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Corporations--Refusal of Directors to Declare Dividends (Ochs v. David Maydole Hammer Co., 138 Misc. 665 (1930))

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out legal or social justifiable cause to the injury of the plaintiff.[8] From this malice may be inferred. As to what constitutes justifiable cause must be left to the jury in each case.[9] The right to contract enjoyment is now held by the courts to be a property and a legal right; and any unjustified interference with it is an actionable legal wrong.[10] It is only natural for it to follow that broker's contracts should be as zealously protected by the courts against interference as other contracts. Surely in the instant case there was such a "malicious interference" as to bring it within the interpretation of that term in previous cases and was such as to justify the holding of the court.

E. H. S.

CORPORATIONS—REFUSAL OF DIRECTORS TO DECLARE DIVIDENDS.—On April 8, 1909, plaintiff's foster mother died. At the time of her death she was the owner of 20 shares of the capital stock of the David Maydole Hammer Company. She left a will in which she bequeathed to plaintiff during her lifetime the income and dividends thereof, and after her decease the stock was given absolutely to the three individual defendants. These three then were and still are the owners of one-half of the stock of the corporation, the remaining twenty shares being owned since 1926 by a daughter of one of them. The three individual defendants are and since 1908 have been the controlling directors of the corporation, and they are the ones who will eventually own the twenty shares of which plaintiff has the dividends. The plaintiff charges that these defendants, being so in control and with intent to build up a large surplus which under the circumstances would profit them but would not benefit plaintiff, have withheld making dividends in such sums as the business would warrant, and have permitted large sums, which should have been paid out as dividends, to accumulate as surplus. Plaintiff seeks an accounting. *Held,* denied. Ochs v. David Maydole Hammer Co., 138 Misc. Rep. 665, 246 N. Y. Supp. 539 (1930).

The directors of a corporation possess the right to declare dividends, and it is for the directors, and not the stockholders to determine whether or not a dividend shall be declared.[1] When therefore, the directors have exercised this discretion and refused to declare a

[8] Campbell v. Gates, *supra* note 5; Lamb v. Cheney & Son, *supra* note 4 at p. 422; Posner v. Jackson, *supra* note 5; Gonzales v. Kentucky Derby Co., *supra* note 6; Burdick, Law of Torts, *supra* note 1, Sec. 23 at p. 25, Sec. 415 at pp. 472-3.

[9] Cooley, Torts, *supra* note 6, p. 592.

[10] *Supra* note 8.

[1] Schell v. Alston Mfg. Co., 149 Fed. 439 (N. D., Ill., 1906); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919); Hastings v. International Paper Co., 187 App. Div. 404, 175 N. Y. Supp. 815 (1st Dept., 1919).

dividend, there will be no interference by the courts with their decision, unless they are guilty of a wilful abuse of their discretionary powers, or of bad faith or of a neglect of duty.[2] And so deferring declaration of dividends in an effort to improve the condition of the company is permissible.[3] Of course where the accumulation of surplus is greatly in excess of capital and the directors' only motive in increasing the surplus is for the purpose of expansion with no thought of the rights of stockholders it may be deemed an abuse of discretion not to declare a dividend.[4] It is said that among the reserves which it may be prudent to establish before a surplus available for dividends is found are reserves for depreciation, repairs, bad accounts, unknown taxes and fluctuations in business conditions.[5] The facts in the instant case do not warrant the interference of the Court, if the rules laid down in the cases considered are to be followed, inasmuch as it does not appear that the powers of the directors have been illegally or unconscientiously executed or that their acts were fraudulent and destructive of the rights of stockholders.

H. L. B.

EQUITY—CANCELLATION—CONDITIONS PRECEDENT.—The defendant defaulted in its contract to install fixtures in plaintiff's store after it had partially performed. Plaintiff had given a series of twenty-eight notes to defendant's attorney to be held in escrow until completion of the contract, and in addition had given defendant a conditional sales contract and a chattel mortgage. After repeated efforts to get defendant to complete its contract plaintiff was finally compelled to have the balance of the work performed by a third party. The defendant somehow secured the notes from his attorney and subsequently negotiated one of the notes. Plaintiff brought suit in equity seeking cancellation of the notes, the chattel mortgage, and the conditional sales contract. Defendant counterclaims for the bal-

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[2] New York etc. R. R. v. Nickols, 119 U. S. 296, 7 Sup. Ct. 209 (1886); Williams v. Western Union Tel. Co., 93 N. Y. 162 (1883); Burden v. Burden, 159 N. Y. 287, 54 N. E. 17 (1899), wherein the Court held that so long as the directors are acting honestly, and within their discretionary powers in accumulating a surplus in an iron manufacturing corporation, a stockholder must abide by their decision and it is only when one can show that the directors are guilty of fraud and bad faith in accumulating a large surplus to the injury of the stockholders that a court of equity would interfere.

[3] Williams v. Western Union Tel. Co., *ibid.*

[4] Dodge v. Ford Motor Co., *supra* note 1; Reynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 60 Atl. 941 (1905), wherein it appeared that the surplus was employed exclusively in expansion of business and in increasing salaries. The Court there held that the directors must bear in mind the stockholders of the corporation and not accumulate a huge surplus which might in the end go to future creditors of the corporation.

[5] Ballantine, Private Corporations (1927) p. 507.