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NOTES

EQUITY REGARDS ADMINISTRATOR OF THIEF AS CONSTRUCTIVE TRUSTEE UNDER CERTAIN STATES OF FACT.

In a recent case decided by the Court of Appeals of the State of New York, that court took a very comprehensive view of the jurisdiction of a court of equity over constructive trustees. *Lightfoot* v. *Davis*, 91 N. E. 582 (1910).

In that case, the action was brought to recover the value of certain school bonds, aggregating in amount the sum of $4000, alleged to have been converted by the defendant's intestate on or about March 18, 1875. The facts, as found by the referee, were briefly as follows: Intestate, who was the father-in-law of the plaintiff, and who at the time of the larceny was resident in the household of the plaintiff, broke open during plaintiff's absence the bureau drawer in which the plaintiff kept the bonds in question and purloined them, together with a memo-

randum stating the numbers and other details of the bonds. This memorandum, being the only record of the bond numbers, the plaintiff was unable to stop their payment or to trace them, although he made every effort so to do. No suspicion attached to the deceased during his life. Deceased, who was a banker, and through whom the plaintiff had bought the bonds, offered to assist the plaintiff to stop payment. The bonds matured within a few years and the interest, as it accrued, and the principal was collected by the deceased and mixed with his own estate, so that the plaintiff was not able to trace it into any specific property of the deceased. Upon the death of the intestate in 1899 there was found among his papers the memorandum aforesaid, and an examination of his books showed that he had collected the bonds. Upon the discovery of these facts, the plaintiff brought this suit against the defendant as administrator with the will annexed. The relief prayed for was an accounting and paying over of the principal and income, if it can be traced, and "if it cannot be traced, that he may have judgment against the defendant as administrator for the sum of $16,000." The defence was the Statute of Limitations.

The Appellate Division of the Supreme Court in May, 1909,[1] reversed a judgment of the referee in favor of the plaintiff. The principal case reverses the judgment of the Appellate Division.

The Court of Appeals rested its decision upon three main points. The first was that the deceased, being a thief, obtained no title to the bonds, their proceeds, or income by reason of the larceny and his subsequent concealment of them. It said, "If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and I think that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public and notorious. Where a person obtains possession of property secretly by common-law larceny, and conceals that possession, no lapse of time should confer title on the thief. The contrary doctrine seems to me shocking both in morals and to common sense. Had the bonds remained in the possession of the defendant's testator, the plaintiff, on discovering that fact, might have recovered possession of them by legal process." [2]

That the adverse possession in order to create a good legal title in the possessor must be open and notorious, seems open to no serious doubt. It seems to be the general rule, however,

[1] 132 N. Y. Sup. Ct. (App. Div.) 452 (1909).

[2] Principal case at p. 584.

that the actual, visible, notorious, hostile, exclusive, continuous and uninterrupted possession of land for twenty-one years under a claim of ownership, whether the original entry was with or without color of right, creates a perfect title sufficient not only to support a defence, but to support a recovery in ejectment,[3] unless, of course, color of title is expressly or by clear implication required by the Statute of Limitation.

In *Ege* v. *Medlar* (Pa.)[4] it is said: "An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another." * * * "It is not to be forgotten that mere color of title is valuable only so far as it indicates the extent of the disseisor's claim; if it fails in this, it fails altogether." [5]

In Missouri it has been held that one taking possession of land without legal or equitable right thereto is a trespasser, but his possession, if continued a sufficient length of time, may, under certain circumstances, ripen into a legal title, although an equitable right can never be developed out of a wrongful act because of the long continuance of the wrong.[6] But if his possession of the land was originally in accord with or in subservience to the true title, the burden is upon him to fix the time at which he began to hold adversely to the true owner.[7]

Assuming that the acquisition of title to chattels by adverse possession is governed by the same rules and principles as the like acquisition of title to land, it is apparent from the foregoing that the title of the decedent was defective—not necessarily because it was under no color of title, for by the general rule that is not necessary to the acquisition of title by adverse possession—but because the possession of the decedent was not open, visible, and notorious.

The second ground, upon which the Court based its opinion, deals with the Statute of Limitations. The Court decided (1) that while the statute may bar the remedy, it does not cancel the debt; (2) that since the thief had not acquired title by adverse possession, the title remained in the plaintiff, who is, therefore, not barred from maintaining legal proceedings to recover possession of it; (3) that, although an action of conversion for the

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[3] *Mead* v. *Leffingwell*, 183 Pa. 187 (1876), at p. 191, top, opinion by Woodward, J. See also cases cited in 1 Cyc. 1084 (Adverse Possession) foot-note 77. Compare, however, *Vorhees* v. *Incorporated Bank of Ackley*, 127 Iowa 658 (1905), at p. 661, top.

[4] 82 Pa. 86 (1876).

[5] *Ege* v. *Medlar*, (*supra*) at p. 99 (top).

[6] *Smith* v. *McCorkle*, 105 Mo. 135 (1891).

[7] *Hunninwell* v. *Adams*, 153 Mo. 440 (1900).

actual taking was barred by the statute, plaintiff still has open to him his equitable remedy against the defendant as constructive trustee, because under the present Code an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that at law, may be brought at any time within six years afer the discovery of the fraud, and (4) that the fact that the ultimate relief sought was a money judgment did not take it out of the statute.

The third ground, and the one on which the Court rested its power to give a money judgment, may be best expressed in the exact words of the Court: "In cases like the one before us there are two distinct elements of fraud. First, the original larceny; second, the subsequent concealment of the stolen property and of its sale and the receipt of its proceeds. Assuming (but only for the argument) that under the first no bill in equity could be maintained, I think the second affords a good ground for the interposition of equity, and, as already stated, that though the plaintiff failed to identify in the estate of the deceased the proceeds of his bonds, he was still entitled to what would be a personal judgment were the original wrongdoer still living; for in equity it is the general rule that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial." [8]

It should be noted that there was no fiduciary relation existing between the deceased and plaintiff at the time of the larceny of the bonds, and that none arose thereafter, unless a constructive trust arose in favor of plaintiff by reason of the decedent's act in stealing the bonds and converting their income, as well as their proceeds, to his own use. The general rule seems to be that equity will only take jurisdiction to decree the return of property, wrongfully in the possession of another, to the true owner when the property so held is of peculiar value and not readily duplicable on the market. It may also be regarded as settled that while a court of equity will not interfere to restrain a crime where there is an adequate remedy at law—unless possibly in the exceptional case of a threatened breach of the peace, where the public officials charged with the duty of preventing the same are either powerless to do their duty or refuse to do it. If, however, there is a good ground of equitable jurisdiction, the jurisdiction is not defeated merely because the acts sought to be relieved against are also a breach of the law.

Mr. Pomeroy lays down the rule that when instruments have

[8] Principal case, at p. 586 (col. 1), at bottom.

been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party.[9]

A careful perusal of the opinion will convince the reader that the Court was especially desirous not to close up the only practicable avenue for the recovery of long-term securities stolen in the numerous bank robberies during the last thirty years. In the words of the Court, "These securities are often, if not generally, long-time bonds not maturing until after the expiration of the six-year statutory period for bringing action for conversion." Having this in mind, it is not necessary to assume that the Court meant to hold that any suppression by a thief of property stolen by him would render him or his estate liable in equity. The principal case on its facts extends only to the case where a written instrument, under seal, and for whose recovery the remedy at law is not really adequate, has been fraudulently suppressed. *I. T. P.*

Cruel and Unusual Punishment.

An interesting discussion as to what constitutes "cruel and unusual punishment" under the Eighth Amendment of the Constitution is to be found in the recent case of *Weems* v. *United States*.[1]

The defendant, a duly appointed officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a public and official document, by fraudulently entering as paid "As wages of employes * * * of the United States Government of the Philippine Islands" of 204 pesos on one occasion, and 408 pesos on another occasion. The following sentence was imposed upon him: "To the penalty of fifteen years of cadena, together with the accessories of Section 56 of the Penal Code, and to pay a fine of 4000 pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

It was contended that the "punishment of fifteen years' imprisonment was a cruel and unusual punishment," infringing the Bill of Rights of the Islands, and entirely disproportionate to the offense for which the defendant was convicted.

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[9] 2 Pom. Eq. Jur., 3rd ed., p. 1654, section 919.

[1] 30 U. S. Supreme Court Reporter, 544.

By referring to the Philippine Code, we find that there are only two degrees of punishment higher in scale than *cadena temporal*—death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve years and one day to twenty years,[2] which shall be served in certain penal institutions. And it is provided that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the State. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution."[3] There are besides certain accessory penalties imposed, which are defined to be (1) civil interdiction (by which the person is deprived, as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*);[4] (2) perpetual absolute disqualification (which is defined as the deprivation of office, even though it be held by popular election, the deprivation of the right to vote, or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay); (3) subjection to surveillance during life (which imposes the following obligations: 1. That of fixing his domicil and giving notice thereof to the authorities, not being allowed to change it without permission from said authorities in writing. 2. To observe the rules of inspection prescribed. 3. To adopt some trade, art, industry, or profession, should he be without means of his own.

The Court (McKenna, *J.*,) in an exhaustive opinion on the provision against "cruel and unusual punishment" as incorporated in the Constitution, its history from the time of the Stuarts when a clause prohibiting it was incorporated in the Bill of Rights framed at the revolution of 1688, its adoption by the Constitutional Convention, and its application to cases arising in the United States since that time, concludes that the punishment in this case was "cruel and unusual" within the meaning of the Bill of Rights of the Philippine Islands and of the Eighth Amendment of the Constitution, on the ground that the inhibition was directed not only against punishments which inflict torture, but also (quoting Field, J., in *O'Neill* v. *Vermont*, 144 U. S. 323, where the question was raised, but not decided) "against all punishments which, by their excessive length or

[2] Arts. 28 and 96.

[3] Arts. 105 and 106.

[4] Art. 42.

severity, are greatly disproportionate to the offenses charged. * * * The whole inhibition is against that which is excessive in the bail required or fine imposed or punishment inflicted."

There was a strong dissenting opinion by White, J., with Holmes, J., concurring, on the ground that "The duty of defining and punishing crime has never, in any civilized country, been exerted upon mere abstract consideration of the inherent nature of the crime punished, but has always involved the most practical considerations of the tendency at a particular time to commit certain crimes, and of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes," and further, that the term "cruel and unusual punishment" involves only such as "inflict torture or a lingering death. * * * It implies something inhuman and barbarous."

As to what constitutes "cruel and unusual punishment" must remain a matter of debate. The law writers are very indefinite. Story in his work on the Constitutions [5] says that the provision "is an exact transcript of a clause in the Bill of Rights framed at the Revolution of 1688." He expresses the view that "the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any government should authorize or justify such atrocious conduct." Cooley in his "Constitutional Limitations," hesitates to advance definite views, and expresses the "difficulty of determining precisely what is meant by cruel and unusual punishment;" but says that it is probable that "any punishment declared by statute for an offense which was punishable in the same way as at common law could not be regarded as cruel or unusual in a constitutional sense;" and further that "probably any new statutory offense may be punished to the same extent and in the mode permitted by the common law for offenses of a similar nature. Different views of the provision are taken by the State Courts. In *State* v. *Driver* [6] a sentence of the defendant for assault and battery upon his wife was imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five, in the sum of $500 with sureties, which was held to be cruel and unusual. In *Hobbs* v. *State* [7] the Court expressed the opinion that the provisions did not apply to punishment by "fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake,

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[5] Vol. 2, 5th Ed. §1903.

[6] 78 N. C. 423.

[7] 133 Ind. 404.

breaking on the wheel, etc. In *Com.* v. *Wyatt*[8] the whipping post was justified, the Court holding that it was "odious, but not unusual." Whipping was also sustained in *Foote* v. *State*[9] as a punishment for wife beating. Cooley, in his "Constitutional Limitations",[10] says that it may well be doubted if the right exist "to establish the whipping post and the pillory in States where they were never recognized as instruments of punishment." In *Territory* v. *Ketcham,*[11] a statute was sustained which imposed the penalty of death upon any person who should make an assault upon a railroad train, car, or locomotive for the purpose and with the intent to commit murder, robbery, or other felony. The courts have held that neither shooting to death,[12] nor elctrocution,[13] as modes of inflicting the death penalty after trial, conviction, and sentence in a court of proper jurisdiction, nor a fine of fifty dollars and three months imprisonment at hard labor for selling liquor in violation of law,[14] nor ten years' imprisonment for conspiracy to defraud, nor the infliction upon one person of a heavier punishment than that inflicted upon another prisoner for an identical offense [15] can be regarded as a violation of the Eighth Amendment.

In view of the various applications of the provisions against "cruel and unusual punishment" by the different courts, and the hesitancy on the part of learned commentators to express definite views on the subject, it must still be considered a fruitful question for argumentation. Perhaps the view of Mr. Justice White that the question should be governed by local considerations, the tendency to commit certain crimes and the difficulty of repressing them, and the expediency of the particular remedy invoked, is more in accordance with public policy and the true intent of the framers of the Constitution.

G. H. B.

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[8] 6 Rand. (Va.) 694.
[9] 59 Md. 264 (1882).
[10] 7th Ed., p. 472.
[11] 10 N. M. 718.
[12] *Wilkerson* v. *Utah,* 99 U. S. 130.
[13] *In re Krennuler,* 136 U. S. 436.
[14] *Pervear* v. *Com.,* 5 Wall. 475.
[15] *Howard* v. *Fleming,* 191 U. S. 126.

LIABILITY OF CONTRACTOR TO THIRD PERSONS FOR NEGLIGENCE.

A manufacturer who furnishes a defective article, or a contractor who erects an unsafe structure, as a general rule, is liable in tort only to his immediate vendee, or contracting party, for injuries received as a result of such defects.[1] To this rule there are two exceptions: 1. Where the article is imminently dangerous to human life, such as a drug, chemical or explosive. 2. Where the defect is known to, and concealed by, the manufacturer or contractor. The case of *O'Brien* v. *American Bridge Co.*,[2] recently decided in Minnesota, while apparently brought within the second exception, in reality goes a step further.

In this case the defendant, under contract, constructed a bridge, which was accepted by the authorities with whom the contract was made. Owing to the negligence of the defendant, the bridge was unsafe, and the plaintiff was injured while crossing it. It was held that the plaintiff could recover, on the ground that the defendant, if not actually aware of the defective condition, was chargeable with knowledge thereof—it "presumably knew."

At common law one who engaged in a business or profession assumed a duty to exercise it competently.[3] As shown by the general rule above, the tendency of the courts has been to restrict this duty and confine it to the parties with whom a contract has been made in the course of the business. Two reasons are given for this: 1. The manufacturer cannot reasonably foresee injury to other than his immediate vendee; the vendee is a conscious intervening agency.[4] 2. Public policy demands such a limitation.[5] Neither of these reasons appears sound. Where a defect is latent and the manufacturer sells to a retail dealer, as is usually the case, the natural and only reasonable expectation is a sale to a third person, and under such circumstances the dealer certainly is not a conscious agency, diverting the normal course of events. And while it may be public policy to encourage and stimulate trade, it would not retard trade to insist that reasonable care be used by those who gain profit from it. Indeed, in view of the reasons given for the general rule,

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[1] *Huset* v. *Case Co.*, 120 Fed. 865; *Lewis* v. *Terry*, 111 Cal. 39; *Heizer* v. *Kingsland Co.*, 110 Mo. 605; *Curtin* v. *Somerset*, 140 Pa. 70.

[2] 125 N. W. 1012.

[3] *Everard* v. *Hopkins*, 2 Bulst. 332; *Pippin* v. *Shepard*, 11 Price 411; *George* v. *Skivington*, L. R. 5. Ex. 1:

[4] *Huset* v. *Case Co.*, 120 Fed. 865.

[5] *Huset* v. *Case Co.*, 120 Fed. 865; *Curtin* v. *Somerset*, 140 Pa. 70.

the first exception hardly seems logical. There is no reason why the manufacturer and vendor of a defective drug should foresee injury to a stranger any more than should the manufacturer of a defective article not a drug. A sound criticism is made in a recent text-book: "Why liability should, as towards strangers to the contract, be limited to cases in which the negligent act is likely to cause death, and not be extended to cases in which it is likely to cause injury of other kinds, it is difficult to see. The fact that one kind of article is likely to produce damage of a less degree than another may be a good reason for requiring a less degree of care to be taken, but seems to afford no reason for limiting the class of persons towards whom the duty to take that care is owed." [6] Furthermore, an unsafe threshing machine may be as dangerous to life as a carelessly-made drug. The real reason for the early decisions from which the exception has developed appears to be the common law rule that every artificer must exercise care in his trade.[7] And if this rule were followed logically, a manufacturer would be liable in all cases where his negligence in construction caused the injury.

The second exception is founded upon the idea that the manufacturer should not be allowed immunity when he has practically committed a fraud. Where he knows of the defect in the article and conceals it, his act in selling such an article so nearly amounts to a fraud that he is held responsible to all who are injured while using the article in the due course of business.[8] The only point of conflict here seems to be the proof of knowledge required. Must actual knowledge on the part of the manufacturer be shown, or is it sufficient that he should be charged with knowledge? The latter view was adopted in the principal case, and a few decisions seem to support it,[9] but the great weight of authority is *contra,* holding that actual knowledge is necessary.[10] This latter view is more consistent with the idea that fraud is really the basis of the liability; the plaintiff must make out his case by showing affirmatively the knowledge on the part of the defendant. The principal case goes further and does not require such affirmative proof, and it

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[6] Clark and Lindsell on Torts (Can. Ed.), p. 470.

[7] See Mr. Bohlen's Article on "Affirmative Obligations in the Law of Tort," 53 Am. Law Reg., p. 361.

[8] *Kuelling* v. *Lean Co.,* 183 N. Y. 78; *Huset* v. *Case Co.,* 120 Fed. 865.

[9] *Pierce* v. *Thresher Co.,* 153 Mich. 323; see *dicta* in *Berger* v. *Standard Oil Co.,* 126 Ky. 155.

[10] *Lebourdais* v. *Wheel Co.,* 194 Mass. 341; *Elkins* v. *McKean,* 79 Pa. 493; *Heizer* v. *Kingsland Co.,* 110 Mo. 605; *Huset* v. *Case Co.,* 120 Fed. 865; *Kuelling* v. *Lean Mfg. Co.,* 183 N. Y. 78

would seem to follow from it that a grossly negligent manufacturer, who sells an article with a latent defect in it, would always be liable to a stranger who has been injured while using the article in the due course of business, because in such case the manufacturer would be charged with knowledge of the defect. The case of *Devlin* v. *Smith* [11] on its facts seems to support such liability. In that case the defendant, a scaffold-maker, negligently constructed a scaffold for a painter, and an employee of the latter was injured while using the scaffold. Though it was not proved that the defect was known to and concealed by the contractor, he was held liable to the employee. It is difficult to see why such a liability is not sound and just, both from the standpoint of causal connection and from the fact of public policy, and it is submitted that in the principal case the defendant was rightly held liable.

In Pennsylvania it seems that no recovery is allowed unless the defective condition is actually known to and concealed by the manufacturer. The element of fraud is necessary.[12]

The liability in tort of a negligent contractor is the same as that of a manufacturer, and the acceptance of the completed work should have no effect upon such liability. However, in *Smith* v. *Railroad,*[13] under facts similar to the principal case, recovery was denied, and the court said that the railroad in erecting the bridge "incurred no obligation except its contract obligation to the borough. This obligation was fully discharged as to the construction by the acceptance of the bridge by the borough council." Also in *Marvin Safe Co.* v. *Ward,*[14] a contractor who erected an unsafe bridge was held not liable to a stranger to the contract who was injured while crossing the bridge. Jaggard, J., in the principal case, distinguishes these decisions on the ground that in neither was there proof of knowledge of the defect by the contractor. Whether or not they should have been charged with knowledge was evidently not considered pertinent by the courts which rendered the decisions.

These cases might well have been decided *contra,* and the principal case justified on another ground—that the contractor by his want of care had constructed what amounted to a public nuisance. Thus Baron Parke, in *Longmeid* v. *Holliday,*[15] says: "So if a mason contract to erect a bridge or other work in a

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[11] 89 N. Y. 470.

[12] *Elkins* v. *McKean,* 79 Pa. 343; *Curtin* v. *Somerset,* 140 Pa. 70.

[13] 201 Pa. 131.

[14] 46 N. J. Law 19.

[15] 6 Exch. 761.

public street, which he constructs, but not according to contract, and the defects of which are a nuisance to the highway, he may be responsible to a third person who is injured by the defective construction, and he cannot be saved from the consequences of his illegal act in committing the nuisance on the highway by showing that he was also guilty of a breach of contract and responsible for it."

When real estate is sold, it seems to be the law that the creator of a nuisance on the land does not relieve himself from liability by the sale.[16] But when an injury is caused by the non-performance of a duty which is incident to the ownership and possession of the land, such as the duty to repair, a transfer of the property transfers the obligation.[17] A latent defect in a personal chattel which prevents its use for the very purpose for which it was made, certainly seems more analogous to a nuisance on land than to the mere breach of a duty incident to the ownership.

One further situation remains to be considered. If the defective article is placed upon the land of the maker, and injury results to a third person in the course of business, there is no question of the liability of the maker.[18] This is merely an application of the rule that the owner of real estate owes a duty to business invitees to use reasonable care to see that the premises are in a safe condition.

R. C. H.

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[16] *Harper* v. *Plumer*, 3 N. H. 69; *Blunt* v. *Aiken*, 15 Wendell 522, is *contra*, but this decision is no longer law in its own jurisdiction; see *Stone* v. *R. R. Co.*, 51 N. Y. 573, 593.

[17] *Palmer* v. *Morris Tasker Co.*, 182 Pa. 82.

[18] *Coughtry* v. *Woolen Co.*, 56 N. Y. 124; *Bright* v. *Barnett*, 88 Wis. 299.