RECENT CASES

ADMIRALTY—JURISDICTION OF STATE COURT—WORKMEN'S COMPENSATION ACTS—The defendant ice company had a contract to deliver ice to a steamship. B, as box-man of the ice company, was sent to assist in the storing of the ice in the ship, and while so helping, he was killed. Suit was brought to recover damages under the *Workmen's Compensation Act. Held:* The state court had no jurisdiction because the contract and tort were maritime. *Jones v. Crescent Ice Mfg. Co.*, 110 So. 182 (La., 1926).

The Constitution of the United States[1] and subsequent legislation have vested in the Federal Government exclusive jurisdiction in matters pertaining to admiralty and maritime causes, saving, however, "to suitors in all cases the right of a common law remedy where the common law is competent to give it."[2] With the passage of the various workmen's compensation acts, the question arose whether the state courts would have concurrent jurisdiction with the admiralty court, or whether the admiralty court would have exclusive jurisdiction. If the state court had concurrent jurisdiction, an injured employee could recover damages under the *Workmen's Compensation Act;* but if the admiralty court alone had jurisdiction, then the employee could only recover under the maritime law. In the leading case, *Southern Pacific v. Jensen,*[3] where a stevedore was injured while working on a dock, the United States Supreme Court held that the *Workmen's Compensation Act* was not applicable to such injuries because the granting of jurisdiction to the state courts would destroy the harmony of the maritime law as afforded by the Constitution.[4] The grave injustice to stevedores and laborers working around ships prompted Congress to pass amendments to the so-called "saving clause" of the Judicial Code,[5] which gave "claimants the rights and remedies under the workmen's compensation law of any state"; but the Supreme Court held these amendments unconstitutional.[6] It was then left to the Court to determine how far the doctrine of the *Jensen* case was

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[1] Art. III, Sec. 2: "The judicial power shall . . . extend to all cases of admiralty and maritime jurisdiction. . . ."

[2] Judiciary Act of 1789, 1 STAT. 76, 77; Judicial Code of 1911, 36 STAT. 1091, U. S. COMP. STAT. (SUPP. 1913) §991 (3). For retention of the "saving clause" through various enactments, see REV. STAT. (2d ed. 1878) 95.

[3] 244 U. S. 205 (1917). For criticisms of the Jensen case see, Fell, *Recent Problems in Admiralty Jurisdiction,* 40 JOHNS HOPKINS STUDIES 288 (1922); Hough, *Admiralty Jurisdiction of Late Years,* 37 HARV. L. REV. 529 (1924).

[4] Southern Pacific v. Jensen, *supra* note 3, at 216: "And plainly, we think, no such legislation is valid, if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony of that law in its international and interstate relations."

[5] *Supra* note 2.

[6] 40 STAT. 395 (1917), U. S. COMP. STAT. (1918) §§991(3), 1233, held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); and 42 STAT. 634 (1922), U. S. COMP. STAT. (SUPP. 1925) §991(3), held unconstitutional in Washington v. Dawson, 264 U. S. 219 (1924). The latter case further held that a state statute cannot bring stevedoring within the operation of the workmen's compensation act.

to be carried.[7] The cases subsequent to the *Jensen* case seem to fall into the following classes: (1) Where the tort and contract are both maritime, the admiralty court has exclusive jurisdiction;[8] (2) where the tort is maritime and the contract is non-maritime, the state court has concurrent jurisdiction over the matter and the workmen's compensation act is applicable;[9] (3) where the contract is maritime, but the tort is non-maritime, the state court also has a like jurisdiction;[10] and (4) where the contract and tort are both maritime, but of such nature as not seriously to affect the harmony and uniformity desirable in the maritime law, the state court has jurisdiction.[11] Maine has attempted to distinguish between compulsory and optional workmen's compensation acts.[12]

[7] See Washington v. Dawson, *supra* note 6, at 228, where Justice Holmes in dissenting said: "The reasoning of Southern Pacific v. Jensen and cases following it never satisfied me and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends." For further articles relating to the doctrine of the Jensen case, see bibliography cited by Justice Brandeis in Washington v. Dawson, at 236; 40 HARV. L. REV. 485, Note (1927).

[8] Southern Pacific v. Jensen, *supra* note 3; Washington v. Dawson, *supra* note 6; O'Hara's Case, 248 Mass. 31, 142 N. E. 844 (1924) (where plaintiff received two injuries, one in a dry dock, the other in a dry dock affixed to land); Newham v. Chile Exporting Co., 232 N. Y. 37, 133 N. E. 120 (1921) (where plaintiff was a checker overseeing stevedores); Butler v. Robins Dry Dock, 240 N. Y. 23, 147 N. E. 234 (1925) (workman repairing vessel in graven dock); Bell v. Southern Casualty Co., 267 S. W. 531 (Tex. 1924) (longshoreman doing work on ship).

[9] Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 (1922) (carpenter working on unfinished ship); *Ex parte* Harvard, 211 Ala. 605, 100 So. 897 (1924) (lumber inspector injured while on a tug tallying lumber), with which compare Newham v. Chile Exporting Co., *supra* note 8. The fact that the tort was committed on navigable waters is not the sole test. Grant Smith-Porter Ship Co. v. Rohde, *supra*. See 73 U. OF PA. L. REV. 190, Note (1924).

[10] Industrial Commission v. Nordenholt, 259 U. S. 263 (1923) (longshoreman working on dock); Shea v. Industrial Commission, 247 Pac. 770 (Ind. 1926); Atlantic Shipping Co. v. Royster, 148 Md. 443, 129 Atl. 668 (1925) (fall from pier to water); Marsh v. Vulcan Iron Works, 129 Atl. 709 (N. J. 1925); Miller Industrial Underwriters v. Baudreau, 261 S. W. 137 (Tex. 1924) (deep sea diver working from barge to fix ways of dock attached to land); Scott v. Dept. of Labor, 228 Pac. 1013 (Wash. 1924) (stevedore working on dock fell to deck of vessel).

[11] Western Fuel Co. v. Garcia, 257 U. S. 233 (1922); City of Oakland v. Industrial Commission of Cal., 198 Cal. 273, 244 Pac. 353 (1926) (city dredge though used throughout San Francisco Bay); Leszczymski v. Radel Oyster Co., 102 Conn. 511, 129 Atl. 539 (1925) (workman engaged in fishing contract fell off boat); Travellers' Ins. Co. v. Bacon, 30 Ga. App. 728, 119 S. E. 458 (1923) (fishing contract); Miller v. Alaska S.S. Co., 246 Pac. 296 (Wash. 1926) (operating winches on a vessel loading piles). For further collection of cases, see 25 A. L. R. 1029, note (1923), 31 A. L. R. 518, note (1924). See also Wright, *Uniformity of the Maritime Law*, 73 U. OF PA. L. REV. 123, 223 (1924), with which compare Canfield, *Uniformity of the Maritime Law*, 24 MICH. L. REV. 544 (1926). A survey of the cases cited in notes 8, 9, 10 and 11 *supra* shows the arbitrary distinctions made by the courts in the attempt to get around a harsh rule.

[12] Optional workmen's compensation acts make it elective with the employer and employee to accept the form of compensating for injuries prescribed by statute, or to retain the common law rights and liabilities. Compulsory workmen's compensation acts afford no such option. 28 R. C. L. 732.

Its act being optional, it held the *Jensen* case inapplicable.[13] This Maine decision has been criticised on the ground that an election between the parties to a suit cannot confer jurisdiction.[14] In the principal case, although the contract between the ship and the ice company was maritime, it is questionable whether the boxman's work can be construed as maritime. But even if one assumes that he was performing a maritime service, it would seem that the case should fall in the fourth class which confers jurisdiction on the state court.

BANKRUPTCY—LIENS—PROMISE TO REIMBURSE FOR LOAN FROM PROCEEDS OF GOODS TO BE SOLD—The defendant loaned money to the corporation and agreed to be reimbursed from the proceeds of the sale of goods. The reimbursement was made within four months prior to bankruptcy and while the corporation was insolvent. The trustee brings this action on the theory that such payment was a preference under §60a of the *Bankruptcy Act*.[1] The defendant claims payment was made in satisfaction of a valid lien and was, therefore, protected by §67d of the Act.[2] *Held:* Defendant had a lien and therefore did not come within §60a. *Coppard v. Martin*, 15 F. (2d) 743 (C. C. A. 5th, 1926).

Under §67d of the Act the holder of a valid lien is preferred to general creditors. In the principal case it is assumed that the effect of the promise made to the defendant was to create an assignment of the proceeds of the goods to be sold.[3] With this for its premise the court's ratiocination establishes a lien in his favor. In its premise, however, it evidently disregards the fact that there is a distinct difference between an actual assignment of a present fund and a mere promise to make future payments out of a fund when it shall come into being. It is only where there is a transfer of rights to a present fund that an equitable assignment exists.[4] It would seem, therefore, that the position taken by the court is untenable. In situations similar to that of the principal case it should be realized that the intention must be to create a lien as distinguished from an agreement to apply the proceeds of a sale to the payment of a debt. To create a lien there must be a clear intention to make the particular property described a security for the debt.[5] In the principal case there is nothing to indicate that the creditors agreed to appropriate any specific property as security for the advances made. They simply agreed to apply the proceeds of such sales as might be made to its payment, and that is insufficient to create an equitable lien.[6] And if the defendant cannot be considered as the holder of a lien, it seems that payment in full of his claim was a preference under §60a of the Act.

[13] Berry v. Donovan, 120 Me. 457, 115 Atl. 250 (1921).

[14] Bell v. Southern Casualty Co., *supra* note 8, at 533.

[1] 32 STAT. 790, U. S. COMP. STAT. (1913) §9644.

[2] 36 STAT. 842, U. S. COMP. STAT. (1913) §9651.

[3] 15 F. (2d) at 745.

[4] Christmas v. Russell, 14 Wall. 84 (U. S. 1872); Trist v. Child, 21 Wall. 441 (U. S. 1875); Story v. Hull, 143 Ill. 506, 32 N. E. 265 (1892).

[5] POMEROY, EQUITY JURISPRUDENCE (3rd ed. 1918) §1235.

[6] Hibernian Banking Ass'n v. Davis, 295 Ill. 537, 129 N. E. 540 (1920); JONES, LIENS (3rd ed. 1914) §32.

CONTRACTS—OFFER AND ACCEPTANCE—SENDING OF APPLICATION BY INSURER—An application for life insurance, tendered by the plaintiff's decedent, was rejected because he was a heavy drinker. The defendant informed him that if he would abstain from drink and apply again a year later, they "would give the case further consideration." Of their own initiative the defendants forwarded an application blank a year later. The decedent filled it out, paid a premium, and took a "binding receipt" giving coverage as of date of application, if accepted. The application was promptly rejected but notice of this action was not received for over a month, during which time the death occurred. *Held:* Plaintiff can recover on a contract to insure. *Stanton v. Equitable Life Assurance Co.*, 135 S. E. 367 (S. C. 1926).

The majority of the court decided the case on the theory that the forwarding of the application with knowledge of the previous circumstances was an offer to insure. This offer was accepted by the payment of the premium, the applicant being in a physical condition which was not impaired by drinking within a year. The forwarding of an application is generally an invitation to negotiate,[1] and it is difficult to see how a previous rejection by the insurance company could turn this into an offer.[2] It is also questionable procedure to allow the jury, as was done here, to find such an offer.[3] The theory of the dissenting judges seems more logical: the issuance of the "binding receipt" was the acceptance of a contract to insure, conditional upon the insurance company's finding the applicant an insurable risk at the time of the application.[4] The decision cannot be supported on any theory of contract. The view that the silence of the insurance company was tantamount to an acceptance is not tenable,[5] and this is not a situation where the previous conduct of the offeree made the applicant understand that silence would amount to an acceptance.[6] The result could have been obtained in some jurisdictions on a theory of tort or quasi-contract—that there was a duty to the applicant to inform him of the decision promptly.[7] It is submitted that this is the desirable solution, and the one which courts are willing to adopt.

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[1] 1 JOYCE, INSURANCE (2d. ed. 1917) §54. Nor is there an obligation on the company to accept because it is an insurable risk. Mutual Life Ins. Co. v. Young, 90 U. S. 85 (1874); Harp v. Granger's Mutual Fire Ins. Co., 49 Md. 309 (1878).

[2] Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 181 (1917). *Cf.* Carter v. Banker's Life Ins. Co., 83 Neb. 810, 120 N. W. 455 (1909) (counter offer in different fiscal terms).

[3] 1 ELLIOT, EVIDENCE (1904) §30, and cases cited.

[4] This is the usual construction given to such receipts. Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 81 (C. C. A. 2d, 1902); Pace v. Provident Life Assur. Co., 113 Fed. 13 (C. C. A. 5th, 1902); Cooksey v. Insurance Co., 73 Ark. 117, 83 S. W. 317 (1904), and cases cited 1 JOYCE, *op. cit. supra* note 1, §64.

[5] See cases cited in Funk, *Duty of an Insurer to Act Promptly on Applications*, 75 U. OF PA. L. REV. 210 (1927), nn. 7, 8; 36 L. R. A. (N. S.) 1211 note (1912).

[6] 1 WILLISTON, CONTRACTS (1920) §91; Corbin, *supra* note 2, at 169. *Cf.* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS (1925) §70 (1) c.

[7] Funk, *supra* note 5, at 244.

CRIMINAL LAW—GRAND LARCENY—VALUE OF LICENSE TAGS—The defendant was indicted for grand larceny of license tags of an automobile. By statute grand larceny was made the stealing of personal property worth more than $10. The original cost of taking out license tags was $16, while the cost of replacement was $1. *Held:* The defendant guilty of grand larceny. *Cowan v. State,* 287 S. W. 201 (Ark. 1926).

The majority of the court held the value of the license tags was the original cost of taking out the license. Since the evidence of the right to operate a car cost the owner $16 to secure in the first place, the defendant was convicted of stealing license tags of the value of $16. This reasoning would seem to be fallacious. It confuses the right to operate a car with the evidence of that right. The felonious taking of the tags has not deprived the owner of the right itself, for, as the dissenting opinion points out,[1] the owner's loss is but $1, the cost of replacement. Such was the value of the tags themselves. The balance of the original fee must be apportioned to the right. It was contended by the State that this case came under a statute holding it to be larceny to steal the means and muniments by which right and title to property, real or personal, may be ascertained.[2] But license tags are probably not the means by which right and title are ascertained within the meaning of the statute. Rather, it would seem to apply to the registration card, or the official receipt. In any case, the further question arises whether the right to operate a car could be held such personal property under the statute as would make the license tags the means of ascertaining title thereto. The license is a personal privilege granted by the state allowing the use of the car on the highways. It is not the subject of barter and sale;[3] and the money paid for such a license right is not a tax on property.[4] As choses in action at common law were not the subject of larceny,[5] so even less would seem to be a personal privilege of this sort. Thus the right to operate a car would not appear to be property under the statute strictly construed, as criminal statutes must be.[6] Even if the license tags do come under the statute, their value still remains $1. While there is a statute fixing the value of certain choses in action as the value of the money they represent,[7] it does not apply to license tags. The necessary conclusion seems to be that license tags are, as the subject of larceny, only of value as bits of metal, and that these statutes, which are nearly uniform, do not apply to increase their value.

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[1] 287 S. W. at 202.

[2] ARK. DIG. STAT. (Crawford 1921) §2484.

[3] Forshee v. State, 15 Ala. App. 113, 72 So. 685 (1916); Bleon v. Emery, 60 Utah 582, 209 Pac. 627 (1922); BERRY, AUTOMOBILES (5th ed. 1926) 84.

[4] State v. Lawrence, 108 Miss. 291, 66 So. 745 (1914); State v. Collins, 94 Wash. 310, 162 Pac. 556 (1917); HUDDY, AUTOMOBILES (7th ed. 1924) 82.

[5] 2 WHARTON, CRIMINAL LAW (11th ed. 1912) 1331.

[6] 36 CYC. 1183.

[7] ARK. DIG. STAT. (Crawford 1921) §2485.

DEEDS—DEPOSIT WITH THIRD PERSON FOR DELIVERY TO GRANTEE AFTER GRANTOR'S DEATH—Suit was brought to cancel a deed executed to the defendant after the drawing of the will under which the plaintiffs claimed. The testatrix handed the deed in a sealed envelope to a third party telling him to open it upon her death and follow the instructions within. The defendant, to whom the testatrix told what she had done, said she would accept the deed. After the testatrix's death, the envelope was opened but was found to contain nothing but the deed, which was then delivered to the defendant. *Held:* The deed is testamentary and must be cancelled as insufficient within the statute of wills. *Van Huff v. Wagner,* 287 S. W. 1038 (Mo. 1926).

The deposit of a deed with a third party, without reservation of control, to be transferred to the grantee upon the grantor's death, is a valid delivery.[1] Whether control is reserved is determined primarily by the grantor's intention,[2] which will be inferred from his words and acts.[3] In the principal case the court found that the testatrix intended the deed not to be operative until her death. The court's basis for this conclusion was that the grantor left the third party in ignorance of the envelope's contents; that the instructions she mentioned were not enclosed, the only guide being the deed itself; and that these factors all indicated the instrument was to be operative only after her death. That the deed was testamentary for this reason is a conclusion which may be questioned. This was a departure from the general rule under which, not the intention as to the time of operation, but the intention as to the finality of delivery, would be examined. The evidence showed that the testatrix meant her act to be irrevocable. She avoided a direct delivery so that she might be undisturbed in her possession for the remainder of her life. The reservation gave her no control over the deed. Had she brought about the destruction of the deed, the grantee's right would still have been recognized.[4] Such destruction could only be used to show an intention in the grantor to retain control.[5] There are dicta to the effect that equity will protect a grantee if a grantor fraudulently reposseses himself of a deed.[6] There is a diversity of opinion as to when title passes by such a deed. A majority holds that title vests in the grantee at the time of delivery by the grantor to the third party, subject to the right of possession in the grantor for life.[7] Other views are that the title passes only upon actual

[1] Martin v. Caldwell, 49 Ind. App. 1, 96 N. E. 660 (1911); Collins v. Norton, 81 Kan. 33, 105 Pac. 26 (1909); Wicklund v. Lindquist, 102 Minn. 321, 113 N. W. 631 (1907); Thrush v. Thrush, 63 Ore. 143, 126 Pac. 994 (1912).

[2] Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915); Rice v. Carey, 170 Cal. 748, 151 Pac. 135 (1915); Rowley v. Bowyer, 75 N. J. Eq. 80, 71 Atl. 398 (1908); Henry v. Phillips, 105 Tex. 459, 151 S. W. 533 (1912).

[3] Linn v. Linn, 261 Ill. 606, 104 N. E. 229 (1914).

[4] Gomel v. McDaniels, 269 Ill. 362, 109 N. E. 996 (1915); Arnegaard v. Arnegaard, 7 N. Dak. 475, 75 N. W. 797 (1898); Maxwell v. Harper, 51 Wash. 351, 98 Pac. 756 (1909).

[5] Latshaw v. Latshaw, 266 Ill. 44, 107 N. E. 111 (1914).

[6] Bigelow, *Conditional Deliveries of Deeds of Land,* 26 HARV. L. REV. 565, 577 (1913).

[7] Wheelwright v. Wheelwright, 2 Mass. 447 (1807); Loomis v. Loomis, 178 Mich. 221, 144 N. W. 552 (1913); Arnegaard v. Arnegaard, *supra* note 4; Henry v. Phillips, *supra* note 2; Maxwell v. Harper, *supra* note 4.

delivery to the grantee, or at the instant of the grantor's death, but subject to be construed retroactively to the original delivery where other claims intervene.[8] It is submitted that the principal case might better have been decided had one of these views been adopted. Although there are cases in accord,[9] it seems excessive to require the grantor to state explicitly that title is to pass at once to prevent a testamentary construction from being put upon the instrument. The general adoption of such a rule would tend to wipe out this mode of transfer of property.

EMINENT DOMAIN—PROPERTY SUBJECT TO CONDEMNATION—RIGHT TO RUN HIGHWAY THROUGH RAILROAD YARD—Proceedings were instituted in the county court to open a highway over land occupied by a railroad yard, under a statute giving the court full authority to make and enforce all orders for opening new roads. The railroad contended that the statute[1] did not give authority to take land used for yard purposes. *Held:* The judgment granting relief was within the exercise of the sound discretion of the county court. *Kansas City Southern Ry. v. Sevier County,* 286 S. W. 1035 (majority opinion), 287 S. W. 404 (concurring opinion) (Ark. 1926).[2]

While acceptable on its own facts, the decision departs from the usual construction of such statutes. The right of eminent domain is an attribute of sovereignty, and is vested solely in the legislature.[3] The question is political, rather than judicial. The exercise of this power may be delegated by the legislature, but as the power is in derogation of the common right to the enjoyment of property, the acts conferring it are to be strictly construed.[4] It is held, furthermore, that property already devoted to a public use cannot be taken for another public use which will destroy or materially interfere with the former use, unless the legislature has expressly manifested that intention.[5] The two inconsistent uses cannot coexist. Because of their semi-public nature, railroads come within this rule, whether their lands be acquired by purchase or by eminent domain.[6] Consequently, statutes granting the general power to lay out

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[8] Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427 (1904); Williams v. Latham, 113 Mo. 165, 20 S. W. 99 (1892); Stonehill v. Hastings, 202 N. Y. 115, 94 N. E. 1068 (1911); Stephens v. Rinehart, 72 Pa. 434 (1872).

[9] Williams v. Kidd; Rice v. Carey, both *supra* note 2; Latshaw v. Latshaw, *supra* note 5; Coles v. Belford, 289 Mo. 97, 232 S. W. 728 (1921).

[1] ARK. DIG. STAT. (Crawford 1921) §5226.

[2] The concurring justices dissented from the reasoning, but accepted the result, as the portion of the yard taken was not then in actual use.

[3] 20 C. J. 513; 3 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1036, and cases cited, n. 1.

[4] United States v. Rauers, 70 Fed. 748 (S. D. Ga. 1895); Comiskey v. Lynn, 226 Mass. 210, 115 N. E. 312 (1917); Ontario Knitting Co. v. State, 205 N. Y. 409, 98 N. E. 909 (1912).

[5] Adirondack R. R. v. New York, 176 U. S. 335 (1900); *In re* Saratoga Ave., 226 N. Y. 128, 123 N. E. 197 (1917); *In re* Normal School, 213 Pa. 244, 62 Atl. 908 (1906).

[6] Chicago R. R. v. Lost Nation, 237 Fed. 709 (S. D. Iowa 1916); Boston R. R. v. Cambridge, 166 Mass. 224, 44 N. E. 140 (1896).

streets, without more, are considered to permit a highway across tracks, as this would not interfere materially with their efficiency, but not to allow condemnation of a yard or depot grounds.[7] The Pennsylvania decisions state the general rule, but from a failure to recognize their public function, do not apply it to railroads.[8] Beyond all considerations both of principle and of obvious public policy, it seems better to draw a definite line, rather than to expose each case to the toils of litigation.

EVIDENCE—PRESUMPTION—NEGLIGENCE OF PARENTS WHEN CHILD IS KILLED ON STREET—Action for the loss of services caused by the death of the plaintiff's infant son, who was killed by the alleged negligence of the defendant's servant. On the issues of the defendant's negligence and the plaintiff's contributory guilt, the jury found for the plaintiff. Subsequently, the court granted judgment *non obstante veredicto,* on the ground that there was a presumption of negligence arising from the fact that the child was killed while in a public street unattended, and that the plaintiff, having introduced no evidence to rebut the presumption, was not entitled to recover. *Held:* That the presumption on which judgment was granted does not exist. *Datolla v. Burke Bros.,* Supreme Court of Pennsylvania, decided Jan. 3, 1927.

The decision in the principal case dispels much of the doubt created by the confusing statements in Pennsylvania cases relative to the evidential effect of the fact of an infant's unexplained presence in a public street unprotected, when the parents are trying to recover for their loss resulting from an injury to their child. In the early case of *Glassey v. Hestonville, etc., Ry.,*[1] the Supreme Court held that it was error for the trial court to refuse to charge that "the fact that a young child is found in a public street alone and unprotected, is *presumptive evidence* that he was so exposed, voluntarily and negligently, by his parents." Through judicial *obiter,* the language in the *Glassey* case was expanded until one finds appearing in the cases such declarations as "Whether the plaintiff rebutted the *presumption of negligence* arising from the fact that the child was on the street alone was a question for the jury."[2] These dicta are all overruled by the principal case. The decision here seems clearly to be correct, in view of the fact that it has been stated that the practical effect of all presumptions recognized in Pennsylvania is to shift the "risk of persuasion."[3] While, therefore, contributory guilt is normally an affirmative defense,[4] the practical result of a

[7] Paterson R. R. v. Paterson, 72 N. J. L. 112, 60 Atl. 47 (1905); People v. New York Central R. R., 156 N. Y. 570, 51 N. E. 312 (1898)

[8] Pittsburgh R. R. v. Butler, 242 Pa. 461, 89 Atl. 579 (1913); Philadelphia R. R. v. Philadelphia, 9 Phila. 563 (1872).

[1] 57 Pa. 172 (1868).

[2] Del Rossi v. Cooney, 208 Pa. 233, at 237, 57 Atl. 514, at 515 (1904); Parotta v. Pennsylvania, etc., Ry. Co., 40 Pa. Super. 138, at 142 (1909).

[3] Bohlen, *Effect of Rebuttable Presumptions on the Burden of Proof,* 68 U. OF PA. L. REV. 307 (1920), at 308, and n. 2.

[4] Beatty v. Gilmore, 16 Pa. 463 (1851); Coolbroth v. P. R. R., 209 Pa. 433, 58 Atl. 808 (1904).

presumption in this instance would be to create the anomalous situation of forcing the plaintiff parents to disprove contributory fault. Moreover, it is a general proposition that even the stronger facts of permitting a child to be on the street unattended are not negligence as a matter of law, but the question is for the jury under all of the circumstances.[5] To give the technical effect of a presumption to the unexplained fact would be, it is submitted, equivalent to ruling that that single fact, in absence of any of the surrounding circumstances, is negligence as a matter of law, and, therefore, contrary to the general proposition. Again, since presumptions have their basis in the probative strength of a fact,[6] it would appear to be erroneous to raise a presumption on this fact, inasmuch as it is just as likely that the child is on the street despite proper parental care, as it is that he is there through parental neglect. Finally, the more modern view, and the weight of authority, favors the submission of the question of the parents' contributory guilt to the jury in every case,[7] except where only one inference is reasonable.[8] Yet these cases do not seem to deny that the fact of the child's presence on the street unprotected is some evidence for the jury to consider. A few early cases have held that this fact is *prima facie* evidence of contributory negligence.[9]

INSURANCE—BREACH OF WARRANTY—ESTOPPEL AND WAIVER—Plaintiff sued on a burglary insurance policy on the front of which was printed, "Please Read Your Policy." Among its provisions was a warranty that, "no burglary insurance applied for or carried by the assured has ever been declined or cancelled." An application by the plaintiff had in fact been declined and a policy had been cancelled. A loss occurred and the plaintiff endeavored to introduce parol evidence showing that defendant knew of the breach of the warranty upon the issuance of the policy, and therefore should be estopped from relying on the warranty. *Held:* Defendant is not estopped. *Satz v. Massachusetts Bonding & Ins. Co.*, 243 N. Y. 385, 153 N. E. 844 (1926).

The question of estoppel[1] and waiver[2] in insurance contracts has come

[5] Fox v. Oakland, etc., Ry. Co., 118 Cal. 55, 50 Pac. 25 (1897); Cleveland, etc., R. R. Co. v. Keely, 138 Ind. 600, 37 N. E. 406 (1894); Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108 (1888); Parznik v. Central Abattoir Co., 284 Pa. 393, 131 Atl. 372 (1925); 1 THOMPSON, NEGLIGENCE, (1901) §324; BEACH, CONTRIBUTORY NEGLIGENCE, (3d ed. 1899) §450.

[6] Greer v. U. S., 245 U. S. 559 (1917); WIGMORE, EVIDENCE, (2d ed. 1923) §2491.

[7] Cases cited *supra* note 5.

[8] Westerberg v. Kinzua, etc., R. R. Co., 142 Pa. 471, 21 Atl. 878 (1891); Pollack v. P. R. R., 210 Pa. 634, 60 Atl. 312 (1905).

[9] St. Louis, etc., Ry. Co. v. Freeman, 36 Ark. 41 (1880); Wright v. Malden, etc., Ry. Co., 4 Allen 283 (Mass. 1862); Gibbons v. Williams, 135 Mass. 333 (1883); Harrington v. Butte, etc., Ry. Co., 37 Mont. 169, 95 Pac. 8 (1908).

[1] BOWER, ESTOPPEL (1923) §15; 2 POMEROY, EQUITY (4th ed. 1918) §801 *et seq.* For history of estoppel see 2 Co. LITT. *352a.

[2] Adams v. Hartford Fire Ins. Co., 193 Iowa 1027, 188 N. W. 823 (1922); Fed. Land Bank v. Atlas Assur. Co., 125 S. E. 631 (N. C. 1924); 2 JOYCE, INSURANCE (2d ed. 1917) 1307.

before the courts many times,[3] and while the distinction between estoppel and waiver is well settled,[4] some courts [5] and text writers [6] use them interchangeably. Parol evidence [7] can be admitted to prove an estoppel,[8] but it cannot be admitted to prove a waiver.[9] Where, as in the principal case, the company has knowledge at the inception of the policy of facts which it might set up as causing a forfeiture, and yet takes no action toward the cancellation of the policy, it would seem that a clear case of estoppel exists.[10] The insurer through his act in issuing the policy has falsely made a statement of a material fact, knowing that it would be relied on, namely, that the policy validly covered the risk. The insured in reliance on the act paid his premium and made no further effort to secure insurance. All of this was conceded in the principal case, but the court held that the plaintiff was precluded from recovery because of three factors: no fraud was claimed, there was notice to the insured to read the policy, and the breach was of a warranty and not of a condition. It is well settled that fraud need not be a concomitant of estoppel.[11] It is equally well settled that to deprive the insured of the claim of estoppel, his knowledge must be such as to put him on inquiry. Constructive or imputed knowledge is insufficient. Hence, it is no answer to the insured's claim to say that he is presumed to know the terms of his policy, when by reading the policy he might have discovered the truth.[12] Furthermore, in this connection it is immaterial whether an averment of the insured is a warranty [13] or a condition, inasmuch as estoppel applies equally well to warranties and conditions.[14] It therefore becomes difficult to

[3] For collection of cases see 7 COOLEY, BRIEFS ON INSURANCE (1919) 976 *et seq.;* 32 C. J. 1343.

[4] Ins. Co. v. Wilkinson, 13 Wall. 222 (1871); Draper v. Oswego Fire Ass'n., 190 N. Y. 12, 82 N. E. 755 (1907); 2 JOYCE, *op. cit. supra* note 2, at 1311. See Vance, *Waiver and Estoppel in Insurance Law,* 34 YALE L. J. 834 (1925) for an excellent article on this entire subject.

[5] Phoenix Ins. Co. v. Grove, 215 Ill. 299, 302, 74 N. E. 141, 142 (1905); "The doctrine of waiver as applied to such a case as this is that of estoppel *in pais.* There is no substantial distinction between the two, and the terms are used interchangeably, a waiver being only another name for an estoppel."

[6] RICHARDS, INSURANCE (3d ed. 1916) 171.

[7] See 5 WIGMORE, EVIDENCE (2d ed. 1923) §2400 *et seq.,* for history of the rule.

[8] Vance, *supra* note 4, at 858: ". . . of course the parol testimony rule has no application to proof of estoppels which are shown not to modify any provisions of the contract, but to prevent the insurer from saying that the policy which he had falsely asserted to be valid was really invalid all the time." See 5 MINN. L. REV. 136, Note (1920) for collection of cases.

[9] See Vance, *supra* note 4, at 841, n. 31 for collection of cases.

[10] *Supra* note 4.

[11] 2 POMEROY, *op. cit. supra* note, at 1640.

[12] Northwestern Nat. Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922); Bushbloom v. Fire Ins. Co., 197 N. W. 957 (Neb. 1924); Eaton v. Nat. Casualty Co., 122 Wash. 477, 210 Pac. 779 (1922).

[13] For definition see 3 JOYCE, *op. cit. supra* note 2, at 3192.

[14] O'Rourke v. Hancock Mut. Life Ins. Co., 23 R. I. 457, 460, 50 Atl. 834, 835 (1902): ". . . the purpose of warranties in a policy is not to set a trap for applicants, but to inform the company about important facts upon which the contract is based. When therefore a company was actually in possession of

support the decision in the principal case. The only explanation[15] that can be offered is that the court had in mind not estoppel but waiver. They considered that the plaintiff was endeavoring to prove a prior parol agreement inconsistent with the terms of a written contract, and refused to allow him to violate the parol evidence rule. In doing this the court appears to have rendered a decision which is counter to the heavy weight of authority.[16]

TRESPASS—ACTIONS—RECOVERY BY TENANT IN COMMON—The plaintiffs, tenants in common as to a moiety of the fee in land, sued the defendants as trespassers to recover possession of the land and to recover damages for injury to the land. It was argued that the plaintiffs should only recover as to their one-half interest. *Held:* Full recovery allowed. *Spencer v. Pierce*, 287 S. W. 1019 (Ark. 1926).

At common law the rule was that a tenant in common had an estate entirely separate from that of his cotenant, and, since he could prove title only to a part, he could only recover in ejectment to the extent of his title.[1] The effect of such a judgment was to give the plaintiff possession of the property in common with the trespasser until such time as the remaining cotenants of the title chose entirely to evict him. This view was adopted by the early American authorities,[2] but the trend of the later cases is toward a view in accord with that of the principal case.[3] The theory of these later cases is that ejectment is a possessory action, that the cotenant is entitled to possession of all the property, and that this is sufficient for a full recovery.[4] It is submitted that the view of the principal case, though not entirely consonant with the conception of a cotenancy, best accomplishes justice between the parties. The remedy given is an eviction of

knowledge of a former rejection of the insured . . . it would be a perversion of the purpose of a warranty to allow it to avoid the policy." See 4 JOYCE, *op. cit. supra* note 2, at 3728.

[15] Vance, *supra* note 4, at 858, n. 95.

[16] *Supra* note 3; Central Market Street Co. v. North British Ins. Co., 245 Pa. 272, 91 Atl. 662 (1914). *Contra:* Northern Assur. Co. v. Grand View Building Ass'n., 183 U. S. 308 (1902) (three justices dissenting), criticised in Grand View Building Ass'n. v. Northern Assur. Co., 73 Neb. 149, 156, 102 N. W. 246, 248 (1905): ". . . the adherence to the letter of an antiquated and wornout technical formality, seems to us to be an ironical commentary upon the often repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs."

[1] Mobley v. Bruner, 59 Pa. 481 (1868).

[2] Baker v. Chastang, 18 Ala. 417 (1850); Wilson v. Chandler, 60 Ga. 129 (1878); Minke's Lessee v. McNamee, 30 Md. 294 (1868); Kirk v. Bowling, 20 Neb. 260, 29 N. W. 928 (1886); Cruger v. McLaury, 41 N. Y. 219 (1869); Mobley v. Bruner, *supra* note 1.

[3] Richmond Cedar Works v. Stringfellow, 236 Fed. 264 (E. D. N. C. 1916); Hooper v. Bankhead, 171 Ala. 626, 54 So. 549 (1911) (apparently overlooking the earlier case of Baker v. Chastang, *supra* note 2); Gilchrist v. Middleton, 107 N. C. 663, 12 S. E. 85 (1890); Winbourne v. Lumber Co., 130 N. C. 32, 40 S. E. 825 (1902); Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705 (1891).

[4] Hooper v. Bankhead; Winbourne v. Lumber Co., both *supra* note 3.

the trespasser—the result desired—whereas the remedy of the other cases merely lets the cotenant into possession.

The full recovery of damages by a cotenant for injury to the land is also subject to a difference of opinion among the courts. Both views agree in holding that trespass is a possessory action, but one set of courts holds that the one entitled to possession should only recover for the injury to his possession and that damages for permanent injury are recoverable only by the owners of the property according to their shares.[5] The other view, the one of the principal case, is that possession is sufficient for a recovery in full since the action is based on possession.[6] The view of the principal case prevents a multiplicity of suits, one by each cotenant, and since no injury is done to the trespasser by a full recovery in one suit, as he must pay in full for any injury inflicted in any event, it is submitted that this is the preferable view.

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[5] Lowery v. Rowland, 104 Ala. 420, 16 So. 88 (1893); Winbourne v. Lumber Co., *supra* note 3 (allowing a full recovery in ejectment but only a partial recovery of damages); Rowland v. Murphy, 66 Tex. 534, 1 S. W. 658 (1886).

[6] Perry v. Jeffries, 61 S. C. 292, 39 S. E. 515 (1901).