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Corporations—Rights of Preferred Stockholders Upon Dissolution

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to its employees, regardless of the cause of injury. The act establishes an industrial insurance program designed to insure both employers and employees engaged in extrahazardous employment. In *Weiffenbach v. Seattle*, 193 Wash. 528, 76 P. 2d 589 (1938), the court said that the 1929 immunity proviso "must have been granted by the 1929 legislature as a reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute . . . 'sure and certain relief for workmen, injured in extrahazardous work.' . . ." In the instant case *D* was a contributor to the fund and was engaged in extrahazardous employment. Having assumed the burden, it is submitted that *D*, as a matter of policy, should have received the benefit, namely the protection afforded by the immunity proviso.

In the instant opinion the court relied heavily on *Gephart v. Stout*, 11 Wn. 2d, 184, 118 P. 2d 801 (1941), where it was said that the employer who seeks to bring himself within the immunity proviso must meet two requirements: (1) he must be a contributor to the fund; (2) at the time of the accident he must be engaged in some extrahazardous employment. Admittedly, *D* met the first requirement, but it was denied the protection of the immunity proviso since the connection between *P*'s injury and *D*'s extrahazardous employment was remote and not temporal. It is submitted that the word "temporal," if it means anything in this connotation, is ill-chosen. Substituting Webster's definition, the court is saying the connection is remote and not "pertaining to, or limited by, time." The opinion doesn't define or explain "temporal," but the use of the term suggests that the application of the immunity proviso will be restricted to cases where the negligent act and injury occurred simultaneously. It is probable that the 1929 legislature did not intend to afford such limited protection to third party employers who are bound by the act. If the immunity proviso is not to be restricted in its application to cases where the negligence and injury occurred simultaneously, the point in time where a third party will be protected is still in doubt.

Perhaps a better test, and one which would avoid the disturbing use of the word temporal, is one based on ownership, possession and control. In most cases where third party immunity has been allowed, all of these elements were in the defendant. But the instant case presents a unique factual situation. By selling the scrap iron to *X*, a third party, and having had it removed from its plant, *D* had divorced itself from ownership, possession, and control. Properly then, it should not be entitled to the protection of the immunity proviso. Thus it is suggested that where there is ownership, possession and control, the defendant will have immunity; where he has none of these, he will not. Future cases falling between these two extremes will determine the exact line of division.

RICHARD M. OSWALD

Corporations—Rights of Preferred Stockholders Upon Dissolution. A corporation's articles of incorporation provided: "In the event of any liquidation, dissolution or winding up of the Corporation the holders of the preferred stock shall be entitled to be paid in full the par value thereof, and all accrued unpaid dividends thereon [italics added] before any sum shall be paid to or any assets distributed among the holders of the common stock." During the corporation's existence, it had never declared a dividend. Furthermore, there was no surplus on hand at date of dissolution. In an attempt to determine the rights of the respective stockholders, the liquidating trustees of the corporation obtained a declaratory judgment construing the words "accrued unpaid dividends" to entitle the preferred stockholders to receive, in addition to the par value of their stock, an amount equal to the total amount of dividends which would have been paid on the stock had there been a dividend paid every year since date of

issue. Since there was no surplus, the amount which the preferred stockholders received in excess of their own capital contribution was paid out of the capital contributions of the common stockholders. Because of the number of years during which no dividend had been paid, the net effect of the judgment was that the preferred stockholders received all of the remaining assets of the corporation and the common stockholders received nothing. Appeal. *Held*: Affirmed. *Hay v. Hay*, 138 Wash. Dec. 485, 230 P. 2d 721 (1951).

The Supreme Court decision was by a five to four margin. The majority argued that: (1) Stockholders may contract among themselves as to their respective rights upon dissolution; (2) the articles of incorporation, which represented the contract between the parties, must be interpreted to determine what the parties agreed upon; (3) in addition to its technical meaning, the word "dividend" has, through extended usage in the business world and in the courts, acquired secondary meanings. The meaning attached to the word has varied with the context in which it was used and, when used in agreements similar to the principal one, has been almost universally interpreted in the way advocated by the majority; (4) REM. REV. STAT. § 3823 does not limit the right of stockholders to contract among themselves as to their respective rights upon dissolution. The statute, which provides that dividends may only be paid out of profits, expressly states that it does not apply to the distribution of corporate assets upon dissolution. (REM. REV. STAT. § 3823 was repealed in 1939 and replaced by REM. REV. STAT. § 3803-24 [P.P.C. § 447-1], but the Court assumed it was applicable to this case. Whether or not that assumption was correct is immaterial, since the provisions of the statutes in this regard are identical.)

The courts in the cases cited by the majority have used similar logic in reaching identical results. For interesting discussions see: *Fawkes v. Farn Lands Inv. Co.*, 112 Cal. App. 374, 297 Pac. 47 (1931); *Levin v. Pittsburgh United Corp.*, 330 Pa. 457, 199 Atl. 332 (1938); *Willson v. Laconia Car Co.*, 275 Mass. 435, 176 N.E. 182 (1931).

The four-judge dissent is not altogether convincing in its treatment of the subject matter. Its basic argument is that under REM. REV. STAT. § 3823 dividends may be paid only out of profits, and that any agreement to the contrary is unenforceable. This fails to meet the majority's position that the words "accrued dividends" were used in a nontechnical sense to express the intent of the stockholders and that the statute applies only to going concerns. The reasons for a statute like REM. REV. STAT. § 3823 are: First, and most important, to protect creditors against a distribution of capital to the stockholders; second, to protect stockholders by forbidding returns of capital to stockholders by a going concern, thereby impairing its ability to operate in the manner contemplated by its articles of incorporation. Neither of these reasons is valid when a corporation is dissolved. The creditors are protected since they necessarily receive payment before any distribution to the stockholders. As for the stockholders, the fact that the corporation is dissolving precludes any objection to the distribution of all capital on hand. The dissent suggests that, aside from the statute, it would be inequitable to allow the preferred stockholders to receive as income the capital contribution of the common stockholders. There seems to be no more inequity in limiting the adverse effects of a dissolution upon preferred stockholders than there is in limiting their rights during an era of prosperity, and if the stockholders see fit to agree among themselves to allow the preferred stockholders upon dissolution to draw upon the capital contributions of the common stockholders, there seems to be no valid reason for nullifying such an agreement.

The dissent cites: (1) *Penington v. Commonwealth Hotel Const. Corp.*, 17 Del. Ch. 188, 151 Atl. 228 (1930), which was overruled by *Penington v. Commonwealth Hotel Const. Corp.*, 17 Del. Ch. 394, 155 Atl. 514 (1931), and is therefore of no precedent

value; (2) *Hull v. Pfister and Vogel Leather Co.*, 235 Wis. 653, 294 N.W. 18 (1940), a case which is in accord with its position but in which the court was guided by a statute expressly limiting the preference allowable to preferred stockholders upon dissolution to the par value of the stock plus any profits; (3) *Michael v. Cayey-Caguas Tobacco Co.*, 190 App. Div. 618, 180 N.Y. Supp. 532 (1920). That case reached the result urged in construing a statute similar to REM. STAT. § 3823, but relied for authority mainly on *In re W. J. Hall & Co.*, L.R. 1 Ch. 521 (1909), which has since been overruled by *In re Springbok Agricultural Estates Ltd.*, L.R. 1 Ch. 563 (1920).

In addition to its general argument the dissent observes: "The capital stock or assets of [the corporation] belong to the common stockholders. The preferred stockholders had either loaned money to the corporation and received payment in shares of preferred stock or had become purchasers of such stock." However, preferred stockholders are universally held to be owners, not creditors, *Armstrong v. Union Trust & Savings Bank, Wash.*, 248 F. 268 (9th Cir. 1918), and this status does not vary with the methods by which they acquire their stock. If the dissent's contention is assumed to be valid, it would seem to strengthen the position of the majority. The normal result in a debtor-creditor relationship based on an annual percentage return is that the creditor becomes entitled to his interest regardless of profits.

The dissent further states: "The purpose of [the clause] when considered in conjunction with other factors was that the preferred stockholders were entitled to have a redemption made of their stock and to receive any dividends which had at any time been made [declared] by the trustees out of net profits, which had not been paid to them." However, since this is true even if there is no specific agreement between the stockholders, the parties would probably have omitted the clause if that is the only effect they wanted it to have.

Other language of the dissent indicates that it would allow the preferred stockholders payment up to the amount of any surplus which a corporation might have upon dissolution. This proposed solution has some merit. Its difficulty is that if the technical meaning of the word "dividend" is applied, as the dissent strongly urges, there could be no dividend in existence until one was declared; thus the dissent can consistently construe "accrued dividends payable" only to mean "dividends declared but not paid," and not to mean that the preferred stockholders are entitled to any part of the surplus in situations where they have not received all of the stipulated periodical dividends and the corporation has a surplus upon dissolution.

LOUIS ROUSSO

Waters—Appropriation—Riparian Rights. Action by a water district to appropriate and condemn water for domestic uses from a nonnavigable lake. All the riparian land was privately owned by persons who used the lake for boating, bathing, and fishing. One tract was planted in berries and intensively fertilized, and drainage from it seeped into the lake. The trial court held that boating, bathing, fishing, and reasonable agricultural pollution were riparian rights which would be damaged by operation of the state health laws protecting water supplies, and awarded compensation for the resulting depreciation in land values. Appeal. *Held*: Affirmed. *Petition of Clinton Water District*, 36 Wn. 2d 284, 218 P. 2d 309 (1950).

The Washington court early held that fishing and reasonable agricultural pollution were riparian rights. *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239 (1900); *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851 (1909). But it had never before decided the status of boating and bathing, although several other jurisdictions have long held these to be riparian rights at common law. *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211