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Equity--Adequacy of Tender on Rescission of Contract (Marr v. Tumulty, 256 N.Y. 15 (1931))

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the patient and specifically bequeathed by will were sold and the proceeds paid into her bank account. After the patient's death the specific legatees were held to be entitled to the money remaining in the bank after the sum applied by the receiver on behalf of the incompetent had been deducted.[8] New York has no statute like the Lunacy Act, and until there is one to that effect it is supposed that the courts here must be bound by the common-law rule.[9]

It is interesting to note that recently the Missouri courts had a case where real estate was specifically devised and was sold by order of the probate court while the testator was insane and under guardianship. It was there held that the sale worked no ademption or revocation of the devise and that at the death of the testator the devisee was entitled to the remainder of the proceeds.[10] The Missouri and English courts look at this particular question logically, while New York insists on adhering to mechanistic legal reasoning.

R. C. W.

EQUITY—ADEQUACY OF TENDER ON RESCISSION OF CONTRACT. —Plaintiff, president and chief stockholder, in the Marr Oil Corporation, brought an action to rescind a contract, whereby he, through the fraud and bribery of his agents, had been induced to sell his shares of stock in exchange for others in the Southern Oil Corporation. The exchanged stocks had been disposed of in the open market. However, upon learning of the fraudulent character of the transaction, the plaintiff rebought an equivalent number. These he tendered back, together with the shares purchased by his innocent co-directors, but failed to do the same as to the shares owned by the guilty directors, the agents in the negotiation. Question: Was such tender adequate? *Held,* it was, and thus plaintiff was entitled to the relief sought. The refusal of the conspirators to join in the undoing of a wrong may not be used as a ground for refusing equity. However, the court may exact the return of the profits made through the purchase of the equivalent number of shares. *Marr* v. *Tumulty,* 256 N. Y. 15, 175 N. E. 356 (1931).

A court of equity will go far to procure the declaration of a rescission on terms that are just. Fraud and misrepresentation as to the stocks of a corporation are adequate grounds for rescinding a

[8] Matter of Hodgson's Trusts 2 Ch. Div. 189 (1919).

[9] The nearest approach to such a statute is §1402 N. Y. CIVIL PRACTICE ACT, which relates to real property.

[10] Lamkin v. Kaiser, 256 S. W. 558 (Mo. App. 1923).

contract,[1] especially when tainted with bribery.[2] Following the maxim of "whoever asks equity must do equity,"[3] it is required that the other party must be put in *status quo* [4] and the accrued benefits must be returned.[5] But where restitution is made impossible by the "duplicity of the wrongdoer" [6] the plaintiff is not deprived of his remedy.[7] However, the court, in shaping its decision may impose suitable terms.[8] The basic principle of equity is justice and equity will adapt its decree to the facts under consideration.[9] In the instant case, there was no question of the stock having passed to *bona fide* purchasers, since the exchanged stock had been transferred only to another corporation, whose officers were identical with those in the guilty corporation. The contract was voidable in its inception, and continued so, since there was no ratification.[10] In this instance, the court illustrated again that where it once secures jurisdiction of a case, it will apply its underlying equitable principles as liberally as necessary.

F. H.

EVIDENCE—JUDICIAL NOTICE.—Plaintiff was struck by an automobile, owned and operated by the defendant. At the trial, witnesses

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[1] Cohen v. Ellis, 42 Hun 660, 4 N. Y. St. Rep. 721 (N. Y. 1886); Delano v. Rice, 23 App. Div. 327, 48 N. Y. Supp. 295 (1st Dept. 1897); Chisholm v. Eisenbuth, 69 App. Div. 134, 74 N. Y. Supp. 496 (1st Dept. 1902); see also John v. Reynolds, 115 App. Div. 647, 10 N. Y. Supp. 293 (1st Dept. 1906) (exchange of stock in a telephone and telegraph company for shares in another telegraph company by false representation); Stern v. Stern, 122 App. Div. 821, 107 N. Y. Supp. 900 (1st Dept. 1907) (falsity concerning amount of production, dividends, etc.).

[2] Donemar, Inc. v. Malloy, 252 N. Y. 360, 169 N. E. 610 (1930).

[3] WALSH, EQUITY (1930) pp. 281 *et seq.*

[4] Gravenhorst v. Zimmerman, 236 N. Y. 22, 139 N. E. 766 (1923); Slater v. Slater, 240 N. Y. 557, 148 N. E. 703 (1925); Mincho v. Bankers Life Ins. Co. of City of New York, 124 App. Div. 578, 109 N. Y. Supp. 179 (1st Dept. 1908).

[5] McNamara v. Eastman Kodak Co., 232 N. Y. 18, 133 N. E. 113 (1921); Wolf v. National City Bank, 170 App. Div. 565, 156 N. Y. Supp. 575 (1st Dept. 1915); Sincerbeaux v. Queensboro Corp., 221 App. Div. 880, 224 N. Y. Supp. 915 (2d Dept. 1927).

[6] American Surety Co. v. Conner, 251 N. Y. 1, 10, 166 N. E. 783, 786 (1929).

[7] Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004 (1891); Allerton v. Allerton, 50 N. Y. 670 (1872); Continental Insurance Co. v. Equitable Trust Co. of New York, 127 Misc. 45, 215 N. Y. Supp. 281 (Spec. T. 1926).

[8] Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652 (1899); Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911); Buffalo Builders Supply Co. v. Rieb, 247 N. Y. 170, 159 N. E. 899 (1928); United Zinc Companies v. Harwood, 216 Mass. 474, 103 N. E. 1037 (1914) (decided squarely on the Buffalo case).

[9] Philips v. West Rockaway Land Co., 226 N. Y. 507, 124 N. E. 87 (1919); Badger v. Scobell Chemical Co., 247 N. Y. 587, 161 N. E. 193 (1928).

[10] The very act of suing disaffirms any possibility of ratification.