Volume 38
Issue 2 *Dickinson Law Review - Volume 38, 1933-1934*

1-1-1934

Corporate Stock as Trust Property in New Jersey

E.F. Hann Jr.

latitude allowed those convicted of crime to appeal and have their conviction reviewed, there should be a corresponding liberalizing of the attitude towards the Commonwealth where the defendant has been convicted and the question ruled against the Commonwealth, as here, is purely one of law."

It appears that more good than harm will result from an extension of the right of the state to appeal in criminal cases at least where the question involved is one purely of law, no matter at what time during the trial the question may have arisen.

Joseph L. Kramer.

CORPORATE STOCK AS TRUST PROPERTY IN NEW JERSEY

In the recent case of *Waterhouse's Est., 308 Pa. 422, 162 Atl. 295,* Justice Kephart again set forth the Pennsylvania rules as to apportionment of stock dividends, stock rights, etc., in cases where a trust is created for life tenant and remaindermen. For the purpose of this article, the following outline of these rules will be followed:—

1. Basic rule: "The value of a trust estate, where its income is to be paid to life tenants with remainder over is determined as of the time the testator dies or when trust is created and is the intact value."
   - a. Prima facie, intact value is book value.
   - b. Intact value is subject to capital increases and losses. Burden of proof is on the person asserting a change.
2. Rules of distribution:
   - a. Ordinary cash dividends belong to life tenants, and are not "in absence of unusual circumstances, apportionable."
   - b. Extraordinary cash dividends; stock dividends.
     - (1) Presumption that same belong to life tenant.
     - (2) When following of such presumption would impair the intact value, there must be apportionment.
     - (3) When extraordinary dividends come from capital increases, such dividends belong to the corpus.
   - c. Sale of stock, producing income, at greater than intact value.
     - (1) Presumption is that proceeds belong to corpus.

(2) Where excess is due to accumulation of income, proceeds are apportionable.

(3) Where excess is due to capital increases proceeds belong to the corpus.

d. Proceeds from sale of stock rights to be distributed in the same manner as those from sale of stock.

Note—Capital increases include good will, enhanced market value, speculation value, earning power of stock.

It has been the generally accepted statement in texts and articles that New Jersey is among those states following the Pennsylvania rule—and, generally speaking, this is true. However, a study of the New Jersey cases shows several distinct differences and inconsistencies. It will be the purpose of this note to make a brief survey of these cases in light of the above outline.

1. Basic rule

The case of *Vandoren v. Alden*[1] first enunciated the doctrine of apportionment in New Jersey, following *Earp's App., 28 Pa. 368*. It was said: —

"where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustees, or at the death of the testator; in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company * * * , such additional value is part of the capital; that this, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainderman; but the earnings on such capital, as well as upon the par value of the shares, belongs to the life tenant. And when an extra dividend is declared out of the earnings or profits of the company, such extra dividend belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment if made since his death, in which case so much must be considered as part of the capital."

It is apparent from the early case that the theory of "intact value" is followed, and that this value is determined of the time of testator's death[2] or subsequent investment of the principal.

As to what value the courts will follow in determining the intact value no definite rule can be given beyond the apparent requirement that the real value be determined from such evidence as is pertinent. In the case of *Bal-*

---

[1]37 N. J. Eq. 176 (1868).

[2]See also:—Van Blarcom v. Dyer, 31 N. J. Eq. 783; Lang v. Lang's Exec., 57 N. J. Eq. 326, 41 Atl. 705 (1898); Day v. Faulkes, 79 N. J. Eq. 66, 81 Atl. 354 (1911); Trust Co. v. McCarter, 111 N. J. Eq. 315, 162 Atl. 274 (1932).

lentine v. Young[3] the book value was adopted in absence of fraud. However, in a late case[4] book value was considered evidence only, and the court refused to follow the contention that value in excess thereof was income or profit; and in a still more recent case,[5] though recognizing the holding of *Ballentine v. Young,* calculations based on the market value were not disturbed. As a general rule the books of a corporation will be presumed to be correct in order to determine the source of dividends.[6]

A presumption for the practical use of trustees was raised in *Lang v. Lang's Exec.*[7] It was said: —

"when a dividend is declared out of earnings, the reasonable presumption is that those earnings have been made uniformly, day by day, since the last similar dividend was declared, leaving the parties in interest at liberty to show that the earnings were really made differently."

This rule is readily applicable to ordinary dividends and was applied in the *Lang* case to an extraordinary dividend.

The obvious rule that the intact value is subject to capital increases, i. e., that such appreciation goes to the corpus, is followed in New Jersey.[8] By logical analogy, the same would seem to be true of capital losses.

An interesting situation arises when the stock held is of a "wasting assets" corporation. The argument raised here is as to whether a certain percentage of earnings must be reserved in a fund to balance depreciation. To carry the theory of intact value to its ultimate conclusion, such a depreciation fund is required, and has been held necessary in the case of *Hewitt v. Hewitt.*[9] Such a deduction is not necessary as between the corporation and its stockholders,[10] but a different situation exists where the life tenant and remaindermen are the interested parties.[11] The case of *DeBrabant v. Commercial Trust Co.*[12] is apparently inconsistent with the *Hewitt* case, but can be distinguished on the ground of the testator-settlor's intention. Since in his lifetime his definition of income did not embrace a deduction for depreciation, his intent, thus impliedly expressed, was followed in the distribution of the trust property.

2. Rules of distribution—a. Ordinary cash dividends.

Oddly enough, on the question with which the Pennsylvania courts have had the least trouble, there appears the greatest conflict in the New Jersey

---

[3]79 N. J. Eq. 70, 81 Atl. 119 (1911).
[4]McCoy v. McCloskey, 94 N. J. Eq. 60, 117 Atl. 473 (1922).
[5]Central Hanover Bk. v. Broman, 111 N. J. Eq. 191, 161 Atl. 674 (1932).
[6]Hewitt v. Hewitt, 113 N. J. Eq. 299 (1933).
[7]57 N. J. Eq. 326, 41 Atl. 705 (1898).
[8]McCoy v. McCloskey, 94 N. J. Eq. 60, 117 Atl. 473 (1922).
[9]113 N. J. Eq. 299 (1933).
[10]DeBrandt v. Comm. Trust Co., 113 N. J. Eq. 215 (1933).
[11]Hewitt v. Hewitt, 113 N. J. Eq. 299 (1933).
[12]113 N. J. Eq. 215 (1933).

decisions. As a rule of thumb, the decisions of the former state have uniformly held that ordinary cash dividends go to the life tenant; but confusion apparently remains in New Jersey due to a wealth of dicta and cases decided by the Courts of Errors and Appeals and Chancery.

In the first place, the *Lang* case raised the presumption that dividends are out of earnings, and no disagreement is apparent in the later cases. However, Justice Collins said :

> "A distinction has been made between extraordinary dividends and ordinary or current dividends, by enforcing apportionment of the first class and not of the others. * * * I cannot assent to the idea that some dividends should stand on a different footing from others. To hold that, where a life estate begins one day before a dividend is declared, the entire dividends shall go to the life tenant, may be convenient, but certainly is unjust."

This statement is clearly an obiter dictum, for the case dealt only with extraordinary dividends, but has been cited in later cases—and in every instance it is but dicta upon dicta.[13] To add to the confusion, in *Ballentine v. Young*[14] it was stated that "ordinary cash dividends, of course, go to the life tenant"; but this is also dicta.

The question has been squarely met in the recent case of *Union County Trust Co. v. Gray*,[15] where in answer to a question the court determined that the dividend involved was ordinary. It is there stated : —

"Ordinary dividends, i.e., dividends periodically declared in the regular course of business, whether out of surplus, current profits, or both, ordinarily belong to the life tenant. Judicial convenience forbids that the source be inquired into."

Statements to the contrary were criticized as dicta and applicable only to the facts of the prior cases. The value of this decision is lessened in that it was not rendered by the court of last resort. Also, with characteristic persistency, the troublesome dictum has been reiterated in the more recent case of *Trust Co. v. McCarter*.[16]

As this article goes to press a recent case appears which meets the ordinary dividend question just as squarely as the *Gray* case, and reaches the opposite conclusion. In *Hewitt v. Hewitt*[17] it was found that a certain percentage of dividends declared after the testatrix's death was from surplus accumulated

---

[13]Beattie v. Gedney, 99 N. J. Eq. 207, 132 Atl. 625 (1926); Hagedorn v. Arens, 106 N. J. Eq. 377, 150 Atl. 4 (1930); Trust Co. v. McCarter, 111 N. J. Eq. 315, 162 Atl. 274 (1932).

[14]79 N. J. Eq. 70, 81 Atl. 119 (1911).

[15]110 N. J. Eq. 270, 159 Atl. 625 (1932).

[16]111 N. J. Eq. 315, 162 Atl. 275 (1932)—Court of Chancery.

[17]113 N. J. Eq. 299 (1933).

prior to that time, and a deduction was ordered from the amount payable as an ordinary dividend. As a result of this decision the lawyer or student is now left with a choice between the chancery decisions of 1932 or 1933.

Substantial arguments can be offered on both sides, one of justice and the other of practicability. The most potent criticism of the Pennsylvania rule of apportionment is the difficulty entailed in inquiry into the source of the dividend and the determination of the correct apportionment. If the dicta of the *Lang* case were followed, these difficulties would be extended to every ordinary dividend declared. It cannot be denied, however, that such an extension of the apportionment rule will come closer to an equitable adjustment between the interested parties. It might be possible to reconcile the conflicting rules by apportioning, or not, in relation to the time when the dividend is declared. Thus, if a regular dividend were declared soon after the death of the settlor or life tenant, apportionment would be allowed, for it might then reasonably appear that the profits, from which the dividends were declared, were earned partly before and partly after the death of either of the above-mentioned parties. Even here we would meet the difficulty of setting limits as to time, and more trouble would ensue. The possible present solution lies in the carrying of the *Gray* case to the Court of Errors and Appeals.

b. Extraordinary dividends (cash and stock).

As to extraordinary cash dividends the rule, if not the application thereof, presents no difficulty. Such dividends are apportioned following the basic rule that the intact value must be preserved.[18] The underlying principle is that upon severance of income from corpus, the person entitled to the income should receive only that coming from profits earned after the severance. On the basis of the presumption established in the *Lang* case, it would seem that the burden of proof rests on him who wishes to show what portion of such dividend should be considered as corpus.

Stock dividends come within the class of extraordinary dividends, but the method of apportionment used in New Jersey differs from that of Pennsylvania. The reasons for apportionment are set forth in *Day v. Faulkes:*[19]

"1. Because stock dividends are not dividends set aside as earnings by the corporation.

"2. Because to permit the new stock to go to the life tenant would lessen the proportionate interest of the estate in the corporation, a result that cannot have been contemplated by the testator."

The stock dividends, when declared, are given in toto to the estate, but

---

[18]Lang v. Lang's Exec., 57 N. J. Eq. 326, 41 Atl. 705 (1898); Ballentine v. Young, 79 N. J. Eq. 70, 81 Atl. 119 (1911); Trust Co. v. McCarter, 111 N. J. Eq. 315, 162 Atl. 274 (1932).

[19]81 N. J. Eq. 173, 88 Atl. 384 (1912).

subject to a charge in favor of the life tenant for that part coming from earnings.[20] If the stock was purchased by the trustee as an investment, then the charge is for the amount of the life tenant's money which was used in the purchase.[21] The stock dividend is apportioned on the ratio that the surplus, at the time the stock was acquired by the trustee, bears to the surplus accumulated thereafter up to the time of the declaration of the dividend, with the date of the death of the testator taken as the time at which the stock was acquired.[22] If necessary, the trustee may sell some of the stock to satisfy the charge.[23]

An interesting case appears in the case of *Koehler v. Koehler*.[24] The trustee held 100 shares of the Standard Oil Co. of New Jersey. This corporation, ordered to dissolve the holdings in the subsidiary corporations, distributed its stock holdings in the subsidiary companies to its own stockholders in proportion to the shares they held in the Standard Oil Co. of New Jersey. It was held that the shares thus distributed went to the corpus in toto, for it was a mere case of exchange. Later these subsidiary corporations declared stock dividends, and the New Jersey rule as to such dividends was applied. The subsidiary corporations also declared a dividend in stock of other corporations. As to these, it was held that there should be apportionment in kind, with no charge as in the usual cases, for here the relative rights of the life tenant and remainderman were not disturbed.

c. Sale of stock, producing income, at greater than the intact value.

No cases appear in New Jersey in regard to this question, but there are definite rules as to the analogous cases where some other form of trust property is sold at a profit. In such case, the profit is part of the corpus, "like a premium realized on the sale of government bonds in which the funds might be invested."[25] However, in a comparatively recent case it was held that "the profit is to be apportioned between the principal and income in the ratio which the principal sum involved bears to the interest due upon it at the time when the security was realized upon."[26] It seems that this rule favors the remainderman, for it would appear that the interest due will enhance the value of property to a ratio greater than the disproportionate amounts of a principal sum and the interest due thereon at any one time. As a practical matter,

---

[20]Day v. Faulkes, 79 N. J. Eq. 66, 81 Atl. 354 (1911), aff. 81 N. J. Eq. 173, 88 Atl. 384; Titsworth v. Titsworth, 107 N. J. Eq. 436, 152 Atl. 869 (1931).

[21]McCracken v. Gulick, 92 N. J. Eq. 214, 112 Atl. 317 (1920).

[22]Hagedorn v. Arens, 106 N. J. Eq. 377, 150 Atl. 4 (1930).

[23]McCracken v. Gulick, 92 N. J. Eq. 214, 112 Atl. 317 (1920).

[24]99 N. J. Eq. 141, 132 Atl. 751 (1926).

[25]Parker v. Johnson, 37 N. J. Eq. 366 (1883).

[26]Skinner v. Boyd, 98 N. J. Eq. 55, 130 Atl. 22 (1925); aff. 100 N. J. Eq. 355, 134 Atl. 919.

such a definte proportion avoids the inherent difficulty of the Pennsylvania rule which seems to determine whether profit is due to earnings or capital increases, and to what amounts.

The question as to disposal of proceeds from the sale of unproductive shares of stock was raised in *Berger v. Burnett.*[27] It was contended that since the life tenants had received no income, the proceeds of the sale should be prorated. It was held that the entire fund realized should go to the corpus. It must be noted that an immediate sale of this property was not contemplated by the testator-settlor, and the court intimates that the presence of a direction to sell would change the decision.

d. Stock rights.

The rule is well settled in New Jersey that stock rights, as declared, belong to the corpus.[28] If such rights are sold at a profit the whole sum still goes to the corpus.[29] The reason why the life tenant is not entitled to any of this profit is explained in *Plainfield Trust Co. v. Bowlby:*[30]

"the fact that the rights to subscribe could be sold for this sum indicates that the subscription price was below the actual value of the stock. That being so, the total value of the stock holdings of a stockholder would be decreased on the issuance of the new stock."

CONCLUSION

Despite the patent attendant difficulties which appear from the above discussion, we will attempt here to outline the New Jersey rules as disclosed by the cases : —

1. Basic rule : —Intact value, as of date of creation of the trust, must be preserved.
   a. Intact value is actual value as can be determined from pertinent evidence.
   b. Intact value is subject to capital increases and losses.
   c. Presumption that earnings are made uniformly, from day to day.
2. Rules of distribution.
   a. Ordinary cash dividends apparently go without apportionment to the life tenant. (Strong dicta contra).

---

27 97 N. J. Eq. 169, 127 Atl. 160 (1924).
28 Ballentine v. Young, 79 N. J. Eq. 70, 81 Atl. 119 (1911).
29 Titsworth v. Titsworth, 107 N. J. Eq. 436, 152 Atl. 869 (1931).
30 107 N. J. Eq. 68, 151 Atl. 545 (1930).

Accord with sec. 228 (a), Restatement of Trusts, Tentative Draft No. 4.

b. Extraordinary dividends.

(1) Cash

(a) Presumption that same go to life tenant.

(b) To maintain intact value, there must be apportionment. Accord with sec. 228 (b), Restatement of Trusts, Tentative Draft No. 4.

(2) Stock

(a) Apportionable in ratio that surplus at time stock was acquired by trustee bears to the surplus accumulated thereafter up to time the dividend is declared.

(b) Dividend goes to corpus subject to a charge for the amount of the life tenant's interest.
Accord with sec. 228 (b), Restatement of Trusts, Tentative Draft No. 4, as to rule but not as to application.

c Sale of stock, producing income, at greater than the intact value.

(1) Prima facie, proceeds go to corpus.

(2) Profit apportionable in ratio as interest due on principal bears to the principal at the time of sale.
Contra sec. 228 (e), Restatement of Trusts, Tentative Draft No. 4.

d. Stock rights, or proceeds from sale thereof, go to the corpus, though a profit be realized on the sale.
Accord with sec. 228 (c), Restatement of Trusts, Tentative Draft No. 4.

E. F. Hann, Jr.