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Federal Practice—Raising New Issues on Appeal—Board of Tax Appeals

claim to participate in future profits in advance of common stockholders.[12]

The dispute is essentially one between preferred and common stockholders over the distribution of future profits. To force the preferred stockholder to relinquish his preferred rights and assume the status of a common stockholder is, of course, to deprive him of a valuable security device. On the other hand, the preferred stockholder receives in lieu of cash the equivalent of a stock dividend, which can be converted into cash if there is a ready market.

The court emphasized the point that the merger plan was fair and equitable. For the plan to be fair and equitable to the preferred stockholders, it should give compensation for their contract rights to priority in the distribution of future profits.[13] On the other hand, since the profits have not been, and may never be, earned, they are not entitled to be paid the full arrearages in cash. An equitable plan would compensate them for loss of priority in the distribution of dividends by giving them a greater proportionate share through ownership of common stock. The court has assumed the difficult task of determining whether the amount of stock given is a fair settlement, taking into consideration the situation of the company and its prospects for future profits.[14]

W. B. W.

FEDERAL PRACTICE—RAISING NEW ISSUES ON APPEAL—BOARD OF TAX APPEALS—[Federal].—The Commissioner of Internal Revenue, applying section 166 of the Revenue Act of 1934,[1] held taxable the income from three irrevocable short-term trusts executed by the taxpayer for the benefit of his children. On appeal by the taxpayer to the Board of Tax Appeals, the Commissioner relied on sections 166 and 167 of the Revenue Act of 1934.[2] The Board entered its decision, holding that there were no deficiencies in the return of the taxpayer. The Commissioner appealed to the Supreme Court, assigning error in the Board's application of sections 166 and 167,

12. See Note (1937) 46 Yale L. J. 985, 989.

13. In the typical situation, the preferred stockholder has had to forego his dividends during times of depression. When business has improved, he is asked by the common stockholders to give up his priority rights so that they may share immediately in profits. Unless the clearing away of arrearages attracts further capital investment which increases profits, such a plan benefits the common stockholders at the expense of the preferred.

14. In the instant case it would seem that the preferred stockholders were adequately protected. The unearned surplus existing at the time of the merger was capitalized and given to them. The fact that a large majority of the preferred stockholders voted in favor of the plan should not, however, be given too much weight in determining the question of fairness of the settlement. Many of the preferred stockholders probably held common stock which they hoped to benefit thereby. Furthermore, the management, usually a large holder of common stock, has a tremendous influence through the solicitation of proxies. See Note (1937) 4 U. of Chi. L. Rev. 645.

1. Revenue Act (1934) 48 Stat. 680, c. 277, 26 U. S. C. A. (1940) secs. 166, 167, and 22 (a).

2. Jay C. Hormel (1939) 39 B. T. A. 244.

and, in his brief, *for the first time* urged section 22(a) of the same act in support of his contention.[3] *Held,* that the ruling of the Commissioner was binding under section 22(a) of the act although this section had not been advanced as authority in either prior proceeding.[4]

The general rule followed by federal appellate courts is that points not raised in the court below are not open to consideration on appeal.[5] This rule operates to estop the party, who is said to have waived his right to review of those matters which he failed to introduce or assign as error below.[6] Throughout its judicial history, however, this rule has been held inapplicable to questions of jurisdiction over the subject matter and fundamental right of action.[7] But it is not limited to mere matters of procedure.[8] To the general rule there is an exception: in federal appellate cases coming from lower federal courts, the reviewing court will consider a new legal theory to support a decision based on a rule of law erroneously applied, if the findings of fact, when governed by the correct rule, are sufficient to sustain the decision.[9] Under this exception the appellate court must find in the record a proper factual basis for its decision before it will apply the apropriate rule.[10]

The general rule,[11] with the glosses concerning jurisdiction and right of

3. Helvering v. Clifford (U. S. 1940) 4 Prentice-Hall 1940 Fed. Tax Serv. par. 62021.

4. Helvering v. Hormel (C. C. A. 8, 1940) 4 Prentice-Hall 1940 Fed. Tax Serv. par. 62617.

5. Old Jordan Mining and Milling Co. v. Société Anonyme (1896) 164 U. S. 261; Duignan v. United States (1927) 274 U. S. 195; Olson v. United States (1934) 292 U. S. 246; Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved (1932) 7 Wis. L. Rev. 91, 92.

6. Gila Valley, G. & N. Ry. v. Hall (1914) 232 U. S. 94, where the court points out the impropriety of allowing the losing litigant to ask judgment of the appellate court without availing himself of the opportunity to present his issues to the lower court. Montana Ry. v. Warren (1890) 137 U. S. 348; Magruder v. Drury and Maddox (1914) 235 U. S. 106.

7. See cases cited supra note 6.

8. West v. Edward Rutledge Timber Co. (1917) 244 U. S. 90, 100, where the court controverted the argument that the general rule applies only to matters of procedure, by saying: "The distinction between questions seems to be artificial. The essential circumstances would seem to be that a review is sought of that which was not decided, not submitted at all or withdrawn from submission and which, if it had been submitted, might have decided in favor of the appealing party."

9. United States v. Holt State Bank (1926) 270 U. S. 49, 56, where, in determining whether a body of water had been navigable, the Supreme Court said: "But notwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable." United States v. Williams (1929) 278 U. S. 255.

10. Helvering v. Ranking (1935) 295 U. S. 123; General Utilities & Operating Co. v. Helvering (1935) 296 U. S. 200; Fox Film Corp. v. Muller (1935) 296 U. S. 207.

11. Blair v. Oesterlein Machine Co. (1927) 275 U. S. 220; Kottemann v. Commissioner of Internal Revenue (1936) 81 F. (2d) 621; National Contracting Co. v. Commissioner of Internal Revenue (1939) 105 F. (2d) 488.

action,[12] and the exception[13] governing the court of review in appeals from federal courts, has been extended by the cases to appeals from the Board of Tax Appeals. The rationale of this extension is that the Board has appellate jurisdiction over the rulings of the Commissioner of Internal Revenue and enjoys the same powers and limitations as federal courts in this respect.[14]

Thus, in the instant case, the Supreme Court, in reversing the Board of Tax Appeals and affirming the ruling of the Commissioner of Internal Revenue, applied the exception to the general rule. The record of the case on appeal contained sufficient facts to uphold the ruling when the correct section of the statute was applied. The fact that the Commissioner based his ruling on the wrong section of the statute and failed to invoke the correct section was of no importance.

R. T. S.

INSURANCE — NON-FORFEITURE STATUTE — DEDUCTION OF LOAN — [Missouri].—Insured borrowed money on two life insurance policies which contained a clause that any indebtedness to the company would be deducted *in any settlement of the policy* but did not provide for deduction of indebtedness in computation of paid-up or extended insurance. Insured left the state and the policies lapsed. A month after lapse, in response to inquiry by plaintiff beneficiary, insurer notified her that it was issuing extended term insurance which, after deducting the loan from the cash value, would carry the policies for five months. She failed to reply to the notice. After the death of insured five years later, plaintiff demanded payment of the policies, contending that deduction of the indebtedness from the cash value was improper and, accordingly, there was sufficient reserve to extend the insurance until the date of death. Insurer contended that its procedure followed the Missouri non-forfeiture statutes,[1] and that the period of extended term insurance had expired. *Held*, that under the peculiar terms of the policies insurer was not entitled to deduct the loan from the cash value in computing the amount to be used for purchase of extended insurance, and that plaintiff was entitled to recover the amount of extended insurance indicated in the policies, less the indebtedness.[2]

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12. Dobbins v. Commissioner of Internal Revenue (1929) 31 F. (2d) 935.

13. In Lewis-Hall Iron Works v. Blair (1928) 23 F. (2d) 972, 974, the court adopted the statement found in 4 C. J. (1916) 663, that "Where a judgment or order is correct, it will not be reversed on appeal because the trial court has based its decision on insufficient or erroneous reasons or grounds, or has stated no reasons therefor." Helvering v. Gowran (1937) 302 U. S. 238; Hurwitz v. Commissioner of Internal Revenue (1930) 45 F. (2d) 780; Dickey v. Burnet (1932) 56 F. (2d) 917; Commissioner of Internal Revenue v. Linderman (1936) 84 F. (2d) 727.

14. Kottemann v. Commissioner of Internal Revenue (1936) 81 F. (2d) 621.

1. R. S. Mo. (1929) secs. 5741-5744.

2. Fitzsimmons v. American Union Life Ins. Co. (Mo. App. 1939) 133 S. W. (2d) 680. In Griffin v. Pennsylvania Mut. Life Ins. Co. (1940) C. C. H. Ins. Law Serv. par. 501,277, the same court allowed judgment on extended insurance for less than face amount.