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Corporate Stocks in Pennsylvania Trusts

William R. Scott

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It is fortunate that our Constitutional provision, requiring legislative enactments to express their subject matter clearly in their titles, has no application to papers read before this Association. Were it otherwise, any views herein expressed would be doomed at the outset, for it must be conceded that this title gives no reasonable intimation of what it purports to embrace.

Actually, it is addressed to some aspects of the rule adopted by our Supreme Court with regard to extraordinary distributions made by corporations, the stock of which is held by trustees under instruments of trust providing for the payment of income to one or more beneficiaries for life or other term of years, with remainder of the principal or *corpus* in fee to other designated persons.

Everyone is familiar with the increase of the number of trusts which have been created in recent years. Whether due to a realization by the public of the advisability of committing property to corporate trustees for management because of their experienced organization and consequently superior ability to that of individual trustees, or for whatever other reason, the fact that the creation of trusts has largely increased is certainly well known.

Everyone is equally familiar with the phenomenal increase in values of corporate securities throughout this

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country for the last thirty years, and especially since the World War. As a result of this corporate prosperity both before and since the war, there have been large and frequent extraordinary distributions by thousands of successful corporations. Notable examples of this have been the liquidating dividends declared by the old Standard Oil trust in 1911 as a result of the dissolution decreed by the United States Supreme Court and the subsequent large distributions by the component parts resulting from that dissolution; also the recent 40 per cent. stock dividend declared by the United States Steel Corporation, and the two 100 per cent. stock dividends which have been declared by the General Motors Corporation. These are but typical and, while more widely known because of the large distributions involved and the large number of persons affected, there have been numerous similar distributions by less well known corporations throughout the country.

Companies with earning records enabling them to make such distributions have naturally been attractive to investors, and those who have purchased these securities and who have desired to provide for the care and support of those dependent upon them, have placed many such securities under wills or deeds of trust in the hands of trustees, providing that the income shall be paid to one or more persons for life or other term and at the expiration of the income beneficiaries' interest that the *corpus* or principal should be paid over to certain designated remaindermen.

In view of the frequency with which these extraordinary distributions have occurred and the extent to which the respective rights of the life beneficiaries and the remaindermen have been affected, it is believed that some discussion of the treatment of these questions in Pennsylvania may be of interest.

So far as ordinary cash dividends are concerned, it has been almost universally held in all jurisdictions, as between the various interests in trust estates, that these belong to the interest entitled to the income at the time the dividend is declared, regardless of when the profits or surplus from which they are declared have been earned. The reason usually given is because dividends have always been considered as not apportionable (although they are now, both in England under the Apportionment Act of 1870, i. e. 33 and 34 Victoria Chapter 35, and by Section 22 of our Fiduciaries' Act of 1917, which is modeled upon the British Act), and because of the practical difficulty of determining the exact amount of profits earned during the short intervals between the frequent payment of such dividends. Earp's Appeal, 28 Pa. 368 (1857); McKeown's Estate, 263 Pa. 78 (1919). Accordingly, they are deemed to have been earned as of the date when declared, and if this occurs after the inception of the trust they are awarded to the income beneficiary. If declared either before the inception of the trust or after the termination of the interest of the income beneficiary, they are awarded to the *corpus* or remaindermen. Ordinary cash dividends are therefore distributed pursuant to an arbitrary rule even in states like Pennsylvania and New York where another and entirely different theory of distribution obtains as to extraordinary corporate distributions.

In the case of extraordinary distributions, there has been a wide divergence in the rules for determining to what interest and in what amounts these should be awarded. Such distributions are of several different types. The commonest is an extra cash dividend. Another example is where the corporation capitalizes its surplus and to the extent that it does so, issues ratably to its stockholders, by way of stock dividend, the additional stock representing such capitalization. Or, again, it may decide to obtain fresh capital and in so doing offer the increased stock, representing the new capital, to its old stockholders for subscription at a price less than the then existing value per share of the old stock. And, lastly, it may liquidate, and distribute to its stockholders in the nature of a liquidating dividend the total proceeds realized from its assets either in cash or securities of other corporations.

In this country three main theories governing such extraordinary distributions have been developed. The first is the "Massachusetts rule" which corresponds virtually to the modern English rule, and as the Massachusetts courts have stated it, is as follows:

> "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." Minot v. Paine, 99 Mass. 108 (1868).

While this rule is subject to qualification in certain cases, such, for instance, as where the cash dividend represents purely an appreciation in value of assets and not accumulated earnings, it is susceptible of almost unqualified application. This is the view which has been adopted by the United States Supreme Court. Gibbons v. Mahon, 136 U. S. 549 (1890).

The second rule, which is the "Kentucky rule" provides that every distribution declared during the continuance of the income beneficiaries' interest is income, regardless of when earned and regardless of the effect of such distribution on the value of the stock. Cox v. Gaulbert's Estate, 148 Ky. 409 (1912). This, of course, favors the income beneficiary at heavy expense to the *corpus* of the trust. As our own Supreme Court has said in Nirdlinger's Estate, 290 Pa. 457 (1927), Kentucky is now probably the only State adhering to it.

The third rule, often referred to as the "American rule," and which has been adopted by the greater weight of authority, is the Pennsylvania rule as laid down in Earp's Appeal, 28 Pa. 368 (1857). This is the so-called theory of apportionment and declares that in every extraordinary distribution whether of cash, script or stock, the time when the profits were earned by the corporation determines who the recipient of the extraordinary distribution should be and to what extent, and that apportionment should be made accordingly between income and *corpus*.

It is interesting to note that although the court specificially based the decision in that case on the ground of the time at which the earnings distributed by the corporations were actually earned, this is not the way in which they determined the basis for the apportionment. In point of fact, what it did was to ascertain the market value of the shares held in the trust at the date of the testator's death. It then determined the market value of the same shares after the declaration and payment of the stock dividend involved. By this process it found that the first market value of the original shares had been to some extent depleted or impaired as a result of the stock dividend, and it therefore held that so many of the dividend shares as were necessary in order to hold intact or make good the original market value of the original shares should be awarded to and retained by the *corpus* but that the balance should be distributed as income.

Earp's Appeal was a case of a stock dividend, and that has been the nature of the extraordinary distributions in the vast majority of adjudicated cases in Pennsylvania. In a long and unbroken line of decisions, involving stock dividends, this rule has been followed ever since, as the Court itself has stated over and over again and finally repeated in Nirdlinger's Estate, 290 Pa. 457, 462 (1927), in which almost all the Pennsylvania law on the subject is reviewed.

Not only has it been consistently followed in cases of stock dividends but also in cases of extraordinary cash dividends: Smith's Estate, 140 Pa. 344 (1891) though the total cash dividend was awarded to *corpus*; Stokes' Estate, 240 Pa. 277 (1913); and Stokes' Estate (No. 2), 240 Pa. 288 (1913), where the extra cash dividend was apportioned between *corpus* and income. With respect to rights to subscribe to stock, there was at first much conflict in the decisions: Wiltbank's Appeal, 64 Pa. 256 (1870); Moss' Appeal, 83 Pa. 264 (1877); Biddle's Estate, 99 Pa. 278 (1882); Eisner's Estate, 175 Pa. 143 (1896); Thompson's Estate, 262 Pa. 278 (1918); Veech's Estate, 74 Pa. Sup. Ct. 373 (1920). But finally in a recent decision, Jones v. Integrity Trust Company, 292 Pa. 149 (1928), the apportionment rule has been adopted with respect to subscription rights as well. It has also been applied to a liquidation by the corporation, or on a sale by the trustee shortly before the liquidation and which the Court held to be tantamount thereto: McKeown's Estate, 263 Pa. 78 (1919). Still more recently, in Nirdlinger's Estate, 290 Pa. 457 (1927), the Supreme Court extended the doctrine to a case where there was no liquidation or other distribution whatever in contemplation by the corporation, but the trustee sold the shares at a price largely in excess of their actual value at the inception of the trust. The Court held that the increase in so far as it represented accumulated earnings since the testator's death, was distributable as income. It is to be noted, however, that the total increase in value was not given to the life tenants either in McKeown's Estate or in Nirdlinger's Estate. In McKeown's Estate the difference between the book value at the date of sale and the book value at the date of the inception of the trust was the amount distributed, although the price realized on the sale was about $45,000 in excess of this difference and this excess was awarded to *corpus*. And in Nirdlinger's Estate, the original or intact value at the inception of the trust was $20,000; the sale price was $170,000, and yet only $40,000 of the $150,000 profit realized was held to be attributable to income earned since the date of the trust and therefore distributable to the life beneficiary. In both cases, the Court holds that distributions on such sales are minor liquidations, whatever that may mean, and also that the portion of the profit realized over and above that represented by accumulated earnings is an enhanced value or super value due to good will, appreciation of assets or some similar element. It will at once be seen that the extensions of the rule adopted in McKeown's Estate and in Nirdlinger's Estate present complicated accounting problems which make proper apportionment, always difficult, still more difficult in such instances.

In addition, the Court has introduced a further complication. In Dickinson's Estate, 285 Pa. 449 (1926), there was under consideration a 100 per cent. stock dividend of the Fire Association of Philadelphia. Six years after the inception of the trust the corporation paid a heavy loss caused by the San Francisco earthquake. The effect of this payment exhausted all the undistributed income accumulated since the testator's death and partially depleted that existing prior thereto. It reduced the book or liquidating value of the stock from $142.61 per share to $71.09 per share. The Court held that to the extent of this loss, except as had been made up by later capital contributions, the intact or original value of the shares at the inception of the trust was to be reduced. The Court was not entirely unanimous on this point, however, and a strong dissenting opinion was filed by Mr. Justice Kephart on the ground that the loss was an operating loss and not a capital loss and that the result of the majority's action was unduly to prejudice the *corpus* or remainder.

The foregoing is a somewhat superficial summary of the development of the Pennsylvania apportionment theory applied to extraordinary distributions—and necessarily superficial, having regard to the reasonable length of this paper. It may perhaps suffice, however, for some consideration of the effect of the rule.

The basis upon which all of the cases have proceeded is that the Massachusetts rule, being purely arbitrary, does not work exact justice as between income beneficiaries and remaindermen, and that it causes distributions to be arbitrarily made without due regard to the actual fact of when the corporate earnings were acquired and without regard to the equities of the situation. On the other hand, it is claimed for the apportionment theory that these results are avoided and that the distributions made thereunder are equitable as between income and *corpus*.

Rules of law are not established or intended to be adopted for the satisfaction of the courts or the lawyers who practice before them, but to provide regulations for orderly conduct and for the orderly transaction of business by the people who have to live under and abide by them. Consequently, it is desirable that any rule of law, particularly when applicable to purely business matters, should be as easily understandable as possible and as convenient and simple in its application as the circumstances will permit.

Our own Supreme Court, throughout the seventy-two years since Earp's Appeal was decided, has consistently recognized that the Massachusetts rule was far more convenient and that there were many substantial, practical difficulties connected with the enforcement of the Pennsylvania apportionment theory. Nearly every time the court has referred to the question of inconvenience and difficulty, it has taken occasion to point out that such matters should not be considered when the rights of the parties in interest are concerned. This statement appears in many cases and has been repeated recently both in McKeown's Estate and Nirdlinger's Estate. Admitting, then, that there are serious complications and difficulties attendant upon the application of the Pennsylvania rule, does the result reached warrant its adoption?

The whole basis of our Pennsylvania decisions rests upon the time when the earnings were accumulated by the corporation as the basis for determining the apportionment. In Earp's Appeal, however, as has been previously mentioned, the actual time when earnings were realized was never ascertained and the Court deduced this simply by a comparison of the market values of the stock at two given times. Value of some time, whether market value, book value, what the Court calls actual or intrinsic value —at any rate, some kind of value—has almost uniformly been the test adopted in order to determine when the earnings accrued. Yet it is believed that this in itself is no very safe criterion. The exact time at which corporate profits have been earned which go to make up the basis of any value attributed to the stock can never be accurately ascertained. Profits or earnings realized ten years hence are often due to expenditures of today, and vice versa.

The effect of corporate losses, as in Dickinson's Estate, also presents another example of the difficulty and inaccuracy in applying the earnings basis. In that case not all the Court itself could agree on what was a capital, and what an operating loss. And how large then must a loss be to deserve consideration? And if the loss occurs after several extraordinary distributions will the income beneficiary receive all further distributions, owing to the loss having wiped out the original value of the stock? Furthermore, assuming there never is a loss, there is no accurate method of allocating profits realized at one time to or over any particular period, and while income tax and similar laws may provide means for arbitrarily determining income in the sense in which they apply that term, this does not alter the facts.

Value may or may not have anything to do with the question of earnings. The actual operation may show a large loss but the value of the security, whether book or market value, may, owing to appreciation in assets, show a larger enhancement. Only a detailed and expert analysis of the corporation's books may show this to be the reason. While Earp's Appeal was decided upon the basis of market values and that fact was commented upon in numerous succeeding cases, in Moss' Appeal the Court vehemently discarded this as the test, saying that in order to determine these questions it was necessary to go down through what the Court termed "the shifting sands of the stock market" and to ascertain the actual or intrinsic value of the securities. Later, in Smith's Estate, 140 Pa. 344 (1891), the Court specifically repudiated market value as a test, saying that while it was evidence on the issue, the intrinsic value of the shares was to be ascertained from the amount and value of the assets; and this again was confirmed still more strongly in Eisner's Estate, 175 Pa. 143 (1896), and again in Stokes' Estate (both cases), 240 Pa. 277 and 240 Pa. 288 (1913). In the first case it was held that it was the actual and not the market value which was important and that this actual or intrinsic value is to be ascertained from the best methods at command.

Just what these methods are has never been definitely explained. In the succeeding cases after Stokes' Estate, book value has been almost universally used and yet, as everyone knows, the book value at which the corporation carries its assets may have no relation whatever to their actual or intrinsic value at the particular time in question.

Later, in Thompson's Estate, 262 Pa. 278 (1918), we find the Court saying that they have no concern with book value and that it is only the actual value in which they are interested. And still later, in Dickinson's Estate and again in Nirdlinger's Estate, Packer's Estate and Jones v. Integrity Trust Company, it is flatly stated that market value has nothing whatever to do with the question.

It would seem, in view of the difficulty of obtaining a proper test for determining when the earnings have been made by the corporation, that little is to be gained by endeavoring to apply the apportionment theory. For if the time when earnings are realized can never be accurately determined, the whole basis of the apportionment theory falls. It would also seem that if the application of value of any particular kind gives a proper indication as to when earnings have been realized, then the question of what this value is and how it should be determined is still so uncertain and so unsettled that it cannot be a matter of practical application. And if both or either of these statements are correct, then is it not true that the arbitrary or Massachusetts rule is in the long run just about as apt to do justice as between the parties in interest as the theory of apportionment? And after all is not the method used in applying the apportionment rule just as arbitrary and just as much a matter of chance as the Massachusetts method?

And there is another consideration which has, so far as yet appears, never been presented in any case decided by the Supreme Court. In nearly every instance there has been but one individual or one class of income beneficiaries. If we assume that a man die leaving a will in which he creates a trust which provides that the income shall be paid to A for life and after A's death, then to B for life, and then after B's death, the remainder to C, we have some slightly different considerations. Ordinarily, the question is considered purely as between A and C, but if the apportionment theory be applied and all extraordinary distributions not impairing the original value of the stock, whatever that may be found to be, are awarded to.A, does it not necessarily result in a reduction of the amount of income which after A's death will be payable to B? And why is the Court justified in assuming, in the absence of any specific declaration to the contrary, that the creator of the trust is not equally desirous of insuring the same regular flow of income to B as he is to A?

Then, further, consider the practical difficulty which faces a trustee holding corporate stock under such a trust as has been outlined. Let us say that the trust company receives at the inception of the trust one thousand shares of the X corporation. Five years later a stock dividend of 100 per cent. is declared, and as a result thereof the trustee receives an additional one thousand shares. What distribution must the trustee make as between A, the income beneficiary, and B, who is entitled to the remainder? It is submitted that the trustee has not the slightest idea what ought to be done about it. Strictly following the apportionment rule, it will have to ascertain first what the actual or intrinsic value of the one thousand original shares was at the date of the testator's death. That in itself is an undertaking. The corporation's offices may be in San Francisco or even in a foreign country. It may be able to get the corporation's statement of its book value and again it may not. If it does, it cannot necessarily accept that but must analyze it to see if it correctly represents the assets then on hand, for book value is no more the test than the market value. It if does not get it through voluntary action of the corporate officials it cannot subpoena the necessary testimony unless it is all in Pennsylvania and even then it involves a law suit. It must next, under Thompson's Estate, investigate all five years to see whether any unusual loss has occurred which would reduce the original actual value of the shares. Having done all this, it must then ascertain what is the actual value of the original one thousand shares after the declaration and payment of the stock dividend. This will require as much analysis, judgment and experience as the first valuation. Assuming it can and will do these things, it is then required to make such an apportionment of the new one thousand shares as will leave the original value of the first one thousand shares intact at whatever net figure that has been determined to be. To the extent that none of the new dividend shares are necessary to be retained for this purpose, it is supposed to issue them forth to A, the income beneficiary.

It is fairly safe to hazard a guess that it will do nothing of the kind and that it probably should not. If it happens to be incorrect in any of its calculations, then the remaindermen, who may at that time not even be living persons and available for consultation, may, upon becoming entitled to the *corpus* in remainder, surcharge the trustee to the extent that an incorrect distribution has been made and the *corpus* prejudiced. The only safe thing for the trustee to do is to carry in the capital account of the trust the entire one thousand dividend shares, and that is almost universally what all the trust companies throughout Pennsylvania have been doing. The result is that if the life tenant, having heard of the distribution, asserts claim of right to the dividend shares, the trustee will be involved in inconvenient and perhaps expensive litigation in order to determine the question. And, judging from the number of reversals which have occurred on appeals from the Orphans' Court to the Supreme Court, it is no easy matter to determine, for men of the caliber of the Orphans' Court Judges throughout Pennsylvania would not be apt to err so often if the questions involved were other than difficult and complicated.

The same considerations apply to extra cash dividends. As a matter of fact, nearly all of the trust companies throughout Pennsylvania consider such distributions income as a matter of course and make full distribution of the total extra cash dividend to the life tenant. Some of them may find that this method of handling extraordinary cash distributions may prove expensive to them when the remaindermen are in position to do something about it, for, as we have seen in Smith's Estate, 140 Pa. 344 (1891), the entire extra cash dividend may be awarded to *corpus*. Many corporations have for years declared extra cash dividends every year. Is the trustee to be put to the necessity of following through this whole procedure every time such a dividend is declared, at the risk of being surcharged some day in case it does not do it?

The dilemma of the trustee is by no means exhausted by these statements. The Court has uniformly held that presumptively every extraordinary distribution is income and belongs to the income beneficiary: Boyer's Appeal, 224 Pa. 144 (1909); McKeown's Estate, 263 Pa. 78 (1919), and numerous other cases therein cited. If that be correct, and if, as held in Thompson's Estate, 262 Pa. 278 (1918), the trustee has no right to take sides in the matter or make a contest on behalf of either the income beneficiary or the remaindermen, then it would seem that everything is to be income. Otherwise the trustee must not only make the detailed examinations previously outlined but disregard the presumption of income and make a contest, in which case it will be subject to the criticism of the Court and, failing to do so, may be subject ultimately to the more serious possibility of surcharge by the remaindermen.

If the question involved is on rights to subscribe to an issue of stock, then pretty much the same considerations obtain as in the case of extra cash dividends or stock dividends. But if the trustee sells the stock and, as in Nirdlinger's Estate, the price realized is greatly in excess of the original intact value, then the trustee has another question to decide and must ascertain how much of the excess represents mere increase due to accumulated earnings and how much over and above that is due to good will or other elements reflected in the enhanced market price. The possibility of error in such a calculation is enormous and the consequences, both in inconvenience and liability previously outlined, are again present.

Another important consideration is the intention attributed by the Supreme Court to the creator of the trust when he merely provides that the income shall be distributed and gives no specific direction to serve as a guide in determining what he considers as income. Every jurisdiction, regardless of what rule it follows, has recognized that the question is, after all, almost entirely a question of the creator's intention. See annotation, 24 American Law Reports 9, at p. 17; and for Pennsylvania in particular, Robinson's Trust, 218 Pa. 481 (1907) and Boyer's Appeal, 224 Pa. 144 (1909). In Boyer's Appeal, the Court so expressed itself in the following unmistakable language:

> "And then, after all, the rule for the determination of controversies over dividends between life tenants and remaindermen should be to give each just what the donor intended each to have. As has been said, the intent of the grantor or testator is the pole stai for the guidance of the courts."

But in the absence of any specific direction by the grantor or testator, a provision that the income is to be paid to designated beneficiaries, still leaves open the question of what he intends or means by the use of the word "income." In numerous cases specific language such as "dividends," "rents," "profits" and other kindred terms are used and furnish the basis of many decisions, but where merely the word "income" is used, it is a more open question of construction; and although, in such cases, the Court has uniformly restated the rule as to the intention expressed in Boyer's Appeal, it has invariably held that the intention is to apply the apportionment theory.

It is submitted that this construction would cause considerable astonishment to the average business man. Regardless of what might or might not be held to be income under the arbitrary definitions of income tax laws, he would unquestionably regard all ordinary cash dividends, and probably extraordinary cash dividends as well, in the nature of income. A stock dividend he would certainly consider as an addition to his original investment; and though possibly he might consider the sale of rights to subscribe as income which he would expect to consume, clearly the investment of additional money in the purchase of stock under rights to subscribe would rank as capital investment. And, similarly, if he sold his holdings, whether only his original investment, or, in addition, any stock dividends or additional stock purchased under subscription rights, and sold the whole at a largely enhanced value, he would know, of course, that he would have to pay income tax on the capital gain which he realized; but he would none the less consider it, not as income, but as increased capital investment; and the income tax laws themselves recognize that this is a *capital* gain even while taxing it as income.

Furthermore, his object in creating the trust is presumably to protect the income beneficiary either from his or her own inexperience or extravagance and to that end to insure him or her a regular recurring flow of income. This must certainly be the case where he also hedges the trust about with the protection of a spendthrift trust provision. Under these circumstances, to award to the income beneficiary large blocks of stock which can readily be sold and the proceeds dissipated—or, in fact, anything other than the ordinary cash accruals from the trust—would probably occasion its creator considerable surprise. The apportionment theory, as the Supreme Court has laid it down, seems to assume that if the creator of the trust uses the word "income" alone, that word is broad enough to cover, and was intended by him to cover, every conceivable kind of distribution to which the apportionment theory applies. The effect of the spendthrift trust provision upon the apportionment doctrine has never been raised on appeal to the Supreme

Court. It was, however, specifically ruled by the Orphans' Court of Allegheny County and was one of the reasons on the basis of which the Court held that the testator's intention was clearly opposed to any such distribution as income. The stock dividend there in question was decreed in its entirety to *corpus*. Pitcairn's Estate, 70 P. L. J. 417 (1922).

If the extraordinary distributions other than extra cash dividends are allowed to remain in the trust, the income beneficiary is not injured, for he of course receives the increased income from the additional property added to the trust fund. On the other hand, through constant depletions in the trust fund, by the application of the apportionment theory, the regular periodic income may well be decreased—at any rate, it will not be likely to increase—and it may happen that the income beneficiary will suffer. Such is usually the case in trusts where the income depends upon a more or less fixed principal consisting solely of high-grade bonds, and the analyses of investments so widely distributed today by experienced investment bankers, all show that over long periods of time those investment lists having a fair proportion of common stocks of seasoned dividend-paying corporations have shown better results by reason of accretions in the way of stock dividends and similar extraordinary corporate distributions. Would it not be more reasonable to suppose that this is precisely what the creator of any trust who did not otherwise specifically provide, both desired and intended? Protection for his beneficiary induces the creation of the trust in the first place, and, presumably, either large distribution to one who needed protection or shrinkage in the purchasing power of the total income would be the last thing intended.

Irrespective of whether the views herein expressed are correct or not, it seems quite clear that the apportionment doctrine is so firmly imbedded in the law of Pennsylvania that the courts will always apply it to extraordinary corporate distributions in trust estates. The trend, as evidenced by Nirdlinger's Estate, where it was applied to something not in reality a corporate distribution at all, indicates that, if anything, it will be extended rather than curtailed. Therefore, if any Pennsylvania lawyer is engaged in drafting a trust instrument wherein the creator of the trust desires to guard against the effects of the apportionment doctrine, his only hope is to provide specifically for the retention of all extraordinary distributions by the trustee as a part of the *corpus* of the trust. But the difficulty with this is that there is a serious doubt whether such a direction is valid and legal.

While the Supreme Court has uniformly reaffirmed the statement in Boyer's Appeal as to the conclusive weight to be given to the creator's direction and, until very recently, has done this without qualification of any kind whatsoever, the most recent expression of the Court may well cast considerable doubt upon the safety of such practice. In Jones v. Integrity Trust Company, 292 Pa. 149 (1928), Mr. Justice Simpson at the close of the opinion says as follows:

> "Our attention has been called to the fact that in some quarters it is supposed that our prior decisions on the subject would be applicable in cases of extraordinary stock dividends and rights to subscribe, even though the testator or settler who created the trust, had provided a different method of distribution under such circumstances. This is incorrect; what the will or deed specifies must be carried into effect, *so far as it is legal*." (Italics supplied.)

This would have been very gratifying language had it not been for the words "*so far as it is legal.*" They leave us somewhat in the frame of mind enjoyed by the general public when President Coolidge announced that he did not choose to run. For the effect of the otherwise clear statement that the creator's directions would be carried out and his intention respected is entirely dependent upon the question as to whether his direction is valid. One is left with the impression that the Court at first definitely intended to decide that it would carry out whatever intention the creator of the trust expressed with respect to these matters. The addition of the qualification at the end, however, while it may have been purely a cautionary statement by the Court, raises greater doubt than that, for the reason that the leading case in New York (Matter of Osborne, 209 N. Y. 450, (1913), in which New York abandoned the Kentucky rule and in an extremely able opinion adopted Pennsylvania's apportionment doctrine, also raised the doubt as to the extent to which the testator's direction could be carried out in these cases. The Court definitely stated that the creator of the trust could provide that what would otherwise be principal should be considered as income and be treated as such. But with equal emphasis it then proceeded to say that in fact what would be income under the decisions of the State of New York could not be declared principal or *corpus* by the testator, because such a direction would violate the New York statutes prohibiting accumulations of income. While the statement was *obiter* in that case, it was shortly followed by the decision in In re Megrue, 217 N. Y. 653 (1915), in which the Court specifically holds that such a direction contained in a codicil invalidated the codicil because in violation of the statute against accumulations.

Although Jones v. Integrity Trust Company indicates that the Court intended to leave these matters to the desire of the persons creating the trust, it may very well be that it had in mind the Osborne and Megrue cases in New York and Section 9 of the Pennsylvania Act of 1853, P. L. 503, prohibiting accumulations of income from real or personal property except during the minority of the beneficiary. In any event, instead of clarifying the situation it has cast sufficient doubt upon it so as to cause extreme nervousness on the part of many members of our profession who have drafted wills and other trust instruments providing for the retention of these extraordinary distributions as corpus.

Those who believe that the Pennsylvania apportionment rule is less desirable than the so-called Massachusetts rule and who doubt the legality of corrective instructions by the creator of the trust, have, then, no recourse to provide against the application of the apportionment doctrine except by addressing themselves to the Legislature. And it is believed that, for the reasons hereinbefore discussed, such a course is advisable. In New York, as a result of the discussion in the Megrue case, the New York Legislature has amended the personal property law and Section 17 (a) now provides that all stock dividends shall be considered principal unless otherwise expressed in the trust instrument and "that the addition of any such stock dividend to the principal of such trust as above provided shall not be deemed an accumulation of income within the meaning of this article."

There are many phases of this question impossible to discuss within reasonable limits of time. For the benefit of anyone sufficiently interested to pursue it further, the annotation in 24 American Law Reports, pp. 9 to 122, is an exhaustive treatment of almost every conceivable phase of the subject. And for a review of the Pennsylvania cases in particular, Nirdlinger's Estate, 290 Pa. 457 (1927), is almost a digest of the law.

WILLIAM R. SCOTT

Pittsburgh, Pa.