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Statute of Limitations--Endorser's Warranty as Express or Implied Promise--Application of Ten-Year Statute to Negotiable Instruments

ships on the purchaser, a change from the usual rule should be made; but if so, it would seem that the change should be made by statute since it would affect conveyancing, a field as to which it is desirable that parties be able to ascertain the law in advance.[7]

Before the existence of a quasi-contractual obligation in this type of situation may be determined, the "bargained for" exchange must be ascertained in order to see whether or not there has been a failure of consideration. Thus, if the agreement was to transfer merely what title the vendor actually had, there obviously has been no failure; but, as Williston says, if "it appears that both parties entered into the transaction on the mistaken assumption, not regarded as doubtful, that the vendor had title, rescission is permitted. . . . ."[8]

STATUTE OF LIMITATIONS — INDORSER'S WARRANTY AS EXPRESS OR IMPLIED PROMISE — APPLICABILITY OF TEN-YEAR STATUTE TO NEGOTIABLE INSTRUMENT. — A bank indorsed the note of a Pennsylvania township to plaintiff "without recourse". Plaintiff sued the township on the note, but was denied recovery on the ground that the note was invalid, as having been improperly executed according to the laws of Pennsylvania. Plaintiff then gave notice of a motion for judgment in West Virginia against defendant, receiver of the bank, based on the provision of the Negotiable Instruments Law that a person negotiating a note by a qualified indorsement warrants "that the instrument is genuine and in all respects what it purports to be."[1] Defendant demurred to the notice, contending that this was an action on a contract not in writing, and therefore barred by the five-year statute of limitations.[2] *Held,* that the ten-year statute of limitations was ap-

to sales of personalty. Uniform Sales Act, § 13. Cogar v. Burns Lumber Co., 46 W. Va. 256, 33 S. E. 219 (1899).

[7] If a statute were passed raising an implied warranty of title in cases of transfer of realty, *quaere* as to the effect of knowledge of defects on the part of the purchaser. In the case of personalty, knowledge will defeat the operation of warranties of title whether express or implied. WILLISTON, SALES (2d ed. 1924) §§ 206, 207, 208. But as to realty, knowledge of a defect will not defeat the effect of an express warranty of title. Bossieux v. Shapiro, 154 Va. 255, 153 S. E. 667 (1930).

[8] WILLISTON, CONTRACTS § 926; see also § 1566.

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[1] W. VA. REV. CODE (1931) c. 46, art. 5, § 6.

[2] W. VA. REV. CODE (1931) c. 55, art. 2, § 6. "Every action to recover money . . . . shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say . . . . if it be

plicable to an action on the warranty imposed by law, arising out of a written indorsement. Overruling of demurrer affirmed. *Houston v. Lawhead.*[3]

The present decision expressly disapproves the previous doctrine of the court[4] that the limitation on such an action was five years. Such a new rule necessarily assumes that the warranty sued upon is one inferred as a matter of fact from the intention of the party assigning; for if it were considered as a quasi-contract, which the law creates, separate and apart from the intention of the parties, it would clearly be an implied promise and subject to the five-year statute of limitations. This assumption is supported by the language of the Negotiable Instruments Law to the effect that a qualified indorser "warrants that the instrument is genuine and in all respects what it purports to be." It does not say that he will be held to have warranted such to be true. The court believes that the indorser intends to make such warranties when he signs his name and that the warranties which the indorsement imposes are omitted for business convenience.[5]

Yet the court's reasoning rests on the recognized proposition that "legal rules affecting contracts enter by implication into and form a part of every contract as fully as if expressed therein."[6] This seems to admit that the warranty originally comes not from within the contract, but from without. While the court thus appears to be inconsistent in its reasoning, the result reached is in accord with authority on the point.[7] The indorsement does show on its face a complete agreement between the parties which cannot be varied or explained by parol evidence.[8] Hence, the result is desirable in that it definitely satisfies the policy of the

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upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, express or implied, within five years."

[3] 182 S. E. 780 (W. Va. 1935).

[4] Merchants' National Bank v. Spates, 41 W. Va. 27, 23 S. E. 681 (1895).

[5] Martin v. Cole, 104 U. S. 30, 37, 26 L. Ed. 647 (1881).

[6] State v. Nutter, 44 W. Va. 385, 30 S. E. 67 (1898); Cole v. George, 86 W. Va. 346, 103 S. E. 201 (1920); Carleton Mining & Power Co. v. W. Va. N. R. Co., 106 W. Va. 126, 145 S. E. 42 (1928); State v. Insurance Co., 114 W. Va. 109, 170 S. E. 909 (1933); Huntington Water Corporation v. Huntington, 115 W. Va. 531, 177 S. E. 290 (1934).

[7] Home Insurance Co. v. Mercantile Trust Co., 219 Mo. App. 645, 284 S. W. 834 (1926); Haines v. Tharp, 15 Ohio 130 (1846); Connor v. Becker, 56 Neb. 343, 76 N. W. 893 (1898).

[8] Note (1919) 4 A. L. R. 765; Cole v. George, *supra* n. 6. The same rule applies to the implication that a draft is paid from money owed by the drawee to the drawer. Schmulbach v. Williams, 95 W. Va. 281, 120 S. E. 600 (1923).

statute of limitations, a policy which seeks by the shorter five-year provision to prevent the bringing of actions upon stale claims difficult of proof except by parol evidence. On the other hand, where the implication is not one of oral proof but rather a hard and fast statutory warranty, the longer ten-year period achieves fairness as between the parties without opening the door to fraudulent claims.

WATERS AND WATERCOURSES — RAILWAY BRIDGE AS OBSTRUCTING THE FLOW — LIABILITY FOR DAMAGES RESULTING FROM UNUSUAL FLOOD. — In 1903 a railway company constructed a bridge across a creek, which structure proved insufficient to accommodate the floods of June 28 and July 11, 1932. As a result the lands above the obstruction were overflowed and damaged. Similar floods had occurred in 1861 and 1916. *Held*, that the instruction[1] given was not a basis for reversible error in view of other instructions granted in defendant's behalf clearly defining its duty. *Mitchell v. Virginian Ry. Co.*[2]

Liability for damages resulting from flood waters has become a peculiarly appropriate topic in view of contemporary circumstances. In all cases the first question in determining legal liability for damages resulting from obstructing the flow of a watercourse is whether the defendant was negligent. This is settled by applying the ordinary test of negligence, that is, whether a man of ordinary prudence under the circumstances would have foreseen harm to the plaintiff as a result of the defendant's act. To be free from negligence, the defendant must guard against such

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[1] The lower court, in its first instruction, told the jury, in substance, that the railway company had the duty in constructing the bridge "to provide for such unusual or extraordinary floods, as it should have been anticipated occasionally would occur in the future, because such unusual or extraordinary floods *may have* occurred in the past", and if *an* unprecedented flood occurred in 1916, and the bridge "caused such an obstruction that the lands above the same were overflowed by water", the railway company then had the duty to provide for such conditions thus established by said flood; and if "*an* unusual, extraordinary flood" came on June 28, 1932, "which caused the bridge to be obstructed" and the waters to injure the plaintiff's lands, "the duty then arose to meet the new conditions thus established", and if "by reason of past occurrences the flood of July 11, 1932, was in reasonable contemplation and should have been anticipated and guarded against by the Railroad Company, in the exercise of reasonable care and that they had the time and opportunity to do so", then the plaintiffs are entitled to damages sustained by them, *either* from the flood of June 28, 1932, or the flood of July 11, 1932, *or* from *both*.

[2] 183 S. E. 35 (W. Va. 1935).