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Notes on Recent Cases

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NOTES ON RECENT CASES

CORPORATIONS—The effect of corporate insolvency upon rights as between creditors and a subscriber who makes a conditional delivery of a stock subscription.—The trustee in bankruptcy, representing creditors of an insolvent corporation, brought an action against a subscriber to the capital stock. By way of defense, the defendant alleged that he had signed the written subscription to the capital stock but had delivered same to the authorized agent of the corporation with the oral agreement that it would not become an effective subscription unless, and until, he had notified said company that it was to be binding upon him. In other words it was not to be a binding obligation until the subscriber was ready to assume the liabilty. The defendant never notified the company that he would take the stock and pay for same so the condition was never satisfied; but the corporation made an unauthorized entry of his subscription on its books. The plaintiff replied that under these facts the defendant was estopped to deny liability. No evidence was offered to show that any credit was extended to the corporation with knowledge of the subscription and reliance thereon. *Held,* defendant not liable. *Martin v. Steinke* (Ct. App. Ohio 1926) 154 N. E. Adv. 47. "In cases involving the conditional delivery of stock subscription and avoidance of liability thereon, the subscriber is entitled to be relieved from the obligation of said subscription unless creditors or others dealing with said company knew of and relied upon said stock subscription and were induced to extend credit to said company or change their position in relation to said company, to their injury, upon the strength of said subscription." Explaining the difference between a *conditional delivery* of stock subscription and a *conditional subscripton,* Pardee, P. J.; stated, "In the *latter,* the corporation is to do something before the subscription becomes obligatory, the subscription being a *continuous offer by the subscriber* which becomes binding when accepted by the corporation by performance of the condition imposed. In the instant case, (conditional delivery), the subscriber reserved to himself the right to say when the subscription should become binding upon him—or in other words *the company made him a continuing offer* to sell him its shares of stock, which would become a binding obligation upon both *when*

and *after* he indicated his willingness to take and pay for the same."

Nowhere is there more confusion than in the law applicable to conditional delivery of stock subscriptions. Not only are the courts not in harmony in their application of law, but there is much confusion of the terms, "conditional subscription", and, "conditional delivery of a subscripton". Moreover there are not many cases reported involving a pure conditional delivery. However, a few general observations will be noted.

Parol evidence is admissible to show that there was a conditional delivery and that the contract was inoperative. Clark, "Corporations," 3rd ed. p. 380, 381, Fletcher, "Corporations," Vol. 2 sec. 600; *Wilson v. Powers,* 131 Mass. 539. *Contra*: *Madison and Indianapolis Plankroad Co. v. Stevens,* 10 Ind. 1; *Wight v. Shelby R.R. Co.* 16 B. Monroe (Ky.) 4, 63 Am. D. 522. A written subscription to stock may be delivered in escrow or conditionally and, with certain exceptions, is not binding until the conditon is fulfilled. This rule obtains where delivery is made to a third person, 14 C. J. 524; but where delivery is made to an agent or officer of the corporation some courts hold to the rule applicable to deeds which makes the delivery absolute. *Madison and Indianapolis Plankroad Co. v. Stevens, supra; Wight v. Shelby R.R. Co., supra.* The general rule seems to be that the conditional delivery is good notwithstanding the fact that it was made to an officer or agent of the corporation, and, "Evidence is admissible to show that the contract, absolute on its face, was not in fact so, and was not operative until the happening of a contingency." Clark, on Corporations 3rd ed. p. 380, 381; *Accord*: Cook, "Corporations," 8th ed. vol. 1, sec. 60: *Gilman v. Gross,* 97 Wisc. 224; *Gt. Western Tel. Co. v. Loewenthal,* 154 Ill. 261, 40 N. E. 318. A subscriber may be *estopped* to set up an oral agreement showing that there was a conditional delivery and that the condition was never fulfilled if innocent creditors have been induced to extend credit to the corporation, or have changed their position relying on an apparent state of facts which did not exist. 14 C. J. 524. *Minneapolis Threshing Mach. Co. v. Davis,* 40 Minn. 110, 41 N. W. 1026, 12 Am. S. R. 701, 3 L. R. A. 796.

W. L. T.

SPECIFIC PERFORMANCE—Part Performance With Compensation—Knowledge.—The granting of specific performance of an agreement, which has been only part performed,

has been a weighty question for the consideration of courts of equity. The general rule in both England and the United States, is to the effect that if one undertakes to convey real estate free from incumbrances, the vendor must specifically perform even though only part performance can be made. Compensation must be made for the defect in performance. That the vendee can get specific performance with compensation for what the seller could not give him, is generally recognized, whether there is a deficiency in the quantity or quality of the res, or whether it is subject to an incumbrance, provided that the buyer supposed at the time of the bargain that the seller was in a position to give him all that he bargained for. Ames in his case book (p. 251) enumerates in a very comprehensive note cases for and against this general proposition. Some of the cases supporting are as follows: *Atty. Gen. v. Day,* 1 Ves. Sr. 218, 224: *Milligan v. Cook,* 16 Ves. 1: 17 Ill. 354: 144 Ill. 213: 7 Ind. 73: 144 N. Y. 671, 675 and a long list of cases from other states.

This rule does not, however, go unchallenged in some jurisdictions. Prominent among those cases opposed to giving specific performance for part performance and compensation are: *Rieszs appeal,* 73 Penn. 785: 60 Oregon 203, 118 Pac. 192, Ann. Cas. 1914 A. 203, n.: and cases cited therein. The chief objection to the principal rule is that of the danger of coercing third parties to alieniate their rights away.

In the case under consideration, just decided by the Supreme Court of Mass. in 152 N. E. report, pg. 243, the court went one step further than previous courts in that and in other states in dealing with this problem. In this case the husband, selling property agreed to convey the estate including the wife's dower rights therein, without having the wife join in the agreement. The buyer had knowledge of the wife's dower interest at the time of the purchase. The husband failed to secure the signature of the wife in the sale. Justice Pierce took this case out of the general run by deciding that even with the *knowledge that the purchaser had concerning the wife's interest in the land, the buyer could get specific performance from the seller by means of partial performance and compensation.* No cases are given to support this part of the decision, but

by dictum the court declares that the modern position of women tends to reduce the danger of coercion. This case of *Brookings v. Cooper* apparently is the most recent and strongest stand taken by any court on this proposition.

S. W.