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DIVIDEND RULES AND MISTAKEN PRECEDENT

JAMES JOSEPH FARLOW*

I

Early in corporate history a board of directors assembled in a properly called meeting had authority to declare dividends according to their discretion, and payment was subsequently made at the pleasure of the corporate officials. This method of division of profits is employed today by smaller businesses and closed corporations which do not depend upon the systematized markets such as the New York Stock Exchange for capital. But another method has become necessary because of the mass issues of securities on the market today. Millions of dollars are invested and shares may be thinly spread among thousands of investors. Vast numbers of shares may be outstanding. Thus dividends must be paid to many thousands of investors. Because of daily transfers of shares some date must be set whereby holders of record on a particular date will be entitled to receive payment. Only by some definite and open announcement can traders value their shares and sell on the market without confusion.

Were it not for this practice, directors and corporate officers could, because of knowledge gained through their offices, buy stock, declare dividends, and sell the following day such shares to investors who would not be aware of what was happening. Dividends would then be paid to the director or other party who held the stock; and, thus, through the manipulation a handsome profit would result. Hence, there was the origination of what will for convenience be known in this paper as the *three-date-system* where a resolution is passed by directors on one date, to pay holders of record on an intermediate date, payable on a subsequent date. All corporations do not use the same three dates, but an example would be for the directors to declare a dividend on the 1st of December payable to holders of record on the 15th of December and payable on the 31st.

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The New York Stock Exchange has its own regulations.[1] When a dividend is declared it requires that the stock be quoted "dividend on" which means that there has been a dividend declared and is represented in the market quotation. After the intermediate date the amount of dividend to be paid is subtracted from the quotation price of the stock and the "ex-dividend" mark is inserted by such stock quotation showing that the amount of the dividend has been subtracted from the quotation.

Two situations will be discussed in this paper. The first involves the application of the general rule for vesting of dividends under the original system; the second involves a split of authority where the three-date-system is used.

McLaren v. The Crescent Planing Mill Company[3] is perhaps the leading decision on vesting of dividends under the original method. The case holds that upon the declaration of a dividend: First, a debtor-creditor relationship is created between corporation and each stockholder for the amount of the dividend, to which he is entitled; second, that it is not necessary that directors set a fund aside for payment;[4] but, if they do, a trust fund is created giving them rights superior to those of general creditors; third, that

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1. Rules NEW YORK STOCK EXCHANGE, Art. 32. Dividends declared pass with the stock until the time of the closing of the books. After that stock passes ex-dividend.
   Also, NEW YORK STOCK CORPORATION LAW, § 62. "The board of directors . . . . may fix a day and hour not exceeding 40 days preceding the date fixed for the payment of any dividend . . . . as a record time for the determination of the stockholders entitled to receive any such dividend . . . . and in such case only stock holders of record at the time so fixed shall be entitled to receive such dividend. . . . ".
2. See BALLANTINE, CORPORATIONS (1930) § 160; also FLETCHER, PRIVATE CORPORATIONS (1932), c. 58, § 5380 both recognize that there are two rules for vesting of dividends where declaration is made on a date to be paid to holders of record of an intermediate date and payable on a third period.
3. 117 Mo. App. 40, 93 S.W. 819 (1906).
4. While some courts hold that a declaration by the board of directors is setting aside a sum, others indicate that actual cash should be set aside. See Rose v. Little Investment Company, 86 F. (2d) 50, 51 (C.C.A. 5th, 1936); Brown v. Luce Mfg. Co., 231 Mo. 259, 96 S.W. (2d) 1098 (1936); Petty v. Hagan, ——Ky.——, 265 S.W. 787 (1924); But, cf., Hadly v. Commissioner of Int. Rev., 36 F. (2d) 543 (C.C.A.D.C., 1929); Alsop v. De-Koven, 205 Ill. 309, 68 N.E. 930 (1903); In Re Fielding, 96 Fed. 800 (W.D.Mo. 1899); Sexton v. C. L. Percival Co., Iowa, 177 N.W. 83 (1920); Coggeshall v. Georgia Land & Investment Co., 14 Ga. 667, 82 S.E. 156 (1914).

once declared the dividend may not be recalled because a debtor cannot revoke or rescind a debt.

This case is unquestionable authority under the old system. Thus we find the law stated in parable by an English judge years ago: "Dividends declared are likened to fallen fruit, which does not pass under a sale or gift of the tree."[5] "While the law permits the seller to retain the fallen fruit, it does not accord him the additional privilege of shaking the tree after the bargain is closed." Dividends declared subsequent to the transfer of ownership therefore belong to the transferee.[6]

However a rescission of a dividend was apparently allowed by the courts in *Ford v. Easthampton Rubber Thread Company.*[7] On the day of the annual meeting of stockholders the directors meeting in an adjacent room passed a resolution for payment of a dividend. It was customary for the president to then come into the stockholders meeting and announce the dividend. This was not done and the dividend voted was not made public. Subsequently on the same day a new board of directors elected at the stockholders meeting voted to rescind the dividend. Such vote was upheld by the courts but because the vote had not been made known to anyone. The stockholders had made no contract, incurred no liability, nor made any reliance upon the vote; nor did the vote constitute a contract of the corporation with its stockholders; nor had there been a fund set aside which could be called a trust.

How could a corporation rescind a debt? This has been justified on the ground that the declaration was not complete.[8] Neither was there a reliance on the declaration by the directors which would cause a change of position sufficient to compel payment.[9]

Profits credited to personal accounts of the four stock-

5. DeGendre v. Kent, L. R. 4 Eq. 283 (1865).
6. LaFountain & Woolson Co. v. Brown, 91 Vt. 412, 101 Atl. 37 (1917).
7. 158 Mass. 84, 32 N.E. 1036 (1893).
8. See Hudson v. Commissioner of Int. Rev., 99 F. (2d) 630, 635 (C.C.A. 6th, 1938); The Gregg., Ltd., Petitioner v. Commissioner of Int. Rev., 25 B.T.A. 81, 91 (1932); Eaton Collector v. English & Mersick Co., 7 F. (2d) 54 (C.C.A. 2d, 1925); Davidson & Case Lumber Company v. Mattox, 14 F. (2d) 137, 139 (D.C.D. Kan. 1926); A. David Co. v. Grissom, 64 F. (2d) 279, 281, 282 (C.C.A. 4th, 1933); Bulger Block Coal Co. v. U.S., 48 F. (2d) 675 (1931).
9. See note 8 supra.

holders of a business in proportion to ownership was held not to be the declaration of a dividend in *Eaton, Collector of Internal Revenue v. English & Mersick Company*.[10] There was no formal vote of directors nor payment nor segregation of a fund known as a dividend. Instead the amount credited to the personal accounts was invested in machinery, tools and equipment. In an effort to collect a tax the Government asserted that there was a dividend and thus the amount retained by the corporation was "borrowed capital" and taxable. Defendant's contention that the credits were "invested capital" was upheld by the court which stated that the only way the stockholders could reach this surplus was by liquidation of the business. The directors presumably knew the law and could have declared a dividend by vote of the directors.

While these decisions probably narrow the law somewhat the general rule still stands that the declaration creates the debt. What these cases really do is form the law on what constitutes a declaration, namely: resolution of the directors to pay on a given date and publication of such fact to the public that such dividend will be paid. Hence the courts in later decisions properly distinguished and explained these two cases on the theory that there was no declaration of a dividend rather than that a declaration properly declared does not create a debt.[11]

Since the declaration of a dividend creates a debt under the original system let us look at the effect of such a ruling upon various factual situations. The owner of stock on the day of declaration is entitled to receive the dividend. After declaration, a subsequent transfer of the stock does not pass the dividend without express or implied agreement so to do.[12] Intent that the dividend should go with the stock could be expressly stated in the contract and agreed to be part of the bargain for which the consideration was given. Or an implied agreement might be shown by custom or past dealings.

10. 7 F. (2d) 54 (C.C.A. 2d 1925).

11. See cases note 7 supra, for general discussion on this point. If there is a declaration, a subsequent transfer to the Capital Accounts is held to be borrowed capital thus recognizing a dividend. If there are acts which do not justify the courts in determining that there has been a declaration then the proper accounting term as held by the courts is invested capital.

12. Ford v. Snook, 205 App. Div. 194, 199 N.Y. Supp. 630 (1923). Affirmed without opinion in 240 N.Y. 624, 148 N.E. 732 (1925).

Otherwise a transferee after the declaration date is not entitled to receive the payment.[13] Likewise a donor has preference over a donee; also a pledgor over a pledgee;[14] testator over legatee; [15] life tenant over remainderman;[16] assignee of bankrupt over trustee in building; executor over devisee. The right being vested it cannot be taken away without consideration or delivery as a gift.

Dividends must be paid from surplus for if there are no current profits or previously accumulated profits there can be no dividends.[17] If directors declare a dividend which impairs capital or if at the time the corporation is insolvent, then a creditor of the corporation may subsequently recover them from the stockholder.[18] This is best rationalized on the basis that there is no dividend and hence no conflict in reasoning between the rule that dividends must be returned and the rule that the corporation cannot rescind a debt. But when a dividend is fully and lawfully declared, the stockholders are in precisely the same position as other creditors.

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13. Ibid; Western Securities v. Silver King, 57 Utah 88, 192 Pac. 664 (1920); Lunt v. Genesee Valley Trust Co. 162 N.Y. Misc. 859, 297 N.Y. Supp. 27 (1937).
14. Boyd v. Conshohocken Worsted Mills, 149 Pa. 363, 24 Atl. 287 (1892).
15. DeGendre v. Kent, L.R. 4 Eq. 283 (1865); Brundage v. Brundage, 65 Barb. 397 (N.Y. 1869); Nutter v. Andres, 246 Mass. 224, 142 N.E. 67 (1923).
16. In Re Kernochan, 104 N.Y. 618, 11 N.E. 149 (1887); Cf., Talbot v. Milligan, 221 Mass. 367, 108 N.E. 1060 (1912); In Re McKeown's Est., 263 Pa. 78, 106 Atl. 189 (1919); In Re Earp's Appeal, 28 Pa. 368 (1857); In Re Smith's Est., 140 Pa. 344, 21 Atl. 438 (1891); Van Dorman v. Olden, 19 N.J. Eq. 176, 97 Am. Dec. 650 (1868); Davis v. Jackson, 152 Mass. 58, 25 N.E. 21 (1890); But see, Talbot v. Milligan, 221 Mass. 367, 108 N.E. 1060 (1915); Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705 (1868); Lamb v. Lehmann, 110 Ohio St. 59, 143 N.E. 276 (1924).
    Under the Pennsylvania rule there is an apportionment of an extraordinary dividend between life tenant and the remainderman, according to whether it is declared out of profits earned before testator's death or afterward. This is the majority American view. Fletcher, Cyc. Private Corp. (1932) § 3713.
    But there is the rule known as the Mass. rule and prevails in Mass., Conn., Del., Georgia, Ill., Ky., Maine, N. Carolina, and Vt. which holds that the life tenant shall prevail over the remainderman in all events.
    Where life tenant dies before dividend is declared even which apportionment statute is effective there is no question in ordinary dividends. Fletcher, Cyc. Private Corp. (1932) § 3714.
17. Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165 (1856); Mackall v. Pecock, 136 Minn. 8, 161 N.W. 228 (1917).
18. Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, (1856).

If insolvency comes before payment, the stockholders share pro rata with other creditors.[19] If a fund has been paid into a depository for payment of the dividend then such has been held a trust and stockholders share in preference to creditors.[20]

In one instance a dividend was made payable at the pleasure of the company. On the company's failure to pay, a stockholder brought suit and the court held that a dividend payable at the pleasure of the company is payable in a reasonable time.[21]

Stockholders cannot hold directors personally liable for the dividend.[22] Upon the declaration of a dividend there is only a debtor-creditor relationship between corporation and stockholders and a trust relationship results only after the fund has been placed in the bank.[23]

With all this in mind the rule can now be better stated as follows: If there is a declaration of an ordinary cash dividend at a properly convened meeting of directors declared from surplus[24] derived from profits[25] and communicated[26] to stockholders, a debtor-creditor relationship is created between corporation and stockholders.[27]

II

Is the rule that the declaration of a dividend creates a debtor-creditor relationship between corporation and stockholder on the day of declaration the law where the three-date-system is used? Does it apply, for example, if a dividend is declared on the 1st day of the month, payable on the 30th day of the month to holders of record on the stock transfer book on the 15th? Does the general rule apply where shares are transferred between the declaration and

19. Stringer's Case L.R. 4 Ch. App. 475 (1867).
20. LeRoy v. Globe Insurance Co., 2 Edw. Ch. 657 (N.Y., 1836).
21. Billingham v. E. P. Gleason Mfg. Co., 101 App. Div. 476, 91 N.Y. Supp. 1046, 1048 (1905).
22. Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N.E. 1036 (1893).
23. Ballantine, Corporations (1930) 504.
24. Powers v. Heggie, 268 Mass. 233, 167 N.E. 314 (1929).
25. Hubbard v. Weare, 79 Iowa 678, 44 N.W. 915 (1890).
26. Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N.E. 1036 (1893).
27. McLaren v. The Crescent Planing Mill Co., 117 Mo. App. 40, 93 S.W. 819 (1906); BALLANTINE, CORPORATIONS (1930) 504.

intermediate date or does the use of "dividend on" and "ex-dividend" alter the application of the rule?[28] Or can it be used under such circumstances since there can be no debt without some one to whom a debt is owed? In the states having decisions on this question, a majority do not apply the general rule under any circumstances where there is a transfer of stock between the day of declaration and the day for determining who shall be the owner of the dividend.[29] Two jurisdictions, New York and Utah have apparently accepted it in certain factual situations.

In *Ford v. Snook*[30] a New York judge handed down a decision seemingly unfair to business practices. The owner of 50 shares of Continental Can turned the stock over to Syracuse Trust Company and sale was made on the 18th of March. A dividend had been declared on March 10th to be paid to owners registered on the stock book March 20. The record of the transfer was not made until some time after the 20th and dividend was paid to the seller. The Supreme Court reversed the lower court stating that there was no evidence to show that defendant knew the Trust Company was a member of the New York Exchange and that the stock would be sold according to such custom and the defendant (seller) was not bound by the rules of the exchange. Thus the general rule was invoked. The actual holding of the case was not so erroneous but the language of the court was copied in later decisions in two states. What the court actually held was that in the absence of competent evidence the broker paid the amount of the dividend to the purchaser, or in absence of evidence that the purchaser assigned the dividend to the broker, he is not entitled to recover the dividend from the defendant seller. If the dividend did not belong to the seller, it belonged to the purchaser of the stock, not the broker. Such is a holding that any court would follow, but the case contained language saying that the payment to the registered holder of the stock on the intermediate date was for the convenience of the corporation and was not to effect legal title to the dividend. Also, the court said that when customers trade on the exchange they adopt the rules

28. New York Stock Exchange rules, note 2, supra.

29. California, Connecticut, Illinois, Massachusetts, North Carolina, and District of Columbia. Contra, New York and Utah.

30. 205 App. Div. 194, 199 N.Y. Supp. 630 (1923). Affm'd without opinion in 240 N.Y. 622, 148 N.E. 732 (1925).

of the exchange; and, the fact that one trades with a broker does not mean that he had knowledge of the peculiar way of trading. The language is unfortunate because of the interpretation the courts gave to this opinion.

Never the less in 1937 in *Lunt v. Genesee Valley*[31] the New York court followed the above dicta. A foundry corporation declared a dividend on January 11, 1935 to holders of record on December 31, 1934. The dividend was paid the next day, January 12, 1935 to defendant, Mrs. Chambers, who was record holder on December 31, 1934. Declaration was peculiar here in that holders on a subsequent date were to receive the dividend. The court said Section 62 of New York Stock Corporation law protected the corporation in paying the record holder of the shares and the corporation was right in so paying her but *held* that the transferee who purchased before the declaration date should get the dividend and not the record holder on December 31, 1934 as was declared by the directors. The court went so far as to say the corporation was right in paying the dividend to her under Section 62 but it was not right for her to retain it. She therefore had to pay over the dividend together with interest from the date she received it. This decision appears to impose an interest payment by requiring the dividend to be paid to Mrs. Chambers under the law and require that she pay interest until the date the vendee gets the money. What the holding really does is to deny to the corporation the right to set a date prior to the declaration date in which holders of record shall be paid a dividend.

Of the leading cases here related only the Utah case, *Western Securities v. Silver King*[32] actually follows the general rule of vesting and that case can be seriously questioned. Here a pledgee, who between the declaration and intermediate dates bought stock which had been previously pledged to himself, was required to account to the pledgor for the amount of the dividend. The court said payment to other than the holder of the stock on the declaration date was a conversion; furthermore a corporation cannot defy the law and specify that a holder on a future date will get a dividend. Sympathy here for the pledgor must have swayed the court in its decision because there was some question as to whether

31. 162 N.Y. Misc. 859, 297 N.Y. Supp. 27 (1937).
32. 57 Utah 88, 192 Pac. 664 (1920).

the pledgee could have sold to himself and whether he got the best available price for the stock. The court here followed *Ford v. Snook,* and, like the decision in that case, this decision is somewhat questionable on the ground that it denies the corporation the right of freedom of contract—the contract being the corporation's promise to pay a dividend in consideration for the investment in the stock by the stockholder. Because of this, the decision is not sound although it is one of the three leading cases applying the general rule that the declaration of a dividend creates a debt in the owner of the stock on the date of declaration even when the three-date-system is used.

Hence, if there be a New York-Utah rule, which we can question, yet hardly deny,[33] the holding of the leading cases fail to establish a very strong argument in favor of it.

The New York-Utah rule then, even when the three-date-system is used, follows the general rule that a debt is created on the declaration date.[34] Unless the parties know the custom of the exchange and contract accordingly, the person who holds the stock on the declaration date is entitled to the dividend although he did not hold it on the intermediate date.[35] Ordinarily though, shares are traded on the exchange and then the holder on the intermediate date gets the dividend because the trading on the exchange implies an assignment of such dividend.[36] The only variation appears to be when there is a transfer of the stock other than on

33. Fletcher, Cyc. Private Corporations (1932) § 5380. The general rule that dividends are payable to the owner of the shares at the time of the declaration of a dividend does not obtain where at the time the dividend is declared it is by resolution of declaration made payable to stockholders of record at a future date. Buchanan v. Nat. Savings & Trust Co., 23 F. (2d) 994 (App. D.C. 1928).
In New York they hold that the rule is for the convenience of the corporation in order that they be liable to only one stockholder. Ford v. Snook, 205 App. Div. 194, 199 N.Y. Supp. 630 (1923). Ballantine, Corporations (1930) § 160, p. 520, 521 recognizes both rules of vesting.

34. Ford v. Snook, 205 App. Div. 194, 199 N.Y. Supp. 630 (1923).

35. Ibid; Western Securities v. Silver King, 57 Utah 88, 192 Pac. 664 (1920); Hopper v. Sage, 112 N.Y. 530, 20 N.E. 350 (1889). "In spite of the usage of the New York Stock Exchange that a dividend already declared goes with the stock until the date of closing of the books, the law is that the dividend becomes the property of the owners of the stock when declared, no matter whether payable immediately or at a future time. A sale of the stock does not pass it as an incident.

36. Lunt v. Genesee Valley, 162 N.Y. Misc. 859, 297 N.Y. Supp. 27 (1937).

the exchange, such as by death of the owner to life tenant by will, or pledgor to pledgee by agreement; then the New York court turns about face and awards to the owner on the declaration date.

Hence let us look at this Connecticut rule which is at variance with the general rule.

The Connecticut rule followed in at least five jurisdictions[37] California,[38] Connecticut,[39] Illinois,[40] Massachusetts,[41] North Carolina,[42] and District of Columbia,[43] gives the dividend to the owner of the stock on the intermediate date in all instances.[44]

Such a rule becomes necessary in the large corporation for practical reasons. The stockholder on the date set gets the dividend whether transfer is on the market or by death of the owner, testator, or otherwise.[45]

The leading case supporting this view is *Ritchner & Company v. Light*[46] a Connecticut corporation, where an extra dividend was declared to be paid in part on December 29th and part on January 1st, to holders of record on December 26th. Defendant sold on December 16, 17, and 19 to plaintiffs but certificates were not transferred to the name of the plaintiffs until after the intermediate date, December 26th. The corporation paid to defendants. The court said that the stockholders' share of the dividend vests when declared no matter when assets were accumulated. That directors have sole authority to declare dividends and their discretion ordinarily will not be interfered with by the courts unless they act unreasonably or unjustly. The declaration of dividends rests in the discretion of the board of directors, and, if declared, they may fix the amount, time, place, manner and means of payment. This custom is not contrary to

37. Graham, When Do Dividends Vest? (1938) 27 Geo. L. J. 74.
38. Smith v. Taecker, 133 Cal. App. 351; 24 P. (2d) 182 (1933).
39. Ritchner & Co., v. Light, 97 Conn. 364, 116 Atl. 600 (1922).
40. Ford v. Ford Mfg. Co., 222 Ill. App. 76 (1921).
41. Nutter v. Andrews, 246 Mass. 224, 142 N.E. 67 (1923).
42. Burroughs v. North Carolina R.R., 67 N.C. 376, 12 Am. Rep. 611 (1872).
43. Buchanan v. National Savings & Trust Co., 23 F. (2d) 994 (App. D.C. 1928).
44. Ritchner & Co. v. Light, 97 Conn. 364, 116 Atl. 600 (1922).
45. Smith v. Taecker, 133 Cal. App, 351, 24 P. (2d) 182 (1933); See Notes 36 to 41 supra.
46. 97 Conn. 364, 116 Atl. 600 (1922).

public policy nor is it unreasonable. Most important of all, the general rule that stockholders at the time a dividend is declared may share therein regardless of when they acquired their stock, or when the dividends were earned, and though they are payable at a future date, is inapplicable, where the directors' resolution specifically declares that the dividends shall be made to stockholders of record on a future day.

Much can be said for the holding of the *Ritchner* case in that the *owner* of the stock on the intermediate date was entitled to the dividend although he was not registered on the transfer record. Such holding shows the corporation may fix the rights of the parties. It also is good authority that one does not need to be registered on the intermediate date in order to recover the dividend.

III

When dividends are declared to be paid on a future date, the New York-Utah view so strongly praised by certain writers may be criticized as not being the law in most of the states, and as inconsistent, awkward, and not adopted to commercial usage.

The New York view errs *first* in that there is no debtor-creditor relationship created when the resolution of the directors is passed.[47] Who is the creditor? The *second* criticism is that it distinguishes between transfers by sale on the market and transfers by death of life-tenants.[48] Such is an unworthy distinction and without merit. The record holder acquires the dividend in the first instance and the non-record holder in the later case.[49] *Third,* there is no money owed anyone until the intermediate date; hence, no debt until that time. The amount is not due until the third date, and no suit could be maintained until that time. To hold otherwise would be to maintain that one might bring suit and compel payment of the dividend before the time when the directors agreed to make it available. It is a debt but not until the intermediate date is it final and not until the third date may suit be maintained. Accounting practices do not determine when a debt is due. There are many contingencies on corporation books some of which never become

47. Lunt v. Genesee Valley, 162 Misc. 859, 297 N.Y. Supp. 27 (1937).
48. Union v. New Haven, 109 Conn. 268, 146 Atl. 727 (1929).
49. Ibid.

payable and are written off the books. Critics of the Connecticut rule are wrong here when they say accountant's placing an item on the liability side of the balance sheet makes it a debt.[50] How then can the New York rule comply with such reasoning? Indeed there can be no debtor-creditor relationship when the creditor is undetermined. A possible exception might be admitted here in the case of negotiable instruments but common stock is not negotiable. A notice to the corporation that stock was sold would relieve them from paying the dividend until notice was given who bought the stock. *Fourth,* when a dividend is declared between the first and the intermediate date it is necessary to imply a contract or assignment of the dividend to the purchaser.[51] In case of controversy such implication depends upon a complaining party's ability to establish facts by a preponderence of the evidence that the trading party knew of the exchange rules and intended to use them in the pending transaction. How can it be said the parties intended an assignment when directors have said that the holder on a date will get the dividend and not the one who formerly owned the stock? Once in court it is difficult to prove that the seller knew of the custom of trading on the exchange. About the only proof available in absence of express words is past dealings. *Fifth,* requiring that the corporation pay to one person, the record holder and then that holder shall pay to a former owner is confusing. Such a rule tends to stir up litigation. *Sixth,* an action of debt or assumpsit lies for an unpaid dividend. An action of debt must be based on a breach of contract, the violation of a duty, or infringement of a right.[52] There is no breach of contract since the promise is to pay the record holder and not the holder when the dividend is declared. There is no violation of a duty because there is no duty under the promise of the contract except to the record holder on and after payment date. There is no infringement of a right until the final date is past without payment. The holder on the intermediate date has the right to the dividend[53] when paid, but there is no breach until the passing of the final date. *Seventh,* the New York rule is a rule of convenience and does not apply unless both parties have contracted to be bound by it either expressly or im-

50. Graham, When Do Dividends Vest? (1938) 27 Geo. L. J. 74.
51. 205 App. Div. 194, 199 N.Y. Supp. 630 (1923).

pliedly.[54] Industry and finance demands a rule which will be consistent and may be applied in every instance. *Eighth,* this rule under attack interferes with freedom of contract. If the directors are not able to determine the amount, time, place, manner, and means of paying dividends the courts are unreasonably denying the right to contract. *Ninth,* the New York rule disregards conflicts of law and applies its own law. Such was shown in a sharp criticism of the Connecticut rule calling it the minority rule.[55] The criticism stated that under the Connecticut rule a court would be bound to pay the record holder regardless of who the owner is on that date. Such was not true as shown in *Ritchner & Company v. Light*[56] where the court said the owner and not the record holder was entitled to the dividend sued for. It was suggested that the Connecticut court would be embarrassed in applying the law of the domicil of the Corporation —its own corporation dividend rules—to a Connecticut corporation and the New York rule to a New York corporation. A life tenant dying between the declaration and the intermediate dates would cause the remainderman to get the dividend if it was a Connecticut corporation, but the personal representatives of the life tenant if it was a New York corporation.[57]

It is my opinion the application of conflicts rules are proper and that there is nothing embarrassing about applying them. If applying conflicts rules is embarrassing, the critic apparently forgot that such could likewise embarrass the New York court in a similar situation. But New York court's decisions ignore the rule of other states. Is such not contrary to conflicts of law principles?[58]

The really embarrassing situation would be that of the New York court in trying to apply its own law. A situation

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52. Nelson v. Wilson, 81 Mont. 560, 653, 264 Pac. 679, 683 (1928); People Ex. Rel. Nelson v. Peoples Bank and Trust Co., 268 Ill. App. 39 (1932); In Re Western States Bldg. Loan Assoc., 50 F. (2d) 632, 633 (S.D.Calif. 1932).

53. Fletcher, Cyc. Private Corporations (1932) § 6342.

54. Hopper v. Sage, 112 N.Y. 530, 20 N.E. 350 (1889).

55. Graham, When Do Dividends Vest? (1938) 27 Geo. L. J. 74.

56. 97 Conn. 364, 116 Atl. 600 (1922).

57. Union & New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 7 (1929).

58. Lunt v. Genessee Valley Trust Co., 162 Misc. 859, 297 N.Y. Supp. 27 (1937).

might arise which would require the award of the dividend to two people at the same time. For instance, to the personal representatives of the life tenant—the life tenant being the holder of the stock on the date of declaration but dying before the intermediate date, and to the remainderman's transferee as owner of the stock on the record date. This could come about by the stock being turned over to the remainderman after deceased's death, a sale to a second person, and sale by the second person on the exchange. Obviously the dividend would be paid to the purchaser on the exchange since he was registered on the corporation books. The personal representatives of the life tenant also could claim the dividend because the life tenant owned the stock and sold it privately before being sold on the exchange. One claimant would maintain that he sold privately and did not pass the dividend. The last purchaser could maintain that he bought on the market and corporation was right in paying to him.[59]

The New York rule being so unworkable, why do courts follow it simply because it follows the general rule of vesting? The answer is the old theory of mistaken precedent. A judge hastily follows the general rule and a line of cases are built upon it because one court has decided without thoroughly reasoning through the situation. The law was intended to be for the use of individuals in settling their claims to property and securing their personal rights and liberties. People were not meant to serve the law. There being no reason for the general rule to be extended to such circumstances, the California or Connecticut rule is the correct rule. The conclusion is based on decisions of a majority of the states, upon sound reasoning, and adaptability to practical circumstances.

IV

The operation of the Connecticut rule provides certainty and is consistent with business practice. For example: A corporation declares a dividend on December 1 payable on December 31 to holders of record on December 15. It is the intent of the corporation to pay their dividends to whom-so-ever may be registered as owners of shares on the books on the intermediate date.[60] As soon as declared

59. Hypothetical case.

60. Smith v. Taecker et al, 133 Cal. App. 351, 24 P. (2d) 182 (1933).

and announced to the public the declaration is valued in the minds of the public and all transactions made from thence on are effected by the declaration. There are sufficient changes of position that the corporation could not possibly revoke its dividend because all transactions after the announcing of the dividend are taken into consideration when dealing on the market. There is no debt however created until the intermediate date because there can be no debt without a creditor ascertained although there may be one payable in the future. Creditors are at that time determined. No creditor was ascertained before such time hence there is no right to payment. Where there is a right there is a remedy and there is no remedy unless there is breach of contract. There is no breach of contract unless the date of payment passes without the checks being mailed to shareholders. Besides aiding the corporation in telling who to pay[61] the public is also aided in valuing their property and trading with certainty. Rights to the dividend would be determined as follows:

TRANSFER OF SHARES

Before Intermediate Date	*After the Intermediate Date*
Donee	Donor
Pledgee	Pledgor
Transferee	Transferor
Remainderman	Life tenant's personal representatives
Assignee of bankrupt	Trustee-in-bankruptcy
Devisee	Executor

Since other difficulties could be determined in like manner an adequate rule of law to aid industry and finance can be obtained under the Connecticut rule. It should be the majority view.

61. Final Accounting of Kernochan & another Exc., 104 N.Y. 618, 11 N.E. 149 (1887).