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Corporations

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to do so. Admittedly, the installer fits neither the donee nor the creditor nomenclature; however, the reasons for allowing third party beneficiaries to recover are present. If the facts of a given case present the very reasons for allowing recovery, the mere inapplicability of existing legal terminology ought not to defeat an interest which is in substance no different from those which are presently protected under the terms donee or creditor beneficiaries. Although other jurisdictions have allowed recovery, despite the fact that the third party was not strictly speaking a donee or creditor benefiiciary,[8] the present case seems to indicate a lack of willingness on the part of the Washington court to extend the current doctrines of third party beneficiaries to such an extent. If a defect in existing legal terminology is all that is preventing recovery in the present case, a new term, such as *commercial beneficiary,* could be created to remedy this present defect.

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CORPORATIONS

Right to Repurchase Shares. In *Jackson v. Colograssi*[1] the Washington court construed a 1947 amendment to RCW 23.08.080 for the first time. The amendment reads as follows:

> (2) Every corporation organized hereunder shall have the power to purchase, hold, sell, and transfer shares of its own capital stock: *Provided,* that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital stock of the corporation.

The plaintiff was a trustee in bankruptcy who was suing to recover $18,000 paid for the purchase of shares by the now bankrupt corporation. The defendants had purchased $18,000 worth of stock and also obtained a repurchase agreement from the corporation. Subsequently, the defendants requested that the corporation repurchase the shares. Since the corporation did not have sufficient cash to repurchase the shares, the defendants were willing to accept a cancellation of a por-

[8] There have been numerous cases allowing recovery to a third party beneficiary although there was a complete absence of a donative spirit and also of any actual, supposed, or asserted duty of the promisee to the beneficiary at the time the contract was made. See Hamill v. Maryland Cas. Co., 209 F.2d 338 (10th Cir. 1954); Coxhead v. Winsted Hardware Mfg. Co., 4 F.R.D. 448 (D. Conn. 1945); Johnston v. Franklin Kirk Co., 183 Ind. App. 519, 148 N.E. 177 (1925); *cf.* Burt v. Brownstone Realty Co., 95 N.J.L. 457, 112 Atl. 883 (1921).

[1] 50 Wn.2d 572, 313 P.2d 697 (1957).

tion of the debts which they owed the corporation. The repurchase was accomplished by the defendants giving the corporation a check for $18,000 in payment for their debt and the corporation returning the check to the defendants in return for the shares. The corporation had no surplus at the time of the repurchase.

The only real difficulty in the case was caused by the rather obscure statutory terminology "impairment of capital stock." That phrase was first introduced into Washington's corporation statute by the 1947 amendment. The original 1933 act repeatedly uses the expression "capital stock" in another manner and specifically defines that term in the following language:

> The "capital stock" of a corporation at any time is:
> (1) the aggregate amount of the par value of all alloted shares having a par value, including such shares alloted as stock dividends; and
> (2) The aggregate of the cash, and the value of any consideration other than cash... plus such amounts as may have been transferred from surplus upon the allotment of stock dividends in shares having no par value.[2]

The 1933 statute does not, however, speak of the "impairment" of capital stock. Moreover, definition of capital stock by the statute does not appear to be helpful in defining the term. However, the 1933 statute does use the "surplus" test to determine whether a dividend can lawfully be declared[3] and it may well be that the draftsman intended to use the same test with regard to a corporation's purchase of its own shares.

However, the Washington court did not attempt to reconcile the two provisions concerning capital stock, but followed the Delaware decision in *In re International Radiator Corp.*[4] The court in the Delaware decision held that a corporation could not repurchase its own shares pursuant to a repurchase contract unless it had a surplus. Since the Delaware statute is almost identical to the Washington

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[2] RCW 23.04.100.

[3] RCW 23.24.030. No corporation shall pay dividends:
(1) In cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter, the amount of its capital stock, after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revalution of fixed assets;
(2) In shares of the corporation, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock.

[4] 10 Del. Ch. 358, 92 Atl. 255 (1914).

statute, the court said that it was bound to follow the decisions of other jurisdictions construing identical statutes.

While there is a general confusion in the cases as to the definition of the phrase "impairment of capital stock," the Washington court's decision seems to follow the majority position.[5] In addition this definition appears to be the most logical construction of the phrase. It seems clear that if the net difference between the assets of the corporation and its liabilities is less than the total statutory value of the capital stock, the capital stock (meaning the total value of shares outstanding) will be "impaired."[6]

Before the 1947 amendment the Washington court had held that a corporation was precluded from purchasing its own shares by the trust fund theory.[7] However, the 1933 statute, in RCW 23.16.120, permitted a corporation to achieve substantially the same result which was forbidden by prior case law. Under the statute any corporation is given the right to reduce its capital stock by a two-thirds vote of the shareholders to any amount which would not reduce the value of its assets to a lesser amount than the fair value of the assets minus the liabilities plus the amount of the capital stock so reduced. Thus a corporation can by a two-thirds vote reduce its capital stock and pay to the shareholders a dividend to the extent of the "reduction surplus" resulting. The ultimate effect of this is quite similar to the direct purchase of shares, although some substantive as well as procedural differences exist.[8] The 1947 amendment adds to this earlier procedure the direct privilege of purchasing shares to the extent that the corporation has a surplus, and consequently provides a much less formal procedure.

The amendment also contains the troublesome term, "Every corporation organized *hereunder* shall. . . ." That term could be construed to mean that only those corporations organized under the 1933 statute can take advantage of the new amendment. The other possible meaning is of course that this phrase is meant to include all those cor-

[5] BALLANTINE, CORPORATIONS § 258, 611 (2d ed. 1946); Acker v. Gerald Trust, 42 F.2d 37 (3rd Cir. 1930); C. F. Topken v. Schwartz, 249 N.Y. 206, 163 N.E. 735 (1928).

[6] RCW 23.04.100.

[7] Whittaker v. Weller, 8 Wn.2d 18, 111 P.2d 218 (1941); K om v. Cody Detective Agency, 76 Wash. 540, 136 Pac. 1155 (1913).

[8] The differences noted are:

1. When the corporation gives itself a reduction surplus by the statutory procedure, it can only remunerate the shareholders by declaring a dividend, and thus may be unable to pay only one shareholder for his shares.

2. A two-thirds vote must be taken to reduce the stock and other formalities of the statute must be complied with, whereas under the new amendment the board of directors need only declare a dividend from surplus.

porations organized under the laws of the state of Washington. The statute as a whole does not answer this question but arguably it would seem to be the intention of the draftsman to free all corporations from the case law restriction.

The problems caused by the 1947 amendment could have been easily prevented by clear draftsmanship. The amendment could have simply provided that the corporation could repurchase shares under the same circumstances and to the same extent as must exist for the lawful payment of dividends. It is to be hoped that in some future revision of the statute the legislature will take care to integrate the repurchase provisions into the main body of the act.

JOHN HOOVER

CRIMINAL LAW

Indigent's Right to a Free Transcript for Use on Appeal. The effect of *Griffin v. Illinois*,[1] a decision of the Supreme Court of the United States, on the present Washington rules for furnishing an indigent a free stenographic transcript for use on appeal was in issue in *In re Grady v. Schneckloth*.[2] Therein the petitioner made the bald assertion that the *Griffin* decision requires that the state furnish him, as an indigent, a free stenographic transcript of the trial proceedings for use on appeal. The Washington court rejected this contention and denied the application for a writ of habeas corpus.

In the *Griffin* case, after being convicted of armed robbery, the petitioners moved in the trial court that they be furnished with a free transcript for use on appeal. This motion was denied, as Illinois had no provision for furnishing a convicted indigent with a transcript at public expense in non-capital cases. This denial was affirmed on appeal to the state courts. The United States Supreme Court granted certiorari.[3] In the Supreme Court, Illinois conceded that the petitioners needed a transcript to get an adequate review of the alleged trial errors, and the court was compelled to "assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript."[4] Under those circumstances the court held that the petitioners had been deprived of the guarantees of the due process and

[1] 351 U.S. 12 (1955).
[2] 150 Wash. Dec. 806, 314 P.2d 930 (1957). For a subsequent case with practically identical facts see In re Ross v Rhay, 151 Wash. Dec. 379, 318 P.2d 975 (1957).
[3] 349 U.S. 937.
[4] 351 U.S. 12 at 16.