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Recent Decisions

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one, the assignee has a preference over the assignor; [12] and (2) There is no contribution between purchasers in succession at different times of different parts of the estate of a judgment debtor.[13] Again it is said that it is inequitable to allow a mortgagee-assignor who has assigned a part of the notes or bonds secured by the mortgage and has received the consideration therefor to compete with the assignee in the insufficient mortgage security.[14] If the assignee knows of the existence of the mortgage, he knows that there are other notes that may be assigned by the mortgagee, and if as between the assignees the pro rata rule applies he takes subject to this rule (risk), that is, he pays for the note or bond assigned to him on this basis. If he does not know of the mortgage security, he has not relied upon it in making his purchase. So there seems to be no equitable basis on which to allow him priority over the mortgagee-assignor. Again, to allow the assignee priority over the mortgagee-assignor would, in effect, give the latter a power of increasing the value of the mortgage security in those jurisdictions that apply the pro rata rule as between the assignees and apply the pro tanto rule as between the mortgagee-assignor and assignee, for, by assigning all of the notes or bonds, the mortgagee-assignor could give to these last assigned a value which they did not theretofore have.[15]

Frank Lanigan.

RECENT DECISIONS

CONTRACTS—OFFER AND ACCEPTANCE IN GENERAL.—In the case of *Daddario v. Town of Milford,* 5 N. E. (2d) 23 (Mass. 1936), the plaintiff brought a suit in equity to compel the return of a certified check for $5,000 which had been deposited by him with the defendant to accompany a bid or proposal for constructing a sewerage treatment works in the town of Milford, Massachusetts. The contract was to be awarded under the rules and regulations of the Public Works Administration as published in a pamphlet furnished to the bidders. The advertisement for the bids provided that no award could be made by the sewer commissioners without the authorization of the State director of the Public Works Administration, and that no bidder might withdraw his bid for a period of thirty days after the date set for the opening of the bids. The advertisement also provided that a certified check for $5,000, payable to the defendant as security for the execution of the contract, should accompany the proposal and that the bidder to whom the contract was awarded had ten days from the date of the notice of the award to execute his contract and bond, otherwise the $5,000 would be forfeited as liquidated damages. On October 28, 1935, the plaintiff signed this proposal as his bid, and the bids were opened on October 29, 1935. On October 30, 1935, the plaintiff wrote the following letter: "Will you kindly allow me to

12 Van Rensselear v. Stafford, 1 Hopk. Ch. 569 (1825).
13 Clowes v. Dickenson, 5 John. Ch. 235 (1821).
14 POMEROY, EQUITY JURISPRUDENCE (4th ed.) 1203.
15 See Domeyer v. O'Connell, *op. cit. supra* note 1, at 835.

withdraw my bid on your disposal plant as I made two serious errors in the concrete. My price on 1-2-4 concrete was to be $26.50 a yard instead of $16.50 per yard and on the 1-2½ was to be $20 instead of $10 a yard. If you will kindly allow me to withdraw my bid and return my check I will appreciate it very kindly." The sewer commissioners, after receiving this letter on the same date, held a special meeting and allotted the contract to the John MacDonald Construction Company and sent a copy of their vote to the Public Works Administration authorities. The authorities informed them that they were to either credit the $5,000 to the construction account or award the contract to the plaintiff as the lowest bidder. The plaintiff received word from the commissioners that the contract had been awarded to him and that in case of his failure to execute the contract and bond within ten days his $5,000 would be forfeited as liquidated damages. He received the notice on December 3, 1935, and did not execute the contract nor bond within the ten days, but did file his bill of complaint on December 11, 1935. The lower court dismissed the complaint and the decision was affirmed upon appeal and the final decree against the plaintiff was entered. The opinion of the appellate court, as written by Justice Pierce, shows that the decision was arrived at upon several grounds. First, "Disregarding the stipulation as to time, the effect of the offer is that the offeree's power of acceptance continues until actual acceptance, that is, continues until terminated by actual acceptance or rejection of the offer or by any other means regarded as effective by the law. 'Am. Law Inst. Restatement, Contracts, Section 34.'" Second, "The plaintiff's letter of October 30, 1935, couched in terms of courtesy, can be construed as a withdrawal of his offer, but the contract is clear that the plaintiff and the defendant understood that the certified check delivered to the defendant was to be forfeited as liquidated damages if the plaintiff within thirty days after the opening of the bids withdrew his offer contained in the proposal." The court thereupon cites *Turner v. City of Fremont,* 170 Fed. 259 (C. C. A. 8th, 1909), *Wheaton Building & Lumber Company v. Boston,* 204 Mass. 218, 90 N. E. 598 (1910), and *John J. Bowes Company v. Inhabitants of the Town of Milton,* 255 Mass. 258, 151 N. E. 116 (1926), in support of its contentions. Third, that the plaintiff had the right to withdraw his bid at the end of the thirty-day period and he did not do so. Fourth, that there was not a mutual mistake of the plaintiff and the defendant as to any essential matter connected with the contract, and that it did not appear that the mistake of the defendant was any more than a hasty statement of the prices intended to be bid as distinguished from a mistake of material fact.

In considering the grounds as given for the decision in the order in which they are set forth herein it should be noted that: First, as stated in the opinion of the court, Section 34 of the *Restatement of the Law of Contracts* states that the effect of the offer is that the offeree's power of acceptance continues until acceptance or rejection of the offer or until terminated by any other means regarded as effective by the law; *but* was there an offer in this case? Section 71 of the *Restatement of the Law of Contracts* states that "If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance." According to the facts of the principal case, the defendant was informed by the plaintiff that the bid did not express that which the plaintiff intended. This information was given to the defendant more than a month before acceptance was attempted by the defendant. "One is not permitted to accept a promise which he knows that the other party understands in a different sense than that in which he understands it. In such a case there is no agreement." CONTRACTS, 13 C. J. § 258, citing *Mercer v. Hickman-Ebbert Company,* 105 S. W. 441 (Ky. 1907).

Secondly, assuming that the plaintiff and the defendant both understood that the certified check accompanying the offer was to be considered as forfeited as

liquidated damages if the plaintiff within thirty days after the opening of the bids withdrew his offer contained in the proposal, was there a withdrawal of the bid by the plaintiff by his letter of October 30, 1935, or was the letter, in effect, a notification to the defendant that the plaintiff had made a mistake in preparing his bid thereby preventing the bid from becoming operative as an offer? The Massachusetts Court, in principal case, cites the case of *Turner v. City of Fremont, supra,* wherein it was held that after the plaintiff had been declared the lowest bidder on the proposed paving work and his bid was accepted by the city, his refusal to enter into a contract operated as a forfeiture of the deposit he had been required to make, and the rights were thereby fixed and were not affected by the subsequent action of the city council in declaring another the lowest bidder and accepting his bid. The court in that case also decided that the agreement between the city and the bidder that a deposit of 5% of the amount of his bid should be considered as liquidated damages and forfeited to the city if the bidder's proposal was accepted and he failed to enter into the contract was a valid and enforceable agreement. The second case cited by the Massachusetts Court, *Wheaton Building & Lumber Company v. Boston, supra,* is in accord with the holding that an agreement fixing a definite sum as liquidated damages in case of a failure of the bidder to enter into a contract, is valid and enforceable. In neither of these cases is the factual situation one of withdrawal of a bid before acceptance, nor does a mistake made by the bidder and known to the other party before acceptance appear. In the case of the *Northwestern Construction Company v. Town of North Hempstead,* 105 N. Y. S. 581 (1907), the defendant advertised for bids on the erection of a bridge according to certain plans. The plaintiff submitted his bid and along with it the required certified check. On receipt of the bids, the commissioners, in a joint session, adopted a resolution that the secretary notify the plaintiff that his bid for the construction of the bridge be accepted, conditioned upon leave being granted by the board of supervisors to issue bonds of the town in the sum of $20,000. Before any steps had been taken to notify the plaintiff of the acceptance of his bid, the plaintiff notified the commission by telegram not to consider his bid and sent them a letter in which he claimed to have made a mistake in the bid and withdrawing it. The court decided that there was no acceptance of the plaintiff's bid which would bind him, and he was entitled to a return of the deposit made by him when he submitted the bid. In *Board of School Com'rs v. Bender,* 36 Ind. App. 164, 72 N. E. 154 (1904), the court held that the acceptance of a bid several thousand dollars lower than intended by the bidder, in consequence of his having turned two leaves of his estimate book and omitted estimate on part of the work, did not create a contract, as the minds of the parties had not met; and a complaint setting forth such facts and that prompt notice of the mistake was given to the board accepting the bid, and the letting of the contract to the next highest bidder, stated a cause of action in equity to rescind the bid and to recover the deposit made as a guaranty that the bidder would enter into a contract if the bid was accepted.

In its final statement the Massachusetts Court correctly states that there was no mutual mistake of the parties, but it goes on to state that it does not appear that the mistake of the plaintiff was any more than a hasty statement of the prices intended to be bid as distinguished from a mistake of material fact. The Massachusetts Court cites the case of *John J. Bowes Company v. Milton, supra,* to show that a mistake of one of the parties to a contract is not ground for relief in either law or equity. There are many cases adopting the view that a mistake in the terms of a bid, relating to price, is a material mistake of fact. *Northwestern Construction Company v. Town of North Hempstead, supra; Board of School Com'rs v. Bender, supra; Mercer v. Hickman-Ebbert Company, supra.* And it appears in the facts of the principal case that there was not merely

a mistake by one of the parties but that there was a mistake by one of the parties and this mistake was known to the other party before acceptance was attempted, thereby bringing the case under the rule stated in Section 71 of *Restatement of the Law of Contracts.*

The opinion of the Massachusetts Court in the principal case does not appear to the writer to be one of sound application of law to facts; and upon viewing the decisions in point in other states, it does not seem that the Massachusetts Court has much, if any, support in the decision it made in the case.

Edward J. Hummer.

CORPORATIONS—INSOLVENCY AND RECEIVERS—APPOINTMENT OF A RECEIVER—GROUNDS—DISSENSION AS TO MANAGEMENT.—A bill was brought by certain stockholders, officers, and creditors of the defendant corporation in which they prayed for the appointment of a receiver to take charge of all the assets on the ground that the stock of the corporation was owned in equal shares by two contending parties and that their condition threatened to result in the destruction of the business and property of the corporation. *Held,* that under such circumstances a court of equity may appoint a receiver to preserve the property of the corporation, administer it, and, if necessary, dispose of it for the protection of the creditors and the benefit of the owners. *Saltz v. Saltz Bros.,* 84 Fed. (2d) 246 (App. D. C. 1936).

The appointment of a receiver to take possession of the assets of a corporation and distribute them is tantamount to dissolving the corporation by a decree in equity. See *People v. Shurtleff,* 187 N. E. 271, 276 (Ill. 1933).

As a general rule a court of equity has no jurisdiction, in the absence of statutory authority, to dissolve a corporation, and distribute its assets, at the suit of a stockholder or any other private individual. CLARK, PRIVATE CORPORATIONS (1916) 310. "Courts are particularly disinclined to appoint a receiver for misconduct or mismanagement of a corporation, or for the purpose of merely preserving its assets, where the application is made by stockholders, for the reason that the sovereign does not furnish public agencies for the carrying on of private enterprises." *Blanchard Bro. & Lane v. S. G. Gay Co.,* 124 N. E. 616, 619 (Ill. 1919). While courts of chancery have no general power to appoint receivers of corporations, dissensions among the stockholders or the members of the board of directors may lead to the appointment of a receiver of a private corporation. HARDY'S SMITH ON RECEIVERS (1920) 720. "Such a situation can exist usually only when there is an equal or nearly equal division of the stock between the contending parties. . . ." HARDY'S SMITH ON RECEIVERS (1920) 720. Where the dissensions among those in charge of the corporation are of such a serious character that it is impossible for the corporation to attain its objects for which it was formed, or where the dissensions result in a deadlock in the management of the business, a court of equity is considered as having power to appoint a receiver to straighten out the muddle and even to wind up the affairs of the corporation. *Flemming v. Heffner & Flemming,* 248 N. W. 900 (Mich. 1933); *Sternberg v. Wolff,* 56 N. J. Eq. 389, 39 Atl. 397, 39 L. R. A. 762, 67 Am. Rep. 494 (1897); *Merrifield v. Burrows,* 153 Ill. App. 523 (1910). On the other hand, some courts have refused to appoint a receiver, where there is a deadlock in the management of the corporation, unless the complainants are able to show some fraud or other wrong doing on the part of their opponents. HARDY'S SMITH ON RE-