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EQUITY—RESCISSION FOR FRAUD—EQUITABLE LIEN IN AID OF RESTITUTION—Defendant had an option to buy certain land at $95 per acre. He induced the plaintiff to take 100 acres at $300 per acre by fraudulently representing the land to be of the same value and quality as some he had previously sold her, and by concealing the existence of the option. Defendant used $20,000 of plaintiff's money to purchase and improve another tract of land as a homestead. Plaintiff seeks to have the contract of purchase rescinded and to secure a lien on the home-

stead. *Held*, conveyance of the 100 acre tract rescinded and title to it restored to defendant, plaintiff being given an equitable lien on defendant's homestead for the $20,000 of her funds traceable into that property, and judgment for the balance of her net expenditure. *Bush v. Gaffney*, (Tex. Civ. App. 1935) 84 S. W. (2d) 759.

It is familiar doctrine that one who is induced to make a contract by fraud is entitled to rescission of the contract and to restitution of the property that he gave in reliance upon it.[1] The principal case represents another instance of the extension of equitable remedies into the field of rescission of commercial contracts for fraud. As early as 1832 the Court of Exchequer entertained a bill for the purpose of reaching corporate stock purchased with the proceeds of a contract induced by fraud, in the face of defendant's objection that this was an unprecedented step, going far beyond the established limits of equitable remedies.[2] A leading American case [3] admitted that special favor was due a fiduciary relationship, but decided to embrace "quasi-trusts" and to enforce "equitable duties," and allowed a constructive trust after rescission of a contract for fraud. This view has received other express support,[4] and Dean Ames seems to consider it the "modern" rule and endorses it.[5] That defendant in the principal case invested the funds in a homestead does not itself offer a difficulty, for it is well established that homestead exemptions will not prevent the granting of equitable liens in cases of theft or misappropriation by fiduciaries.[6] Constructive trusts and equitable liens will only be required in such cases, however, when the defendant is uncol-

[1] CLARK, EQUITY 504 (1924); 3 BOGERT, TRUSTS AND TRUSTEES, § 473 (1935). On rescission of contract of deposit for fraud, see 20 A. L. R. 1206 (1922) and 25 A. L. R. 728 (1923). On putting defrauded party *in statu quo*, see CLARK, EQUITY, § 379 (1924), and also 13 HARV. L. REV. 410 (1900). On effect of rescission on legal title, see 32 YALE L. J. 267 (1923).

[2] Small v. Attwood, Younge 407, 159 Eng. Rep. 1051 (1832).

[3] American Sugar Refining Co. v. Fancher, 145 N. Y. 552, 40 N. E. 206 (1895).

[4] General Motors Acceptance Corp. v. Larson, 110 N. J. Eq. 305, 159 A. 819 (1932); and see Whalen v. Marling, 176 Wis. 441, 187 N. W. 169 (1922); and Exchange State Bank v. Poindexter, 137 Kan. 101, 19 P. (2d) 705 (1933), commented on in 18 MINN. L. REV. 366 (1934) Several courts have reached the same conclusion in cases where there is no apparent insolvency of the defendant: Harrison v. Tierney, 254 Ill. 271, 98 N. E. 523 (1912); Success Realty Co. v. Trowbridge, 50 Okla. 402, 150 P. 898 (1915); Traders' Bank of Canada v. Fraser, 162 Mich. 315, 127 N. W. 291 (1910). For cases of banks taking deposits while insolvent, see: Boatright v. Rankin, 150 S. C. 374, 148 S. E. 214 (1929); Marvin v. Martin, (C. C. A. 6th, 1927) 20 F. (2d) 746; People's Nat. Bank v. Waggonner, 185 N. C. 297, 117 S. E. 6 (1923); Atkinson v. Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178 (1889).

[5] Ames, "Following Misappropriated Money into Its Product," 19 HARV. L. REV. 511 at 513 (1906).

[6] Warsco v. Oshkosh Savings & Trust Co., 190 Wis. 87, 208 N. W. 886 (1926); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925); Smith v. Green, (Tex. Civ. App. 1922) 243 S. W. 1006; First Nat. Bank of Ellinger v. Zelesky, (Tex. Civ. App. 1924) 262 S. W. 190; American Ry. Express v. Houle, 169 Minn. 209, 210 N. W. 889 (1926). See also 43 A. L. R. 1446 (1926). For the Texas statute applicable to the principal case, see Tex. Stat. (1928), Art. 3833.

lectible and when such remedies aim in effect at a preference over other creditors. It is not at all clear that a preference is desirable in such situations. This is not a case of violation of an express trust or other fiduciary relationship. In such cases courts have been quick to aid the petitioner by a trust or lien. But it does not follow that the same should be done where the parties were strangers, engaging in an ordinary commercial transaction in which plaintiff clearly meant to rely on defendant's general credit and simply failed to bargain for ample security. Every case cited by the Texas court as authority for its position involved a fiduciary relationship, though that element was not always emphasized.[7] In most instances where texts or judicial opinions contain broad language as to the use of a lien for restitution of property taken by fraud, the writer is really contemplating a fiduciary relationship.[8] There is considerable judicial opinion doubting the social desirability of such an extension of equitable preferences. Courts strictly limit preferences to property that can be traced, and then refuse to apply ordinary tracing fictions in cases where the trust is merely an implied one arising from fraud.[9] The same attitude appears in cases arising out of the Ponzi frauds.[10] Even in cases of fiduciary relationships, any slight indication that the defrauded cestui is relying on something other than his equity remedy may at once be labeled a "choice of remedy" and defeat the preference.[11] It would seem that the type of relief given in the principal case should be granted only after careful examination of the conflicting interests on either side, even though related fields provide a machinery that can readily be adapted to the purpose at hand.

J. I. W.

[7] First Nat. Bank of Ellinger v. Zelesky, (Tex. Civ. App. 1924) 262 S. W. 190.

[8] 18 MINN. L. REV. 366 (1934); also see 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 1051 (1918), where the writer denies that we need a fiduciary relationship in order to impose a constructive trust—but seems to have in mind the case of theft. See also Cardozo, J., in Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922); and see Massachusetts Bonding & Ins. Co, v. Josselyn, 224 Mich. 159, 194 N. W. 548 (1923).

[9] People v. California Safe Deposit & T. Co., 175 Cal. 756, 167 P. 388 (1917); First State Bank of Corwith v. Oelke, 149 Iowa 662, 129 N. W. 70 (1910); also see Brandeis, J., in St. Louis & S. F. R. R. v. Spiller, 274 U. S. 304, 47 S. Ct. 635 (1926).

[10] Cunningham v. Brown, 265 U. S. 1, 44 S. Ct. 424 (1923); Downing v. Cunningham, 256 Mass. 285 ,152 N. E. 365 (1926).

[11] Oliver v. Piatt, 44 U. S. 333 (1845); Lathrop v. Bampton, 31 Cal. 17 (1866); see also BOGERT, TRUSTS 506 (1921); also see 4 BOGERT, TRUSTS AND TRUSTEES, §§ 945, 946, 867 (1935); and see 19 VA. L. REV. 72 (1932), and cases there cited.