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IS IT A TORT TO CREATE AN OBLIGATION AGAINST A THIRD PARTY, WITHOUT RIGHT OR HIS CONSENT, WHEREBY ANOTHER MAY RIGHTFULLY DEPRIVE HIM OF HIS PROPERTY?

A holder of a negotiable instrument with notice of fraud, claiming under the defrauder and another having notice of the fraud, has passed it on to a bona fide purchaser without notice. Can he be held by the defrauded party in a quasi-contract action for money had and received, even before the obligation has been met by the plaintiff?

It is well settled that a holder with notice, not claiming under a bona fide purchaser for value, may not recover from the defrauded party on the instrument.[1] The personal creditor of

[1] *Mooney v. Mooney Co.*, 128 Pac. (Wash.) 225; *First Nat'l Bank v. Flour City Co.*, 136 N. W. (Minn.) 563; *Shur v. Hall & Lyon Co.*, 88 Atl. (R. I.) 801.

the treasurer or other fiscal officer of a corporation is held to have notice that such officer is misappropriating the funds of the corporation when he attempts to meet his debt with a corporation check or note.[2] But the cases have gone further. Such creditor, having accepted the check or note and realized on it, is liable to the corporation in an action for money had and received.[3] We have a different question before us. Suppose such creditor passes the instrument on to A for value, making him acquainted, however, with the whole situation; then suppose A passes it on to a bona fide holder for value, without notice,[4] who collects from the corporation; may the corporation recover from A in indebitatus assumpsit?

What is the basis of this quasi-contract action in which the defrauded party recovers from the personal creditor? The cases say that it is because he has gotten money to which he knows he has no right, and because he knows of the officer's disability so to use his principal's funds.[3] The courts do not hesitate to give this relief because of considerations of public policy, for the negotiability of instruments is interfered with in no way. But there seem to be more fundamental bases for these decisions. In the first place, the creditor, so long as he has the check or note in his own hands, is a converter of nothing but the actual paper itself. In his hands it is worth only a fraction of a cent, the value of the paper, and in an action of trover it is submitted that damages should be only one cent.[5] He does not have legal

[2] *Rochester & C. T. R. Co. v. Paviour,* 164 N. Y. 281; *Lanning v. Trust Co. of America,* 127 N. Y. Supp. 485.

[3] *Reynolds v. Gerdelman,* 170 S. W. (Mo.) 153, semble; *St. Louis Charcoal Co. v. Lewis,* 154 Mo. App. 548; *Lampson v. Beard,* 94 Fed. 30; *Ward v. City Trust Co.,* 192 N. Y. 61.

[4] A corporation check drawn by its fiscal officer does not carry on its face notice of any infirmities. *Merchants' Bank v. State Bank,* 10 Wall. 644.

[5] *Buck v. Kent,* 3 Vt. 99, allows a recovery of the face value of the instrument in an action for conversion, as do several other cases. However, it seems obvious that so long as the note is in the hands of one against whom the maker has a defense, the maker has been deprived of nothing but a piece of paper. As Justice Holmes says, in *Danforth v. Groton Water Co.,* 178 Mass. 472, "Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions." There has been no technical conversion of anything equal to the face value of the note. Some cases can be distinguished, for example, *Inhabitants of Otisfield v. Mayberry,* 63 Me. 197, where the note was paid, but the holder refused to give it up.

title to the instrument, for there has been no contract between him and the corporation. The fiscal agent had no actual authority to pass title from his principal to the creditor, and the creditor is in no position to claim that he had apparent authority. But the fact that the creditor does not himself have legal title does not preclude him from vesting legal title in an innocent purchaser, in accordance with the doctrines of the law merchant.[6] Along with possession of the paper he has the power, by passing the instrument into the hands of a bona fide purchaser for value without notice, of creating in that purchaser a right against the corporation to which the corporation has no defense, yet which was created without its consent. Depriving another of his property, without right and without his consent, is a tort—conversion. Why is not the creation of an obligation, without right or consent, whereby another may rightfully deprive him of his property, also a tort? The corporation is entitled to an injunction in equity to restrain the creditor from passing it on to an innocent purchaser.[7] *This tort* (not conversion) the creation of a liability in the corporation, without right, and against its will—*is the tort which is waived by the corporation when it sues in indebitatus assumpsit.*

But now suppose, instead of passing it on to a bona fide purchaser, that the creditor sells it to A, with notice. Is not A in a position exactly analogous to that of the creditor above? And when he passes it on to a bona fide purchaser for value without notice, is there any reason why he should not be held, just as the creditor himself would be?

This position is strengthened by the recent case of *Hamlin's Wizard Oil Co. v. U. S. Express Co.*[8] In that case the payee's

[6] The reason for this doctrine is that same public policy which gave rise to (a) market overt; (b) "money carries a clear title"; (c) the doctrine that a vendor, retaining possession after a sale to one person (by which that person gets title), may by subsequent acts vest title in another; (d) the Recording Acts, according to which one retaining title *on the books*, although it is actually in another, may transfer it to a third party; (e) the rule that one having ostensible, though not actual, authority to pass title may vest it in a third party, although contrary to the explicit, but secret, instructions of the true owner.

[7] In *Schmidt v. West*, 104 Fed. 272, the maker's name had been forged, and although the instrument could never be valid in anyone's hands, equity restrained its negotiation. *A fortiori* in this case, where it becomes valid in the hands of an innocent purchaser.

[8] 106 N. E. (Ill.) 623.

indorsement was forged and the instrument came into B's hands. B had negotiated for value, being without knowledge of any irregularity. But he had committed a technical conversion, having constructive notice. The payee waived the tort and recovered in indebitatus assumpsit. In that case the defendant was morally guiltless; in ours he was conscious of his unjust enrichment. In that, the plaintiff might have had recourse to his original debtor on the original contract, and also to the tort-feasor; in this, the corporation has recourse only against its treasurer, the tort-feasor.[9]

It is not necessary that the corporation should have been forced to meet the obligation before suit brought, for, in determining the measure of damages in an action, the plaintiff may show that he is under a liability to pay to another, as a result of the defendant's breach of duty, although he has not yet paid.[10]

It is submitted that a defrauded party may recover in an action of indebitatus assumpsit from anyone claiming under the defrauder and having notice of the fraud, if such person has negotiated the instrument to a bona fide purchaser for value.

SALE OF INTOXICATING LIQUORS BY A BONA FIDE SOCIAL CLUB WITHOUT A LICENSE.

There has been a great conflict in the cases on this subject in the past. Recently two more cases have been added to the already large number.[1] The first case deals with an unincor-

[9] If the corporation waives his tort and recovers from him in assumpsit, of course it may not recover from the creditor. *Security Co. v. Amer. Exch. Nat'l Bank,* 103 N. Y. Supp. 399.

[10] *Josling v. Irvine,* 6 H. & N. 512. (Liability arose because of plaintiff's inability to deliver goods, due to defendant's breach of contract.) *Randall v. Raper,* E. B. & E. 84. (Plaintiff's vendee claims compensation from plaintiff on a warranty. Defendant sold to plaintiff on same warranty.) *Spark v. Heslop,* 1 E. & E. 563. (Defendant agreed to answer to plaintiff for all expenses undergone in maintaining a certain suit. *Held,* plaintiff may recover the amount of his attorney's bill, which has been rendered, but not paid.) *Richardson v. Chasen,* 10 Q. B. 756. (Action for breach of agreement to assign a lease. Plaintiff recovers the bill of costs due his attorney for investigating the title, though such bill was not paid before action was brought.)

[1] *Gevinis v. State,* 107 N. E. (Ind.) 78; and *Commonwealth v. Woelz,* 106 N. E. (Mass.) 560.

porated club, and the second with an incorporated club. Both hold that the transfer of liquor by the club to a member constitutes an illegal sale and is a misdemeanor.

The facts of the first case are briefly these: the club was a social order, unincorporated, having rooms and equipment. Appellant was steward, having charge of the liquors, which had been purchased with club money. The plan of disposing of the liquor was to sell tickets or coupons (to lodge members only) which were good in exchange for definite quantities of liquor. There was no profit and the club had a select membership. The court held that when the liquor was purchased it belonged to the club members in common, and when a member received a definite portion, it belonged to him and that this constituted a sale within the meaning of the Statute forbidding sales without a license.

The second case differed from the first only in the fact that the club was incorporated. "In the present case the beer was owned not by the members but by the corporation, which is a distinct legal entity. . . . He (member) had no individual right or interest in the liquors owned by the corporation. In short, the transaction discloses the transfer of property from one person to another for a consideration of value, or a 'sale' in the ordinary meaning of the word."

Are these two cases right? On the first question, where the club is unincorporated, the decisions and courts are in hopeless conflict as to whether the transaction is a sale. The courts of Massachusetts have held that such a transaction is not a sale, but that it is merely a method of distributing common property.[2] So have the courts of other states.[3] Is this view sound? Whose property is it when it is purchased with the club funds? It is the property of all in common? Each one has as much right to it as the next member. When the liquor is drawn off, and the member passes over his coupon or money, the title to the property has changed, from an undivided interest with the other members to an absolute ownership of the amount in question. This transaction contains all the elements of sale, call it what

[2] *Com. v. Smith,* 102 Mass. 144; *Com. v. Pomphret,* 137 Mass. 564.

[3] *Barden v. Montana Club,* 10 Mont. 330; *Graff v. Evans,* 8 Q. B. 373; *Davies v. Bennett,* 1 K. B. 666; *Klein v. Livingston,* 177 Pa. 224; *Leim v. State,* 55 Md. 566; *People v. Adelphi Club,* 149 N. Y. 5; *State v. McMaster,* 35 S. C. 1.

you will.[4] "Each received liquor which mostly belonged to others and in which he had a minute undivided interest. For his money he received in exchange liquor which belonged to several others as well as to himself and converted it to his sole and separate use. This is surely a sale."[5] To say that the liquor when bought belonged to all in common and by a transaction which vests the title free from the interests of all others, therein is not sold would be flying right in the face of what the community regards as a sale and what the very ones who receive the liquor at the club regard as a sale. "I content myself with saying briefly, that I agree with the general opinion of the community."[6]

Now let us consider the attitude of the courts when the club is an incorporated one. By far the great weight of authority, and reason, consider such a transaction a sale.[7] The legal title to the liquor, purchased with the corporate funds, is in the corporation. By the transaction, the title is vested in the individual. This certainly contains all the elements of a sale. "An

[4] *People v. Law & Order Club,* 203 Ill. 127; *Mannont v. State,* 48 Ind. 21, *semble; Martin v. State,* 59 Ala. 34; *Russel v. State,* 116 Pac. (Wyo.) 451; *Nogales Club v. State,* 69 Miss. 218; *People v. Bradley,* 58 Hun 601, *semble; U. S. v. Alexis Club,* 98 Fed. 725; *State v. Neis,* 108 N. C. 787; *Manning v. City of Canon City,* 45 Colo. 571.

[5] *State v. Neis,* 108 N. C. 787.

[6] McPherson, J., in *U. S. v. Alexis,* 98 Fed. 725.

[7] *Martin v. State,* 59 Ala. 34; *Newark v. Essex Club,* 53 N. J. L. 99; *State v. Lockyear,* 95 N. C. 633; *County v. Boise Club,* 20 Idaho 421; *United States v. Alexis Club,* 98 Fed. 725; *Country Club v. People,* 228 Ill. 75; *People v. Soule,* 74 Mich. 205; *State v. Robinson,* 163 Mo. App. 221; *Cuzner v. California Club,* 100 Pac. (Cal.) 868 (holding that the statute does not apply to clubs who do not sell as a business); *City of Spokane v. Banighman,* 54 Wash. 315; *State v. Klein,* 93 Pac. (Ore.) 237; *State v. Mudie,* 115 N. W. (S. Dak.) 107; *Beauvoir Club v. State,* 42 So. (Ala.) 1040; *State v. Honcek,* 41 Kans. 87; *State v. Shumate,* 44 W. Va. 490; *Commonwealth v. Woelz,* 106 N. E. (Mass.) 560; *Mohrman v. State,* 105 Ga. 709; *State v. Maryland Club,* 105 Md. 585; *So. Shore Country Club v. People,* 228 Ill. 75; *State v. Minnesota Club,* 106 Minn. 515; *Chesapeake Club v. State,* 63 Md. 446; *University Club v. City of Louisville,* 7 Ky. Law Rep. 902; *Hermitage Club v. Shelton,* 104 Tenn. 101; Army and Navy Club, 8 App. D. C. 544. Contra, *Graff v. Evans,* 8 Q. B. D. 373; *Davies v. Bennett,* (1902) 1 K. B. 666; *People v. Adelphi Club,* 149 N. Y. 5; *Klein v. Livingston,* 177 Pa. 204; *Piedmont Club v. Commonwealth,* 87 Va. 541; *State v. Austin Club,* 89 Tex. 20; *Barden v. Montana Club,* 10 Mont. 330; *State v. McMaster,* 35 S. C. 1. Black on Intoxicating Liquors, Sec. 142.

essential difference between a corporation and a partnership is that the corporators have no legal title or interest in the corporate property, while the real and personal estate of the partnership is held by the partners. Shareholders are not tenants in common or co-owners of the property of the corporation in any sense; but the title thereto rests in the legal entity, called the 'corporation.'"[8]

On the other hand, the following is the basis of the view that it is not a sale. "The society is not a trading corporation but a voluntary association for social purposes. Each member is elected and each is a joint owner of all the corporate property and assets. Liquors are not *sold* to him by the corporation, but *furnished* him by the steward upon his paying into the common fund the cost of the article *furnished*."[9] This view is unsound because it assumes the title to corporate property is in the members of the club and not in the corporation. The same is true of the following extract: "Club buys the liquors and distributes them to members who pay for what they drink. They are *all* owners of the property in equal shares when purchased. Some drink; some do not. The one who drinks the others' shares puts back the value of these shares in the common treasury, for they are all owners of the property in equal shares when purchased. Therefore, the distribution is made equal by contribution. This does not constitute a sale. There is no element of bargain; only a method of distribution of common property."[10]

There are cases in which the decisions of the courts are based on the idea that a bona fide social club was not a public place within the meaning of statutes prohibiting the sale of liquor in public places or as a business.[11]

In State v. Warcholik,[12] the court said that, granting for the moment that a sale may be made to a member, it cannot be made to a non-member without a license, though the sale was made in the bona fide belief that the man was a member.

It would seem that both the cases cited in the beginning are correctly decided.

[8] *State v. Nurdie*, 115 N. W. (S. Dak.) 107.

[9] *Leim v. State*, 55 Md. 566.

[10] *Klein v. Livingston Club*, 177 Pa. St. 224.

[11] *Grant v. State*, 33 Tex. Cr. R. 527; *State v. Austin Club*, 89 Tex. 20; *Manassas Club v. City*, 121 Ala. 561.

[12] 80 Conn. 351.

SPECIFIC PERFORMANCE OF A PAROL CONTRACT FOR THE SALE OF LAND.

The question of when a parol contract for the sale of land will be taken out of the Statute of Frauds is one of great interest and upon which the cases are greatly in conflict. To add to the difficulties is the fact that the cases abound in dicta, often grossly inaccurate. The cases themselves, while they may be fundamentally correct, often give enormous grounds for the decisions.

But the mass of cases, taken as a whole, show the growth and trend of the doctrine, and though the results arrived at vary in different jurisdictions, it is chiefly because the courts have not all advanced to the same point of progress. It is here proposed to trace the evolution of the doctrine.

The statute was passed in order to avoid frauds and perjuries, which were but too frequently met with in actions regarding lands. It was felt that a contract for the sale of the land should be evidenced by something more definite and certain than mere parol testimony, which, owing to the fact that neither party could testify in his own behalf, could be easily manufactured by an unscrupulous and designing plaintiff. But it was soon seen that the statute had another effect; it enabled a vendor to defraud an innocent purchaser, who in reliance upon oral promises had entered into the possession of the land, by later setting up the statute to prevent the purchaser from obtaining specific performance of the contract.

The courts of equity therefore, soon after the passage of the statute, gave specific performance in a number of cases, giving no reasons for it,[1] or else giving the very general reason that it would be a fraud upon the vendee not to do so.[2] In *Clynan v. Cooke*[3] the Lord Chancellor allowed specific performance on the ground that "if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. For the purpose of defending himself, such evidence (i. e. of the parol agreement) was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have pro-

[1] *Butcher v. Stapeley,* 1 Vernon 363; *Pyke v. Williams,* 2 Vernon 456; Earl of Aylesford's Case, 1 Geo. 2. See 26 Harv. L. Rev. 343.

[2] *Attorney General v. Day,* 1 Ves. 218.

[3] 1 Sch. & Lef. 22. Contra, *Glass v. Hulbut,* 102 Mass. 24.

ceeded in permitting the partial performance of an agreement to be a ground for avoiding the statute." This manifestly is incorrect, as the court might well admit evidence of the parol agreement as a defense to an action of trespass without violating in the least the express terms of the statute. But to go beyond this and allow the purchaser to sue for specific performance goes further than is required for his protection on that ground. This erroneous reason was also given in *Gregory v. Mitchell*,[4] though the court there indicated the true ground, namely, that the plaintiff had been permitted to make expenditures upon the premises and it would be unjust to him if the defendant should not go on with the contract. Thereafter the courts abandoned this erroneous reason and allowed specific performance on the ground of constructive fraud. Great injustice would arise if a party were permitted to escape from the engagements he had entered into, upon the ground of the Statute of Frauds, after the other party had, upon the faith of such agreement, expended his money or otherwise acted in execution of the agreement.[5]

But, as said in *Givens v. Calder*,[6] the judges became very astute in laying hold of circumstances in order to enforce parol agreements. In avoiding Scylla they were in peril of Charybdis. Just as parol evidence had been a source of fraud before the statute, so now the admission of evidence of the parol contract under which the plaintiff alleged he had acted had become productive of frauds. There was a great outcry against the former laxity of the courts. The judges began to insist that if a party set up part performance, he must show acts unequivocally referring to and resulting from that agreement.[7] The pendulum is never swung in the opposite direction without being swung too far. In their insistence upon unequivocal proof of the contract, the courts failed to scrutinize carefully the alleged fraud. As a result countless cases granted specific performance where the fraud could be adequately remedied at law and where, therefore, there was no need for specific performance.[8] And many a plaintiff was refused specific performance because the parol contract was not evidenced by such acts as were deemed to be "unequivo-

[4] 18 Ves. 328.

[5] *Mundy v. Joliffe*, 5 Myl. & Cr. 167.

[6] Desaus Ch. Rep. 171.

[7] *Boyd v. Cleghorn*, 94 Va. 780; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Morphett v. Jones*, 1 Swanst. 172; *Phillips v. Thompson*, 1 Johns. Ch. 131.

[8] *Andrews v. Babcock*, 63 Conn. 109; 36 Cyc. 654.

cal evidence of the contract" even though the court itself acknowledged that there was no other adequate remedy.[9]

But the pendulum is now swinging back. The courts are less ready to grant specific performance and prefer either to leave the party to his remedy at law, or themselves to give compensation and not specific performance.[10] But when specific performance is the only adequate remedy, the courts are more ready to grant it,[11] even though the vendee has not been let into possession,[12] an indispensable prerequisite to the maintenance of a suit for specific performance in the earlier cases, and indeed still so in those jurisdictions which cling to the evidential aspect of the question.[13]

Our courts are constantly striving to approximate absolute justice. Where there is a wrong, then they desire to give a remedy. The trend of the better modern decisions is in accordance with this. Where the plaintiff can satisfactorily show that a parol contract was entered into, and that it would be inequitable for the defendant to refuse to perform, there they will decree specific performance. They neither cling to the severe evidential rules of the older decisions, nor will they grant specific performance where they can give other adequate relief.

Is the Statute of Frauds nullified by this doctrine and if not, on what does the plaintiff sue, since he cannot sue upon the parol contract? The basis of the action is equitable fraud. The suit is not upon the contract,[14] but upon the equities arising from the inequitable conduct of the defendant.[15] Thus the authority of the statute is upheld as a shield, while by a careful and discriminating application of the doctrine, it is prevented from being used as a sword.

This modern view of the rule was adopted and followed in the recent case of *Clinchfield Coal Corporation v. Steinman*, 217 Fed. Rep. 875.

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[9] *Maddison v. Alderson*, L. R. 8 A. C. 467.

[10] *Pankhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Forrister v. Sullivan*, 132 S. W. (Mo.) 722; *Weeks v. Land*, 69 N. H. 78; *Cooper v. Colsom*, 66 N. J. Eq. 328; *Gallagher v. Gallagher*, 31 W. Va. 9; *Burns v. Daggett*, 141 Mass. 368.

[11] *Johnson v. Riseberg*, 33 N. W. (Neb.) 183; *Bridgewater v. Hooks*, 159 S. W. (Tex.) 1008; *Fred v. Asbury*, 152 S. W. (Ark.) 155.

[12] *Gladville v. McDole*, 247 Ill. 34.

[13] *Maddison v. Alderson*, L. R. 8 A. C. 467.

[14] Contra. "Part performance will take the case out of the statute and support the suit *on the agreement*." *Brown v. Pinniger*, 81 N. J. Eq. 229.

[15] *Maddison v. Alderson*, L. R. 8 A. C. 467; *Gladville v. McDole*, 247 Ill. 34.