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### Preferred and Common Stock, Non-cumulative Preferred, Extent of Preference

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dispose of the remainder on that person's death,<sup>4</sup> or (3) he may intend to give the first taker a fee simple estate absolute, and to impose a restraint on its alienation.<sup>5</sup> Those cases where the attempt is to dispose of what, if anything remains, after the death of the first taker, while most nearly like cases of the first kind above suggested, are to be distinguished from them, in that they come within the category of cases where the first taker has an estate which he can convey in fee simple so as to destroy an attempted limitation over, and as to which the case of *Williams v. Elliott*,<sup>6</sup> says that the attempted limitation over is void, and yet are to be further distinguished so as to take them out of even this category, in the aspect that the gift over is of what remains, if anything, the holding in such cases that supports the gift over resting upon the construction that the right to convey away all if desired proceeds from a power coupled with a life estate rather than from a fee simple absolute estate, itself.<sup>7</sup>

The limitation which is the subject of this comment, may well be placed in the second category with the result, held in the case, of giving the first taker a fee simple absolute estate.

ELMER M. LEESMAN.

### OTHER JURISDICTIONS

CORPORATIONS—PREFERRED AND COMMON STOCK—NON-CUMULATIVE PREFERRED—EXTENT OF PREFERENCE.—[New Jersey] The case of *Day v. United States Cast Iron Pipe and Foundry Company*,<sup>1</sup> apparently presented a question of unusual difficulty. A note appended to the case states that when the case was conferred upon and assigned for the writing of opinion, thirteen judges were present, of whom seven were for the affirmance of the court below and six for reversal, but that upon opinion-day, the fourteenth judge was present and voted with the minority, with the result that the decree below was affirmed by an equally divided court.

The defendant in that case had an authorized capital of \$30,000,000, of which half was preferred and half was common stock.

The statute under which the defendant corporation was organized gave the power to provide for common and preferred stocks, and declared that if preferred stock was provided for—

"the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend, to be expressed in

4. *Hempstead v. Hempstead* 285 Ill. 450, 457; *Hudson v. Hudson* 287 Ill. 298; *Buckner v. Carr* 302 Ill. 382; *Bohn v. Irvington* 303 Ill. 84, 86. But see *Bender v. Bender* 292 Ill. 361.

5. *Williams v. Elliott* 246 Ill. 449; *Glass v. Johnson* 297 Ill. 152; *Tucker v. Tucker* 308 Ill. 376.

6. 246 Ill. 552; and see *Glass v. Johnson* 297 Ill. 154; *Harder v. Matthews* 309 Ill. 562.

7. *Defrees v. Brydon* 275 Ill. 550; *Bradley v. Jenkins* 276 Ill. 162, 163; *Boyle v. Moore* 299 Ill. 573, 575; *Boye v. Boye* 300 Ill. 511; *Bohn v. Irvington* 303 Ill. 84, 85.

1. (1924) ... N. J. L. ..., 126 Atl. 302.

the certificate, not exceeding 8 percentum, payable quarterly, half yearly or yearly, before any dividend shall be set apart or paid on the common stock, and such dividends may be made cumulative."

The charter of the corporation provided:

"The preferred stock shall be entitled out of any and all surplus net profits, whenever declared by the board of directors, to non-cumulative dividends at a rate not to exceed 7 per cent per annum for the fiscal year, beginning on the first day of June, 1899, and for each and every other fiscal year thereafter, payable in preference and priority to any payment of any dividend on the common stock for such fiscal year."

"The common stock shall be subject to the prior rights of the holders of the preferred stock as herein declared. If after providing for the payment of full dividends for any fiscal year on the preferred stock there shall remain any surplus net profits for such year, any of such net profits of such year and of any other fiscal year, after full dividends shall have been paid on the preferred stock, shall be applicable to such dividends upon the common stock as from time to time shall be declared by the board of directors; and out of any such surplus net profits after the closing of any fiscal year the board of directors may pay dividends upon the common stock of the corporation for such fiscal year, but not until the dividends upon the preferred stock for such fiscal year shall have been actually paid or provided for and set apart."

Article 13 of the by-laws provided—

"The directors may from time to time set aside all or any portion of the net profits of the corporation as and for additional working capital; and the directors may also from time to time, as in their discretion seems best, diminish such working capital by transferring such net profits as may have been set aside therefor back into the profit and loss account.

"At the expiration of each fiscal year of the corporation, the directors may declare a dividend among the common stockholders of the corporation out of the accumulated profits exceeding the amount reserved for working capital as aforesaid, and such dividends may be made payable as and when the directors may determine; but such dividends shall only be paid after full dividends shall have been paid or provided for upon the preferred stock for such fiscal year."

It appears from an earlier case<sup>2</sup> that a considerable fund known as "Reserve for Additional Working Capital" had been accumulated from the profits of various years in a number of which the dividends upon the preferred stock had been scaled down below 7 per cent. At the end of the fiscal year 1922, the amount of dividends withheld from preferred stock was \$700,000; from common stock about \$1,800,000. The company's earnings during the year 1922 were over \$1,000,000, and after paying a dividend of 5 per cent on the preferred stock, the balance was transferred to the working capital reserve. Later, a further dividend of 2 per cent upon the preferred stock was declared for 1922, and the amount necessary to pay it was withdrawn from the working capital reserve. In November, 1923, the company resolved to pay to the preferred

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2. *Bassett v. U. S. Cast Iron Pipe & Foundry Co.* (1909) 75 N. J. Eq. 539, 73 Atl. 514

stockholders an additional dividend of one-half of one per cent, and a similar dividend upon the common stock. This resolution declared that the dividend on the preferred stock was made out of earnings withheld from the preferred stockholders in previous years, and no longer needed as working capital; and the one on the common stock stated that it was out of the net earnings for the year 1922, after a dividend of 7 per cent had been paid to the preferred stockholders for the year 1922, out of the profits of that year. At this stage, a common stockholder filed a bill to prevent any further payment upon the preferred stock, and a preferred stockholder filed a bill to prevent the payment of the dividend referred to upon the common stock.

The lower court held that the dividend upon the preferred stock was properly payable inasmuch as it was payable out of funds which might have been appropriated to the payment of such dividends in previous years, but had been withheld and put into the working capital reserve.<sup>3</sup> The decree upon this point was separately affirmed by the Court of Errors and Appeals, without dissent.<sup>4</sup>

As to the dividend upon the common stock, the lower court held that, under the statute and charter provisions above referred to, so long as dividends, earned and available on the preferred stock but diverted to the surplus fund remained unpaid, no dividend could be paid on the common stock.<sup>5</sup>

It was on appeal from the decision as to this dividend that the Court of Errors and Appeals was equally divided as above stated. The position of the seven judges who were for the affirmance of the decree of the court below is briefly stated in the following clause:

"We think that the corporation's charter and by-law provisions could not authorize the payment to the common stockholders of the proposed dividend, while earned, available and unpaid dividends on the preferred stock remain undistributed to the preferred stockholders in the corporation's surplus."

As to the question whether this amount was now available as dividends the court held that the resolution to pay it to the common stockholders was evidence that such a sum could be distributed by way of dividend, but they held that, if it was to be paid as dividends at all, it must be paid to the holders of the preferred stock. No opinion appears to have been written setting forth the view of the seven judges who were for reversal of the court below.<sup>6</sup>

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3. *Moran v. U. S. Cast Iron Pipe & Foundry Co.* (1924) ... N. J. Eq. ..., 123 Atl. 546.

4. *Moran v. U. S. Cast Iron Pipe & Foundry Co.* (1924) ... N. J. L. ..., 126 Atl. 329.

5. *Day v. U. S. Cast Iron Pipe & Foundry Co.* (1924) ... N. J. Eq. ..., 123 Atl. 546.

6. In an article by *Mr. A. A. Berle, Jr.* Col. L. Rev. 23:358, entitled: "Non-Cumulative Preferred Stock" (1923), a number of rules deduced by

It will be observed that the provision in the charter and by-laws did not in terms provide for a dividend of 7 per cent, but "at a rate not to exceed 7 per cent." The statute, however, provided that if there be preferred stock, the holders thereof should be entitled to receive and the corporation be bound to pay "a fixed yearly dividend to be expressed in the certificate not exceeding 8 per cent." The latter part of Article 13 of the by-laws provides that dividends shall only be paid upon the common stock "after full dividends shall have been paid or provided for upon the preferred stock for such fiscal year."

The seven judges whose opinion is here under review were apparently of the opinion that these provisions gave to the holder of the preferred stock the right to a dividend up to but not exceeding 7 per cent out of the surplus for any year before any dividend could be declared upon the common stock. While the preferred stock dividend was made non-cumulative, this construction gave to the preferred stockholder the right to a dividend of 7 per cent in any year when the surplus was adequate to pay it, and if less than 7 per cent was paid and the balance of the surplus transferred to working capital and later returned to surplus, the preferred stockholder was entitled to have the deficiency made good out of such surplus before any dividend was paid upon the common stock. Under this interpretation, it would seem that the opinion of the seven judges, affirming the opinion of the vice chancellor, was correct.

FLOYD R. MECHEM.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT—COVENANTS RUNNING WITH LEASEHOLDS.—In *Investor's Guaranty Corporation v. Thomson*<sup>1</sup> [Wyoming] (1924) the assignee of the reversion brought suit against the assignee of a leasehold interest to cancel the lease for violation of the covenant against assignment without the lessor's consent. The defense made was

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him from the cases are laid down, among which the first, second, and fourth are as follows:

I

"Holders of non-cumulative preferred stock have rights in any surplus profits of the corporation accumulated by failure to declare the preferred dividend provided for in the charter when such dividend or any part thereof has been earned."

II

"Out of the surplus net profits of each year, an amount equal to the non-cumulative preferred dividends provided for in the charter, or whatever part of such dividend has been earned, less whatever dividend has been declared and paid or set apart upon the non-cumulative preferred stock, although it may be used in the corporate business, must be segregated on the books for the benefit of such preferred stock. It can never be distributed as dividends to the common stock."

IV

"All or part of the dividends earned but not paid to the preferred stock may be paid at any later time to the preferred stockholders, out of the preferred surplus fund."

1. 225 Pac. 590.