

the power given to the court to amend a pleading, even after judgment, is most liberal. Section 727. Every issue of fact essential to make out a cause of action for money rightfully the property of plaintiff, received by defendants to his use, was tendered in the complaint, except that the precise amount thus received was not set forth,—probably because it was not within plaintiff's knowledge,—an amount greater than the true amount being averred. The facts proved—indeed, the undisputed facts, since the knowledge of Edgett was the knowledge of his partners, irrespective of the jury's finding as to Townsend's knowledge—show that the plaintiff was entitled to recover the \$2,480.88 which the defendants had received by selling his bonds without his consent. Under these circumstances, it would be a failure of justice to send the case back for a new trial, by reason of technical defects in the complaint, when defendants have had full opportunity to adduce, and have adduced, on the trial, whatever evidence was available to them as a defense against such cause of action. The vital issue of fact, namely, the transfer of the bonds from Hagar to Edgett upon an express agreement that they should be used only for a special purpose, and then returned to plaintiff, was proffered in the complaint, and controverted by the answer. It must be assumed that on that issue defendants produced all the proof they had. Certainly, if they did not it was not because they were misled, either by the complaint or by any action of the trial judge. Every other fact necessary to recovery—the existence of the partnership; the dates when Downey came into it, and when Edgett left; the time of, and circumstances attending, the raising of the additional \$1,000; the fact that it was passed to the firm's credit, and drawn out of the bank on its checks; the instructions to the bank to sell the bonds; the amount of the surplus realized on such sale; the passing of that surplus to the credit of the firm, and the drawing of it out by firm checks—all appeared by the uncontradicted evidence of one of the defendants himself. As we find no error in the admission of evidence, or in the instructions to the jury, the judgment of the circuit court is therefore affirmed.

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#### NEW MEMPHIS GAS & LIGHT CO. v. CITY OF MEMPHIS.

(Circuit Court, W. D. Tennessee, W. D. March 20, 1896.)

**1. POLICE POWER—REGULATING PRICE OF GAS—REASONABLENESS.**

Under an act of a state legislature authorizing a taxing district to regulate the price of gas furnished by gas companies within such taxing district, provided the price shall not be fixed below a certain minimum, such power to regulate cannot be exercised arbitrarily, without investigation of the facts bearing upon the reasonableness of the rate to be fixed, or in such a manner as to bring about a destruction or confiscation of the property of the gas companies; but due regard must be given to the right of such companies to receive such an income from their business as to pay operating expenses, legitimate fixed charges, and a reasonable profit.

**2. EQUITY PRACTICE—PRELIMINARY INJUNCTION.**

Accordingly, upon a bill charging that a rate for gas, fixed under such a statute by a taxing district, was fixed arbitrarily, without investigation, and was so unreasonably low that the company affected would be unable

to meet its expenses and fixed charges, and would be rendered insolvent, and praying for an injunction to restrain the enforcement of the ordinance fixing the rate, *held*, that a preliminary injunction restraining its enforcement should be granted, upon the gas company's giving a bond to refund to the consumers of gas the excess of charges if its bill should fail.

3. SAME.

On application for preliminary injunction it is not proper to decide the merits of the controversy, especially where the case turns on grave questions of law. All that the judge should, as a general rule, require, is a case of probable right and probable danger to that right without the interposition of the court, and the judge's discretion should then be regulated by the balance of inconvenience or injury to the one party or the other.

4. SAME.

The judge should, in a case of probable right, grant the provisional injunction where the relief sought is essentially preventive and a denial of the injunction might in effect amount to denial of all relief.

Brown, Hirsh & Brown and Thos. M. Scruggs, for complainant.  
S. P. Walker, City Atty., for defendant.

CLARK, District Judge. The question now considered in this case is whether a preliminary injunction shall be allowed. This question arises upon bill, answer, and affidavits in support of the charges in the bill. The act of the legislature of the state of 1887 (chapter 91), confers upon the taxing district of Memphis the power to regulate gas companies, and also to regulate the price to be charged for gas furnished to the city and its inhabitants, with a provision that it shall not reduce the price below \$1.50 per 1,000 feet, when paid within the customary discount days. Pursuant to this legislative authority, the taxing district, by ordinance, October 29, 1895, undertook to exercise the power of regulation by reducing the price of gas from \$1.75 per 1,000 feet, as theretofore charged, to the lowest limit which, under the statute, it was permitted to go, namely, \$1.50 per 1,000 feet. The ordinance was subsequently amended so as to make its violation a misdemeanor and a subject of prosecution. The substance of the charges made in the bill, as ground for an injunction, is that this ordinance is invalid because the price fixed thereby was arbitrarily done; the taxing district going to the lowest limit possible, without any method whatever of inquiry to ascertain whether the rate fixed was reasonable, or such as would enable the company to maintain its existence or to make a reasonable profit on the money invested in the enterprise. Various questions are made in the bill, as well as in the brief, as to the constitutionality of the legislative act, and of the ordinance passed under authority of that act. So, too, various questions arise as to whether or not the New Gas Company, by virtue of its organization under the act of 1885, has so connected itself with the contract rights and privileges of the old company under its charter as to be exempt from regulation, beyond such as might have been had in regard to the old company, and under the original charter of that company.

It is to be borne in mind that it is not proper, on an application of this kind, to decide, or to consider with a view to final decision, the merits of the controversy, especially where such merits turn

on grave questions of law. It would no more be proper to do so on a motion for an injunction than on a motion to dissolve an injunction. *Owen v. Brien*, 2 Tenn. Ch. 295. It is consequently settled that, upon preliminary application for an injunction, all that the judge should, as a general rule, require, is a case of probable right, and probable danger to that right without the interposition of the court; and his discretion should then be regulated by the balance of inconvenience or injury to the one party or the other. 2 Beach, Mod. Eq. Prac. § 756; *Flippin v. Knaffle*, 2 Tenn. Ch. 238. Such being the practice upon this subject, I do not now deem it proper to discuss the more serious legal questions here involved. I think it is safer to make such examination as is now required from the standpoint of the contention made by the able counsel for the taxing district, and determine how far this contention meets the prima facie case made in the bill for injunction, and whether such contention offers valid ground for refusing the preliminary injunction.

The defendant's contention is that the New Gas Company became incorporated in 1894 subsequent to the passage of the act of 1887 authorizing regulation, and that it therefore took its franchises subject to the provision of said act, and that the ordinance of the taxing district, although passed subsequent to the incorporation of the New Company, was merely in execution of the legislative act, and is therefore entirely valid, if the act of the assembly is itself valid. I think this contention is in the main sound. And I desire to say, in passing, that, if the New Company can so connect itself with the old company as to stand in the shoes of the old company in all respects, I do not think that it by any means follows that the company is not subject to regulation as to the price which it shall charge for gas. It would require provisions in the original charter sufficiently definite to amount to a contract right to exemption from regulation, before its claim to this effect could be sustained. But the real attack made in this bill upon the ordinance in question is not so much that the act of assembly authorizing an ordinance is, when properly construed and enforced, not valid, but that the ordinance is not a legal and proper exercise of the power conferred by that act. The objection is not so much to the legislation on its face, as to the manner in which the taxing district has undertaken to enforce the act. The act of the general assembly is to receive such construction as will render it, if possible, constitutional and valid, and not invalid; and it must be borne in mind, constantly, that when a corporation is chartered under the general incorporation law, with the right to manufacture and sell gas, the right to charge a reasonable rate for all gas furnished is a right implied, and one that forms part of the charter contract with the state, which cannot be impaired by legislation. And a reservation of the right to repeal, modify, or amend the charter does not change this rule, so long as the state chooses to allow the charter and the charter rights to remain. Conceding for the present that under this reserved power the state might withdraw the franchises granted, and extinguish the corporate existence, that is not the question here,

as the state has not attempted to do anything of the kind, and no attempt has been made to amend or modify the charter. An extinguishment of the charter and of corporate existence must be distinguished from an unreasonable regulation of the corporation while its existence is permitted by law; and the legislature would have no more power, by an unreasonable amendment of the charter, to destroy the company's business, and thereby destroy its property, which is devoted to, and valuable only for its use in the conduct of, such business, than it would have to accomplish this result by an independent statute. The state is under an obligation to act justly, and without arbitrary discrimination, between corporations of the state, just as it is between citizens of the state enjoying equal rights. The state cannot, under the guise of a regulation, bring about a destruction and a confiscation of a company's property; and the state's power to absolutely abolish the corporation must be distinguished from its power to destroy its business and confiscate its property, so long as it chooses to permit its existence and to authorize its business by a valid charter. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702. And this is the fair result of what are known as the "Reagan Cases." 154 U. S. 362, 420, 413, 418, 14 Sup. Ct. 1047, 1060, 1062. And the question of the reasonableness of a rate of charge is eminently a question for judicial investigation, requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the use of its property, and, in effect, of the property itself, without the due process of law. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, supra. The act of assembly under consideration, therefore, must be given a construction which would not render it invalid, or obnoxious to constitutional objections, for otherwise the act itself would be void. It is clear, therefore, that the act in question, in fixing a limit below which the taxing district should not go, did not thereby authorize the taxing district to reduce the price of gas to that limit arbitrarily. And the very use of the term "regulation" implies that an investigation shall be made; that an opportunity to present the facts shall be furnished; that, when the facts are established, they shall, by the regulating power, be given due consideration; and that such action as shall be taken in view of these facts, thus ascertained, shall be just and reasonable, and such as enables the company to maintain its existence, to preserve the property invested from destruction, and to receive, on the capital actually and bona fide invested in the plant, a remuneration or dividend corresponding in amount to the ruling rates of interest. The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise. All of these items, and perhaps others, must be taken into account, in any regulation which may be made in respect to the prices of gas. Such investigation and

such regulation as are contemplated by the statute might enable the company to fix the price at \$1.50 per 1,000 feet, or at any named figure between that and the former price of \$1.75 per 1,000 feet. This would depend on the reasonableness of the regulation, in the sense above explained; keeping constantly in mind that the power to regulate rates is not a power to destroy, and that limitation is not the equivalent of confiscation. It is common for railroad charters to provide that the carrier may charge a rate for transportation of goods and passengers, not exceeding a fixed amount; for example, five cents a mile for every passenger. But this is a restriction on the company itself, as to its charges, and it is entirely competent for the legislature, notwithstanding this provision, to regulate the charges, within reasonable limits, and to fix a sum below the maximum, beyond which the company could not go. *Ragan v. Aiken*, 9 Lea, 609. Such is the doctrine of the *Reagan Cases*. Indeed, this is all now very well understood and is familiar.

So the minimum fixed in this statute, below which the taxing district cannot go, is a restriction on the taxing district itself, and a limitation on its power in this respect; and it is compelled to fix a limit above this sum, if it is just and reasonable to do so. Now, if the contention made in this bill is true, the taxing district, without any inquiry, and without any adequate knowledge whatever, and without any effort to know the truth and do justice, has undertaken, in the first instance, and by way of arbitrary action, to exercise its power down to the lowest limit. So, I repeat, the objection is not so much to anything in the terms of the ordinance, or of the act of the assembly, as in the facts which exist outside of the ordinance. If the plaintiff can, by proof, sustain the charges of this bill, it results inevitably that the ordinance is not a legal and valid exercise of the power conferred on the taxing district by this statute, but is an attempt to exercise the power in a manner which clearly amounts to destruction, and in such manner, too, as that if the act of assembly had undertaken, in terms, to authorize it, would render the act unconstitutional and void on its face. The distinction is between a valid and just execution of the power given by the act, and an illegal and unwarranted execution of such power. The bill charges distinctly that under the rate of charges, as fixed by this ordinance, the corporation would not be able to pay its expenses, interest on its fixed charges, much less a reasonable interest or dividend on its stock, and that an attempt to operate under such a rate of prices would result in its bankruptcy. And the bill, in its main allegations in this respect, is supported by affidavits of persons experienced in the manufacture and sale of gas, and some of them, so far as the record discloses, without any interest in this controversy. So that, according to the *prima facie* showing, if the injunction should be refused, and the city allowed to put this destructive rate in force, the insolvency and dissolution of this company would speedily follow. It seems to me clear, therefore, that, considering as I must do, the balance of inconvenience and injury which may result to one party or the other from my action on this injunction pending the litigation, the injunction

should be allowed. The public can be protected by a bond in a suitable sum, with condition to refund either to the persons who consume gas, or to the taxing district, for the use and benefit of such persons, all sums which may be charged over the rate fixed by this ordinance, in the event plaintiff's bill shall fail, and the regulation by said ordinance be sustained as valid on final hearing. It will not be difficult to thus reimburse fully each purchaser of gas for the excess which may be paid over the rates fixed by the ordinance, if finally sustained, and no serious injury can therefore result to the public, while to refuse the injunction would possibly result in the destruction of the plaintiff's business and property before this litigation can be terminated. It is to be observed that this is a bill essentially for preventive relief only, and a denial of the injunction might, in its practical effect, amount to a denial of all relief. The injunction is therefore granted, upon the execution of such bond, and, in case the amount thereof is not agreed upon by the solicitors in the case, the amount will be fixed through the aid of the clerk of this court, upon proper inquiry made by him for that purpose.

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ROSS-MEEHAN BRAKE SHOE FOUNDRY CO. v. SOUTHERN MALLEABLE IRON CO. et al.

(Circuit Court, E. D. Tennessee, S. D. March 20, 1896.)

No. 466.

1. EQUITY PRACTICE—CREDITORS' BILLS.

Bills for the foreclosure of a mortgage and as general creditors' bills were filed against the S. Co. A receiver was appointed in the first suit, and the receivership extended to the others, and all the suits were then consolidated. An auxiliary suit having been brought by the receiver to enforce a subscription to the stock of the S. Co., the defendant set up in his answer objections to the jurisdiction of the court in the original suit, on the ground that, as the consolidated bills did not show exhaustion of the legal remedy by returns of nulla bona, the cause was not one of equitable cognizance. *Held* that, even if the defendant in the auxiliary suit could raise objections to the jurisdiction of the court in the original suit, the objection was without merit, since the bills were for foreclosure as well as general creditors' bills, and simple contract creditors have the right to intervene in such suits, while it is the practice in the circuit court for the Eastern district of Tennessee to make all foreclosure suits against insolvent corporations general creditors' bills as well, in order to secure complete winding up.

2. CONSTITUTIONAL LAW—TRIAL BY JURY—SUITS IN EQUITY.

The enforcement of the liability of a subscriber to the stock of a corporation by an auxiliary suit in equity, brought by the receiver of the corporation appointed in a creditors' suit instituted upon its insolvency, does not infringe the constitutional right of such subscriber to a trial by jury.

3. CORPORATIONS—SUBSCRIPTIONS TO STOCK—CALLS.

When a corporation is insolvent, and proceedings are pending, instituted by creditors, to wind up and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balances on subscriptions to its stock.

4. SAME MISREPRESENTATIONS.

When proceedings are instituted to collect a subscription to the stock of a corporation after its insolvency and the institution of proceedings to wind

it up, the subscriber cannot defend against the claim on the ground of fraudulent misrepresentation in securing his subscription, without showing that he exercised the greatest diligence to discover the fraud and repudiate his contract of subscription.

5. **SAME—CONSTRUCTION OF CHARTERS—GENERAL ACTS.**

The rule that a grant by legislative charter is to be strictly construed, and that nothing passes by implication, applies with even greater force to articles of association organizing a corporation under general laws than to a charter granted by special act.

6. **SAME—INCREASE OF STOCK—TENNESSEE STATUTE.**

The general incorporation act of Tennessee, as adopted in 1875, provides that a corporation organized under it "may, by by-laws, make regulations concerning the subscription for or transfer of stock, fix upon the amount of capital stock, \* \* \* the division of the same into shares, the time required for payment thereof," etc. An amendment, adopted in 1883, provides that "any corporation which may desire to change its name, increase its capital stock," etc., may do so by filing a certificate, with the same formalities as its original articles of association. *Held* that prior to the amendment of 1883 no power was given by such act to corporations organized under it to increase their capital stock, and that an attempt by such a corporation to increase its stock by a by-law was of no effect, and the subscriptions to the increased stock were void.

7. **SAME—ILLEGAL ACTS—ESTOPPEL.**

When corporate stock has been illegally increased, not by a mere irregular exercise of an existing power, but by an act which the corporation was wholly without power to do, a subscriber to such increased stock is not estopped to defend an action on his subscription on the ground of the illegality, by having acted as president and manager of the corporation, and representing the stock at meetings of stockholders, whether the action be brought by the corporation itself or by a receiver acting in the interest of creditors.

Wheeler & McDermott, for receivers.  
White & Martin, for defendant Elliott.

CLARK, District Judge. The above is a consolidated cause pending in this court. Three separate bills have been filed against the defendant company as an insolvent corporation. Receivers were appointed under the first bill, and the receivership extended to the subsequent bills as filed. The bills, as now consolidated, are for the foreclosure of a mortgage on defendant's property, and as general creditors' bills, to wind up the defendant company as an insolvent corporation. The usual steps taken in such cases have been had in this. In the progress of the case, and on December 5, 1894, the receivers appointed prepared and presented to the court, Judge Key presiding, a bill against the defendant Elliott, a citizen of the state of Alabama. It is alleged in the bill (as appears to be the case) that a large balance of indebtedness exists against the corporation, after all of its other assets shall have been exhausted, and that it is necessary to collect unpaid subscriptions, and that defendant Elliott is indebted to the company for a large balance on his subscription to capital stock. This bill was presented to Judge Key, who made the following order thereon:

"File the foregoing bill or petition as a dependent and auxiliary bill in this cause, upon a proper cost bond, with security, being executed by the petitioners, and issue process as prayed for.

"Sept. 7th, 1894.

D. M. Key, Judge."

Thereupon the bill was filed, and defendant Elliott answered the same, and in his answer sets up various defenses, and among them objections to the jurisdiction of the court in the original case in which this is filed as a dependent bill. The insolvent corporation was organized under the general incorporation act of 1875, and its original or initiatory stock was fixed by by-law at \$50,000, and was subsequently and at different times attempted to be increased by resolution of the stockholders to \$70,000, again to \$80,000, and finally to \$100,000, and defendant Elliott is a subscriber to the last increase of stock from \$80,000 to \$100,000. The defendant Elliott was president and general manager of the company for the period of about 11 months, beginning in 1892 and extending into 1893. He also attended meetings of stockholders representing his stock, as well as meetings of directors. No certificate of stock appears to have in fact been issued to defendant Elliott, but his subscription is in proper form. The issues now to be disposed of arise under this bill by the receivers against Elliott, and a more particular statement of the facts and history of the case is not deemed necessary to an understanding of this branch of the litigation.

Defendant's first contention is that the court is without jurisdiction, and the point made is that the present suit is in no sense a dependent and auxiliary bill, but an independent suit. The court has, however, by express order, made it such, and this bill is filed in the original case, and such order has not been set aside or reversed, and the objection is, therefore, according to *Davis v. Gray*, 16 Wall. 204, not well taken. Moreover, the proposition that this bill is in its essential character auxiliary or ancillary to the original suit, and that the court has full jurisdiction of it as such, is fully sustained by the case of *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018; and the entire procedure in the case before Judge Key is fully sanctioned by the cases of *Davis v. Gray* and *White v. Ewing*. The defendant contends that, treated as an auxiliary bill, the court was without jurisdiction of the original bill, and that plaintiffs have no right, for this reason, to recover. Passing by the question whether the defendant can, in this dependent suit, make an objection to jurisdiction in the original case, it is clear, I think, that this contention cannot be sustained. The objection made is that the consolidated bills do not show exhaustion of the legal remedy by *nulla bona* return, and that the case is not, therefore, one of equitable cognizance. As the bills are bills for foreclosure as well as general creditors' bills, it is not perceived on what basis an attack upon the jurisdiction can rest. The court certainly had jurisdiction to foreclose the mortgages, and it was pointed out in *Hollins v. Iron Co.*, 150 U. S. 379, 14 Sup. Ct. 127, that in such foreclosure suit simple contract creditors can intervene, and assert any equity or priority in respect to the property, and secure protection in that proceeding, and it has become the well-established practice of this court in foreclosure suits against an insolvent corporation to make the suit also a general creditors' bill, for the purpose of having all liens and priorities settled, and a complete winding up and distribution of assets made. And it was decided in *Hollins v. Iron Co.*, that the objection that plaintiff had not



exhausted the legal remedy before commencing proceedings in equity must be made in limine, and, if not so made, that a court of equity is not ousted of jurisdiction; and certainly this defense, coming, as it does, in an ancillary suit, and in an answer at the hearing after the original case is well-nigh ended, is too late. And, the corporation being confessedly insolvent, it is doubtful if there is any basis in the facts of the case for this defense, aside from the legal objection to the time and manner in which it is attempted to be presented.

It is next objected that suit cannot be maintained in a court of equity in the United States court, because the demand is purely legal, and deprives the defendant of trial by jury. This contention is again met and answered adversely to defendant by *White v. Ewing*, supra, and *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, in which Mr. Justice Gray, giving the opinion of the court, said:

"It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust or settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him."

The principle is that jurisdiction of the creditors' suit and the receivership draws to such jurisdiction all litigation necessary to completely wind up the insolvent corporation, and distribute its assets legally; and it has never been supposed that the constitutional provision for trial by jury in any manner restricted or affected jurisdiction of a chancery court as it existed at the time of the adoption of the constitution. This contention is therefore wholly untenable. It is again insisted that plaintiffs cannot recover because the suit was not preceded by a call or assessment against the defendant as a subscriber, and that until this is done no right of action accrues. In a suit by a solvent, going corporation to collect subscription, and in certain suits provided by statute, this would be true; but it is now quite well settled that when the corporation becomes insolvent, with proceedings instituted by creditors to wind up and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balances on subscription. *Hatch v. Dana*, 101 U. S. 205; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Washington Sav. Bank v. Butchers' & Drovers' Bank* (Mo. Sup.) 17 S. W. 644; *Bank v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73; *Tayl. Priv. Corp.* § 703.

The defendant also sets up as a defense that his subscription to this stock was obtained under fraudulent misrepresentations as to the condition and past business operations of the company, and that the subscription is, for this reason, invalid. I am clearly of the opinion that this defense comes too late. All of the facts now known to the defendant as grounds for rescinding his contract were such as he could, at any time, have discovered by reasonable inquiry, and where the means of knowledge are open to him the ef-

fect is the same as knowledge itself; and, if the defendant could in any case make this defense after insolvency, and after institution of proceedings to wind up the corporation, it would be necessary for him to show that he exercised the greatest diligence to discover the fraud, and to promptly repudiate his contract of subscription. *Chubb v. Upton*, 95 U. S. 665; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Cunningham v. Railroad Co.*, 2 Head, 23.

The only remaining defense is that the attempted increase of stock to which the defendant became subscriber was one which the corporation was without authority to make, and that it was, therefore, illegal, and the defendant's subscription thereto void, and this presents a serious issue. Was the increase of stock, as here attempted by the resolution of the stockholders, if we treat this as equivalent to a by-law, illegal? And, if so, has the defendant, by his connection with the company as above stated, estopped himself to make this question? Whether or not the corporation has power to increase its stock by by-law, after the capital stock has been originally fixed, was a question expressly reserved by the supreme court of the state in *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030. It was decided in that case that subscription to capital stock above the amount fixed by by-laws, when that had been previously all taken, is absolutely void. The general incorporation act, under which defendant company was organized, contains the following provision upon this subject: "The corporation may, by by-laws, make regulations concerning the subscription for or transfer of stock, fix upon the amount of capital stock to be invested in the enterprise, the division of the same into shares, the time required for payment thereof by the subscribers for stock, the amount to be called at any one time; and, in case of failure of any stockholder to pay the amount thus subscribed by him at the time and in the amounts thus called, a right of action shall exist in the corporation to sue said defaulting stockholder for the same." Plaintiffs' learned counsel directs attention to the fact that "by-laws" is employed in the plural, instead of the singular, number in the statute, as indicating that more than one such by-law might be made in regard to the capital stock of the corporation, and defendant's able counsel attaches importance to the terms "fix upon the amount of capital," as indicating permanency in the original amount determined upon. As various other subjects are enumerated to be regulated by by-laws, as well as the amount of capital stock, I do not think much force is derived from this circumstance, nor do I think that the primary definition of the term "fix" is of serious consequence in this connection. Mere verbal distinctions such as these can have little influence in the determination of a question so important as the one now considered. The remainder of the context in which the words occur, as well as the entire statute upon the subject, must be taken into account, and the reasoning must be somewhat broad and practical. Prior to the incorporation act of 1875, the method of forming corporations had been by special legislative charters, in which the amount of the capital stock was definitely fixed, and publicly and easily known. A certain mode of ascertaining the real capital of the company was

thus secured to the public, and such legislation with reference to these companies gave the public definite information as to their property in much the same way that registration laws furnish information as to the condition of private property generally. When a change in the mode of establishing corporations was made,—as by act of 1875,—the previous law and its construction by the courts is to be considered in the interpretation of the new law and in determining the extent of the change. Settled legislative policy is not to be regarded as abandoned further than the terms and objects of the new legislation require.

"A controlling purpose," said the supreme court of Alabama, "as we suppose, in authorizing or in compelling the creation of private corporations under general laws, is to secure uniformity and equality of corporate powers, functions, and privileges, that all corporations of the same class, formed for like purposes, should possess the same capacities and properties, and exercise and enjoy the same franchises and privileges. Unless it was intended to work a radical change in the nature and character of these artificial beings, the mere creations of the law, and to subvert the whole theory which had prevailed in reference to them, it cannot have been contemplated that they should for themselves create power and privileges by declaration or reservation, whether the declaration or reservation is expressed in the articles of incorporation or in the constitution or by-laws ordained by the incorporators for their government. Such declarations or reservations would soon become more liberal and diverse than was the liberality and diversity of the grants of corporate power by special legislative enactment, the evil it was intended to remove." *Insurance Co. v. Kamper*, 73 Ala. 325.

In a direct grant by legislative charter the rule that the grant is strictly construed, and that nothing passes by implication, has become axiomatic in the law of corporations. And this general rule of construction applies with still greater force to articles of association organizing a corporation under general laws, such as the act of 1875. In *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 9 Sup. Ct. 409, the supreme court of the United States said:

"It is to be remembered that where a statute making a grant of property or of powers or of franchises to a private individual or a private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or of the general public. As was said in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420: 'In this court the principle is recognized that in grants by the public nothing passes by implication.' See, also, *Railroad Co. v. Litchfield*, 23 How. 66; *Turnpike Co. v. Illinois*, 96 U. S. 63. Therefore, if the articles of association of these two corporations, instead of being the mere adoption by the corporations themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated, and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation. We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte*. Their formation and execution—what shall be put into them as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become incorporators, and stimulated by their zeal for the personal advantage of the parties concerned, rather than the general good."

In harmony with this rule of strict construction, the cases are unanimous in holding that a corporation has no power to increase or diminish its capital stock, unless expressly authorized to do so. No such power can be claimed by implication. *Railroad Co. v. Allerton*, 18 Wall. 235; *Scovill v. Thayer*, 105 U. S. 143; *Insurance Co. v. Kamper*, 73 Ala. 325; *Spring Co. v. Knowlton*, 103 U. S. 49; *Kampmann v. Tarver* (Tex. Sup.) 29 S. W. 768; *Tayl. Priv. Corp.* 133.

In view of previous legislation and public policy involved in fixing permanently and definitely the amount of capital stock, so as to furnish a certain and easy mode of inquiry as to the condition of corporations, I think the conclusion is unavoidable that a corporation organized under the general law is authorized by by-law to fix only the original or initiatory capital stock of the company. It is clear that the statute does not, in terms, confer any power to either increase or diminish such stock, when once fixed, by subsequent by-law, and it has been seen that no such power can exist by implication. Indeed, the fact that with the previously well-known rule of strict construction no such power is added by apt words, furnishes an argument of much force against the existence of the power. It is impossible to think that the legislature, in view of the established law, could have intended to grant such power without doing so in suitable language. If the corporation may, by implication, increase its stock, it may with equal reason decrease the same, and so enlarge or diminish the amount of capital stock without restriction; and in the general incorporation law no notice or intimation whatever is given of the existence of such power. It is quite obvious that such a construction of the statute as this would furnish opportunity for the loosest possible methods in the business of these important and large concerns, and would open wide the door to fraudulent imposition on the public. In the case already referred to,—*Insurance Co. v. Kamper*,—the supreme court of Alabama, denying that such power could arise or exist by implication, said:

“Changes of the capital stock of corporations of this character involve changes in organization, and a displacement of the power and influence the original stockholders, or their legitimate successors, are of right entitled to exercise in the election of officers, and in the general management of the corporate affairs and business. That corporations have not an implied power to effect such change—that it can be effected only by legislative sanction—seems to be settled. *Green’s Brice, Ultra Vires*, 112; *Thomp. Liab. Stockh. par.* 115; *Lathrop v. Kneeland*, 46 Barb. 432; *Insurance Co. v. McKelway*, 12 N. J. Eq. 133; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Railway Co. v. Allerton*, 18 Wall. 233; *Scovill v. Thayer*, 105 U. S. 143.”

This is almost the exact language of the court in *Railway Co. v. Allerton*. This power of a corporation over its stock is fundamental and important. If the capital stock may be enlarged or diminished at will by the simple method of by-law, a temptation to constant change would be offered. The power would be resorted to as often as business reverses or the results of speculation might suggest. An unsuccessful concern could be thus bolstered up from time to time, and its operation extended over a period far beyond its usefulness, thereby causing greater loss to innocent creditors on the one hand and unwary subscribers to stock on the other. The only method pro-

vided by the general incorporation law, as now amended by the act of 1883 (chapter 163, § 19), by which the right to increase the capital stock, or any other corporate power, can be obtained, is by an amendment of the charter. That act, so far as it relates to the matter now under consideration, is as follows:

"Any corporation which may desire to change its name, increase its capital stock, or obtain any powers granted herein, shall have the right to do so, by the board of directors of said corporation copying said amendment, and making an application in these words:

"State of Tennessee—Act of Incorporation.

"We, the undersigned, comprising the board of directors of (here insert the name of the corporation), apply to the state of Tennessee, by virtue of the general laws of the land, for an amendment to said charter of incorporation, for the purpose of investing said corporation with the power (here state the clause in the general law aforesaid, which is desired as an amendment, or if it be simply to change the name, so state the fact).

"Witness our hands the ——— day of ———.

"(To be signed by the directors.)"

"This instrument shall be probated or acknowledged as hereinafter provided, and the certificate of registration, given by the secretary of state, under the great seal of the state, shall complete the amendment to said act of incorporation, and the validity thereof shall not, in any legal proceedings be collaterally questioned."

This statute is itself a legislative interpretation that the power to increase the capital stock did not exist under the previous law of 1875, for otherwise this statute would have been useless. And I think it is significant, too, that when the attention of the general assembly was thus deliberately directed to this point, it was unwilling to clothe such corporations with the power to increase or decrease their capital stock, except in a manner which was equally public, and attended with the same formalities, as was the original charter. It is obvious, I think, that the general assembly fully recognized the evil of leaving it within the power of the corporation, after having fixed upon the amount of its capital stock, to constantly increase and diminish the same, thereby rendering it impossible for the public to know anything of the amount of such capital stock. This act maintains the policy of previous laws upon this subject, and gives reasonable permanence and publicity to the amount of capital stock of the company. I am therefore clearly of opinion that the attempted increase of stock in this case, to which the defendant Elliott became subscriber, was illegal, and his subscription void, conferring on him no right, and subjecting him to no liability.

It remains only to determine whether or not defendant has by his conduct precluded himself from making this defense. In considering this question, I have been fully mindful of the distinction as it affects the case between a suit at the instance of the creditors and one by the company itself. It is clear, I think, that in a suit by the company to collect defendant Elliott's subscription, it would be open to him to make this defense. This suit is, however, in the interest of creditors of the corporation, and does this change the result? I think the case of *Scovill v. Thayer*, 105 U. S. 143, answers this question in the negative. That was a suit by creditors to recover an unpaid balance on subscription, and the defendant in

that case had attended the meeting at which it was voted to issue the illegal stock, had received and held a certificate for such stock, and the officers of the company had publicly represented its capital to be equal to the amount of both the authorized and unauthorized capital stock. Plaintiff's counsel relies on a number of cases which hold that where the power to issue the stock exists an irregular exercise of this power is such defect as may be waived, and that defendant may be estopped from making such defense. These cases, however, have no application to an increase and subscription where there was an entire want of power. The distinction is that, between the existence of a power irregularly exercised and the absolute want of power to do the act in any manner whatever, in which latter case the act is absolutely void, is incapable of ratification, and is not cured by estoppel. In this case not even an abstract power to increase its stock resided in this corporation without amendment of the charter, and a right to obtain such power by amendment of its charter was not the power itself, any more than the right to obtain an original charter would be the powers under the charter when obtained. The right to obtain the power and the power when obtained are clearly distinguishable. An amendment of the charter must be registered just as the original, and until this is done is subject to the same objection which renders void a defectively registered charter. *Anderson v. Railroad Co.*, 91 Tenn. 44, 17 S. W. 803. It is true that *Scovill v. Thayer* was distinguished, and its limits stated, in *Banigan v. Bard*, 134 U. S. 294, 10 Sup. Ct. 565, and *Handley v. Stutz*, 139 U. S. 424, 11 Sup. Ct. 530, but the doctrine of the case has not been questioned, and it has become a leading authority. It is also true that in that case there was an express statutory restriction on the amount of the capital stock, and that the increase was above this limit; but where the power is wanting it can make no difference in the effect whether this lack of power results from an express limitation or a limitation by implication, for, as the court in *Marbury v. Land Co.*, 10 C. C. A. 401, 62 Fed. 342, said:

"It is well-settled law in this country and in England that a corporation is impliedly prohibited from doing anything which it is not expressly permitted by its charter to do, or which is not fairly incidental and necessary to the enjoyment of that which is expressly permitted."

The case of *Scovill v. Thayer* was cited with approval in *Cartwright v. Dickinson*, and was followed in *Insurance Co. v. Kamper*, 73 Ala. 325, where this subject is much considered in an able opinion by Chief Justice Brickell. And in the recent case of *Kampmann v. Tarver* the cases of *Insurance Co. v. Kamper* and *Scovill v. Thayer* are expressly approved, and their doctrine applied, by the supreme court of Texas; *Gaines, C. J.*, saying:

"The opinions in these two cases are well considered, elaborate, and are well supported by the numerous authorities therein cited. We think they render any further discussion of the question on our part unnecessary." 29 S. W. 768.

And see *Thomas v. Railroad Co.*, 101 U. S. 71; *Mallory v. Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52.

It is sufficient, therefore, without pursuing the discussion further, to say that I am of opinion defendant Elliott may make the defense that his subscription to this increase of stock is void, and that this defense is a complete answer to the suit. The court has treated the method of increasing the stock in this case as equivalent in effect to a by-law, and rested the ruling on the entire want of power; for, if the power existed, the exercise by resolution instead of formally adopted by-law would be an irregular exercise of power which it is believed would, on the facts of this case, be cured by estoppel. The result is that the bill is dismissed, and plaintiffs will pay the costs of the suit out of the funds in their hands to the credit of the receivership.

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WHEELER v. WALTON & WHANN CO.

(Circuit Court, D. Delaware. March 19, 1896.)

No. 157.

INSOLVENT ESTATES—COLLATERAL SECURITIES.

When a creditor of an insolvent estate holds collateral securities for his debt, he is not required to exhaust his remedy upon such securities, nor to surrender them to the assignee or receiver administering such assigned estate, before receiving a dividend therefrom.

Bradford, Vandegrift & Byrne, for receivers.

W. C. & A. W. Spruance, for the bank.

WALES, District Judge. By a decree of this court, made on June 5, 1894, the defendant company was declared to be insolvent, and on the same day receivers were appointed to take charge of their affairs. The receivers are now ready to make a pro rata distribution among the creditors of so much of the assets of the company as have been collected up to the present time, and as are applicable for that purpose; but, before making such distribution, they ask the instruction of the court on exceptions which have been filed to the claims of such creditors as hold collateral securities for the payment of the debts due to them. The case presented for the special consideration of the court is that of National Bank of Wilmington and Brandywine, which at the time of the appointment of the receivers was a creditor to a very large amount, for which it held collateral security, consisting chiefly of bills receivable. By far the greater portion of these securities have been paid and the moneys received from them have been credited to the company on the account between it and the bank, leaving a balance now due to the bank of \$5,912.37. The securities still remaining in the hands of the bank have no market value, and have not been appraised. Their face value is equal to the amount on which the bank is claiming a pro rata dividend. The receivers object to the payment of the bank's claim until it shall have exhausted its remedies against the collateral securities which it still holds, or until it shall surrender these securities to the receivers, to be added to the general fund for distribution among all the creditors, and without giving any undue advantage to one class of creditors over another. The bank promises to use all diligence in collecting the unpaid securities, and in