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CORPORATIONS—POWER TO ISSUE AND REDEEM PREFERRED STOCK.—Hogin, McKinney and Co., an Indiana corporation, had issued 600 shares of preferred stock due serially from 1924 to 1930. Plaintiff held series "F" one hundred shares par value of $100 per share due July 1, 1929. On Nov. 13, 1929 the corporation gave its note to plaintiff for $10,000 to

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[11] 73 Ind. App. 309, 127 N. E. 298 (1920).

[12] 190 Ind. 633, 128 N. E. 836 (1921).

[13] 179 Ind. 415, 101 N. E. 479 (1913).

[14] 155 Ind. 634, 58 N. E. 1040 (1900).

[15] *Central Ind. R. Co. v. Wishard,* 186 Ind. 262, 114 N. E. 970 (1917); *Cleveland, C., C. & St. L. R. Co. v. Baker,* 190 Ind. 633, 128 N. E. 836 (1921); *Lake Erie & W. R. Co. v. McFarren,* 188 Ind. 113, 122 N. E. 330 (1919); *Pittsburgh, C., C. & St. L. R. Co. v. Dove,* 184 Ind. 447, 111 N. E. 609 (1916).

[16] *Pittsburgh, C., C. & St. L. R. Co. v. Dove,* 184 Ind. 447, 111 N. E. 609 (1916).

[17] *Teague v. St. Louis, S. W. R. Co.,* 36 Fed. (2nd) 217 (1929)—electric gong; *Canadian Pac. R. Co. v. Slayton,* 29 Fed. (2nd) 687 (1928)—gates; and see cases cited in 2 R. C. L. 1206 and 46 L. R. A. (N. S.) 702.

[18] *B. & O. Railroad Co. v. Shaw* (1929), 34 Fed. (2nd) 410; *Brommer v. Pennsylvania R. Co.,* 179 Fed. 577 (1910).

[19] See 46 L. R. A. (N. S.) 702; 16 Calif. L. R. 238; 18 Calif. L. R. 203; 8 N. Carolina L. R. 293; 21 Columbia L. R. 290; 28 Columbia L. R. 250; 37 Yale L. J. 532; 2 R. C. L. 1206; 3 Elliott on Railroads (2nd Ed.) soc. 1166; 51 C.J. 279.

redeem the mature preferred stock and plaintiff retained stock as collateral security. The corporation was solvent at that time and remained solvent for some time thereafter. The plaintiff brought this action on the note against the receiver of the insolvent corporation and obtained judgment. Receiver appealed. *Held,* that the retirement of stock was provided for by statute; and since the corporation was solvent at the time it gave the note to redeem the stock there was no fraud upon subsequent creditors; and that the plaintiff was entitled to share in distribution of assets as a creditor.[1]

Here there was clearly a valid issuance of the preferred stock since the statute[2] authorized the issuance of preferred stock. Even in the absence of statute expressly authorizing preferred stock, that power is implied in the absence of prohibition or restriction, but is subject to the qualification that it must be exercised for a legitimate purpose and that no contract right of other stockholders is impaired.[3] Power exists if authorized by the articles of incorporation, or by by-laws, adopted by the corporation prior to the issuance of the common stock, since by such action the rights of stockholders are not impaired. The power may be obtained after issuance of common stock if all the stockholders consent.[4] But in Indiana by statute[5] the preferred stock could be issued after an issuance of common stock over the dissent of a stockholder. However, in some states preferred stock cannot be issued against the dissent of any holder of common stock, if his contract with the corporation will thereby be broken or impaired.[6] Thus if not expressly authorized by charter, law or articles of incorporation to issue preferred stock when a corporation issues common stock, it cannot afterward issue preferred stock without unanimous consent of holders of common stock.[7] Sometimes the power to borrow money may be relied upon as authorizing the issuance of preferred stock, when issued merely as security for such repayment.[8]

When preferred stock is issued, the rights of the preferred stockholder depend upon the terms of his contract with the corporation.[9]. Since there seems to be almost unlimited degrees of preference that a preferred stockholder may receive, the problem of the rights of preferred stockholders as distinguished from the rights of creditors often becomes greatly involved. It has been said that a person cannot, by virtue of a certificate of preferred stock be, at least as to the creditors of the corporation, both a stockholder and a creditor at the same time. This seems to be true in the case of

[1] *Campbell v. Grant Trust & Savings Co.,* July 27, 1932, Appellate Court of Indiana, 182 N. E. 267.

[2] Burns' Ann. St. 1926, Sec. 4994.

[3] *Hogsett v. Aetna Building & Loan Assn.* (1908), 78 Kans. 71, 96 Pac. 52; *Kent v. Quicksilver Min. Co.* (1879), 78 N. Y. 159; *People v. Hugo* (1920), 181 App. Div. 628, 182 N. Y. Supp. 9.

[4] *Banigan v. Bard* (1890), 134 U. S. 291, 33 L. Ed. 932, 10 Sup. Ct. 565; *Hazlehurst v. Savannah* (1871), 43 Ga. 14; *Kent v. Quicksilver* (1879), 78 N. Y. 159.

[5] Burns' Ann. St. 1926, Sec. 4994.

[6] *Kent v. Quicksilver* (1879), 78 N. Y. 159.

[7] *Kent v. Quicksilver* (1879), 78 N. Y. 159; *Knoxville C. G. & L. Ry. Co. v. Knoxville* (1896), 98 Tenn. 1, 37 S. W. 883.

[8] *Totten v. Tison* (1875), 54 Ga. 140.

[9] *Wilson v. Laconia Car Co.* (1931), 275 Mass. 435, 176 N. E. 182.

ordinary preferred stock.[10] But it does not seem to be true under some statutory provisions, for the legislature may expressly authorize the issuance of stock which will give the holders the rights of creditors, and a lien on the property of the corporation which will have a priority over the claims of subsequent creditors, and at the same time give them all the rights and subject them to the liabilities of a stockholder. Thus the holder of the so-called preferred stock that has a lien upon the property has rights superior to the rights of subsequent creditors.[11] The nature of the transaction is to be determined by the real substance and effect of the contract rather than by the name given to the obligation or its form,[12] and the fact that the shares are denominated preferred stock either in the certificates or by the legislature is not conclusive.[13]

Preferred stock can be issued upon any condition not prohibited by statute, or articles of association, or contrary to public policy.[14] When preferred stock is issued a corporation may include a provision for its redemption,[15] but such a right is not to be inferred from ambiguous words in the certificate.[16] Provisions for redemption, when valid, are binding upon the preferred stockholders,[17] and upon creditors whose claims accrue subsequent to the redemption.[18] Again, the provision that the stock "shall be retired" on a certain date has been held to indicate that the holder is a creditor.[19] However, even if the provision for retirement upon a certain date would not make the holder of a certificate a creditor, the retirement provision is valid[20] and binding upon creditors whose claims accrued after redemption. The action of the corporation in redeeming the preferred stock after the maturity date by note is valid against subsequent creditors, since the corporation was solvent when the stock was redeemed. The redeeming of the stock is a part of the corporate business that devolved upon the board of directors.[21]

A more interesting problem arises where the corporation is solvent at the time that the first stock is redeemed, but the claims of creditors have arisen before the redemption. This is a much closer case but it seems that the redemption should be valid if the corporation was solvent

[10] *Booth v. Union Fibre Co.* (1919), 142 Minn. 127, 171 N. W. 307; *Star Pub. Co. v. Ball* (1922), 192 Ind. 158, 134 N. E. 285.

[11] *Heller v. National Marine Bank* (1898), 80 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 7 Am. St. Rep. 212; *Savannah v. Silverberg* (1899), 108 Ga. 281, 33 S. E. 908; *Totten v. Tison* (1875), 54 Ga. 139; *Burt v. Rattle* (1876), 31 Ohio St. 116; *Fryer v. Wiedemann* (1912), 148 Ky. 379, 146 S. W. 752, 39 L. R. A. (N. S.) 1011.

[12] *Burt v. Rattle* (1876), 31 Ohio St. 116.

[13] *Heller v. National Marine Bank* (1898), 80 Md. 602, 43 Atl. 800; *Burt v. Rattle* (1876), 31 Ohio St. 116.

[14] *Coggeshall v. Georgia Land & Investment Co.* (1914), 14 Ga. App. 637, 82 S. E. 156.

[15] *Coggeshall v. Georgia Land & Investment Co.* (1914), 14 Ga. App. 637, 82 S. E. 156; *Hackett v. Northern Pac. R. Co.* (1901), 36 Misc. 583, 73 N. Y. Supp. 1087.

[16] *Star Pub. Co. v. Ball* (1922), 192 Ind. 158, 134 N. E. 285.

[17] *Weidenfeld v. Northern Pac. R. Co.* (1904), 129 Fed. 305.

[18] *Mannington v. Hocking Valley Ry. Co.* (1910), 183 Fed. 133.

[19] *Savannah v. Silverberg* (1899), 108 Ga. 281, 33 S. E. 908; *Best v. Oklahoma Mill. Co.* (1927), 124 Okla. 135, 253 Pac. 1005; *Allen v. Northwestern Mfg. Co.* (1920), 189 Iowa 731, 179 N. W. 130.

[20] Burns' Ann. St. 1926, Sec. 4994.

[21] *Mannington v. Hocking Valley Ry. Co.* (1910), 183 Fed. 133.

and the rights of the creditors were not prejudiced at the time of the redemption. In *Westerfield-Bonte Co. v. Burnett*[22] it was held that where there was a valid agreement to redeem preferred stock, the provision for redemption was enforceable so long as it would not affect the collection of claims by creditors, even tho it would result in winding up and dissolution of the corporation. This case seems entirely sound and would always permit the redemption of preferred stock, where there was a redemption provision, if the corporation is solvent. Furthermore, if a creditor could interfere with the redemption of preferred stock even when it would not be prejudicial to his interests it would always be an impossibility to redeem preferred stock since practically all corporations have some creditors at all times. C. A. R.

DOMESTIC RELATIONS—MARRIAGE OF INSANE PERSON VOID—COMMON LAW MARRIAGE PRESUMED.—Grace Langdon and William Langdon were married Sept. 15, 1923, and since that time until the death of William Langdon in 1929, the two lived together as husband and wife. Grace Langdon upon her husband's death brought suit against the brothers and sisters of William Langdon to quiet the title to her interest in her husband's real estate, and for partition. The defendants filed a counterclaim alleging that William Langdon was insane at the time of the marriage to plaintiff, that she had no interest in the property, and asking that their title be quieted and the marriage of Grace Langdon and William Langdon be declared void. *Held,* altho the marriage of a person who is insane at the time of the ceremony is absolutely void under Burns R. S. 1926, Sec. 9862, still, if the parties to the ceremonial marriage continued to live and cohabit together as husband and wife, "the law will presume a good common law marriage, the presumption being in favor of morality and not immorality, legitimacy and not bastardy."[1]

It would seem that the court reached a desirable result in upholding the marriage. "Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality; not only casting the burden of proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption that it is illegal and void. So that it cannot be tried like ordinary questions of fact, which are independent of this sort of presumption."[2] In accordance with this theory it has been held that though a person once adjudged insane by a proper tribunal is presumed to continue to be insane until the contrary is shown,[3] a person adjudged insane three years before a marriage, was presumed to have regained his sanity at the time of such

[22] *Westerfield-Bonte Co. v. Burnett* (1917), 176 Ky. 188, 195 S. W. 477.

[1] *Langdon v. Langdon,* Supreme Court of Indiana, Dec. 7, 1932, 183 N. E. 400.

[2] Bishop on Marriage and Divorce, Vol. I, 6th ed., sec. 457; quoted in *Boulden v. McIntire* (1889), 119 Ind. 574, 21 N. E. 445; and cited in *Weeing v. Temple* (1896), 144 Ind. 189, 41 N. E. 600. See also *Castor v. Davis* (1889), 120 Ind. 231; *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742; *Franklin v. Lee* (1901), 30 Ind. App. 31, 62 N. E. 78.

[3] *Reden v. Baker* (1882), 86 Ind. 91.