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NOTES.

DISCOVERY—PRODUCTION OF BOOKS AND PAPERS IN ACTION AT LAW.—A United States statute[1] reads: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of producing in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." *Held*, that this section does not authorize the courts to compel the production of books or papers for the inspection of the other party before the trial, but only at the trial.[2]

There is pronounced division of authority on this question, as noted by the court; and they therefore state a number of reasons for

[1] Sec. 724, Rev. St., U. S. Comp. St. 1901, p. 583.

[2] Carpenter v. Winn, 31 Sup. Ct. Rep. 683 (1910).

the position which they have taken: (1) The word "trial" should be considered as meaning the examination and decision of the issues in an action at law; not every step in the cause from the time issue is joined. (2) "In the trial" should be considered as implying "a restricted use of the procedure as compared to a bill of discovery," where the matter is necessarily produced and examined before the trial at law. (3) Because of the severity of the penalty, in case of non-production of the papers, the party against whom the order is made would probably want to avail himself of his under-rated right to all the objections which he could make, were he a defendant in equity to a bill of discovery of the same evidence; and this would mean practically two trials of the same issue.

In an early case in the Circuit Court for Massachusetts much the same view was taken.[3] This decision was reached under the fifteenth section of the Act of Sept. 24, 1789;[4] but sec. 724 of the present Act is taken practically verbatim from this earlier statute, so that the case is entirely in point. The same question was raised a little later in the same court, and the following extract from Mr. Justice Clifford's opinion is of interest in this connection: "No doubt is entertained that the motion may be made, in a pending action at law, before the day of trial; but the requirement of the order of the court must, perhaps, be that the books and writings be produced at the trial of the action. . . . Production before the trial is not, perhaps, contemplated by the words of the provision." [5] This would seem to show that, despite the previous decision,[6] the learned justice was in doubt on the point; and in a subsequent case in the same court, the previous cases have been taken to represent a difference of opinion.[7] In the principal case this interpretation was not put on the words of Mr. Justice Clifford. The first, and apparently only, case in which a Circuit Court of Appeals has been called upon to determine the question is Cassatt v. Mitchell Coal & Coke Co.;[8] and it was there said that the production should only be at, not before, the trial. This view undoubtedly had considerable influence upon the decision in the present case,[9] as indicated in the opinion. In the Circuit Court for the District of New Jersey it was decided that the section under consideration—namely sec. 724— should be interpreted in the narrow sense, that is, as allowing the production to be compelled only at the trial;[10] but it is interesting to note that

[3] Iasigi v. Brown, 1 Curtis (C. C.) 401 (1853).

[4] 1 Stat. at Large, 82.

[5] Merchants' Nat'l Bank of Boston v. State Nat'l Bank of Boston, 3 Clifford (C. C.) 201 (1868).

[6] Iasigi v. Brown, *supra.*

[7] Caspary v. Carter, 84 Fed. 416 (C. C. 1897).

[8] 150 Fed. 32 (1907).

[9] Carpenter v. Winn, *supra.*

[10] United States v. Nat'l Lead Co., 75 Fed. 94 (1896).

Mr. Justice Green, in delivering the opinion of the court, substitutes the phrase "on the trial" for "in the trial", as the statute reads. It is quite probable that he is only reading into the Act the court's prior interpretation of it, so that the result of the case was not affected by the error; but he is certainly begging the question, so far as argument goes.

The courts which take the other, and what may be called the broader, view of the statute, argue that the very purpose of this provision was to give a substitute for the equitable bill of discovery, and that this will not be done, if the court cannot compel the production of the books or papers before, as well as on, the trial.[11] Here again there has been confusion in decisions in the same Circuit Court. In Colgate v. Compagnie Francaise du Telegraph de Paris a New York,[12] the court said: "Under the existing practice in courts of law in this State, a plaintiff can obtain . . . a production of books and papers both before and upon the trial"; and a little further on: "The practice which thus prevails is the practice of the federal courts also, by force of sects. 724, 858, 914 Rev. St." But Mr. Justice Wallace, who delivered the opinion, went on to say that the plaintiff "cannot obtan the *testimony* of the defendant before the trial in an action pending in this court," *i. e.*, an action at law. Mr. Justice Lacombe, in Guyot v. Hilton,[13] proceeded on the assumption that the previous case held that the production of books and papers could not be compelled before trial, apparently applying the later quotation concerning testimony to the production of books and papers, whereas there is a clear dictum in the earlier case to the contrary.

Sufficient has been said to show that there has existed a distinct division of authorities on this question. The decision in the present case[14] has the effect of settling this difference. Whether the view here taken is considered the better, depends largely on whether one believes that Congress intended to allow a complete substitute at law for the equitable bill of discovery, or only a partial and supplemental one. This in turn depends primarily on the construction put on the phrase "In the trial of actions at law." The purpose of the statute must have been to expedite the business of the courts; and this will be considerably more effectually done by the broader interpretation of the section than by that put upon it in the present case. Furthermore, it would not have required a strained

[11] Exchange Nat'l Bank of Atchison v. Wachita Cattle Co., 61 Fed. 190 (C. C. 1894); Lucker v. Phœnix Assurance Co. of London, 67 Fed. 18 (C. C. 1895); J. B. Brewster & Co. v. Tuthill Springs Co. *et al.*, 34 Fed 769 (C. C. 1888); Jacques v. Collins, *et al.*, 2 Blatchford (U. S. C. C.) 23 (1846); Victor G. Bloede Co. v. J. Bancroft & Sons Co., 98 Fed. 175 (C. C. 1899), which gives a review of the decisions on both sides of the question.

[12] 23 Fed. 82 (1885).

[13] 32 Fed. 743 (1887).

[14] Carpenter v. Winn, *supra.*

construction of the very phrase in controversy, which can hardly have been employed with the intention of limiting such action to the actual trial of the case; for that interpretation prevents the party seeking the evidence from properly preparing his case, except by employing the equitable bill of discovery, and, as above indicated removes half the efficiency of the statute. The section in question says nothing as to allowing the substitution of the legal remedy only on the trial; and if the framers had so intended, they would very probably have said so. It, therefore, appears that the decision in the present case, while based on strong grounds, might have had an even stronger foundation, if it had taken the broader view; and it would certainly have had a more beneficial result.

L. C. A.

FRAUD—RIGHT OF PURCHASER TO RESCIND—NECESSITY FOR PECUNIARY LOSS.—The principal question of legal import in King v. Lamborn[1] is whether the false representation of a material fact by which a purchase of property is intentionally induced amounts to fraud which vitiates the contract, and entitles the purchaser to rescind without showing any substantial injury in a pecuniary way. The court answered the question in the affirmative.

Where recovery is sought on the ground of misrepresentation and deceit, the proper measure of damages is the difference between the actual value of that which the complainant parts with and the actual value of that which he receives under his contract—the loss really sustained in a pecuniary sense.[2] It is apparent that this rule does not afford relief to one who has been misled and entrapped into purchasing something for which he did not bargain unless he has suffered pecuniary loss.[3] And, in the words of the court in the

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[1] 186 Fed. 21 (C. C. A. Ninth Cir. 1911).

[2] Peek v. Derry, 37 Ch. Div. 541 (1887); Smith v. Bolles, 132 U. S. 125 (1889); Sigafus v. Porter, 179 U. S. 116 (1900); Alden v. Wright, 49 N. W. 767 (Minn. 1891); High v. Berret, 148 Pa. 261 (1892). A strong line of decisions must be noted, however, which allow the defrauded party to recover in his tort action not only his actual loss but the benefit of his bargain had the thing been as represented. This is probably the predominant view in America today. It has been adopted in Illinois, Autle v. Sexton, 137 Ill. 410 (1891); Massachusetts, Morse v. Hutchins, 102 Mass. 439 (1869), and New York, Ettlinger v. Weil, 184 N. Y. 179 (1906); and has the support of an eminent authority on damages, 2 Sedgwick on Dam., § 777, *et seq.* But all the cases which have adopted this rule can be traced to Sherwood v. Sutton, 5 Mason 1 (1827), where this rule is printed in the headnote, but the decision by Mr. Justice Story, then on Circuit, is a statement of the rule referred to *supra* as the proper rule. Mr. Sedgwick himself quotes from this opinion by Story, J., in his text, but misinterprets it. For the leading cases on both sides of this question see Fargo Gas Co. v. Electric Co., 4 N. D. 219 (1894).

[3] Urtz v. N. Y. C. & H. R. R. Co., 95 N. E. 711 (N. Y. 1911).

principal case, "there may be an injury without pecuniary loss that is as revolting to conscience as if actual damages had ensued." But it must be remembered that courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral.[4]

The cases which have denied equitable relief unless pecuniary damage is shown rely mainly on this statement by Mr. Justice Strong: "Cancelling an executed contract is an exertion of the most extraordinary powers of a court of equity, which should not be exercised unless the falsity of the alleged false representations is certainly proved and unless the complainant has been deceived and injured by them."[5] The bill was dismissed in that case because the fraud alleged was not proved. The complainant had suffered no injury of any kind; and, it is submitted, Strong, J., did not mean to limit equitable relief to cases of *pecuniary* injury.[6]

The authority of an eminent text writer would seem to be against the principal case, Mr. Pomeroy thus stating the law: "Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal."[7] But the chancery cases cited do not emphasize the necessity for pecuniary damage. And Justice Story makes no mention of pecuniary damages, simply stating the law to be "that fraud and damage coupled together will entitle the injured party to relief in equity,"[8] quoting from Chancellor Kent's decision in Bacon v. Bronson.[9] A New York Supreme Court case[10] and a recent Western case[11] adopt Mr. Pomeroy's view; but no equity cases are cited by these courts in support of their position. The former case has been overruled;[12] and the Nebraska decision was modified by the case of like caption in 109 N. W. 388, where an attempt is made to reconcile the conflicting decisions, and a new rule is enunciated, that where the vendor, by fraud or false representations, has induced the buyer to accept something not contemplated by the contract, the vendee may rescind without showing pecuniary injury or damage; but where the buyer receives what he actually purchased, and loses his right to rescind on some false representation as to its qualtiy, condition, or matter affecting its value, he must show that such representation was material and that he was misled thereby to his injury and damage.

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[4] 2 Pomeroy, Eq. Jur. 386; 1 Story, Eq. Jur. 238.
[5] Atlantic Delaine Co. v. James, 94 U. S. 207 (1876).
[6] See Bispham, Prin. of Eq. § 217.
[7] Pomeroy, Eq. Jur. § 898. See also Eaton on Equity, 299.
[8] Story, Eq. Jur. § 203.
[9] 7 Johns. Ch. R. 194 (N. Y. 1823).
[10] Hewlett v. Spring Co., 84 Hun, 248 (1895).
[11] Jakway v. Proudfit, 106 N. W. 1039 (Neb. 1906).
[12] Harlow v. Brum, 151 Fed. N. Y. 278 (1897).

The weight of authority is certainly against Pomeroy and these sporadic decisions, and in accord with the principal case.[13] The law is correctly stated by Baldwin, J., in Brett v. Cooney:[14] fraudulent representations constitute no ground for equitable relief unless made to one who was induced by them to act to his injury; but in measuring injury, equity does not concern itself merely with money losses. If it finds that a clear right has been invaded, it will seldom refuse its aid because the plaintiff can show no substantial damage to his pecuniary interests.[15] And the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented.[16] Obviously, different questions will arise when it is sought to determine the measure of damages recoverable for such a fraud.

C. L. M.

WILLS—CHARITABLE BEQUESTS—PRECATORY WORDS.—In Stinson's Estate (No. 1)[1] the testatrix's will provided: "I give and bequeath" certain property, "to start and use for a Women's Christian Association. . . . I hereby appoint or wish the institution to be carried out upon the plan of the Women's Christian Association of Philadelphia. . . . I would like the executive committee to consist of the following ladies." One of the ladies named was a witness to the will. The Act of 1855[2] provides that wills containing charitable bequests must be "attested by two credible and at the time disinterested witnesses." The court held the bequest void because of the interest of the witness in question.

The case appears to raise two questions: first, should the precatory words, "I would like," be construed as a mandatory direction as to who shall compose the executive committee; and second, under such construction, is a person so named interested within the intent of the act. Mr. Justice Stewart, in his dissenting opinion, maintains that the words are a mere expression of advice or desire and supports this view with numerous cases.[3] The authority of these cases is unquestioned and they have been followed in recent decis-

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[13] Mather v. Barnes, 146 Fed. 1000 (1906); Williams v. Kerr, 152 Pa. 560 (1893); Hansen v. Allen, 117 Wis. 61 (1903).

[14] 75 Conn. 338 (1902).

[15] Wainscott v. Bld. & Loan Assn., 98 Cal. 253 (1893).

[16] MacLaren v. Cochran, 46 N. W. 408 (Minn. 1890).

[1] 232 Pa. 218 (1911).

[2] Act of April 26, 1855, P. L. 332.

[3] Pennock's Estate, 20 Pa. 268 (1853); Janretch v. Proctor, 48 Pa. 466 (1865); Church v. Disbrow, 52 Pa. 219 (1866); Bowlby v. Thunder, 105 Pa. 173 (1884); Burt v. Herron, 66 Pa. 400 (1870); Hopkins v. Hunt, 111 Pa. 287 (1885).

ions,[4] but it is submitted that they are not conclusive upon the point in question. In Burt v. Herron,[5] Sharswood, J., said: "Precatory words . . . will not in general convert a devisee . . . into a trustee," and in the same case he pointed out that there is no case where "words expressive of desire as to the direct disposition of the estate have not been held sufficient. . . . It is different where, having made a disposition, he (the testator) expresses a desire that the legatee or devisee should make a certain use of his bounty." In the principal case, the will itself creates the legatee; and it would seem that words describing that legatee, are of the substance of the disposition, and not a limitation on a disposition already completely made. The majority opinion held the direction mandatory.

On the question of the interest of a person thus appointed to the first executive committee, the court said: "In testing the qualification of witnesses to a deed or will by which a charity is created the situation is just the same as if the charity was in existence." This seems to follow from the words of the act, and has also been laid down in Kessler's Estate:[6] "The interest which disqualifies a witness under the act is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself, or by reason of the attesting witnesses being then interested[7] in the religious or charitable institutions for which provision is made by the testator, or both, or either, as the case may be." Mr. Justice Stewart contended that the facts of the principal case did not bring it within this rule, and that the contingent quality of the interest took it out of the intent of the act. He said: "It is upon this ground that we have held that executors are not disqualified." It is submitted that a study of the cases on interest under the Act of 1855 will show that the contingent quality of the interest has in no case been the ruling ground for the decision. The case of Snyder v. Bull[8] arose before the act, and the question was the proper proof of a will under the Act of 1833.[9] An executor was a witness, and after giving the contingent quality of his interest as a ground for his competency, the court said: "But in contemplation of law an executorship is not an office of profit. In England the services are gratuitous and though they are paid for here the design of allowance is compensation. . . . Unlike a legatee, he is not the testa-

[4] *In re* Estate of Hugh Bellas, 176 Pa. 122 (1896).

[5] 66 Pa. 400 (1870).

[6] 221 Pa. 314 (1908).

[7] Employment by the institution as a servant is not such interest as is meant. Coomb's & Hankinson's Appeal, 105 Pa. 155 (1884). *Cf.* Words of auditing judge in Kessler's Estate, 221 Pa. 314 (1908): "It would seem that those who gather its assets, conserve and expend them, and upon whom the financial existence of the church depends, are such persons who, under the terms of the act, are interested."

[8] 17 Pa. 54 (1851).

[9] April 8, 1833, P. L. 249.

tor's beneficiary."[10] In Jordan's Estate[11] the leading case on the same question since the act, these words are used: "But even in the event of his assumption of duties he can receive no more than compensation for the services which he may have rendered. . . . He could have no conceivable motive in unduly influencing the act of the testator, nor interest in the subject matter of the future controversy, and had therefore no legal interest." In Jeane's Estate,[12] the latest case on the question, where the witness was both executor and an officer of the company which was trustee of the gift for charitable uses, it was held, "The reasoning of our cases which hold that the compensation of an executor for his services does not disqualify him, applies with no less force to the services which may be rendered by the Pennsylvania Company in paying the dividends to the Children's Hospital." The court distinguishes Kessler's Estate [13] on the ground that in that case, the witness in addition to being trustee and executor, was an officer of the church which was the beneficiary. It is submitted that it is the beneficial quality of the interest of a witness that brings it within the act; that its contingency has no rational bearing on the question, because, whether a man be executor, legatee, or officer of a charitable beneficiary under a will, the receipt of his bequest or the devolution of his duties thereunder, are subject to the same contingencies, *e. g.*, the will may be revoked; or he may die before the testator. If this interpretation of the cases be accepted, the decision of the principal case is in full accord with the existing law.

F. L. B.

WILLS—SECRET TRUST TO DEFEAT A MORTMAIN STATUTE.—The question, whether a secret trust attached to an alternative bequest, which, by the terms of a will, was to become effective in case the testatrix died within one calendar month, is discussed in the case of Stirk's Estate.[1]

The facts of the case presented a very interesting problem. The testatrix in her will bequeathed her residuary estate to a charity. The scrivener, knowing that the testatrix was about to undergo a serious operation, prepared a codicil in which was contained an alternative bequest, in case of the death of the testatrix within one

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[10] For authority that the correct theory of the commissions of executors and trustees is compensation for work done, see McCausland's Appeal, 38 Pa. 466 (1861); Montgomery's Appeal, 86 Pa. 23 (1878); Henson's Estate, 217 Pa. 207 (1907).

[11] 161 Pa. 393 (1894).

[12] 228 Pa. 314 (1908).

[13] 221 Pa. 314 (1908).

[1] 232 Pa. 98 (1911).

month. The name of the legatee was not inserted by the scrivener before the codicil was read to the testatrix; but she was told that in case of her death within thirty days, the gift to the charity would be void under the Act of 1855,[2] that therefore it became necessary for her to consider to whom should go the amounts which she had given to charity in such event. As to the residuary bequest she said, "Give that to the company," meaning the trust company which was to act as trustee of the original bequest. The court held that this alternative bequest to the trust company was impressed with a secret trust for charities and was void.

The question as to whether a bequest, absolute on its face, is in reality a secret trust has been discussed in many cases in both English and American courts. Judge Sharswood summarizes the result of the English decisions as follows:[3] (1) If an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly or impliedly, by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the statute of Mortmain will avoid the devise, if the trust is in favor of a charity. (2) But if the devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though after it comes to his knowledge he should express an intention of conforming to the wishes of the testator."

The important question, therefore, in every case is to determine whether or not there has been any assent, express or implied.[4] The facts of the cases which fall under the second class referred to by Judge Sharswood, disclose that the alternative bequest or the bequest to which there is attached the desire of the testator that the legacy be laid out by the legatee for charity, was, in each instance, made with full knowledge that the legatee was not bound to carry out such desires and could do with the bequest what he willed. The facts of Stirk's Estate show that the scrivener knew or had reason to believe that the testatrix executed the codicil in the belief that the trust company would be bound to carry out her desires that the residuary estate should go to charity. The silence of the scrivener under these circumstances amounted to assent and acquiescence, and a trust was accordingly imposed upon the trust company. The bequest of the residue was treated as a gift induced by fraud and the trust company, although innocent, was not allowed to gain any benefit through the fraud of another. As is said in an old English case,[5] referred to in a case cited by the court,[6] "No person can

[2] P. L. 332.

[3] Schultz's Appeal, 80 Pa. 396 (1876).

[4] Flood v. Ryan, 220 Pa. 450 (1908).

[5] Bridgman v. Green, 2 Ves. 627 (Eng. 1755).

[6] Russell v. Jackson, 10 Hare 212 (Eng. 1852). For a review of English and American decisions see 20 L. R. A. 465, and 22 L. N. S. 1262.

claim any interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest and prevents any party from claiming under it."

The only distinction that can possibly be drawn between the principal case and the cases where the legatee actually promised to carry out the trust, is that different parties committed a fraud upon the testator. The reason for imposing a trust upon the legatee who has made such a promise is that no one can claim any interest in a fund acquired by fraud unless that person is a bona fide purchaser for value. A legatee to whom a gift induced by fraud is given, certainly can not be classed as a bona fide purchaser, and a gift to such a person plainly falls within the first class of cases mentioned by Judge Sharswood.

R. B. W.