

by a general law affecting all municipal corporations, or may be all of a class.
* * *

In *City of Stockton v. Western Fire & Marine Ins. Co.*, 73 Cal. 624, 15 Pac. 314, there seems to be a modification also of *Desmond v. Dunn* in part. The court in that case say:

"We do not mean to imply that the legislature, even by a general law, can substitute an entirely new charter for an old one, without the consent of the people of the locality. To that extent we understand the decision in *Desmond v. Dunn*, supra, to be the law."

In passing, this may be said to be an inconsistency, because, if a charter can be amended by general laws, what is the limit of change? We are not now concerned with this apparent or real inconsistency. The case of *People v. Henshaw*, 76 Cal. 437, 18 Pac. 413, affirms the power over corporations formed prior to the constitution by the legislature by general laws.

There are some other objections to the legality of the ordinances and the issue of the bonds, which I think are not well taken. Upon these views it follows that the demurrer must be sustained. As I have said, this is a somewhat crude review of the cases, because I have not had the time to put it in proper shape, but the essence of the cases has been properly given.

Let an order be entered sustaining the demurrer and granting the complainant 10 days within which to amend the bill.

LOUISVILLE TRUST CO. v. STOCKTON.

(Circuit Court of Appeals, Fifth Circuit. May 26, 1896.)

No. 445.

CONVERSION—TITLE—STOCK HELD IN TRUST.

Where stock is transferred to a trustee under a contract by which he agrees to hold and vote it for the benefit of two other persons and himself, jointly, the manner of voting, in case of disagreement, to be settled by arbitration, and to dispose of it when and as agreed upon by himself and one of the other parties, such other parties have no such title or right of possession of the stock as would give either of them a right to bring an action against the trustee for conversion upon his refusal to transfer to such party a third of the stock, nor can any incidental expressions in the contract, consistent with or indicating a different title, extend the title beyond what is clearly stated.

In Error to the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee and C. D. Rinehart, for plaintiff in error.

A. W. Cockrell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PARDEE, Circuit Judge. This was an action at law, begun by Horace Scott, for the conversion of 130 shares of the capital stock of the Jacksonville Ferry Company. Other stock in another cor-

poration was also claimed to have been converted, but no evidence whatever was offered to support the claim for this other stock.

The bill of exceptions shows the following evidence introduced on the trial:

(1) The minutes of a stockholders' meeting held March 10, 1893, at which meeting J. A. Russell, H. H. Buckman, and Horace Scott were present, and in which Horace Scott, as president, called the meeting to order; and in which it is recited that "J. A. Russell and Horace Scott had, by a certain agreement with Archer Harmon, transferred three hundred and ninety shares of the ferry stock owned by them; and that said Harmon having stated that he would transfer a portion of said stock to Thomas P. Denham and J. N. C. Stockton, the said Harmon, Denham, and Stockton were admitted as stockholders," and thereupon Harmon, Stockton, Denham, and Buckman were elected directors, etc.

(2) A contract, executed same day, March 10, 1893, by Harmon and Stockton, containing the following:

"That out of the capital stock of said company received by the said Archer Harmon from the said Scott, Russell, and Yeomans, and such other stock as may receive in any other way, an amount equal to 51 per cent. of the total capital stock of said company shall be transferred and assigned to J. N. C. Stockton, as trustee, to be held by him in the following manner, to wit: A one-third interest to be issued to said Stockton, as trustee, to be voted by him for the joint interests of the joint owners thereof, and said Stockton hereby, as mutually agreed and directed by the owners of said stock, to wit, the said Harmon, Scott, and Stockton, and in the event that the said Harmon, Scott, and Stockton shall fail to agree as to how said stock shall be voted, then the parties hereto agree to submit the cause of disagreement to arbitration, the said Harmon choosing one arbitrator, the said Stockton one, and the two arbitrators so chosen together selecting the third; and the parties hereto agree to abide by the decision of said arbitrators, and the said Stockton agrees to vote said stock in accordance with such decision. The said stock to be held intact until such time as the said Stockton and Harmon shall mutually agree to dispose of the same."

(3) Archer Harmon's certificate for 390 shares, and indorsement thereon, dated same day, March 10, 1893, as follows:

"For value received, I hereby assigned and transferred unto J. N. C. Stockton, Archer Harmon, and Horace Scott, in equal proportions, 390 shares of the capital stock named in the within certificate, and do hereby constitute and appoint J. N. C. Stockton and Archer Harmon true and lawful attorney, irrevocable, for and in my name and stead, but to transfer and set over all or any part of said stock, and for that purpose to make and execute all necessary acts of assignment, and transfer and one or more persons to substitute with like full power, as provided in contract dated March 10th, 1893, between Archer Harmon and J. N. C. Stockton.

"Dated March 10, 1893.

Archer Harmon."

(4) Letter of Bisbee & Rinehart to John N. C. Stockton, dated March 3, 1894, demanding the issue by him, as secretary, to Scott, of 130 shares of stock,—that is, of stock of the face value of 130 shares of stock therein,—saying, "We are advised that said company issued to you, as trustee, a certificate of stock which includes that amount of stock belonging to Horace Scott."

(5) Stockton's reply, stating that the stock so issued to him "in trust for Harmon, Scott, and myself is, by the terms of the trust under which it was issued to me, required to be held by me in my

name, to be voted as might be agreed upon between myself and Archer Harmon, and in event said parties could not agree as to how the stock was to be voted the arbitrators were to be appointed to determine how it should be voted. I cannot comply with your request without violating the trust under which the stock was to be issued to me."

(6) A statement of a witness, Buckman, that Horace Scott and one Yeomans and Russell bought all the stock of the Jacksonville Ferry Company in March, 1892. The defendant, to rebut this, introduced in evidence an indenture executed March 9, 1893, between Scott, Yeomans, and Russell of the first part and Harmon of the second part, containing this provision:

"Third. And the said parties of the first part, for the consideration aforesaid, hereby further bargain, sell, and transfer unto the said party of the second part three hundred and ninety shares, of the par value of thirty-nine thousand dollars, of the capital stock of the Jacksonville Ferry Company, and the said parties of the first part hereby agree to deliver the said last-mentioned stock to the party of the second part, and make any and all necessary transfer thereof which may be necessary to transfer and assign the same to the said party of the second part, his legal representatives or assignees. Said parties of the first part are to retain three hundred and sixty shares, of the par value of thirty-six thousand dollars, of capital stock of the Jacksonville Ferry Company, as their own property."

There was other documentary evidence offered, but it is not necessary to recite it, because it throws no additional light upon the title of Scott to the 130 shares of stock sued for, nor upon the right of possession under which Stockton held the same. Upon the evidence submitted the trial court directed a verdict for the defendant. A motion for a new trial was made, whereupon the judge, among other reasons for refusing the same, said:

"There does not appear to be any difficulty in determining from this record the title of the plaintiff's testator to this stock. It was purchased by Russell, Scott, and Yeomans, sold and transferred by them by the agreement of March 9th to Harmon, and on the 10th transferred to Stockton, the defendant herein, in trust for Harmon, Scott, and Stockton, to hold it intact, vote it as directed, divide the profits between these three, but only to dispose of it when he and Harmon could mutually agree so to do. All the title that Scott had in it was to have a voice in determining how it should be voted, and an equitable right to one-third of the profits. This was no such title or right of possession as would give him the right to bring an action for trover and conversion. The fact that he remained upon the board of officers subsequently to these agreements cannot be considered as showing any other title than is expressly shown, as the resignation of the offices held by Scott, Russell, and Yeomans was provided for only to take place as soon as requested by Harmon, but in the meantime they were to assist in calling and holding any and all meetings of directors or stockholders of the companies. Nor can the implication of ownership which may possibly be understood to arise from the language of the third paragraph of said agreement where it speaks of 'the owners of said stock, to wit, the said Harmon, Scott, and Stockton,' extend the title beyond what has been clearly stated. It is impossible in my view of the case to find any evidence of title in Scott, the testator of the plaintiff, sufficient to submit to a jury. I find no error in my previous instructions, and the motion for a new trial is refused."

We concur in this view of the case. Judgment affirmed.

BEATTY v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Ninth Circuit. June 1, 1896.)

No. 261.

1. ASSESSMENT INSURANCE—NONPAYMENT OF CALLS—WAIVER—QUESTION FOR JURY.

Plaintiff held a policy of insurance on the life of one S., a debtor to plaintiff, issued by defendant, an assessment insurance company. The policy contained an express condition that, if any assessment was not paid when due, the policy should be void, and all previous payments forfeited. In an action on the policy it appeared that an assessment was made, which became due and payable May 1, 1889, and that plaintiff, on May 3d, tendered to the defendant's agent the amount thereof, which the agent refused to accept, without consultation with the company, and after such consultation refused to accept unless a certificate of health was furnished. Plaintiff testified that he was unable to draw the money to pay the call from the bank on May 1st, because that day was a holiday, and that on the 2d he could not find defendant's agent, though he looked for him; that he had paid several previous calls to the company, after maturity, though in every case but one he furnished a health certificate; that he had had a conversation with the secretary of the defendant, at its home office, in which the secretary said that the part of the country where plaintiff resided was so distant that they were not particular about time; that he supposed, from their previous dealings, that the company would be willing to accept the assessment after May 1st. He also testified that after the refusal of the agent to accept the amount due May 1st, except upon conditions, he received notice of a subsequent assessment, in the usual form of such notice, requesting payment, and stating that the sending thereof should not be held to waive any forfeiture for nonpayment of previous calls, and that he tendered payment of the amount of such call. *Held*, that the question whether a course of dealing was shown which would estop the defendant to claim a forfeiture, because the call of May 1st was paid a few days too late, and whether any forfeiture which had occurred had been waived by the levy of the second assessment, were for the jury, and it was error to direct a verdict for the defendant.

2. SAME.

If, after a member of an assessment insurance company has become delinquent by failure to pay a call, the nonpayment of which renders his policy subject to forfeiture, a new assessment is levied upon him, with full knowledge of such delinquency and nonpayment, this will constitute a waiver of the forfeiture, even though the notice of the assessment contains a warning that the sending thereof is not to be held to waive a forfeiture.

Error to the United States Circuit Court for the Northern District of California.

This is an action brought by George W. Beatty, the plaintiff in error, to recover from the defendant the sum of \$4,000 on a certificate or contract of insurance upon the life of Edwin L. Smith, a debtor of the plaintiff. The certificate of insurance declares that:

"In consideration of the application for this certificate of membership, * * * and in further consideration of the admission fee paid and of the dues for expenses to be paid on or before the sixth day of May in every year during the continuance of this certificate, and of the further payment of all mortuary assessments, payable at the home office of the association in the city of New York within thirty days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association * * * does hereby receive Edwin L. Smith, of San Francisco, * * * as a member