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NOTES AND COMMENTS

SOME EFFECTS OF THE ALIEN LAND ACT IN WASHINGTON[1]

In General

Legislation restricting the ownership of land by aliens in the State of Washington, has given rise to many interesting questions of law. The Supreme Court of the State, beginning with the *Oregon Mortgage Co. v. Carstens* case[2] in 1896, and presently ending with the *Ying v. Kay* case[3] in 1933, has had manifold opportunities to answer a great portion of the perplexing problems that have arisen under the Alien Land laws. However, there remain many questions as yet undecided, and it is the purpose of this article to not only epitomize the conclusions already adjudicated, but also predict some probable results to situations which may arise in the future.

The constitutional[4] and statutory[5] provisions which prohibit the

[1] For Article "RIGHTS OF JAPANESE AND CHINESE ALIENS IN LAND IN WASHINGTON" see 6 Wash. Law Rev. 127 (1931).

[2] 16 Wash. 165, 47 Pac. 421 (1896.)

[3] 74 Wash. Dec. 98, 24 Pac. (2d) 596 (1933).

[4] WASH. CONST., Art. II, Sec. 33, provides: "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien shall be void: *Provided*, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

[5] Rem. Rev. Stat. 10582: "An alien shall not own land or take or hold title thereto. No person shall take or hold land for an alien. Land now held by or for aliens in violation of the Constitution of the State is forfeited to and declared to be the property of the State. Land hereafter conveyed to or for the use of aliens in violation of the Constitution or of this act shall thereby be forfeited to and become property of the State."

ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens, is in derogation of the common law At common law, aliens could take property by act of the parties, but not by operation of law. Thus title acquired by deed or devise was good against the whole world except the soverign until "office found", that is, until the fact of alienage was authoritatively established by a public officer upon an inquest held at the instance of the government. But there could be no inheritance by, from, or through an alien, for the reason that the law would never cast descent upon anyone who could not hold the estate.[6] The purpose of such a prohibition at common law was to prevent the acquisition of lands in large quantities by aliens and non-resident owners, so as to protect the state from the danger of allowing persons who owed it no allegience, to own land within its boundaries, and perhaps use the profits derived therefrom in acts of hostility to the state.[7]

In Washington, it has been established by a unanimity of decisions, that the constitutional provision prohibiting the ownership of lands by aliens, and declaring such conveyances to be void, means that the conveyance is *void against the state only*.[8] Thus before "office found" by the state in the nature of special escheat proceedings, an alien can transfer an indefeasible title to a third party qualified to take, and the state can not thereafter forfeit such lands.[9] Upon the death of an alien intestate before "office found," all property possessed by him descends to his heirs, whether citizens or alien, and does not escheat to the state or revert back to the grantor.[10]

Since an alien can transfer an indefeasible title to a citizen before escheat proceedings have been instigated, an agreement by an alien grantor to a citizen grantee can be specifically enforced.[11] Although an alien grantee can not specifically enforce a conveyance of land to himself,[12] since a court of equity will not lend its aid to the commission of an unlawful act, still it has been held that if the alien grantee assigns the contract to a citizen, the citizen assignee can specifically enforce the agreement,[13] and even though the assignee and alien agreed to divide the profits from a resale of the property [14] These holdings, though they seemingly appear to violate the fundamental principle of contract law, which axiomatically states that an assignee can get no better rights than his assignor had in the contract, still may be rationalized by several theories (1)Public policy favors the acquisition of property

[6] 1 R. C. L. p. 808.

[7] DEVLIN ON DEEDS (3d Ed.), Sec. 131.

[8] *Abrams v. State*, 45 Wash. 327, 88 Pac. 327 (1907).

[9] *Abrams v. State, supra*, note 8; *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 47 Pac. 421 (1896) *State ex rel. v. Commercial Co.*, 46 Wash. 104, 89 Pac. 471 (1907) *Prentice v. How*, 84 Wash. 136, 146 Pac. 388 (1915)

[10] *Abrams v. State*, note 8 *supra, Ying v. Kay*, 74 Wash. Dec. 98, 24 Pac. (2d) 596 (1933).

[11] *Oregon Mortgage Co. v. Carstens*, note 9 *supra.*

[12] *Ales v. Epstein*, 222 S. W 1012 (Mo. 1920).

[13] *Keene v. Zindorf*, 81 Wash. 152, 142 Pac. 484 (1914).

[14] *Mott v. Cline*, 253 Pac. 718 (Cal. 1927).

by citizens, and hence will not apply the alien restrictions as long as the party seeking to enforce the conveyance is a citizen, (2) that the notification by the assignee to the grantor, of the assignment and the assent thereto by the grantor, constitutes a new contract which is valid and enforceable; or (3) the alien may be treated as a mere "conduit" through which the grantor is to pass title to a qualified purchaser.

Although it has been repeatedly held that the only party entitled to question the title of an alien is the state, in an action to condemn land, defendant can set up the alienage of the plaintiff to defeat the action, upon the theory that the defendant is not questioning the right of the alien to the land which the alien then has, but questions the alien's ability to acquire new land from him.[15]

In 1921, a new law[16] was enacted in Washington to "put teeth" into the former restrictions on the ownership of land by aliens, which made it a gross misdemeanor for a citizen to *knowingly* transfer land to an alien, or for an alien in possession of land to refuse to disclose to the attorney general or the prosecuting attorney of the county wherein the land is situated, the nature and extent of his interest in the land. This statute did not change in any respect the former law upon this subject. Aliens may still dispose of the property so held by them before "office found"[17]

[15] *State ex. rel. Morrell v. Superior Court*, 33 Wash. 542, 74 Pac. 686 (1903) *State ex rel. Roberts v. Superior Court*, 165 Wash. 648, 5 Pac. (2d) 1037 (1931).

[16] Rem. Rev. Stat. 10587: "Whoever, (a) Knowingly transfers or conveys land or title to an alien; or (b) Knowingly takes land or title in trust for an alien; or (c) Holding in trust for an alien or title to land, either heretofore or hereafter acquired, fails for 30 days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prsecuting attorney of the county where the land is situated; or (d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or (e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county wherein the land is situated the nature and extent of interest of persons not citizens of the United States in the corporation or other organized group of persons; or (f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney wherein the land is situated the nature and extent of the alien's interest in and the title to the land, or (g) Willfully counsels, aids or abets another in violating or evading this act, is guilty of a gross misdemeanor."

[17] After the State has commenced escheat proceedings against an alien, it is a question whether the alien can defeat the action by declaring his intention to become a citizen thereafter. In *State ex rel. Tanner v. Stalheli*, 112 Wash. 344, 192 Pac. 991 (1920) the court intimates that the declaration cannot be made after action is begun. In that case, however, it was not necessary to decide this point, since the court found that as matter of fact, the alien's declaration was not made in good faith. However, there are decisions in other jurisdictions to the effect that since the State does not acquire title to the land until final judgment, that therefore the naturalization of an alien before judgment will defeat the right

and convey good indefeasible title to citizens;[18] as well as inherit land from either aliens or citizens.[19] However, the time wherein aliens must dispose of their land acquired either through inheritance, or by mortgage in good faith in the collection of debts, has been extended to sixteen years.[20]

INSURABLE INTEREST

The question arises as to whether or not an alien has an insurable interest in the property held by him in violation of law A thorough search into the "books" has been sterile of any precedents upon the particular point. Any solution to the problem therefore must be accomplished through study of analogies and the general principles of insurance law. That the insured must have an insurable interest in the subject matter of the policy is the first axiom in the law of insurance.[21] An insurable interest is generally defined as such an interest in property that a person is so situated with reference to it that its destruction will occasion him an actual loss of money or legal right, or incur him liability [22] At first blush therefore, it seems apparent that an alien has such an interest which can be insured.[23] However, the principle that there can be no insurable interest where the only right arises under a contract which is void, unenforceable, or illegal,[24] does serve to cast doubt upon the prima facie conclusion reached above.

Authorities are agreed as to the general rule, that if an insurance contract is intended to advance the illegal purpose of the insured, the contract is void,[25] although if such insurance policy does not further the illegality, but is merely collateral to it, it is not void. The true test is laid down by Judge Marshall in *Armstrong v Toler*,[26] to the effect that.

> "Where the consideration is illegal, immoral and wrong, or where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void."

Certainly the alien's ownership of land, although forbidden, is good as against the whole world, challengeable by the state only

of the State to enforce the escheat proceedings. *Huxley v. State*, 40 Ala. 689 (1867) *Jackson v. Beach*, 1 Johns. Cas. 399 (N. Y. 1800) *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532 (1894) see also *Osterman v. Baldwin*. 6 Wall (U. S.) 116, 18 L. Ed. 730 (1867) *Baker v. Westcott*, 11 S. W 157 (Tex. 1889).

[18] *State v. Shokuta*, 131 Wash. 291, 230 Pac. 166 (1924) *State v. Kosai*. 133 Wash. 442, 234 Pac. 5 (1925)

[19] *Ying v. Kay*, note 10 *supra*.

[20] Laws '33, p. 431, sec. 1. (Rem. Rev. Stat. 10584 (1933).

[21] *Wash. Fire Relief v. Albro*, 137 Wash. 31, 241 Pac. 356 (1925).

[22] Wash. Rem. Rev. Stat. sec 7033: "Insurable interest is every interest in property or any relation thereto, or liability in respect thereof, of such nature that a contemplated peril might directly damnify the insured."

[23] *Cetkowski v. Knutson*, 204 N. W 528, 40 A. L. R. 599 (Minn. 1925).

[24] JOYCE, INSURANCE, 2d Ed. Sec. 892, 893; COUCH ON INSURANCE, 1st Ed. Sec. 301, see *Hessen v. Iowa Ins. Co.*, 190 N. W 150, 30 A. L. R. 657 (Iowa 1922).

[25] 3 WILLISTON, CONTRACTS, sec. 1752; *Brown v. New Jersey Ins. Co.*, 14 Pac. (2d) 272 (Ore. 1932)

[26] 11 WHEAT, 258.

Until the State brings a special action of escheat, the alien has such an interest wherein he receives a benefit from its continued existence, and will suffer a loss from its destruction. The fact that an alien can convey an *indefeasible title* to third persons, and can perfect his own title thereto by becoming a citizen before "office found" proves unmistakably that this is a valuable interest which he should be able to protect. It is only upon the extreme view that the policy of the state is to discourage the holding of land by aliens at all events, that it would inflict so severe a penalty by denying recovery upon an insurance policy affecting the land. When we recall the words of Chancellor Kent, that the "law is very gentle in the construction of the disability of alienism, and rather contracts than extends its severity,"[27] it would seem very "impolitic" to impose this added "crown of thorns" upon the already burdened "brow" of aliens.[28]

The aliens ownership of lands, although forbidden, is not criminal as such. The statute[29] merely provides that the alien is guilty of a gross misdemeanor *upon his refusal* to divulge the location and interests of the land which he then holds. Since a "refusal" implies a previous request on the part of somebody else, it is evident, that until so requested, the alien commits no crime by the mere holding of land. The statute imposes no duty to voluntarily disclose this information on the part of the alien, as required from a trustee who discovers that he is holding for the benefit of an alien. Hence by no means can it be said that an alien's ownership of land as such is akin to the possession of contraband liquor under the "ancient" liquor laws.[30]

ACTION FOR PURCHASE PRICE

Another question as yet unadjudicated in this state or elsewhere, is whether or not a grantor who conveys land to an alien can recover the purchase price in an action at law. It is well settled that there can be no recovery upon a contract which violates some penal statute.[31] It follows therefore that the grantor would

[27] 2 KENT, 56-62, 6 L. Ed. 468 (1826.)

[28] The status of an alien's interest in land resembles somewhat the interest of a *bona fide* purchaser of a stolen car from a thief. Though in many jurisdictions (see annotation in 46 A. L. R. 526) it has been held that the purchaser acquires no interest which can be insured in the stolen car, still the leading case of *Barnett v. London Assurance Corp.*, 138 Wash. 673, 245 Pac. 3 (1926), points out that since the purchaser gets a title which is good against the whole world but the true owner, that therefore this indefeasible title can be insured, even as "sole and unconditional owner" under the policy. If the courts follow the reasoning in the stolen car cases, it must *a fortiori* hold that an alien has an insurable interest.

[29] Note 18, *supra.*

[30] Under the liquor cases, the courts have generally held that there is no insurable interest in such goods held in violation of penal statutes, *Kelly v. Ins. Co.*, 97 Mass. 284 (1867) *Wood v. First Nat. Fire Ins.*, 94 S. E. 622 (Ga. 1917) although there is some authority to the contrary. *Erb v. German Ins. Co.*, 67 N. W 583 (Iowa 1896) *Brown v. New Jersey Ins. Co.* Note 25, *supra. Mechanics Ins. Co. v. Hoover Distilling Co.*, 182 Fed. 590 (CCA 8th 1910).

[31] *Miller v. Howell*, 113 S. E. 621 (N. C. 1922) *Lloyd v. Railroad Co.*, 151 N. C. 536, 66 S. E. 604 (1909) *Balagurer v. Macey*, 238 S. W 322 (Tex. 1922) *McLaughlin v. Ardomore Loan Trust*, 95 Pac. 779 (Okla. 1908), *Arotzky v. Kropnitzky*, 120 Atl. 921 (N. J. 1923).

be barred from recovering, if at the time he conveyed title to an alien, he acted with knowledge of the grantee's alienage. But whether or not the grantor could recover the purchase price from an alien, where the grantor acts innocently, and without any knowledge that the grantee is an alien, seems to depend upon the further question, whether or not the grantor could rescind upon discovery of the disability of the grantee. Should the courts hold that once the deed is executed to an alien, the grantor loses all his rights in the subject matter as to rescission, then it would seem that upon principle, the grantee should not be able to set up his alienage to defeat action for the purchase price. In such a case, the conveyance is not a nullity as against the grantor, but operates as such only against the state. On the other hand, if the courts should give the grantor the right to rescind[32] on the theory that a fraud has been perpetrated on him, then recovery for the purchase price should be defeated, since the proper remedy in such a case would be rescission, which effects the purpose of the statute.

Upon the further question as to the right of a bona fide purchaser to recover upon a negotiable instrument executed by an alien for the purchase price of land sold to him by the payee, there should be no doubt. In Washington, the illegality of the consideration of a negotiable note does not vitiate it in the hands of a bona fide purchaser, whether the illegal act is malum in se or malum prohibitum, unless the statute making the act illegal, expressly or by implication makes the instrument void in the hands of all holders with or without notice.[33] It is submitted therefore, that since there is no statute of either sort in Washington, that therefore the alienage of the maker would be no defense upon a negotiable instrument in the hands of a bona fide purchaser.

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[32] Rescission might be granted on the ground of unilateral mistake where the parties have not changed their position, although there are very few cases to that effect. The general rule is that there can be no rescission for unilateral mistake. However, in the case of unilateral mistake known by the other party and relied on, rescission may be granted the same as in the case of mutual mistake. In *Baker v. Knight*, 160 Wash. 500, 295 Pac. 174 (1931) the court annulled the executory contract to convey land to an alien, where both parties acted innocently. In *Hart v. Nagasawa*, 24 Pac. (2d) 815 (Cal. 1933), court refused the grantor the right to rescind, where the contract was fully executed, the court saying that thereafter the State was the only party who could question the validity of the alien's title. See also *Town of Meredith v. Fullerton*, 139 Atl. 359 (N. H. 1927) *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879 (1905) *Calif. Delta Farms v. Chinese American Farms*, 268 Pac. 1050 (Cal. 1928) 278 Pac. 227 (Cal. 1929).

[33] *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828 (1909) M executed a negotiable note to P in part payment of premiums upon a policy of insurance. An excess rebate was allowed M in violation of the Anti-rebate Act, which punished violations thereof as misdemeanors. P indorsed note to E, a *bona fide* purchaser. Held, that defense of illegality was not available against a holder in due course, since it is not the policy of the law to render negotiable paper void in the hands of innocent holders where the staute has not so expressly declared. See also *C. I. T. Corp v. Byrnes*, 38 S. W (2d) 750 (Mo. 1931) BRANNAN, NEG. INST. (5th Ed.), p 556.