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Recent Decisions

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RECENT DECISIONS.

INSURANCE—POLICY TO CONTAIN THE ENTIRE CONTRACT—FRAUD AS A DEFENSE. In an action to recover on a policy of life insurance the company defended that the insured had knowingly deceived the company when applying for insurance; that the misrepresentations induced the contract and related to the insured's state of health. These statements were not contained in the policy, either directly or by reference. *Held,* that the defense was insufficient in law because of section 58 of the Insurance Law. (*Archer* v. *Equitable Life Assurance Society,* N. Y. Court of Appeals, Law Journal, April 28th, 1916.)

"Every policy of insurance issued or delivered within the state, on or after the first day of January, 1907, by any life insurance corporation doing business within the State shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, applications or other writings unless the same are endorsed

upon or attached to the policy when issued, and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void". (Section 58, Insurance Law.) This section, under the holding in the principal case, enacted that "the policy, that is, the document or paper, should contain, physically, the entire contract. All of the stipulations, agreements or statements constituting the contract must be placed, through the delivery of the policy, in the possession of and be and remain accessible to the insured". (Per Collin, J.)

Prior to the enactment of the statute, warranties might be made a part of the policy by a reference or indorsement, contained in the policy. (*Foot* v. *Aetna Life Ins. Co.*, 61 N. Y. 571; *Gaines* v. *Fidelity & Casualty Co.*, 188 N. Y. 411.) The same was true of all instruments, statements and agreements not a part of the policy physically. (*Cushman* v. *U. S. Life Ins. Co.*, 63 N. Y. 404; *Clemens* v. *Supreme Assembly &c.*, 131 N. Y. 485.) This is no longer possible under section 58, above quoted, and, as interpreted in the instant case, nothing which is not upon the face of the policy or attached thereto, can be invoked by either party as an inducement to or a condition of the policy.

The decision in the principal case is in accord with the construction placed upon Section 58 by previous decisions. (*Becker* v. *Colonial Life Ins. Co.*, 153 App. Div. 382; *Murphy* v. *Colonial Life Ins. Co.*, 83 Misc. 475, Affd. 163 App. Div. 875; *Mees* v. *Pittsburgh Life &c.*, 169 App. Div. 43). The decision of the Appellate Division in the Archer case, which the instant case affirms, contained a strong dissenting opinion, however, which conceives the purpose of the section to be "to prevent a policy being avoided by reason of a warranty or condition not incorporated in the policy itself, and that it has no application to a case where the policy itself is sought to be avoided as having been obtained by fraud". In rejecting this interpretation, the principal case modifies the maxim that fraud vitiates all contracts and makes the contract of insurance an exception. To be available in this case, the subject matter of the fraud must be in the policy or in some instrument attached thereto. The Court, however, refused to consider the question "whether or not fraud, not relating to warranties or representations as defined by the law relating to life insurance" will be a defense to an action on the policy. The spirit of the decision, we submit, is such as to

warrant the belief that the Court will finally resolve that question in the negative.

ACTION—WHEN COMMENCED—ISSUANCE OF WARRANT OF ATTACHMENT—SERVICE OF SUMMONS BY PUBLICATION.—Plaintiff procured a warrant of attachment against the property of defendant, a foreign corporation, on Nov. 25th, 1914. Levy was made thereunder on Dec. 24th, 1914, on which date an order was signed directing service of summons by publication. Publication was commenced Dec. 26th, 1914, and completed on Feb. 6th, 1915. The defendant appeared and served an answer. Thereafter and within twenty days plaintiff served an amended complaint alleging in addition to the original cause of action, breaches of the same installment contract upon which the previous complaint was based, which additional breaches occurred during the interval between the issuance of the attachment, on Nov. 25th, 1914, and the completed service of the summons, on Feb. 6th, 1915. On motion of defendant to strike out, *Held*; the allegations in the complaint which relate to matters which occurred after Nov. 25th, 1914, the date of the issuance of attachment, must be stricken out. (*Import Chemical Co.* v. *Forster & Gregory, Ltd.*, Appellate Division, First Dept., April 19th, 1916, 158 N. Y. Supp. 409.)

The plaintiff's rights herein are to be determined by the answer to the question, which is squarely presented, when is an action commenced? It is well settled that one can recover only on the state of facts that existed at such time. An action is commenced by the service of a summons (Code of Civil Procedure, Sec. 416). However, for some purposes an action is deemed to be commenced before such service, as under Sec. 399 of the Code the delivery of the summons to an officer for service is equivalent to the commencement of the action for the purpose of stopping the running of the Statute of Limitations. The provision of Sec. 416 that, "from the time of granting of a provisional remedy the court acquires jurisdiction", must be considered. In some states attachment is an original process for the commencement of an action, but not in New York. Yet the jurisdiction that the court acquires is jurisdiction of the subject matter of the action. This is necessarily so because otherwise the words of the statute would be meaningless; for attachment of the property certainly places it within the jurisdiction of the court. But the court cannot acquire jurisdiction of the subject matter of an action unless that action

has been commenced. The subject matter of the action here is the breach of contract, and it is only of the breaches thereof that had occurred at the time when the action was begun that the court has jurisdiction. This jurisdiction is subject to a condition subsequent that service of the summons will thereafter be made, but subject to this condition the action is pending. Laughlin, J., dissenting, holds that the action was not commenced until the completion of the publication. Sec. 441, Code of Civil Procedure, reads in part, "service by publication is complete on the day of the last publication, pursuant to the order."

Though the prevailing opinion seems to be correct on principle, the result creates a situation which is contrary to the present tendency of the courts to expedite litigation. Matters here which might better be adjudicated in connection with the suit that is pending are excluded from the consideration of the court and relegated to a subsequent action.

EVIDENCE—GENERAL REPUTATION—ADMISSIBILITY IN CIVIL TRIALS.—Plaintiff testifying on his own behalf in a civil action, admitted on cross-examination his prior conviction of forgery and his sentence to prison. He thereafter offered evidence of witnesses as to his general reputation in the community in which he lived. This was excluded as incompetent on the ground that his reputation had not been impeached except by cross-examination. *Held,* on appeal, that the refusal to admit this evidence was reversible error. (*Derrick* v. *Wallace,* 217 N. Y., 520.)

At Common Law the best evidence rule was held to apply, and the prior conviction of a witness, introduced to impair his credit, could only be shown by the record itself. (*Newcomb* v. *Griswold,* 24 N. Y., 298.) Under the Code of Civil Procedure, sec. 832, conviction of a crime may be proved by cross-examination, but, if proved at all, it must be proved either by the record or by cross-examination. (See also Sec. 2444 of Penal Law to same effect.) "Records of conviction of crime exhibit the bad character directly and cannot be explained away by testimony as to good repute." (Wigmore, sec. 1106.) The inference that Professor Wigmore desires drawn apparently is that as the conviction refers only to a *particular* action indicating bad character, rebutting proof of *general* good character is incompetent. It is unnecessary to cite the line of numerous cases which hold to this doctrine. As the

principal case points out, the courts in this State seem to have been against the admissibility of rebutting evidence of general good character. But, "When it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case." (*Gertz* v. *Fitchburg R. R. Co.*, 137 Mass. 77); and, "There is no doubt that evidence tending to diminish the wickedness of the act, *like evidence of good character,* does meet, so far as it goes, the evidence afforded by the conviction. * * * If one side goes into the matter the other must be allowed to also." (*Lamoureux* v. *N. Y., etc., R. R.*, 169 Mass. 338.) Although in these Massachusetts cases the convictions were shown to have been against ordinary witnesses, it seems reasonable to assume that the opinions would have been the same had the convictions been shown to have been against the parties in interest, as in the cases under discussion. We have, therefore, two lines of radically conflicting cases, and it is submitted that the holding in the principal case will more surely aid in realizing substantial justice than would the application of the opposing doctrine.

Since, up to the present, the Court of Appeals appears to have drawn a distinction in the receipt of character evidence to impair credibility, between ordinary witnesses and parties as witnesses, as is shown by comparing *Carlson* v. *Winterson* (147 N. Y. 652), with *People v. Hinksman* (192 N. Y. 421), where the accused was a witness in his own behalf, and it was held that evidence of his general bad reputation was *not* admissible. It is to be regretted that the Court in the instant case did not see fit to incorporate in its opinion a positive indication as to whether the character evidence to be admitted in rebuttal would be assumed to cover the witness' general character, or merely his character as to truth and veracity. The general tone of the decision, however, seems to point to the former.

LAW AND FACT—COURT AND JURY—CONSTRUCTION OF WRITINGS.—In an action to recover commissions, plaintiff, a broker, had a verdict. Defendant appealed to the Appellate Division, which Court, holding a letter written by defendant to plaintiff

to work a revocation of the latter's authority to sell, dismissed the complaint. On appeal to the Court of Appeals, *Held,* that the letter, when referred to the extrinsic circumstances, could not as matter of law be understood as a revocation of such authority. "The most that can be said for the defendant is that its meaning is ambiguous, and that its construction was for the jury." Judgment was reversed and the case remitted to the Appellate Division to determine whether the verdict was in accordance with the weight of evidence. (*Martin* v. *Crumb,* 216 N. Y. 500.)

"It is the duty of the Court to construe all written instruments" (per Parke, B. in *Hutchison* v. *Bowker,* 5 M. & W. 535, 541; Wigmore, Ev., sec. 2556, and cases cited); and so the Appellate Division remarked of the letters in the principal case "The construction of them is for the Court" (158 App. Div. 228, 230). The writing in this case being ambiguous, the construction thereof required the decision of these questions: What were the extrinsic facts under which it was executed; what do the written words when referred to those facts mean; and what, in law, is the effect of such words, after the meaning has been found? The construction of the writing thus becomes a so-called question mixed of law and fact, and the Court may submit the writing to the jury, under proper instructions (*White* v. *Hoyt,* 73 N. Y. 505; *Nellis* v. *Western Life Ind. Co.,* 207 id. 334; *East Hampton* v. *Vail,* 151 id. 470; *Stokes* v. *Mackay,* 140 id. 649). In this process it is the function of the Court to formulate and announce the rule of law which defines the effect of the writing (Thayer, Prelim. Treat., sec. 253). The Court, too, must define the meaning of the written words to the jury, unless the words are technical words of art or of commerce, when their meaning is for the jury (*Hutchison* v. *Bowker,* supra). But since the writing may mean one thing or another according as the surrounding circumstances are found, and as such circumstances are to be found by the jury, the Court must define the meaning of the words conditionally on the surrounding circumstances being found one way or the other. Whether the Court construes the writing in advance, by instructing the jury as to the law upon the different sets of facts they may find, or the jury returns a special finding of fact and leaves to the Court its legal interpretation, the construction placed on the writing will in either case be the same.

The jury in rendering a general verdict decides whether the ultimate facts as found by it are or are not within the rule of

law as announced to them by the Court, making for themselves the application of the facts to the law. When the ultimate facts are found and returned to the Court in the form of a special finding, the Court applies the measuring rule of law to such facts (Chamberlayne, Ev., vol. 1, sec. 88). In both cases the Court has formulated the rule of law applicable to the ultimate facts as ascertained by the jury, and hence it follows that the Court has placed on the writing its construction. The facts as found by the jury are reviewable by the appellate court, and the verdict, based on such facts, will be sustained or set aside according as they are supported by the weight of evidence or not. (*Junkerman* v. *Tilyou Realty Co.*, 213 N. Y. 404; *Galley* v. *Brennan*, 216 id. 218).

The effect of the decision, should the Appellate Division find that the evidence did not support the facts, would be to give the plaintiff another opportunity to make out his case at a new trial. The same result would follow had the Court, upon a special finding of the jury of the same facts, based its decision thereon. It is submitted that the Appellate Division erred, not in stating that the construction of the letter was for the Court, but in not weighing the evidence to ascertain if the facts on which the construction was founded were in accordance with the evidence. If the findings of fact were supported by the evidence, then their legal interpretation was for the Court, and the Appellate Division, construing the letter to work a revocation, would seem to be justified in dismissing the complaint and denying the plaintiff a new trial.

CONFLICT OF LAWS—CONTRACTS—FOREIGN LAW.—Plaintiff gave defendant an option to buy certain railroad rights and lands situated in the island of Cuba, in return for certain consideration, part of which was payable at the maturity of the option. The contract was in writing, but was not made a public document as required by the Cuban Civil Code. In an action brought in New York on the contract, *Held*, that the contract was a valid obligation under the laws of Cuba; that the failure to make the instrument a public document affected the remedy only and not the right, and that the action was maintainable in the Courts of this State. (*Reilly* v. *Steinhart*, N. Y. Court of Appeals, N. Y. Law Journal, May 5, 1916.)

The Court was, in the first instance, called upon to decide whether a contract existed under the Cuban law (*Cuban R. R.* v. *Crosby,* 222 U. S. 473): hence proof was properly received of the foreign law. The Cuban Civil Code provides (Art. 1279), that, should the law require an instrument to be executed in accordance with certain formalities, either party may compel the other to carry out such formalities. The plaintiff, therefore, need only bring proper proceedings in order to have this instrument protocolized. This being so, the requirement that the instrument be protocolized becomes merely a rule of evidence, and upon the clear weight of authority does not bind the courts of this state. (Wharton Confl., 3rd Ed., 688; Dicey 2nd Ed. Confl., p. 710; *Emery* v. *Burbank,* 163 Mass. 326, 327.)

The defendant contended that the requirements of the Cuban Code were analogous to the Statute of Frauds, but it would seem the Court properly dismissed this objection. Although the rule does not seem to be very well settled in this State, still the majority of the cases hold that the statute merely declares a rule of evidence, and is part of the *lex fori.* (*Crane* v. *Powell,* 139 N. Y. 379; *Matthews* v. *Matthews,* 154 N. Y. 288.) However, a clear distinction exists between the Statute of Frauds and the Cuban Code, as the Court points out. In New York there is no method of compelling a party to reduce to writing a contract theretofore within the statute. The Cuban Code, on the other hand, provides a remedy for the failure, as in the instant case, to comply with required formalities. New York recognizes the validity of the contract under the Cuban law, but follows its own procedure in the enforcement thereof. The decision in the principal case would seem logically reasoned and sound on principle.

CRIMINAL LAW—BURGLARY—BREAKING OUT.—Where defendant and his companions entered a barn through an open doorway, closed the door after them and fastened it, and after committing larceny in the barn unfastened the door and escaped. *Held,* that the act of opening the door which they themselves had closed and fastened was a breaking and constituted burglary in the third degree, as defined by statute. (*People* v. *Toland,* 217 N. Y. 187.)

Whatever doubt may have existed at Common Law as to whether a "breaking out" constituted burglary (*Rolland* v. *Com-*

monwealth, 82 Pa. St. 306, 324; but see *State* v. *Ward,* 43 Conn. 489, 494, holding 12 Anne, C. 7, sec. 3, was merely declaratory of the Common Law), it has been definitely settled in New York by the Penal Law, sec. 404, subd. 2. The statute 12 Anne, C. 7, sec. 3, made it burglary for a person being in a dwelling house, committing a felony therein, to break out in the night time. "A person who: 1, With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or, 2, being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree." (New York Penal Law, sec. 404.) Entering a building through an open door and committing a crime therein does not constitute burglary, so that the mere wrongful invasion of another's premises is not of the essence of the crime. It is the physical violation of the structural protection to the owner and his goods that aggravates the trespass and constitutes the crime. It is not necessary that an intention to commit larceny be present: breaking and entry with intent to commit rape has been held burglary (*Rex* v. *Gray,* 1 Strange 481). The wording of the New York Statute clearly includes such sets of facts within its scope. Nor is it necessary that a lock be broken or a door demolished. Breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, is sufficient to constitute the crime (Chitty's Blackstone Bk. IV., *222, *et seq.*; *Rex* v. *Hughes,* 1 Leach 406); or cutting down a netting of twine nailed over an open window (*Commonwealth* v. *Stevenson,* 8 Pick. 354), or raising a latch where a door is not otherwise fastened (*Curtis* v. *Hubbard,* 1 Hill 336). This doctrine has been refined so far as to include as burglary, drilling a hole in the bottom of a corn-crib, provided the tip of the bit protrudes, while drilling, within the crib. (*Walker* v. *State,* 63 Ala. 49.) If the defendant had effected egress by opening another door or window not closed by himself, even after entry through a door already open, the application of the statute and his guilt thereunder would be clear.

Kellogg, J., dissenting in the Appellate Division, argued,— "When the heifer was killed they found themselves confined to the barn unable to take away the stolen property or to gain their own liberty without breaking the building. * * * It is immaterial by what door they escaped, so long as they and the stolen property were imprisoned in the barn and it was necessary for them to remain or break out." This practical reasoning is supported

by Bartlett, Ch. J., speaking for the Court of Appeals:—"It is both their misfortune and their fault that they did not leave the door open." The argument that the closing of the door, after entry, involved no greater violation of the owner's right than had already been perpetrated, and that consequently the act of re-opening the door should not subject the defendant to the greater penalty, is neither conclusive nor convincing; especially when it is noted that the door was closed not in order to perform any service to the owner, but to further the culprit's criminal enterprise. It is submitted, therefore, that the decision is sound under the statute.