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Recent Decisions

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CORPORATIONS—RIGHTS OF PREFERRED STOCKHOLDERS—SURPLUS PROFITS.

The plaintiff, as holder of preferred stock, brought an action to restrain the defendant, a railroad corporation, from distributing among its common stockholders an extra dividend out of a surplus. The surplus consisted of profits accruing from the purchase and compulsory sale of stocks in other railroads: HELD, that the dividend so declared was properly divisible among the common stockholders alone. (*Equitable Life Assurance Society v. Union Pacific Railroad*, 212 N. Y. 360; 106 N. E. 92.)

A share of stock is a right which a shareholder has by reason of his ownership to participate, according to the amount of his stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts. (*Plympton v. Bigelow*, 93 N. Y. 592.) This right is inherent in all stock, preferred and common. Preferred stock, moreover, entitles the holders to priority in dividends out of the net profits or in preference to the holders of the common stock. (Purdy's Beach on Corporations, sec. 467a). The privileges, rights, and powers of preferred stockholders are fixed to a great extent by the terms governing the issuance of the stock and by the terms of the certificate. It is a matter of contract. (Morawetz on Corporations, sec. 456; Cook, sec. 269; *Scott v. Baltimore Railroad*, 93 Md. 475). In the absence of an express contract, it seems to

be an open question whether preferred stockholders have the right to participate in surplus profits which remain after the preferred dividend has been paid on the preferred stock, and an equal dividend on the common. Logically, it would appear that the preferred stockholders have such right. It is well settled that upon the dissolution of a corporation, preferred and common stockholders share pro rata. And a share of preferred stock has all the rights of a share of common stock, except as expressly restricted. (Morawetz, sec. 461; Cook, sec. 269). And preferred shares differ from other shares only in being entitled as against them to payment of dividends in priority to them (Purdy's Beach, sec. 467a.) Hence mere priority of right in payment of dividends should not be allowed to derogate from the common law right inherent in all stock to participate in all the profits. Pennsylvania upholds this doctrine (*Fidelity Trust Co. v. Lehigh Valley,* 215 Pa. St. 610; *Steinbergh v. Brock,* 225 Pa. St. 279) while the English Court (*Will v. United Co.,* 107 L. T. Ref. 360, but see *re Espruela Co.* 2 ch. 187), and Maryland (*Scott v. Baltimore R. R., supra*) adopt a contrary view. Where, however, as in the principal case, it is expressly contracted that the preferred stockholders, after payment of the preferred dividend, are to be entitled to no other or further share of the profits, the question is a clear one. Hence, the decision is sound.

CRIME—PRACTICE OF MEDICINE BY CHRISTIAN SCIENTIST WITHOUT BEING LICENSED AND REGISTERED—COMMERCIALIZED USE OF PRAYER—PRACTICE OF RELIGIOUS TENETS OF CHURCH. Defendant was a Christian Scientist, who maintained an office and by the use of prayer only treated all persons for all kinds of diseases and received compensation therefore. HELD, that defendant practiced medicine as defined by the Public Health Law, and may be convicted of the crime of practicing medicine without a license and without being registered, in violation of §174 of the Statute; that such commercialized use of prayer does not constitute the "practice of the religious tenets of any church" within the meaning of the statute. (*People v. Cole,* 163 App. Div. 292.)

The practice of medicine is not confined to administering drugs or the use of surgical instruments. (*People v. Allcut,* 117 App. Div. 546; affd. 189 N. Y. 517; *People v. Mulford,* 202 id. 624; Ch.

344 Laws of 1907, §1, sub. 7; Cons. Laws, Ch. 45.) The same rule prevails in Kansas and Colorado. (*Stevens v. Peters*, 87 Kansas 265; Kansas General Statute, 1909, §8090; *Smith v. People*, 51 Colo. 270; Colorado Laws, 1905, Ch. 135, §11; Colo. Rev. Statutes, 1908, §6099; Colorado Statutes Anno. §6069.) The definition of Public Health Law of the practice of medicine is broad enough to cover acts of defendant, because "he holds himself out as being able to . . . treat . . . any human disease," and he did "undertake . . . to treat . . . any human disease." The language of the statute is "by any means or method." (Ch. 344, Laws of 1907, §1, sub. 7.) It is provided that no person shall practice medicine unless registered and licensed. (§2.) Under the police power of the States, they may regulate certain trades and callings, particularly those which closely concern the public health. (*Watson v. Maryland*, 218 U. S. 176; *Dent v. West Virginia*, 129 U. S. 114.) Defendant cannot avail himself of §173 of the statute: "This article shall not be construed to affect . . . the practice of religious tenets of any Church." The exercise of the art of healing for compensation is not a practice of the religious tenets of any church. (*People v. Spinella*, 150 App. Div. 923; affd. 206 N. Y. 709; *State v. Buswell*, 40 Neb. 158; *State v. Marble*, 72 Ohio St. 21.)

INSURABLE INTEREST—HUSBAND AND WIFE—EFFECT OF DIVORCE. A husband took out a policy of life insurance for benefit of his wife. The wife obtained the policy and paid the premiums. Subsequent to the issuance of the policy the wife obtained a divorce. Suit was brought against the company for the proceeds. HELD, the insurable interest of the wife is to be tested as of the date of the original contract. The divorce did not invalidate the pre-existing valid contract of insurance. (*Marquet v. Aetna Life Ins. Co.*, 159 S. W. (Tenn.) 733.)

Insurable interest in life is tested as of the time the contract was made. (*Dalby v. India and London Life Assur. Co.*, 15 C. B. 365.) By the great weight of authority a payer of a life insurance policy need not have an insurable interest. (*Sabin v. Phinney*, 134 N. Y. 423; *Breese v. Metropolitan Life Ins. Co.*, 37 N. Y. A. D. 152; *contra*, *Gilbert v. Moose*, 104 Pa. 74.) An assignee in good faith is not required to have an insurable interest. (*Steinback v. Diepenbrock*, 158 N. Y. 24.) The preponderance of authority is

to the effect that relationship creates an insurable interest. (But see *Singleton v. St. Louis Mutual Ins. Co.*, 66 Mo. 63.) However it is everywhere held, and correctly, that the relationship of husband and wife gives to each an insurable interest in the life of the other. (*Baker vs. Union Mutual Life Ins. Co.*, 43 N. Y. 283; *Equitable Life Assur. Society v. Paterson*, 41 Ga. 338.) A parent has an insurable interest in the life of a minor child (*Grattan v Nat. Life Ins. Co.*, 15 Hun. 74), but a complaint setting forth the relationship of parent and child only has been held demurrerable. (*Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, *sed quaere.*) Mere relationship when coupled with dependency or a moral obligation would seem to be a sufficient interest. (*Cronin v. Vermont Life Ins. Co.*, 20 R. I. 570.) The principal case is sound.

REAL PROPERTY—EASEMENTS—MAPS AND PLANS—NUISANCES. Defendant owned a large tract of land and issued circulars, etc., stating that complete systems of sewer and water pipes had been constructed for which there was to be no assessment, and that purchasers would have the right to connect their property with such systems. The defendant conveyed part of the tract to plaintiff's grantor and in the deed there was a covenant against nuisances. The plaintiff obtained connections with these systems by pipes running partly over defendant's land. Defendant consented to this on a representation of plaintiff's husband, who acted as her agent, that the building so connected would not be used as a boarding house. She subsequently used the premises in question as boarding house. HELD, an injunction will lie to prevent defendant from cutting off the connection with the sewer and water pipes. (*Biggs v. Sea Gate Association*, 211 N. Y. 482, 105 N. E. 664.)

An owner of a tract of land may create reciprocal easements upon a division of the tract to several grantees. (*Curtiss v. Ayrault*, 47 N. Y. 73.) Equity has jurisdiction to compel the observance of covenants made for the mutual benefit and protection of all the owners. (*Barrow v. Richards*, 8 page 351.) Though complaint be a little poetical, such a power of equity is not a poetic fiction, vide Barrow v. Richards, supra at P. 360. A purchaser of land subject to a uniform plan has the same right to mentioned easements as if they were already in existence. This is so where a lot is sold bounded by a street. (*Lord v. Atkins*, 138 N. Y. 184 at P. 191.)

Such a right passes to a grantee. (*Lampmann v. Milks,* 21 N. Y. 505.) The findings settle the fact that the boarding house was not a nuisance for it was not offensive to the general public thereabouts. (*Roland v. Miller,* 139 N. Y. 93 at P. 102.) The plaintiff having the right to connections with the sewer and water systems is not bound by the promise of her husband not to erect a boarding house, for there is no consideration for such promise.

REAL PROPERTY—EASEMENT—WAY BY PRESCRIPTION ACQUIRED AGAINST RAILROAD'S RIGHT OF WAY TAKEN IN CONDEMNATION PROCEEDINGS. In 1864, Railroad acquired right of way by condemnation proceedings through 3-acre lot, leaving one acre, plaintiff's property, without access to highway save by trespass on property of third persons, or over Railroad's right of way and thence across the remainder of the 3-acre parcel to one street, or over Conine lot, taken by Railroad in same proceedings, lying between one acre lot and another street. Railroad erected fence between Conine lot and one-acre lot, with ten-foot gate therein. Plaintiff used way through gate and along one side of Conine lot to street. HELD, that as use was open, etc., under claim of right, for over twenty years, plaintiff acquired way by prescription and was entitled to injunction restraining Railroad from interfering therewith; that the lost grant presumed need not be the deed of owner of fee, but may be of one holding only an easement and good only during existence of easement. (*Hood vs. N. Y. C. & H. R. R. R. Co.,* 163 App. Div. 833.)

The case might have been decided on the ground of a substituted way. Whether or not plaintiff had a way by necessity over the Railroad's right of way to the remainder of the 3-acre plot, he had, under the Railroad Law, a right to a private way thereto. The Railroad by putting a gate in the fence it built, and leaving the Conine lot unfenced where it fronted Mansion Street, fairly invited the plaintiff to use a way over said lot. To quote from the opinion of Lyon, J.: "This right of way was evidently given by the Railroad Co. in consideration of the relinquishment by the owner of the one-acre parcel, of his claim of a right of way from that parcel to Whitbeck Street." This invitation having been acted upon without protest from the Railroad Co. for a great many

years, all the elements of a substituted way would seem to be present. The Court, however, abandons this ground of decision, saying that, whatever the fact as to the giving of a substituted way, it could not now be proved, as the owner of the 3-acre plot in 1864 has been dead some thirty years. As between plaintiff and Railroad, the result appears sound. The rule contended for by the Railroad, and adopted in some few states, holding Railroad's right of way similar to a highway in that adverse possession cannot be gained against it, (*Southern Pacific Co. vs. Hyatt,* 132 Cal. 240; *M. K. & T. Railway vs. Watson,* 74 Kan. 494), is not good on principle. The doctrine of the principal case that an easement can be gained against an easement, while apparently novel in New York, is reasonable. The interesting point, however, under the facts here concerns the relative rights of plaintiff and the owner of the fee of the Conine lot. An easement of right of way gives the Railroad exclusive possession and control of the land, and the owner of the fee has the mere naked right of reversion upon abandonment of same for railroad purposes. *Roby vs. N. Y. C. & H. R. R. R. Co.,* 142 N. Y. 176.) Upon the ripening of plaintiff's easement at the end of the twentieth year, since plaintiff's way and Railroad's way were inconsistent, all rights of the Railroad to that part of the Conine lot ceased, and there was an immediate reversion to the owner of the fee. (*Strong vs. City of Brooklyn,* 68 N. Y. 1.) Could the owner of the fee come in and close up plaintiff's way; or could he be deemed to have had notice, so that the time subsequent to the twentieth year ran against him?

WILLS—POST-TESTAMENTARY CHILD—FATHER'S RIGHT TO CURTSEY—EFFECT OF STATUTE. A child born subsequent to the making of a will, if unprovided for in the will, is entitled to a share in the deceased parent's real and personal estate as though no will had been made. Such child takes by inheritance as heir-at-law and not under the will. (*Smith vs. Robertson,* 89 N. Y. 555; *Udell vs. Stearns,* 125 A. D. 196; *Herriot vs. Prime,* 155 N. Y. 5.) Hence the father of such post-testamentary child is entitled to curtsey to the extent of such child's share in its deceased mother's realty. (*Yung v. Blake,* 163 A. D. 501.)

Laws of 1849, Ch. 375 enables married women to hold to their separate use and to convey their real and personal property during

life in the same way and to the same effect as though they were unmarried. (Dom. Rel. Law §51.) This act is held valid, but will not defeat existing rights under a marriage prior to the act of 1849. (*Clark vs. Clark*, 24 Barb. 581.) The object of the act was to remove the common-law disability of the married woman; to protect her property as against the husband by permitting her to convey it by deed or devise. (Gerard "Titles to Real Estate," 5th Edition, pp. 173-4; *Blood vs. Humphrey*, 17 Bard. 662; *Knapp vs. Smith*, 27 N. Y. 277; *Darby vs. Callaghan*, 16 N. Y. 71.) Since it does away with a common-law right it must be construed strictly. The only purpose of the act, then, is to enable married women to dispose of their property during life without the consent of the husband, even though such conveyance defeats the husband's right of curtsey. She may also dispose of it by will to become operative upon her death.

The right of curtsey itself is not thereby done away with. Upon the failure of the married woman to exercise the "jus disponendi" during life her property becomes subject to all common-law encumbrances. (*Beamish vs. Hoyt*, 2 Robertson 307; *Ranson vs. Nichols*, 22 N. Y. 110; *Jaycox vs. Collins*, 26 How. Pr. 496.) Inheritance is one of the qualifications thus attaching. And the estate of inheritance is impressed with the husband's life interest as tenant by curtsey. Although a conveyance durng life is effectual to defeat the husband's curtsey, a testamentary devise is not, if issue be born, capable of inheriting, subsequent to the making of the will. The will then becomes inoperative as to that portion of the estate which would have descended to that child as an heir-at-law, had the parent died intestate. (*Matter of Murphy*, 144 N. Y. 557; *Luce vs. Burchard*, 78 Hun. 537.) The husband takes a life estate in so much of the property as descends to the child by inheritance. (Dec. Est. L. Art., II §26.) This constructive intestacy as to such child is a rule of the civil law based on the presumed oversight of the parent. Hence if it is plain from the terms of the will that the testator had in mind the possibility of after-born children the presumption of oversight fails and the children cannot avail themselves of the statutory provision. (*Wormser vs. Croce*, 120 A. D. 287.) Where the husband willed all property to his wife to insure a just distribution to his "family" at his death; that was held to include after-born children and grantee from widow takes marketable title.