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ENFORCEMENT OF CONTRACT BY THIRD PARTY.

In the case of the *Dunlop Tyre Co. v. Selfridge & Co.*,¹ Lord Haldane formulates in three fundamental principles what he considers to be the present English rule of contracts, as regards the rights of third parties. They are: I, That a stranger (i. e., one who is not a party) to the contract cannot enforce it; II, That a person, with whom a contract not under seal has been made, may not enforce it unless he has given consideration; III, That a principal not named in the contract may not sue upon it, unless (a), the promisee really contracted as his agent, and (b), the principal either personally or through the agent has given consideration. These principles have been negatively stated, inasmuch as it is with the position of the third party we are concerned. It is here sought to be shown that there is a vital distinction between principles I and II—which for brevity's sake

¹ (1915) A. C. 847.

will be designated by the Roman numerals—which has been very little recognized by either English or American courts; and that, furthermore, principle II is by no means so firmly embedded in English law as the statement by Lord Haldane would lead one to suppose.

The typical issue, in which one or both principles may be presented, is that in which enforcement is sought by a beneficiary, either donee or obligee. But this beneficiary may hold one of two positions. In I he may be a total stranger to the agreement, to whom neither promise is made, nor from whom consideration moves, or he may, under II, be a party to the extent that the promise is made directly to him, though consideration move from another. Pollock on Contracts, in the note on American law,² points out the above line of cleavage. "Promises for the benefit of a third party," he says, "must also be distinguished from promises to one who has not given consideration for the promise"; and in illustration, though not affirmation, of principle II, goes on to state that "there seems to be no good reason why A should not be able, for consideration received from B, to make an effective promise to C. Unquestionably he may in the form of a promissory note, and the same result is generally reached in this country in the case of an ordinary simple contract." Unfortunately, however, this eminent authority proceeds to cite several cases as being of this nature, among them the leading decision of *Lawrence v. Fox*.³ This, it is submitted, is clearly incorrect, inasmuch as the promise was made in that instance, to the party who gave consideration, for the benefit of a third. Only two of the six judges were of the opinion that by any manner of means could the giver of consideration be construed to be an agent for the third party, in receiving the promise. Other cases cited as examples—but, once more, not in affirmance—of II are as clearly correct,⁴ while an insurance case like that of the *Palmer Bank v. Ins. Co.*,⁵ in which there was a promise to the insured to pay any subsequent mortgagee, is much nearer the border line, though probably within the limits of I.

Anson on Contracts⁶ lays down that "it is now established that no stranger to the consideration can take advantage of the

² Pollock: Contracts (Ed. Williston), 241.

³ *Lawrence v. Fox*, 20 N. Y. 268.

⁴ *Rector v. Teed*, 120 N. Y. 583; *Van Eman v. Stanchfield*, 10 Minn. 255.

⁵ *Palmer Bank v. Ins. Co.*, 166 Mass. 189.

⁶ Anson: Contracts (Ed. Huffcut), 106.

contract, though made for his benefit," while the editor in a footnote on American law declares that "if the promise is made directly to the plaintiff, he may recover upon it, notwithstanding consideration moves from another." As a matter of fact, American courts, as we have seen, have allowed enforcement by the third party in both positions, thus denying the application of either principles I or II to the law of this country.⁷ Massachusetts continues to be the most reluctant to go the length of granting relief to the entire stranger.⁸

It is now equally well recognized that, as regards the stranger, English courts are of the same opinion as Massachusetts. Since the case of *Tweddle v. Atkinson*,⁹ principle I has, as the Lord Chancellor claims, become firmly established. There is much more doubt as regards II. The comparatively recent decisions of *McGruether v. Pitcher*¹⁰ and *Taddy & Co. v. Sterious & Netten*¹¹ display a tendency to support it, but the respective conclusions are reached on the ground that conditions as regard minimum retail price cannot pass with the goods and be imposed upon subsequent purchasers, rather than upon the ground of non-enforceability of a contract, once made, by the plaintiff who have given no consideration. But in *Slater v. Jones and Capes v. Ball*¹² the defendant debtor was allowed to set up a composition agreement among his creditors, under the Bankruptcy Act of 1869, in bar of suit, although no consideration had moved from him. The later case of *West Yorkshire Darracq Co. v. Coleridge*¹³ is decided independently of the Bankruptcy Act. This was an instance of an agreement with the plaintiff, by the plaintiff's directors, in return for consideration given by the directors to each other, not to sue for their respective fees. The plaintiff, in defending against a counterclaim by the defendant for his fee, was allowed to enforce the agreement. The opinion of Harridge, J., locating this case under II but specifically disavowing that principle by finding for the plaintiff, takes

⁷ Also recent cases: *Uhrich v. Globe Surety Co. of Kan. City*, 166 S. W. (Mo. App.) 845; *Grimes v. Barndollar*, 148 Pac. (Colo.) 256; *Stanley v. Weston*, 92 Kan. 317; *Harbeck v. Harbeck*, 149 N. Y. Supp. 791; *Torp v. Jahn*, 177 Ill. App. 85.

⁸ *Sampson Co. v. Commonwealth*, 202 Mass. 326.

⁹ *Tweddle v. Atkinson*, 1 B. & S. 393.

¹⁰ *McGruether v. Pitcher*, 91 L. T. 678.

¹¹ *Taddy & Co. v. Sterious & Netten*, 89 L. T. 628.

¹² L. R. 8 Ex. 186.

¹³ *West Yorkshire Darracq Co. v. Coleridge*, 2 K. B. 326.

a radical step toward the American doctrine. He says, "It is contended for the defendant that though the agreement may be binding as between the defendant and his co-directors, the company are not thereby relieved from liability to pay the defendant his fees. In support of that contention the case of *Tweddle v. Atkinson* was cited, reliance being placed especially on the judgment of Wightman, J.; but it is clear that the plaintiff in that case was in no sense a party to the agreement, and the decision cannot, therefore, be regarded as governing the present case."

C. B.

PRICE RESTRICTIONS ON RESALE OF CHATTELS.

In a recent Federal case,¹ the court held that an agreement for price restriction in case of a patented article was binding upon the vendee. Stress was laid upon the fact that the object to which the agreement related was a patented article, thus raising an inquiry in the mind of the reader as to what result would follow if an ordinary chattel were involved.

That a general restraint on the alienation of chattels is void is a well-established common-law doctrine.² But this does not mean that all conditions on vendee's privilege of resale are invalid. For limited restrictions as an incident to the sale of chattels are permissible at common law.³ The usual test of validity is that such restriction must not be wider than the protection of the parties thereto demands nor so wide as to affect the public injuriously—in other words, it must not be in unreasonable restraint of trade.⁴ And so even in cases of ordinary chattels, the circumstances may be such as to make stipulations as to price of resale binding upon the vendee.⁵

According to the decision of the principal case, the patent has added to the power of its owner enabling him to exact an agreement from the vendee as to the price of resale even though the effect is to prevent competition and thus maintain prices. So that patented articles are exempted from the operation of the usual common law inhibition of restraint of trade or monopoly.

¹ *American Graphophone Co. v. Boston Store of Chicago*, 225 Fed. 785.

² *Coke on Littleton*, Sect. 360.

³ *Grogan v. Chaffee*, 156 Cal. 611; *Walsh v. Dwight*, 40 N. Y. A. D. 513; *Garst v. Harris*, 177 Mass. 72.

⁴ *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24.

⁵ See note 3, supra.

That a patentee is so favored may be attributed to the patent law. The protection given to inventors and authors in this country originated in the Constitution.⁶ Pursuant to this provision the Act of Congress provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the *exclusive* right to *make, use* and *vend* the invention or discovery."⁷

It is by virtue only of this act that the patentee can claim rights, powers, privileges or immunities that are not incident to the ownership of ordinary chattels. That the statute gives him the power to prevent others from making, using or vending his invention is clear. This naturally enables the patentee to control the whole output of the particular article and thus gives him a monopoly. So that a monopoly which is obnoxious to the common law is thus legalized. However, the added privilege of making agreements restricting price of resale does not necessarily flow from the express powers given by the act of Congress.

Once the patented object has been sold, courts might have held that the exclusive right to vend had been exercised and the patentee subject to the same law as the owner of an ordinary chattel. As the general welfare of the people was to be furthered by the encouragement of inventions the patent act was liberally construed. The courts reason that inasmuch as the patentee could create agencies to sell for him directly to the consumer at certain prices, he should be permitted to reach the same result by a different method, namely, by getting a binding obligation from the vendee not to sell below a certain price. Or it is agreed that excluding all others from selling includes the lesser privilege of imposing such conditions as to the price of resale as the patentee sees fit and the objection of restraint of trade is unavailing.

If then we conclude that the patent law has clothed the patentee with a power to control the price of his article by the method of restrictive agreement, can he also attain this by means of a license-restriction-notice so as to bind not only his immediate vendee but all those that have knowledge of the price stipulation? This depends upon whether we are ready to apply to patented

⁶ Section 8 of article 1 of the Constitution authorizes Congress "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

⁷ Section 4884 of the Revised Statutes.

articles the doctrine of *Tulk v. Moxhay*⁸ relating to land, that the condition or restriction attaches to the chattel and all who take with notice are bound thereby.

In the case of ordinary chattels, the condition of resale, even if valid, only creates a personal obligation against the party contracting and purchasers with notice are not bound.⁹ And according to the case of *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*¹⁰ the owner of a trade-secret article has no greater power in imposing a restriction upon resale than the owner of any chattel property. As regards copyright works, the Supreme Court of the United States¹¹ decided that the main purpose of the copyright law was to give the exclusive right to multiply copies of works and for that reason held that a notice as to the price of resale was ineffectual as against one not bound by contract.

In the case of patented articles the English courts hold that one who has taken with notice of a price-restriction of resale is bound.¹² This view obtained in our Federal courts¹³ until reversed by *Bauer v. O'Donnell*,¹⁴ which held that a patentee cannot by notice limit the price of his article. As our patent law is worded almost identically as the English one, our arriving at a different conclusion must be due to a difference in the construction of the language. However, the Supreme Court has not been consistent in its interpretation of the patent law. For curiously enough, but a few years before the Bauer case, it decided in *Henry v. Dick Co.*¹⁵ that a license restriction authorizing the use of a patented article only in connection with certain unpatented articles made by the vendor bound all with notice and the defendant who sold one of these unpatented articles mentioned in the license restriction after notice was liable as a contributory infringer.

An attempt was made in the Bauer case to distinguish between these cases because one involves a restriction on *use* and the other

⁸ 78 R. R. 289.

⁹ *Taddy v. Sterious*, [1904] 1 Ch. 354; *Garst v. Hall & Lyon*, 179 Mass. 588.

¹⁰ 220 U. S. 373.

¹¹ *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339.

¹² *Phonograph Co. v. Menk*, 1911 A. C. 336.

¹³ *New Jersey Patent Co. v. Schafer*, 144 Fed. 437; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424.

¹⁴ 229 U. S. 1 (4 judges dissenting).

¹⁵ 224 U. S. 1.

on *selling*. But inasmuch as all the added powers and privileges the patentee obtains are derived from the act that gives him "the exclusive right to *make, use, and vend,*" a power to impose similar conditions and limitations must of necessity exist where the exclusive right to vend is exercised as where the patentee exercises the exclusive right to *use*. Perhaps the court has receded from its former position in the Dick case and now refuses to supplement to the personal obligation that may be imposed upon a vendee by contract an equitable constructive obligation on all those that take with notice of the restrictions or conditions. As has been intimated before, the patent act does not expressly endow a patentee with the extraordinary power of being able to impose a servitude on his goods analogous to burdens on land. Nor does this power seem to be reasonably incidental to the express powers and the court is justified in refusing to give patented articles the status of land and thus bind strangers by mere notice.

The principal case dealing as it does merely with the personal right against the party who contracted appears to be sound. For endowing patented articles with immunity from the objection of monopoly is in line with the general policy of the law in encouraging inventions. And as the law has granted the patentee a monopolistic right of vending, it may be considered as fairly incidental to hold that an agreement restricting the price of resale is valid.

M. H. L.

ORAL ASSENT BY THE BANK OF PRESENTMENT TO THE DIRECTION
OF ITS DEPOSITOR TO PAY HIS NOTE HELD BY IT FOR
COLLECTION AS DISCHARGING THE
INSTRUMENT.

The decision of the New York Court of Appeals in the recent case of *Baldwin's Bank of Penn Yan v. Smith* is novel, striking and of great importance in the practical workings of the business community. The holder of a note payable at the W. bank sent it before maturity to that bank "for collection and remittance." On the due day the maker telephoned to the bank and, on being informed by the president that the note was there, directed that it be paid, and was told that that would be done. Seven days later the bank failed without having remitted to the holder, or made a transfer of credits, or marked the note or done anything further to evidence payment. At all times the maker had sufficient funds

in the bank to take up the note. In an action on the note by the holder against the maker, it was *held*, that (1) the W. bank was the agent of the holder and not of the maker; (2) the holder must bear the loss caused by the negligence of its agent; and (3) the note was paid.¹

The note being payable at a bank is equivalent to an order on the bank, and the relation of the parties is therefore similar to that of the parties to a check.² It is pointed out by the court that the commonly accepted doctrine which makes the bank the agent of the drawer of a check "to hold or to pay his money as he directs" can not bear analysis.³ That the bank does not pay the drawer's money, that it merely liabilities itself on its implied contract with the drawer, by refusing to pay its own money at the direction of the drawer, whether the latter has deposited sufficient funds before or after presentment, is asserted on unimpeachable authority by the whole court in this case.

That the collecting bank is in fact the agent of the holder can not be reasonably contested. If the holder had sent the note to his own private general or special agent for collection, would the maker be justified in refusing to pay such agent? True, his having sufficient funds in the bank on the due day is equivalent to a tender,⁴ but the maker being the party primarily liable, is not thereby discharged.⁵ If such private agent had presented the note at the bank of presentment on the due day, the maker would clearly be liable to costs if payment were refused. Then, if the holder chooses as his agent the bank which is the depository of the maker, is it reasonable to suppose that his appointment is a nullity?

The question arises, however, when did the bank become the agent? The majority opinion declares that the agency was constituted by the *sending* of the note; but, except as an act establishing one element of estoppel, the sending of the note could surely not amount to more than an offer for an agency. The minority opinion declares that the agency was constituted by the

¹ *Baldwin's Bank of Penn Yan v. Smith*, 215 N. Y. 76; 109 N. E. 138. (Collin and Cuddeback, JJ., dissented; and Seabury, J., concurred in result.)

² Neg. Instr. Law, § 87 (Consol. Laws, § 147); *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82.

³ See Morse on Banks and Banking, vol. 1, pp. 700, 442.

⁴ Neg. Instr. Law, § 70 (Consol. Laws, § 130).

⁵ *Wolcott v. Van Santvoord*, 17 Johns. 248.

receipt and detention of the note; and this, although involving an acceptance of an offer by silence, commends itself as more logical, in view of the peculiar fiduciary obligation imposed by business custom upon the banker.

The agency once established, the vital question arises, Was the agent paid? It is to this point that the dissenting opinion of Collin, J., is directed. The bank was the holder's agent to receive payment; in that capacity it could do no more. If A appoints as his agent B's debtor, and B authorizes his debtor to pay A, which authority is not carried out, it may safely be said, as a general proposition, that A has not been paid. Negligence can not discharge an instrument where presentment was made in reasonable time, as was the case here; and the negligence in making payment, if none was made, consisted in the omission of a duty owing to the maker.⁶

But the negligence in the principal case was of such nature as to work an estoppel. This must be taken as the holding of the court on this point. Says Miller, J.: "By sending the note to the Watkins bank . . . the plaintiffs . . . led the defendants to suppose that their credit had been applied *pro tanto* to the payment of the note, and lulled them into taking no further measures either to pay the note or to draw upon the credit thus appropriated."⁷ If, in the supposititious case, *supra*, B's debtor, A's agent, tells B that A will be paid, and the circumstance of the parties is such that B can reasonably rely on his debtor's word, and as a result of such reliance B suffers loss in having the debt unpaid, will not A be estopped by the conduct of his agent to claim from B?⁸ Should it be contended that the bank in making the representation was not acting within the agency conferred by the holder, the reply may be made that the bank was the holder's agent *to take* payment and that extrinsic facts surrounding the agency and giving the agent a power peculiar to him are sufficient to base an *estoppel in pais* against his principal.⁹

The difficulty here is that the representation was a promise or, at most, an assent. But if the reliance thereon was reasonable, it surely should, under the circumstances, be equivalent to an act. To hold that a depositor acts unreasonably in relying on the

⁶ *Sutherland v. First Nat. Bank*, 31 Mich. 230.

⁷ 215 N. Y., at 81.

⁸ *Griswold v. Haven*, 25 N. Y. 595.

⁹ *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 68, *et seq.*

word of his banker, would strike a blow at the very foundation of our commercial institutions. In fact, it may be suggested here that no reliance was necessary, and that the assent accomplished a novation. When the holder sent the note to the bank, he surely assented to have the bank substituted as his debtor in place of the maker; when the maker directed the bank to apply his credit to the note, he surely offered a discharge *pro tanto* of his claim against the bank in return for a promise by the bank to pay to the holder and an assent by the holder to accept the substitution. Thus the assent of the bank consummated the transaction; for the assent of the holder had already been given to precisely such a transaction.

By considerations, perhaps, involving a parity of reasoning, the court was induced to hold that the note was paid. Although not essential to the decision of the case, the manner in which the holding was handed down, and the cogent reasoning and authorities given in its support, will commend it as of binding force. The conclusion is reached on the premise that the act of payment is distinct from evidence of the act, and as long as the act occurred, evidence of it is not important.

The difficulty suggested—*i. e.*, the ascertainment of the fact—is more apparent than real in the case at hand. If the maker had handed money over the counter, and the bank had sent to the holder a bad check, or had made no remittance, the note would clearly have been paid as to the maker;¹⁰ but if the maker had passed a bad check over the counter and had been given a credit memorandum, the note would not have been paid.¹¹ That is, the evidence of payment failing, the fact of payment would not necessarily fail; and, on the other hand, the evidence of payment established, the fact of payment is not necessarily established.

It is not to be supposed that the bank was to send to the holder the identical money it obtained from the maker, and surely the maker would never be required to do more than place in the hands of the collecting agent sufficient funds to take up the instrument. If the bank already has the sum or an equivalent in its hands, would it not be unreasonable and legally unnecessary to require a transfer and retransfer of the sum in order to constitute payment? *Lex neminem cogit ad vana seu inutilia*. If the

¹⁰ Morse on Banks and Banking, § 214.

¹¹ *Smith v. Miller*, 6 Roberts. 157; *Nat. Gold Bank v. McDonald*, 51 Cal. 64.

bank, "in fact, accepted an appropriation of the maker's credit with it in payment of the note, that should constitute payment," and "the acceptance of the maker's verbal order to make the application was an act fully as effective as, *e. g.*, the marking of the note paid."¹²

It is to be observed that there was in this case an acceptance of the verbal order of the maker. Would the court, in the absence of such order and acceptance, entertain the presumption that the bank had performed its legal duty by paying the note?¹³ Several statements in the opinion would justify such conclusion. But if, instead of appropriating the maker's credit to the payment of the note, the bank allows him to withdraw his entire deposit, it is very questionable whether the note would be held paid. In fact, sureties on the instrument would probably be discharged, on the theory that the bank has prejudiced them by not taking advantage of the opportunity to make the appropriation.¹⁴ It would, therefore, be more correct, in view of the facts of the principal case, to say that on this point the Court held, that an oral assent given by a bank, holding for collection the note of a depositor, to the depositor's direction to pay it, is sufficient evidence of payment.

A. M.

¹² 215 N. Y., at 84, 85.

¹³ *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82.

¹⁴ *Pitts v. Congdon*, 2 N. Y. 352; *Wright v. Austin*, 56 Barb. 13; *King v. Baldwin*, 17 Johns. 384, 390, 393; *Shutts v. Fingar*, 100 N. Y. 546; *Bank v. Smith*, 66 N. Y. 272.