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## The Conversion of Stock

George F. L. Hentz

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Thus we can see as an apparent result of the above discussed decisions and the Lien Law mentioned by section, that if an owner desires to improve property that has a large lien on it, or such a lien that a mortgage company refuses to consolidate with its first lien, unless he can get a subordination to such a building loan mortgage, which in the light of this decision, he will not get, then the property will have to stay as it is, unimproved—thus achieving the very thing that the brief of the *amicus curiae* in the instant case feared, but not from his point of view, that of danger to a title or mortgage company investment, but rather from the viewpoint of the holder of a first lien who wants to aid in improving the property but fears the results of this case.

A subordination agreement is nothing more than a contract between the party giving and the party receiving, and the ordinary, well established rules of contract should apply where a court of equity is called upon to determine the issues raised between contesting parties.

SAMUEL A. LOCKER.

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#### THE CONVERSION OF STOCK.

In a recent New York case<sup>1</sup> the plaintiff was awarded damages to the full extent of the value of the stock for the conversion of an undorsed certificate. The case presents problems which are fundamental both in the law of conversion and in the law of corporate stock.

By disregarding the doctrine: "In order that conversion of a certificate of stock may constitute a conversion of the stock, which it represents, the owner must be thereby deprived of the stock, and not merely of the certificate;"<sup>2</sup> the Court of Appeals has ignored precedent set in several other states.<sup>3</sup> These irreconcilable decisions are based on the theory that acquisition of use and title by the converter is the test of conversion, and the rule that a certificate of stock is not the stock or share itself, but mere evidence of the holder's rights as a stockholder.<sup>4</sup> The latter is a logical deduction from the former unsound premise.

The natural meaning of converting property to one's own use has long since been left behind. Conversion, in the modern view, manifests itself in the exercise of unlawful dominion over the plain-

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<sup>1</sup> *Pierpoint v. Hoyt*, 260 N. Y. 26, 182 N. E. 235 (1932).

<sup>2</sup> 11 FLETCHER, CYCLOPEDIA OF CORPORATION LAW (1932) §5114.

<sup>3</sup> *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548 (1884); *Pardee v. Nelson*, 59 Utah 497, 205 Pac. 332 (1922).

<sup>4</sup> *Ibid.*

tiff's personal property.<sup>5</sup> It is not essential that the tortfeasor have actual physical possession of the chattel.<sup>6</sup> That he assume control over the property, by a possession, actual or constructive, which deprives the owner of his lawful dominion for any purpose, is sufficient.<sup>7</sup>

While it is universally held that the stock certificate is mere evidence of the holder's rights, it is to be noted that the better-considered cases apply this principle solely to questions of title.<sup>8</sup> There can be no doubt of either the logic or the justice of that rule, when confined to the aforementioned subject; but, since a share of stock is an intangible essence incapable of physical possession or control, we submit that the certificate is also the means by which the owner takes his stock into constructive possession, the master switch through which a corporate member's rights are controlled. For this reason it can be seen that a conversion of the document deprives the true owner of dominion and control of his stock and thus constitutes a conversion of the stock itself.<sup>9</sup>

In *Pierpoint v. Hoyt* the majority opinion voices a similar view,<sup>10</sup> the Court there says: "Wrongful acts affecting property rights in corporate stock can ordinarily be committed only through the medium of the certificates which evidence those rights. For the purpose of redressing such wrongs the law must and does treat the symbol as though it were the thing symbolized."

Such has always been the law in New York.<sup>11</sup> It has often been held, that a wilful and wrongful taking and disposal of indorsed stock certificates is a conversion of the stock itself.<sup>12</sup> In *Anderson v.*

<sup>5</sup> *Bristol v. Burt*, 7 Johns. 254 (N. Y. 1810); *Ball v. Liney*, 48 N. Y. 6 (1871); *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492 (1872).

<sup>6</sup> *Chambers v. Lewis*, 28 N. Y. 454 (1864).

<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512 (1908); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 32 Sup. Ct. 641 (1912); *U. S. Radiator Corp. v. State*, 208 N. Y. 144, 101 N. E. 783 (1913); *Flour City Nat. Bank v. Shire*, 88 App. Div. 401, 84 N. Y. Supp. 810 (4th Dept. 1903), *aff'd*, 179 N. Y. 587, 72 N. E. 1141 (1904); *Burke v. Steele*, 43 N. Y. Supp. 346 (1896); *Pacific Fruit Co. v. Coon*, 107 Calif. 447, 40 Pac. 542 (1895); *Cotter v. Butte & Ruby Valley Smelting Co.*, 31 Mont. 129, 77 Pac. 509 (1904); *Morris v. Hussong Dyeing Machine Co.*, 75 N. J. Eq. 256, 86 Atl. 1026 (1908); *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710 (1914).

<sup>9</sup> *Supra* notes 5 and 6.

<sup>10</sup> *Supra* note 1, at 29, 182 N. E. at 236.

<sup>11</sup> *Anderson v. Nicholas*, 28 N. Y. 600 (1863); *Markham v. Jaudon*, 41 N. Y. 235 (1869); *Mahaney v. Walsh*, 16 App. Div. 601, 44 N. Y. Supp. 969 (4th Dept. 1897); *Miller v. Miles*, 58 App. Div. 103, 68 N. Y. Supp. 565 (1st Dept. 1901), *aff'd*, 171 N. Y. 675 (1902). In *Page v. Clark*, 100 Misc. 395, 165 N. Y. Supp. 1058 (1917) the New York City Court held that a broker who receives for sale, from a person not authorized to pass title, a stolen certificate of stock upon which the name of the real owner has been forged and indorsed is liable to him for the reasonable value of said stock represented by the certificate, at the time of its sale by the broker.

<sup>12</sup> *Ibid.*

*Nicholas*,<sup>13</sup> speaking of the wrongful withholding of a stolen indorsed certificate which had passed into the hands of a third party, the Court remarked: "The stock sold and converted by the defendant, and the avails of which he received, was indisputably the property of the plaintiffs; the conversion by the defendant was distinctly found. The defendant acquired no title thereto, by the delivery thereof to him by the person who purloined the same from the plaintiffs, and he, therefore, acquired no greater or better title to it than that possessed from the person from whom he received it." Since the converter of the stock did not obtain a good title, aside from statute,<sup>14</sup> he could pass no better title to an innocent purchaser than he himself had, even if the document was indorsed in blank by the owner.<sup>15</sup> It is to be noted that notwithstanding the fact that neither the wrongdoer or the purchaser could get beneficial use of the stock, nevertheless the Court held that the conversion of the certificate deprived the owner thereof of dominion and control of the property which it represented.<sup>16</sup> On no other grounds can the decision be justified.

There is one seeming exception to the rule of conversion of stock certificates. That is in the case of a pledgee, who will not be guilty of conversion should he sell pledged certificates, provided that he has in his possession, at all times during the term of the pledge, a certificate or certificates equalling the number of shares pawned by the pledgors.<sup>17</sup> This doctrine is based on the principle that: "One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges and property."<sup>18</sup> Thus, the bailor is in no way injured, for by complying with his contract, he may obtain from the bailee the identical thing which he left with him. The principle is sound and any other rule would place an unnecessary burden on those engaged in the

<sup>13</sup> *Id.* at 603.

<sup>14</sup> The Uniform Stock Transfer Act, N. Y. PERS. PROP. LAW (1913) §§162-185, makes it possible for one who has stolen an indorsed certificate to give unimpeachable title to an innocent purchaser for value. *Turnbull v. Longacre Bank*, 249 N. Y. 159, 163 N. E. 135 (1928).

<sup>15</sup> *Knox v. Eden Musee Co.*, 148 N. Y. 441, 42 N. E. 988 (1896); *Hall v. Wagner*, 111 App. Div. 70, 97 N. Y. Supp. 570 (1st Dept. 1906); *Kilmer v. Hutton*, 131 App. Div. 625, 116 N. Y. Supp. 127 (1909). Cf. *McNeil v. Tenth National Bank*, 46 N. Y. 325 (1871); *Merchants' Bank v. Livingston*, 74 N. Y. 223 (1878); *Brady v. Mount Morris Bank*, 65 App. Div. 212, 73 N. Y. Supp. 532 (1st Dept. 1901); *Talcott v. Standard Oil Co.*, 149 App. Div. 694, 134 N. Y. Supp. 617 (1st Dept. 1912); *Mitchell v. Boyer*, 160 App. Div. 565, 145 N. Y. Supp. 715 (1st Dept. 1914). Note (1902) 15 HARV. L. REV. 403.

<sup>16</sup> *Anderson v. Nicholas*, *supra* note 11.

<sup>17</sup> *Horton v. Morgan*, 19 N. Y. 70 (1859); *Barclay v. Culver*, 30 Hun 1 (N. Y. 1883); *Caswell v. Putnam*, 120 N. Y. 153, 24 N. E. 287 (1890); *Harding v. Field*, 1 App. Div. 391, 37 N. Y. Supp. 399 (1st Dept. 1896); *Douglas v. Carpenter*, 17 App. Div. 329, 45 N. Y. Supp. 219 (1st Dept. 1897).

<sup>18</sup> 3 COOK, CORPORATIONS (8th ed. 1923) §485.

pledging of stocks. The courts have followed a similar principle in the grain elevator bailment cases.<sup>19</sup>

It seems that in the *Pierpoint* case<sup>20</sup> the opinion ignored one very important element, which, if considered, would have appreciably clarified the situation.<sup>21</sup> While at common law the stock certificate is of great importance, it is not essential to the transfer of title; but, section one of the Uniform Stock Transfer Act.<sup>22</sup> adopted by the legislature of the state, makes the transfer of the certificate the only way of doing this. While this statute has not as yet been so interpreted by the New York courts, it seems certain that this would be the view taken, for the framers of the Uniform Act have indicated such to be the purpose of that section.<sup>23</sup> Thus we can see that where, aside from statute, it would be extremely difficult without a certificate to dispose of stock, under the statute it would be impossible to pass title. Certainly, one, who deprives a property owner of the power of passing title, is guilty of conversion.

Undoubtedly some will hold that the awarding of damages to the full extent of the value of the stock for the conversion of the undorsed certificate is unfair. Yet, this is the cry that has often arisen in similar cases.<sup>24</sup> Nevertheless the courts, with few exceptions, have steadfastly clung to the test of dominion and control for the tort,<sup>25</sup> and the value of the property at the time of conversion as the measure of damage.<sup>26</sup> Certainly a person who has been deprived of his

<sup>19</sup> *Andrews v. Richmond*, 34 Hun 20 (N. Y. 1884); *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637 (1882); *St. Anthony & Dakota Elevator Co. v. Dawson*, 20 N. D. 18, 126 N. W. 1013 (1910).

<sup>20</sup> *Supra* note 1.

<sup>21</sup> The certificate might, however, have been issued prior to the passing of the uniform law in which situation the statute would not apply. N. Y. PERS. PROP. LAW (1913) §184.

<sup>22</sup> N. Y. PERS. PROP. LAW (1913) §162.

<sup>23</sup> Uniform Stock Transfer Act, §1,

#### "COMMISSIONERS' NOTE

The provisions of this section are in accordance with the existing law (COOK, CORPORATIONS §373 *et seq.*) except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of the corporation becomes thus like the record of a deed of real estate under a registry system."

<sup>24</sup> G. L. Luther, *A Test for Conversion* (1908) 21 HARV. L. REV. 408.

<sup>25</sup> *Supra* notes 5 and 6.

<sup>26</sup> This is, of course, when the plaintiff waives the tort and sues in *assumpsit*. A different rule of damages applies when the suit is in tort. *Baker v. Drake*, 53 N. Y. 211 (1873); *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 18 N. E. 79 (1888). *Cf. McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. Supp. 234 (1st Dept. 1910), *aff'd*, 201 N. Y. 526, 94 N. E. 1096 (1911). But *cf. Franklin Bank v. Harris*, 77 Md. 423, 26 Atl. 523 (1893); *Continental Mining Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633 (1896).

certificate of stock, and thus of his only *reasonable* method of disposing of his property in the open market, should be recompensed for whatever harm he has suffered through the wrongdoer. Of course if juries were gifted with a godlike intuition, it might be well to adopt a rule, allowing the plaintiff damages for the depreciation of the stock from the time he lost dominion until he regained control (by the issuance of the new certificate), plus an award for whatever additional inconvenience he suffered as a result of the defendant's action. But we are living in a fallible age with jurymen whose opinion as to the pecuniary value of trouble, arising from the same source, might range from the infinitesimal to the infinite. Thus such a calculation might well work an injustice on either party to the action. Moreover, in these troublous times of panic markets, it might be extremely difficult to dispose of the new certificate, whereas at the time of the conversion it might have been readily sold. In such case we would be putting the burden on the person harmed rather than on the wrongdoer. We think the fairer rule is the one adopted by the courts that he who handles the property of another does so at his peril.

GEORGE F. L. HENTZ.

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#### SET-OFF—RIGHT OF DEPOSITOR-INDORSER IN INSOLVENT BANK.

The general rule followed by the great weight of authority is that a depositor of an insolvent bank may set off his deposit therein against a bona fide indebtedness of his own to the bank.<sup>1</sup> The fact that the indebtedness of the depositor to the bank has not yet matured at the time of insolvency does not interfere with this right of set-off.<sup>2</sup> However, the question arises whether a depositor may set off against a note upon which he is indorser his deposit in an insolvent bank, where the solvency of the maker is conclusively proven.

That issue was raised in the recent case of *Bank of United States v. Braveman*.<sup>3</sup> There the defendant, indorser of a note held by the

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<sup>1</sup> Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148 (1892); Yardley v. Clothier, 49 Fed. 337, *aff'd*, 51 Fed. 506 (C. C. E. D. Pa. 1892); Smith v. Fenton, 43 N. Y. 419 (1871); Clute v. Warner, 8 App. Div. 40, 40 N. Y. Supp. 392 (3rd Dept. 1896); Van Wagoner v. Paterson Gas Light Co., 23 N. J. L. 283 (1852); Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, 90 Atl. 369 (1914); Upham v. Bramwell, 105 Ore. 597, 209 Pac. 100 (1922).

<sup>2</sup> Scott v. Armstrong, *ibid.*; Adams v. Spokane Drug Co., 57 Fed. 888 (E. C. D. Wash., E. D. 1892); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894). In Clute v. Warner, *ibid.*, the Court said: "that while the note was not due when the bank became insolvent, and its collection could not be enforced before maturity, the plaintiff had the right to waive the additional time and elect to have it become due at that time, and to make payment thereof by applying the amount of his money in the possession of the bank to such payment."

<sup>3</sup> 259 N. Y. 65, 181 N. E. 50 (1932).