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## BLUE SKY LAW—SELLER'S DEFENSE OF ESTOPPEL

Plaintiff sought to rescind a sale of stock alleging it had not been registered as required by the Florida Blue Sky Law.<sup>1</sup> The defendant pleaded estoppel, claiming the plaintiff had participated as a director in the defendant-corporation after becoming a stockholder. The circuit court sustained this defense and dismissed the action. *Held*, affirmed: the right of a purchaser to recover the consideration paid for unregistered securities is subject to the defense of estoppel when the statute provides for an avoidance of the sale at the election of the purchaser. *Popper v. Havana Publications, Inc.*, 122 So.2d 247 (Fla. App. 1960).

Estoppel is one of several defenses permitted by some jurisdictions in voidable sales of unregistered securities.<sup>2</sup> Despite this overall acceptance, however, there remains an area of serious disagreement within these jurisdictions. It concerns the standard of conduct, *i.e.*, the degree of less than innocent behavior required of the buyer before any defense may be invoked. This dispute can be seen most clearly in the decisions involving the purchaser's participation in the affairs of the seller. A few cases have held that inducing another to purchase shares of the same unregistered stock,<sup>3</sup> and examining the records of the seller after the purchase,<sup>4</sup> have not barred an action for rescission by the purchaser. Yet, there are a number of decisions allowing estoppel as a defense simply because the purchaser accepted and retained profits distributed by the corporate vendor.<sup>5</sup>

As the degree of participation becomes more wilful, correspondingly, the courts have become increasingly amenable to the interposition of defenses preventing recovery. Personal participation in the business and election meetings of the corporate vendor have been held to validate a previously voidable sale,<sup>6</sup> although merely executing a proxy ballot has not always estopped a purchaser from later recovery.<sup>7</sup> When the purchaser was one of the incorporators of a company, and later subscribed to an offering of its stock, he was held liable for his unpaid subscription, the

1. Sale of Securities Act, FLA. STAT. ch. 517 (1959).

2. Among those other affirmative defenses which have been raised are: *laches*, *Cummings v. Hotchkin Co.*, 292 Mass. 78, 197 N.E. 473 (1935); *Farrar v. Hood*, 56 N.M. 724, 249 P.2d 759 (1952); *De Lamar Mines v. Mackay*, 104 F.2d 271 (9th Cir. 1939); *release*, *Foreman v. Holsman*, 10 Ill.2d 551, 141 N.E.2d 31 (1957); *in pari delicto*, *Gornly v. Dickenson*, 2 Cal. Rptr. 650 (1960); *Stonehocker v. Cassano*, 154 Cal. App. 732, 316 P.2d 717 (1957).

3. *Gales v. Weldon*, 282 S.W.2d 522 (Mo. 1955); *Schmidt v. Stortz*, 208 Mo. App. 439, 236 S.W. 694 (1922).

4. *Harvey v. Electric Refrigeration Corp.*, 246 Mich. 235, 224 N.W. 443 (1929).

5. *Farmers' Union Co-op Royalty Co. v. Little*, 182 Okla. 178, 77 P.2d 33 (1938); *Good v. Starker*, 216 Wis. 253, 257 N.W. 299 (1934); *Wichita Duntile Co. v. Wright*, 130 Kan. 139, 285 Pac. 635 (1930); *Thomas v. United Royalty Co.*, 180 Okla. 230, 68 P.2d 490 (1937); *Brown Memorial Foundation v. Rohrer*, 152 Kan. 291, 103 P.2d 814 (1940); *Cummings v. Hotchkin Co.*, 292 Mass. 78, 197 N.E. 473 (1935).

6. *Kaye v. Sunbeam Quarrie Co.*, 258 Ky. 190, 79 S.W.2d 700 (1935); *Winfred Farmers' Co. v. Smith*, 47 S.D. 498, 199 N.W. 477 (1924).

7. *Bunge v. Kirchoff*, 251 Ill. App. 119 (1928); *Edward v. Ioor*, 205 Mich. 617, 172 N.W. 620 (1919).

court holding that it was his responsibility to see that the stock was properly registered for sale.<sup>8</sup> The same reasoning was applied to estop the director of a corporation from avoiding her subscription pledge when she knew of the illegality of the sale at the time of the purchase.<sup>9</sup> When, as in the instant case,<sup>10</sup> the buyer became a director of the corporate vendor after the purchase had been innocently made, recovery of the purchase price was not permitted because of the implied knowledge of the illegality of the sale imputed to the buyer by reason of his familiarity with the business dealings of his employer.<sup>11</sup>

There are several jurisdictions which have refused to sanction any defenses preventing recovery, regardless of the conduct or position of the purchaser prior to his suit for rescission. Their rationale is illustrated in the New York case of *Garey v. Perez F. Huff Co.*,<sup>12</sup> where it was pointed out that the Blue Sky Law was solely for the protection of the investing public, and since all the sanctions were imposed upon the fraudulent vendor, rescission should be allowed in every case when it was requested by the buyer.<sup>13</sup> This position has been sustained in situations when the buyer and seller were *particeps criminis*,<sup>14</sup> and joint adventurers.<sup>15</sup>

Illinois has ruled consistently in favor of the purchaser, disregarding assertions that he actively controlled the stock,<sup>16</sup> that he signed a waiver of liability,<sup>17</sup> and that he participated as an officer of the corporate vendor.<sup>18</sup> Arizona is another jurisdiction sustaining the theory that no guilt adheres by virtue of association. Its courts have reasoned that the purchaser's acceptance of a position with the vendor was probably a part of the consideration offered for the sale. Rather than penalize the buyer for fulfilling his part of the bargain, the court has held the inducer liable.<sup>19</sup>

The instant case is the first one in which a Florida court has interpreted the "voidable at the election of the purchaser" section of the Florida Blue Sky Law.<sup>20</sup> In an extremely terse opinion its conclusions were that:

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8. *Norton v. Lamb*, 144 Kan. 665, 62 P.2d 1311 (1936).

9. *In re Groenleer-Vance Furniture Co.*, 23 F. Supp. 713 (W.D. Mich. 1938).

10. *Popper v. Havana Publications, Inc.*, 122 So.2d 247 (Fla. App. 1960).

11. *Guynn v. Schulters*, 223 Miss. 232, 78 So.2d 114 (1955); *Moore v. Manufacturers Sales Co.*, 335 Mich. 606, 56 N.W.2d 397 (1953); *Schrier v. B & B Oil Co.*, 311 Mich. 118, 18 N.W.2d 392 (1945).

12. 135 Misc. 138, 238 N.Y. Supp. 38 (Sup. Ct. 1930).

13. *Ibid.*

14. *Ibid.*

15. *Covert v. Cross*, 331 S.W.2d 576 (Mo. 1960).

16. *Bunge v. Kirchhoff*, 251 Ill. App. 119 (1928).

17. *Foreman v. Holsman*, 101 Ill.2d 551, 141 N.E.2d 31 (1957).

18. *Hudson v. Silver*, 273 Ill. App. 40 (1933).

19. *Reilly v. Clyne*, 27 Ariz. 432, 234 Pac. 35 (1925); *United Bank & Trust Co. v. Joyner*, 40 Ariz. 229, 11 P.2d 829 (1932); *Trump v. Badet*, 84 Ariz. 319, 327 P.2d 1001 (1958). See also *Brannan, Beckham & Co. v. Ramsaur*, 41 Ga. App. 166, 152 S.E. 282 (1930), where the court did not find facts sufficient to constitute estoppel in a situation similar to the instant case.

20. FLA. STAT. § 517.21 (1959).

The weight of authority appears to recognize the availability of estoppel as a defense under a statute such as that involved here by which such sales are not made void but voidable at the election of the purchaser . . . . The majority of the cases, and we feel the better reason, hold that under statutes worded as the Florida Statute is framed, estoppel may be a defense and we follow and apply that rule in this case.<sup>21</sup>

The facts through which the trial court found conduct amounting to an estoppel were left undiscussed by the appellate court.<sup>22</sup> It deferred in its review to those "applicable authorities"<sup>23</sup> cited in its opinion, most of which had held, in varying degrees, that direct participation by the purchaser in the business affairs of a corporate vendor was conduct sufficient to estop any later action of rescission.<sup>24</sup>

Properly viewed, the contention that the Blue Sky Laws were enacted solely for the protection of the investing public is not tenable. Very rarely is all the right on one side. Rather, it would seem that these laws were passed to regularize and make more secure the business of selling securities, much as insurance laws regulate the sale of insurance. To do this, protections must be extended to both contracting parties, and both must conform to similar standards of fair dealing. If the legal protections were all on one side and the standards of conduct were legislatively unbalanced, then remedial action protecting the seller of securities would soon be necessary. It is far better that this result be achieved within the existing legal framework than to rely on piecemeal legislation.

HERBERT STETTIN

## VENUE — CONTRACT FOR SALE OF REAL PROPERTY

The plaintiff-vendor filed a complaint and good faith affidavit in the Circuit Court of Manatee County, seeking specific performance of a contract for the sale of realty located in Manatee County. The defendant moved to dismiss the complaint on the grounds that the residence of the parties and the transaction giving rise to the action were both situated in Pinellas

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21. *Popper v. Havana Publications, Inc.*, 122 So.2d 247, 248 (Fla. App. 1960).

22. *Id.* at 249.

23. *Popper v. Havana Publications, Inc.*, 122 So.2d 247 (Fla. App. 1960).

24. *De Lamar Mines of Mont. v. Mackay*, 104 F.2d 271 (9th Cir. 1939); *Brown Memorial Foundation v. Rohrer*, 152 Kan. 291, 103 P.2d 814 (1940); *Fitch v. United Royalty Co.*, 143 Kan. 486, 55 P.2d 409 (1936); *Kaye v. Sunbeam Quarries Co.*, 258 Ky. 190, 79 S.W.2d 700 (1935); *De Polo v. Greig*, 338 Mich. 703, 62 N.W.2d 441 (1954); *Moore v. Manufacturers Sales Co.*, 335 Mich. 606, 56 N.W.2d 397 (1953); *Schrier v. B & B Oil Co.*, 311 Mich. 118, 18 N.W.2d 392 (1945); *Thomas v. United Royalty Co.*, 180 Okla. 230, 68 P.2d 490 (1937).