UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published October to June by the Law School of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS.

NOTES.

LEGISLATIVE POWER TO TAKE AWAY INTENT IN CRIMINAL CASES.—The State Constitution of Washington contains the following provisions, Art. 1, § 3: "No person shall be deprived of life, liberty or property without due process of law;" and Art. 1, § 21: "The right of trial by jury shall remain inviolate." Rem. and Bal. Code, § 2259 provides that insanity is no defence to a charge of crime, and that whenever in the judgment of the court any person convicted of a crime shall have been, by reason of his insanity unable to comprehend the nature of the act, the court may, in its discretion, direct such person to be confined in one of the state hospitals for treatment.

In the case of State v. Strasburg[1] the trial Court had refused to admit evidence tending to prove that the defendant at the time of committing the crime was insane and incapable of understanding the nature and quality of his act, and had charged the jury "that, under the laws of this State, it is no defense to a criminal charge that the person charged was at the time of the commission of the offense unable, by reason of his insanity, idiocy or imbecility, to comprehend

[1] 110 Pac. R. 1020 (1910).

the nature and quality of the act, or to understand that it was wrong."

The Supreme Court of Washington reversed the decision on the grounds that the Code provision contravened Art. 1, § 3 of the Constitution, because (1) criminal intent is an essential element of crime, and Art. 1, § 21, because (2) its effect is to take away from the jury the question of criminal intent.

The Code provision did not merely take away that intent required at common law as a necessary ingredient to a crime, but said "the right of trial by jury shall remain inviolate;" that is, everyone who, before the adoption of this Constitution would have possessed a right to trial by jury, will continue to possess such right. So far so good: the defendant in State v. Strasburg had a trial by jury. But does such a trial mean merely the placing of twelve figure-heads in a box, or the submitting to them certain evidence long permitted and required at common law which goes to the very root of the defense? It has always been the jury's province to determine, upon proper evidence, whether or not a man charged with an action having for its aim the death of another was insane at the time of committing such action. This is a common law right of the prisoner, if he can prove insanity he cannot be convicted as he would otherwise have been convicted, because intent was lacking to commit the crime. Such question for the jury seems to have been an inherent part of the functions. But is it part of the "due process of law" required by the Constitution before a person shall be deprived of life, liberty or property? Does Art 1, § 3 apply to "due process of law" as known before the adoption of the Constitution, or as changed by statutes after such adoption? The Court says the constitution itself answers this question in Art. 1, § 32: "A frequent recurrence to fundamental principles is essential to the security of individual rights."

If abstracting criminal intent from the elements of crime conflicts with a provision that the right of trial by jury shall remain inviolate, it also contravenes the due process of law clause, for such trial by jury is, and always has been in certain cases (of which, says the Court, this is one), part of the due process of law. The statement in State ex rel. Mullen v. Doherty,[2] "The effect of the declaration of the Constitution is to provide that the right of trial by jury as it existed in the territory at the time the Constitution was adopted should be continued unimpaired and inviolate" is familiar law.

As against the constitutionality of the Code provision appear the following general principles: (*a*) Prior to the adoption of the Constitution a defendant's right to prove his insanity at the time of committing the act was as perfect as his right to prove that his physical person did not commit the act or set in motion a chain of events resulting in the act. (*b*) Due process of law requires that

[2] 16 Wash. 382.

a party shall be properly brought into court and that he shall have an opportunity when there, to prove any fact which according to the Constitution, the Statutes and the usages of the common law, would be a protection to him or his property. (*c*) Any method of procedure which a Legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty or property, is in no sense the process of law designated and imperatively required by the Constitution.[3] (*d*) The Legislature may not change the rules of evidence as to deprive parties of such a jury trial as the Constitution reserved to them. The rules of evidence may be so changed as to infringe the constitutional right of trial by jury, or they may be so changed as not to infringe it. The Legislative power of regulating evidence, like all other Legislative power, is limited by every right guaranteed by the Constitution, and to say the Legislature may regulate evidence is merely to say that they may make any law on any subject that infringes no Constitutional right. Otherwise it might be said that as jury trial is a remedy, and remedies may be altered by the Legislature, the Legislature may alter jury trial to any extent.[4] (*e*) Of what value is the right to "appear and defend" if the Legislature can clog it with conditions and restrictions which substantially nullify the right? How can due process of law be interpreted if the Legislature can alter the Constitutional meaning of that phrase?

The idea of the Legislature was, that because of modern humane methods in treating those convicted of crime, there remains no longer any reason for considering the element of will on the part of those who commit prohibited acts when their guilt is being determined for the purpose of putting them in the criminal class for restraint and treatment. Such legislation, says Rudkin, C. J.,[5] is "a result of the dangers which have been multiplied by the absurd length to which the defense of insanity has been allowed to go under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science and made the names of experts unsavory in the community. No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions and not by destroying the safeguards of private liberty."

It is submitted that the above conceptions may be answered. "Due process of law" means that a man is to be tried, as every other man is tried, in accordance with the law of the land in the State where he is charged with the crime. "Due process of law" does not mean the general body of the law, common and statute, as it was at the time the Constitution took effect, but rather means

[3] Witherbee v. Supervisors, 70 N. Y. 228, and State v. Billings, 55 Minn. 467.

[4] King v. Hopkins, 57 N. H. 334.

[5] State v. Strasburg (*supra*).

that there must be a competent tribunal to pass on the subject matter; notice, actual or constructive; an opportunity to appear and produce evidence, to be heard in person or by counsel; and if the subject matter involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State or by his voluntary appearance.[6] Such "due process" according to State v. Strasburg would always be forced to remain exactly as it was at the adoption of the Constitution. The provision of the Legislature in this case must have been, therefore, part of the law of the land, and the only question is, if it took away the accused's right to trial by jury.

That the right of trial by jury as heretofore enjoyed shall remain inviolate, means that all the substantial incidents and consequences which pertain to the right of trial by jury are beyond the reach of legislation, and these are (1) that the jury must be twelve men, indifferent between the prisoner and the Commonwealth, and to secure this challenge must be allowed; (2) the jury must be summoned from the vicinage where the crime is supposed to have been committed, as this gives the accused, on the trial, the benefit of his own good character and standing with his neighbors; (3) the jury must unanimously concur in the verdict, and (4) the jurors must be left free to act in accordance with the dictates of their own judgment.[7] The provision that trial by jury shall remain inviolate applies to the jury as such and cannot be interpreted as the relation of the jury to newly created personal disabilities of the prisoner. The latter must be regulated either by common law or the Legislature, and after such personal disabilities are thus determined, the prisoner is entitled to his trial by jury. All that the Constitution aims to do is to retain to the citizens of the State, trial in the form of a judge and jury in proper cases, and where questions of fact, so considered by law, must be submitted to the jury.

A large number of cases, though not deciding this Constitutional point because it was not raised, have held that the Legislature in statutory crimes may take away the intent. Now insanity as a defense only goes to negative intent, or, at most, whenever a man committed a crime, while insane, at common law he was not treated as he would have been if not insane, and so even under this supposition, as the question of insanity must be less than that of intent, the Legislature can take it away.

The substance of the opinion of the court is found in the following statement of Parker, J.: "The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise the provision of our Constitution * * * would ben rendered void." While admitting the absolute truth of this statement we submit that the Legislature may change facts which constitute guilt or innocence.

T. W. B. 3d.

[6] 8 Cyc. 10, 83 B.

[7] State v. Harvey, 168 Mo. 167.

POWER OF A STATE TO REVOKE THE RIGHT OF A FOREIGN CORPORATION TO DO INTRASTATE BUSINESS.—An interesting constitutional question is presented in considering the validity of a state law, which provides in substance, that if a foreign corporation licensed to do an intrastate business by the state, removes a suit commenced against it in a state court to a federal court or institutes a suit against a citizen of the state in a federal court, the license of the corporation shall be revoked. A statute so framed causes two independent rights to clash. The Constitution of the United States and legislation in pursuance thereof, gives a right to invoke the federal courts on the ground of the diverse citizenship of the parties to the litigation. Under the doctrine of reserved powers the states may exclude foreign corporations from doing intrastate business within their borders. There is no doubt about the former right. It is self-evident that if a state in so many words attempted to prevent foreign corporations from availing themselves of the federal courts, the statute so declaring would be unconstitutional. But if the latter right exists, is a statute, which merely sets it forth and proclaims that it will be exercised under certain circumstances, unconstitutional? In order to answer this question, we must examine the cases in which the right has been recognized, to ascertain its extent.

The cases divide themselves into two classes. In one an intrastate business alone was being done. In the other this business was being carried on in conjunction with interstate commerce. We will first consider the former. Paul v. Virginia [1] is the historic case on the subject. It was an insurance case and insurance has been consistently held not to be interstate commerce.[2] Virginia had imposed a license tax on foreign corporations for the privilege of doing business in the state. A company attempted to do business without paying the tax. The court held, that a foreign corporation may be excluded entirely or regulated as, in the judgment of the state, will best promote the public interest. In the Pembina Mining Co. v. Penna.[3] it was said, a foreign corporation not carrying on foreign or interstate commerce or not employed by the government of the United States, is dependent on the will of the state for any recognition. The state can grant it recognition on the payment of a license tax if it so desires. The clause of the Constitution granting all the privileges and immunities of citizens in the several states has no application to foreign corporations. The Fourteenth Amendment, to the effect that no state shall deprive any person of the equal protection of the laws, applies to corporations, but a foreign corporation is not a corporation outside of the state, of its creation until recognized. In other words, a licensed foreign corporation can claim the equal protection of the laws afforded to

[1] 8 Wall. 168 (1868).
[2] N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389 (1900).
[3] 125 U. S. 181 (1887).

domestic corporations, but an unlicensed one cannot. Mr. Justice Field for the court said in the Horn Silver Mining Co. v. New York,[4] a state may impose as a condition of doing business as a corporation, the payment of a specific sum each year and may prescribe the mode in which the sum shall be ascertained. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business within the state by its permission. A foreign corporation can claim a right to do business to any extent in another state only subject to the conditions imposed by its laws. The only exceptions are, where it does an interstate business or where it is in the employ of the United States. This was affirmed in the later case of New York v. Roberts.[5] The same doctrine appears in Hooper v. California.[6]

The next class comprises the cases in which the corporations were engaged in both forms of business. Obviously this complicates the situation. It is almost axiomatic, to state that interstate commerce is under the control of the Federal government. It has been held in numerous cases however, that the intrastate business may be separated from the interstate and as to the former, foreign corporations are subject to state control. In the Wells, Fargo Co. v. Northern Pacific Ry. Co.,[7] the court said, "Of course the right to engage in interstate commerce is not a right to do a local business within the territory and therefore the plaintiff has no rights to do business in Washington, Idaho, Montana and Dakota." Crutcher v. Kentucky [8] expresses the same thought. In pronouncing a tax invalid as being upon interstate commerce, it is said, "But taxes on license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." In Postal Telegraph Cable Co. v. Charleston,[9] the decision bears immediately. The company was a New York corporation doing both kinds of business in the State of South Carolina. The City of Charleston was a municipal corporation of the same state. By an act of the state legislature, the city was authorized to impose a license tax on persons engaged in business in the city. Accordingly a tax was imposed on the company for engaging in intrastate business in the city. The tax was sustained, although the company was also transacting an interstate business. It was only by the grace of the state, that they were permitted to do that sort of business and they must accept the conditions prescribed

[4] 143 U. S. 305 (1892).
[5] 171 U. S. 658 (1898).
[6] 155 U. S. 648 (1895).
[7] 23 Fed. 469 (1884).
[8] 141 U. S. 47 (1891).
[9] 153 U. S. 692 (1894).

or cease doing it. In the Waters-Pierce Oil Co. v. Texas,[10] the license of the oil company, a Missouri corporation, was taken away for a violation of the laws of Texas and they were prohibited from doing intrastate business thereafter. It is expressly stated, that business of a Federal nature is excluded from the operation of this judgment. The next recognition of the principle is in Pullman Co. v. Adams.[11] The State of Mississippi taxed the intrastate business of the Pullman Company. The latter objected. All the cars in use in Mississippi were interstate cars and local business was done by them at a loss, and consequently to tax them for engaging in it would burden interstate commerce. The court decided, since they were free to abandon this business, they must pay the state tax, if they desired to continue it. This case was affirmed in Allen v. Pullman Company.[12] Probably the strongest case decided up to this time is Kehrer v. Stewart.[13] The State of Georgia imposed a license tax upon all agents of packing houses doing business in the state. The defendant was an agent for a company which engaged in both forms of business and objected to the tax as burdening interstate commerce. The court held, that since the tax was for the privilege of engaging in intrastate business, it must be paid by anyone doing that kind of business and it mattered not, that by far the greater part of the business was interstate. The only exception was in the case of a man not regularly doing an intrastate business but compelled to once in awhile, when an interstate contract of purchase was broken and the goods had to be sold in the state.

From these cases it would appear, that the power of a state to control corporations engaged in intrastate business is absolute under all conditions. Therefore it would seem that a statute which merely states that a power acknowledged to be in the states will be exercised in the event of a foreign corporation going into the Federal courts on the ground of diverse citizenship, is constitutional. And so it was held in the Security Mutual Life Insurance Company v. Prewitt.[14] It had been decided, if the statute compelled an agreement in advance to waive the right of involving the Federal courts it was unconstitutional.[15] Mr. Justice Hunt put it on the ground, that a person could not contract away his constitutional rights. But when the same justice had the statute that we are considering, before him, he immediately said, no agreement is required here and this is valid.[16] In the Prewitt case the company was engaged solely in local business. Since the right of exclusion

[10] 177 U. S. 28 (1900).
[11] 189 U. S. 420 (1903).
[12] 191 U. S. 171 (1903).
[13] 197 U. S. 60 (1905).
[14] 202 U. S. 246 (1905).
[15] Ins. Co. v. Morse, 20 Wall. 445 (1874).
[16] Doyle v. Continental Ins. Co., 94 U. S. 535 (1876).

as to intrastate business apparently exists, although the company is also engaged in interstate commerce, we would expect to find, that the statute as applied to the local business of interstate railroad companies had been held constitutional. But the case of Herndon v. Chicago, Rock Island and Pacific Ry. Co.[17] is decided to the contrary. The decision is based on four cases decided at the same term of court.[18]

We will review these decisions. In the Western Union Telegraph Co. v. Kansas the state had imposed a license fee based on the entire capital stock whether used in or out of Kansas for the privilege of doing intrastate business. On refusal to pay, ouster proceedings were commenced. The court in the course of its opinion says, that the general rule, that a state may exclude foreign corporations or impose such terms and conditions on their doing business in the state as in its judgment may be consistent with the interests of the people, applies only to corporations engaged solely in intrastate business. Where the company is also engaged in interstate commerce, the exclusion may not be accomplished by burdening interstate commerce and since the tax imposed in the present case would directly burden that commerce, it is illegal and the corporation cannot be excluded for refusal to pay it. To get around the cases reviewed by us in which the corporations were excluded from doing a local business, although engaged in interstate commerce as well, it is said, that in none of these cases was a direct burden imposed on interstate commerce. The reasons of public policy for the decision may be best summed up in the words of the court: "We cannot fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the Supreme Law of the Land."

In view of the previous decisions of the Supreme Court, there seem to be very excellent grounds for the dissent delivered by Mr.

---

[17] U. S. Supreme Ct. Advance Sheets, July 1, 1910, at page 633.

[18] W. U. T. Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910); Ludwig v. W. U. T. Co., 216 U. S. 146 (1910); Southern Ry. v. Greene, 216 U. S. 400 (1910).

Justice Holmes and acquiesced in by the late Chief Justice Fuller and Mr. Justice McKenna.

The Pullman Co. v. Kansas and Ludwig v. Western Union Telegraph Co. are in accord with the Western Union Telegraph Co. v. Kansas. The Southern Railway v. Greene is decided on different grounds. On the authority of Pembina Mining Co. v. Penna., *supra*, corporations are within the terms of the "equal protection of the laws" clause of the Constitution. A licensed foreign corporation is to be regarded as a corporation and if the statute does not embrace domestic corporations, it does not give equal protection. This argument is expressly used in the Herndon case, but is made as an additional reason for invalidating the statute rather than as the principal reason.

The inevitable conclusion to be drawn from these cases seems to us to be, that the Supreme Court has considerably restricted the long line of cases hitherto decided.

E. S. McK.

CONSTRUCTIVE TRUSTS—SUFFICIENCY OF EVIDENCE.—Where a purchaser at sheriff's sale has promised orally to hold the land in trust for the judgment debtor, and after he has taken title has denied the trust and claims the beneficial interest in the land for himself—under what circumstances should a court of equity compel him as a constructive trustee to reconvey?

Among other things, it is universally held that if the transaction is attended by circumstances which show legal fraud on the part of the purchaser, a constructive trust will arise.[1] Legal fraud may be defined as any intentional misstatement of a material fact by which another is induced to change his position to his detriment.[2] The condition of the purchaser's mind at the time he gets title by an absolute conveyance, is held in most jurisdictions to be a material fact. Thus, if the judgment debtor has been induced to permit the purchaser to acquire title at the sale for an inadequate consideration by reason of the purchaser's oral promise to hold in trust for him when the purchaser had no intention at the time of performing the promise, a clear case of legal fraud is made out. But suppose the purchaser made the promise in good faith but later repudiated it, what are the consequences? It is evident that there is no legal fraud in this case because the purchaser truly stated his intention, which was the inducement to lead the judgment debtor into the transaction, and the bare fact of inadequacy of consideration really proves nothing as to the *bona fides* of the transaction. It is also evident that the detriment which the latter has sustained is the same in both cases.

The prevailing American doctrine is to deny relief in the

---

[1] Brison v. Brison, 75 Cal. 525 (1888).

[2] See discussion in Peek v. Derry, L. R. 14 App. Cas. 541.

second case. It is usually expressed in the language that a mere refusal to perform a parol promise which is void under the Statute of Frauds, is not a fraud, either at law or in equity.[3] This position has driven the American courts to a more detailed consideration of what circumstances amount to legal fraud, and the strong equity in the case has induced them, in some instances, to a liberality of presumption in favor of fraud.[4]

The recent case of Harras v. Harras[5] is, in result, in accord with the prevailing American doctrine and lays down the rule that the evidence of legal fraud must be "clear, cogent, and convincing" to enable the court to order a reconveyance. Thus, there is not even a liberality of presumption in that jurisdiction. The court enumerates the circumstances surrounding such a transaction from which fraud may properly be inferred as follows: (1) Where there existed between the judgment debtor and the purchaser a confidential relation aside from that created by the agreement to purchase. (2) Where the judgment debtor supplied a part of the purchase money. (3) Where the judgment debtor was lulled into inactivity by reason of the promise and was prevented from protecting his rights in the land, or refrained therefrom. (4) Where the purchaser was, by his promise, enabled to get the land at a price materially below its actual value. (5) Where the judgment debtor remained in possession and made valuable improvements.

As practically all of these elements were in that case the court decreed a re-conveyance, but it is submitted that a strict adherence to the rule of this case would work injustice, not only in a case where the evidence of legal fraud is less clear, but as well in the case where there is no evidence of legal fraud.

The fact that it was a judicial sale in the case under discussion is immaterial,[6] and, therefore, for the purpose of simplicity, it may be well to state the question in another form: Where A conveys land to B upon oral trust to hold for A, and B repudiates the trust which he assumed in good faith, does such a case contain sufficient equity to enable the court to order B, as constructive trustee, to reconvey to A? In this case, as pointed out above, it is apparent that when the parties come into court, since B has paid either no consideration at all or a wholly inadequate

---

[3] Wheeler v. Reynolds, 66 N. Y. 227 (1876); Nash v. Jones, 41 W. Va. 769 (1896); Fairchild v. Rasdall, 9 Wis. 379 (1859); Mescall v. Tully, 91 Ind. 96 (1883); Calder v. Morgan, 49 Mich. 14 (1882); Wolford v. Farnham, 44 Minn. 159 (1890); Marcel v. Marcel, 70 Neb. 498 (1903); Lovett v. Taylor, 54 N. J. Eq. 311 (1896); Barry v. Hill, 166 Pa. St. 344 (1895); Baker v. Baker, 72 Atl. Rep. 1000 (N. J. Ch. 1909).

Contra: Davis v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. App. Cas. 469; Marlborough v. Whitehead, 2 Ch. 133 (1894); Cromwell v. Norton, 79 N. E. Rep. 433 (Mass. 1906); *Dictum*—Peacock v. Peacock, 50 Mo. 256, 261.

[4] Larmon v. Knight, 140 Ill. 232 (1892); Beegle v. Wentz, 5 P. F. Smith, 369; Boynton v. Housler, 23 P. F. Smith, 453.

[5] 110 Pac. Rep. 1085 (Wash. 1910).

[6] Beegle v. Wentz, and Boynton v. Housler, *supra.*

consideration, he should not in equity and good conscience be allowed to retain the advantage he has acquired over A. The cases which refuse to order a reconveyance in this case proceed upon the ground that it would amount to sustaining an oral trust in land, contrary to the seventh section of the Statute of Frauds. Although A would receive the same relief that he would by the enforcement of the express trust, it is submitted that this is a mere coincidence. As pointed out by the late Professor Ames, the prevailing American doctrine which leaves A without remedy, grows out of the failure of the courts to distinguish between specific performance of an agreement and compulsory restitution of the consideration for the agreement.[7] A's right of *restitutio in integrum* seems as strong in this case as in the case where a *cestui que trust* has parted with a valuable consideration relying upon the oral promise of the owner of land to hold in trust for him which, the promisor later repudiates. Yet in this latter case the courts uniformly compel the promisor to restore the consideration to the promisee, regardless of whether the circumstances of the case show legal fraud. Similarly, one who has received money for an oral promise to convey land, and refuses to convey, must refund the money.[8] It also seems anomalous that American courts which will admit oral evidence to show that an absolute conveyance was intended to operate as a mortgage—and which hold that the mere proof of that intention at the time of the transaction is sufficient to establish the grantor's equity irrespective of the presence or absence of strict legal fraud—will deny relief in this case which involves the same equity.[9]

If these principles may properly be applied to the case of an execution sale upon a judgment, it is submitted that the equity of the judgment debtor arises as soon as he proves the existence of an oral trust agreement and a subsequent breach, and that the only decree which will give him complete relief is one which restores him to the *status quo*, viz.: reconveyance by the purchaser and a restoration by him to the purchaser of any money that has been spent by the latter in the transaction.

J. F. S.

---

[7] Constructive Trusts Based Upon the Breach of an Express Oral Trust in Land.—20 Har. Law R., at p. 552.

[8] Cook v. Doggett, 2 Allen (Mass.), 439; Gilbert v. Maynard, 15 Johns (N. Y.), Rineer v. Rollins, 156 Pa. St. 342.

[9] Campbell v. Dearborn, 109 Mass. 130.