time the particular deed in question was executed or the standard in use at the time the timber was cut?"

In view of the language employed in the deed of 1901, it cannot be doubted that the grantor intended to reserve to itself, its successors, and assigns, the timber rights of the land conveyed for a period of eighteen years. The timber reservation was not, however, full and complete, but restricted to merchantable timber.

[1] According to the great weight of authority, the term merchantable in timber deeds has reference to such timber as was marketable at the date of the deed, and, in the absence of provisions to the contrary, does not convey such as subsequently becomes merchantable by growth, or change in custom or marketability. Polley v. Ford, 190 Ky. 579, 227 S. W. 1007; Roberts v. Gress, 134 Ga. 271, 67 S. E. 802; Whitfield v. Rowland Lbr. Co., 152 N. C. 211, 67 S. E. 512; Robertson v. H. Western Lumber Co., 124 Miss. 606, 87 South. 120, and authorities there cited.

[2] Had the parties to the deed in the present case intended to confine the reservation to timber merchantable at the date of the deed they would not have added the words "for a period of 18 years from the date hereof." The reservation of all merchantable timber at the date of the deed would have been accomplished by the omission of these words. Their use cannot, therefore, be ignored, but must be given effect in construing the contract. Their use could serve but one purpose; that is, to include within the reservation of marketable timber, the timber subsequently becoming marketable by growth. This is the evident meaning of the language used.

There is nothing in the deed, however, that expressly or impliedly indicates that it was the intention to reserve timber that might subsequently become merchantable by reason of change in market conditions and in the absence of any such provision the merchantability is to be determined by the standard in use at the time the deed was executed, and not the standard that may have come into use at a subsequent time within the 18-year period. Authorities supra.

[3] The reservation in the deed of 1899 presents no serious difficulty. In it there is reserved to the grantor all merchantable timber standing or growing, or to be standing or growing upon the land for the period stated. This language is sufficiently comprehensive to include and does include timber subsequently becoming merchantable by growth.

[4] The test of merchantability in this instance is, of course, the same as in the case of the conveyance of 1901, and what has been said with reference thereto in construing that instrument, is applicable in construing the present one. In this case, as in that, there is no expressed or implied provision reserving timber that subsequently becomes marketable on account of changed market conditions, and in the absence of such a provision the standard of merchantability is to be tested by the standard in use at the date of the execution of the deed. To hold otherwise would be to import into the contract a provision not found therein.

In answering the certified questions, we hold: (1) That the test of merchantability in use at the date of the execution of the deed is the test to be applied to determine what trees had grown merchantable and not the standard in use at the time of the cutting of the timber. The deed of 1901 reserved all timber merchantable at the date of the execution of the deed, and all that subsequently became merchantable by growth during the stated period, tested by the standard of merchantability in use at the date of the deed. (2) The same answer applies as to the construction to be given in the deed of 1899. (3) The answers to questions 1 and 2 render unnecessary an answer to question No. 3.

CURETON, C. J. The opinion of the Commission of Appeals answering certified questions is adopted, and ordered certified to the Court of Civil Appeals.

AMERICAN NAT. INS. CO. v. COATES et al. (No. 372–3381.)

(Commission of Appeals of Texas, Section A. Jan. 3, 1923.)

1. States ⟹5—Each state may declare its own public policy.

Each state in the Union has the power by constitutional or statutory enactment to declare its own public policy.

2. Insurance ⟹438—Execution of insured for capital crime does not avoid life insurance contract as matter of "public policy."

That a man on whose life insurance is carried is convicted and executed for the commission of a capital offense does not of itself operate as a matter of public policy to avoid the contract of insurance; the public policy being that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Policy.]

3. Insurance ⟹438—Life policies held not unenforceable as against public policy because insured was executed for murder.

Where insured more than seven years after taking out incontestable life insurance poli-

cies under which his mother was the beneficiary was convicted of murder and executed, the policies were not thereby rendered unenforceable by the public policy of the state as declared in Const. art. 1, § 21 (Vernon's Ann. Civ. St. art. 2465), both providing that no conviction shall work corruption of blood or forfeiture of estate.

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by Mary Coates and others against the American National Insurance Company. From judgment for plaintiffs, defendant appealed to the Court of Civil Appeals, which rendered judgment for plaintiff and certified the case to the Supreme Court. Certified question answered.

C. W. Nugent, of Galveston, and Thompson, Barwise, Wharton & Hiner, Alfred McKnight, and F. B. Walker, all of Fort Worth, for appellant.

Slay, Simon & Smith, A. W. Christian, and C. E. McGaw, all of Fort Worth, for appellees.

RANDOLPH, J. The Court of Civil Appeals for the Second Supreme Judicial District of Texas has submitted to the Supreme Court of Texas the following statement and certified questions in the above-styled cause, and same has been referred to us for consideration and report thereon:

"In the district court of Tarrant county, Tex., Rufus Coates was duly and legally indicted, tried, convicted, and sentenced to be hanged for the murder of Zella Faulk, committed on June 3, 1917, and, in obedience to a warrant from that court, he was legally executed on November 8, 1918. Prior to the commission of that offense, he had obtained from the American National Insurance Company two life insurance policies, each for the sum of $135, the first dated May 4, 1908, and the second dated April 10, 1911. The insurance company was chartered under and by virtue of the laws of the state of Texas, and its principal office and place of business was in Galveston, which was the place of payment of all premiums, and the insured and the beneficiary both resided in Texas. Hence the policies were contracts governed by the laws of this state. Each policy contained these provisions:

" 'Incontestability. This policy shall be incontestable after two years from its date of issue for the amount due, provided premiums have been duly paid, except for fraud. * * * In event of the death of the insured the company may pay the sum of money due under this policy to the families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the insured at the time of death and the production by this company of a receipt signed by any or either of said persons shall be conclusive evidence that such sum has been paid to the persons entitled thereto, and that all claims under this policy have been fully satisfied.' * * * 'In the event of the death of the insured from suicide, whether sane or insane, within one year from the date hereof, the liability of the company shall be limited to a return of the premiums paid on this policy.' * * * 'This policy is issued upon an application which omits the warranty usually contained in applications, and contains the entire agreement between the company and the insured and the holder and owner hereof.' * * *

"At the time of the death of Rufus Coates, all premiums accruing on said policies had been duly paid and the policies were then in full force and effect. After his death, Mary Coates, his mother, and admittedly the rightful and only beneficiary of the policies, duly presented to the insurance company notices of her claims of benefits, and proofs of death, all in compliance with the terms of the policies and the requirements of the statutes applicable thereof. The insurance company refused payment of the amount claimed by the insured, to wit, the sum of $270, which was the aggregate of benefits named in the two policies, but tendered to Mary Coates the sum of $7.70 in full liquidation of the two policies, the amount so tendered being the aggregate of all premiums paid on the policies from the date of the murder of Zella Faulk to the date of the execution of Rufus Coates. That tender was refused by Mary Coates, who, joined by her husband, instituted this suit in the county court against the company to recover the amounts stipulated in the policies, together with statutory interest, penalties, and attorneys' fees for the failure of payment. A judgment was rendered in favor of plaintiff against the company for the amount of the second policy with interest penalties and attorneys' fees, but denying a recovery on the first policy. Both parties duly excepted to the judgment and gave notice of appeal. The defendant has perfected its appeal, and the plaintiff, after replying to defendant's assignments of error, has presented cross-assignments to that portion of the judgment denying her a recovery on the first policy.

"All assignments contained in briefs for the defendant company present the contention that, notwithstanding the incontestable clause in the policies, it would be against the public policy of this state to permit a recovery upon either insurance policy, since the insured came to his death at the hands of the law as a penalty for the commission of a crime; that by reason of such public policy his death, which was legally inflicted for a crime committed, was not an insurable risk, but was excepted therefrom, notwithstanding the clause of incontestability contained in the policies, and notwithstanding that, by the provisions of article 4741 of our statutes, which was enacted in 1909, the company was required to insert that clause in the second policy which was issued after its passage. That defense was presented in the defendant's answer to plaintiffs' petition, and defendant also pleaded the tender of premiums received from the insured.

"The converse of those propositions is the only contention presented in briefs for the plaintiff, both in reply to defendant's assignments, and by cross-assignments to the refusal of the court to allow a recovery on the first policy of insurance, as well as on the second.

"On a former day of its present term, this court overruled the contention so presented by defendant, and sustained the cross-assignment presented by plaintiff to the refusal of the court to allow a recovery on the first policy, as well as the second; and the judgment of

the trial court was so reformed as to allow a recovery on both policies. The conclusion reached by this court that neither of the contracts of insurance against the death of Rufus Coates inflicted as a punishment for crime was forbidden by the public policy of this state is in conflict with the decision of the Court of Civil Appeals of the Ninth Judicial District in the case of American Insurance Co. v. Munson, 202 S. W. 987.

"Appellant has filed in this court a motion for rehearing, which is still pending; also a motion to certify to your honorable court the question on which the two courts are in conflict. The latter motion has been granted. Accordingly, by reason of said conflict, and because, aside from such conflict, we deem it advisable so to do, we certify to your honorable court for determination whether or not this court erred in the conclusion reached upon the issue stated above. A copy of our opinion accompanies this certificate."

There are quite a number of cases outside of this state holding that recovery cannot be had upon a life insurance policy where the insured has been convicted and executed for a capital crime (Burt v. Union Central Life Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; N. W. Mutual Life Ins. Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. [N. S.] 57; Scarborough et al. v. American Nat. Ins. Co., 171 N. C. 353, 88 S. E. 482, L. R. A. 1918A, 896, Ann. Cas. 1917D, 1181; Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 353; Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693), but they are based upon the holding in the case of Amicable Society v. Bolland, decided by the House of Lords of England and reported in Bligh N. S. 194–211, or are rendered in cases where there are no constitutional or statutory provisions declaratory of a contrary public policy. The decision in the Bolland Case, supra, was rendered at a time when the laws of England recognized and enforced forfeitures as a punishment for crime, and the declaration of a public policy taken from the laws and decision was in harmony with the laws of England. However, we cannot agree to the reasoning in that case, and to illustrate why we cannot agree we quote from that opinion as follows:

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against—that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money —is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description with such a form of condition inserted in it in express terms cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went, at least, altogether void?"

The reasoning in the above quotation does not appeal to us. The hypothetical case stated presents one entirely different from the case the House of Lords was considering and from the case at bar. In the hypothetical case stated there is a contract contemplating the commission of a capital crime. No one would have the hardihood to say that a contract requiring the commission of a crime before the consideration would inure to the benefit of the insured would not be against public policy in any civilized country, as it operates to induce him to violate the laws of his country. In the instant case, one of the policies was executed May 4, 1908, and the other April 10, 1911. The insured was hanged November 8, 1918. Between the date of the last issued policy and the date of the death of the insured at the hands of the law more than seven years had elapsed. To presume that the insured at the time he obtained the insurance had in his mind an intention to commit a capital felony is to do violence to human nature. Criminals are supposed to have incentives inducing them to commit offenses, and the law requires in capital cases that a motive be shown for the commission of the crime. In this case, if the penalty of life imprisonment or death did not deter the insured from the commission of the crime, it would be a far-fetched conclusion and presumption to say that he might have committed the crime so that his mother could collect $200 or $300 insurance. To indulge in such a presumption requires that we believe that the insured had in his mind an intention of committing a capital felony for many years, and that during all that time he carried within him "a heart regardless of social duty and fatally bent on mischief," and was only waiting for an opportune time to vent his malice.

[1] The Burt Case, supra, is not in conflict with our holding in this case, and neither is the McCue Case. The Constitution of the United States contains no such provision as does our state Constitution, prohibiting forfeitures of estates for crimes, and consequently that decision is not declaratory of the public policy of this state. Each state in the union has the power, by constitutional or statutory enactments, to declare its own public policy.

The case of Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542, 14 L. R. A.

(N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129, declares upon that subject as follows:

"Each nation or state having the power to adopt a Constitution and legislate for itself necessarily has the inherent power to declare its own rules of public policy. There is nothing in international law or the comity between our states that requires our courts to enforce the consequences following the conviction for felony in obedience to the public policy of the state where the conviction is had, when to do so would be to depart from our own public policy on the same subject."

This right or power is recognized in the McCue Case, supra, where the Supreme Court of the United States says:

"The obligation of a contract undoubtedly depends upon the law under which it is made. In which state, then, Virginia or Wisconsin, was the policy made? In Equitable Life Assur. Soc. v. Clements [Equitable Life Assur. Soc. v. Pettus], 140 U. S. 226, 35 L. Ed. 497, 11 Sup. Ct. Rep. 822, the question arose whether the contract of insurance sued on was made in New York or Missouri. The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the office of the company, provided that the contract between the parties was completely set forth in the policy and the application therefor, taken together. The application declared that the contract should not take effect until the first premium should have been actually paid during the life of the person proposed for assurance. Two annual premiums were paid in Missouri, and the policy, at the request of the assured, was transmitted to him in Missouri, and there delivered to him. The court said: * * * 'Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract, and governed by the laws of Missouri."

The insured and the plaintiffs in this cause being all residents of the state, and the appellant being a corporation organized under the laws of this state, it is clear that the public policy of this state must control in the disposition of this case.

[2] Entertaining these views in order that we should hold that the policies sued on are unenforceable, we would have to hold that the very fact that a man is convicted and executed for the commission of a capital crime, of itself, operates as a matter of public policy to void the contract of insurance, which we cannot do. The broadest definition of public policy that we can find in the books is that given in volume 3, p. 2765, Bouvier's Law Dictionary, quoted by the Court of Civil Appeals in their opinion, which definition is as follows:

"It is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good."

Working the proposition out under this definition, can it be said that these contracts of insurance and the enforcement thereof are injurious to the public or against the public good? This question must be answered "No," unless it is answered "Yes," on the theory that, in addition to the death penalty inflicted on him, the insured is to be further penalized by having his right to make provision for his mother, in the event of his death, taken from him. Further definition of the phrase "public policy" is given by the same author on the said page 2765, as follows:

"Public policy is imposed by public acts, legislative and judicial, and not by private opinion, however eminent. It is said to be determined from legislative declarations, or, in their absence, from judicial decisions."

If the public policy of a state is manifested by public acts, legislative or judicial, then there is nothing in either in this state to indicate that the public policy is opposed to the enforcement of the policies sued on herein. There are no decisions in this state so holding except the decision in the case of American Insurance Co. v. Munson, by the Beaumont Court, cited in the certificate of the Court of Civil Appeals, and which is in direct conflict with the decision by the Fort Worth Court in this case. On the contrary, there is in our opinion an express declaration of the policy of this state as set out in article 1, § 21, of our state Constitution, and in article 2465, Vernon's Civil Statutes.

Article 1, § 21, of the Constitution of Texas is as follows:

"No conviction shall work corruption of blood, or forfeiture of estate; and the estates of those who destroy their own lives shall descend or vest as in case of natural death."

Article 2465, Vernon's Civil Statutes, provides as follows:

"No conviction shall work corruption of blood or forfeiture of estate, nor shall there be any forfeiture by reason of death by casualty; and the estate of those who destroy their own lives shall descend or vest as in the case of natural death."

[3] It being the policy of the state, as declared by these constitutional and statutory provisions, that no conviction shall work corruption of blood or forfeiture of estate, as applied to the inheritable estate of the party executed, we cannot see any reason why the same declaration should not be made to apply to the proceeds of an insurance policy, payable to beneficiaries who were in no wise a party to the offense against the law, and, as in this case, who would be under our statute of descent and distribution the parties who would benefit by the inheritable estate. In the one case the property of the felon accumulated during a course of years in various ways is declared to be nonforfeitable,

and we think that this declaration of policy should, by analogy, apply to contractual rights which he has acquired for the benefit of those dependent upon him. The case of Collins v. Metropolitan Life Insurance Co., supra, presents our view of the question herein discussed, and we quote from that decision as follows:

"If a man who is executed for crime has at his death $1,000 in real estate, $1,000 in chattels and $1,000 life insurance payable to his estate, his real estate descends to his heir and his personal chattels to his administrator, but the $1,000 life insurance must be left in the hands of the company who has received the premiums because it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policy holders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error's position. This contention seems to border closely on the absurd. We know of no rule of public policy in this state that will enforce this species of forfeiture, but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except the performance by the other, which will compel performance or award damages for the default against the delinquent party."

We therefore recommend to the Supreme Court that the certified question be answered: That the public policy of the state of Texas does not render the insurance policies in this case unenforceable, but that same be valid and subsisting contracts collectable by law.

CURETON, C. J. The opinion of the Commission of Appeals answering certified questions is adopted, and ordered certified to the Court of Civil Appeals.

BENSKIN et al. v. BARKSDALE.*
(No. 349-3086.)

(Commission of Appeals of Texas; Section B. Jan. 10, 1923.)

1. Landlord and tenant ⚷66(2) — Tenant's possession becomes adverse only by disclaimer of landlord's title.

A tenant cannot set up an adverse claim which may operate to bar the landlord's title by adverse possession under the statute of limitations, until he shall have expressly disaffirmed such title of his landlord and given him full notice that he claims to hold adversely thereto.

2. Landlord and tenant ⚷66(3)—Mere holding over is not disclaimer of landlord's title.

A mere holding over after the expiration of the term is not evidence of a tenant's adverse possession, for the tenant in such case becomes either a trespasser or a tenant of the landlord's option; and one succeeding to the possession of a tenant holding over, whether by purchase or inheritance, is equally disqualified with the original tenant to set up his possession as adverse to the landlord's right.

3. Landlord and tenant ⚷66(2)—Subtenant's possession is not adverse prior to disclaimer of landlord's title.

Where a tenant leased to another, such subtenant's possession was the landlord's possession until his adverse possession was made out, not by inference, but by clear and positive proof of a claim on his part of adverse possession and acquiescence therein on the part of the landlord after knowing the same.

4. Landlord and tenant ⚷66(2)—Whether subtenant disclaimed landlord's title to the latter's knowledge held for jury.

In trespass to try title, *held* that, the evidence being conflicting on the issues of whether defendant subtenant's possession was with assertion of title adverse to the landlord, and whether such claim was brought home to the landlord, such issues were for the jury.

5. Deeds ⚷93—Intention prevails.

In all contracts, including deeds, the intent of the parties, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law, and when the intention of the parties can be plainly ascertained arbitrary rules are not to be resorted to.

6. Deeds ⚷95—Effect must be given to all parts.

The intention of the parties is to be ascertained by considering all the provisions of the deed, and the deed should be so construed, if possible, as to give effect to all its parts.

7. Deeds ⚷97—First part of deed prevails where clear.

Wherever the first part of a deed is definite and certain and irreconcilable with later parts, the first part must prevail, but this rule is resorted to only where there is an irreconcilable conflict between the different parts of the instrument.

8. Deeds ⚷25—Deed held not a quitclaim.

A deed by a lessor, wherein the granting clause conveyed all his right, title, and interest in the premises, but the habendum clause was to the grantee, "his heirs and assigns forever," and no mention was made of the leasehold interest in the deed, either directly or by reference to any other document, *held* not to show an intent merely to quitclaim the leasehold interest of grantor.

9. Evidence ⚷461(2)—Parol evidence not admissible to alter unambiguous deed.

Where the terms of a deed are plain and intelligible, the intent cannot be altered by evidence of extraneous circumstances.

10. Adverse possession ⚷71(1)—Deed of fee by lessee held sufficient to support adverse possession.

Under article 5674 a deed of the fee by lessee *held* sufficient to support adverse possession.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied February 7, 1923.