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# Note and Comment

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## NOTE AND COMMENT.

CONCEALING A SECRET TRUST BY MAKING AN ABSOLUTE TESTAMENTARY GIFT TO TESTATOR'S SOLICITOR.—How to effect a testamentary gift to charity, invalid by statute, if made directly to a charitable institution or upon trust, express or implied, for such purpose, is a question of frequent occurrence in the many States that limit the amount or purposes for which property may be devised for charitable ends.

A recent California decision upheld a testamentary gift made to testatrix's solicitor under the following circumstances. Testatrix, the day before the will was drawn, explained to her solicitor "that she wished to leave $200,000" to erect a memorial gate. He expressed doubt of the validity of such a gift, and the next day returned and gave his reasons. She thereupon suggested that he and Mr. Spreckels take the bequest as park commissioners. The solicitor replied that they would take in trust as public officers and the gift would still be void. At her suggestion that they take individually he said, "You can give your property to any one you please, but you cannot make a trust of it." She said she wished to give it absolutely and that they

might "do with it as (they) please." Accordingly, the will was so drawn, leaving the property to the attorney and Mr. Spreckels, and stating that testatrix had abandoned the idea of a memorial gate and left the money without any understanding or trust as to its appropriation. After testatrix's death, these two legatees executed a declaration of trust to appropriate the money to the erection of such memorial gate. A direct bequest for such purpose would have been invalid as to the greater part of the legacy because in California testatrix could not have devised or bequeathed more than a third of her estate to charitable uses, CIVIL CODE 1313. *O'Donnell, et al.* v. *Murphy, et al.* (Dist. Ct. of Appeal, re-hearing denied by Supreme Court, Cal. Feb. 9, 1912), 120 Pac. 1076.

A statute prohibiting charitable bequests cannot be evaded by a secret trust. If such a trust is disclosed by any means, the devise is invalid. 1 JARMAN, WILLS, Ed. 6, 195. Accordingly, the question arises how is a secret trust to be fastened upon a legacy absolute upon its face? In England the point is well determined to be a question of fact, requiring clear proof of two distinct elements. First, did the testator intend that the gift should be appropriated for a charitable purpose? and, secondly, was his intention that the devise should not be taken beneficially known to the devisee and the devise accepted on that footing? *Wallgrave* v. *Tebbs*, 2 K. & J. 313, 4 W. R. 194; *Jones* v. *Badley*, L. R. 3 Ch. App. 364; *McCormick* v. *Grogan*, L. R. 4 H. L. 82, 17 W. R. 961. "The trust springs from the intention of the testator and the promise of the legatee." *Amherst College* v. *Ritch*, 151 N. Y. 282.

If it distinctly appears that the testator preferred to leave the disposal of his property within the discretion of the legatee, there is no ground for the theory of a trust. "Whatever moral obligation there may be, no legal obligation rests upon him." *Amherst College* v. *Ritch, supra.* In *McCormick* v. *Grogan*, above cited, testator devised his entire estate to a friend in whom he had great confidence and left with his will a letter of instructions. The House of Lords decided that the letter of instructions was in the nature of a confidential communication regarding the distribution of the estate, and that the testator at the same time endeavored to invest the devisee "with all his own irresponsibility in carrying them into effect." This decision points out that the testator may express his own idea as to the proper disposition of his property and that such does not necessarily constitute an "intention" that his property must be so disposed of. In *Lomax* v. *Ripley*, 3 Sm. & Giff. 48, it was held, after great consideration, that the fact that the devisee, who was the testator's wife, intended to carry out his desires and purpose (to found a charity) of which she was fully cognizant, did not invalidate the gift because he "refrained by instruction and premeditation from declaring any trust or imposing any obligation or exacting any promise for" the fulfillment of his plan. But in *Pilkington* v. *Boughey*, 12 Sim. 114, an intimation that testator trusted his devise would be disposed of in a manner that he would approve, although the matter was expressly left in the discretion of the trustees, was held sufficient to defeat the gift, because it was shown that the testator desired the building of a chapel in violation of the statute of

mortmain. Testator's intent is in such cases difficult to determine, but usually, as in *Lomax* v. *Ripley,* the court prefers to believe that it is just as the will expresses it, that is, that the gift is absolute. But the difficulty which arises in the principal case is that the will was drawn by the beneficiary, the solicitor.

When the beneficiary knows that the testator intended the property to be applied for purposes other than his own benefit, and "either expressly promises or by silence implies that he will carry the testator's intention into effect and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust." *Wallgrave* v. *Tebbs,* above cited. Once testator's intent is communicated to the beneficiary, the point is: did he promise, expressly or impliedly, to carry it into effect? Knowledge of testator's hope or desire is not of itself sufficient. The assent must be enforceable "on the footing of a breach of a promise or engagement. * * * binding on the conscience." *Lomax* v. *Ripley, supra.* In *Tee* v. *Ferris,* 2 K. & J. 357, the will and a memorandum of testator's wishes were read to the legatee and his silence under such circumstances was held to be equivalent to an express assent. *Accord: Springett* v. *Jenings,* L. R. 10 Eq. 488. There is no necessity for a bargain between the testator and the trustee. *Moss* v. *Cooper,* 1 J. & H. 352. The power of a court of equity to prevent fraud authorizes it to fasten a trust upon a testamentary gift secured through the assent of an agent, silence being held equivalent to consent. *In re Stirk's Estate* (Pa. 1911), 81 Atl. 187, 10 MICH. L. REV. 250, *Russell* v. *Jackson,* 9 Hare, 387.

*Rowbotham* v. *Dunnett,* L. R. 8 Ch. D. 430, supports the principal case. There an absolute gift was made to testatrix's solicitor, who had advised his client that a direct devise of such a sum for charity was illegal. The Vice-Chancellor adopted the rule laid down in *Wallgrave* v. *Tebbs,* and upheld the gift on the ground that the devisee had not assented to the testatrix's plan and that no obligation had been imposed upon him. The court, however, was in doubt about the case and refused to allow costs. Considering the confidential relation between an attorney and his client, which fact was not mentioned in the case just cited, there seems good reason for doubt. Judge FINCH characterized a gift to a solicitor for a secret and illegal purpose, as follows: "It exposes testators to the suggestion of unnecessary difficulties as inducements to the artifice of an absolute devise, concealing an illegal trust. It exposes the devisee to temptation and, even when he acts honestly, to severe and unrelenting criticism. It subserves no good or useful purpose." *O'Hara et al.* v. *Dudley, et al.,* 95 N. Y. 403. Finally, considering whether the solicitor in truth assented to the desire originally expressed by the testatrix, the question arises how could he do other than assent, or else commit a fraud? One in such a fiduciary situation, and about to be given a great sum of money, knowing at the time that the donor desired the property to be disposed of in a particular manner, would be under a duty to declare his purposes if he intended to dispose of it in a different way. If he should not be under such a duty, then what is there to prevent an unscrupulous attorney procuring similar bequests to himself upon representing the principal case to be the law and after obtaining such a gift devoting it with impunity to his own purposes? D. L. L.

CONFLICT OF STATE AND FEDERAL REGULATIONS OF INTERSTATE COMMERCE BEFORE THE LATTER BECOMES OPERATIVE.—In July, 1907, the Northern Pacific Railway Company, in operating a train which was engaged in interstate commerce in the State of Washington, permitted some of the train crew to remain on duty more than sixteen consecutive hours. This was contrary to the federal "hours of service" law of March 4th, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1909, p. 1170; but a clause of that act provided that it should not become operative until March 4th, 1908. Therefore the railroad was not liable under the federal act; but the State of Washington sought to enforce a State law, the provisions of which were similar to those in the federal statute. The United States Supreme Court held that the enactment of the federal act precluded a State, during the period between the date of that act and the time when it should go into effect, from enforcing a State law concerning the same subject. *Northern Pac. Ry. Co.* v. *State of Washington* (1912), 32 Sup. Ct. 160.

The court reasoned that the right of the State to apply its police power for the purpose of regulating interstate commerce exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. The Supreme Court of Wisconsin, with reference to a similar case, held that Congress postponed the date when this law should become operative because it desired to allow interstate railroads a reasonable time in which to adjust their business to the new restrictions. *State* v. *Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 117 N. W. 686. This practically amounts to saying that Congress intended to suspend all laws on this subject for one year. The Supreme Court of Missouri held that this act, although not yet operative, superseded a similar law of that State; the court said that this federal enactment "must be construed as a notice to all State legislatures, first, that Congress has occupied the ground by its statutory regulations, and second, that in its high wisdom it has prescribed and marked out a transition or preparatory period of one year." *State* v. *Mo. Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500.

Although the decision in the principal case has settled the law on this subject, the contrary holding would have been supported by much reason and authority. "A law must be understood as beginning to speak at the moment it takes effect, and not before. If passed to take effect at a future day, it must be construed as if passed on that day, and ordered to take immediate effect." *Rice* v. *Ruddiman*, 10 Mich. 125. See also *Price* v .*Hopkin*, 13 Mich. 318; *Grant* v. *Alpena*, 107 Mich. 335, 65 N. W. 230; *Galveston, etc., R. Co.* v. *State*, 81 Tex. 572; *Jackman* v. *Garland*, 64 Me. 133; *Evansville etc. R. Co.* v. *Barbee*, 59 Ind. 592; 26 AM. & ENG. ENCY. LAW, Ed. 2, p. 565. The federal Bankrupt Act of 1841 was held not to have superseded the State laws until it went into operation one year after its enactment. *Ex parte Eames*, 2 Story 322; *Larrabee* v. *Talbott*, 5 Gill. (Md.) 426. With reference to the federal Bankrupt Act of March 2nd, 1867, it was held that, in so far as it operated to supersede the State insolvency laws, it did not take effect until the date on which the act was to become fully operative. *Martin* v. *Berry*, 37 Cal. 208; *Day* v. *Bardwell*, 97 Mass. 246; *Chamberlain* v. *Perkins*, 51 N. H. 336; *Augs-*

*bury* v. *Crossman*, 10 Hun 389. In a case, in which the facts were identical with those in the principal case, it was held that the federal "hours of service" law, during the period before it went into operation, did not supersede a State law on the same subject. The court said:—"We do not see how an act which does not by its own terms become a rule of conduct until a future time, can be said to displace another existing rule on the same subject during the interval between the time of its enactment and the time it becomes operative." *State* v. *Northern Pac. R. Co.*, 36 Mont. 582, 93 Pac. 945. When the principal case was tried in the Supreme Court of Washington that court said that when a law "goes into effect for one purpose it goes into effect for all purposes. So with this statute, it can not be a law between the day of its passage and the day it is made to go into effect, for the sole purpose of superseding the State statute, and not a law for any other purpose." *State* v. *Northern Pac. Ry. Co.*, 53 Wash. 673, 102 Pac. 876.

The effect of the decision in the principal case is to free the railroads from the restraint of any statute whatsoever on this subject during the period between the approval of such an act and the date on which it is to become operative. It is perhaps worthy of notice that in all those cases wherein the decisions are contrary to that in the principal case, the State statute which was sought to be enforced had been enacted before the enactment of the federal statute; while in the cases wherein the decisions agree with the holding in the principal case, the State statute had been enacted subsequent to the enactment of the federal act. The facts of the principal case place it in the latter class. This difference in the facts, although not mentioned as a controlling influence in any of the cases, may have been very influential in causing the courts to reach diverse decisions. P. P. F.

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ADVERSE POSSESSION BY AN ALIEN AND THE EFFECT OF STATUTE REMOVING AN ALIEN'S DISABILITY TO INHERIT.—The question whether an alien under disability to inherit at the time of taking possession may acquire title to land by adverse possession was recently passed upon by the Supreme Court of the State of Iowa in the case of *Hanson* v. *Gallagher* (Iowa 1912), 134 N. W. 421. Plaintiff claimed title by adverse possession. He and his brother Patrick came to the United States from Ireland about 1854. Patrick acquired title to the land in controversy by entry under the United States land laws and secured a proper certificate of entry. He died intestate and unmarried in 1859, leaving surviving him plaintiff, his sole relative in the United States, and his father, mother and other sisters and brothers, non-resident aliens. Plaintiff took possession of the premises soon after the death of his brother; procured the issuance to himself of a patent therefor, upon surrender of the certificate of entry which had come into his possession; improved and cultivated the land; paid the taxes thereon, and remained in undisturbed possession for over 20 years. Plaintiff was and is an alien. Prior to 1868 a non-resident alien could not inherit lands in Iowa, but, under an act passed that year, made retroactive in operation, aliens were made capable to inherit. The

mother died after plaintiff had been in possession over ten years. Defendants, alien brothers and sisters of plaintiff, contended that plaintiff's possession, in its inception, was as an heir and therefore not hostile to the defendant co-heirs who were tenants in common with him. The court held that plaintiff was not an heir at the time of entry; that the effect of the enabling act was immaterial because at the time of its enactment plaintiff had been in possession asserting for himself the rights incident to ownership; and that plaintiff was entitled to a decree quieting title in him. The court conceded that plaintiff had no color of title when he entered, but stated that in Iowa an unequivocal claim to the property and possession as against the whole world is sufficient basis for the running of the statute of limitations. "Claim of title is sufficient under the Iowa statute requiring that possession shall be taken and held under a hostile claim." *Hamilton* v. *Wright,* 30 Iowa 480; *Colvin* v. *McCune,* 39 Iowa 502; *Montgomery Co.* v. *Severson,* 64 Iowa 326, 17 N. W. 197, 20 N. W. 458, but in the case last cited, although there was no paper title, so called, still the person claiming adversely had a substantial equity in the land. Inasmuch as the plaintiff in the principal case immediately procured the issuance to him of a patent for the lands, there is authority holding such would confer "color of title" upon him, were color of title essential to invoke the statute of limitations in that State. *Buckley* v. *Taggart,* 62 Ind. 236; *Dean* v. *Goddard,* 55 Minn. 290, 56 N. W. 1060; *Hawkins* v. *Richmond Cedar Works,* 122 N. C. 87, 30 S. E. 13. "If one in possession take a deed in fee from another who has no right, that is a colorable title, which apparently authorizes the subsequent possession." *Rogers* v. *Mabe,* 15 N. C. 195; *Jackson* v. *Thomas,* 16 Johns. 293.

There are apparently but few cases involving the right of an alien claiming by adverse possession. While these cases, with one exception, uphold the claim of the alien, yet it is interesting to note that they are not all agreed as to the nature and extent of such right. The title or right acquired by adverse possession for the statutory period is in the nature of a title by purchase, rather than a title acquired by operation of law; and as an alien at common law, though not permitted to take lands by operation of law, can take by purchase and hold against everyone but the State. (*Burrow* v. *Burrow,* 98 Iowa 400, 67 N. W. 287; *Omnium Investment Co.* v. *North American Trust Co.,* 65 Kan. 50, 68 Pac. 1089); such adverse possession by an alien will bar the recovery by the original owner. *Piper* v. *Richardson* (1845), 9 Metc. 155; *Price* v. *Greer* (1909), 89 Ark. 300, 116 S. W. 676. In *Overing* v. *Russell* (1860), 32 Barb. 265, the court declined to pass upon the question whether *title* became vested in the alien and expressly held that the real owner was barred by the statute of limitations. However, in *Leary* v. *Leary* (1874), 50 How. Pr. 122, the court, without any reference to *Overing* v. *Russell,* held that although a person had been in possession adversely for the statutory period, if during five years of that time he was an alien and incapable of holding land, the possession did not ripen into title. The court did not mention the statute of limitations as constituting a bar in favor of the alien. The report does not disclose that the statute was specially pleaded. It does show, however, that the alien claimed to be the *owner* of the land

by virtue of such possession. The court, in *Piper* v. *Richardson, supra,* held that by such possession an alien might acquire an indefeasible title against everyone, including the State; that the right of the State was barred by the statute of limitations and that it followed, as a result, that the alien acquired a valid title. The reasoning of the court finds support in cases involving adverse possession by persons not aliens. Thus in *Dean* v. *Goddard, supra,* the court held a valid title in fee was acquired by adverse possession for the statutory period. "The legal effect not only bars the remedy of the owner of the paper title, but divests his estate and vests it in the party holding adversely. * * * To say that the statutes * * * only bar the remedy, as some authorities do, is only to leave the fee in the owner of the paper title; * * * without a remedy. We think it better and more logical to hold that the occupier of premises by adverse possession acquires title." See also *Campbell* v. *Holt,* 115 U. S. 620, 623. It is worthy of note that in *Baker* v. *Oakwood* (1890), 123 N. Y. 16, 25 N. E. 312, not involving adverse possession by aliens, the court held the statute of limitations not only cut off the remedy, but also vested title. The court said: "The idea that title to property can survive the loss of every remedy * * * would seem to have but small support in logic or reason." In *Price* v. *Greer, supra,* the court stated that under a statute providing that aliens may take lands either by purchase, will or descent, a non-resident alien could establish *title* to the land by virtue of the statute of limitations. The court held that investiture of title by limitations is not by operation of law; that the statute of limitations raises a conclusive presumption in favor of the possessor of the land. In *Scottish American Mortgage Co.* v. *Butler* (Miss. 1911), 54 South. 666, under a statute providing that non-resident aliens shall not acquire or hold lands, except in certain instances and that all lands held contrary to its provisions shall be subject to escheat to the State, it was held that it was not the purpose of the legislature to render absolutely void titles acquired and held by non-resident aliens in violation of its terms, but they should be, as at common law, only voidable at the instance of the State. The court further held the owner of land was barred of right to a recovery by the adverse possession of an alien under claim of title for the statutory period; that title by adverse possession is not a title by operation of law. "It is title by purchase." See also *Bunckley* v. *Scottish American Mortgage Co.* (1911), 185 Fed. 783. G. E. B.

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THE RESCISSION OF A PRE-CORPORATE CONTRACT ON THE GROUND OF PROMOTER'S FRAUD.—Cases arising out of promoters' frauds are numerous, and they present situations both varied and complex. They have been none too well classified by writers on corporation law. One recognized line of cleavage, however, separates those in which the parties base their claims upon some pre-corporate contract or relation from those in which the corporate relation itself is primarily and necessarily involved. See ALGER'S LAW OF PROMOTERS, § 123 *et seq.;* 1 MORAWETZ PRIV. CORP., Ed. 2, § 293. Within the first class such cases as *Brewster* v. *Hatch,* 122 N. Y. 349; *Short* v. *Stevenson,* 63 Pa.

St. 95; *Teachout* v. *Van Hoesen*, 76 Iowa 113; *Paddock* v. *Fletcher*, 42 Vt. 389; and *Emery* v. *Parrott*, 107 Mass. 95 are to be found. See also *Dole* v. *Wooldredge*, 135 Mass 140; *Cheney* v. *Gleason*, 125 Mass. 166. The substantive rights of parties to such transactions as these are fairly well settled, see ALGER'S LAW OF PROMOTERS, §§ 123-129, and in general their remedies and the classes of them are clearly defined. See *Vail* v. *Reynolds*, 118 N. Y. 297, 23 N. E. 301, and cases cited therein. The application of one of these remedies has twice raised before the New York courts a question which seems not to have been precisely before any other tribunal either English or American. It is that of the right of a subscriber to a partnership, joint adventure, or syndicate agreement made "prior to the formation of a corporation, the incorporation being an incident of the enterprise," (ALGER'S LAW OF PROMOTERS, § 123) to rescind the agreement, after incorporation has taken place, for the fraud of his promoter associates, and to recover money paid thereunder, upon the tender to the promoter or promoters of certificates of shares of the corporation's stock which he has received *pro rata* his subscription to the joint venture agreement, there being on laches.

The question was first discussed in *Getty* v. *Devlin* which was three times before the higher courts of New York, 54 N. Y. 403, 9 Hun 603, and 70 N. Y. 504, but the right of rescission was determined by the Commission of Appeals in the first case. See 70 N. Y. 504, per RAPALLO, J. In *Heckscher* v. *Edenborn*, 203 N. Y. 210, 96 N. E. 441 it was recently raised again, this time before the Court of Appeals.

In *Getty* v. *Devlin* the defendants, owning certain rights and interests in Ohio land for which they paid $30,000, secured subscriptions to an agreement of "association for development" to take over the land and interests at $125,000, which they represented to be their cost. They themselves, with some others subscribed to this agreement but paid nothing upon it, and they concealed their own interest in the land. Innocent parties subscribed and paid $65,000. Of this the promoters, after paying for the lands, etc., appropriated $30,000, and also received stock in the corporation later formed to take over and develop the land *pro rata* their subscriptions to the association agreement, along with the innocent and paying subscribers. In an action for equitable relief the defendants were compelled to account, but the Court declared that rescission, the plaintiff's offering to return to the fraudulent promoters their stock, was impossible.

In *Heckscher* v. *Edenborn*, the defendant was owner of more than one-half the capital stock of a New Jersey Iron Company, of par value capital stock $1,000,000. He and others promoted and organized a syndicate to raise $2,500,000 to acquire and develop iron properties, among them the New Jersey Iron Company. Defendant himself became in terms the largest subscriber to the agreement, but paid his subscription by transferring his Iron Company stock, concealing from plaintiff and other subscribers the fact of his interest in the Iron Company. The syndicate was organized, calls made upon subscriptions, the properties bought. Later the properties and cash assets were turned over to a corporation and certificates of corporate stock issued *pro rata* the syndicate subscriptions. Upon the basis of defendant's

concealment of his interest in the Iron Company, plaintiff and others tendered to him their corporate stock, and sought to recover the sums they had paid under the syndicate agreement. The court, viewing the action as one based on a prior rescission of the agreement, granted the recovery.

The cases differ in the plaintiffs' theories of them. They also differ in that in *Getty* v. *Devlin* there was actual fraud, while in *Heckscher* v. *Edenborn* the fraud was found to be constructive only. But they do not differ in the problem of rescission which they present. The basic contractual relation of the parties was about the same in each. In the former , EARL, J., considered that the parties were essentially partners and that partnership principles should apply; in the latter, right to relief was founded upon an express agency created by the syndicate agreement. But fiduciary relationship was the vital consideration in both cases. How then if at all, may the two decisions be reconciled? It appears that in *Getty* v. *Devlin* the plaintiffs and other stockholders, after discovering the fraud of the promoters, but before the action in that case was begun, had proceeded against the corporation and obtained the sale of the property acquired under the subscription agreement, to satisfy claims of theirs for money which they had advanced to the corporation for development purposes. It was this fact that furnished the ground for the court's denial of the right to rescind, under the view that since the sale of the property the return of the stock could no longer place the defendants *in statu quo*. In *Heckscher* v. *Edenborn*, the corporate property being still intact, the rescission was allowed. There is no doubt that HISCOCK, J., in his decision, relies upon *Getty* v. *Devlin* as an authority, and the later case must clearly stand as an affirmative and positive declaration of a rule of law laid down by indirection and implication in the older one.

The decision in *Getty* v. *Devlin* was no doubt equitable, and that in *Heckscher* v. *Edenborn* seems to be right, but there is a real difficulty in the cases. It is to be assumed that in both of these cases rescission is sought of the agreement of association, not of that of property or land purchase, or any other. With this in mind, a necessary and fundamental implication of the New York courts' doctrine seems to be that shares in a partnership or joint adventure, or in a corporation, are shares in the physical property of that partnership, joint adventure, or corporation. See LINDLEY, PARTNERSHIP, Ed. 7, p. 377, *Horner* v. *Meyers*, 4 Ohio Decisions 404; also COOK, CORPORATIONS, Ed. 6, § 12, pp. 54 et seq. and cases noted; *Commonwealth* v. *Hamilton Mfg. Co.*, 12 Allen 298; WILGUS, CORP. CAS. pp. 783, 785. See also WILGUS, CORP. CAS. pp. 781-785 n. Says EARL, J., "The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company, and through it in the real estate, was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control." And HISCOCK, J., "By what was thus said (in *Getty* v. *Devlin*), I think it was fairly implied that if the corporation had still been in possession of the real estate which

formed the subject of the fraudulent contract plaintiffs, by tendering the stock which represented their interest in the real estate to the defendant, would have offered a sufficient restoration." Yet the agreement in *Getty* v. *Devlin* contained these suggestive words, "said property to be put into an association for development upon such terms as these subscribers may elect after this subscription is complete," and in *Heckscher* v. *Edenborn* the agreement was for a syndicate to "purchase, acquire, use, develop and dispose of the lands and properties."

An examination of the texts and cases covering the law of the rescission of contracts convinces one that here is no place to apply a rule of thumb. There was none such applied in the leading case of *Hunt* v. *Silk*, 5 East 449. The doctrine of rescission *"in toto"* and of "parties put in *statu quo"* arose there from a situation the equities of which were simple and obvious. It is a doctrine equitable in its nature and should always be so applied. See *Babcock* v. *Case*, 61 Pa. St. 427, notwithstanding the implication of the term "voidable." See ADDISON, CONTRACT, Ed. 10, p. 117. The law is stated in *Masson* v. *Bovet*, 1 Denio 69, to be that "where a party has been led to enter into a contract by the fraud of the other party * * * the law only requires that the injured party restore *what he has received*, (strange to say HISCOCK, J., in *Heckscher* v. *Edenborn* uses the words, "on restoration of what they have received"), and, in so far as he can do, undo what has been done in the execution of the contract." See also ADDISON, CONTRACTS, *supra*, pp. 117, 118 and cases cited; and generally pp. 113-125; 2 PARSONS, CONTRACTS, Ed. 9, p. 679 and Note p. 680 with cases cited and discussed.

It is submitted as a possible view that one who subscribes to such agreements as were involved in the New York cases, contracts for, and gets, not a share of the physical property owned and developed by the "joint adventure," but *a share in the enterprise*, and that one who in a like case returns to the promoters of the enterprise certificates representing his share in the same has returned *what he has received*. See LINDLEY, PARTNERSHIP, *supra*, pp. 522 *et seq.* at pp. 524 *et seq.* The following cases, while not exactly in point, are suggestive as bearing upon this question. *Cohen* v. *Ellis*, 16 Abb. N. C. 320; *reversed* 4 N. Y. St. Rep. 721, 26 Wkly. Dig. 43; *New Sombrero Phosphate Co.* v. *Erlanger* [1877], 5 Ch. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436; *affirmed* 3 App. Cas. 1218, 48 L. J. Ch. 733, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65, 6 Eng. Rul. Cas. 777; *Cortes* v. *Thannhauser*, 45 Fed. 730; *Morrison* v. *Earls*, 5 Ont. Rep. 434; *In re Lady Forrest Gold Mine* [1901], L. R. 1 Ch. Div 582, per WRIGHT, J., at p. 590.

W. W. M.

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WHEN IS AN AGREEMENT "NOT TO BE PERFORMED WITHIN A YEAR."—The House of Lords has confirmed the earlier English holdings to the effect that a contract of employment for two years, subject to determination by six months' notice by either party during that period, is within the fourth section of the Statute of Frauds, and that no action can be brought upon such

agreement in the absence of a written memorandum. *Hanan* v. *Ehrlich* [1911] 2 K. B. 1050, affirmed in [1912], A. C. 39.

The general rule announced both in England and this country is, that, although the agreement is not likely to be performed within a year from the making thereof, still it does not come within the statute unless it cannot by any possibility be performed within the space of a year. *McGregor* v. *McGregor*, 21 Q. B. D. 424; *Fenton* v. *Embers*, 3 Burr. 1278; *Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305, *Roberts* v. *Rockbottom*, 7 Metc. 46; *Harper* v. *Harper*, 57 Ind. 547. But as to what is meant by "performed" as used in this rule, the courts are in conflict. English authorities say that in order to exempt a contract from the operation of the Statute of Frauds on the ground that it may or may not be completed within a year, the contingency must be one which tends to the complete fulfilling or accomplishment of the contract, in the sense originally contemplated by the parties, and not merely to its avoidance or determination. *Harris* v. *Porter*, 2 Har. 27; SMITH'S LEADING CASES, (5th Am. Ed.) 436. The Missouri court of appeals takes a similar view. *Biest* v. *Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081; while at least two other courts in this country say the determination of a contract similar to the one in the principal case really amounts to a performance. *Smith* v. *Conlin*, 19 Hun. 234. *Roberts* v. *Rockbottom Co., supra;* the former of these two cases being severely criticised in 1 SMITH'S LEADING CASES, Ed. 9, 599, where it is said that the authorities on which the New York case is decided do not by any means support the propositions for which they are quoted. But even in the principal case, one of the judges in the King's Bench, MOULTON, L. J., said if he was free to use his own intellect, and not bound by precedent, he would say there was a possibility of performance within a year. However, all the judges in both courts felt themselves bound by three old English cases, the first of which is based on practically the same state of facts as the case under discussion. *Dobon* v. *Collis*, 1 H. & N. 81; *Birch* v. *Earl of Liverpool*, 9 B. & C. 392; *Ex parte Acramen*, 31 L. J. (Ch.) 741. In the *Dobson* case decided in 1856, being the interpretation of a contract for service for more than a year but subject to determination by three months' notice, the court found the contract within the statute because the legislature surely did not mean to leave any such a loophole as a contrary decision would have afforded. Several of the judges in the King's Bench in the principal case point out the same dire result if that case should be held not to have been within the statute. The English courts dispose of the decision in *McGregor* v. *McGregor*, 21 Q. B. D. 424, in which it was held a contract for the yearly payment of funds to a person for life was not within the statute, by saying, first, the contract in that case was not for a specified time, and second, that the rule in the *McGregor* case is a general rule and must give way to a special rule such as is laid down in *Dobson* v. *Collis, supra,* and similar cases. Of the three American cases, the facts of which resemble closely the principal case, *Biest* v. *Versteeg Shoe Co., supra,* agrees with the English court in its decision, stating: "A few decisions which exclude an agreement having a fixed time of performance but

liable to be determined by a contingency, such as the death of the party, from the operation of the statute. as an agreement to support a minor until his maturity, or to abstain from doing an act indefinitely, would, of course, exclude this agreement if they were followed. But most cases are the other way, and hold a contract to render services for more than a year to be within the intention and force of the statute, notwithstanding one or both of the parties may have the option of ending it by notice in a year, because full performance cannot be rendered in a year consistently with the understanding of the parties * * * the purpose of the statute must be remembered." Opposed to this case in this country, we have *Smith* v. *Conlin, supra,* and *Roberts* v. *Rockbottom Co.. supra.* In the latter case, the court was of the opinion that the legal effect of the contract was the same as if it had been expressed as an agreement to serve the company as long as A should continue to be an agent, not exceeding five years. Thus, in the principal case it was argued the contract should be interpreted to read that the plaintiff should continue in the employ of the defendant as long as both parties were suited, but not to exceed two years. The court refused to listen to such an interpretation. A. E. M.