S. G. SALEEBY for THE SALEEBY BROTHERS CORPORATION, Appellant, *v.* ELI G. HAIKAL, a Shareholder of THE SALEEBY BROTHERS CORPORATION, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 1, 1961. Decided December 15, 1961.

1. The fundamental principle upon which all complaints, answers or replies are to be constructed is that of giving notice to the other party by serving copies thereof simultaneously with the filing of said pleadings thereby affording notice and time to respond.
2. The failure of a party to produce a dispatch book to prove that a copy of an amended answer was duly served on the opposing party is ground for dismissal of the answer.
3. Where an answer has been dismissed and the defendant placed on bare denial of facts alleged by the plaintiff, the defendant is barred from introducing affirmative matter.
4. Corporate dividends may ordinarily be properly paid only out of profits, except upon dissolution of the corporation.

Appellee filed a bill in equity to compel the appellant board of directors to declare dividends on shares of the corporation of which appellee claimed to be a shareholder and director. The court below decreed an award which, upon appeal, the Supreme Court *reversed and remanded.*

Ephraim Smallwood for appellant. *P. Amos George* for appellee.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

As revealed by the record certified to this Court, the appellee in the above-entitled cause filed a petition in the equity division of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, against Saleeby Brothers, Inc., which petition was entitled: "Bill in Equity for Declaration of Dividends." The reasons underlying the

institution of this action by appellee, as gleaned from the record, may be succinctly stated as follows:

In a letter dated May 30, 1960, addressed to the appellants, the appellee solicited certain basic information relative to the operation of the corporation. More specifically appellee requested a statement covering the years 1957 to 1959 inclusive, and a complete list of the corporation's activities reflected in whatever avenues the corporation had embarked upon for progress and success; and finally he indicated his desire for the declaration of dividends. The corporation, through its legal representative, replied to the letter of appellee referred to, *supra,* by giving the said appellee to understand that he did not have a share in the corporation.

In answer to a question on cross-examination, appellee said:

> "I worked for Saleeby Brothers since 1948; after I finished my first two years, I wanted to go into business of my own. Saleeby Brothers offered me a percentage of their profit to keep me with their company. When we formed the corporation, my share of profit was due me. They offered me shares in the Saleeby Brothers Corporation equal to the amount that was due me. I accepted the proposition."

The facts stated and embraced in this answer of appellee as quoted, *supra,* constitute the foundation of this action.

Pleadings progressed as far as respondents' rejoinder and rested. Law issues having been duly disposed of, which resulted in the case being ruled to trial on bare denial, and appellants' answer having been dismissed, His Honor, John A. Dennis, presiding over the Circuit Court of the Sixth Judicial Circuit, Montserrado County, called for the hearing of this cause. After hearing evidence based upon the facts set out in the petition, Judge Dennis rendered a final decree granting the petition, and order-

ing that dividends be declared and paid to the petitioner in the sum of $46,000 within a period of not less than ten days from the effective day of the final decree.

The appellants excepted to this final decree, and having prosecuted this appeal according to law, have brought this matter for review and final adjudication by this Court of last resort on an approved bill of exceptions containing eight counts, which we shall pass upon in the order presented with the sole exception of Count "5," which we do not consider worthy of attention. The first three counts read as follows:

"1. Because respondent says that His Honor, Judge Findley, presiding over the September term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, did, on November 17, 1960, in ruling on the law issues in this case, abate the answer of respondent because, according to him, counsel for respondent refused to produce the dispatch book to satisfy the court that the answer was simultaneously served on the petitioner on the same day it was filed, but contradicted himself when he refused on the ground that he would prefer proving his allegation of the service of said amended answer by the dispatch as aforesaid.

"2. And also because Judge Findley, further ruling on the law issues in the sixth paragraph thereof, said: 'The court in passing may, however, state and observe that Rule 15 of the Circuit Court Rules referred to attaches no penalty for failure to make the simultaneous service as mentioned, and under law extant cannot cause a pleading to be inoperative if there is appropriate objection made by the party pleading to an attack in the form of the reply,' yet overlooking Count '1' of the rejoinder which is in the same tenor and with more effect than Count '1' of the reply; and since

there is no penalty for failing to serve at the same time when filed, the answer of the respondent should not have been abated.

"3. And also because His Honor, Judge Findley, in ruling on the law issues said: 'In view of the failure and refusal of counsel for respondent to bring up the dispatch book to clarify the mind of the court, we have to conclude that, though the amended answer was filed with the clerk on October 3, 1960, within time, yet it was not served on petitioner until October 5, 1960; for surely in the absence of the dispatch book or a receipt showing the delivery of the answer to the petitioner, Rule 15 of the Circuit Court Rules has not been substantially complied with.' Now let us see what the respondent has said in his rejoinder as to Count '1' of the reply. In Counts '1' and '2' of the rejoinder, respondent charges the reply with being filed late as aforesaid, and it is quite clear, and I reiterate, that the deliberate failure of respondent to show a receipt of the service or produce his dispatch book showing said service proves beyond doubt that the amended answer was not served simultaneously.' The Court should therefore overrule Counts '1' and '2' of the rejoinder and sustain Count '1' of the reply abating the answer for having been filed against the spirit and intent of Rule 15 of the Circuit Court Rules and 1956 Code, tit. 6, § 227."

The fundamental principle upon which all complaints, answers or replies should be constructed is that of giving notice to the other party by serving copies thereof simultaneously with the filing of said copies, thereby not only giving the required legal notice to the opposite party of whatever may be the allegations or averments therein contained, but that the statutory time for responding to said pleading may be amply enjoyed by the opposite

party. Defendant's failure to produce his dispatch book to prove that a copy of his amended answer was duly served on his opponent as the law directs is an incurable legal blunder. Counts "1" to "3," inclusive, of the bill of exceptions are hereby not sustained.

We shall take together Counts "4" and "6" of the bill of exceptions in which counts respondent-appellant complains of the trial judge sustaining objections to questions put to a witness on the stand, and which counts we quote hereunder, for the benefit of this opinion, as follows:

> "4. And also because, during the trial of this case, petitioner having testified that he was offered shares for alleged offer of a percentage of the profits of a company of which he was not a partner, the following question was put to him on cross-examination: 'I presume that you have in your possession some document showing the alleged offer of profits of Saleeby Brothers Company which you alleged was used for the payment of the shares. Am I correct?' which Your Honor did not permit the petitioner to answer based on the objection of the petitioner's counsel as soliciting matters of an affirmative nature, and to which ruling the respondent excepted.
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> "6. And also because on the direct examination of respondent the following question was asked by his counsel: 'Please say, if you know, what disposition has been made of the number of shares he subscribed to as a result of his failure to pay for them?' This question was also objected to as soliciting affirmative matter and sustained by Your Honor, which was excepted to by respondent."

The answer having been dismissed and the respondent-appellants having been placed on bare denial of the facts stated in petitioner's petition, the said appellants were precluded from propounding questions tending to elicit

affirmative matter. This unfortunate situation legally deprived respondent-appellants of the right guaranteed by statutory provisions controlling pleadings by party litigants. Therefore Counts "4" and "6," being unmeritorious, are hereby not sustained.

Count "7" of the bill of exceptions complains of the trial judge as follows:

> "7. And also because Your Honor on February 8, 1961, after hearing evidence and argument on both sides, handed down a final decree and said, among other things: 'Whatever is written cannot be legally overcome by oral testimony.' Articles VII and VIII of the corporation further establish that the petitioner was a member of the board of directors, as also a shareholder, or otherwise, the issue that forces itself in this final decree is the failure of the respondent to have taken any step contrawise in keeping with law controlling payment for stock. (1956 Code, tit. 4, § 10.) Nowhere in any of the articles mentioned above, or for that matter, in the entire certificate, is it stated that the petitioner is a shareholder but rather it is stated that the petitioner is a *subscriber of shares.* Further, the issue controlling the payment of shares was never raised; but nevertheless, respondent attempted to show to the court that the law in this respect had been followed when the chairman of the board was asked the question referred to in Count '6' of this bill of exceptions, which question was not permitted by Your Honor to be answered."

Taking recourse to the above-mentioned Count "7" of the bill of exceptions, we find that the decree relative to Articles VII and VIII further establishing that the petitioner was a member of the board of directors, as also a shareholder is fully borne out and upheld by the said Articles VII and VIII which, for the benefit of this opinion, we quote as follows:

"ARTICLE VII

"The number of directors of the corporation shall be four, who shall be vested with the power of management of the corporation."

"ARTICLE VIII

"The names and post office addresses of the first board of directors who, subject to the provisions of this certificate of incorporation, by-laws, and the hereinbefore mentioned act, shall hold office for the first year of the corporation's existence, or until their successors are elected and have qualified, are as follows:

Names	*Post Office Addresses*
Elias G. Saleeby	P. O. Box 137, Monrovia, Liberia
Sleiman George Saleeby	P. O. Box 137, Monrovia, Liberia
Eli G. Haikal	P. O. Box 137, Monrovia, Liberia
Charles Saleeby	P. O. Box 137, Monrovia, Liberia"

We refer to the following statute:

"Subscriptions to the shares of a corporation shall be paid at such times and in such installments as may be provided in the contract of subscription, or, in the absence of such provisions in such contract, as the board of directors may by resolution require." 1956 Code, tit. 4, § 10.

Upon a careful perusal of the articles of incorporation referred to, *supra,* we observe no condition therein contained prescribing the way and manner whereby subscription and payment of shares may be made, or penalty assessed for neglect or failure to make the necessary settlement or payment therefor, at any specified time. Nor is there any resolution promulgated by the board of directors relative to same.

"When an official act has been done which can only be lawful and valid by the doing of certain preliminary acts it will be presumed that said preliminary acts

have been done." *Diggs* v. *Ferguson,* 2 L.L.R. 397 (1921), Syllabus 2.

This supports the contention of appellee, in view of the fact that the articles of incorporation and the certificate of the notary public attest this fact, and that appellee's name appears on the face of these two instruments as a shareholder and member of the board of directors of the Saleeby Brothers Corporation, Monrovia, Liberia, as one of the original parties of the execution thereof, as also the articles of incorporation duly probated and registered according to law. We deem it expedient for the benefit of this opinion to quote the notary public's certificate, which reads, word for word, as follows:

"REPUBLIC OF LIBERIA)
MONTSERRADO COUNTY)

"Notary Public Certificate

"On this 31st day of May, 1957, before me personally came Elias G. Saleeby, Sleiman George Saleeby, Eli G. Haikal, Charles G. Saleeby, Richard G. Haikal and David G. Saleeby, to me known and known by me to be the individuals described in, and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same for uses and purposes therein set forth.

"[Sgd.] ROBERT G. M. AZANGO,
Notary Public, Montserrado County.

"Facsimile Copy:
RAYMOND A. HOGGARD,
Acting Clerk of the Civil Law Court."

In Count "8" of the bill of exceptions appellant complains of the trial judge as follows:

"8. And also because Your Honor decreed and said as follows: 'In view of the foregoing enumerated facts and circumstances and the law controlling, the bill of complaint is sustained, and the court decrees that the prayer of the petitioner being reasonable, just and fair and being pregnant with

good faith, that the dividends be declared and paid to petitioner in an amount of $46,000 within a period of not less than ten days as from the effective date of this final decree being the 18th day of February, 1961.' The prayer of the petitioner is that a *dividend* be declared and paid over to the shareholders, yet Your Honor decreed that the sum of $46,000 be paid to the petitioner which is the alleged amount he paid for the 460 shares at the rate of $100 per share."

The term dividend has been defined as follows:

"The term 'dividend' as applied to corporate stock may be defined as that portion of the profits and surplus funds of a corporation which has been actually set apart, by a valid act of the corporation, for distribution among the stockholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the stockholders distributively. 14 C.J. 798 *Corporations* § 1207.

"With the exception of dividends in liquidation, dividends can be declared and paid out of net profits only, or conversely stated, when the payment thereof does not impair the capital stock of the corporation." 14 C.J. 800 *Corporations* § 1209.

"The general rule, even in the absence of any statute on the subject, is that dividends, in a going concern, can be properly declared and paid only out of profits, and not out of capital or assets required for the security and payment of creditors." *Davenport* v. *Lines,* 72 Conn. 118, 128, 40 Atl. 17, 21 (1899).

It is evident that the trial judge erred when, in his final decree in these proceedings, he ordered the payment of $46,000 to be paid to the petitioner, which was not prayed for by the said petitioner, nor is it legally consistent in face of the fact that the petitioner in his bill made known his desire to the effect: "That a dividend be declared and

paid over to the shareholders." The allegations of the parties, appellant and appellee, respectively, are supported by evidence on either side; but it has not been shown to the satisfaction of the court that petitioner is not a shareholder and member of the board of directors of the Saleeby Brothers Corporation.

In view of the fact that the trial judge erred in granting what was not prayed for in petitioner's petition, the final decree in these proceedings is hereby reversed and the case remanded for a new trial. Costs to abide final determination. And it is hereby so ordered.

Reversed and remanded.