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INTERNATIONAL POWER COMPANY, LIMITED (RESPONDENT AND MISE-EN-CAUSE) ..... } APPELLANT;

AND

McMASTER UNIVERSITY AND OTHERS (RESPONDENTS) .....

AND

MONTREAL TRUST COMPANY ÈS QUAL. (PETITIONER) ..... } RESPONDENTS.

Company—Winding-up—Assets realized by liquidator—Preference and common stocks re-imbursed in full at par—Distribution of surplus assets—Rights of preferred shareholders—Interpretation of terms of preference—Extent of priority—Equal division of surplus assets among preferred and common shareholders—Preferred shareholders receiving per share dividend greater than those received by common shareholders—Whether "equality" to be made between them before division—Seven per cent cumulative preference as to dividends—Right to higher dividend than specified by by-law—Claim for equalization as between preferred and common shareholders of certain dividends paid to them—Companies Act, R.S.C. 1906, c. 79, ss. 47, 49.

The Porto Rico Power Company, incorporated in 1906 under the Dominion *Companies Act* with a capital of $3,000,000 divided into 30,000 common shares, increased its capital in 1909 and 1911 by creating each year preference stock for an amount of $500,000. The by-laws, dealing with the rights of the preference shareholders, provided that such shares shall be "entitled out of * * * net earnings * * * to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid." The Company, in January 1944, then in voluntary liquidation under the *Winding-up Act*, had in its treasury more than $6,000,000. The liquidator, after having made a preliminary distribution by which the preference and common shareholders were reimbursed in full at par, still had surplus money amounting to $500,000. Up to the winding-up of the Company, the preference shareholders had received the stipulated dividends of 7 per cent., aggregating per share $239.75 and $200.11 for the first and second issues; while the holders of common stock had received in dividends a smaller aggregate of $188.50. The latter had received, until 1931, dividends lower than 7 per cent. per year; but, from 1931 to 1942, the annual dividend had been 8 per cent. and, in 1943, 49½ per cent. The liquidator, by way of petition, then sought the direction of the Bankruptcy Court as to the distribution of the surplus amount of $500,000, submitting that the holders of common shares were alone entitled to it. The preferred shareholders, represented by the respon-

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

dents, claimed, first, that there should be an equalization as between them and the common shareholders of certain dividends paid before liquidation, and, so, that they should be paid the amounts in excess of 7 per cent. received by the common shareholders from 1931 until liquidation, and, secondly, that they should then share equally with the common shareholders in the balance of $500,000. These claims were disallowed by the Bankruptcy Court, which made an order in accordance with the conclusions of the petition. On appeal, the dismissal of the first claim advanced by the preferred shareholders was affirmed, but it was held that the preferred and common shareholders were entitled to share equally in the distribution of the Company's surplus assets. The common shareholders appealed from that judgment before this Court and the preferred shareholders cross-appealed.

Held, affirming the judgment appealed from (26 C.B.R., 170), The Chief Justice dissenting in part, that, under the by-laws of the Company, the preference shareholders, subject to their rights with regard to dividends and priority to be repaid at par, have otherwise all the rights of the common shareholders; and, once the preference and the common stocks have been reimbursed in full at par, the preference shareholders are further entitled to share *pari passu* in the distribution of all surplus assets of the Company with the common shareholders.

Per The Chief Justice (dissenting in part):—But for the very reason that the common and preference shareholders should be put on the same footing for the purpose of such division, they should have received previously "equal treatment," outside of priorities to which the latter are entitled, the fundamental principle of "equality" being basically the essence of the Canadian *Companies Act.* In the present case, the preference shareholders did in fact receive per share dividends greater in the aggregate than those received by the holders of common shares; and, if the judgment appealed from is allowed to stand, there would be "inequality" between all shareholders. Therefore, before any division of surplus assets is made, the common shareholders should first be paid the sum representing the difference between the aggregate dividends paid to them and the aggregate dividends paid to the preferred shareholders; and, thereafter, the balance of the surplus assets should then be distributed equally between all shareholders.

Held, also, that the claim of the preference shareholders that they should be paid on a basis of equality of dividends with the common shareholders must be dismissed. The preference shareholders are not entitled to any greater amount than 7 per cent. on their shares *per annum,* nothwithstanding dividends at a higher rate having been paid on common shares in any year.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing in part the judgment of the Superior Court, Boyer J., sitting in Bankruptcy (2).

(1) (1945) 26 C.B.R. 170; [1945] 2 D.L.R. 93, 531.

(2) (1944) 26 C.B.R. 6; [1945] 1 D.L.R. 32.

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The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Geo. A. Campbell K.C. for the appellant.

Aimé Geoffrion K.C. and *A. S. Bruneau K.C.* for the respondents McMaster University and others.

J. Senécal K.C. for the Liquidator respondent.

THE CHIEF JUSTICE (dissenting in part)—The cross-appeal should be dismissed, for the reasons given by my brother Kerwin with whom I am fully in accord in this respect.

On the main appeal however, I have to make the following observations: The by-laws providing for the issue of the preference shares as set out in the supplementary letters patent confirming them are as follows:

> The said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The Porto Rico Power Co. Ltd., now in liquidation under the *Winding-up Act* and whose liquidator is the Montreal Trust Company, was incorporated under the Dominion *Companies' Act* of 1906; and by force of section 49 of that Act,

> holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

That is the law of Canada and the law which must be applied in the premises, notwithstanding any ruling handed down by courts having to apply different laws or statutes.

For that reason, may I say with respect, most of the authorities, to which the Court has been referred, can have no application to the decision which we have to render.

That decision depends on the language of the by-laws under authority of which the preference shares were issued and the issue was set by Viscount Haldane in *Will* v. *United Lanket Plantations Co.* (1).

> The point in dispute is one of construction, and construction must always depend on the terms of the particular instrument; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority has been cited in the course of the argument, and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us.

To which the Earl Loreburn in the same case added at page 18:

> My lords, I do not think that any light can be thrown upon the construction of this particular resolution by considering language that was used, whether by way of decision or of conjecture, in the construction of perfectly different contracts by other learned judges. There is nothing more unfortunate than the tendency which appears to influence some minds that you can attain to certainty in the interpretation of one set of sentences by considering the analogy of other different sentences.

Now, if we look at section 49 of the Dominion *Companies' Act* of 1909, we find that holders of preference stock are shareholders and

> shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part.

It follows that, under our law, holders of preference stock are primarily shareholders on the same footing as ordinary shareholders. But section 49 adds the proviso that

> in respect of dividends and in any other respect declared by by-law as authorized by this Part, they (the preference shareholders) shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

The preference shareholders and, in this particular case, the respondents have therefore all the rights of the ordinary shareholders (in this case the appellant); but in addition, they have the preferences and rights given by the by-laws under which the preferred shares were issued.

Moreover, if we will now refer to the by-laws which govern the case, we find that the preference stock is entitled

> (1) out of any and all surplus earnings whenever ascertained to cumulative dividends at the rate of 7 per cent. per annum for each and every year in preference and priority to any payment of dividends on common

(1) [1914] A.C. 11, at 15.

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stock; (2) and further entitled to priority in any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The claim by the preference shareholders for additional dividends provided for in the first part of the by-law formed the subject of the cross-appeal and has now been finally disposed of.

The main appeal concerns the meaning of the second part of the by-law dealing with the division of the assets of the company, and on that point, I have this to say:

Like the Court of King's Bench, I think the second part of the by-law, having to do with the division of the assets of the Company, deals only with the priority to which the preference shareholders are entitled. In my view, it means that, "to the extent of its repayment in full at par" i.e. to the extent of the repayment in full at par of the preference stock, the holders of that stock are entitled to a priority as against the common shareholders. They will be reimbursed of the amount of their stock "in full at par" before the common shareholders are reimbursed of the amount of their stock.

But, should there be a surplus remaining after both the preference shareholders and the common shareholders have been so reimbursed, then, as the by-law is silent on the subject, the first part of section 49 of the *Companies' Act* comes into play and for the purpose of the division of those surplus assets, there are no longer preference shareholders and common shareholders, there are left only holders of shares in all respects possessing "the rights and subject to the liabilities of shareholders within the meaning of" the *Companies' Act*.

So far therefore, I agree with the proposition that after the preference stock has been reimbursed in full at par and the common stock has also been reimbursed, with regard to the surplus assets then remaining, both the preference and the common stock holders must be put on the same footing for the purpose of division; but, for that very reason, my view is that, in the present case, the judgment of the Court of King's Bench (appeal side) must be modified.

It is common ground in this case that the holders of preference stock, up to the winding-up of the Company,

have received dividends aggregating $239.75 or $200.11 per share while the holders of common stock have received in dividends only an aggregate of $188.50 per share.

Although the Court of King's Bench fully acknowledged that fact, which is undisputed, and although the judges of the Court insisted upon the fundamental principle, under our law, of the equality of shareholders, yet they took no account of the fact and they delivered a judgment which, if it should be allowed to stand, would do away with the principle of "equal treatment" between the preference and common shareholders, outside of the priorities to which the preference shareholders are entitled. For if all the shareholders are now to be allowed to divide share and share alike the surplus assets now in the hands of the liquidator, it will follow that, on the aggregate and outside of their priorities, the preference shareholders will have received or will receive in the end, a larger amount than the common shareholders, although there are in the hands of the liquidator ample funds both to cover the amounts to which the preference shareholders are entitled in priority and to meet the fundamental requirement of equality between all shareholders outside of the priority.

As stated in the judgment of Boyer J. "the principle of equality invoked by the contestants should work both ways".

From the incorporation of the company in liquidation up to the date of the winding-up order herein, the preference shareholders, as remarked by MacKinnon J. in the Court of King's Bench, did in fact receive per share dividends greater in the aggregate than those received by the holders of common shares.

As matters now stand, the preference shareholders have received in full the 7 per cent. per annum cumulative dividends to which they were entitled under the by-laws and the supplementary letters patent. They have also been reimbursed in full at par, of the whole of the payments they made in purchase of the preference stock. On the other hand, under the scheme proposed by the judgment appealed from, the common shareholders would receive payment in full at par of the stock paid for by them, but in respect of dividends, they stand in the proportion of

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$239.75 per share, paid in the aggregate to the holders of preference stock of the first issue, to approximately $200.11 per share to those of the second issue and to only $188.50 per share to the holders of common shares.

There would follow this inequality: that the common shareholders have therefore received as dividends per share less than the preference shareholders.

I cannot see how to reconcile such a result with the principle of equality which is basically the essence of the Canadian *Companies' Act,* which is the principle on which the Court of King's Bench pretends to proceed and which indeed is the very foundation of the claims made by the preference shareholders in the present case. In the absence of any provisions to the contrary, the rights of the shareholders are equal and they should participate in the distribution of profits and assets in proportion to their interest in the company of which they are shareholders.

In the Court of King's Bench, Stuart McDougall J. very well said:

> Under our system it seems to me that we should start with that equality as a basis and then endeavour to determine if it has been derogated from by the by-laws or charter.

Astbury J. in *In re Fraser and Chalmers Limited* (1) said at page 120:

> All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares.

It is what, with respect, the judgment appealed from has disregarded. If the respondents were to be paid what the Court of King's Bench gave them, they would, in the aggregate, receive more than the appellant and there would be no equality as between the shareholders.

According to the ruling case of *Steel Company of Canada* v. *Ramsay* (2), dividends do not mean yearly dividends but dividends in the aggregate, and the holders of common shares should be entitled to be paid dividends equal in amount to those paid to the holders of preferred shares, before the latter become entitled to participate further.

Of course, it is objected in the present case that we are no longer dealing with profits as such, but rather with the division of the remaining assets. But I think the objec-

(1) [1919] 2 Ch. 114. (2) [1931] A.C. 270.

tion is answered by Lindley L.J., in *In Re Bridgewater Navigation Co.* (1). At page 329, Lord Justice Lindley says:

> The problem is no longer what is to be done in the way of dividing the profits of a going concern; the problem now is how much of the whole assets of the company belongs to one class of shareholders and how much to another; and if it appears that some of those assets consist of the undrawn profits of one of those classes, such undrawn profits ought to be distributed among the members of that class unless some sufficient reason to the contrary can be shown, and in this case there is no such reason.

Applying the words of Lindley L.J. to the case now before us, I must repeat: "In this case there is no such reason", i.e. there is no reason why before any division of the surplus assets, in fact, before the liquidator could consider that there are surplus assets, he should not first equalize the payments made to the preferred shareholders and those made to the common shareholders so that each class of shareholders shall receive equal treatment. In the premises, this cannot be done unless and until the common shareholders receive the amount of dividend per share, which so far the preferred shareholders have received over and above that paid to the common shareholders.

That is the only result consistent with the fundamental equality of rights in the matter of dividends as between the preference and common shareholders, taking into consideration the amounts paid in the aggregate on each class of shares down to the liquidation. This, to my mind, is the proper application of the decision of the Privy Council in the *Ramsay* case (2) and also appears to be the conclusion reached by MacKinnon J. in the present case.

The *Ramsay* case (2) was a Canadian case and the decision of the Judicial Committee in that respect constitutes an authoritative statement of the law applicable in this case.

If the rule of parity between shareholders must prevail and if all shareholders are entitled to equal treatment, unless and to the extent that their rights are modified by the contract under which they hold their shares, the rule would not be followed if the preferred shareholders, having received substantially more in dividends than the common shareholders and still holding that advantage, should

(1) L.R. [1891] 2 Ch. 317. (2) [1931] A. C. 270.

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be allowed to divide equally with the common shareholders the surplus assets now in the hands of the liquidator.

My conclusion is that, here, the proper advice to be given the liquidator is, that the common shareholders and that is to say, among others, the appellant, should first be paid the sum representing the difference between the aggregate dividends paid to the preferred shareholders and the aggregate dividends paid to the common shareholders, up to the date of the liquidation, and that the judgment of the Court of King's Bench (appeal side) should be modified accordingly.

Outside such modifications, the judgment of the Court of King's Bench in the main appeal should not be further disturbed. As agreed, the costs of all parties both in the main appeal and in the cross-appeal should be against the estate.

KERWIN J.—Porto Rico Power Company, Limited, is being wound-up under the provisions of the Dominion *Winding-up Act,* and the liquidator sought the direction of the Bankruptcy Court in Quebec by two petitions, with the second of which only are we concerned. The liquidator therein requested the Court to direct it to distribute a sum of $500,000, and any additional assets which might thereafter become available in its hands, among the holders of the common shares of the Company. The holders of those shares and of the preferred shares had been repaid in full the amount paid for them. Upon the hearing of the petition, the preferred shareholders, represented by the present respondents, claimed first that there should be what they termed an equalization as between the preferred and common shareholders of certain dividends which had been paid by the Company before liquidation, and second, that they should share equally with the common shareholders in the balance of the $500,000 and in the additional assets. These claims were disallowed and an order made in accordance with the conclusions of the petition. On appeal the Court of King's Bench agreed with the dismissal of the first claim advanced by the preferred shareholders but decided that the preferred and common shareholders were

entitled to share equally in the distribution of the Company's surplus assets. It is from that judgment that International Power Company, Limited, representing the common shareholders, appeals and that McMaster University and others, representing the preferred shareholders, cross-appeal.

Porto Rico Power Company, Limited, was incorporated by letters patent dated August 29th, 1906, under the provisions of the Dominion *Companies Act,* 1902, chapter 15. After some years of operation, the directors of the Company decided to increase its capital by creating and issuing $500,000 of preference stock. In 1909 this was done by by-law no. 10 and confirmed by supplementary letters patent in accordance with the provisions of the *Companies Act,* R.S.C. 1906, chapter 79. Clause 2 of by-law no. 10 provides:—

> 2. That the said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock; and further entitled to priority on any division of the assets of the Company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

By-law no. 10 and the supplementary letters patent provided for further increases of capital stock by the issue of additional preference stock on the same terms, and to rank *pari passu* in all respects with the $500,000 of preference stock authorized by the by-law. In the exercise of the right so reserved, the capital stock of the Company was by by-law increased by the further sum of $500,000 by the creation of an additional 500,000 preference shares of $100 each. The relevant wording of this by-law and the confirming supplementary letters patent is substantially identical with the phraseology in by-law 10.

In due course all the preference stock was issued, and at liquidation amounted in the aggregate to $1,000,000 fully paid. For upwards of thirty years, without interruption, dividends at the stipulated rate of 7 per cent. were paid on all preference shares from time to time outstanding, and so continued down to the 31st of December, 1943, shortly before liquidation. Down to that date the holders of preference stock of the first issue were

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paid dividends amounting to $239.75 per share, and the holders of the second issue were paid dividends amounting to approximately $211 per share, whereas the common stock holders received only $188.50, paid at varying rates in some of the years and including a special dividend of 49·50 per cent. in 1942.

The respondents' contention is that the preferred shareholders were entitled to participate in dividends equally per share with the common shareholders after each class had received 7 per cent. dividends in each year. As to this claim and as to the claim to share in the surplus assets, the position of the respondents is that the *Companies Act* of 1909 did not permit any restriction upon what they term the rights of preferred shareholders in common with all other shareholders but that, on the contrary, the Act permitted merely the granting of a preference and priority. They also argue that the by-law on its true construction did nothing more. The trial judge disagreed with these contentions but the Court of King's Bench, while apparently holding the view that the Act did not authorize the suggested restriction, decided, on the wording of the by-law, that no such restriction was in fact imposed. However, on the first claim, that Court decided that the silence or acquiescence of the holders of preferred stock over a period of thirteen years was a bar to the holders of preference shares now seeking to be put on a footing of equality.

The applicable statutory provisions of the *Companies Act* of 1909 are sections 47 and 49, which read as follows:—

47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is by such by-laws declared.

2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.

* * * *

49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

Subsections 3 and 4 of section 57, which have been referred to, really have no application as they deal merely with the result of the increase or reduction of capital which might be effected only by supplementary letters patent.

Certain rights are common to the holders of all shares under Part I of the Act in which sections 47 and 49 are found but not all the rights of any shareholder are found in any part of the statute. While the judgment of the Privy Council in *Steel Company of Canada* v. *Ramsay* (1), does not refer to the provisions of the Act, it will be noticed from the report of this case in the Court of Appeal for Ontario (2) that counsel for the company argued:—

> Under secs. 47, 48 and 49, preference shareholders may be given priority when the fund shall be distributed; but apart from that, all shares, preference and common, must be placed on an equal basis when the distribution is made, i.e., at the time of the distribution it must be a "rateable distribution".

No reference is made in any of the judgments in any of the Courts to the statutory provisions, and the judgment of the Privy Council, therefore, cannot be taken as a pronouncement upon the point. However, it has arisen in *Holmsted* v. *Alberta Pacific Grain Co. Limited* (3), where the court of appeal of Alberta, affirming the decision of Ford J. decided that the powers given the directors of a company were not restricted to giving preferences. I agree with those judgments and particularly the statement of Chief Justice Harvey that preference shareholders

> have the rights and liabilities which are common to all shareholders and in addition they have the preferential rights conferred by the by-law. It (section 49) does not say nor can I see any reason to think it means, that they possess all the rights of any shareholder.

The fact that in 1924 Parliament amended section 47 does not alter my opinion in this respect as the amendment deals with deferred as well as preferred stock.

Having the power to provide that so far as dividends are concerned the holders of preference shares should be entitled to cumulative dividends at the rate of seven per cent. per annum, and to nothing more, is that what the by-law provides? I think it does because, as pointed

(1) [1931] A.C. 270.
(2) (1929) 65 O.L.R. 250.
(3) [1928] 1 D.L.R. 135.

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out by Viscount Dunedin in the *Ramsay* case (1), it has been decided by the House of Lords in *Will* v. *United Lanket Plantations Company Limited* (2), that, ordinarily speaking, when a preferred shareholder receives his preferred dividend, he can ask no more. So far as the claim now under consideration is concerned the remarks of Earl Loreburn in the *Will* case (2), at page 19, are, I think, apposite:—

> My lords, I have no doubt myself in regard to this particular resolution, that the people who took the preference shares under it knew perfectly well that they were taking shares with a preferential dividend of 10 per cent. I think they would have been rather surprised, although no doubt they would have been gratified, if they had been told that they were about to receive the almost boundless additional advantages which have been held out to them in the arguments we have been hearing.

While there are differences between companies in England and those incorporated under the Dominion *Companies Act,* the decision in the *Will* case (2) applies equally here as is indicated by Viscount Dunedin's reference to it in the *Ramsay* case (1).

The question remains as to whether, having similar powers with reference to surplus assets, the directors exercised it. The true nature of the fund in dispute is, I think, nowhere better expressed than in the reasons for judgment of Mr. Justice Eve in *In re William Metcalfe & Sons, Ld.* (3), where he says:—

> The expression "surplus assets" in this and similar cases signified something different from the expression "capital"; surplus assets are part and parcel of the property of the company not required for the discharge of its liabilities or for returning to the shareholders the capital they have paid up; they are part of the joint stock or common fund which, at the date of the winding-up, represented the capital of the company, but they are no part of the repayable capital. It has *ex hypothesi* been repaid before they came into existence.

His judgment was affirmed by the Court of Appeal and in the judgments in that court are found references to most, if not all, prior decisions.

While in *Birch* v. *Cropper* (4), the House of Lords was concerned with a company, the articles of which contained no provision as to the distribution of assets on its winding-up, the inclusion in the present case in the by-law of the words

(1) [1931] A.C. 270.
(2) [1914] A.C. 11.
(3) [1933] Ch. 142, at 148.
(4) (1889) 14 App. Cas. 525.

and further entitled to priority on any division of the assets of the Company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid

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can I think make no difference. The remarks of Lord Macnaghten at page 543, referring, of course, to a company incorporated under the *British Companies Act* of 1862, apply as well to the Porto Rico Company,—that every person who becomes a shareholder becomes entitled to a proportionate part in the capital of the company and unless otherwise provided, entitled as a necessary consequence to the same proportionate share in all the property of the company, including its uncalled capital. In the present case the priority of repayment in full at par applies to the preference stock and has no application to the right of a holder of such stock to a share in the surplus assets as above defined. The reasoning in *Williams v. Renshaw* (1) to which we were referred, seems to overlook this distinction.

For these reasons, therefore, I am of opinion that the Court of King's Bench came to the right conclusion as to the surplus assets, and that both Courts came to the right conclusion with respect to the respondents' claim for equality of dividends. Upon this view of the matter, no question arises as to the propriety of the allowance of interest at five per centum per annum from February 2nd, 1944, upon the division of the sum of $500,000. If the conclusion now arrived at had been reached by the judge of first instance, that sum would have been distributed among the holders of preference shares at that time.

The appeal and cross-appeal should be dismissed and the costs of all parties paid by the liquidator out of the assets of the Company.

The judgment of Taschereau and Estey J.J. was delivered by

TASCHEREAU J.—The Porto Rico Power Co. Ltd. was incorporated under the Dominion *Companies Act* of 1902, by letters patent dated the 29th of August, 1906. Its original authorized capital was $3,000,000 divided into 30,000 common shares of $100 each, all of which were issued and

(1) (1927) 220 App. Div. [N.Y.] 39.

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fully paid. In 1909, the Company increased its capital by creating and issuing $500,000 of preference stock, divided into 5,000 shares of $100 each, and again in 1911, a further increase of $500,000 raised the amount of preference stock to $1,000,000 and, as a result of which, the total capitalization of the company was $4,000,000.

The provisions of both supplementary letters patent, dealing with the rights of the preference shares are the following:—

> The said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The main holdings, if not the only, of the Porto Rico Power Company, Limited were the shares of a certain Porto Rican subsidiary, the assets of which were expropriated by the Porto Rico Water Resources Authority, of the Porto Rican Government. As a result of this transaction, the Montreal Trust Company, in its quality of liquidator of Porto Rico Power Company, Limited, now in voluntary liquidation, had in its treasury more than $6,000,000 available for distribution amongst both classes of shareholders. The present appellant owns 29,357 of the 30,000 common shares of the Porto Rico Power Company, Limited, and the respondents are the holders of a substantial number of preference shares.

The Montreal Trust Company of Montreal was appointed liquidator on the 26th of January, 1944, and was authorized by the Court to make a preliminary distribution of $100 per share to the preference shareholders and $150 per share to the holders of common stock, and it also prayed the Court to determine how the surplus money amounting to $500,000 should be distributed. The Montreal Trust Company submitted that the holders of common shares are alone entitled to share in any surplus assets available for distribution after payment by priority of $100 per share to the preference shareholders, plus dividends thereon accrued due and remaining unpaid, and that the holders of preference shares are

entitled only to said payment by priority of $100 per preference share and dividends thereon accrued and remaining unpaid, and that they are not entitled to share *pro rata* with the holders of shares of common stock in any surplus assets. The contention is that the rights of the holders of the preference shares of stock of the Porto Rico Power Company Limited, in liquidation, are completely and exhaustively set out in the by-laws and supplementary letters patent and that, after having received cumulative dividends at the rate of 7 per cent. per annum, which in fact they have received, they are entitled to only $100 per share in the distribution of the assets of the company which is the repayment in full of their shares at par.

The respondents intervened to contest the petition of the liquidator claiming that the preference shareholders are entitled to equal treatment in all respect with the common shareholders, except to the extent to which the said preference shares are given a priority by the supplementary letters patent and the by-laws of the company. They further alleged that no limitation whatsoever is placed upon the rights of the preference shareholders, and all that the said by-laws and supplementary letters patent provide is the extent of the priority given to the preference shareholders.

The respondents further claimed that the company in liquidation has paid dividends to the common shareholders in excess of the 7 per cent. received by the preference shareholders, and that the said dividends paid to the common shareholders constitute an advance in respect of which the preference shareholders are entitled to be placed on an equal basis.

Mr. Justice Boyer dismissed the contention of the McMaster University and directed that the $500,000 and all further assets subject to distribution should be distributed to the common shareholders only, and to the exclusion of the preferred shareholders.

The Court of King's Bench allowed the appeal of the McMaster University, ordered that the judgment *a quo* be modified to the extent of ordering, and ordered, the liquidator to distribute amongst the holders of prefer-

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ence shares the sum of $500,000 in proportion to their holdings of said shares, with interest at the rate of 5 per cent. per annum from the 2nd day of February, 1944. The Court of King's Bench further ordered the liquidator to distribute amongst the holders of preference and common shares in proportion to their holdings of the said shares, without any distinction, any or all balance of surplus assets available for distribution, but dismissed the claim of preferred shareholders as regards dividends.

The decision of this case depends upon the true construction of the essential words of the supplementary letters patent and by-laws already cited. It is clear, I think, that under the Dominion *Companies Act*, a preferred shareholder has all the rights and liabilities of a common shareholder. This proposition is found in section 49 of the *Companies Act*, R.S.C. 1906, chap. 79, which reads as follows:—

> Holders of shares of such preference stock shall be shareholders within the meaning of this part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this part.

The preferred shareholders are however entitled to additional preferences and rights which are authorized by section 47 of the Act, which is to the effect that the directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividend and in any other respect, over ordinary stock as is by such by-laws declared, and this is confirmed by subsection 49, which, after stating that holders of shares of preference stock are shareholders within the meaning of the Act, says that they are, as against the ordinary shareholders, entitled to the preferences and rights given by the by-laws.

Many judgments have been cited by both parties. As it will be seen the consensus of opinion appears to be that preference shareholders have all the rights and liabilities of common shareholders, and that the additional preferences and priorities, to which they may be entitled, must be found in the by-laws and supplementary letters patent of the company.

The oldest case is, I think, the case of *Birch v. Cropper* (1). In that case, the articles of association of an English company incorporated under the *Companies Act* of 1862 provided that the net profits for each year should be divided *pro rata* upon the whole paid-up share capital, and that the directors might declare a dividend thereout on the shares in proportion to the amount paid up thereon. The articles contained no provisions as to the distribution of assets on the winding-up of the company. The original capital consisted of ordinary shares partly paid up. Afterwards, preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends and claims of the ordinary shareholders. The preference shares were fully paid up. The undertaking having been sold under an Act which made no provision for the distribution of the purchase money amongst the shareholders, the company was voluntarily wound up and assets remained for distribution. It was held by the House of Lords, reversing the decision of the Court of Appeal, that in distributing the assets "amongst the members according to their rights and interests in the company" and in adjusting "the rights of the contributors amongst themselves", the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded; and that, after discharging all debts and liabilities and repaying to the ordinary and preference holders the capital paid on their shares, the assets ought to be divided amongst all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held.

At page 531, Lord Herschell said:—

> To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the Company, and as such shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think, therefore, that the first contention of the appellant wholly fails.

At page 543, Lord Macnaghten says:—

> Every person who became a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations

(1) (1889) 14 App. Cas. 525.

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of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital.

And at page 546, Lord Macnaghten says also:—

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent, upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort— affecting their rights as shareholders in the capital of the Company.

In *In re Espuela Land and Cattle Company* (1), it was held:—

There is no general rule that where preference shareholders have a preference as to repayment of capital they can have no further share in surplus assets. The question depends on the construction of the memorandum and articles of association. But if these documents contain no provisions on the point, surplus assets must in a winding-up be divided amongst all the shareholders, ordinary and preference, in proportion to the nominal value of the shares.

In this case, Mr. Justice Swinfen Eady says at page 193:—

There remains the question how the assets which remain after paying preference capital, interest thereon, and ordinary capital are to be distributed.

Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that where priority of repayment on a winding-up is secured to the preference capital the preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preference shareholders they take that fixed amount and nothing more, however large the revenue of the company may be.

This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the preference and ordinary shareholders. An instance

(1) L.R. [1909] 2 Ch. 187.

of this is found in *Webb* v. *Earle* (1). The documents embodying the constitution of the company determine how its revenue shall be distributed; and in like manner they determine how any surplus assets are to be divided. An instance of a provision that preference shares shall confer certain rights, "but shall not confer any further right to participate in profits or surplus assets," occurred in *In re South African Supply and Cold Storage Co.* (2). In the absence, however, of any provision to the contrary, the rights of the shareholders are equal. Where the shares are of unequal amounts the surplus assets must be distributed rateably according to the nominal amount of the shares, unless some provision to the contrary is to be found in the memorandum or articles: *In re Wakefield Rolling Stock Co.* (3); *Birch* v. *Cropper* (4).

The judgment in the case of *Will* v. *United Lankel Plantations Co.* (5) did not deal with the distribution of the assets of the company but only with the right to dividends, and the House of Lords came to the conclusion that, on the construction of the by-law, a contract or a bargain for a 10 per cent. dividend was complete as to dividends, and that the preferred shareholders were not entitled to share in the dividends in excess of that amount. The only point in dispute was one of construction, and as Viscount Haldane said,

> construction must always depend on the terms of the particular instrument

and

> our primary guide must be the language of the documents we have before us.

Lord Atkinson said:

> It is said that the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that construction.

In that same case, where only the right to dividends was discussed before the House of Lords, Lord Justice Farwell had said in the Court of Appeal (6):—

> To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern.

In *In re National Telephone Company* (7) much turned on the wording of some of the preferred share provisions.

(1) (1875) L.R. 20 Eq. 556.
(2) [1904] 2 Ch. 268, at 271.
(3) [1892] 3 Ch. 165.
(4) (1889) 14 App. Cas. 525.
(5) [1914] A.C. 11.
(6) [1912] 2 Ch. 571, at 580.
(7) [1914] 1 Ch. 755.

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The first preferred stock was entitled to a cumulative dividend of 6 per cent. per annum and no more, and to a preferential payment of the amount paid up out of the assets of the company in the event of the company being wound up in priority to any payment in respect of the ordinary shares of the company but to no other participation in profits.

The second preferred shares were given the right to participate rateably in the surplus profits with the common shareholders, and it was provided that in winding up the surplus assets shall be applied in the first place in repaying the holders of the original preference shares, the full amount paid up thereon, and subject thereto in repaying to the holders of the second preference shares the full amount paid up thereon in priority to any payment in respect of the ordinary shares of the company.

Next, the surplus assets were to be applied in repaying to the holders of the third preference non-cumulative shares the full amount paid up thereon, and the fourth preferred was in the event of winding up to rank for repayment of the full amount paid up thereon, together with a bonus of 5 per cent. in priority to the common stock.

The appellants have relied upon this judgment and particularly upon the following passage of Mr. Justice Sargant:—

> It appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is *prima facie* a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled.

But this expression of opinion of Mr. Justice Sargant was later overruled in two cases.

In *In re Fraser & Chalmers Limited* (1) Mr. Justice Astbury, after considering the *Espuela* (2) and *National Telephone* (3) cases as well as the *Will* case (4), expressed his preference for the decision of Mr. Justice Swinfen Eady in favour of the preference shareholders.

At page 120, Mr. Justice Astbury says:—

> All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares.

(1) [1919] 2 Ch. 114.
(2) [1909] 2 Ch. 187.
(3) [1914] 1 Ch. 755.
(4) [1914] A.C. 11.

And at page 121, he further adds:—

It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding-up in a particular order, a fund remaining after doing so which is not expressly, nor by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some, to the exclusion of other shareholders.

The ordinary shareholders contend that the express rights given to the preference shareholders by these resolutions contain the whole of their rights as such. It is clear however that they do not. They have voting and other rights as corporators, and I see no reason for construing this contract as depriving them of a right to share in an ultimate surplus that is not referred to, any more than as depriving them of voting and other rights of shareholders which are in the same position.

The other case which overruled the decision in the *National Telephone Company* case (1), is the case of *Anglo-French Music Company Limited* v. *Nicoll* (2). In that case the preferred shareholders were entitled to a fixed 7 per cent. cumulative dividend with right to repayment of capital before any dividend is paid or capital repaid to the holders of ordinary shares, with right to a further participation in dividends.

At page 391 Mr. Justice Eve says:—

The point I have to consider is this: does the provision in the bargain providing for what is to happen in the event of the assets being insufficient to repay all the capital operate to preclude the preference shareholders, in the event of the assets being more than sufficient to repay all the capital, from participating in the excess? I see no reason why it should do so * * * I do not think it is accurate to say that the whole bargain between the two classes of shareholders is to be found in the memorandum, except to this extent, that the rights of each class are thereby finally determined in respect of all matters expressly or by necessary implication therein dealt with.

In the present case the respective rights of the two classes to the profits of the company are expressly dealt with—so also are the rights in the event of an insufficiency of assets to repay all the capital in a winding-up—but I cannot see anything which deals either expressly or by necessary implication with the rights of either class in the event of the assets being more than sufficient to repay the capital.

Mr. Justice Eve who gave the judgment in the case of *Anglo-French Music Company Limited* v. *Nicoll* (2), made a further similar pronouncement in *In re Madame Tussaud & Sons, Limited* (3). In that case His Lordship held that, according to the constitution of the company, the *prima facie* presumption in favour of equality of distribution amongst all the shareholders ought to obtain, and the sur-

(1) [1914] 1 Ch. 755 (2) [1921] 1 Ch. D. 386.
(3) [1927] 1 Ch. D. 657.

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plus assets were distributed amongst all the shareholders *pro rata,* in proportion to the amount paid up on their shares.

The appellant relied on the *Collaroy Company, Limited* v. *Giffard* case (1). The company's memorandum after stating that the capital was 300,000 divided into 10,000 preference shares of 10 each and 20,000 ordinary shares of 10 each, declared that such preference shares should confer "the right" to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital paid up thereon, and "shall rank" both as regards dividends and capital in priority to the ordinary shares. It was held that the memorandum and article contained an exhaustive delimitation of "the right" of the preference shareholders, and that in the event of a winding-up they would be entitled to a return of their capital, but not to participate in surplus assets. This judgment was given by Mr. Justice Astbury who had previously given the judgment in the *Fraser & Chalmers* case (2). It would seem that both decisions are contradictory, but a careful reading of the judgment leads me to a different conclusion. The learned Justice stated in the first part of his judgment a proposition that cannot in his mind be questioned, and it is that:—

> The annexation to preference shares of a right to receive back their capital in a winding-up in priority to the ordinary shares does not *prima facie* exclude the preference shareholders from participation in the ultimate surplus assets if any.

In support of this proposition Mr. Justice Astbury cites the *Espuela* case (3), as well as *Fraser & Chalmers Limited* (2) *and Anglo-French Music* (4) cases. He further states that a provision may be expressed in such a manner and in such a context that according to its true construction, it does exclude preference shareholders from such a participation, and the question that he had to decide was as to whether the contract in the particular case he had to determine did exclude the preference shareholders. On the construction of the contract he reached the conclusion that the preference shareholders were excluded, and he seems to base his judgment on a very narrow ground, namely, that the preference shareholders were given "the right", to

(1) [1928] 1 Ch. 144.
(2) [1919] 2 Ch. 114.
(3) [1909] 2 Ch. 187.
(4) [1921] 1 Ch. 386.

repayment of capital, and that the use of the word "the" was limitative and produced a very different result from the use of such words as a "right".

In the *Metcalfe & Sons Limited* case (1) the Court of Appeal affirmed the decision of Mr. Justice Eve who disagreed with the conclusion arrived at by Mr. Justice Astbury in the *Collaroy Company, Limited* v. *Giffard* case (2), and Lord Hanworth says at page 158:

> Personally I find myself inclined to agree with Eve J. in not being able to follow the distinction between the *Fraser & Chalmers Limited* (3), and the *Collaroy* case (2).

And at the same page he also states:—

> Therefore, looking at the authorities as a whole, I come to the conclusion that there must be in respect of this balance of surplus assets a parity between all the shareholders. I cannot find anything in the present case which either expressly or impliedly is sufficient to displace the rights which belong to the preference shareholders equally with the ordinary shareholders, and the rule of parity among shareholders must therefore prevail.

In the *John Dry Steam Tugs Limited* case (4) the principle, that there being nothing in the articles to modify or exclude the normal right of the preference shareholders to share in the distribution of the surplus assets, was upheld and the preference shareholders were declared to be entitled to rank *pari passu* with the ordinary shareholders in the distribution of the assets of the company.

Another case reported in England is *Re W. Foster & Sons Limited* (5). It was there held that the question whether a liquidator ought to divide and distribute the surplus assets amongst the holders of the ordinary shares alone, or amongst the holders of the preference shares and the holders of the ordinary shares *pari passu,* was governed by the decision *In re William Metcalfe & Sons Limited* (1).

The English Weekly Notes of May 27th, 1944, at page 143 refers to a decision of Mr. Justice Cohen in *In re Wood, Skinner & Company Limited* (6), in which the preferred shareholders were entitled to rank as regards dividends and capital in priority to the ordinary shares. It was held that all shareholders are entitled to

(1) [1933] Ch. 142.
(2) [1928] 1 Ch. 144.
(3) [1919] 2 Ch. 114.
(4) [1932] 1 Ch. 594.
(5) [1942] 1 All E.R. 314.
(6) Full Report in [1944] Ch. 323.

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equal treatment unless and to the extent that their rights are modified by the contract under which they held their shares.

Two other cases were cited by the appellant, but nothing in the reasons for judgment can be found which is useful to help us in the determination of the case at bar.

The first one is the case of *Steel of Canada Limited* v. *Ramsay* (1). In that case the preferred shareholders were entitled to a fixed cumulative preferential 7 per cent. dividend, and were further entitled to share equally with the common stock in additional profits after the holders of the ordinary shares should have received dividends equal to those paid on the preferred shares. The question was whether under this special clause the common shareholders were entitled to be equalized with the preferred shareholders only in respect of the current year or as regards other years. The judgment of the Privy Council did not purport to deal with the division of surplus assets, but was only dealing with the right to additional dividends.

The other case is *Holmested et al.* v. *Alberta Pacific Grain Company Limited* (2). In the by-law of the company it was provided that the cumulative preferred shares would rank both as regards dividends and return of capital, in priority to all common shares in the capital stock of the company, but did not confer any further rights to participate in profits or assets. The preferred shareholders commenced an action for a declaration that they were entitled to rank equally with the holders of common shares on the distribution of the proceeds of the sale of the company's assets and business. It was argued that the by-law creating the said preferred shares, in so far as it purported to *limit or restrict* the right of the preferred shares to participate in the distribution of the profits or assets of the company was *ultra vires* of the Grain Company, because section 47, as it read at that time (now amended by 14-15 Geo. V, chap. 33, sec. 16), authorized *only priorities but not restrictions.* The Court came to the conclusion that the by-law was not invalid and that the restriction was *intra vires* of the powers of the

(1) (1931) A.C. 270; [1931] 1 D.L.R. 625.

(2) [1927] 3 D.L.R. 901; [1928] 1 D.L.R. 135.

company. The decision in that case does not apply to the case which has been submitted to this Court. In the *Alberta Pacific Grain* case (1) there was a restriction attached to the preference shares, but such restriction does not exist in the case which is submitted to this Court.

From all these numerous judicial pronouncements, and from a careful reading of the *Company's Act,* I believe that one may rightly gather that the rights of all classes of shareholders are on a basis of equality, unless they have been modified by the by-laws or the letters patent of the company, and, that the right to the return of invested capital, and the right to share in surplus assets are quite different and distinct matters.

Holders of preference stock are shareholders within the meaning of the Act, and they possess in all respects the rights, and are subject to the same liabilities as the other classes of shareholders. Section 49 on this point is quite clear and unambiguous. It is in virtue of this section that the ordinary rights of preference shareholders are created. These rights put them on an equal footing with the common shareholders as to the sharing in surplus assets.

It is in the letters patent and the by-laws of the company that have to be found the priorities that may be attached to preference shares, and which are clearly authorized by section 47. It may of course happen that these priorities are exhaustive of the rights of the preference shareholders., and therefore negative any additional rights, or it may be also that they create additional rights which coexist with the original rights inherent to all classes of shareholders. But in order to determine the true meaning and the legal effect of these preference and priority clauses, one must necessarily look at the creating clauses in order to find if there is or not an express or implied condition, which limits or adds to the ordinary rights of the shareholders. It is a mere question of construction of these clauses, which form part of the contract under which the shareholders hold their shares.

I entirely agree with the Court of King's Bench that the provisions of the by-laws of the company do not expressly or by necessary implication, limit the rights of the holders of preference shares. They do create priorities, but

(1) [1927] 3 D.L.R. 901; [1928] 1 D.L.R. 135.

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these priorities are in addition to the existing rights, and are not a declaration of all the rights of this class of shareholders. These priorities consist in a right for the preference shareholders to be repaid of the invested capital at par, together with any dividends accrued and remaining unpaid, but do not affect their right to share in the profits. For the sharing in the profits, which is the fundamental right to all shareholders, is a matter entirely different from the priority given to the preference shareholder which is the additional privilege given to him.

In the present case the priority to repayment

> on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid

is a definition of the existing priority as to the sharing of assets, and cannot, I believe, be construed as a bar or a limitation to any further rights.

For these reasons, I come to the conclusion that the preference shareholders have a priority to be repaid at par, and that they are further entitled to share *pari passu* in the distribution of the assets of the company with the common shareholders, after the latter have received payment at par.

The main appeal should therefore be dismissed.

It is the contention of the cross-appellant that the stipulation for payment of cumulative dividends at the rate of 7 per cent. per annum for each and every year, in preference and priority to any payment of dividends on common stock, was not limitative in its terms and that in the event of the common shareholders receiving, in any year, a dividend exceeding the said rate of 7 per cent. per annum, then, the preferred shareholders were entitled to be paid on a basis of equality.

The preference shareholders have received each year the stipulated dividends of 7 per cent. until the winding-up of the company, and the common shareholders until 1931 have received dividends lower than 7 per cent per year. However, from 1931 to 1942, the directors have declared for the benefit of the common shareholders an annual dividend of 8 per cent. and in 1943 this dividend was 49½ per cent. The preference shareholders ask for equal treatment in

the matters of dividends. I cannot agree with this proposition, and it seems that the cases cited by the respondents on the main appeal defeat this very contention.

The question, I think, has been settled by the case of *Will* v. *United Lanket Plantations Company, Limited* (1). In that case the Court of Appeal (2) decided that, in the distribution of profits, holders of the preference shares were not entitled to anything more than a 10 per cent. dividend, and in the House of Lords (1) Viscount Haldane said:—

> Moreover, I think that when you find—as you do find here—the word "dividend" used in the way in which the expression is used in the resolution and defined to be a "cumulative preferential dividend" you have something so definitely pointed to as to suggest that it contains the whole of what the shareholder is to look to from the company.

The right to dividend, while the company is a going concern and the right to capital and surplus assets in the winding-up, are quite distinct. In the present case, the right of preference shareholders is to be paid an annual dividend of 7 per cent. and they have a priority for dividends accrued due and remaining unpaid. These dividends have been paid, and the preference shareholders, as to dividends, have therefore received all that they are legally entitled to.

The by-laws give priority to the preference shareholders to obtain reimbursement of their invested capital, in addition to their right to share in the division of assets, but a similar privilege as to dividends is not given. In the latter case, the privilege is only to assure the payment of a dividend of 7 per cent. which has been declared, and which at the time of the winding-up accrued and remained unpaid. I should dismiss the cross-appeal.

As agreed, all costs of the parties will be paid by the liquidator out of the mass of the estate.

RAND J.—This is a controversy between holders of common and preferred shares of the Porto Rico Power Company Limited in liquidation. Two claims are made, one by each group. During the company's business life, the preferred shareholders have received more than one-half of the total dividends declared: but they claim that where in any year a dividend equal to that received by

(1) [1914] A.C. 11. (2) [1912] 2 Ch. 571.

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them is paid to the common shareholders, any excess in that year must be shared equally by both classes. On the other hand, the common shareholders contend that when the total amount of subscribed capital has been repaid, the remaining or surplus assets belong exclusively to them.

The provision of the supplementary letters patent authorizing the issue of the preference stock was in these words:

> The said increased capital stock of $500,000 shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of 7 per cent per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued, due and remaining unpaid.

This authority was exercised under the Dominion *Companies' Act,* R.S.C. 1906, chapter 79, sections 47 and 49 of which were at the time as follows:

> 47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as by such by-laws declared.
>
> 2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.
>
> * * *
>
> 49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-laws as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

I see no substance in the claim of the preferred shareholders that their equality in dividends must be referred to each year's distribution. On Mr. Geoffrion's basic assumption that all shareholders are equal with certain additional rights annexed to the preferred shares, his clients, having received substantially more in dividends than the common shareholders, are still holding an advantage. The reasoning in *Steel Company of Canada Limited* v. *Ramsay* (1), although there it was expressly pro-

(1) [1913] A.C. 270.

vided that participation of the preferred shareholders in addition to the fixed rate of 7 per cent should be only when the ordinary holders should have received "dividends equal to those paid on the preferred shares", applies even in the absence of such a stipulation. Certainly that would seem inescapable under the principle of section 49.

The language of the letters patent

> the said increased capital stock * * * shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends * * * in preference and priority to any payment of dividends on common stock

is claimed by the appellants to limit the preference holders so far as dividends go to the rate of 7 per cent provided. What is sometimes called a "preferential dividend" is simply a dividend with certain preferential incidents. The latter in this case are, the fixed rate, the accumulation and the priority. What the resolution deals with however is the entire right itself to dividend or to participation in profits, with those incidents. Whether this commutation of the right rather than merely declaring preferential additions is a violation of section 49 it is not, in view of the dividend inequality, necessary to consider, but the particular language used will be seen to be relevant to the second claim, that of the holders of ordinary shares in the distribution of assets.

The provision in relation to that is quite different in effect. Its subject does not purport to be the whole right to share in assets; it deals only with a preferential incident, the right of priority and priority only to the extent "of its repayment" meaning the repayment of the capital paid in. The funds which we are considering are surplus assets which were not paid in, and could not in any proper sense be said to be repaid.

It is argued that you cannot have a share in the abstract, that it is only to issued shares that incidents attach, and that these arise only at the moment of issue. But the determination of "preferential" rights involves an interpretation of qualifying language, and before that is possible we must make assumptions of the underlying

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substantive matter. The preference provision would be meaningless in isolation, and its interprteation depends upon what we attach to the concept of a share.

As declared by section 49, the holder of the preferred share is none the less a shareholder because he has certain advantages over ordinary shareholders: he places his property at the fundamental risk; but the interpretation of the constituting provision will depend upon whether we superimpose it upon the ordinary notion of share with its incidents of voting, participating in profits and in assets when the venture is over; or upon a skeleton of that concept such as a fractional interest in a fund to which the resolution adds all significant characteristics. Here again the essential fact obtrudes itself that all members are of a common group, and I think the rule unassailable that postulates the common and ordinary rights of shareholders as the underlying basis for the interpretation: *In re Wm. Metcalfe & Sons Ltd.* (1). The question then is simply one of construction: how far have those rights been clearly taken away? Here, in relation to surplus assets, the right is left intact and taking that view, I do not, again as in the other branch of the argument, find it necessary to consider whether section 49 would have prevented any restriction of that right.

I would therefore dismiss both the appeal and the cross-appeal with costs to be paid by the liquidator as agreed.

Appeal and cross-appeal dismissed, costs to be paid by liquidator as agreed.

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Solicitor for the respondents McMaster University et al. *A. S. Bruneau.*

Solicitors for the Liquidator respondent: *Stairs, Dixon, Claxton, Senécal & Lynch-Staunton.*

(1) [1933] 1 Ch. 142.