *pro tanto* out of those assets?

While there are several American decisions of courts of last resort which accord with the English cases,⁸ there are other holdings⁹ of courts of similar standing in agreement with the principal case. The brief for the latter series is presented most effectively in *Holt v. Libby*.¹⁰ There Peters, C. J., said¹¹ that a testator is more likely to intend to forgive than to collect his statute-barred debts when he made no declaration about them in his will, especially debts against children or relatives. In many cases, he argued, such claims are covered by the dust of time and are forgotten, though found by executors after the death of the testator. "In many other instances the advances are intended as benefactions and gifts conditioned upon some unforeseen circumstances arising to make it expedient to regard them as debts." Is not the presumption of forgiveness rather a violent one, especially when the testator could so easily effectuate it by a declaration in the will? Furthermore, are we to assume that the passing of the day when the statute of limitations has run automatically transforms the previous non-intention of the testator into an intention to remit? As to the fact that such claims are dust-covered and forgotten, this is only a superficial condition, for they are encased in the unsullied and enduring cover of equity. Incidentally, as to both the first and third arguments, the facts of the principal case are at variance with them, for it is incredible that the testatrix intended a gift to the legatee of the three notes, to which there were two other joint and several

⁸ "The claim may be barred by the statute and yet be properly set up as a claim against defendant (distributee) in settling his distributive share of the estate. It may, as we conceive, be taken into consideration in settling the estate, yet could not, on account of the statute, be enforced in a suit at law." *Garret v. Pierson* (1870) 29 Ia. 307; *Holmes v. McPheeters* (1897) 149 Ind. 591.

⁹ *Drysdale's Appeal* (1850) 14 Pa. St. 531; *Reed v. Marshall* (1879) 90 Pa. St. 345; *Milne's Appeal* (1882) 99 Pa. St. 483.

¹⁰ (1888) 80 Me. 329.

¹¹ (1888) 80 Me. 329, 332.

obligors. The reasoning in the decisions favorable to the principal case seems arbitrary and technical, and based upon a questionable conception of the nature of a legacy and of the statute of limitations. It is, therefore, submitted that the rule of the English Chancery and the several concurring American courts including the New York Surrogate, which has thus been set aside by the principal case, would, if followed, effectuate justice more amply and be more in accord with equitable principles.

A. N. H.

EFFECT OF A PROVISION IN A CERTIFICATE OF FRATERNAL BENEFIT
INSURANCE THAT SUBSEQUENT BY-LAWS SHALL
CONSTITUTE A PART OF THE CONTRACT

A fraternal benefit association which issues certificates payable at the death of the insured is essentially a mutual life insurance company, and is governed by similar principles of law.¹ The distinction between the benefit association and the insurance company is that the policy issued by the latter is the contract, while in the case of the former, the certificate together with the by-laws of the association constitute the contract.² However, by-laws which are enacted subsequent to the issuance of the certificate are not binding on the insured unless he has so agreed,³ and even where there is such a provision there must be some limitation as to the extent to which the insured will be bound.

In *Abitz v. Supreme Lodge*⁴ the defendant society issued a certificate of insurance to the plaintiff's testator which contained such a provision. Later the lodge enacted a by-law which provided that any member who disappeared and whose residence was unknown for one year, should stand suspended and that no dues would be received in payment on the certificate. The insured paid eleven annual assessments and disappeared in 1905. The society refused to accept assessments after the lapse of one year. In 1913 the wife as beneficiary brought an action against

¹ *Modern Woodmen of America v. Coleman et al.* (1903) 96 N. W. (Neb.) 154.

² Bacon, *Benefit Societies*, sec. 321; *Sabin v. Phinney* (1892) 134 N. Y. 428.

³ *Peterson v. Gibson* (1901) 199 Ill. 365.

⁴ (1916) 113 N. E. (Ill.) 63.

the society on the certificate, claiming recovery by virtue of the doctrine of presumption of death due to the seven years absence of the insured. The society set up the defence that according to the by-law the insured was suspended in 1906, and for this reason, the certificate gave no right of recovery to the beneficiary. The plaintiff claimed that the by-law was unreasonable and did not apply to the certificate issued prior to its enactment. The Supreme Court of Illinois decided that the by-law was reasonable and consequently valid.⁵

The common-law presumption of death which arises after an absence of seven years has been recognized in this country in many states,⁶ including Illinois.⁷ The question then resolves itself to this issue: Is a subsequent by-law which, by implication, waives the right of the presumption of death, valid and binding on the insured?

It is generally held that by-laws which are contrary to the law of the state,⁸ or which are unreasonable,⁹ or which change the contract in any essential particular,¹⁰ or which affect the vested rights of the insured,¹¹ are invalid and do not in any degree affect the certificate. A by-law is usually declared unreasonable if it materially affects the amount to be paid under the contract,¹² or if it lessens a primary duty which one party owed the other. Some courts go even farther and hold that a by-law is unreasonable if it attempts to do more than regulate the administration of

⁵ See also *Baldwin v. Begley* (1900) 185 Ill. 180: "A party cannot claim the right to have a contract remain unaltered when the contract itself provides that it may be changed."

⁶ *Davie v. Briggs* (1878) 97 U. S. 628; *Loring v. Steineman* (1840) 42 Mass. 204.

⁷ *Reedy v. Millizen* (1895) 155 Ill. 636; *Whiting v. Nicholl* (1867) 46 Ill. 230.

⁸ *Woodmen of the World v. Robinson* (1916) 187 S. W. (Tex.) 215.

⁹ *Weber v. Maccabees* (1902) 172 N. Y. 490; *Gilmore v. Knights of Columbus* (1904) 58 Atl. (Conn.) 223.

¹⁰ *Smythe v. Knights of Pythias* (1912) 198 Fed. 967.

¹¹ *Smythe v. Knights of Pythias*, *supra*; *Weber v. Maccabees*, *supra*.

¹² For the effect of by-laws reducing (1) benefits payable to the insured, *Poultney v. Bachman* (1881) 62 How. Pr. (N. Y.) 466; (2) benefits payable to the widow of the insured, *Gundlach v. Mechanic's Association* (1875) 40 How. Pr. (N. Y.) 190; *contra*, *Fugure v. Mutual Society* (1874) 46 Vt. 362; (3) benefits payable for total disability, *Beach v. Maccabees* (1904) 69 N. E. (N. Y.) 281.

the association and the manner of conducting its business.¹³ Courts in other jurisdictions declare that a by-law is unreasonable if it introduces elements into the contract which were beyond the contemplation of the parties when the certificate was issued.¹⁴

There is, however, another ground on which the decision of this case may be questioned. Subsequent by-laws are invalid which interfere with, or impair the vested rights of the insured.¹⁵ Although the rights of the beneficiary prior to the death of the insured are merely contingent,¹⁶ it is not true of the insured who has a vested right in the contract¹⁷ even though he has no such right in the fund payable at his death. The trend of modern decisions seems to be that the society cannot materially change the terms of contract,¹⁸ for by so doing the contractual rights of the insured are impaired. In the case of *Woodmen of World v. Robinson*¹⁹ the question arose as to the validity of a by-law which explicitly waived the presumption of death. A statute in that state provided for the same presumption of death after seven years' absence as existed at common law. It was held that the by-law, being contrary to the statutory law, was unreasonable and therefore void.

In the principal case, although no statute was involved, it is submitted that this by-law clearly abrogated a common-law right and was in derogation of the primary object for which the insured had paid eleven annual assessments. His vested

¹³ *Ayers v. United Workmen* (1907) 188 N. Y. 280.

¹⁴ *Newhall v. Legion of Honor* (1902) 63 N. E. (Mass.) 1, Justice Holmes said: "The agreement to comply with future by-laws does not mean absolute submission to whatever may be enacted by the company in good faith . . . and it does not extend to permitting a direct deduction from the sum, which from the face of the certificate any ordinary man would be led to suppose secure."

¹⁵ *Levine v. Knights of Pythias* (1907) 99 S. W. (Mo.) 821.

¹⁴ *Sabin v. Phinney, supra*.

¹⁷ *Ayers v. United Workmen, supra*.

¹⁸ *Smythe v. Knights of Pythias, supra*, Justice Ray said: "Should a clause be inserted in the contract whereby the citizen, a party to such a contract with the government, should in general terms agree to be bound by all laws of the United States then in force or that might be thereafter enacted, would he be held to consent thereby to a change in the terms of his contract made by some special act of Congress? I think such a construction would be unreasonable, oppressive and unconstitutional."

¹⁹ (1916) 187 S. W. (Tex.) 215.

right in this contract, by which he desired to provide for his family at his death was impaired by a by-law to which, even by implication, he never intended to consent. It seems that this by-law falls within the prohibited class as it is unreasonable and an infringement of vested rights.

R. W. D.

THE CHILD LABOR LAW¹

The Commerce Clause² of the Constitution has been invoked by federal legislation for the purpose of stamping out child labor in the states through a denial of the channels of interstate transportation for the product of such labor. That the power of Congress to regulate interstate commerce is exclusive and plenary where it has attempted to deal with problems that promoted the business of carriers as public servants, has become an accepted principle.³ The real difficulties have arisen in the use made of this power to regulate or prohibit certain forms of commerce.

While the Supreme Court might have ruled that regulation of interstate commerce could not take the form of prohibition, it was early intimated that the power to regulate commerce might be considered as an instrument for other purposes of general

¹ Act Sept. 1, 1916, c. 432: "No producer, manufacturer or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian."

² Art. I, sec. 8, ¶ 3.

³ *Gibbons v. Ogden* (1824) 9 Wheat. (U. S.) 1, 195: "As to such commerce as is national in character and requires uniformity of regulation, the power of Congress is exclusive." *Gloucester Ferry Co. v. Pennsylvania* (1884) 114 U. S. 196; *Minnesota Rate Cases* (1912) 230 U. S. 352, 398.

policy and interest.⁴ Under the Articles of Confederation the states had not only the power to regulate commerce but the power to prohibit. When the Constitution gave Congress the complete and exclusive power over commerce, it is a legitimate presumption that the power to prohibit was included.⁵ The Supreme Court has, moreover, frequently declared that the power of Congress over interstate commerce is as extensive as the power over foreign commerce,⁶ a power which in turn has often assumed the form of prohibition.⁷

The real source of authority that Congress has relied upon in the extension of its activity from mere regulation to prohibition of certain commodities in interstate commerce is found in the federal police power, and the constitutionality of the Child Labor Law will have to be determined by deciding whether or not it represents a legitimate exercise of that power. Although a police power is nowhere in the Constitution delegated to the national government it has been regarded either as inherent, or established by its repeated exercise. Its foundation lies in the right and duty of the federal government to secure the general comfort, health and prosperity of the nation;⁸ and when confining their operations within the powers enumerated by the Constitution, Congress, as well as the state legislatures, may establish police regulations.⁹

As against the constitutionality of the law it has been argued that Congress has made an unwarranted use of the Commerce Clause to usurp the state's powers in a field belonging peculiarly

⁴ *U. S. v. The William* (1808) Fed. Cas. 16700; *License Cases* (1847) 5 How. (U. S.) 577.

⁵ Thomas I. Parkinson, *Congressional Prohibitions of Interstate Commerce*, 16 *Col. L. Rev.* 367. U. S. Const. Art. I, sec. 9: Congress was forbidden to prohibit the importation of slaves prior to 1808. The express prohibition shows the implied grant of power to Congress to prohibit in interstate commerce.

⁶ *Bowman v. Chicago and Northwestern Ry.* (1888) 125 U. S. 165; *Crutcher v. Kentucky* (1897) 141 U. S. 47.

⁷ Embargo and Non-intercourse Acts (1807-1809). Prohibition of foreign convict-made articles, *Oceanic Navigation Co.* (1909) 214 U. S. 330; prohibition of importation of prize fight films, *Weber v. Freed* (1915) 239 U. S. 325.

⁸ On the general subject of the *police power* in interstate commerce see Freund, *The Police Power*, pp. 2, 63; Paul Fuller in 4 *Col. L. Rev.* 563.

⁹ Cooley, *Constitutional Limitations*, p. 732; *Munn v. Illinois* (1876) 94 U. S. 113, 123, 125.

to the latter, and is thereby violating the Tenth Amendment of the Constitution,¹⁰ in attempting to prohibit *indirectly* what it could not *directly* prohibit. The position is taken that manufacturing and production do not *per se* involve interstate commerce even though the goods made or produced are intended for interstate shipment.¹¹ The *Knight case*, however, has been seriously doubted and the emphasis laid on the idea that manufacturing was set apart from federal regulation has been gradually overcome.¹² The Fifth Amendment,¹³ under which the Erdman Act,¹⁴ providing that it be a criminal offense against the United States for a carrier engaged in interstate commerce to discharge an employee because of his membership in a labor organization, was held unconstitutional,¹⁵ is also relied upon as a ground for attack upon the Child Labor Law. If we adopt the same test, however, as to the Fifth Amendment that is applied to the Fourteenth Amendment¹⁶ the issue resolves itself into the question whether Congress was making a reasonably necessary use of its power, or an arbitrary and unreasonable use. The enactment of child labor laws and the regulation of working hours for women by the state have been held not to be a violation of the Fourteenth Amendment.¹⁷

Congress in its exercise of the police power has passed in recent years a series of Acts prohibiting the use of the facilities of interstate commerce where the health, safety, and morals of the people were in a reasonable way connected with the subject

¹⁰ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

¹¹ *Coe v. Erroll* (1885) 116 U. S. 517; *Kidd v. Pearson* (1888) 128 U. S. 1; *U. S. v. E. C. Knight & Co.* (1903) 187 U. S. 611.

¹² Goodnow, *Social Reform and the Constitution*, pp. 77, 123, 126.

¹³ "No person . . . shall be deprived of life, liberty or property without due process of law. . . ."

¹⁴ Passed June 1, 1898. 30 U. S. St. 424, c. 370.

¹⁵ *Adair v. U. S.* (1907) 208 U. S. 161, Justices Holmes and McKenna dissenting; affirmed as to a similar state statute, *Coppage v. Kansas* (1914) 236 U. S. 1; see criticism of these cases by Mr. Louis D. Brandeis, now Justice Brandeis, *The Living Law*, 10 ILL. L. REV. 467-468.

¹⁶ *Slaughter House Cases* (1872) 60 Wall. (U. S.) 36.

¹⁷ *Miller v. Wilson* 236 U. S. 373. *Chicago B. & Q. R. R. Co. v. McGuire* (1910) 219 U. S. 569; "Liberty implies the absence of arbitrary restraint. Freedom of contract is qualified and not absolute."

matter of transportation.¹⁸ In all of the instances a clash of national legislation with the powers of the states was urged, and in all it was rejected. The Lottery Act,¹⁹ the Pure Food Act,²⁰ the White Slave Act²¹ have been sustained by decisions upholding the power of Congress to exercise the authority involved. It has further been contended that while Congress might validly, as in the preceding cases, legislate to protect the consumer, it could not employ its power over commerce to protect the producer, when the articles prohibited are not *per se* injurious to public welfare.

This might be a valid objection if it were not for the fact that the constitutionality of such acts rests not on the limited grounds of the harmful character of the commodities but on the broader ground that the nation's morals, interests and health are concerned,²² even though only in the manner of the production of goods. It is the public welfare that is aimed at, whether the product be harmful to the consumer or perfectly innocent.²³ On this ground it would seem that the Child Labor Law should be sustained.

B. L.

¹⁸ Obscene Literature and articles designed for immoral use, Act of Congress, Feb. 8, 1897, 29 U. S. St. 512, c. 172; *Lottery Act*, Act of Congress, 1895, 28 U. S. St. 963, c. 191; Food and Drugs Act, Act of Congress, June 30, 1906, 34 U. S. St. 963, c. 191; White Slave Act, Act of Congress, June 25, 1910, 36 U. S. St. 825, c. 395; Meat Inspection Act, June 30, 1906, 34 U. S. St. 674.

¹⁹ *Champion v. Ames* (1903) 188 U. S. 320.

²⁰ *Hippolite Egg Co. v. U. S.* (1910) 220 U. S. 45; *Seven Cases v. United States* (1915) 239 U. S. 510.

²¹ *Hoke v. United States* (1912) 227 U. S. 308.

²² Justice Holmes in *Noble State Bank v. Haskell* (1910) 219 U. S. 104, 111: "It (police power) may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Also see the relation of the national police power to the state police power in *Champion v. Ames* and *Hoke v. United States*, *supra*.

²³ The Lacey Act, sec. 242 of Criminal Code of United States prohibits interstate shipment of animals or birds killed in violation of state game laws, prohibition of perfectly good articles of commerce, not injurious to the consumer, but to protect the general welfare.