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Note and Comment

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NOTE AND COMMENT

ESCHEAT—HOW STATE ACQUIRES TITLE.—Escheat is of feudal origin, and properly applied only to land which on failure of heirs or for certain other reasons, "fell in" to the lord under whom it had been held. Personal property without an owner, as *bona vacantia*, became the property of the crown. *In re Bond* [1901] 1 Ch. 15. In the United States escheat is used more broadly, but usually arises when the owner of property dies intestate without heirs. Our alienage laws have generally removed disabilities of aliens to take, but in some jurisdictions there may still be escheat because of alienage, see 5 MICH. L. REV., 463. In others mortmain statutes provide for escheat of certain property held by corporations, *Louisville School Board* v. *King*, 127 Ky. 824, 15 L. R. A. N. S. 379, note, and in some states property like bank deposits, if long unclaimed, will vest in the state, *State* v. *First Nat. Bank of Portland*, 61 Oreg. 551, Ann. Cas. 1914 B 153, note; Mich. C. L. Secs. 321 ff., though in such cases the state is a kind of trustee for the absent owner, *Atty. Gen.* v. *Provident Inst. for Savings*, 201 Mass. 23; Mich. C. L. Sec. 338.

The state has such interest in a will of one dying without heirs that it is a proper party to a contest. *State* v. *Lancaster*, 119 Tenn. 638. Cf. *In re*

McClellan's Estate, 27 S. Dak. 109, Ann. Cas. 1913 C 1029, note, though of course there is no escheat if the last owner has by valid will fully disposed of his property. The right of the state to contest such a will does not depend upon statute, *State* v. *Lancaster, supra,* but is often expressly so given. Mich. C. L. Sec. 13839. Property by statute escheating to the county in which it is found is subject to an inheritance tax, *People* v. *Richardson,* 269 Ill. 275, commented on in 29 HARV. L. REV. 455, and some cases consider the state the ultimate heir, 29 HARV. L. REV. 455, but this cannot be sustained. See 21 HARV. L. REV. 452, *contra.* If the state were regarded as an heir title would not fail, and the better view is that the state takes because there is no heir. *Barnett's Trusts* [1902], 1 Ch. 847. Such was the view adopted in the recent case of *Delaney* v. *State,* 174 N. W. 290 (North Dakota, May, 1919). The owner of certain personal property died. An administrator was appointed, he administered, made final report, and was discharged. The probate court decreed that the "State of North Dakota is the only heir of said deceased, and as such is entitled to the whole of said estate." Action was brought against the State by plaintiffs who claimed to be heirs of the former owner. It was held that in such case the State does not take as heir, nor *ipso facto* on failure of heirs, but only by pursuing the remedy provided by statute to have property declared escheated.

The feudal conception of escheat, as a reverter of land to the lord or to the king, like so many feudal concepts, has persisted even in this country, where at least since the Revolution there have been no feudal tenures, 3 Washburn Real Property, Sec. 1866 (6th Ed.). According to the feudal view, in the United States the state takes the place of the lord or the crown, not as ultimate heir, but as donor or grantor of all land. Most land is indeed held by patent from the state, and many statutes, like the North Dakota statutes involved in the *Delaney case,* in substance provide that the original and ultimate right to all property, real and personal, is in the state, and when title fails for want of heirs it "reverts to the state." Political Code of North Dakota, 1905, Sections 6, 7; Code of 1913, Sections 8, 9; *Delaney* v. *State, supra.*

But these ideas are relics of a past that is gone, and it is believed to be more consistent with the social and property concepts of today to treat all private property not belonging to any particular individual as *bona vacantia* to be taken over by the state for the good of all. *Sands* v. *Lyndham,* 27 Grat. 291, *In re McClellan's Estate,* 27 S. Dak. 109, Ann. Cas. 1913 C 1029. That such property is to be taken for the community good is seen in many statutory provisions that such property shall go to some special public purpose, like the common school fund. Mich. C. L. Sections 324, 331; Shannon's Tenn. Code, Sec. 3825.

By the better view, such property does not *ipso facto* vest in the state. The state by inquest of office must first establish the fact of intestacy and failure of heirs, and it must do this in the way provided by statute. In the *Delaney case* the probate court, as part of the probate proceedings, found there were no heirs, and decreed distribution to the state. This was no

office found, and vested nothing in the state. Failure of ownership is a fact to be established. It is "most unusual, not to say unnatural, that there shall live a person who does not have some heir, living at the time of his death, capable of inheriting his property." There is, therefore, a very strong presumption against escheat, and the state has no purpose to take property unless all heirs fail. *State* v. *Williams,* 99 Miss. 293, Ann. Cas. 1913 E 381, note; 3 Washburn Real Property, Section 1869 (6th Ed.). This presumption is sometimes changed by statute, Mich. C. L. 329, but in suing to declare lands escheated the state must rely on the strength of its own title, and not on the weakness of the contestant's. *State* v. *Williams, supra.* Under a mortmain statute one in good faith buying of a corporation land which it might not own, and which the state on office found might have forfeited on a judgment declaring escheat, acquires a title indefeasible against the state and all others. *Louisville School Board* v. *King,* 127 Ky. 824. Indeed, it was held in that case that it would be unconstitutional for the legislature to vest title *ipso facto,* in the state, and deny an adverse claimant a chance to resist escheat, and it is believed the same things would apply to the *Delaney case* in which plaintiffs sought to contest the finding that there were no heirs. After office found as provided by statute there seems no reason why the title of the state to property acquired by escheat should not be as secure as that of a distribute under ordinary probate proceedings. In neither case is the probate court the usual court of final resort to try out the rights of respective claimants. *Delaney* v. *State, supra; In re McClellan's Estate,* 27 S. Dak. 109, Ann. Cas. 1913 C 1029. After final proceedings in the probate court the escheat is in suspense pending inquest of office and decree of escheat as provided in the statute governing escheats. *Estate of Miner,* 143 Cal. 194.

E. C. G.

ACCIDENT INSURANCE—INTERPRETATION OF WORD "IMMEDIATELY."—One of the common clauses in accident insurance policies is one providing that the insured shall receive a specified sum of money per week for "loss of time" resulting from injuries due to "external, violent and accidental means" which shall "independently of all other causes, immediately, wholly and continuously disable the insured from transacting any and every kind of business pertaining to his occupation." A considerable amount of litigation has involved the interpretation of the various words and phrases in such a clause. On the interpretation of "total disability" see 4 HARV. L. REV. 176. Concerning the scope of "external, violent and accidental means" see 14 MICH. L. REV. 329. It is proposed to consider briefly in this note the word "immediately."

In two jurisdictions, the word "immediately," when used in clauses as indicated above, has been held to be a word of causation, and synonymous with the phrase "independently of all other causes;" or, at least (said the courts), the presence of the said phrase and the word "immediately" in the same clause, rendered the said word ambiguous, and therefore, since all ambiguities should be construed favorably to the insured, the plaintiff was entitled to recover. *Shera* v. *Ocean Accident Corporation,* 32 Ont. Rep. 411;

Pac. Mut. Life Ins. Co. v. *Branham,* 34 Ind. App. 243. On the contrary, all other courts which have passed upon the question have held that when both the said phrase and the said word were used in such a clause, there was clearly no ambiguity, but the phrase "independently of all other causes" referred to causation, and "immediately" was used to designate proximity of time between the accident and the disability. See especially *Merrill* v. *Travelers' Co.,* 91 Wis. 329; *Williams* v. *Preferred Mutual,* 91 Ga. 698.

Assuming that "immediately" is used in such clauses as an adverb of time, the question arises, how much time? The Kansas Court in a recent decision (*Erickson* v. *Order of United Commercial Travelers,* 103 Kans. 831) following its own precedent (*Order of United Commercial Travelers* v. *Barnes,* 72 Kans. 293), held that the word means "within such a time as the processes of nature consume in bringing the person affected to a state of total disability." Hence, a baseball pitcher who was injured in September but was not disabled until the following February was held to have been "immediately" disabled. The reasons given for such decisions are that the processes of nature require time in which to operate, and the insured should not be precluded from a recovery merely because of the tardiness of nature. The practical effect of such a doctrine is to construe "immediately" as a word of causation.

In *Ritter* v. *Preferred Masonic Mutual,* 185 Pa. 90, the court laid down a different definition of "immediately," *viz.,* "within a reasonable time," and held that what is a reasonable time is a question for the court. No intimation is given in the opinion as to what matters should be considered in determining what is a "reasonable time" in such cases. It is possible to construe the decision as being equivalent to the Kansas view; but the Pennsylvania court probably did not intend such an interpretation to be put upon its decision, for it expressly concedes that the word is used in the policy to mean "instantly" or "at once," but says that, owing to the nature of the policy, there is not to be attached to the word the strict idea of instantaneously. The court held that three days was a reasonable time under the circumstances of that case.

The overwhelming weight of authority accords in holding that "immediately" means "presently, without any substantial interval of time" when used in such clauses, but such definition naturally raises the question, what constitutes such a substantial interval of time as to be beyond the meaning of the word "immediately?" The following cases held the number of days indicated to be such an interval of time: sixty-two days in *Merrill* v. *Travelers' Co., supra;* forty-two days in *Pepper* v. *Order of United Commercial Travelers,* 113 Ky. 918; thirty-six days in *Hagadorn* v. *Masonic Equitable Ass'n,* 69 N. Y. Supp. 831; thirty days in *Williams* v. *Preferred Mutual, supra;* twenty-four days in *Vess* v. *United Benevolent Society,* 120 Ga. 411; twenty-two days in *Laventhal* v. *Fidelity and Casualty Co.,* 9 Cal. App. 275; eight days in *Wall* v. *Continental Casualty Co.,* 111 Mo. App. 504; six days in *Mullins* v. *Masonic Protective Ass'n,* 181 Mo. App. 395; five days in *Preferred Masonic Mutual* v. *Jones,* 60 Ill. App. 106; two and one-half days in *Windle* v. *Empire State*

Surety Co., 151 Ill. App. 273. To appreciate fully the reasons and policy of such decisions necessitates an inquiry into the purpose of the insurer in using the word "immediately" as it did.

One of the controlling questions in actions on accident insurance policies frequently is whether or not the disability is the direct result of accident, and in cases where the disability did not have inception until a considerable period of time had elapsed after an accident, this question becomes one of acute difficulty. The insurance companies realize that, since such questions of physiological reactions are usually, if not always, decided upon the testimony of the insured and his witnesses—especially his expert witnesses—and since there exists a strong tendency on the part of juries to resolve such questions in favor of the insured, the insurer is likely to be subjected to frequent frauds and impositions at the hands of its policy holders. For these reasons, the insurance companies seek to limit their liability, under such clauses as the one now under consideration, to cases where there can be no doubt as to the causal connection between the accident and the disability. Accordingly, the provision is inserted in the policy that the disability must follow "immediately" after the injury. Clearly, such a limitation is neither unreasonable nor contrary to public policy. An insurance company has a right to be arbitrary in defining the limits of its liability, but in its effort to be arbitrary the company errs in using a term which is notoriously flexible in the law. It might better follow the precedent of the common law in limiting the liability for homicide by the "year and a day" rule, and specify that the disability must follow within twenty-four or forty-eight hours after the injury, although it must be admitted that such a provision might lessen the salability of the policy. However, the decision must be based upon the terms actually employed in the policy, but these terms should be interpreted with a view toward giving full effect to the purpose for which the insurer incorporated such ideas in the policy. The court should consider and respect the reasons and the theory upon which the insurer drafted the policy, and realize that, although the insurer might have chosen better terms to accomplish its purpose, the company has rights as well as the policy holder. On the other hand, the policy should not be so interpreted as to give the holder thereof mere illusory insurance; if his case comes justly within the terms of the policy, he should be allowed to recover. The two main questions which the court should ask itself may be stated thus: First, will a decision that the particular interim between the time of the injury and the disability in the case at bar is within the meaning of the term "immediately" adequately preclude the possibilities of fraud and imposition against which the insurer desired to protect itself, or will such a decision serve as a precedent for opening the door to just such hazards? Second, will such a decision deprive the policy holder of any benefits which he had a right to expect?

It can hardly be doubted that, if the Kansas court had properly considered these questions, especially the first one, it would not have enunciated the doctrine which it did. If the Pennsylvania court had considered said questions, it might still have been justified in announcing the rule which it did,

depending, of course, upon what the court means by a "reasonable time." The soundness of the other decisions cited can hardly be doubted, except possibly *Windle* v. *Empire State Surety Co.*, in which the court might be accused of failing to observe adequately the second question. But it would be almost unfair to criticize severely the courts for any decision in this regard not clearly absurd, for it is evident that, by the use of such word, the insurance companies have imposed upon the courts an extremely nice question, and one upon which judicial minds might reasonably differ. See 1 CORPUS JURIS 468, Section 178; COOLEY, BRIEFS ON INSURANCE, Vol. 4, p. 3168 (e); Vol. 7, p. 3168 (e); ANN. CAS. 1914 D, 380, note. L. K.

CONTINUANCE OF STATUS AS PASSENGER WHILE TRANSFERRING FROM ONE CAR TO ANOTHER.—There is a great deal of confusion in the reports as to whether a passenger on a street car, who is required to transfer to another car, is still a passenger to whom the railway company owes a high degree of care during the act of transferring. In *Feldman* v. *Chicago Railways Co.* (Ill. 1919), 124 N. E. 334, the plaintiff was walking from the northwest to the southwest corner of Twelfth Street and Cicero Avenue in transferring from one car to another; while so doing the rear end of the car from which he had just alighted swung around on a switch and struck him, knocking him down and injuring him severely. The court took the view that the relation of carrier and passenger continued while he was transferring, and held the defendant company liable. The dissenting judges pointed out that the cases cited as supporting the majority opinion were either cases of steam railways where the injured person had not left the premises of the defendants, or cases in which the plaintiff was in the act of boarding or alighting at the time he was injured.

In the case of steam railways the question seems to be settled. "The general rule is that the relation of carrier and passenger begins as soon as one intending in good faith to become a passenger enters, in a lawful manner, upon the carrier's premises to engage passage, and that relation continues to exist until the passenger has been made aware of his arrival at the place of destination and has had a reasonable time to alight from the car and to leave the premises of the carrier." *Powell* v. *Phila. & Reading Ry. Co.*, 220 Pa. St. 638. Thus, a person was held a passenger when on the depot premises for the purpose of taking a train, though he had not purchased a ticket, in *Grimes* v. *Pennsylvania Co.*, 36 Fed. 72. Likewise, where a passenger alighted at an intermediate station for the purpose of refreshment (*Watters* v. *Phila. B. & W. R. Co.*, 239 Pa. 492), of sending or receiving telegrams (*Alabama G. S. Ry. Co.* v. *Coggins*, 88 Fed. 455), of taking exercise (*Gannon* v. *C. R. I. & P. Ry. Co.*, 141 Ia. 37), of talking with an acquaintance while cars were being switched (*Ark. Cent. Rd. Co.* v. *Bennett*, 82 Ark. 393), or of engaging in an altercation with a servant of the railway company (*Layne* v. *C. & O. Ry. Co.*, 66 W. Va. 607). But where a passenger left the premises of the railroad company at an intermediate point and went to a hotel to spend the

night, it was held that the relation of carrier and passenger was severed for the time being, and could only be resumed when he again entered the station yard for the purpose of completing the journey. *King* v. *Central of Ga. Ry. Co.*, 107 Ga. 754.

In cases of street cars and other carriers the same rule seems to preponderate. In *Birmingham Ry. Co.* v. *Wise*, 149 Ala. 492, allegations that a car stopped to receive passengers at the stop where plaintiff and her children were waiting to board it, but that she did not board it by reason of the failure of the servant in charge of the car to allow her a reasonable time to do so, were held sufficient to show a passenger relation. A person on a station platform of a suburban electric railway signalling an approaching car to stop was held a passenger, in *Great Falls & O. D. R. Co.* v. *Hammerly*, 40 App. D. C. 196. (But see *contra, Donovan* v. *Hartford St. Ry. Co.*, 65 Conn. 201.) And at destination a passenger remains such after alighting until he has had a reasonable opportunity to reach a place of safety. *Louisville Ry. Co.* v. *Kennedy*, 162 Ky. 560; *Melton* v. *Birmingham Ry. Light & Power Co.*, 153 Ala. 95. But it is held that he ceases to be a passenger when he has safely alighted, in *Powers* v. *The Connecticut Co.* 82 Conn. 665, and in *Columbus R. R. Co.* v. *Asbell*, 133 Ga. 573.

Plaintiff was held not to have lost his rights as a passenger by leaving a street car at the motorman's request to help in removing a wagon from the track (*Stuchly* v. *Chicago City Ry. Co.*, 182 Ill. App. 337), nor by temporarily stepping from the car to allow other passengers to alight (*Tompkins* v. *Boston Elevated Ry. Co.*, 201 Mass. 114). A passenger in a taxicab of a common carrier, who entered a saloon to procure change to pay the chauffeur for the part of the journey already completed, was held to remain a passenger, in *Fornoff* v. *Columbia Taxicab Co.*, 179 Mo. App. 620.

Opposed to the above decisions is the recent case of *Niles* v. *Boston Elevated Ry. Co.*, 225 Mass. 570. Plaintiff there had to alight at a car barn and walk about three car lengths in transferring to another car. It was held she was not a passenger while in the act of transferring. The court stressed the fact that she was not on defendant's premises, but on the public highway, exposed to dangers not caused by defendant; she could choose her own way, her movements being under her own guidance. There is this distinction between the cases of steam railways and street cars,—that there is usually, in the case of street cars no station, but passengers must alight in the public streets, often indeed in the midst of dense traffic. However, it seems that this should not be permitted to befog the decisions, for it is not suggested anywhere that the carrier should be held liable for mishaps due to the density of traffic or other causes not traceable to the company. The carrier is to be held only for injuries occasioned by its failure to observe a high degree of care. There is no greater danger in transferring from one street car to another than in crossing the tracks of a steam railroad to change cars. It is submitted that the doctrine of *Feldman* v. *Chicago Rys. Co., supra,* is sound.

R. G. D.