

Corporations--Recovery of Declared Dividends-- Statute of Limitations (Jacques, et al. v. White Knob Copper and Development Co., Inc. 260 App. Div. 640 (1st Dep't 1940))

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the contract was "unilateral as to time and hence could be terminated by either party at any time."⁷ It is a well settled rule of law that a contract of agency, which leaves the agent free to terminate his relations with the principal upon reasonable notice, must be construed to confer the same rights upon the principal, unless provisions to the contrary are stipulated.⁸ The plaintiff contends that the evidence presented by the defendant and accepted by the jury was insufficient to show a termination of the contract and he should recover commissions to the time of the present trial. However, a finding or a judgment by the court on facts will not be disturbed, if there is any evidence fairly tending to support it, or if sustained by sufficient evidence, or substantially supported by the evidence,⁹ and the Court of Appeals so found in the instant case.

S. C.

CORPORATIONS—RECOVERY OF DECLARED DIVIDENDS—STATUTE OF LIMITATIONS.—Plaintiffs, executors of the estate of Thomas L. Jacques, deceased, seek to recover the amount of unpaid dividends on 100 shares of preferred stock of the defendant corporation together with interest. During the period from 1906 to 1938, one H. C. Lloyd was the owner of record of 100 shares of preferred stock of defendant corporation. In 1913 decedent, Thomas L. Jacques, acquired the stock certificate upon the death of his father, who evidently obtained the certificate by transfer from H. C. Lloyd. Jacques held the certificates from 1913 until his death in 1931. Until 1938 no attempt was made to present the certificate for transfer on the books of the defendant corporation. The defendant corporation from 1914 to 1922 declared dividends on this stock. After the declaration of dividends no sum was set aside from the corporate assets for their ultimate payment. Entry was made on the books of the corporation of the total

struction Co., 182 App. Div. 455, 169 N. Y. Supp. 622 (1st Dept. 1918); 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 106 ("A promise that was originally too indefinite may by performance become definite and as to the other party to the bargain must be regarded as continuously assenting to receive such performance in return for his promise, a valid unilateral contract arises on receipt of such performance.").

⁷ Nathan Rubin v. Dairymen's League Co-operative Association, Inc., 284 N. Y. 32, 38, 29 N. E. (2d) 458, 460 (1940); cf. Lady Duff Gordon, 222 N. Y. 88, 118 N. E. 214 (1917); Ehrenworth v. Stuhmer & Co., Inc., 229 N. Y. 210, 128 N. E. 108 (1920) (This case must be differentiated from the instant case, for herein it was agreed in writing that the contract was to last as long as both parties were in business. The default was by the defendant who was still in business and bound by the terms of the agreement, hence the plaintiff recovered damages to the date of the trial.)

⁸ Wilcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94 (1891); Martin v. The New York Life Ins. Co., 148 N. Y. 117, 42 N. E. 416 (1895); Winslow v. Mayo, 195 N. Y. 551, 88 N. E. 1135 (1909).

⁹ Batchelor v. Hinkle, 210 N. Y. 243, 104 N. E. 629 (1914).

amount of the dividends. The dividends were not paid. At no time was the corporation aware of the transfer of the stock until the certificate was presented to them by the plaintiffs in April, 1938. Trial court gave judgment for plaintiffs. Upon appeal, *held*, judgment reversed, and complaint dismissed on the grounds that the right of the plaintiff to recover was barred by the six-year period of limitation, and that the period commences from the time of the declaration of the dividend in cases where no specific sum is set aside to meet the dividend. Although a demand for payment was necessary, the right to make the demand was complete when each dividend was payable. *Jacques, et al. v. White Knob Copper and Development Co., Inc.*, 260 App. Div. 640, 23 N. Y. S. (2d) 326 (1st Dept. 1940).

A stockholder has no legal title to the property or profits of the corporation, until a division is made, or a dividend declared.¹ Before a dividend is declared, the intangible right of the stockholder to share in the earnings of the corporation is a mere incident to the stock and passes with it on a sale.² A stockholder may not maintain an action against a corporation to recover a dividend until one has been declared.³ When a dividend has been declared out of the earnings of a corporation, such dividend becomes the property of the owners of the shares of stock no matter whether payable immediately or at a future time.⁴ The declaration of a dividend creates no contractual relation between the corporation and the stockholder, but creates a debt in favor of the latter against the corporation.⁵ An action at law may be maintained for its recovery⁶ at any time after the date fixed for payment, and should be brought against the corporation, and not against the directors personally, unless they converted it to their own use or by some act changed their relation to it.⁷ Where the amount of the dividend has been segregated or set apart into a distinct fund for the purpose of paying the dividend and is within the dominion of the directors who refuse to use it for the purpose intended, they become trustees of the fund and an action in equity may be maintained to reach the fund and to charge the directors with official misconduct.⁸ However, where the money to pay the dividends has never been severed from the mass of the corporate property, but to all intents and purposes

¹ *Hyatt v. Allen*, 56 N. Y. 553 (1874); *Jones v. Terre Haute & Richmond Ry.*, 57 N. Y. 196 (1874); *Beveridge v. New York El. Ry.*, 112 N. Y. 1, 19 N. E. 489 (1889).

² *Ford v. Snook*, 205 App. Div. 194, 199 N. Y. Supp. 630 (4th Dept. 1923), *aff'd*, 240 N. Y. 624, 148 N. E. 732 (1925).

³ *Godley v. Crandall & Co.*, 212 N. Y. 121, 105 N. E. 818 (1912).

⁴ *Brundage v. Brundage*, 65 Barb. 397 (N. Y. 1873), *aff'd*, 60 N. Y. 544 (1875); *Robertson v. Debrulatur*, 188 N. Y. 301, 80 N. E. 938 (1907).

⁵ See note 3, *supra*.

⁶ *Jones v. Terre Haute & Richmond R. R.*, 57 N. Y. 196 (1874); *Godley v. Crandall & Co.*, 212 N. Y. 121, 105 N. E. 818 (1912).

⁷ *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199 (4th Dept. 1906), *aff'd*, 190 N. Y. 553, 83 N. E. 1131 (1907).

⁸ *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. 657 (N. Y. 1836); *King v. Patterson & Hudson River R. R.*, 29 N. J. L. 89 (1860).

remains a part of it, the action is maintainable only against the corporation.⁹ In the instant case the mere entry by the corporation on its books of the total amount of each dividend did not put the defendant in the position of a trustee.¹⁰ Where the relationship between the corporation and its stockholder is that of debtor and creditor, and no equitable considerations are present, the latter's right to recover declared, but unpaid dividends may be barred by the operation of the statute of limitations.¹¹ In an action to recover a dividend the stockholder must prove the making of the dividend and a demand for payment.¹² Where a right exists, but a demand for payment is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete.¹³ The right to make the demand is complete when each dividend becomes payable and, consequently, the statute commences to run from that time.¹⁴ The non-payment of the dividend gives rise to a cause of action for a simple debt which must be commenced within six years under the New York statute.¹⁵ Similarly, it has been held that an interest coupon, detached from a corporate bond, and providing that the maker would pay to bearer a named sum on a date certain, is a simple contract obligation to pay and subject to the six-year statute of limitations.¹⁶ The debtor and creditor relationship held to exist in the instant case was recognized in a suit by the United States for dividends declared on stock held by it in a private corporation, although the right to set up a state statute of limitations was denied upon the ground that it could not bind a sovereign.¹⁷ In Texas, the courts, while recognizing the declared and unpaid dividend as a debt, incline to the view that the corporation's holding of the dividends, until demand is made, is in the nature of a trustee relation, which requires notice to a *cestui que trust* of the trustee's repudiation of the trust before the statute of limitations can be set in motion against him.¹⁸

J. J. T.

⁹ *Lowne v. American Fire Ins. Co., et al.*, 6 Paige 482 (N. Y. 1837).

¹⁰ *Jacques, et al. v. White Knob Copper and Development Co., Inc.*, 260 App. Div. 640, 23 N. Y. S. (2d) 326 (1st Dept. 1940).

¹¹ *Jacques, et al. v. White Knob Copper and Development Co., Inc.*, 260 App. Div. 640, 23 N. Y. S. (2d) 326 (1st Dept. 1940); *Winchester, etc., Turnpike Co. v. Wickliffe*, 100 Ky. 531, 38 S. W. 866 (1897).

¹² *Scott v. Central R. R. & Banking Corp.*, 52 Barb. 45 (N. Y. 1868).

¹³ N. Y. CIV. PRAC. ACT § 15.

¹⁴ 100 Ky. 531, 38 S. W. 866 (1897).

¹⁵ N. Y. CIV. PRAC. ACT § 48(1).

¹⁶ *Dickerson v. Wilkes-Barre & H. R. R.*, 100 N. J. L. 80, 124 Atl. 512 (1924), *aff'd*, 103 N. J. L. 175, 143 Atl. 618 (1926).

¹⁷ *Chesapeake & Del. Canal Co. v. United States*, 223 Fed. 926 (C. C. A. 3d, 1915).

¹⁸ *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710 (1914).