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making it an item of the cost of maintenance. This seems more desirable than the result of the principal case.

HUGH B. CAMPBELL.

Corporations—Non-Cumulative Preferred Stock— Participation in Past Undistributed Profits

In 1927, the directors of a corporation declared a dividend—the first since the organization of the corporation in 1915—from profits which had accumulated over a period of twelve years. The plaintiffs, owners of non-cumulative preferred stock, sought to enjoin the payment of this dividend to junior shareholders until the directors had paid to the plaintiffs preferential dividends alleged to have been earned, but not distributed to them, in previous years. A Federal District Court in New York denied plaintiffs injunctive relief.¹ But, in 1929, the Circuit Court of Appeals reversed this decision and held that the non-declaration of dividends from the profits earned in previous years made the corporation a dividend debtor to the plaintiffs to the extent of their preferential right to share in the corporation's yearly profits, and that this debt must be paid before dividends to junior stockholders could be declared.² Then, in 1930, the Supreme Court of the United States overruled the holding of the Circuit Court of Appeals.³ It decided that, since the profits made in previous years had been devoted each year to capital improvements instead of dividends, the non-cumulative, preferred shareholders had no claim to the past invested profits. The reason given was that "a common and reasonable" interpretation of the nature of non-cumulative stock gives to its holders the right to share only in the declared dividends of any given year and precludes any right to share in undistributed profits earned in past years.

Since the right of any shareholder to participate in the profits of a corporation is a contract right the nature of which is determined by the particular type of stock owned by him,⁴ a preliminary test in

¹ *Barclay v. Wabash Ry. Co.*, 23 F. (2d) 691 (S. D. N. Y. 1928).

² *Barclay v. Wabash Ry. Co.*, 30 F. (2d) 260 (C. C. A. 2d, 1929).

³ *Wabash Ry. Co. et al. v. Barclay*, 50 Sup. Ct. 106 (1930).

⁴ *Day v. U. S. Cast Iron Pipe, etc. Co.*, 96 N. J. Eq. 736, 126 Atl. 302 (1924); *Continental Ins. Co. v. Minn., etc. Ry. Co.*, 290 Fed. 87 (C. C. A. 8th, 1923); *Scott v. Baltimore, etc. Ry. Co.*, 93 Md. 475, 49 Atl. 327 (1901); *Elkins v. Camden, etc. Ry. Co.*, 36 N. J. Eq. 233 (1882). See Note (1929) 14 CORN. L. Q. 341, 342. "Corporate charters are contracts and preferred stock created by such charters carries only the rights derived from the charter provisions." *Berle, Non-Cumulative Preferred Stock* (1923) 23 COL. L. REV. 358.

determining the rights of shareholders to dividends would naturally be an examination of their stock certificates and the corporate charters authorizing the issuance thereof. But, this test has been of little value in determining the dividend rights of non-cumulative, preferred stockholders because, in most cases, their certificates merely state that their dividends shall be non-cumulative without any further defining provision.⁵ The instant case affords an excellent illustration. There the stock certificates merely provided that holders "were entitled to receive preferential dividends in each fiscal year * * * before any dividends shall be paid upon any other stock of the company, *but such preferential dividends shall be non-cumulative.*"⁶

A variety of other tests have been offered as the basis for determining the meaning of "non-cumulative preferred stock."⁷ Possibly the most common meaning, and that adopted by the Supreme Court, denies to such stockholders the right to share in past, undistributed profits.⁸ Writers on corporation finance, however, and a few courts have contended that non-cumulative shareholders *do* have a right to share in past, accumulated profits, whether declared or not, and that a sum equal to the amount due them shall be earmarked each year when earned and set aside on the books of the corporation.⁹

The chief objection to be urged against the ruling of the Supreme Court is that it affords those directors of a corporation who might

⁵ Note (1929) 14 CORN. L. Q. 341; Note (1925) 11 VA. L. REV. 353; Berle, *Non-Cumulative Preferred Stock*, *supra* note 4.

⁶ *Supra* note 3.

⁷ Berle, *Non-Cumulative Preferred Stock*, *supra* note 4; Note (1929) 14 CORN. L. Q. 341; Note (1926) 74. U. OF PA. L. REV. 605.

⁸ New York, L. E. and W. Ry. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209 30 L. ed. 363 (1886); Lyman v. Southern Ry. Co., 149 Va. 274, 141 S. E. 240 (1928). See also, *supra* note 5.

⁹ Bassett v. U. S. Cast Iron etc. Co., 75 N. J. Eq. 539, 73 Atl. 514 (1909); Moran v. U. S. Cast Iron etc. Co., 95 N. J. Eq. 389, 123 Atl. 546 (1924), *aff'd*. 96 N. J. Eq. 698, 126 Atl. 329 (1925); Collins v. Electric Portland Power Co., 7 F. (2d) 221 (D. Ore. 1925), *aff'd*. 12 F. (2d) 671, (C. C. A. 9th, 1926); Kurtz v. Electric Portland Power Co., 7 F. (2d) 221 (D. Ore. 1925), *aff'd*. 12 F. (2d) 671 (C. C. A. 9th, 1926); Day v. U. S. Cast Iron etc. Co., 95 N. J. Eq. 389, 123 Atl. 546 (1924), *aff'd*, 96 N. J. Eq. 736, 126 Atl. 302 (1925); Berle, *Non-Cumulative Stock*, *supra* note 4. See also citations, *supra* note 4.

It has been suggested that the result of the decision of the Circuit Court in the above case would be to extend the meaning of "non-cumulative stock" to a degree even more favorable to holders of this type of stock than that expressed by the stock experts in that it would not only allow such holders the right to participate in past undeclared profits but would also impose a "restriction on directorate discretion" by preventing the directors from declaring even a single year's dividend to the junior shareholders until the holders of non-cumulative stock have been paid their share of all the past dividends due them. Note (1929) 14 CORN. L. Q. 241, 345.

be partial to junior shareholders the opportunity of discriminating against holders of non-cumulative preferred stock by allowing the profits of the corporation to accumulate over a period of years instead of declaring dividends from the profits as they accrue each year.¹⁰ However, a court of equity will compel directors to declare a dividend where it is clear that a fraudulent accumulation of profits is being allowed.¹¹ But it is obvious that the relief to be obtained from such a remedy is more apparent than real because of the great difficulty in proving such a discrimination and the reluctance of equity to interfere with corporate management.¹² The result of the instant decision at least gives a definite legal meaning to "non-cumulative preferred stock" and requires, in order to protect the holders of such stock from discrimination by a partial corporate directorate, the insertion of express provisions in corporate charters and stock certificates entitling the holders of non-cumulative preferred stock to participate in those profits which have accumulated over a period of years upon which yearly dividends have not been declared.

J. FRAZIER GLENN, JR.

Evidence—Effect of Uncontradicted Rebutting Evidence on Presumption of Respondeat Superior in Automobile Accidents

Among the many problems that have arisen because of the widespread use of automotive transportation is the one dealing with the increasing number of automobile accidents. Statistics supplied by the National Safety Council of Chicago show that motor vehicle fatalities have increased at the rate of approximately two thousand per year since 1925 despite the more efficient precautionary methods

¹⁰ See Berle, *Non-Cumulative Preferred Stock*, *supra* note 4, for detailed illustration of how the accumulation of profits over a period of years will affect holders of non-cumulative preferred stock.

It is true as a general proposition that directors of a corporation, in allowing profits to accumulate over a period of years, have some sound business reason for so doing, but it is not improbable that in many cases the real reason for allowing profits to accumulate is the desire of the directors to further their own financial interests—if they own junior stock, either directly or indirectly.

¹¹ *Hazeltine v. Belfast, etc. Ry. Co.*, 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330 (1887); *In re Brantman*, 244 Fed. 101 (C. C. A. 2nd, 1917); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668, 3 A. L. R. 413 (1919); *Cannon v. Wischassett Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928). It should be noted, however, that a declaration of dividends from those profits which are in excess of a working capital can be required by any shareholder under N. C. Cons. Stat. Ann (1919) §1178.

¹² *Morse v. Boston and M. R. R.*, 263 Mass. 308, 160 N. E. 894 (1928); *Fernald v. Frank Ridlon Co.*, 246 Mass. 64, 140 N. E. 421 (1923).