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CORPORATIONS-DISSOLUTION-PAYMENT OF "ACCRUED UNPAID DIVIDENDS" TO PREFERRED SHAREHOLDERS FROM CAPITAL

Frank M. Bowen, Jr.
University of Michigan Law School

CORPORATIONS—DISSOLUTION—PAYMENT OF "ACCRUED UNPAID DIVIDENDS" TO PREFERRED SHAREHOLDERS FROM CAPITAL—The Big Bend Land Company was in the process of liquidation. The articles of incorporation provided for preferred stock which "in the event of any liquidation . . ." was ". . . entitled to be paid in full the par value thereof, *and all accrued unpaid dividends thereon* before any sum shall be paid to or any assets distributed among . . ." the common stock.[1] No dividends had ever been declared or paid, nor had there ever been any surplus profits. After discharging all corporate liabilities, including payment of the par value of the preferred stock, the liquidating trustees brought suit for a declaratory judgment as to the disposition of the substantial assets remaining. A Washington statute provided that "It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company . . . Provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company which shall remain after the payment of all its debts upon the dissolution of the corporation."[2] The trial court found that the "accrued unpaid dividends" should be paid to preferred shareholders from the assets prior to any distribution to the common shareholders. On appeal, *held*, affirmed. *Hay v. Hay*, (Wash. 1951) 230 P. (2d) 791 (1951).

Whether upon dissolution a corporation should be said to pay "accrued unpaid dividends" from capital to holders of cumulative preferred stock is generally considered a matter of construction of the articles of incorporation.[3] In the absence of any provision in the articles,[4] all shareholders would divide equally the assets remaining after payment of creditors.[5] The decision of the principal case in interpreting the articles of incorporation to make provision for payment from the remaining assets of an amount equal to "accrued unpaid

[1] Principal case at 793.

[2] Wash. Rev. Stat. (Remington, 1940) §3823.

[3] STEVENS, CORPORATIONS 473 (1949); 12 FLETCHER, CYC. CORP., perm. ed., §5449 (1932); cases collected, 133 A.L.R. 666 (1941).

[4] Murphy v. Richardson Dry Goods Co., 326 Mo. 1, 31 S.W. (2d) 72 (1930) held that provision in the by-laws would be ineffective.

[5] Continental Insurance Co. v. United States, 259 U.S. 156 at 181, 42 S.Ct. 540 (1921).

dividends" seems logical,[6] is in accord with the great weight of authority,[7] and complies with the generally understood significance of these words.[8] Although the dissenting opinion disagrees with this interpretation of the articles,[9] of more interest is the view of the dissent that the Washington statute[10] prohibits any contract in the articles which would result in an unequal distribution of the assets.[11] For such an interpretation of the statute, the dissent relies upon two cases which construe statutes in New York and Wisconsin. The New York case[12] is spoken of as "fortified by a statute the same as . . ." the Washington statute.[13] The Wisconsin case[14] is said to construe a statute ". . . of the same import as the [Washington statute] . . . but . . . more specific in its wording. . . ."[15] However, the New York case does not construe the New York statute to prohibit the shareholders from contracting in the articles for unequal distribution of assets, but uses the statute to interpret the contract.[16] On the other hand, the Wisconsin case follows a statute which, by expressly prohibiting such a contract, leaves no room for interpretation which would allow unequal distribution.[17] Therefore, to equate the Washington statute to both the New York and Wisconsin statutes seems erroneous. The majority, correctly, it is believed, construes the statute to have no application in the principal case by distinguishing between a corporation as a going concern with possible creditors' claims and one in liquidation when all creditors' claims are satisfied.[18] It should be remembered that in the absence of a statute comparable to that in Wisconsin expressly limiting distribution of remaining assets other than profits on dissolution, the problem considered here is one which should be met by exact draftsmanship of the articles of incorporation.

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[6] If the clause in question was intended to relate only to distribution of net profits or surplus, then it would add nothing to the prior clauses, and would be mere surplusage. See 40 YALE L.J. 828 (1931).

[7] Supra note 3.

[8] Willson v. Laconia Car Co., 275 Mass. 435 at 441, 176 N.E. 182 (1931), quoted in principal case at 794.

[9] Principal case at 797.

[10] Supra note 2.

[11] Principal case at 798.

[12] Michael v. Cayey-Caguas Tobacco Co., 190 App. Div. 618, 180 N.Y.S. 532 (1920), noted 6 CORN. L.Q. 103 (1920). See 34 HARV. L. REV. 303 (1920).

[13] Principal case at 800.

[14] Hull v. Pfister & Vogel Leather Co., 235 Wis. 653, 294 N.W. 18 (1940).

[15] Principal case at 800.

[16] "It is, of course, competent for shareholders to contract between themselves and the company as to what their respective rights shall be. . . . The question to be answered is the interpretation of that contract." Michael v. Cayey-Caguas Tobacco Co., 180 N.Y.S. 532 at 535 (1920).

[17] Wis. Stat. (1929) §182.13: "Any corporation may . . . provide . . . for a preference of such preferred stock not exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits." This restriction is no longer present. Wis. Stat. (1949) §182.13.

[18] Principal case at 797. See Fawkes v. Farm Lands Investment Co., 112 Cal. App. 374, 297 P. 47 (1931) for interpretation of a similar statute; note, 30 MICH. L. REV. 281 (1931).