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THE TRANSFER OF INTERESTS IN ASSOCIATIONS.*

I. TRANSFER OF A PARTNER'S SHARE.

Partners are co-owners of firm property, though neither has a right of partition. The partner as an owner may compel a dissolution (except where by contract the association is to be continued for a given time) and he may seek an accounting in equity. If the firm be regarded as a person distinct from the partners, then a partner's interest may be spoken of as a chose in action. If this term is used, however, it must not be forgotten that the holder of the chose has not merely the right to a dissolution and accounting, but also the right to profits, that he is subject to the liability of a principal and has an owner's right of control. If no separate legal existence is accorded to the firm, the partner's interest may still be called a chose in action running against his associates; but in this aspect of the case all that has just been said respecting the position of the holder of the chose remains true, and in addition it may be observed that the

* Preliminary study for a chapter in a work on the Law of Association.

chose represents not a general personal right against the associates, but only a right in respect of the particular fund which the associates have embarked in business. To speak of a partner, then, as the holder of a chose in action is to extend that term far enough to cover the owner's right to enjoy and control the subject of his ownership. If this is clearly understood, the use of the term, though apt to mislead, is not positively wrong.[1]

Passing from the question of terminology, the important inquiry arises whether or not a partner's share is transferable. To this inquiry one of three possible answers might be given by the law: either (1) that the interest is not transferable at all, or (2) that it is freely transferable and that the transfer involves the substitution of the transferee as a member of the group, or (3) that the interest is transferable, but that the transferee acquires no right to be admitted to the group.

The first possible answer may be rejected as unsatisfactory. A partner's interest in the common property is a property right which, like other property rights, should be susceptible of sale and pledge unless there is some controlling reason to the contrary. It is believed that the transferability of a partner's share has never been denied. The real choice, therefore, is between the second and third of the answers above suggested. The partnership has been treated by the courts somewhat as a commercial family, and the right to select those who shall be admitted into the group is of the essence of the relation. This choice of persons, the

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[1] In *Colonial Bank* v. *Whinney*, 11 App. Cases, 426, 1886, the question was whether shares in an incorporated company are "things in action" within the meaning of a provision in the Bankruptcy Act. The House of Lords was of opinion that the term in the act was intended to be used broadly enough to cover such shares. Lord Blackburn in his opinion refers to the use by Lord Thurlow, Lord Denman, and Wood, L. J., of the term "chose in action" to designate shares, and concludes as follows: "It was hardly disputed that in modern times lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession." In so deciding the House reversed the decision of the Court of Appeal (Cotton and Lindley, L. J. J., Fry, L. J., dissenting), which stood upon the technically accurate definition of a chose as "a liberty of proceeding in a court of law to recover damages or a debt." 30 Ch. D. 261 (1885).

delectus personarum of the civil law, explains the refusal of the courts to recognize as a partner one with whom a partner has made a private contract to share his profits and losses.[2]

Consistently with the doctrine of *delectus personarum,* it is the general rule that the transferee of a partner's interest acquires no right to be admitted to the partnership against the will of the other members.[3] An agreement by the partners that the transferee of any one of their number shall have the right to be admitted into the group is a valid and enforceable contract.[4] From this it follows that there is no legal reason why associates should not by contract make shares in the common property as freely transferable as in the case of associations whose shares are made transferable by statute. An ineffectual protest against this right on the part of associates is to be found in *DePass's Case.*[5] In that case it was urged by counsel that to make shares transferable there is needed either an act of Parliament or a royal charter, and that those who without such authority were pretending to act as a corporation were therefore in contempt of the Crown as usurpers of the royal prerogative. The court went no further than to decide that the issuing of transferable shares raised an inference that the associates were pretending to act as a corporation, but that in this case the inference was rebutted by other considerations. In *Barclay's Case* [6] the holder of a scrip certificate of membership in an unincorporated association purporting

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[2] *Burnett* v. *Snyder,* 76 N. Y. 344 (1879); *Reynolds* v. *Hicks,* 19 Ind. 113 (1862); *Keystone Bank* v. *Randall,* 1 Pa. C. C. 354 (1886). In Massachusetts it appears that a contrary view has been taken: see *Baring* v. *Crafts,* 9 Metcalf, 380 (1845), and *Fitch* v. *Harrington,* 13 Gray, 468 (1859). It will be observed that while the contract of A, a partner with B, a stranger, does not make B a partner, yet A's claim against B for indemnity under the contract is an asset of A's estate and should be enforced at the instance of creditors. As B's promise is to pay only firm debts it seems that the promise should be available for firm creditors only, and for them only after they have exhausted their rights against A.

[3] *Jefferys* v. *Smith,* 3 Russell, 158 (1826).

[4] *Lovegrove* v. *Nelson,* 3 M. and K. 1 (1834); *Fox* v. *Clifton,* 9 Bing. 119 (1832).

[5] 4 DeG. and J. 544 (1859).

[6] 26 Beav. 177, 1858.

to be transferable by delivery was held liable to be placed on the list of contributories.

It may be concluded, therefore, that while a partner's interest is freely transferable the transferee does not in the absence of agreement become entitled to be received as an associate, but that a contract for such a substitution is a valid and enforceable contract. It is to be observed, however, that in exceptional cases where the nature of the group is such that there is little or no reason for preserving the *delectus personarum* the right of the transferee to be received into the group might readily be recognized and enforced. Such is the case of mining partnerships, which (as Lindley points out) [7] "are in some respects governed by the doctrines of real property law and in others by the doctrines which regulate trading concerns." He adds, however, that "if the persons originally interested in the mine are not only part owners but also partners, a transferee of the share of one of them, although he would become a part owner with the others, would not become a partner with them in the proper sense of the word unless by agreement express or tacit."

The third of the three suggested answers is therefore the answer which represents the general rule of law. A partner's interest is transferable but his membership is not. The transfer may take the form of an absolute sale or of a mortgage or pledge. In the case of an absolute sale, the purchaser enters into no relation with the other members of the group. He acquires a property right only—the right, that is, to compel a sale and accounting and a distribution. The effect of such a sale is to destroy the basis of association between the vendor and his associates. In a partnership at will the assignee should have the right to seek an immediate accounting in equity. If the time set for dissolution in the articles has not arrived, and if the articles contain no provision for the assignment of the share, the making of the assignment should be regarded as conferring upon the associates a

[7] Partnership, 6th ed. 369.

right to institute a proceeding to wind up the affairs of the group. It is not clear, however, that in such case the assignee should have a right to invoke equitable aid. In England § 31 of the Partnership Act of 1890 secures to him the right in question. Lindley thinks that before the act the right did not exist, and under the act the assignee has no right to apply for a dissolution. The section of the Partnership Act in question is as follows:

"31 (1.)—An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of the profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution." The act does not mention sale or assignment of a share as a ground for dissolution. Lindley thinks that a sale is "no more than a circumstance enabling the court if it thinks fit to decree a dissolution on the ground that it is for the reasons above stated just and equitable to do so" (p. 577).[8] In this country there is authority for the proposition that the assignee may assert his right in advance of the time fixed by partnership articles.[9]

The status of a partner's assignee for the benefit of creditors

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[8] Lindley, 6th ed. 367.

[9] *Marquand* v. *New York Mfg. Co.*, 17 Johnson, 525 (1820). This was the case of an assignment to a stranger. The case would be clearer if the purchaser of the interest were himself a partner: *Heath* v. *Sansom*, 4 B. and Adol. 175 (1832); *Cochran* v. *Perry*, 8 W. and S. 262 (1844).

is in this respect the same as that of the specific assignee of the partner's interest.[10]

In connection with the mortgage or pledge of the partner's interest, three questions arise: first, as to the status of the mortgagee or pledgee; second, as to the effect of the transfer as respects dissolution; and, third, as respects the effect of the transfer upon creditors of the partner.

First: The mortgagee or pledgee has no rights until a default is made in the obligation to secure which the assignment is given. After default he may, according to the terms of the assignment, either sell the share or himself assume the status of an owner. It follows that the assignee will be affected by equities between the assignor and his associates arising subsequently to the assignment, and he cannot change his position in this respect merely by giving notice of the assignment to the other partners.[11]

Second: The reasons in favor of regarding an out-and-out sale of a partner's interest as working a dissolution of the partnership relation are not present in the case of an assignment by way of pledge. It is accordingly the general rule that the assignment of a share by way of mortgage or pledge does not work a dissolution.[12] In the case cited in the note the assignment was by one partner to another. It should seem, however, that the case is the same where the partner although he assigns to a stranger still remains bound by his duties as a partner—to contribute time, labor, and skill to the prosecution of the common undertaking. An interest in the partnership may be a valuable basis of credit, and there seems no sufficient reason why the use of such an asset by the owner should be held to involve a dissolution of the relation until the question of sale arises.

Third: The question whether or not the mortgage or pledge of a partner's share is a fraud upon his separate creditors does not, of course, arise where chattel mortgages are permitted and

[10] *Raymond* v. *Schoonover*, 181 Pa. 352 (1897).

[11] *Cavander* v. *Bulteel*, 9 Ch. App. 79 (1873); *Bergmann* v. *McMillan*, 17 Ch. D. 423 (1881).

[12] *Monroe* v. *Hamilton*, 60 Ala. 226 (1877).

where a registry of the assignment has been made in due form.[13] Where there is no legal provision for chattel mortgages the question of fraud may arise either as respects creditors of the assignor who were such at the date of the assignment or as respects subsequent creditors.[14]

An interest in a partnership should be made available as an asset upon the security of which the owner can raise money unless such a disposition is likely to mislead creditors. Creditors cannot be misled unless they give credit in the belief that their debtor has a substantial interest in the firm. It is, however, impossible for a creditor to assume with safety that a partner's interest is a valuable asset, inasmuch as the taking of an account may show not merely a large indebtedness to firm creditors, but such an indebtedness on the part of the partner in question to his associates as will reduce his distributive share to little or nothing or even to less than nothing. To permit a partner to pledge his share for a debt does indeed introduce one additional complication into the situation, but the situation is already so complicated that the creditor is not likely to be injuriously affected. It is always possible for the creditor to make an inquiry concerning the magnitude of the interest, and such an inquiry would result in a disclosure of the

[13] *Monroe* v. *Hamilton, supra.* In this case the question was whether persons dealing with the pledgor-partner were affected with notice of limitations upon the pledgor's authority contained in the mortgage instrument. It was decided that as these limitations were not, properly speaking, parts of the mortgage as such, the mere inclusion of them in the instrument and the placing of them upon record did not bind a third person who had no actual notice.

[14] In *Collins' Appeal*, 107 Pa. 590 (1884), antecedent creditors of the assignor sought to invalidate the assignment on the double ground that the interest was incapable of assignment and that, since no possession was given, the title of the pledgee was defective. It was decided that the interest was in its nature assignable, and that as respects the completeness of the pledge the case fell within the class of cases in which by agreement of the parties the possession of the pledge remains with the pledgor. This case is not an authority for the proposition that subsequent creditors of the assignor are bound by an assignment of which they had no notice: indeed, a point is made in the opinion of the court that the creditor objecting to the assignment was "not a creditor subsequent to the creation of the partnership but anterior thereto, and therefore cannot assert that his credit was given on the faith of the apparent ownership of this interest." There is, however, room for the contention that even as against subsequent creditors such an assignment should be upheld.

existence of the pledge. The analogy of a pledge of a stockholder's interest in corporate property, presently to be referred to, is significant in this connection. The great weight of authority is in favor of the proposition that a pledgee of stock to whom a certificate and power of attorney have been delivered by the pledgor is entitled to the share as against a creditor of the pledgor who has obtained judgment and levied an attachment upon the stock still standing upon the corporate books in the name of the pledgor.

II. TRANSFER OF SHARES MADE TRANSFERABLE BY STATUTE.

Let it be supposed that A, B, and C are co-owners of property. It has been seen that the share of each is assignable. Where the association is a partnership the incidents of the assignment have already been discussed. If the associates have so agreed, or if the association is organized in a form to which transferability of shares is an incident either by custom or by statute, the assignment carries with it the right of the assignee to be substituted as a member of the group. The effect of this substitution upon the title and liability both of transferor and transferee will be discussed in another chapter. If the right of substitution results from agreement, it is usual for the agreement to specify the way in which the transfer is to be effected. In the case of shares made transferable by statute, it is generally contemplated that an official record shall be kept in some form and that the name of the transferor shall be removed from the record and the name of the transferee substituted. Let it be assumed that A's name appears upon the record as a holder of ten of the shares into which the common stock of the associates is divided. It is usual for the official representatives of the associates to issue to each registered stockholder a document certifying that he is the owner of so many shares of the capital stock, which certificate specifies on its face that these shares are transferable only on the books of the company by the shareholder in person or by an attorney duly constituted. Let it be assumed that A is the holder of a certificate in respect of his ten shares.

If A desires to assign his shares to X, he may go with X to the office of the corporation, deliver up his certificate for cancellation, remove his own name from the corporate register and substitute X's, and the corporate officers may then issue a new certificate to X. If the transaction were to be consummated in this way, no complications would arise. Let it be supposed, however, that A in pursuance of his desire to make an assignment of his shares to X merely delivers this cerificate to X, together with a power of attorney duly executed authorizing X or another to accomplish the transfer on the corporate books. Under such circumstances an interval must elapse between the delivery of the certificate and power of attorney and the completion of the transfer. Complications may accordingly arise in various ways. A creditor of A's may obtain judgment and levy an attachment upon the stock standing untransferred on the company's books. Or X may lose the certificate and persuade the corporation to issue to him a new one without the surrender of the old. The finder of the certificate and power may sell the documents to a bona fide purchaser for value who will demand of the corporation a recognition of his right to a transfer of shares or damages if the transfer has become impossible. Or, again, instead of a loss of the certificate and power, a theft of the documents may be supposed; or it may be assumed that X is a mere donee of the certificate, and the question will arise whether the gift is executed by delivery of certificate and power; and if it be held that the gift is effective where the certificate is accompanied by the power, the further question may arise as to the rights of the donee in case the donor has omitted to sign the power. These and many other complications may present themselves, and it is therefore necessary to determine what principles are applicable to the situation in order that each problem may receive a satisfactory solution.

It is believed that a share of stock is property of such a kind that legal title to it passes only by transfer upon the books of the company. Different kinds of property at the common law require different formalities in order that title may be effectually transferred. Title to real estate is transferable only by a deed which runs to the person named, his heirs and assigns. Title to personal property passes by assignment. Title to a negotiable instrument passes by endorsement or delivery. Title to a share in the common stock, however, passes only by a change in the registry. In a suggestive article in 11 Harvard Law Review, 536, Prof. Langdell points out the striking analogy between shares in a corporation and copyhold land: "for a title to the latter can be obtained only by grant from the lord of the manor, all of whose grants, moreover, cease upon the death of the transferee, the representative of the latter having no more than a right to call upon the lord for a new grant, and a grantee can transfer his interest only by surrendering to the lord, and procuring him to grant anew." Prof. Langdell assumes that a share in an incorporated company is a right against the entity. This leads him to say that "the shares in every incorporated joint stock company are originally created by the issue of certificates by the corporation." If the entity be discarded, it becomes inaccurate to say that the shares are originally created by the issue of certificates. The associates are co-owners of the corporate property and they have shares therein corresponding to their several contributions. This is true even if no certificates are ever issued to evidence their ownership. It is also true, however, that until a system of record and registry is established there can be no transfer by any associate of the legal title to his share.

In the case above supposed A is the owner of ten shares of stock. A record of his ownership appears upon the corporate books. His title is evidenced by a certificate duly issued to him. If A contracts to deliver his shares prior to a date certain, it may happen that before that date he will cause the shares to be transferred into the name of the purchaser and will himself receive from the corporation a new certificate issued in the purchaser's name. Upon such a state of facts the purchaser after the date fixed for delivery may sue A for a breach of contract, and the question will arise whether the legal title has passed in virtue of the transfer or whether the delivery of the certificate was essential to performance. In *White* v. *Salisbury* [15] it was held that delivery of the new certificate was not essential and that the legal title was vested in the purchaser when the transfer upon the books was completed. It is to be assumed in this case that the transferee had notice of the transfer.. A transfer without notice ought not to be regarded as a performance of a contract to deliver.[16] A gift without notice to the donee may perhaps stand on a different footing. Where a donor puts the subject matter of his gift beyond his power the title is said to vest in the donee subject to his right to repudiate upon notice.[17] B held stock in corporation A. A agreed to accept B's stock in payment of a debt due by B to A. The stock was transferred without the production of B's certificate. A then refused without such production to credit B with payment and sued B on the original obligation. Judgment was given for B. The court were of opinion that the legal title passed by transfer and used the following language: "The fear that there might be such outstanding equity that would give trouble to the purchaser would be a very good reason on its part for insisting as a condition of purchase that the certificate be surrendered. But when no such condition was insisted on and the transfer was in fact made, such fear would be no excuse for refusing payment." [18]

It thus appears that the legal title to the shares passes by transfer. Delivery of the certificate with a blank power of attorney duly executed confers upon the holder an equitable right to effectuate a transfer and upon surrender of the old certificate to compel the issue of a new certificate to him. It may be assumed that if the power is unsigned the purchaser of the share may in equity compel the vendor to execute the power. If the holder of the certificate, however, is a mere donee and the

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[15] 33 Mo. 150 (1862).

[16] See a dictum on this subject in *Cartmell's Case*, 9 Ch. App. 691 (1874).

[17] *Butler & Baker's Case*, 2 Coke, 25 a. A similar ruling was made in the case of stock in the Bank of England. The decision is partly attributable to a statutory provision. *Standing* v. *Bowring*, 31 Ch. D. 282 (1885).

[18] *Boatmen's Ins., etc., Co.* v. *Able*, 48 Mo. 136 (1871).

power is unsigned, the question is whether the gift will be regarded as complete. If the passage of the legal title is essential to the validity of the gift, then, obviously, this gift must fail. It is well settled, however, that where a donor has put the share wholly out of his own power by making delivery of the certificate accompanied by a signed power of attorney the gift will be regarded as effectually made. This shows that the legal title need not pass and the question becomes merely a question of the extent to which the donor must divest himself of control in order that the gift may be enforced. If he delivers the certificate and fails to sign the power of attorney, it may be urged that he has not done all that he might do to effectuate the gift. This view was taken in *Mathews* v. *Hoagland,*[19] where the question arose between the donee and the executor of the donor. On the other hand, it may be said that while the donor has not done all that he might do, he has yet effectually parted with the control of his shares because he cannot dispose of them to another or cause them to be transferred upon the corporate books, inasmuch as he is unable to produce his certificate. It was accordingly decided in *Commonwealth* v. *Crompton*[20] that as against the commonwealth in an escheat proceeding the donee shall have the stock although the power be unsigned.[21]

The next question for consideration is whether a certificate of stock is a negotiable instrument. If a shareholder's right were merely a chose in action against the corporate entity, it would be difficult to assign a good reason why the instrument should not be regarded as negotiable. When, however, it is remembered that the certificate is merely evidence of ownership of a

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[19] 48 N. J. Eq. 455, 1891.

[20] 137 Pa. 138 (1890).

[21] It is suggested in this case that there was a consideration for the so-called gift—to wit, past services. There is also room for the contention that the gift was really *mortis causa,* and it is often said that a rule more liberal to the donee obtains in the case of gifts in the event of death than in the case of gifts *inter vivos.* In the absence of evidence that the donor was physically incapable of doing more than he did to effectuate the gift it is hard to see any reason for a distinction.

share in the common property it is not surprising to find a steady refusal upon the part of the courts to give to the share the quality of negotiability. To sanction the view that an owner of property can be deprived of it except by his own consent or in consequence of a judicial proceeding is to adopt a position more advanced than the courts have as yet shown themselves willing to take. A owns a share of stock. He has signed the accompanying power. The stock still stands in his name upon the corporate books. The certificate is stolen and B buys in good faith. The equities of A and B are equal. But A has not parted with the legal title, and he may compel B to deliver the certificate in order that A may make a transfer of the share.[22]

Or let it be supposed that A signs a power and pledges his certificate to C, a broker, who fraudulently rehypothecates the certificate with B, an innocent lender. C becomes insolvent and the stock rises in value. A tenders to B the amount of the debt for which the stock was originally pledged to C and demands restitution. There has been no transfer upon the books of the company and A, therefore, has not parted with the legal title to his shares. He has, however, put it in C's power to deceive B, and he is estopped from asserting his legal title to B's detriment.[23]

The court in the case last cited refuses to accord the quality of negotiability to a certificate of stock although strongly urged by the defendant to take that position. There is language in the opinion from which it might be inferred that the legal title was regarded as having passed upon delivery of the certificate. An analysis of the opinion, however, makes it clear that the decision was based on the ground above stated. That this is a correct analysis of *McNeil* v. *The Bank* appears from a study of *Colonial Bank* v. *Cady*.[24] In this case X died possessed of certain shares of stock. A was X's executor. In order to get

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[22] *E. Birmingham Land Co.* v. *Dennis*, 85 Ala. 565 (1888).
[23] *McNeil* v. *Tenth National Bank*, 46 N. Y. 325 (1871).
[24] L. R. 15 Appeal Cases, 267 (1890).

himself registered on the books of the company A took the certificates bearing X's name and endorsed thereon a form of assignment and power of attorney, signing it with his name as executor of X. The document was delivered by A to C with instructions to surrender the old certificate, effectuate the transfer, and obtain a new certificate in the name of A as executor for re-delivery to A. C in fraud of A delivered the certificate to the Colonial Bank as security for advances to a firm of which he was a member. C and his firm having become bankrupt and the fraud having been discovered, A brought an action against the bank to establish his right to the shares. The bank resisted on the ground that although the dealings with the shares had been in England, the case must be governed by the law of New York (since the shares were shares in a New York corporation), and by that law delivery of the certificates with the accompanying power passed a legal as well as an equitable title to the shares. Mr. James C. Carter and other lawyers were examined as experts in New York law and their evidence made it clear that the certificates were not negotiable instruments, and that the mere delivery of the certificates with the accompanying assignment and power was not of itself sufficient to pass legal title. "If," said Lord Herschell, "there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it and who received it in good faith and for value." The court, however, were of opinion that certificates bearing X's name and the endorsement of X's executor might be in the hands of a broker for either of two purposes: to effect a transfer or to complete the title of the executor. The broker's possession is just as consistent with the one purpose as the other. Under the practice both of the New York and the London Stock Exchange the delivery of certificates with the endorsement of the executor of the registered owner is not a good delivery. It followed that the bank should have been put upon inquiry when C proposed the certificate as the basis of the loan, and was therefore not in a position to assert an estoppel against A, who never intended to pass a title to the shares.

It will be observed that in *McNeil* v. *Bank* the real owner of the stock himself placed the endorsed certificate in the hands of the broker and thus empowered him to deceive third persons. If it be supposed that the broker, instead of representing that the stock is his own admits that it belongs to a client or customer, and that he desires to borrow money for the use of the real owner, the question will arise whether one who lends upon the faith of this representation will be entitled to assert an estoppel against the owner, who has in fact given no authority to the broker to make such a use of the stock. The case thus suggested might readily be assimilated to the situation presented in *McNeil* v. *The Bank*. On the other hand it may be urged that no one is in a position to assert an estoppel in cases of this class unless he has reason to suppose that he is dealing with the real owner of the stock. If he is notified that he is dealing with an agent, he must satisfy himself of the extent of the agent's authority. Upon such a state of facts as has just been suggested it was accordingly decided that the title of the real owner must prevail against the claim of the pledgee.[25]

While the act of the owner of the share in placing the certificate and endorsed power in the hands of a broker is regarded as clothing the latter with the means of committing fraud, it seems that a similar view is not taken if the owner merely gives to a friend or confidential clerk access to the place in which the unendorsed certificates are kept. Thus, where C forged the name of the registered owner to a transfer and power and sold to B, and B caused the stock to be transferred to him on the books and a new certificate issued, it was held that the mere fact that A, the guardian of the registered owner, had given C access to the certificate did not deprive A of her right to compel the corpora-

[25] *Merchants' Bank of Canada* v. *Livingston*, 74 N. Y. 223 (1878).

tion to replace the ward's name upon the register of shareholders.[26]

Upon the facts of *Telegraph Co.* v. *Davenport* it should seem that the plaintiff had no rights against B, the innocent purchaser of the certificate from the forger. A's claim was against the corporation for reinstatement as a shareholder or in the alternative for money damages. It should seem that in every case in which A is entitled to relief at all he is entitled to specific relief and not merely to damages. By supposition he has not lost his title to his shares and has not estopped himself from asserting it. He may therefore compel the corporation to replace his name upon the registry and issue him a new certificate. The question then arises as to the right of the innocent purchaser from the forger who has taken the forged power to the corporation and has caused his own name to be placed upon the registry and a certificate issued to him. If the entire number of shares which the corporation is authorized to issue are outstanding, then since A's title to his shares has not been divested B gains nothing by the improvident registration and the issue of the new certificate. The corporation, which has been compelled to replace A's name on the registry, should have a right to compel B to surrender the certificate and to remove his name from the record. Let it be supposed, however, that at the time of the presentation of the forged power the corporation is authorized to issue more stock. The entry of B's name upon the record and the issue of the new certificate to him might be contended to have the effect of the

[26] *Telegraph Co.* v. *Davenport,* 97 U. S. 369 (1878). In this case it appeared that C was known by A to be insolvent, and A also knew that he had on another occasion used funds received by him in a fiduciary capacity. The court were of opinion that there was no necessary connection between the insolvency and misappropriation of funds on the one hand and the forgery of the names upon the certificate on the other. As A was suing as guardian for minor children, the court added that it was not possible to preclude the minors from asserting their property rights merely by reason of the negligence of their guardian, if there were any negligence. An interesting question would arise if a guardian or other fiduciary were to be guilty of negligence in the custody of a certificate for shares standing in his name as such fiduciary. If as the result of his negligence third persons were deceived, query whether the ward or other beneficiary would be permitted to ignore the negligence of the fiduciary and enforce liability as if the certificate had been carefully kept?

issue of so much new stock to B, thus constituting him a shareholder. Having acquired the legal title, B might be regarded as entitled to hold it on the theory that his equity was equal to that of the corporation.[27]

The question next arises whether a shareholder will be estopped from setting up his legal title because he has permitted a friend or confidential clerk to have access to the place in which *endorsed* certificates are kept. The by-laws of the B company required that all certificates exchanged or returned should be cancelled by the secretary, and that no new certificate should be issued until the old certificate had been cancelled. X, the general manager of B, had sole access to the safe in which the stock certificate book was kept. Certain certificates of stock belonging to C were delivered to X in order that a transfer might be made and new certificates issued to the purchaser. The transfer was made and the new certificates issued, but the president of B did not require X to cancel the old certificates before the new ones were signed. X thereafter fraudulently took the uncancelled certificates and used them through an agent in obtaining a loan from A. A brought an action against the B company to recover damages for B's alleged negligence in failing to cancel the original certificates. Judgment was given for the defendant. While recognizing the principle that as between two innocent persons he must bear the loss who has enabled the wrongdoer to occasion it, Chief Justice Andrews was of opinion that "There must be something more than the mere entrusting to a servant of the custody of a chattel and the consequent opportunity for theft in order to preclude the master from reclaiming it if stolen by the servant and sold to another." The court were of opinion

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[27] No case presenting this precise state of facts has come under the writer's observation. The result stated, however, should follow if it is assumed that B has become a stockholder. The situation is then analogous to that which is presented where the innocent holder of a forged check obtained payment from the bank on which it is drawn. Upon discovery of the forgery the bank is not entitled to recover the money from the payee, since the payee has legal title to the fund and the equities of both parties are equal. See an article by Prof. J. B. Ames on the Doctrine of *Price* v. *Neal*, in 4 Harvard Law Review, 297.

that there were no special circumstances in the case which took it out of the general rule thus stated. It may be assumed that if the corporation is not liable to one who has given value for endorsed certificates to which an employee was given access, the same principle would be applied to the case of a stockholder who without negligence gives his clerk or some other trusted person access to the endorsed certificate.

George Wharton Pepper.

(To be continued.)