# RECENT CASES

**Building and Loans—Liquidation—Priority Rights of Different Classes of Shareholders to Surplus Fund.**—Installment shareholders and paid-up or income shareholders of defendant building and loan association each claimed priority in a liquidation surplus remaining after debts had been paid and after all investments had been returned to the subscribing shareholders. Under the constitution of the association, income shares were to merit a fixed return (six per cent, later five per cent) on the amount of the investment ahead of all other shares, while installment shares were entitled to all further profits of the association. After five per cent was paid on income shares in 1932 no dividends were paid, and a sum apportioned to installment shareholders was removed from surplus and subsequently wiped out in real estate losses. *Held*, that neither class is preferred as to surplus on liquidation; each having been equally affected by the loss of asset value and absence of dividends since 1932, each has an equal claim upon the residual surplus. The fund was prorated among each class. *Schwarz v. Orion Building & Loan Ass'n*, 129 N.J.Eq. 297, 19 A. 2d 443 (Ch. 1941).

Installment shareholders contended the surplus was theirs. Since the funds used to cover losses in 1932 had been recaptured from moneys already appropriated to the payment of dividends on installment shares, they argued that such apportioned dividends should be paid ahead of dividends subsequently declared on income shares. Income shareholders relied on their express contract with the association, alleging that a fixed percentage must be paid on income shares before any return could be claimed by any other class of stockholders, and further contending that the installment shareholders had no vested interest in dividends apportioned and then withdrawn from surplus.

The pro rata distribution of surplus fund proceeds on notions at least of "rough-and-ready" equity and fairness. The claims of both classes cannot be right, yet each possesses merit; thus the fund shall go equally to each, and neither claim has been adjudged the prevailing one. It is submitted that this "decision" is in reality no decision in point of law at all.

Although a New Jersey statute[1] and decisions[2] generally support

1. P.L. 1925, ch. 65, p. 224; P.L. 1932, ch. 97, p. 167; R.S. 17:12-48,

the implication of the principal case that neither class of shareholders upon dissolution is to have any preference over any other class, it is important to note that in each of the cases the building and loan association was insolvent and a consideration of possible losses was present—quite a different situation from the present case where all debts have been paid and the controversy is as to surplus profits. Scrutiny of the instant case reveals no logical reason for treating both classes of shares alike but does suggest strong grounds for deciding uncompromisingly between them.

The income shareholders base their claim of priority in the fund on their failure to receive dividends to which they were promised preference. The statute in force at the time of the formation of this organization permitted its constitution to specify that holders of income stock would be entitled to a fixed annual profit as determined by the board of directors, in lieu of all other returns;[3] the certificate issued to such holders provided that "an annual profit of six per cent is allowed on these shares in lieu of all other profits of the association." It does not appear illogical to argue that payment of this percentage on the income shares before anything is credited to installment shares

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N.J.S.A. 17:12-48. "No such association shall issue preferred or other than common shares; and all members shall occupy the same relative status as to debts and losses of the association."

2. Fitzgerald v. State Mutual B. & L. Ass'n, 76 N.J.Eq. 137, 79 A. 454 (Ch. 1909); People v. N. Y. Building-Loan Company, 110 App. Div. 554 (N.Y. 1905); People v. Metropolitan S. & L. Ass'n, 103 App. Div. 153 (N.Y. 1905); Forwood v. Eubank, 20 Ky. 1842, 50 S.W. 255 (1899); Solomons v. American B. & L. Ass'n, 116 Fed. 676 (C. C. Ga. 1902).

Holders of income shares are on a par with the holders of installment shares and are not entitled to such special consideration on dissolution as is accorded general creditors. Rocker v. Cardinal B. & L. Ass'n, 13 N.J.Misc. 397, 179 A. 667 (S. Ct. 1935).

3. P.L. 1925, Section 74, p. 223: "Provided, that agreements may be entered into by and between any such association and any of its members holding paid-up shares, as the constitution shall provide, whereby said members waive participation in the general profits of such association in consideration of a fixed profit on the paid-up shares." The designation "paid-up shares" was altered to "income shares" by P.L. 1932, p. 167.

is not a prohibited preference within the meaning of the statute,[4] inasmuch as the express contract clearly contemplates such payment.

That the returns on income shares may be unequal to those of the installment shares does not seem to destroy the mutuality required by statute. Mutual credits need not be equal.[5] A Pennsylvania *dictum* suggests that income shareholders are to be paid off before the installment shareholders receive any share on winding up the association.[6]

While one case gives weight to the contention of the installment class, that dividends once apportioned to a class of stockholders create a vested right and must be distributed before other dividends are declared,[7] several cases squarely state that reserves are properly set up entirely out of funds appropriated to the payment of dividends on installment shares.[8] Thus the claim of a vested right in apportioned dividends is unfounded.

An analogy of building and loan law to corporation law is not illogical and is supported by cases,[9] the liquidation of a building and loan

4. *Supra*, note 1.

5. Parkview B. & L. Ass'n v. Herold, 203 F. 876 (D.C. N.J. 1913), *aff'd* 210 F. 577 (C.C.A. 3d 1914). But, where calculable in sharing profits, "mutuality requires substantial equality"; conflicting claims might support an equal prorating.

6. Folk v. State Capitol Ass'n, 214 Pa. 529, 63 A. 1013 (1906), *aff'd* 214 Pa. 543, 63 A. 1019, "If a society agrees to allow a paid up stockholder a periodical dividend reasonably within the profit likely . . . to accrue, which dividend is understood to be payable only out of the profits earned and in lieu of any share therein upon winding up, it is not clear how the principle of mutuality of profit and loss, as among the whole number of stockholders, is at all violated."

7. National State Bank v. Victory B. & L. Ass'n, 120 N.J.Eq. 277, 184 A. 738 (Ch. 1936), "There would seem to be at least very grave doubt that if the association credits dividends unconditionally to the accounts of the shareholders it would have the right subsequently to deduct them."

8. 13th Ward B. & L. v. Weissberg, 115 N.J.Eq. 487, 170 A. 662, 98 A.L.R. 134 (E. & A. 1933); Newark 21 B. & L. Ass'n v. Zukerberg, 115 N.J.Eq. 579, 171 A. 804 (Ch. 1934); Steinlein v. Pioneer B. & L., 18 N.J.Misc. 683, 15 A. 2d 232 (Ch. 1940). The Steinlein case so held only on the strength of the preceding two decisions and might well have gone otherwise had not the complainant been in laches.

association being mentioned as similar to the dissolution of a corporation.[10] Income shares have from the beginning been treated as stock with all the rights of ordinary stock;[11] they are simply paid-up capital stock with certain distinctions.[12] But the pertinent principles of corporation law are not so uniform as to suggest a line of reasoning which clearly tends either to support or to refute the basis of the instant building and loan holding, and corporation legal doctrine does not form a valid ground for consideration and criticism of the principal case. On the one hand, it is held that a dividend once properly declared may be demanded by the stockholder and gives rise to a cause of action[13] and, on the other hand, that preferred stock will be given priority over common in the distribution of profits on dissolution[14] (income shares are not regarded by the courts as preferred stock, but they do have the same incident of dividend priority). These two cases by analogy respectively support, if anything, the installment shareholders' and the income shareholders' claims, but they do not present a united front which could be applied to the building and loan situation.

A hypothetical case aids in revealing the inconsistency of the decision under present consideration. Suppose the fund to be distributed were sufficiently great to give the income shareholders more than their contracted six per cent when prorated; prorating would be unjust then, since in no way can the income shares justify a return greater than six per cent, the installment shareholders being entitled to all over that

9. National Bank v. Victory B. & L., *supra,* note 7; Newark 21 B. & L. v. Zukerberg, *supra,* note 8.

10. *In re* Lawyers' and Home-Makers' B. & L. Ass'n, 128 N.J.Eq. 22, 15 A. 2d 137 (Ch. 1940).

11. Latimer v. Equitable Loan & Inv. Co., 81 F. 776 (C.C. Mo. 1897).

12. Towle v. American B. & L. Ass'n, 75 F. 938 (C.C. Ill. 1896).

13. King v. Paterson R.R. Co., 29 N.J.L. 82 (S. Ct. 1860), *aff'd* 29 N.J.L. 504 (E. & A. 1861); Jackson's Adm'r v. Newark Plankroad Co., 31 N.J.L. 277 (S. Ct. 1865); Beattie v. Gedney, 99 N.J.Eq. 207, 132 A. 652 (Ch. 1926).

14. MacGregor v. Home Ins. Co. of Newark, 33 N.J.Eq. 181 (Ch. 1880). Hellman v. Pa. Electric Vehicle Co., 73 N.J.Eq. 269, 67 A. 834 (Ch. 1907), stated that no preferment as to surplus existed without stipulation, but found the Corporation Act (P.L. 1896, p. 304, Section 86) a sufficient direction.

figure. Thus the law of distribution would have to vary as the surplus exceeded a certain amount determined for each case—surely a remarkable law indeed.

In view of the contract clearly providing that income shares shall receive a certain percentage before any other class shall deserve a return, and of cases holding that the installment shareholders have no vested right in profits apportioned them which may be recaptured by the association at any time, it is difficult to perceive any logical basis for the prorating of the surplus in the principal case. There is no applicable principle of corporation law which could by analogy support the proportionate distribution of the fund. This form of distribution, patently contrary to the express contract of the parties when the surplus fund exceeds a certain figure (determined for each case by the amount of unpaid dividends on income shares), is applicable only to a fund of limited size; and there is no basis in law for differentiating the treatment in the principal case of a smaller fund from the treatment necessarily accorded a larger fund in order to avoid awarding income shareholders more than their proper six per cent. The decision in the principal case, it is submitted, is of questionable benefit to the field of building and loan law.

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**Crimes — Homicide — Charge to Jury Concerning Powers of Court of Pardons.**—The defendant, Willie Leaks, was convicted of murder in the first degree and he brings error. The error assigned relates to that part of the trial judge's charge to the jury in which he stated the power vested in the Court of Pardons in the following words:—

> "I know that there is in your minds some question. You have read in the papers undoubtedly as to whether life imprisonment is life imprisonment and whether there is anything that can come after this court, so far as either of where the death penalty is imposed or the sentence of life imprisonment is imposed, and I feel constrained to read to you a part of the charge in a recent