

Mobile, but included the larger portion of the inhabitants and taxable property of the former corporation. In an action brought against the port of Mobile to recover upon the bonds that had been issued by the former municipality, the court held that the port of Mobile was the legal successor of the city of Mobile, and liable for its debts, saying: "Where the legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name, for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and, if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new."

This is also the doctrine in the recent case of *Shapleigh v. City of San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957.

It follows from these authorities that the allegations contained in paragraphs 53, 54, 55, and 56 of the answer are immaterial and irrelevant, and should be struck out.

The remaining paragraphs of the second affirmative defense, namely, a portion of paragraph 29 and the whole of paragraph 46, to which the motion to strike out is directed, are objected to as presenting only issues of law. Standing alone, these averments of the answer are subject to that objection, but, read in connection with the other allegations respecting the proceedings taken in issuing the bonds of the district, they may serve the purpose of directing the attention of the court to the particular constitutional provisions which it is claimed have been violated in the proceedings. The motion to strike out the matter here indicated will therefore be denied. Let an order be entered in accordance with this opinion.

MARQUAND v. FEDERAL STEEL CO.

SCHAEFFER v. SAME.

(Circuit Court, S. D. New York. July 19, 1899.)

1. CORPORATIONS—TIME FOR DECLARING DIVIDENDS—NEW JERSEY STATUTE.

A corporation organized under the corporation act of New Jersey, section 47 of which provides for the distribution of all accumulated profits of the corporation, less the amount reserved for working capital, in dividends in January of each year, "unless some specific day or days for that purpose be fixed in its charter or by-laws," and whose charter provides that dividends on its common stock shall be declared after the close of any fiscal year, has no power to declare such dividends previous to the close of a fiscal year.

2. SAME—DIVIDENDS ON PREFERRED STOCK—POWER OF DIRECTORS.

Such statutory provision applies as well to dividends on preferred stock as to those on common stock; and, while the statute (Revision 1896, § 18) permits the payment of dividends on preferred stock quarterly or semi-annually, such provision does not affect the requirement that the specific day or days for declaring such dividends must be fixed by the charter or by-laws, and, where they are not so fixed, the directors have no power to declare quarterly dividends on preferred stock on days selected in their discretion, nor can the charter vest them with such discretionary power.

These were suits in equity for injunctions.

Lamb & Voss (Joseph F. Daly, of counsel), for complainants.

Stetson, Jennings & Russell (Charles MacVeagh, of counsel), for defendant.

THOMAS, District Judge. The questions for decision are these: (1) May the defendant corporation declare and pay quarterly dividends upon its preferred stock upon days selected by the directors, or must "some specific day or days for that purpose" be fixed in its charter or by-laws? (2) May dividends be declared upon the common stock previous to the close of the fiscal year? The charter itself provides that the dividend upon the common stock shall be declared "after the close of any fiscal year," and thereby accords with the general time fixed by the statute soon to be noticed. The provision is plain, and no attempted construction can diminish its simple and direct authority. The solution of the question relating to the preferred stock is not difficult. The inquiry does not relate to the capacity of the directors to determine whether sufficient profits applicable to dividends have been received. That is uncontroverted. The directors have undertaken to select the months and days when the dividends for the year 1899 shall be paid. If the directors have the ability to do this, they have capacity pursuant to their will to vary the time of payment in different years. But it is considered that the statute (section 47, Corporation Act, N. J.) requires that fixed times for making such payments shall be embodied in the charter or by-laws, and that in default of such designation of certain days in either the charter or by-laws the declaration and payment of dividends shall be made, as provided by the statute, during the month following the close of the fiscal year. Section 47 provides:

"The directors of every corporation created under this act shall in January in each year, unless some specific day or days for that purpose be fixed in its charter or by laws, and in that case, then on the days so fixed, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand: provided that the corporation may in its certificate of incorporation or in its by laws give the directors power to fix the amount to be reserved as a working capital."

One obvious intendment of the statute is to publish to stockholders or proposed stockholders the fact that the profits shall be divided at appointed time or times, and that such time shall be uniformly in the months of January, unless the charter or by-laws designate "some specific day or days for that purpose." Full power of selection is conferred upon the corporation, but such power is not confided to the varying discretion of the directors. The corporation is limited only in its method of establishing and publishing such days. "Embody the days in the charter or by-laws,"—that is the single qualification of power. But the learned counsel for the defendant urges (1) that section 47 is not applicable to preferred stock; (2) that the section does not negative the power of the directors to declare and

pay dividends upon any days selected by them; (3) that section 18 (Revision 1896) permits quarterly payment of dividends upon preferred stock; (4) that the charter gives the directors power at will to declare dividends on the preferred stock. Section 47 commands that the "whole" surplus profits, less the amount reserved, shall be distributed to stockholders. Certainly it was not intended to limit the payment to the common stockholders. The second contention is equally untenable. The claim there is that the object of the section is to compel a distribution in January, if some profits then remain undivided. That may be one purpose of the section. But does the section intend that the directors may divide the profits on any days they prefer previous to January? What, then, is the use of the words "unless some specific day or days," etc.? Clearly, the section does not intend that the distribution may be made on any days selected by the board of directors, and, if not so made, that the surplus profits shall be distributed during the month of January, or "on some specific day or days" fixed in the charter or by-laws. Such a construction renders the section shapeless and meaningless. Nor does section 18 impair the restraint imposed by section 47. Section 18 permits payment of dividends upon preferred stock quarterly, semiannually, or annually. There is no contrary contention. But who shall fix the dividend days,—the directors or the charter or by-laws? Section 47 states that the designation of days must be made in the charter or by-laws. The two sections are entirely harmonious and helpful. The last contention is that the charter provides that "the preferred stock shall be entitled, out of any and all surplus net profits, whenever declared by the board of directors, to noncumulative dividends at the rate of, but not exceeding, six per cent. per annum," etc., and that this provision empowers the directors to select the dividend days. It is palpable that the provision intends to declare the rights of preferred stockholders, and not to endow the directors with power to declare dividends at their pleasure. But assume otherwise; who placed the provision in the charter? The incorporators. May incorporators, by inserting such a provision, nullify the commands of section 47? The matter does not admit of discussion. It is finally objected that the directors cannot be restrained, since by their act, found to be illegal, the title of the dividend fund has vested in the stockholders according to their respective holdings. But shareholders acquire interests in dividends when lawfully declared. This court will not withhold its hand to prevent unlawful action on the part of directors until it can ascertain and bring within the influence of its decree the proposed beneficiaries of the wrongful act. It will be sufficient to enjoin a shareholder when he shall venture to participate in the unauthorized act of the directors, by seeking to obtain some portion of the fund attempted to be divided. It results from the foregoing view that the injunction must be continued.

QUIN v. EARLE.

(Circuit Court, E. D. Pennsylvania. August 9, 1899.)

No. 8.

1. BANKS—INSOLVENCY—RECOVERY OF DEPOSIT FROM RECEIVER.

To authorize the recovery of a general deposit from the receiver of an insolvent bank on the ground that the bank was insolvent, and known to be so by its officers, when the deposit was received, and that the fraud authorized a rescission of the contract by the depositor, the thing deposited, or its proceeds, must be capable of identification in the hands of the receiver, or it must appear that the funds coming into his hands were increased by that amount.

2. SAME—PROOF OF FRAUD IN RECEIVING DEPOSIT—KNOWLEDGE OF INSOLVENCY BY OFFICERS.

To constitute fraud on the part of a bank in receiving a deposit when insolvent, which will authorize a rescission by the depositor, and a recovery of the deposit from a receiver subsequently appointed for the bank, the officers of the bank must have known or believed that it was insolvent at the time the deposit was received; and such knowledge cannot be presumed, but must be proved. The mere fact that the bank was known by the officers to be in an embarrassed condition is not sufficient to establish fraud.

This was a suit in equity against the receiver of an insolvent national bank to recover the amount of a deposit alleged to have been fraudulently received by the officers of the bank with knowledge of its insolvency.

E. Hunn Hanson, for complainant.

Asa W. Waters and W. H. Addicks, for respondent.

GRAY, Circuit Judge. This suit was brought to recover \$3,000, with interest from February 16, 1898 (date of demand from receiver), on the ground that when deposited by the complainant, on the 22d of December, 1897, it was such a fraud on the part of the bank to receive it that it did not become the property of the bank, nor was the relation of debtor and creditor between it and the complainant created. The bill was filed March 23, 1898, and alleges: (1) That pursuant to the national banking act of June 3, 1864, and of its supplements, there was incorporated and organized the Chestnut Street National Bank on June 14, 1887, which from that time until December 22, 1897, conducted its business in the building No. 721 Chestnut street, Philadelphia. That for more than eight years the complainant was a depositor in the bank, and that from January 13, 1891, to his death, February 27, 1898, William M. Singerly was its president, and exercised supervision over its business. (2) That on December 22, 1897, and for some days prior, the bank was hopelessly insolvent, in a great measure brought about by the irregular dealings of its president, and on December 22, 1897, it was unable to continue business a day longer. This was known to its president, who on the date last aforesaid was in the bank building, and knew its business was so conducted that it represented solvency. That the complainant was ignorant of this insolvent condition, and was not informed