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Corporations—Informal Declaration of Dividends

tirely upon private beneficence. The arguments against holding mutual promises binding, as made by Professor Williston, are that the subscriptions are made at different times and directly to the charitable institution without reference to the other subscribers, and that earlier subscriptions would be open to the objection of past consideration.[6]

The state of Georgia has established the modern view by a statute[7] which provides that: "in the mutual subscription for a common object, the promise of the other is a good consideration." The courts, in interpreting this statute, have declared that a personal benefit to the promisor is not a necessary prerequisite to the validity of such a contract.[8] California supports the modern view, holding that even if at the time the subscription was made there was no consideration, yet if others were induced to subscribe because of the previous subscription, it becomes binding because of the reliance of the later subscribers.[9]

It is a common belief in the legal profession that the Missouri courts would follow the modern theory, if such a case arose, and would hold that the mutual promises of subscribers would constitute consideration sufficient to make the subscriptions binding.[10] In *Methodist Orphans' Home Association v. Sharp* there is constructive dictum to the effect that in a different factual situation "the consideration of the promise of each subscriber is the corresponding promise made by the other subscribers, and that as the party for whose benefit a promise is made may sue on it though the consideration is between the promisor and a third person, a subscription by many to raise money for a charitable purpose in which all feel an interest is binding on all."

O. J. G.

CORPORATIONS — INFORMAL DECLARATION OF DIVIDENDS — [Missouri].— Plaintiff was hired by a family corporation under a contract, according to the language of which he agreed to buy shares of stock by paying the purchase price out of dividends declared, with no right to the dividends in cash unless he was discharged before full payment of the price. Until the

6. 1 Williston, *Contracts* (1st ed. 1927) sec. 116.

7. Georgia Code (1933) sec. 20-304. This statute is limited to written promises only. Y. M. C. A. v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913).

8. Glass v. Grant, 46 Ga. App. 327, 167 S. E. 727 (1933); Miller v. Oglethorpe University, 24 Ga. App. 388, 100 S. E. 784 (1919); Y. M. C. A. v. Estill, 140 Ga. 291, 78 S. E. 1075 (1933); Wilson v. First Presbyterian Church, 56 Ga. 554 (1875); Jackson v. Forward Atlanta Comm. Inc., 39 Ga. App. 738, 148 S. E. 356 (1929); Lagrange Female College v. Carey, 168 Ga. 291, 147 S. E. 390 (1929).

9. First Trust & Saving Bank of Pasadena v. Coe College, 47 P. (2d) 481 (1935); University of Southern Cal. v. Bryson, 103 Cal. App. 39, 283 Pac. 949 (1929).

10. Charitable institutions have been raising money by this method in St. Louis for a number of years, without any case going to the Missouri appellate courts.

11. Methodist Orphans' Home Association v. Sharp, 6 Mo. App. 150 (1878).

said dividends equalled the full price, no stock was to be issued to him, nor was he to have any right to vote the shares. The business prospered, and the president of the corporation who had been intrusted with the management of the business by the only other shareholders and officers, credited plaintiff with a certain amount of the profits on the books of the corporation. The plaintiff was the only shareholder to whom the alleged dividend applied. The question arose, upon plaintiff's discharge before full payment of the shares, whether this credit amounted, in effect, to a declaration of a dividend. *Held:* that this crediting of the plaintiff on the books of the corporation with a portion of the profits amounted to a declaration of a dividend in his favor.[1]

The question arises whether the president had the power to declare a dividend, and if he has, whether this was a dividend.

A corporate dividend has been defined as that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors for distribution among the shareholders according to their respective interests.[2]

Ordinarily the power to declare dividends is vested in the board of directors alone, and not in the shareholders or corporate officers.[3] But it has been held that when all the shareholders, including all the directors of a corporation, meet and agree to a division of the profits, and such agreement is executed, the corporation is bound thereby,[4] and where the officers of a corporation distribute the profits among the shareholders without authorization by either the directors or shareholders, the corporation may be bound by the acquiescence of all the shareholders.[5] And, where the rights of creditors are not impaired, the distribution of the profits of a corporation among its shareholders without any action on the part of the board of directors, but by the consent or agreement of all the shareholders, is the equivalent of a dividend.[6]

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1. Brown v. Luce Mfg. Co., 96 S. W. (2d) 1098 (Mo., 1936).
2. 2 Thompson, *Corporations* (1927) sec. 2126.
3. Hamblock v. Lawn Mower Co., 148 Ill. App. 618 (1909); R. S. Mo. 1929, sec. 4942 provides that dividends may be declared by the directors every six months or oftener, as the directors may elect. Under this statute, shareholders cannot, even in the most formal manner and by a unanimous vote, declare a dividend and enforce its payment without the consent of the directors. Milligan v. Milligan, 207 Mo. App. 432, 233 S. W. 506 (1921).
4. Spencer v. Lowe, 198 Fed. 961 (C. C. A. 8, 1912); Quinn v. Quinn, 201 Mich. 664, 167 N. W. 898 (1918); Thiry v. Window Glass Co., 81 W. Va. 39, 93 S. E. 958, L. R. A. 1918B, 1048 (1917); Shaw v. Ansaldi, 165 N. Y. Supp. 872 (1917), where it was held that where the directors are the sole shareholders, their action in voting themselves salaries may amount to the declaration of a dividend. Griffin v. Brody, 167 N. Y. Supp. 725 (1917), (only two shareholders and both agreed to divide corporate property—held to amount to a dividend.)
5. Central of Ga. Ry. v. Central Trust Co. of N. Y., 135 Ga. 472, 69 S. E. 708, (1910); Knight v. Alamo, 190 Mich. 223, 157 N. W. 24, 6 A. L. R. 789 (1916).
6. In Chattanooga Bank v. Brewer, 9 F. (2d) 982 (C. C. A. 6, 1925), it was held to be a dividend where the corporate profits were distributed with-

In the instant case all the stock was owned by two brothers and their mother, and they comprised all the officers and directors of the corporation. The corporation was looked upon by them as their private business and they conformed to only such laws and regulations relative to the corporation as was necessary to keep the charter alive.[7] It would seem, therefore, that the court was entirely justified in holding that the president was authorized to declare a dividend, since all the shareholders, directors and officers had given him full power to run the business, and had acquiesced in his course of dealings. It would be a useless adherence to the strict rules of formality to hold that they could only have declared the dividend in a meeting of the board of directors as such.

The court goes on to say that it is a valid dividend even though not applicable to all the shareholders. The court recognizes the fact that ordinarily dividends must be distributed to the shareholders proportionately to their several holdings.[8] But it cannot be doubted that the shareholders may, by unanimous consent, adopt and become bound by a different mode of division.[9] This was the case in *Brown v. Luce*. The court points out that although the business was operated under a corporate form, it was regarded as the individual property of the three owners, and they were not interested in making any distribution of the profits as regards themselves, whereas the plaintiff was not so situated.

A sounder basis for the decision would have been that in the contract of employment, the corporation impliedly promised that it would, when the conditions justified it, set apart a sum of money measured by the amount of dividends declared out of the corporate profits.[10] The contract between plaintiff and defendant corporation was, fairly construed, a contract to create shares in the future. The distinction between a contract to create shares in the future and a present sale of stock is that a present purchaser has certain attributes in the way of rights, privileges, and liabilities, ordinarily including title, that do not attach to one contracting to become a

out any formal action by the two sole shareholders among themselves in proportion to their respective holdings. The same result was reached where two men who owned all the stock, and who constituted two out of the three directors, divided the proceeds of the sale of corporate property between them. In re Wilson's Estate, 85 Ore. 604, 167 Pac. 580 (1917).

7. Brown v. Luce, supra, note 1, at 1099.

8. Ibid. p. 1101.

9. In Coal Co. v. Rogers, 216 Ky. 440, 288 S. W. 342 (1926) held that a solvent corporation, with the consent of its shareholders, all of whom were directors, could declare and pay a dividend to retiring shareholders representing their interest in individual profits, no rights of creditors being involved, and the fact that the dividend is disguised as a payment of salaries for fictitious services was immaterial.

10. Cf. Bennet v. Millville Imp. Co., 67 N. J. L. 320, 51 Atl. 706 (1902), which held that the payment to an employee of a corporation, as compensation, of a percentage of the profits of the business, was only the wages of the employee, and not a division of the accumulated profits to which the shareholders were entitled. For a full discussion of Employee Stock Purchase Plans, see 8 N. C. L. Rev. 161.

shareholder in the future.[11] In the instant case no title was to pass until final payment, nor was the plaintiff to have any right to vote the shares, nor was any stock to be issued to him. Since plaintiff was not a shareholder, therefore, he should not be allowed to recover the money on the theory that it represented dividends, but he should be allowed to recover it on the implied promise of the corporation that it would allocate a sum of money to him which would be measured by the amount of profits. The amount with which plaintiff was credited on the books of the corporation would be good evidence as to what a dividend would have been had one been declared.[12]

G. M.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR SHARES ISSUED IN VIOLATION OF BLUE SKY LAWS—[Kansas].—The effect of participation in the affairs of a corporation on the rights and liabilities of a purchaser of stock sold in violation of the Blue Sky laws, though seldom considered by the courts, is important in view of the oft-quoted statement that such stock is void, or, in some jurisdictions, voidable at the purchaser's option.[1] In a recent case a trustee in bankruptcy of a corporation sued to recover from a stockholder the amount of an unpaid subscription. The Kansas Supreme Court stated, though the point was not raised by the pleadings, that as the defendant was an incorporator, director, treasurer and member of the executive committee, he could not avail himself of the defense of the company's noncompliance with the Kansas Securities Act.[2] The fact that the company was insolvent and that the defendant was so actively engaged in its affairs, of course, presented the case in its strongest light.

Except in the jurisdictions where sales in violation of the Blue Sky laws are valid,[3] a person who has merely contracted for the purchase of stock, without being active in the corporate business, may rely on the defense of illegality in a suit by a solvent corporation for the purchase price.[4]

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11. Stern v. Mayer, 166 Minn. 346, 207 N. W. 737 (1926).
12. Transport Co. v. Jones, 260 U. S. 747, 43 S. Ct. 248, 67 L. ed. 493 (C. C. A. 4, 1922); Hoffer Oil Corp. v. Carpenter, 34 F. (2d) 589 (C. C. A. 10, 1929).

1. Regan v. Albin et al., Golden Eagle Milling Co. v. Same, 26 P. (2d) 475, 476 (Cal., 1933) (void); Rice v. Allison, 229 Ill. App. 1 (1922) (voidable); 14 Fletcher, *Cyclopedia Private Corporations* (Rev. ed. 1932) sec. 6763. Even where the transaction is said to be *void*, the effect is merely to make it *voidable* on the part of the purchaser, since he may recover the consideration paid. Otten v. Riesener Chocolate Co., 82 Cal. App. 83, 254 Pac. 942 (1927).
2. Norton v. Lamb, 62 P. (2d) 1311, 1313 (Kan., 1936).
3. The view taken by these courts is that their state Blue Sky law is penal in its nature, in no way affecting the contract made in violation of the act. Warren People's Market Co. v. Corbett, 114 Ohio St. 126, 151 N. E. 51 (1926), criticized in Comment, 35 Yale L. J. 881 (1926); Watters & Martin v. Homes Corp., 136 Va. 114, 116 S. E. 366 (1923).
4. Witt v. Trustees' Loan & Savings Co., 33 Ga. App. 802, 127 S. E. 810 (1925); 14 Fletcher, *op. cit.*, sec. 6770.