

May 2014

Corporations--Property Dividends--Trusts (In re Wolfe's Estate, 155 Misc. 190 (Surr. Ct. 1935))

St. John's Law Review

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CORPORATIONS—PROPERTY DIVIDENDS—TRUSTS.—The Directors of the Distilling Corporation of Virginia adopted a resolution declaring a dividend on common stock payable in warehouse receipts for whiskey. Anticipating a repeal of the Prohibition Amendment, payment was deferred for about two years. Within this two-year period a holder of both preferred and common shares died and his executors exchanged his preferred holdings for a larger number of the common. The life beneficiary contended that the Personal Property Law¹ required a holding that the dividends were income. *Held*, where executors have exchanged preferred shares constituting a part of the capital of an estate for common shares and have received thereon dividends which were declared before decedent's death, both the common shares and the dividends thereon must be accounted for as capital and not as income. *In re Wolfe's Estate*, 155 Misc. 190, 279 N. Y. Supp. 605 (Surr. Ct. 1935).

Property dividends are a source of discomfort to the stockholder whose holdings are extensive, for he must find a ready market in order to avoid insurance and storage costs. Yet, they are not against public policy and no objection can invalidate them.² The Board of Directors in their discretion can declare a cash, stock or property dividend.³ To rule otherwise would be to interfere with the internal management of a corporation which the courts are loath to do in the absence of fraud or illegality.⁴ It is true, the stockholders cannot be compelled to receive property dividends, and in that event the corporation must retain the same and if possible sell them for the stockholders.⁵

The declaration of a dividend does not create a contractual relationship but instead there arises a debt in the stockholder's favor against the corporation.⁶ If payable in cash, the corporation is bound

¹ N. Y. PERS. PROP. LAW (1931) § 17B: "Unless otherwise expressly provided by the will of a person dying after this act takes effect, all income from real and personal property earned during the period of administration of the estate of such testator and not payable to others or otherwise disposed of by the will shall be distributed pro rata as income among the beneficiaries of any trusts created out of the residuary estate of such testator and the other persons entitled to such residuary estate. * * *"

² *Venner v. Southern Pacific Co.*, 279 Fed. 832 (C. C. A. 2d, 1922).

³ Earl, J., in the case of *Williams v. Western U. Tel. Co.*, 93 N. Y. 162 (1883), wrote: "There is no rule of law or reason founded upon public policy which condemns a property dividend. The directors could convert the property into cash before a dividend and divide that, so the stockholders can take the property divided to them and sell it and then realize the cash." *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149 (1887); *City Bank Farmers Trust Co. v. Ernst*, 263 N. Y. 342, 189 N. E. 241 (1934); *BALENTINE, CORPORATIONS* (1st ed. 1927) § 159.

⁴ *Liebman v. Auto Strop Co.*, 212 App. Div. 306, 208 N. Y. Supp. 589, *aff'd*, 241 N. Y. 427, 150 N. E. 505 (1926); *A. Rosen & Sons, Inc. v. Silverman*, 235 App. Div. 524, 258 N. Y. Supp. 15 (1st Dept. 1932); *Musson v. N. Y. etc., Electric Lights, etc.*, 138 Misc. 881, 247 N. Y. Supp. 406 (1931).

⁵ *Williams v. Western U. Tel. Co.*, 93 N. Y. 162 (1883).

⁶ *Ehle v. Chittanooga*, 24 N. Y. 548 (1862); *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199, *aff'd*, 190 N. Y. 533, 83 N. E. 1131 (1907);

to discharge this debt in lawful currency.⁷ After dividends are declared out of surplus, such dividend becomes the property of the stockholders irrespective of the time of payment.⁸ If the directors provide in their resolution that the dividend shall be payable to the holders of record on a certain day they may do so to protect the corporation in paying to holders of record when they have no notice of transfer.⁹ By this provision title is not affected.¹⁰

If the preferred stock is part of the capital assets of an estate, it must follow that the common stock received in exchange in addition to the dividend declared thereon before decedent's death must be substituted for the preferred shares, *i. e.*, capital assets.¹¹

M. E. McC.

EVIDENCE—NEGLIGENCE—VIOLATION OF CITY ORDINANCE—
SOME EVIDENCE OF NEGLIGENCE—PROXIMATE CAUSE.—Plaintiff's
intestate, a member of the New York City Fire Department, in responding to an alarm, placed a ladder to the scaffolding on the unfinished side of a burning building. As the plaintiff's intestate stepped from the ladder to the platform of the scaffolding, his foot came in contact with a live wire and he was electrocuted. At the time the defendant company erected its high tension wires the lot was vacant. The wires were so hung that when the building construction began they crossed over the private property and were within the building line. When the walls of the building approached the wires, one of the building employees raised the wires about eight feet above the scaffolding by means of a wooden strut. A rain storm soaked the strut, short-circuited the wires and they fell to the scaffolding. At the trial, the judge excluded evidence of a city ordinance requiring line wires to be at least eight feet from the nearest point

Cogswell v. Second Nat. Bank, 78 Conn. 75, 60 Atl. 1059 (1905), *aff'd sub nom*, Jerome v. Cogswell, 204 U. S. 1, 27 Sup. Ct. 241 (1906); Green v. Bissell, 79 Conn. 547, 65 Atl. 1056 (1907).

⁷ Williams v. Western U. Tel. Co., 93 N. Y. 162 (1883); Grants Pass Hardware Co. v. Calvert, 71 Ore. 103, 142 Pac. 569 (1914).

⁸ Brundage v. Brundage, 60 N. Y. 544 (1875); *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149 (1887); Hoffer v. Sage, 112 N. Y. 530, 20 N. E. 350 (1889); Robertson v. De Brulatur, 188 N. Y. 30, 80 N. E. 938 (1907); Hill v. Newichanwanich Co., 8 Hun 459, *aff'd*, 71 N. Y. 593 (1887); Rowe v. White, 112 App. Div. 688, *aff'd*, 189 N. Y. 523, 82 N. E. 1132 (1907); Warner v. Watson & Gibson, 4 Misc. 12, 23 N. Y. Supp. 922 (Sup. Ct. 1893).

⁹ Brisbane v. D. L. & W. R. R., 25 Hun 438, 94 N. Y. 204 (1883).

¹⁰ Jones v. Terra Haute *etc.* Ry., 57 N. Y. 196 (1874); Brisbane v. D. L. & W. R. R., 25 Hun 438, 94 N. Y. 204 (1893); Robertson v. De Brulatur, 188 N. Y. 30, 80 N. E. 938 (1907).

¹¹ *In re Osborn*, 209 N. Y. 450, 103 N. E. 723 (1913); Pratt v. Ladd, 253 N. Y. 213, 170 N. E. 895 (1930).