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Specific Performance of Contracts for the Sale of Stock in West Virginia

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SPECIFIC PERFORMANCE OF CONTRACTS FOR THE SALE OF STOCK IN WEST VIRGINIA

In *Hoge v. Pollard*[1] the West Virginia court was again called upon to decide whether equity would grant specific performance of a contract to transfer[2] corporate stock. Since the question appears to have arisen infrequently in this jurisdiction, the cases cited,[3] taken together, may be said to encompass the essential features of West Virginia law on the subject.

The general rule in West Virginia[4] as well as in other American jurisdictions[5] is that equity will not ordinarily grant specific performance of contracts for the sale of corporate stock. The reason advanced in support of this rule is that the mode of dealing in stock in this country is such that most stocks have a readily ascertainable monetary value and are easily available on the open market.[6] Therefore, damages at law afford a complete and adequate remedy. However, shares of stock, being unlike most other personalty in that they are intangible and frequently have an extrinsic value, are often both difficult to purchase and to evaluate. It is in these instances that exceptions to the above stated general rule arise.[7]

The reasons set forth in the leading case of *Hogg v. McGuffin*[8] serve to indicate on what grounds the West Virginia court will grant specific performance of contracts for stock. In that case the defendant agreed to exchange stock in the *A* company for shares in the *B* company held by plaintiff. The court, while recognizing the general rule, said that specific performance of this contract

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1 188 S. E. 867 (W. Va. 1936).

2 Although the suit was to compel the transfer of stock, the court relied on cases involving purchase and sale, pointing out that so far as the jurisdiction of equity is concerned it is immaterial whether the question arises in the purchase and sale of stock or otherwise.

3 188 S. E. 867, 869 (W. Va. 1936).

4 Gibbon v. Jameson's Ex'rs, 5 Call 294 (Va. 1804); Burke v. Parke, 5 W. Va. 122, 126 (1872); Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776 (1891); Hissam v. Parish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892 (1896); Hogg v. McGuffin, 67 W Va. 456, 68 S. E. 41 (1910), 31 L. R. A. (N. S.) 491 (1911); Morgan v. Bartlett, 75 W. Va. 293, 83 S. E. 1001, L. R. A. 1915D 300 (1914); Hubbard v. George, 81 W. Va. 538, 94 S. E. 974, L. R. A. 1918C 835 (1918); McCullough v. Clark, 81 W. Va. 743, 95 S. E. 787 (1918).

5 POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) § 19.

6 *Id.* at § 18.

7 *Id.* at § 19; 2 COOK, CORPORATIONS (8th ed. 1923) § 338.

8 Hogg v. McGuffin, 67 W. Va. 456, 68 S. E. 41 (1910).

should be granted because (1) the amount of plaintiff's damages could not be accurately estimated because the *B* company stock was a factor to consider and the *B* company was insolvent; (2) the *A* company stock was not on the stock list and had no stock list value; (3) the stock sued for had a peculiar value to plaintiff since he desired it for a special and legitimate personal purpose — *i. e.*, its present and promising prospective value; (4) the *A* company was a "close corporation" and its stock was not available on the open market; (5) defendant was insolvent; (6) the stock had a peculiar value by reason of its intangible nature.

Of the bases for equitable relief above enumerated, those most frequently relied on in the West Virginia cases are: the uncertainty in the value of the stock by reason of its not being on the stock list,[9] unavailability of the stock because closely held,[10] and its peculiar value to the party seeking specific performance."[11] Decisions from other jurisdictions[12] would indicate that the uncertainty in the value of the stock which will be recognized as a sufficient ground for equitable interference must arise, not merely from the fact that the stock is not on the stock list, but from the fact that the true value of the stock cannot be ascertained from any available circumstances. In the case of *Hubbard v. George*,[13] the West Virginia court granted specific performance when the evidence showed that on an inquiry among persons reputedly conversant with the value of the stock, those persons varied widely in their estimates of that value. It has also been held that the fact that the price of a particular stock was dependent on the divergent judgments of a number of individual holders, and that it had no market value, rendered its value so uncertain that an award of money damages would not be an adequate remedy.[14] Thus, at least

[9] Hogg v. McGuffin; Morgan v. Bartlett; Hubbard v. George; McCullough v. Clark, all *supra* n. 4; Wallace v. Eclipse Pocahontas Coal Co., 83 W. Va. 321, 98 S. E. 293 (1919).

[10] Bumgardner v. Leavitt; Hogg v. McGuffin; Morgan v. Bartlett; McCullough v. Clark, all *supra* n. 4; Wallace v. Eclipse Pocahontas Coal Co., 83 W. Va. 321, 98 S. E. 293 (1919).

[11] Bumgardner v. Leavitt; Hogg v. McGuffin, both *supra* n. 4; Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299 (1912); Hubbard v. George, 81 W. Va. 538, 94 S. E. 974 (1918); Applegate v. Wellsburg Banking & Trust Co., 68 W. Va. 477, 69 S. E. 901 (1918); Wallace v. Eclipse Pocahontas Coal Co., 83 W. Va. 321, 98 S. E. 293 (1919).

[12] Butler v. Wright, 103 App. Div. 463, 93 N. Y. S. 113 (1905); Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. S. 766 (1905); Moulton v. Warren Mfg. Co., 81 Minn. 259, 83 N. W. 1082 (1900); Ryan v. McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501 (1900).

[13] Hubbard v. George, 81 W. Va. 538, 94 S. E. 974, L. R. A. 1918C 835 (1918).

[14] Morgan v. Bartlett, 75 W. Va. 293, 83 S. E. 1001 (1914).

by implication, the West Virginia court has indicated that it adopts the rational general rule that the mere fact that the stock does not appear on the stock list is not a sufficient basis for granting specific performance. Another basis for specific performance which is mentioned in a large number of cases is the unavailability of the stock. From the very nature of things, this question would generally arise only when the stock of the corporation is closely held — it would rarely be a factor where the stock sued for is listed on the market. The third element much relied on by the courts is that of the peculiar value of the stock. By peculiar value here is meant something more than "uniqueness" as generally applied to personalty. The peculiar value of the stock may not necessarily arise from anything inherent in the stock itself, but rather from the peculiar situation of the party seeking to acquire the stock. This point is illustrated in the case of *Bumgardner v. Leavitt*[15] in which the court said that the peculiar value of the shares sued for rested in the fact that the acquisition thereof would give plaintiff control of the company. This is apparently the law in West Virginia,[16] although other authorities are not uniform[17] in their holdings as to whether or not a desire for control is a sufficient reason for granting specific performance. One other reason advanced in the *Hogg* case[18] for the awarding of equitable relief is that the defendant was insolvent and that therefore plaintiff should not be confined to a recovery of damages at law. Apparently the West Virginia court later took a different view of this matter, for in the case of *Warren Company v. Black Coal Company*[19] it said that if a contract will not otherwise be specifically enforced, the mere insolvency of the defendant will not be a basis for equitable relief.

As is illustrated by the *Hogg* case,[20] the court appears to be reluctant to base its result on any single one of the reasons above mentioned. Hence, the cases usually contain two or more of the bases which have been pointed out.

V. V. C.

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15 Bumgardner v. Leavitt, 35 W. Va. 195, 13 S. E. 67, 12 L. R. A. 776 (1891).

16 Hubbard v. George, contains a dictum (at 541) in accord with what is said on this point in Bumgardner v. Leavitt, both *supra* n. 4.

17 Rimes v. Rimes, 152 Ga. 721, 111 S. E. 34 (1922), 22 A. L. R. 1030 (1923) (specific performance refused where plaintiff's purpose was to secure control of the corporation); Ryan v. McLane, 91 Md. 175, 46 Atl. 340 (1900) (specific performance refused where control sought by plaintiff would harm minority stockholders). Sherman v. Herr, 220 Pa. 420, 69 Atl. 899 (1908); Schmidt v. Pritchard, 135 La. 240, 112 N. W. 801 (1907) (specific performance granted where purpose of plaintiff was to secure control of the corporation).

18 Hogg v. McGuffin, 67 W. Va. 456, 68 S. E. 41 (1910).

19 Warren Co. v. Black Coal Co., 85 W. Va. 684, 102 S. E. 672 (1920).

20 Hogg v. McGuffin, 67 W. Va. 456, 68 S. E. 41 (1910).