Department of the Interior in construing statutes which refer only to Indian "allottees," or Indian "allotments," as applicable also to Indians claiming under the homestead laws, must be considered as "equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 481.

Nothing herein contained must be taken as intimating that the Act of June 21, 1906, has any application to the acquisition of homestead rights under the general homestead laws by persons of the Indian race who have acquired or seek to acquire such rights as citizens rather than as Indian wards of the United States. This distinction is pointed out in *Case of Frank Bergeron,* 30 L. D. 375.

Both questions answered, "Yes."

WABASH RAILWAY COMPANY ET AL. v. BARCLAY ET AL.

AUSTIN v. SAME.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 37 and 38. Argued December 2, 1929. Decided January 6, 1930.

When the net profits of a corporation out of which a dividend might have been declared for the preferred stock are justifiably applied by the directors to capital improvements, the claim of the stock for that year is gone, if by the terms of the articles of incorporation and the certificates the preferential dividends are not to be cumulative. The fact that there were profits in that year out of which dividends might have been (but were not) declared does not entitle such stock to a correspondingly greater preference over other stock when the profits of a later year are to be divided. P. 203.

30 F. (2d) 260, reversed.

Certiorari, 279 U. S. 828, to review a decree of the Circuit Court of Appeals sustaining a bill brought against the Railway Company and its directors by holders of preferred shares to control the apportionment of dividends as between the plaintiffs and shareholders of other classes. The District Court had dismissed the bill.

Mr. Charles E. Hughes, with whom *Messrs. Winslow S. Pierce, F. C. Nicodemus, Jr., Gerald V. Hollins, George R. Leslie, Earle Krapp, Winthrop Taylor, Myron S. Hall, H. W. Cohu, La Motte Cohu, Arnold L. Davis,* and *William Fraser Dickson* were on the brief, for petitioners.

In the absence of language creating a different obligation, the holders of a non-cumulative preferred stock who do not become entitled by appropriate declaration to dividends for a particular fiscal year, have no right to require that dividends for such year be added to the dividends declared for a subsequent year. *Bailey* v. *Railroad Co.,* 17 Wall. 96; *New York, L. E. & W. R. Co.* v. *Nickals,* 119 U. S. 296; *Continental Ins. Co.* v. *United States,* 259 U. S. 156.

That the mere realization of net earnings in non-dividend or partial dividend years should result in the creation of a dividend credit giving cumulative rights *pro tanto* to non-cumulative stock is, we submit, an idea developed recently and directly traceable to a misinterpretation of decisions which do no more than give effect to the special statutory law and policy of the State of New Jersey. *Bassett* v. *Cast Iron Pipe Co.,* 74 N. J. Eq. 668, aff'd 75 N. J. Eq. 539; *Moran and Day* v. *Cast Iron Pipe Co.,* 95 N. J. Eq. 389; *Moran* v. *Cast Iron Pipe Co.,* 96 N. J. Eq. 698; *Day* v. *Cast Iron Pipe Co.,* 96 N. J. Eq. 736. Cf. 23 Columbia L. Rev. 358; 27 *id.* 53; 34 Yale L. J. 657; 11 Va. L. Rev. 553; 74 U. Pa. L. Rev. 605; 14 Cornell L. Q. 341; 38 Yale L. J. 1003; Cook, Corporations, 8th ed., p. 3273; Black's Law Dictionary; *Norwich Water Co.* v. *Southern R. Co.,* 11 Va. L. Reg. (N. S.) 203.

The language of the Preferred A stock contract of Wabash Railway Company definitely excludes a construction under which the investment of earnings in improvements and equipment or working capital in non-dividend or partial dividend years operates as a permanent restraint against the distribution of earnings of subsequent years.

Mr. Joseph S. Clark, with whom *Messrs. William R. Begg* and *Ellis Ames Ballard* were on the brief, for respondents.

The point of difference between cumulative and non-cumulative preferred dividends relates to the right of the stockholders to receive dividends for any year in which the company has failed to earn said dividends, either in whole or in part. Cumulative preferred dividends must be paid before junior dividends, regardless of the year in which they are earned. This is not true of non-cumulative preferred dividends. If they are not earned in any year, or to the extent that they are not earned in any year, the stockholders are not entitled to receive dividends for that year. The deficiency can not be made up out of the surplus earnings of any subsequent year. Non-cumulative preferred dividends, however, to the extent that they are earned year by year, must be paid before junior dividends are paid. This difference between cumulative and non-cumulative dividends is well settled by the authorities. Machen, Corporations, 1908 ed., § 551; Palmer's Company Precedents, Pt. I, 11th ed., p. 812; Palgrave's Dictionary of Political Economy, Vol. I, pp. 606–607; Clark and Marshall, Corporations, § 529–d; *Staples* v. *Eastman Co.,* 65 L. J. Ch. N. S. 682, L. R. 2 Ch. Div. 303. *Day* v. *Cast Iron Pipe Co.*, 95 N. J. Eq. 389. See also, as to definition of "non-cumulative" dividend, *New York, L. E. & W. R. Co.* v. *Nickals.* 119 U. S. 296; *Dent* v. *London Tramways Co.,* L. R. 16 Ch. Div. 344; *Belfast & M. L. R. Co.* v. *Belfast,* 77 Me. 445, s. c. 79 Me. 411; Fletcher's Cyc. of Corporations, vol.

6, § 3754; Berle, Studies in the Law of Corporation Finance, c. V; 23 Columbia L. Rev. 358; 11 Va. L. Rev. 553; 74 U. Pa. L. Rev. 605.

A non-cumulative preferred dividend for any year to the extent that it is earned in that year is no more inchoate and unenforceable than a cumulative dividend. A non-cumulative preferred dividend, to the extent that it is earned in a particular year, is not lost if not declared within the year, but forms the basis for a dividend credit to the extent that it is earned. No junior dividends may be paid out of the earnings of the subsequent year or the general surplus or any other fund until after the Preferred A dividend credit is first satisfied.

The Preferred A dividend is "preferential" but not guaranteed or made a charge upon any earnings, any more than a cumulative dividend is made a charge on earnings. Each fiscal year is a separate accounting period to determine the amount of the non-cumulative dividends which the Preferred A stockholders are entitled to receive in and for that year, but not for any other purpose. The preference is not limited to dividends which may be declared by the Board in the exercise of its ordinary discretion. The dividend right is given by the contract, not by any dividend declaration. The contract provided that the Preferred A stock "is entitled to receive preferential dividends in each year."

By the certificate of incorporation, before any of the preferential B dividends may be paid, the Preferred A stockholders are entitled to receive all of their preferential A dividends, not only those for the current year, but, in addition, those earned in prior years which still remain unpaid. It is true that the stock certificate issued to represent the Preferred A stock uses the word "dividend" instead of the plural, but that was evidently a clerical error.

If the Board divert the earnings of any year, which they might use to pay dividends, to pay for permanent improvements, the result of such action by the Board is a postponement only in the payment of the dividends and the right of priority in payment still remains intact.

If inequitable results would follow from the adoption of a particular interpretation of the contract, the Court will consider carefully whether there is not some more reasonable interpretation. *Henry* v. *Great Northern R. Co.,* 1 deG. & J. 606.

The following cases were compared and classified: (A) *New York, L. E. & W. R. Co.* v. *Nickals,* 119 U. S. 296; *Continental Ins. Co.* v. *United States,* 259 U. S. 156; *Burk* v. *Ottawa Gas & E. Co.,* 87 Kan. 6; (B) *Wood* v. *Lary,* 47 Hun. 550, s. c. 124 N. Y. 87; *Bassett* v. *Cast Iron Pipe Co.,* 74 N. J. Eq. 668, s. c. 75 N. J. Eq. 539; *Moran* v. *Cast Iron Pipe Co.,* 95 N. J. Eq. 389, s. c. 96 N. J. Eq. 698; *Day* v. *Cast Iron Pipe Co.,* 95 N. J. Eq. 389, s. c. 96 N. J. Eq. 736; *Collins* v. *Portland Elec. Co.,* 7 F. (2d) 221, s. c. 12 F. (2d) 671; (C) *Norwich Water Co.* v. *Southern R. Co.,* 11 Va. L. Reg. (N. S.) 203.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill by holders of first preferred stock (called Class A) of the Wabash Railway Company, to have it declared that holders of such stock are entitled to receive preferential dividends up to five per cent. for each fiscal year from 1915 to 1926 inclusive to the extent that such dividends were earned in such fiscal years but were unpaid, before any dividends are paid upon other stock; and that the Company may be enjoined from paying dividends upon preferred stock B or common stock unless it shall first have paid such preferential dividends of five per cent. to the extent that the Company has had net earnings available for the payment and that such dividends remain unpaid. The case was heard upon bill and answer. The bill was dismissed by the District Court but the decree was reversed by the Circuit Court of Appeals, one of the Judges dissenting, 30 F. (2d) 260, and a writ of certiorari was granted by this Court. 279 U. S. 828.

The railway company was organized in 1915 under the laws of Indiana with three classes of capital stock: shares of the par value of $100, of Five Per Cent. Profit Sharing Preferred Stock A; shares of the same par value of Five Per Cent. Convertible Preferred Stock B; and shares of the same par value of Common Stock. At the date of the bill there were 693,330.50 shares of A, 24,211.42 B and 666,977.75 common. From 1915 to 1926 there were net earnings in most of the years but for a number of years no dividend, or less than five per cent., was paid on Class A, while $16,000,000 net earnings that could have been used for the payment were expended upon improvements and additions to the property and equipment of the road. It is not denied that the latter expenditures were proper and were made in good faith, or that the money could not have been applied to dividends consistently with the duties of the Road. The Company now is more prosperous and proposes to pay dividends not only upon A but also on B and the common stock, but the plaintiffs say that it is not entitled to do so until it has paid to them unpaid preferential dividends for prior fiscal years in which it had net earnings that might have been applied to them but were not.

The obligations assumed by the Company appear in its instrument of incorporation and in the certificates of Preferred Stock A in substantially the same words: "The holders of the Five Per Cent. Profit Sharing Preferred Stock A of the Company shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of the Company, but such preferential dividends shall be non-cumulative." In the event of a liquidation the holders "shall be entitled to be paid in full out of the assets of the Company the par amount of their stock and all dividends thereon declared and unpaid before any amount shall be paid out of said assets to the holders of any other stock of the Company." By the plain meaning of the words the holders "are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the Company formally declare, or ought to declare, a dividend payable out of such profits"; in the first instance at least a matter for the directors to determine. *New York, Lake Erie & Western R. Co.* v. *Nickals,* 119 U. S. 296, 307.

We believe that it has been the common understanding of lawyers and business men that in the case of non-cumulative stock entitled only to a dividend if declared out of annual profits, if those profits are justifiably applied by the directors to capital improvements and no dividend is declared within the year, the claim for that year is gone and cannot be asserted at a later date. But recently doubts have been raised that seem to have affected the minds of the majority below. We suppose the ground for the doubts is the probability that the directors will be tempted to abuse their power, in the usual case of a corporation controlled by the holders of the common stock. Their interest would lead them to apply earnings to improvement of the capital rather than to make avoidable payments of dividends which they do not share. But whether the remedies available in case of such a breach of duty are adequate or not, and apart from the fact that the control of the Wabash seems to have been in Class A, the class to which the plaintiffs belong, the law, as remarked by the dissenting Judge below, "has long advised them that their rights depend upon the judgment of men subject to just that possible bias."

When a man buys stock instead of bonds he takes a greater risk in the business. No one suggests that he has a right to dividends if there are no net earnings. But the investment presupposes that the business is to go on, and therefore even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern. When, as was the case here, the dividends in each fiscal year were declared to be non-cumulative and no net income could be so applied within the fiscal year referred to in the certificate, the right for that year was gone. If the right is extended further upon some conception of policy, it is enlarged beyond the meaning of the contract and the common and reasonable understanding of men.

Decree reversed.

THE FARMERS LOAN & TRUST COMPANY, EXECUTOR, *v.* MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 26. Argued October 30, 1929.—Decided January 6, 1930.

1. The maxim *mobilia sequuntur personam* applies to negotiable bonds and certificates of indebtedness issued by a State or her municipality, as to ordinary choses in action, and they have situs for taxation—in this case a testamentary transfer tax—at the domicile of their owner. P. 209.
2. When negotiable bonds and certificates of indebtedness issued by a State or her municipality and not used in business in that State, are owned, at the time of his death, by a person domiciled in another State in which they are kept, an attempt of the State in which they were issued to tax their transfer by inheritance is repugnant to the Fourteenth Amendment. *Blackstone* v. *Miller,* 188 U. S. 189, overruled. P. 209.
3. Existing conditions imperatively demand protection of choses in action against multiplied taxation, whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. P. 212.
4. Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. *Id.*