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CONTRACTS—ILLEGALITY—AGREEMENT OF CURATRIX TO RENOUNCE HER OFFICE

Nute v. Fry

The plaintiff's father and his half brother were business partners. Their partnership was dissolved by the death of the plaintiff's father, leaving the plaintiff, an infant son, and his mother surviving. Shortly afterwards, the half brother, fearing that the share of the infant son in the partnership assets would be taken from the business, agreed with the mother that if she would allow him to act as the plaintiff's guardian and leave the plaintiff's share of the estate in the business, he would repay the plaintiff such share with six percent interest, and an additional sum of $25,000, when the plaintiff became of age. There was further promise of provision for the payment of this sum in the promisor's will should he die before such settlement was made. The mother accepted this offer, and waived her rights as curatrix, whereupon the half-brother was appointed and qualified as curator of the estate of the infant son. Upon final settlement of the curatorship, when the infant son attained his majority, the promised sum of $25,000 was not paid, nor did the will of the promisor, who died the following year, provide for such payment. Plaintiff sued the promisor's estate upon such agreement. The trial court sustained the defendant's demurrer to the evidence, and the plaintiff appealed. In affirming the judgment of the lower court, the upper court held that the agreement sued upon was against public policy and was unenforceable.

The contract alleged in the instant case is one of that class loosely called illegal contracts. The word "illegality" as used in this sense does not necessarily indicate that the agreement in question is contrary to any positive law; it indicates that the contract is against public policy. Such contracts have been classified, broadly, as contrary to positive law, immoral, and against public policy. Such a classification, however, does not present a criterion for accurate segregation of the cases, for clearly, if a contract is either contrary to positive law or immoral, then for that reason its enforcement is against public policy. Regardless of the class in which any given offending agreement falls, however, it would seem that the basis for the court's refusal to enforce it is its violation of sound public policy. The Restatement of the Law of Contracts is of interest

1. 125 S. W. (2d) 841 (Mo. 1939).
2. "It should be said here that when a bargain is spoken of as illegal, it is not meant thereby to assert that it is criminal or that the law will visit with any punishment the making of such bargain other than refusing to enforce it."
3. POLLOCK, CONTRACTS (3d ed. 1906) § 275; see classification in 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1628.
4. Restatement, Contracts (1932) § 512.
in this regard. It states: "A bargain is illegal within the meaning of the Re-
statement of this Subject if either its formation or its performance is criminal,
tortious, or otherwise opposed to public policy." (Italics supplied)

A comprehension of the basic term public policy, as so employed, is a more
difficult matter. Although it has prevented the enforcement of innumerable
otherwise valid contracts, it remains one of the most intangible and obscure con-
cepts in the law. It has been described as a "very unruly horse, and when once
you get astride it you never know where it will carry you." In an effort to ex-
plain the term, it has been said that " . . . whenever any contract conflicts
with the morals of the times and contravenes any established interest of society,
it is void as being against public policy", and it is not necessary that the illegal
or immoral purposes be actually accomplished in order to avoid the contract.7
Public policy is to a large extent a matter of individual opinion, for one man
might think a certain thing against the established morals, while another feels
that the same thing is excellent policy.8 Clearly it is subject to wide variation
from time to time and from place to place.9 Public policy, then, becomes largely
a matter of the opinion of a certain court in a certain time at a certain place.

The scope of the term may best be illustrated by a consideration of various
types of cases in which the agreements have been held unenforceable because
of illegality. The range of actors involved is wide and includes not only
gamblers betting on the continuing life of Napoleon,10 but also their spiritual
advisers trading in their ecclesiastical offices.11 The more common applications
of the principle have been in contracts injurious to marital relationships,12 acts
of corporation officers unfaithful to the corporation,13 contracts in restraint of
trade,14 the fostering of monopolies,15 contracts obstructing or perverting the
administration of justice,16 contracts for future illegal cohabitation,17 contracts

5. Burroughs, J., in Richardson v. Mellish, 2 Bing. 229, 252 (C. P. 1824),
as quoted in 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1929.
6. Cox, J., in Montgomery v. Montgomery, 142 Mo. App. 481, 127 S. W.
118 (1910).
(1879).
9. Turney v. Tillman Co., 112 Ore. 122, 228 Pac. 933 (1924); in Rodriguez
v. Speyer Bros., [1919] A. C. 59, Lord Haldane summarized the influence of
public policy, stating that it had taken three shapes in the law: (1) those rules,
having their basis in policy, which are now hard and fast principles of law—as
the rule against perpetuities; (2) those rules which are not yet virtually
unalterable legal principles but which are accepted as matters of fact—as the
rejection of wagering contracts; (3) those rules which are still being moulded
by current policy—as covenants in restraint of trade. See also Winfield, Public
Policy in the English Common Law (1928) 42 HARV. L. REV. 76.
11. See Kirloudbright v. Kirloudbright, 8 Ves. 51 (Ch. 1802).
12. Blank v. Nohl, 112 Mo. 159, 20 S. W. 477 (1892); see an excellent
14. See Wiggins Ferry Co. v. Chicago & A. R. R., 5 Mo. App. 347 (1878);
Note (1937) 183 L. T. 335.
16. Ashby v. Dillon, 19 Mo. 619 (1854); Kribben v. Haycraft, 26 Mo. 396
(1858); Baker v. Farris, 61 Mo. 389 (1875).
17. Prince v. Missouri, 159 S. W. 356, 157 S. E. 836 (1917); see, In re
Greene, 45 F. (2d) 428 (1930); Note (1938) 2 MD. L. REV. 291.
threatening the most capable performance of public duties, and contracts where one person is, by virtue of his position, enabled to advise great numbers of people to their possible detriment and his own benefit, as the agreement of an astrologist to advise her clients to buy mining stock sold by the other contracting party.

Courts have consistently invalidated contracts which would serve to encourage any dishonesty or favoritism in public office. Thus, contracts to pay for services rendered in commutation of a convict's sentence, to reward an officer for doing only his duty, to promote the election of candidates to public office, and even acts of bodies with a public franchise which tend to greatly inconvenience the public or otherwise interfere with its best interests, have been invalidated.

The office of curatrix is one of trust and confidence, as are the offices of administratrix and executor, and sound public policy would seem to demand that trafficking in such offices be discouraged and contracts looking thereto be unenforceable in the courts. The courts feel that such contracts would tempt the administrator to reimburse himself for the costs of procuring the office, by unnecessary and illegitimate charges against the estate. Moreover, since such offices are public trusts, whose incumbents are appointed by public officers and perform duties clearly defined by law, they should be safeguarded by the same considerations forbidding the trafficking in public offices. Thus, the courts

18. Kick v. Merry, 23 Mo. 72 (1856); Stark v. Publishers George Knapp & Co., 160 Mo. 529, 61 S. W. 669 (1901); Reed v. Peper Tobacco Warehouse Co., 2 Mo. App. 82 (1876); Eads v. Stifel, 204 Mo. App. 420, 222 S. W. 482 (1920).


22. Kick v. Merry, 23 Mo. 72 (1856).

23. Keating v. Hyde, 23 Mo. App. 555 (1886); Eads v. Stifel, 204 Mo. App. 420, 222 S. W. 482 (1920); see Mo. REV. STAT. (1929) §§ 3933, 3935, on bribery to procure office, and accepting offices procured by bribery. In Eddy v. Capron, 4 R. I. 394 (1856), Ames, C. J., stated: "By the theory of our government, all offices, whether civil or military, whether general, or as in this case, professional, are trusts held solely for the public good; and in which no man can have property to sell, or can acquire one by purchase . . . the services performed under such appointments are paid for by salary or fees, presumed to be adjusted by law to the precise point of adequate remuneration. Any premium paid to obtain office, other than that which the law establishes or regulates, interferes with this adjustment, and tempts to peculation, overcharges and frauds, in the effort to restore the balance thus disturbed."


25. In Missouri, the term curator (or curatrix) has been adopted from the Civil Law, and is applied to the guardian of the estate of the ward, as distinguished from the guardian of the person. Duncan v. Crook, 49 Mo. 116 (1871).


regard the agreement to renounce such an office as inconsistent with the obligations of the office and consequently against public policy. Such an agreement is not regarded, by the courts, as valid consideration.30

JOHN H. GUNN

FEDERAL PROCEDURE—INTERPLEADER—DIVERSITY OF CITIZENSHIP

Treinies v. Sunshine Mining Co.1

Amelia Pelkes died leaving a husband, Pelkes, and one child by a former marriage. Among the assets of the estate was some stock in the S Co., which was considered valueless and was not appraised. The order of distribution, by which three-fourths of the stock was assignable to the husband and one-fourth the child, was not followed, but the inventoried property was divided according to their wishes. Pelkes took the stock in the S Co. Later the S Co. declared a dividend. Pelkes, a citizen of Washington, assigned the stock to Treinies, also a citizen of Washington. Extended litigation followed, in which the daughter, a citizen of Idaho, claimed half the shares and her stepfather and Treinies claimed them all. In 1935 the Washington state court, in probate proceedings in which the daughter appeared, upheld Pelkes' ownership in full. In 1936, in a proceeding to which all the claimants and the S Co. were parties and which was begun prior to the Washington probate suit, the Idaho Supreme Court held the Washington judgment void for lack of jurisdiction of the subject matter and found for the daughter. The S Co., a Washington corporation, then brought the present bill of interpleader in the Idaho federal district court against Pelkes, Treinies, and the daughter, to determine the ownership of the stock and the dividends. Reviewing a decision for the daughter, affirmed by the circuit court of appeals, the United States Supreme Court held that the requirement of diversity of citizenship under the Interpleader Act of 19362 was satisfied and the bill of interpleader proper, and that the decision of the Idaho state court was res judicata of the merits of the controversy, of its own jurisdiction to pass thereon, and of the lack of jurisdiction of the Washington court.


30. Currier v. Clark, 19 Colo. App. 250, 75 Pac. 927 (1903); Cunningham v. Cunningham, 18 B. Mon. 19 (Ky. 1857); Porter v. Jones, 52 Mo. 399 (1873); Oakeshott v. Smith, 104 App. Div. 384, 93 N. Y. Supp. 659 (1904), aff'd, 185 N. Y. 583, 78 N. E. 1108 (1906), both memorandums; Bowers v. Bowers, 26 Pa. St. 74 (1856); McGraw v. Traders' Nat'l Bank, 64 W. Va. 509, 63 S. E. 398 (1908). The renunciation of an administratrix was held to be consideration to enforce a promise on the ground that the orphan court could prevent any fraud, and it was better to tolerate such contracts than to allow repudiation of obligations, Basset v. Miller, 8 Md. 548 (1855). Cf. Orr v. Sanford, 74 Mo. App. 187 (1898).


The Constitution limits the jurisdiction of federal courts to, *inter alia*, "controversies . . . between citizens of different States." The Judiciary Act setting up the lower federal courts adopts the same phrase. Using letters to designate citizens of a given state, it may be said the statute has been interpreted to confer jurisdiction over suit A v. B, or A v. B & C, or A & B v. C & D, but not over suit A₁ v. B & A₂, or A & B₁ v. B₂ & C. That is, diversity must be complete. Whether the same words in the constitution have the same meaning it has not been necessary to determine.

An interpleader action involves at least three parties and three different interests, the stakeholder and the several adverse claimants to the fund. The Interpleader Act of 1936 specifically gives jurisdiction where there are, "Two or more adverse claimants, citizens of different States." No mention is made of the citizenship of the stakeholder. Rule twenty-two of Rules of Civil Procedure for the United States District Courts, dealing with interpleader, applies to suits under the general diversity of citizenship jurisdiction of federal courts as well as to suits specifically brought under the Interpleader Act, but makes no attempt to clarify the "diversity" requirements of either statute. The following situations suggest themselves: (1) X, stakeholder, interpleads A & B, adverse claimants; (2) X interpleads A₁ & A₂; (3) X interpleads A₁, A₂, & B; (4) X₁ interpleads X₂ & A; (5) X₁ interpleads X₂, X₃ & A.

Every interpleader action presents two controversies, (a) whether it is an appropriate case for interpleader, in which controversy the interpleading plaintiff is on one side and the claimants on the other, and (b) the dispute between the claimants over title to the fund, as to which the stakeholder (if it is a proper case for interpleader) must be a disinterested bystander.

Of our hypothetical situations, the first is within the federal jurisdiction by any test. In the second and third situations set out above, there is diversity as to the first issue on trial but either no diversity or incomplete diversity as to the second. In *Turman Oil Co. v. Lathrop*, a case brought under the general equity powers of the federal court and not within the limited scope of the 1926 Interpleader Act, it was held that the court might in the second situation take jurisdiction of the first controversy and retain it to settle the second. In view of the express language of the Interpleader Act "... two or more adverse claimants, citizens of different States" it would not seem possible to bring such a case under the Act. The question may well be asked whether the remedy furnished is exclusive in cases which in other respects meet its requirements.

5. New Federal Rule of Procedure twenty-two would seem to liberalize this requirement to permit interpleader under the Act of 1936 (or without it) though the stakeholder "avers that he is not liable in whole or in part to any or all of the claimants," i.e., though by disputing his liability he has an interest in the controversy.
7. The Interpleader Act of 1926 was held not exclusive, and jurisdiction exercised over a case of this type, which otherwise could have been brought within that statute, in *Mallens v. Equitable Life Assur. Soc.* 87 F. (2d) 233 (C. C. A. 7th, 1936).
Against jurisdiction here there is the practical argument that the stakeholder can interplead all the claimants in their own state courts. While that would force the foreign stakeholder to put to issue in the home of his adversaries the possibly acute question of the propriety of interpleader, incurring the same danger of prejudice which supports the policy of all federal diversity jurisdiction, the prevailing philosophy favors restriction rather than extension of that jurisdiction.8

The third situation raises the question as to whether the above quotation from the Interpleader Act is satisfied whenever there are two adverse claimants from different states. Or must each of the claimants, if there are more than two, be of distinct citizenship from every other claimant? Analogy to the general principles of federal “diversity” jurisdiction might lead to the latter conclusion, but interpleader procedure is anamalous. The several federal acts have all recognized the necessity of a special federal jurisdiction, arising from the limited scope of process from state courts.9 And as for the language of the Constitution, Professor Chafee argues that it is to be given a wider interpretation than that given the Judiciary Act setting up the lower federal courts, since the Constitution has a broader purpose than that statute and is intended to last for a longer time.10

The fourth situation seems to be within the Interpleader Act, though, of course, there is not perfect diversity between the contestants to the issue of whether interpleader is proper.11 The principle case falls within this situation (for Pelkes and Treinies were not adverse to each other and must be aligned together), and asserts federal jurisdiction. The opinion is clear that the court considered the second issue the only significant question in an interpleader action. For that reason it held there was no necessity of considering whether the diversity language of the Constitution should be interpreted more liberally than the identical words in the Judiciary Act. It should be noted that the plaintiff here was truly disinterested. That will not always be the fact. Quaere, will the court then adhere to the rationalization of the instant case? Though admittedly not used with reference to equity suits to prevent multiplicity of

9. Note that in this situation, unless B voluntarily submits to the jurisdiction of state A (or vice versa) there is no state court which can give X effective relief by interpleader. Concededly to rectify this same difficulty in situation one, the Interpleader Act permits nationwide process (as compared to statewide process in the ordinary “diversity” case. Rule of Procedure 4 f). And because of the lack of alternative state relief, the jurisdictional amount is reduced to $500. X’s need being quite as pressing here as in the first situation, it may be argued with reason that the language of the statute should not be construed to limit jurisdiction at least beyond its literal requirements.
actions, there is danger that the emphasis placed upon importance of the second controversy may result in a denial of jurisdiction in the second, third, and fifth situations, whether the stakeholder disclaims all or merely multiple liability.

The fifth situation is the most difficult of all and is but partly settled by the principle case. To allow interpleader it is necessary to overcome the jurisdictional objections raised in both the third and fourth situations. If Treinies v. Sunshine Mining Co. disposes of the latter, its rationalization emphasizes the difficulties of the former. Professor Chafee has suggested that analogy might be made to cases sustaining jurisdiction where the case presents a separable controversy or is ancillary to a suit over which the court has already taken jurisdiction, to support the proposition that neither Constitution, Judiciary Act, or Interpleader Act require complete diversity in all instances. That the relief otherwise unobtainable from any court could be had in this situation under the Interpleader Act was recently held by the Circuit Court of Appeals for the Seventh Circuit.

HARRY H. BOCK

INSURANCE—LIABILITY OF INSURER FOR LOSS ACCRUING AFTER TERMINATION OF POLICY


Plaintiff, a shipowner, took out a policy of insurance covering loss arising from liability for any damage to the cargo of the ship. The policy was to cover loss until noon, February 20, 1937. He later procured the same type of insurance from another company, covering such losses for another year, the insurance commencing at noon on February 20th, the time when the first policy expired. In January, 1937, the ship loaded a cargo of tobacco in Turkey and stored it in the ship's hold on top of a cargo of valonia, an acorn used in tanning. The ship sailed for New York and on discharging her cargo there, on March 13th, it was discovered that part of the tobacco had been seriously damaged by the excessive heat and moisture thrown off by the valonia. The lower court found that the damage began a few days after the stowing and continued uninterruptedly until unloading. After settling with the tobacco owners, the shipowner brought libel against the two insurers. The federal district court found the first insurer liable for the entire amount of the settlement. In reversing the decision of the lower court, the circuit court of appeals (Clark, J., dissenting) held each insurer liable for a share of the damage proportionate to the time of

the voyage during which his insurance had been in force, using the testimony of experts to affect the apportionment.

It is the general rule with respect to term policies of insurance that the insurer is liable only for losses realized during the period covered by the policy.\(^2\) Thus, courts have usually rejected claims for losses occurring after the expiration of the policy even though the actual cause was operative during the period of coverage, and the loss was imminent at the end of the term.\(^3\) Conversely, where the event insured against occurred within the term of the policy, the courts have allowed recovery although the fact sequence which ultimately caused that event began before the term of the policy.\(^4\)

A few of the earlier marine cases\(^5\) established the so called “Death Wound” rule, to the effect that where the vessel, during the term of the policy, received an injury resulting in loss after the policy had expired, still the insurer was liable for the entire amount of the loss which occurred. Other cases allowed recovery on marine insurance only for the loss actually sustained during the term covered by the policy.\(^6\) The general tendency with respect to fire insurance has been to adopt this “Death Wound” theory, for the practical reason of the difficulty of ascertaining the amount of damage done before and after the moment of time when the policy lapsed.\(^7\) Such a rule becomes increasingly important in cases of policies insuring buildings against fire with the provision that the liability of the insurer ceases when the building falls from any cause other than the fire.\(^8\) In such cases the “Death Wound” theory is a practical necessity. It has also been applied to a few cases of insurance against personal injuries.\(^9\) Even in the fire insurance cases accepting the doctrine, however, the courts have refused to allow recovery if the fire did not touch the insured property within the term of the policy, no matter how imminent the peril.\(^10\)

6. Coit v. Smith, 3 Johns. Cas. 16 (N. Y. 1802); Hare v. Travis, 7 B. & C. 14 (K. B. 1827); Knight v. Faith, 15 Q. B. 649 (K. B. 1850); Hough & Co. v. Head, 5 Asp. Cas. 505 (Ct. of App. 1885); 1 ARNOULD, MARINE INSURANCE AND AVERAGE (11th ed. 1924) § 438.
9. Burkleiser v. Mutual Accid. Ass’n, 61 Fed. 816 (1894), where the policy sued on was to indemnify the deceased for injury during membership. The court said: “The accidental injury was the cause; the death, the consequence. . . . The contract with respect to liability of the company had relation to the time of the happening of the accident, not to the time of the final outcome of the injury”. 5 PHILLIPS & HOLLAND, Express Co., 229 N. Y. 527 (1920) (mem).
The lower court in the instant case adopted the position that in the contemplation of law the loss occurred when the negligent storing, which was the proximate cause of the injury, was made. The circuit court of appeals unanimously rejected this view, all judges agreeing that the cause of action accrued to the tobacco owner, and hence to the insured, at the time when the tobacco was damaged. The majority, holding that the infliction of the damage was not a single event, adopted the usual marine and life insurance rule, and held each insurer liable for the amount of damage which in fact occurred during the time his policy was in force. The dissent held the first insurer liable for all the loss occurring, since that loss was merely a continuation of the original injury; in other words, the actual damage occurring subsequent to the term was but a part of the one entire injury having its inception during the period covered by the first insurance policy. The dissent clearly adopts the fire insurance rule and asserts the fire insurance reason in favor of it; that just as it is impossible to ascertain in retrospect just how much damage had been done to the building at any given moment in the course of a fire, so it is impossible to tell at the end of the journey how much damage had occurred at any point of the voyage. The impracticability of unloading the cargo at regular intervals on the voyage for inspection of present and prevention of further damage makes the loss, in a realistic sense, as continuous, inseverable and unific as loss from fire.

While many of the courts have applied the life insurance rule to cases of marine insurance, a distinction may be drawn between the two types of insurance. It has been said: "The indisputable principle in cases of life insurances cannot be applied unconditionally to time insurances against perils of the sea. In the first class of cases the insurer is bound to pay only when the insured dies in the time mentioned, and is free from liability when the insured survives that time. A middle condition between life and death cannot be recognized. On the other hand, in the last class of cases (marine insurance), there really exists a middle condition, for which the insurer is likewise answerable, between the sound condition and the entire loss of the ship, viz. damage without immediate destruction."

An analysis of the causation problem shows that the arbitrary principles of fire insurance might easily fit the facts in question. Causes of loss may be remote, proximate, or immediate. Except where the policy by its terms extends to loss accruing from injuries received during the term, insurance contracts are not concerned with proximate cause, let alone remote cause. Analogies

Rochester German Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 87 S. W. 1115 (1905), 19 Harv. L. Rev. 217. In Liverpool, London & Globe Ins. Co. v. McPadden, 170 Fed. 179 (C. C. A. 3rd, 1909), the court abandoned the practical view adopted by the fire cases that "injury occurs when the fire strikes the property" in a case where a fire raged for several days during which time the value of certain cotton destroyed increased.


12. Coot v. Smith, 3 Johns. Cas. 16 (N. Y. 1802); Hare v. Travis, 7 B. & C. 14 (K. B. 1827); Hough & Co. v. Head, 5 Asp. Cas. 505 (Ct. of App. 1885).

to tort cases only lead to confusion. The immediate cause is inseparable from, simultaneous and co-extensive with the loss, which begins and stops with the operative force upon the subject matter of the insurance. This principle is expressly recognized in life insurance policies, which provide indemnity against death, the immediate cause of loss rather than the loss itself, but which are not concerned with the more remote cause, mortal illness. Death and loss, the cause and effect, are both simultaneous and instantaneous, and the physical act of dying does not permit of such a splitting as to present the problem of how much of the effect was covered by the policy. In fire insurance, while the cause (i.e., the burning) and effect (the consumption) are simultaneous, they are usually not instantaneous, and both cause and effect are often operative beyond the date when the policy expires. So the valonia, giving off heat and moisture, caused immediate concurrent loss over a measurable duration of time.

On logical grounds, the loss insured against stops at the time the policy lapses. For the practical reason that it is virtually impossible to ascertain the damage done by a fire down to a given point of time before its cessation, the fire insurance rule was promulgated. This rule and the "Death Wound" doctrine have allowed recovery until the cause and effect have ceased to operate, for example, until the fire stops. The rule clearly extends the liability of the insurer, who has agreed to compensate the insured for loss occurring before a certain moment of time. The rule can be supported on the ground that if the ultimate damage is an inevitable result of the peril insured against, then the final loss will form an element in the ascertainment of damages, for it is an evidential fact as to the condition of the subject of the insurance at the end of the risk. Vance suggests that loss after the termination of the policy, from forces operative during the term of the policy which made the result inevitable, should be compensated on the ground that where such an injury had occurred, the entire injury had been done during the term of the policy. Property which can never be enjoyed in the future is worthless at the present.

The insurance policy contemplates, however, loss actually occurring in point of time during the insured term, and not the ultimate consequences of an inevitable force set in motion during the contract term. The time limits of the policy serve to limit recovery to actual loss during a certain term, and contemplates no recovery for the possibility of future loss appearing during the insured term. It is submitted that since the fire insurance rule is designed merely to avoid the practical difficulty of ascertaining the damages at a given time, it should not be extended to facts like those of the instant case, where the testimony of experts is available to determine the equitable apportionment of damages between two insurers in proportion to the amount of loss occurring fairly uniformly during the terms when the two policies were in effect.

John H. Gunn

14. It was into this error the trial court fell in the instant case.
15. 4 Joyce, Insurance (2d ed. 1918) §§ 2792, 2793.
SALES—ESTOPPEL OF SELLER IN CASH SALE TO ASSERT TITLE

Goddard Grocer Co. v. Freedman¹

A seller of goods sued a subsequent *bona fide* purchaser for value from a buyer who gave a forged certified check for the goods. Although a cash sale was stipulated in the contract, the seller readily admitted that he treated the check "as cash and that the transaction was a closed cash transaction." He issued an invoice to accompany the goods stating that the purchase price had been paid. A great deal of suspicion surrounded the transaction since no effort was made by the seller to ascertain the buyer's name, place of business, or credit standing. The court found that the buyer had been guilty of fraud and that the seller was guilty of negligence, saying that a seller can reclaim the goods if payment is not made, even from a *bona fide* purchaser, if the seller has not waived cash payment or been guilty of laches or such conduct as would estop him from so doing. The court held that although the seller intended to pass title, the fraud of the defendant buyer vitiated the sale and, therefore, the plaintiff was entitled to rescind or affirm the sale as he wished, but that the plaintiff was guilty of such conduct as would estop him from claiming the goods from the *bona fide* purchaser.

The doctrine of cash sales, under which payment is a condition precedent to the passing of the property, has been created as a modification of the general rule that in a sale of ascertained goods, property in the goods will pass to the buyer when the contract is made, in the absence of a contrary intention, of the parties, a rule which has been codified in the Uniform Sales Act.² In a technical cash sale the parties have agreed that the sale is to be for cash, which shows, so the courts say, "other contrary intention," and therefore, the property does not pass at the time of the making of the contract, as would be the case under the ordinary presumption, but payment is a condition precedent to the transfer of the property. Where the seller retains possession of the goods, in an ordinary sale the property may pass before the price is paid, but the seller retains a lien on the goods; whereas in a cash sale the seller has no lien, but instead retains the property.³ In the ordinary case the seller is sufficiently protected by his lien, while at the same time the buyer is protected by his ownership of the goods. In the case of a cash sale, however, the seller has stipulated for greater security by retaining not possession alone, but the property in himself until he has been paid, and the buyer has agreed to let him do so. The doctrine of cash sales is essentially a protective device but the protection under it should not be given unless the buyer has so assented. In the Missouri case of *Strother v. McMullen Lumber Co.*,⁴

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1. 127 S. W. (2d) 759 (Mo. App. 1939).
4. 300 Mo. 647, 88 S. W. 34 (1906).
the doctrine has been extended unwarrantably to encompass the situation where the parties expressly have provided that the title was to pass upon the delivery of the goods, while payment was to be made at thirty day intervals for the goods received within the preceding thirty days, thus clearly contemplating an extension of credit. About this case, Williston says: "It is impossible to speak respectfully of such a decision. The court disregards the express provision of the contract as to the time title should pass to reach a result which would not have been permissible even in the absence of the express provision." It is to be noted that this is the most extreme position yet to be taken by any court.

As in the principal case, where possession of the goods was surrendered for a check, the weight of authority has consistently held that the giving of a check is only conditional payment and title does not pass until the check has been cashed by the vendee. Missouri has not hesitated in the acceptance of this fundamental doctrine. It is generally held that the acceptance of a check when a cash sale is bargained for does not waive the condition of cash. Upon the acceptance of a check which is later dishonored, the property is then held to remain in the seller unless he is shown to have accepted the check as unconditional or absolute payment. The seller can recover the property from a subsequent purchaser, even though he be a bona fide purchaser for value, the reasoning being that since the buyer took nothing in the way of title his purchaser in good faith can get no more.

Upon careful analysis this reasoning appears faulty. The seller must
have one of three states of mind with regard to the property; he must either intend that the property pass, that it not pass, or have no intention whatsoever with respect to it. The court in concluding that the property remained in the seller must find evidence of the seller's intention to retain the property. From business custom and from the actual facts of this type of situation, no such intention can be found. Possibly the seller had no intention at all, but if he had it was that the property should pass to the buyer, since he expects the buyer to use the goods as his own from the time he receives the check, and ordinarily does or would assent to the buyer's trading in the goods as he sees fit, even before cash is realized on the check. If the court's reasoning is carried to its logical extreme, the buyer becomes a converter if he uses the goods before his check has cleared. Payment by check in these cases is no different from payment by note where credit is extended and the property in the goods passes, since it takes some time for the check to reach the drawee bank and become honored.

Nevertheless, the legal conclusion given above is followed by most American courts and to a great extent in Missouri. As often repeated in Missouri cases, the law in this jurisdiction seems to be that in the case of a cash sale where payment is not made, the seller may reclaim the property from the buyer or his purchaser in good faith without notice, if he has not waived payment in cash or been guilty of laches or conduct estopping him. A few Missouri cases seem not to follow this doctrine, holding that no title passed to the purchaser from the fraudulent buyer unless he was an innocent purchaser for value, the court seeming to say that a bona fide purchaser will take good title from a vendee who has given a worthless check for the goods, thus not requiring waiver, estoppel or laches as do the majority of courts. The more recent Missouri decisions do not follow this line of reasoning.

The plaintiff in the principal case clearly intended to pass title, as was indicated both by his actions in releasing the goods to a total stranger, marking the invoices paid, and by his testimony at the trial in which he expressly said

16. Wright v. Mississippi Valley Trust Co., 144 Mo. App. 640, 129 S. W. 407 (1910), holds that a present cash sale on the grain exchange is a true cash sale, i. e., payment is a condition precedent to the transfer of property to the buyer. Therefore, the seller could recover its value in an action for conversion against one who is not a bona fide purchaser because he gave past consideration. The result would have been the same even though the court had held that the property passed to the buyer, for the giving of the bad check gives the seller an equity of recision which is not cut off by a transfer to one not a bona fide purchaser. Boyd v. Bank of Mercer County, 174 Mo. App. 431, 160 S. W. 587 (1918).
that he treated the certified check as payment and that he regarded the transaction as a completed sale. In discussing this, the court seems to imply that title did pass to the buyer, but the fraud vitiates the sale so that the seller had an alternative of electing to rescind or to affirm the sale as he wished. Should this be true, an entirely different outlook is placed upon the case. A voidable title would have been given the buyer, which by the weight of authority would have given an indefeasible title to the subsequent bona fide purchaser for value.\footnote{18} There would have been no need to dwell in lengthy terms upon the negligence of the plaintiff. This statement that the buyer gets a voidable title is inherently contradictory with the opening statement made by the court to the effect that the buyer gets no title because the transaction was a cash sale and, therefore, the seller can recover from the subsequent bona fide purchaser without notice unless the seller be guilty of waiver, laches or estoppel. On the whole, however, the opinion gives the impression that the court is not misled about the matter and that the original buyer secured no title under which the subsequent purchaser could claim, but that the purchaser is allowed to retain the property solely upon the ground that the seller has been so negligent that he is estopped from denying the purchaser’s title.

If the court desires to give a greater protection to the bona fide purchaser of a buyer who gave a bad check to the seller, there are two openings suggested by this case. The court could require little or no evidence of real negligence in order to estop the seller from asserting his title. On the other hand, as another method, the court can require more evidence of the intent of the seller to retain title, thus holding more often that the buyer acquires a voidable title with power to cut off the seller’s equity of recision by a sale to a bona fide purchaser.

EDWARD E. MANSUR, JR.

WILLS—CONSTRUCTION OF “CHILDREN” TO INCLUDE ADOPTED CHILDREN

Sanders v. Adams\footnote{1}

Testator devised to his daughter Martha certain farm lands with the limitation that “if Martha should have children (the lands are) to go to them after her death” and “if Martha should die without children, then the lands so devised . . . shall be equally divided between my daughters, Maggie Adams and Lizzie Adams. . . .” Testator also bequeathed certain bank stock to his wife, and provided that his daughter Martha should have the interest on two

\footnote{18. Bidault v. Wales & Sons, 20 Mo. 546 (1855); Western Union Cold Storage Co. v. Bankers’ Nat. Bank, 176 Ill. 260, 52 N. E. 30 (1898); Rowley v. Bigelow, 12 Pick. 307 (Mass. 1832); Baldwin v. Childs, 249 N. Y. 212, 163 N. E. 737 (1928); Levy v. Cooke, 143 Pa. 607, 22 Atl. 857 (1891); Shufelt v. Pease, 16 Wis. 659 (1863); \textit{Uniform Sales Act} § 24.}
shares thereof after the death of his wife and upon Martha's death the stock to go to her children. Held, that upon the death of the daughter without natural born children, children adopted by her after the death of the testator could not take under the will.

The question of the meaning of the word "children" in a will when there is a limitation to one for life then to his children, or where there is a limitation to testator's children, is one which has caused difficulty when the life tenant or testator had no natural born children, but had legally adopted a child or children. In accordance with the general principle of interpretation of wills the intention of the testator should be followed if it can be ascertained from the will itself and the surrounding circumstances. When the will and the surrounding circumstances throw light upon testator's intention, the interpretation of the will presents no great legal difficulty. But when testator's intention is not so divulged a court is faced with a difficult problem of construction with regard to adopted children.

"While the difference is not always recognized, it is helpful to draw a distinction between interpretation and construction. The former is the process of discovering the meaning or intention of the testator from permissible data. Construction, on the other hand, consists of assigning meaning to the instrument when the testator's intention cannot be ascertained from proper sources. In other words construction is only necessary when interpretation fails."

The holdings are numerous to the effect that the term "children" will not ordinarily be construed to include adopted children, but this general rule has been departed from under some circumstances.

The first of these is where testator makes a devise or bequest to his own children. Absent any showing of his intention, i.e., in the cases where interpretation fails, the courts usually hold that his own adopted children should take. It makes no difference in this situation whether the adoption was before or after the will was made. It has been suggested that the reason for these holdings is that "the testator is presumed to intend to care for his own adopted child to whom he owes at least a moral obligation."

In the cases where the gift has been to a third person, with remainder to his "child or children," the usual construction has been that children adopted prior to the date of the will should take under the gift, while those adopted subsequent

5. Russell v. Russell, 84 Ala. 48, 3 So. 900 (1887); Martin v. Aetna Life Insurance Co., 73 Me. 25 (1881).
8. Moses v. Peakes, 101 Conn. 194, 198 (1918); (1926) 190 Ind. 585, 591 (1926).
to the date of the will should not. Here again where interpretation has failed construction has been called to the aid of the court. If the donee of the gift had adopted children, and the testator knew of and apparently recognized such adopted children, then the courts have imputed to him an intention to include them, i.e., the testator’s intention is presumed to be in favor of such adopted children. If, on the other hand, the third person had not adopted children at the time of the making of the will it is conclusively presumed that testator intended to use the words according to what is called their “usual legal significance” and children adopted at a later date are not included.

Broader adoption statutes have in some jurisdictions led to decisions which are seemingly out of harmony with the presumptions heretofore seen. It would seem that the judicial process of construction, being an expression of the policy of the law and sensitive to social attitudes, has been tending toward a more favorable position for the adopted child in the jurisdictions where he enjoys an enlarged status under the adoption statutes. As we have seen, the ordinary rule has been that adopted children of one other than the testator have not been included if adopted after the date of the will. But under the newer types of statute this is not always the result.

In In re Olney, where adoption came after the death of testator, it was held that where testator created a trust for the benefit of his two sons, the income to be used for the support of them and their families, and in the event of their decease, leaving lawful issue, for the support of such issue until the termination of the trust, and on the death of both of the sons to distribute one-half of the trust res to the “children” then living of each, an adopted child of one of the sons took the same interest she would have taken if she were a child of the

wald, 289 Ill. 468, 124 N. E. 605 (1919); Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446 (1899); In re Levy’s Estate, 140 Misc. 595, 251 N. Y. Supp. 552 (1931); In re Truman, 27 R. I. 209, 61 Atl. 598 (1905). Contra: Woodcock’s Appeal, 103 Me. 214, 68 Atl. 821 (1907).

9. Russell v. Russell, 84 Ala. 48, 3 So. 900 (1887); Casper v. Helvie, 83 Ind. App. 166, 146 N. E. 12 (1925); Russell v. Musson, 240 Mich. 631, 216 N. W. 423 (1927); Parker v. Parker, 77 N. H. 453, 22 Atl. 955 (1915); Schaefer v. Enue, 54 Pa. 304 (1867); Puterbaugh’s Estate, 261 Pa. 235, 104 Atl. 601 (1918); Lichten v. Thiers, 139 Wis. 481, 121 N. W. 153 (1909). Cf. Beck v. Dickinson, 99 Ind. App. 463, 192 N. E. 899 (1934) (where one child was adopted prior to the date of the will, and one after, but both before the death of testator. Held, the fact that testator knew of and recognized both the adoptees was sufficient evidence that he intended them to take under a limitation to the children of another. This case was treated as one of interpretation.

10. See cases cited supra note 9.

11. The Missouri statute is typical of the newer ‘yp statute. It provides that the adopted child shall after adoption “be deemed and held to be for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock.” Mo. Rev. Stat. (1929) § 14079. The exact question we are considering seems never to have arisen under the Missouri statute. In St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S. W. (2d) 685 (1934), where the question was whether the adopted child came within the designation of “heirs” of the adopter as used in a will, the court, in holding that an adopted child was included, said that “the adopted child is taken out of the blood stream of its natural parents and placed, by the operation of law, in the blood stream of its adopting parents, if adopted under the provisions of our present statutes.”

12. 27 R. I. 495, 63 Atl. 956 (1906).
body. The court set out the statute for adoption of children as follows: "A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock. . . ."13

In Tirrell v. Bacon,14 it was said of statutes in Massachusetts similar to the one in the Olney case that "an adopted child was conclusively taken to be the equivalent of a legitimate child of the parent or parents who had adopted him. . . ."15 The court held in view of the Massachusetts statutes that where the devise was to one for life, and then to his children, that an adopted child took even though adopted long after the death of testator, and even though the will of the testator antedated the statutes in question.

In the case under discussion, the court said that the "adoption . . . while effective to make them (the adopted children) her own heirs with the right to inherit from her, was ineffective to extend to the adopted children the right to inherit through her from others who were not parties to the contract of adoption."16 The instant case was decided under a statute which made the adopted child "capable of inheriting as though such person were the child of such petitioner. . . ." This statute did not purport to make the adopted child a child "the same as if he had been born to them in lawful wedlock." The decision is, therefore, in accord with the presumptions which we have seen, and is not contra to cases of the Olney and Tirrell type, which were decided under statutes materially different.

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13. Id. at 497, 63 Atl. at 956. It was said that this case was ruled by Hart- well v. Tefft, 19 R. I. 644, 35 Atl. 882 (1896), decided under the same statute. In that case the court held that the "lawful issue" it was held that the adopted daughter, having the same status as a child born in lawful wedlock, and hence the same as 'lawful issue,' is entitled to take the fund under the bequest.
15. Id. at 63.