RIGHTS

OF THE

MINORITY STOCKHOLDER

BY

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This book is inscribed
to
L. S. Carrère
in token of old friendship.

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FOREWORD

The subject of the rights of minority stockholders is one of supreme importance at this time, when the corporation is the favorite vehicle for conducting business enterprises.

The author has endeavored to deal with those situations where the rights of the minority are most frequently brought in question or ignored by the majority; also with those decisions defining the rights of the holder of minority shares.

The unquestioned tendency of the courts today is to afford protection to the smaller investor.

In some instances the property of a corporation has been taken in charge through a receiver appointed by the courts at the request of a small minority, or even of a single stockholder.

In the case of Forrester v. The Boston and Montana, etc., Co., the management of the entire property, valued at $30,000,000, was turned over to a receiver at the request of holders of only 200 shares of stock who had information that the property was being manipulated to their disadvantage.

Where relief in equity is suggested, the owner of a few shares of capital stock should not feel

that this advice is practicable only for persons of large means. While occasions arise where the interests at stake are so great as to require the expenditure of large sums in litigation, yet in the vast majority of cases referred to herein the rights of the parties have been permanently established by the courts. Within the confines of those decisions it is only required that the stockholder shall meet the expense of an orderly presentation of his cause to obtain the appropriate relief.

When successful, the court will require the company to repay from its treasury the amount of the counsel fee and other expenses incurred in the proceedings, with the result that the cost of the litigation will be distributed among all the owners of capital stock.

The situation of the minority is not free from the risks and uncertainty that attend all active affairs; but the existence of equitable rights and in a limited degree the presence of rights in courts of law render the condition of the small investor comparatively secure,—provided he knows and will defend the privileges that pertain to the ownership of corporate shares.

The pleadings annexed to the text have stood the test of appeals to the highest courts. They are from the records of leading cases and illustrate the principal points involved in stockholders' suits.

RICHARD S. HARVEY.

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CHAPTER I.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Abuse of the Control.

The enrichment of the majority at the expense of the minority is a condition usually arising from the desire on the part of a few individual stockholders to secure the control of the enterprise, and to obtain benefits to which they are not entitled under the terms of the charter.

The right to make contracts and to appoint officers and agents to transact the ordinary business of the corporation rests exclusively with the board of directors. The control of the board, therefore, is the medium through which acts prejudicial to the rights of the minority stockholder must be carried into effect.

Source of Abuses.

In framing the general corporation laws, which are substantially the same in all the states, it was the plain intention of the lawmakers to create a governing body consisting of the board of directors, to the end that this governing board should exercise its best judgment in each transaction.

The legislature, in providing its creature, the

corporation, with the machinery necessary to carry out the purpose of its existence, clothed the board of directors with ample power suited to that purpose. Those powers are coupled with a duty on the part of the directors to manage the affairs of the company impartially and with an honest regard for every interest. So long as the company is conducted in accordance with the original plan embodied in its charter, and so long as the business is carried on in obedience to the spirit as well as the letter of the laws regulating the organization and management of corporations, the minority stockholder has no occasion to fear any invasion of his rights. There is protection afforded to every interest, however small, under the terms of the statute; it is only where the majority, having complied with the forms of the law, are breaking its spirit and intent, that the small stockholder is compelled to look to courts of equity for relief.

Oppressive Acts of Board

Among the forms of oppression to which the minority stockholders are subject and which are capable of being relieved by proper proceedings in equity, we desire to name the following wrongs of which all have been carefully scrutinized by the courts.

First.—Actual or threatened abuse of power by the majority of the directors.

Second.—Fraudulent transactions by the majority of the directors or stockholders, intended to secure an unfair advantage at the expense of the corporation or of the other stockholders.

Forms of Oppression

Third.—Unfair personal advantage secured by

individual directors or stockholders at the expense of the corporation or the other stockholders.

Some further classes of wrongs exist. Thus, false and injurious statements in the public press, without any effort on the part of the control to counteract the hurtful influence, may be mentioned. But it will be found that all these classes of wrongs are connected in some manner with one of the three forms of oppressive acts above-named. In some way each of these classes leads back to the desire of the majority to obtain improper benefits for themselves through the control of the affairs of the corporation.

For reasons already appearing, the strength of the majority can be met and overcome only through the aid which equity extends for the protection of the rights of the minority.

Opposed to the management of the company, and to the power in the hands of the control, the position of the minority stockholder would at first seem hopeless, but he has his remedy in equity. At this point that department of our courts which administers justice in accordance with the precepts of equity will exercise its powers for the benefit of the minority interests; and the smallest stockholder—the possessor of but a single share—may assert his rights upon an equal footing with the proprietor of every remaining share of the capital stock, providing a substantial loss through inaction, or the threatened invasion of any right, can be shown.

Relief in Equity

Law-Courts.

Limitations of Law Courts

Law-courts are seldom useful to the minority interests, for those courts are harnessed to and confined within the limits of the language of the statute. Their means of relief are confined to a money judgment against the wrongdoer, and even this form of recovery must be deferred until the end of a long and costly litigation.

Equity.

Broadness of Equitable Relief

Equity, on the contrary, proceeds against the person of the wrongdoer; commands him to refrain from the guilty act; or if he has already completed the transaction, requires him to account and make restitution, under pain of imprisonment. A receiver may be appointed to make the judgment of the court effective, and in his official charge is placed the protection of all the corporate property and the interests of every stockholder.

Distinction.

Is a Permanent Right

The distinction between law and equity is too important to be lost sight of for a moment. With the exception of a few situations where the law-courts can issue the writ of mandamus, courts of equity afford the only effective means of redress for the party injured by the acts of the majority. This power to invoke the aid of equity is not a transient right; on the contrary, it is a power that cannot be taken away by act of the legislature, or materially changed even by the constitution itself.

Abuses Generally.

In accordance with the list of abuses already mentioned, these forms of attack upon the rights of the minority will now be taken up in their order.

First.—ACTUAL OR THREATENED ABUSE BY THE MAJORITY:

Directors are elected by the majority and frequently represent the purposes of the control rather than the general interests of the corporation.

Majority Rules.

The stockholder, from the date of his subscription to shares in the company, or his purchase of its stock, acquiesces in the rule of the majority represented by the controlling vote of the directors of the corporation. This is a part of the understanding entered into by him at the time when, by subscribing for his shares, or by purchase of stock, he becomes a member of the corporation.

Minority Protected by Equity.

Acts Oppressive to Minority Outside of Authorized Power

But it must not be assumed that the minority have no rights which the directors or the controlling interests of the stockholders are bound to respect. On the contrary, minority shareholders, in addition to their right to attend and criticise and protest at stockholders' meetings, may also withstand every act of oppression and every other detrimental course on the part of the management, and to that end as a matter of right may claim and secure the protection and active support of the equity courts.

Directors, in defense of their course, may point to the regularity of their acts and of their compliance with every requirement of the statute. In the law-courts such a statement will be a complete answer to the complaint of the injured minority, and the door of redress will be closed.

In equity, all is different. This branch of our judicial system recognizes the unfair advantage which mere numbers sometimes affords; for equity permits the majority to establish the policy and direct the affairs of the corporation only so long as the management deals fairly with every member and protects every interest.

Only Fair-dealing Allowed

Instances of the abuse of this control and of the power of equity courts to aid the minority stockholders are very numerous. For the most part, these attempts at unfair dealing consist in purchasing property owned by the directors or their friends, and paying a price in excess of the true valuation, at the expense of the corporation. Sales of the property of the company at less than the true value, where the directors or their friends are the purchasers, partake of the same system of unfair dealing; while excessive salaries voted to directors who are also officers is also among the class of acts which are objectionable because calculated to prefer the directors or their friends, to the disadvantage of the corporation. The power of the control, whether used directly or exercised through the agency of the members of the board of directors or the officers of the company, must not be employed to gratify personal ends, or to serve any purposes other than those for which the corpora-

Cases Illustrating Limits of Power

tion was created, and which will advance its general interests and those of its stockholders and creditors.

Majority Must Not Abuse Its Powers

Where directors have wasted the assets of the corporation and secured unlawful gain for themselves, they are liable to account for its property, and will be charged with any deficiency, the same as other trustees.[1]

In a case where the directors have individual interests that conflict with their duties as trustees of the company, they should consider, before accepting office, whether they are prepared to make their personal interests subordinate to their duties as trustees.

They will not be permitted to secure for themselves advantages that are not common to all the stockholders.[2]

Cases Illustrating Oppressive Acts.

The office of director has been said by Lord Hardwicke to partake of the nature of a crown office, since it arises from the charter which the crown grants.[3]

Decisions by Equity.

Excessive Salaries

Excessive salaries voted to the directors or their associates will not be permitted to stand. Directors must use the property of the company as any other agent or trustee is obliged to do, in dealings with the property of a principal.[4] Nor can the agent, appointed to sell property of the company, buy for himself and thereby act as both seller and

purchaser, unless such a transaction is shown to be fair both as to terms and consideration. Equity will set aside the sale at the instance of the company, or of some protesting stockholder.[5]

Secret Profits Disallowed

Generally speaking, sales of this description are not invalid of themselves, although capable of being set aside by a court; and unless an aggrieved party questions the transaction, the presumption of fair dealing will prevail.

Individual Dealings.

Transactions between directors and stockholders as individuals will not be invalidated simply on the ground the director has greater knowledge of the circumstances and standing of the company. It is a sufficient test of regularity that there has been no actual misleading of the stockholders by the directors.[6] In such cases the parties deal as individuals, and the bargain is made with whatever information each person has at his command. The director surrenders no individual rights except when the particular transaction involves some interference between official and individual interests; in transactions of the latter class the right of the corporation to receive the best judgment of the director precludes him from having a selfish interest in the result. It is assumed in all cases where the director is dealing in an official capacity with the stockholder that he will be bound by the rules of conduct governing officers and trustees; and no fair-minded person will object to such a rule or refuse to recognize and comply with those requirements.

Unfair Transactions.

Numerous decisions illustrate the manner in which the courts have laid down and enforced equitable principles in their application to the management of corporations, where the infraction of the minority's rights calls for protection or relief. Thus, the sale of corporate property to obtain funds to pay the claim of a director, where the debt is occasioned by the mismanagement of the board, is open to an attack by the minority;[7] and authority to sell lands does not permit a sale to the wife of the director exercising such power, unless full value is paid for the property.[8] Where a director bought the property of his company at a sheriff's sale for a small price he is chargeable with the profit, and the court will require him to account and turn the money into the treasury of the company.[9] In cases like these the director is regarded as a trustee for the company, and the proceeds become a trust fund which can be used only for its benefit.

Principles Protecting Minority

An agreement to pay a salary to the manager on condition that he shall buy stock, which the directors in turn engage to buy back from him at an advance, is a transaction which is voidable at the instance of any protesting stockholder, since directors have no authority in law to make a contract to give preference to one stockholder over another,[10] and proof of good faith will not legalize the transaction.

Where directors hold office in two companies, their mutual compacts are subject to scrutiny, to

Rule Covers Cases of Joint Control

see whether they are in accord with the same rules of fair dealing; and no director is authorized in persuading either of the companies in which he holds office, to enter upon contracts where his interest will be adverse to either company.[11]

In scrutinizing a situation where the directors deny any intention of proceeding with the contract in their own right, but agree to submit the proposed contract to the stockholders, equity will not enjoin a meeting of stockholders called for the purpose, nor prohibit that meeting from increasing the capital stock to buy additional property.[12]

In such cases, however, only confirmation by the stockholders, and the absence of any impairment of the rights of creditors, will overcome the presumption that some advantage has been taken, or that some loss has occurred to one or the other of the corporations concerned.

A disinterested board of directors is so necessary to the proper and orderly administration of the affairs of the company that where a director is receiving a profit from the transaction and has the deciding vote, the contract will be set aside.[13]

Second.—Fraudulent Transactions by Stockholders:

Where the control of a railroad was secured by a competing line which cut off the usual sources of its profits from freights, and instituted a foreclosure of the mortgage which fell into arrears from the failure of the railroad to earn the interest, thereby reducing the value of the shares and endangering the existence of the stock itself, in the event that the proceeding to foreclose proceeds to

a sale—the court held that such an abuse of power required the managing corporation to explain such a transaction and to act as equity should require.[14]

Equity Prohibits Fraud

This case illustrates the distinction between mere oppression on the one hand, and acts destructive to the rights and property of the stockholder on the other hand. With this distinction in mind, it can be readily understood that an objectionable course adopted by the directors may be merely burdensome, and intended to secure some personal advantage, without endangering the life of the corporation, or the loss or impairment of any substantial right.

The conduct described in Paragraph One belongs to the latter class and consists of matters which the courts will reprove and set aside at the request of a dissenting stockholder. But there is another class of acts, more serious in their nature, that calls for active measures by the court to preserve the rights of the stockholders. Sometimes the very existence of the corporation is at stake.

Forms of Fraud.

These wrongs are illustrated by instances where the interests in control, by "stock-watering" methods, have sought to increase the capital stock without adequate consideration paid into the treasury of the company,[15] or where the additional shares were issued with intent to change the voting power injuriously to the minority.[16]

Fraud Destructive of Corporations

The transfer of the voting power to a trustee, permanently, or for a period of years longer than the statute permits, to the end that the minority

Endangers Minority Rights

shall have no real opportunity to present their views and persuade the other stockholders of the wisdom of the course they desire the company to adopt, is in like manner prohibited.[17]

Mortgages and other liens against the company, filed with the purpose of purchasing the property in whole or in part, or of depressing the market price of its stock, when watchfulness and proper regard for the success of the enterprise would have avoided such encumbrances, imply a fraudulent motive.[18]

The entire assets, including the corporate franchise, must not be turned over to a rival concern by a sale or through combination, consolidation, exchange of stock, or kindred device without the consent of every stockholder, and without any business necessity for such a course.[19]

Sale of Prosperous Concern Requires Unanimous Consent

Plans to sell out a prosperous business and divide the proceeds, or to invest the money in some other venture, cannot be carried into effect against the protest of the minority stockholders,[20] and the franchise and the property of the corporation must not be bargained away by the majority.[21]

Acts like these, in every instance, point toward dissolution, either directly through positive action on the part of the management, or as a result of the neglect of the best interests of the corporation by the officers and stockholders having control of the corporate affairs. In such cases the vital importance of recourse to a court of equity is a subject that requires no enlargement; in all matters of this description, whether falling under the exact lines mentioned in the foregoing cases or when

Relief Vital to Corporation

presenting new forms of neglect or fraud,—equity will intervene by injunctive or affirmative orders to prevent or cure the corporate wrong.

The questions involved will be taken up as occasion requires, in other connections; but the predatory attitude on the part of the majority, which cases like these disclose, demands particular mention here.

Attention should be called to the destructive nature of such acts, and the fact that, taken together, they constitute a group of courses which are outside the regions of legitimate business, and present an urgent need for equitable relief.

Having explained both forms of abuses in their order, a few words will suffice to describe the attitude of the courts toward these classes of wrongs, generally.

Attitude of Courts.

Where it is plain that the company is being conducted for the benefit of the majority, to the injury of the minority interests, and the directors or officers have begun, or are entering upon, transactions that may cause their personal interests to become adverse to the corporation, equity will not confine its inquiry to the surface, but will look deeply into the matter. In such cases the court will issue the judicial decree which justice requires.

Where new stock is issued to some stockholders, all the stockholders are entitled to share alike. This rule covers an issue of convertible bonds.[22] Any undue advantage secured by one or more stockholders over others and every act which impairs or

takes away a right which originally existed, constitutes an injury to the corporate body and to each and every outstanding certificate of stock. Since each certificate represents rights which cannot be divested or impaired without the consent of the owner, it follows that acts of this description, when known, impart to such owner the right to ask for equitable relief.

Undue Advantages Restrained

The rule resulting from the application of these principles is clear. A majority of the directors or stockholders have no right to exercise the control over the corporate management which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves, or to any of the shareholders, to the exclusion or prejudice of the others.[23]

The abuse of joint control constitutes fraud, and is wrongful whether done directly by the majority of the stockholders or whether the directors attempt to carry out such a plan.

Where two corporations are under the same control, and their affairs are conducted in such a manner as to sacrifice the business interests of one to advance those of the other, a minority stockholder of the corporation injured through such practices is entitled to equitable relief. Under such circumstances a court of equity will intervene for the protection of the stockholders, both by injunction and by the appointment of a receiver to represent the company.[24]

Receivership when Required

The transfer of the entire property to a corporation organized in another state requires the consent of every stockholder. An instance of the abuse

of joint control, with an illustration of the relief afforded by equity, appears in the ensuing case. Where a corporation organized under the laws of Montana creates a corporation under the laws of New York, and by a vote of the board of directors proceeds to transfer all its property to the new corporation, such an act requires the unanimous consent of the stockholders. The owners of only 200 non-assenting shares of issued capital stock, where the total issue of outstanding stock amounts to 150,000 shares, may object to the transaction, and a court of equity will set aside the transfer. In this case, the court appointed a receiver to manage and enforce the return of the property. The fact that no other share-owners joined in the proceeding, or that upward of thirty millions of dollars were involved, did not interfere to prevent the exercising of an equitable right.[25]

Small Owner May Obtain Relief

While in theory there is a distinction between the method of performing oppressive acts through the medium of the board of directors, and the accomplishment of the same ends through measures adopted by the stock control,—in practice these wrongs are identical. Each consists of a desire on the part of the management to obtain special advantages and an unequal division of the earnings or assets of the company, through abuse of the powers of control.

Third.—Other Oppressive or Illegal Acts.

Instances are found where individual misconduct on the part of the officers or directors, or of the stockholders, has accomplished equally harmful results.

If the president of the company receives a sum of money as the purchase price of his official position, and secures the election of his successor on those terms, he will be obliged to pay into the treasury of the corporation the amount he realized from the sale. Such an act is a perversion of the powers of office, and is regarded in law as a fraud upon the corporation. The offices are the exclusive property of the company and no person will be permitted to turn them into gain. In this instance the sum involved was $3,000, and the corrupt transaction included a seat upon the directing board.[26]

Sale of Office Illegal

The rules which govern the relation of the stockholder with his company apply with equal force where one person owns every share of its stock. No perversion of profits from the treasury of the company into the pockets of the individual stockholder will be permitted, even in such a case. The corporation still remains a distinct body in the eyes of the law, and its property and rights will be as fully protected as if the stock were owned by numerous parties.[27]

Entire Ownership Does Not Excuse Oppression

Ultra Vires Acts.

In addition to that class of abuses which contains the element of fraud or overreaching on the part of the officers or majority interests, there is another source of injury which sometimes causes serious loss to the corporation, and always is regarded as oppressive to the minority. This description of abuses consists of efforts to transact business or to perform things outside of the scope of the corporation, and is known as *Ultra Vires* Acts.

Ultra Vires Acts Defined

A corporation is a creature of the law, and derives all its powers from its charter. In former times the franchise comprised within its terms only those rights with which the people, through the legislature, in express terms endowed the incorporated body. But with the advent of a new era in business methods, a new system for the creation of incorporated bodies has been evolved, and certain features require particular mention.

Under the practice as it exists today the certificate or articles of incorporation—as the modern charter is variously termed—amounts to little more than a petition to the proper officers of the state for permission to transact business within that jurisdiction. Within the confines of other states and countries the corporation conducts its affairs by sufferance under the rules of comity, which, so far as they concern corporations, amount to a system of mutual recognition of chartered powers. Every corporation, in return, is obliged to accept and obey the statutes and regulations there in force.

Scope of Chartered Powers

The entire powers of a business corporation are not contained within the wording of the certificate of incorporation, but must be looked for in a wider field. To discover the exact limits of what a modern business corporation can or cannot do without exceeding its chartered powers, it will be necessary in every instance to consider the general corporation laws of the parent state in their bearing upon (*a*) the certificate of incorporation, (*b*) the by-laws, resolutions, and other records containing the

rules for its guidance, prescribed by the corporation itself.

Furthermore, the laws of each state are governed in their turn by the provisions of the federal constitution and of the constitution of the parent state; while the construction placed upon those provisions by the courts of proper jurisdiction must likewise be ascertained and applied.

Directors and Officers Are Personally Liable for Ultra Vires Acts

Courts will not countenance corporate acts which exceed the limits of the authority conferred by law or charter. In every state it is well recognized that directors and officers of a corporation are liable personally for any loss arising from *ultra vires* acts, when committed with knowledge.[28] A dissenting minority of stockholders may set aside corporate acts which are irregular and *ultra vires,* as, for instance, where the questionable act was done prior to the granting of authority at a corporate meeting. A majority of the stockholders cannot ratify an *ultra vires* act against the protest and dissent of the minority, but where a single stockholder applies for such relief, the complaining party should show that a substantial loss will ensue, unless the court interferes.[30]

Ultra Vires Acts Present Different Forms

It has been frequently held by the courts that no corporation has the power to change the amount of its capital stock, excepting in such manner as the statute provides. Any change of that description is beyond its inherent powers, and is an *ultra vires* act.[31]

All changes that commit the stockholder to an enterprise which was not in his mind at the time

when his shares were acquired are manifestly unjust.[32]

The courts will not permit such conduct on the part of corporations to pass unnoticed. In the interest of public policy, as well as in the protection of the rights of the minority, the courts will issue decrees confining corporations within the limits of their franchises. Incorporated bodies must not accept from the state the privilege of exercising corporate functions, only to disregard the conditions under which the right was conferred. Where a corporation is about to execute a contract which is beyond its powers, the court will intervene to stop the transaction. Since no majority can legalize an *ultra vires* act, a single objecting stockholder is sufficient.

A Single Stockholder May Protect Corporation

The franchise which the corporate body enjoys binds it to respect the contract which it made with the state at the time of its creation; namely, that it would keep within its powers; and any violation of the contract contained within this recognized rule of law endangers its very existence. For such violation, the charter may be canceled, and valuable rights which have vested thereunder may be destroyed. Accordingly, each and every stockholder, the smallest owner as well as the controlling interest, is concerned in the regularity and the orderly management of the affairs of the corporation. By implication, at least, the corporation has agreed with every stockholder that it will proceed along the lines defined by its franchise.[33] This right of the stockholder, like other rights, must not be too long deferred as to its enforcement. It

Exceeding Corporate Powers Endangers Franchise

must be exercised before the conduct of the corporation has grown into a recognized course of business, and before additional capital has been invested, and the rights of others have become fixed.[34]

Delay in Objecting Tends to Ratify

Silence gives consent quite as readily in matters connected with corporations as in other affairs; but assent will not cure defects nor remove a right where the objectionable thing itself is prohibited by law, or partakes of the nature of a crime. Asquiescence by every stockholder cannot legitimatize an act illegal by nature or by statute.[35]

Wrongs Corporation Cannot Ratify.

Ultra vires measures, and even wrongful infractions of the duty which the majority owes to the corporation or to the minority,—provided the acts in question are not violations of law, nor opposed to public policy,—may be ratified by a course of conduct which will lead the courts to hold that the injured party has slumbered too long on his rights.

Any Affirmative Course May Ratify

Sometimes the objecting stockholder is shown to have taken an affirmative part in the transaction, and by accepting a share in the profit has debarred himself from petitioning the court for relief: in such cases his own conduct shuts the doors of redress against him. Whether he has placed himself in this position intentionally, or whether he has been merely negligent in the matter of asserting his rights, the legal effect is the same; he is held to have ratified the action of the corporation by re-

fraining from due and timely protest. This condition in its legal effect is known as estoppel, which has been defined as "the stopping of a man's mouth from telling the truth."

Acquiescence on the part of the complainant is a very frequent form of defense, when the management of a corporation is charged with neglect or malfeasance in conducting the control. This defense in its most common form alleges that the complaining party has participated in benefits resulting from these acts.

The rule of estoppel does not include those cases where the managers of one corporation are exploiting it for the benefit of another company; in such instances, while the minority stockholder is a nominal complainant, he is such in name only—it is really the injured corporation that is petitioning the court for redress, and in cases of this description knowledge on the part of the negligent officials will not be imputed to the corporation nor preclude it from seeking redress.[36] In order that estoppel may result in ratification, there must be actual knowledge of the wrongful act.[37] This exception to the general rule has an important bearing, for where secret fraud is charged and suit is begun within a reasonable time after evidence of the true condition is discovered, the court will grant a hearing and afford the proper relief.[38]

Corporation not Estopped by Acts of Individual Stockholder

Reasonable Time Allowed.

What is a reasonable time in which to act upon such knowledge is a circumstance that varies in accordance with rules in force in each individual

Reasonable Time for Beginning Action Defined

state. In New York the period fixed by the code is ten years from the time when the action accrued.[39] As has been shown, possession of knowledge of the guilty act on the part of the injured party is required to set in motion the limiting statute. In other states, three years is the usual period for instituting such a proceeding.[40]

In brief, corporations are held subject to the same presumptions as in the case of natural persons; and where actual corporate knowledge is shown, ratification and estoppel will bar the successful pursuit of relief in the courts. This rule is important in its bearing upon the subject of stockholders' suits to set aside *ultra vires* or other unlawful acts, since those actions are brought in behalf of the corporation, though upon the petition of one or more individual stockholders. In theory, these suits are brought by the corporation through volunteers acting for its interest and in its name; and for any concurrence in the breach of chartered rights or contractual relations, the corporation and those assuming to act in its name will be forever estopped.[41]

Corporation Subject to General Rules

Individual Stockholder May Await Result of Similar Litigation

Where numerous persons have felt aggrieved by the same corporate acts and one of them has taken measures for relief in the courts, it is not required that all should duplicate the course pursued by the complaining party.

Stockholders have the right to await the result of suits on similar claims by other owners of shares without being charged with neglect.[42]

A presumption of approval and ratification may arise from slight circumstances, and defeat action

in the courts. Especially is this true where the advantages of the unauthorized act have been valuable to the complaining party, and were accepted by him without objection at the time when the transaction took place.[43]

Innocent Purchaser's Right to Redress.

An important ruling has been established in New York, and in the opinion of many courts and individuals a similar rule should be adopted in every jurisdiction. It holds that no stockholder is deprived of his right to complain of oppressive acts, because of the fact that he has purchased shares of the stock of the corporation subsequent to the time when the despoiling act took place.[44] The power to redress such a wrong should not cease because of the transfer of shares to an innocent holder. On the contrary, the courts should scrutinize with particular care the effect of those acts upon the property and interests of investors who have become members of the corporate body through confidence in the managers of its affairs.

Rights Follow Stock

The rule in the federal courts is less favorable to innocent purchasers of shares. An actual right to sue must be shown to have pertained to the stock in the hands of the prior owner, to entitle the purchaser to seek relief in equity against the wrongful act.[45]

Federal Rules

In England it has been decided that no stockholder is obliged to look into the management of the company. The officers of the incorporated body are entrusted with the control of its affairs, and

English Rule

are presumed to have performed their duty faithfully.

Silence alone without full knowledge cannot amount to estoppel,—"it is not enough to show that they (the stockholders) might have become acquainted with the management of their affairs. It must be shown that they did so."[46]

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[1] Bosworth v. Allen, 168 N. Y. 157.

[2] In re Cameron v. Coalbrook, etc., Ry. Co., 18 Beavan 339; affirmed, 24 L. J. Ch. 130; Corbett v. Woodward, 5 Sawyer (U. S.) 403.

[3] The Charitable Corp. v. Sir Robert Sutton, 2 Atkyns (Eng.) 400.

[4] Balte v. Bellins, 15 Hawaiian Rep. 151.

[5] Twin Lick Co. v. Marbury, 91 U. S. 587.

[6] Haarstick v. Fox, 156 U. S. 674; McIntyre v. Ajax Mining Co., 17 Utah 213.

[7] Crescent City Brewing Co. v. Flanner, 44 La. Ann. 22.

[8] Green v. Hugo, 81 Tex. 452.

[9] Tobin Canning Co. v. Fraser, 81 Tex. 407.

[10] Wilbur v. Stopel, 82 Mich. 344.

[11] Langan v. Francklyn, 29 Abb. N. C. (N. Y.) 102; McGourkey v. Toledo & O. C. Ry. Co., 146 U. S. 536; Jacobus v. Mineral Water Mach. Co., 38 Misc. (N. Y.) 371.

[12] Geer v. Amalgamated Copper Co., 16 Dick. (N J.) 364.

[13] Higgins v. Lansingh, 154 Ill. 301; Gildersleeve v. Lester, 68 Hun. (N. Y.) 532.

[14] Farmers' Loan & Trust Co. v. Trustees of the N. Y. & W. R. R. Co., 150 N. Y. 410.

[15] Ex parte Daniell, 1 De. Gex. & J. (Eng.) 372.

[16] Brewer v. Boston Theatre, 104 Mass. 395.

[17] Shepaug Voting Trust Cases, 60 Conn. 553.

[18] Gray v. Fuller, 17 App. Div. (N. Y.) 29.

[19] Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336.

[20] Kean v. Johnson, 9 N. J. Eq. 401.

[21] Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27.

[22] Wall v. Utah Copper Co., 70 N. J. Eq. 17.

[23] Hawes v. Oakland, 14 Otto (U. S.) 450; Brewer v. Boston Theatre, 104 Mass. 395.

[24] Jacobus v. Amer. Mineral Water Machine Co., 38 Misc. (N. Y.) 371.

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[26] McClure v. Law, 161 N. Y. 78.

[27] Waycross Air Line R. R. Co. v. Offerman, 109 Ga. 827; Blatchford v. Ross, 54 Barb. (N. Y.) 42.

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[29] Commonwealth v. Cullen, 13 Pa. 133.

[30] Albers v. Merchants Exchange, etc., 45 Mo. App. 206.

[31] Granger v. Kamper, 73 Ala. 343.

[32] Susquehanna Boom Co. v. Du Bois, 58 Pa. St. 185.

[33] Bliss v. Anderson, 31 Ala. 613; Atwood v. Merryweather, L. R., 5 Eq. (Eng.) 464.

[34] Dimpfell v. Ohio & M. Ry. Co., 110 U. S. 209; Ashurst's Appeal, 60 Pa. 290; Pinkus v. Minneapolis Linen Mills, 65 Minn. 40.

[35] Kent v. Quicksilver Min. Co., 78 N. Y. 159.

[36] Fitzgerald v. Fitzgerald, 41 Nev. 374.

[37] First National Bank v. Drake, 29 Kansas 311.

[38] Meader vs. Norton, 11 Wallace (U. S.) 442.

[39] Brinkerhoff v. Bostwick, 99 N. Y. 185.

[40] Deniemeyer v. Coleman, 11 Fed. Rep. 99.

[41] Hall v. The Union M. F. Ins. Co., 32 N. H. 299; Gilbert v. Manchester, 55 N. H. 298; Lewin on Trusts, Chap. XXX, Sections 1 and 2.

[42] Boardman v. Lake Shore R. R. Co., 84 N. Y. 157.

[43] Maryland Savings Ins. v. Schroeder, 8 Gill & J. (Md.) 93; Booth v. Robinson, 55 Md. 419.

[44] Frothingham v. Broadway & Seventh Ave. Ry., 9 Civ. Proc. (N. Y.) 304; Ramsay v. Gould, 57 Barb. (N. Y.) 398.

[45] Church v. Citizens' St. Ry. Co., 78 Fed. 526.

[46] Stanhope's Case, L. R. 1 Chancery, 161.

CHAPTER II.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Means of Redress.

The maxim of equity expressed by Lord Hardwicke in the words "there can be no injury but there must be a remedy," applies with full force to abuses of corporate control.

These remedies, however, are not so apparent that care or research is not required to fit the cure to the disease; on the contrary, knowledge joined with earnest effort is necessary to apply the needed remedy and to secure the desired redress. Some preliminary statements are required before the means of redress is considered in regular course.

Injury Implies Remedy

Where there is real abuse of the powers of control, or where fraud is seen in the transaction between the corporation and those who manage its affairs, the matter involves a question of principle rather than of method; and in such cases the injury to the corporation has usually made it impossible for its shares to be sold without serious loss. In all such cases the courts are open to applications for protection and redress on the part of every owner of a single share of stock.

Rights Affording Redress.

Certain rights, indeed, may be said to attach themselves to the ownership of shares of capital stock, and connected with each right is the power to petition the courts for relief.

Rights of Stockholders Enumerated

These rights are to (1) take part in the meetings of shareholders; (2) receive a proportionate share of the dividend declared; (3) compel directors to declare dividends under suitable conditions; (4) examine the books and papers of the company, when such information is necessary for a proper purpose; (5) have transfers of stock recorded on the books of the company; (6) require the directors to govern their acts by the articles of incorporation; (7) compel the directors to account to the corporation for all profits made; and (8) secure the appointment of a receiver to carry out the decree of the court.

In connection with this list of rights, attention is called to the fact that the first five refer particularly to relations between the corporation and its individual members, whereas the remaining three represent rights pertaining to stockholders as a class, and proceedings for their enforcement greatly outnumber those brought by individuals in their own behalf.

When the subject in dispute between the stockholders and the corporation consists of personal matters or interests, the ordinary powers of a court of law will supply the required relief.

Powers of Law-Courts.

Limited Relief in Actions at Law

If either of these elements is present, and the damages can be fixed at a money value and collected through the ordinary course of judgment and execution, then the case is a plain action at law. But as will be seen, the number of these actions is very limited, and where a minority stockholder seeks redress, in almost every instance he will find relief only in equity. The occasion for this condition is the rigid nature of the rules and procedure on the law side of the court.

Where neglect of duty is shown, courts of law will issue their writs of mandamus, compelling the proper officers of the company to open books of subscription[1]; restore member wrongfully disfranchised[2]; issue a certificate of stock[3]; transfer shares by registering the change in the books of the company, with the exception that in some States, the owner, instead, may sue the negligent officer for the loss occasioned by such refusal[4]; call stockholders' meetings to elect officers[5]; produce the books for inspection by the stockholders[6], though relief is also afforded in equity and this is frequently the preferable remedy.[7]

Redress Equity Affords.

Equity Affords Broader Means of Redress

Equity, in affording relief, supplies flexible methods. It adapts itself to the needs of each situation. It has shown itself fully able to regulate the complicated relationship between stockholders and the business corporation, and for these reasons its aid is sought to prevent threatened wrong or to cure the effect of the evil, when inflicted. In a word, equity looks beneath the surface, and appreciating

the individual rights which enter into and make up the corporate idea, affords justice to every interest. So universal has this desire to obtain the scrutiny of equity become in cases concerning corporations that in future it will be assumed this form of relief is invoked, unless the contrary is expressly stated in our text.

The advantages of equity over law in corporation matters is displayed in two forms of relief which the chancellors' courts have exercised exclusively for centuries and which still mark equity's peculiar field. When the case calls for a prohibitory order, restraining the guilty party from beginning or continuing the wrongful or injurious act, or where the conduct complained of requires an accounting of the profits, and the transfer of the fund into the treasury of the company, in compensation for the wrongful act, the powers of equity should be invoked.

Grants Injunction or Accounting

Right of Redress Follows Ownership.

The first necessity for an action to right a corporate wrong is ownership of shares of the corporation. These should be registered on the books of the company, for the sake of regularity, since the distinction between recorded and unrecorded stock is maintained with great severity in some jurisdictions.[8]

According to this rule, to place the stock on the register after the suit is begun will not cure the defect[9]; while mere ownership without a formal entry of the transfer to the complainant confers no right whatever to bring suit.[10]

Nature of Redress.

These suits in equity have for their purpose the doing of one of three things: *first,* the prevention of a wrong; *second,* the command that some necessary act be performed; or, *third,* the redress of injuries occasioned to the property or rights of the corporation.

The purpose to be accomplished is the only distinction between these classes of cases; indeed, they are frequently combined in the prayer for relief, it being a maxim of equity that where that court can discover a wrong, the injured party will not be left without a remedy. Accordingly, it is of little moment whether one or all of these forms of relief are sought; equity is able and willing to protect the rights of every interest, only requiring that the facts shall be clearly spread before the court.

Individual Stockholder Shares in Benefit

The benefits of the recovery belong to the corporation; and although the individual stockholder participates in the result in proportion to the number of his shares of capital stock, he is not preferred in any way. He may be allowed his counsel's charges and other expenses out of the treasury of the corporation, but this is the extent of his reimbursement.

This rule seems severe, and indeed it often does inflict a hardship upon the protesting stockholder, who devotes his time and effort to the litigation; but it results from the theory of the action itself. The importance of a clear understanding of this feature of stockholders' suits has led us to mention the subject thus early and out of its order,—the fact being that these actions in theory are brought in the interest of the whole corporate body, against

which the wrong has been attempted or carried into effect. The minority stockholding interest is therefore not the real plaintiff, although it is the moving party, and brings the wrongdoing to the attention of the court. In accordance with this plan it was formerly held to be the duty of the minority to lay its grievance before the board of directors and to demand that they proceed in the name of the corporation, before the minority could claim the attention of the court.[11] The absurdity of this course at length became apparent, and it is now well established, both in the English and American tribunals, that no previous demand of this nature is required.[12]

Corporation Real Plaintiff

Notice or Demand.

In order to excuse such a demand, however, it should be set forth distinctly in the pleadings, and later must be shown to the court, that the managing board are themselves the wrong-doers in some breach of trust, and have control of a majority of the stock so as to dominate the actions of the corporation, and that the demand would have to be made upon the persons who are themselves guilty of the illegal acts.[13] In a case where the company owned property largely in excess of the amount required to pay its debts, but the officers and original incorporators had abandoned it and were trying to obtain title to the property through fraudulent bankruptcy proceedings, it was held that the management had assumed a position adverse to the interests of the corporation, and the minority was excused from making such demand.[14] In cases of this description, the non-assenting stockholders have standing in equity to sue in their own names,

Demand for Redress Before Suit, Not Required

without demand, making the corporation a party defendant.[15]

Motive.

A Wrong Implies Redress

In furtherance of the ends of justice, equity will not enquire into the question whether ulterior ends are served by these proceedings in court, nor whether the shares of stock were purchased just prior to the commencement of the action, and subsequent to the injuries set forth in the complaint. It is sufficient that a wrong exists which the court has power to redress.[16]

Minority interests, however small, are entitled to full protection, and even a single stockholder has the right to set the machinery of a court of equity in motion.[17]

Acquiescence.

These rights must be prosecuted with diligence. Inaction, if too long continued, will amount to acquiescence, and prove fatal to any hope of redress through the courts.[18]

Delay May Ratify Wrong

Thus, the acceptance of rent during a period of seventeen years will bind the stockholders of a railroad and amount to a ratification of the instrument, even though the lease was for a term of nine hundred and ninety-nine years, which it was clearly beyond the power of the board of directors to execute on behalf of the corporation.[19]

Parties.

With regard to the parties who must be brought before the court in suits by minority stockholders to redress the wrongs of the corporation, it is required that the corporation shall always be included.

When the directors refuse to sue, or where the stockholder is excused from bringing the action in the corporate name or after notice to the board,—it is necessary that the corporation should be made a defendant.[20]

The relief which it is sought to obtain belongs to the corporation, and inures to its benefit, so that the advantage of a favorable decree will benefit the stockholder only as the owner of shares in its capital stock. Consequently, the court would be unable to provide a full measure of relief, if the corporation was not a party to the suit.

Parties in Suit for Redress

The Directors are also necessary parties, unless a portion of the Board have not been concerned in the subject-matter of the proceedings;[21] and all other persons joined in the wrong should also be made defendants.

The court itself will order that all necessary parties be brought before it, in an action by a stockholder in equity. The practice in suits in equity is more elastic than the procedure in actions at law, in that particular.[22]

Limitation of Powers.

Exceeding Corporate Powers Restrained

When the company has entered upon a course which exceeds its chartered powers, it will be restrained by equity at the instance of a minority interest, even where it claims the sanction of legislative permission for those acts.[23]

Any action on the part of a corporation which endangers its franchise, will in like manner be enjoined.[24]

Officers and Directors.

The offices of the company and the influence and control connected with those positions of trust are

an asset of the corporation itself and never can become the property of the person who is appointed to fill the office. Accordingly, where the president sold his office for three thousand dollars, equity refused to countenance such a transaction, and required payment of the money into the treasury of the corporation.[25]

Diverted Funds Must Be Restored

Directors are subject to like scrutiny of their dealings, and when it appears that they have diverted the funds of the company to their own use, without adequate security, the corporation can recover the full amount from them or from their estates.

Even a formal release from liability, on the authority of the board of directors, will not permit individual directors who have wasted the funds of the company to escape liability for the amount of the loss.

Dividend From Principal Illegal

A director who voted for payment of a dividend, knowing it would be paid out of principal, is liable to make it good by payment of the entire amount into the treasury of the company.[28]

All contracts between directors and their company are regarded with suspicion by the courts, and will be scrutinized with care. When it can be shown that they have benefited by reason of their official position, the contracts will be set aside.[29]

Sales to or by Director Voidable

A sale by a director or a trustee directly or indirectly to a corporation in which he is a large owner, implies a selfish if not a fraudulent motive, and will be treated by equity on the same basis as if there was an outright transfer to himself.[30]

It will be seen from this principle, in its applica-

tion to business under corporate forms, that a court of equity possesses the power to "adapt its practice and course of procedure, as far as possible, to the existing state of society, and to apply its jurisdiction to all those cases which, from the progress daily taking place in the affairs of men, must continue to arise * * * and to enforce rights for which there is no other remedy."[31] Also, that "the powers and processes of a court of equity are equal to any and every emergency."[32]

Where the directors decline to resist the collection of a tax which they believe to have been imposed upon their corporation in violation of its charter, this refusal amounts in law to a breach of trust; and a stockholder may file his bill in chancery to procure the proper remedy. If the stockholder is a resident of another state from the home state of the corporation, he may seek relief in the Federal courts. He has this right under the constitution and laws of the United States.[33]

Remedy for Failure to Defend

Directors of a corporation are held to such a measure of care and diligence as prudent men exercise in the conduct of their own affairs.[34]

Promoters.

Promoters who occupy the place of the directors prior to the incorporation of the company are liable to the subscribers if the property is conveyed at a secret profit to the promoters due to their purchase of it at a price far below the sum mentioned to the subscribers as its cost.[35]

A majority which combine together with the object of using the corporation to advance their per-

Profits to Promoters or Majority Scrutinized

sonal ends, become for all practical purposes the corporation itself, and in their dealings with the minority must assume the trust relation usually occupied by the corporation.[36] Where this influence is exercised to transfer to the corporation property at a figure far in excess of the real value, little difficulty will be encountered in securing the assistance of a court of equity in restraint of such action.[37]

Fraudulent Mortgages by Majority Cancelled

In a case where the control executed a mortgage to themselves, for a fictitious consideration consisting of money they were required by contract to pay, and executed the instrument without the knowledge of the minority directors and stockholders, the indenture was set aside.[38]

Nor can they eliminate the minority by foreclosing a trust mortgage and bidding in the property for a new company owned exclusively by themselves, and without any new investment by them.[39]

Joint Control.

The rules of the trust relation apply with equal force to remedy or prevent abuses of joint control.

Equity Reaches Abuses of Joint Control

Where two corporations are under the same control but are conducted in such a manner as to sacrifice the interests of one corporation to advance those of another, a minor stockholder of the corporation injured in these transactions is entitled to protection, and equity will afford him relief.[40]

The same principle has been applied where a railroad caused the traffic of a subsidiary railway to fall away, in order to secure the entire property through a mortgage foreclosure.[41]

Receivership.

Receivership is a remedy which courts of equity will employ to carry out their decrees, and this form of relief is by no means limited to cases where the insolvency of the company makes the rights of creditors the principal consideration.

Relief by Receivership

The attempt of a corporation to transfer all its assets to a new corporation organized in another state, where the first company is a prosperous concern, requires unanimous consent of the stockholders. If the transfer has been made, the court will set aside the act on the complaint of any stockholder, however small his holdings, and will appoint a receiver to supervise the return of the property.[42]

Advice of Counsel.

Unconscionable actions like these are not cured by the claim that they were done under the advice of able and experienced counsel;[43] nor should such a refuge be permitted. It usually occurs that the suggestion is the act of the oppressive majority through the board which it controls, and the legal skill of the attorney is called into play only for the purpose of expressing its resolutions in proper and binding form. The responsibility which flows from the origination of the policy of the control is a matter which concerns that control alone, and cannot be transferred to its counsel, when the results are not pleasing to the majority interests.

Advice of Counsel Not a Defense

Minority stockholders may take steps to protect the rights and property of a company which had

leased its assets to and came under the domination of another corporation; especially, where the lessee company conducts the business entirely in its own interests.[44]

This situation is not now of frequent occurrence, since the "trust" has been declared illegal, and fallen into disuse.[45]

Holding Companies.

The law does not countenance a partnership of corporations, and leases like that mentioned in the foregoing instance are cumbersome and unsatisfactory. Nor is a consolidation always feasible, since the legislative consent has frequently to be secured in advance of such a merger. Under the circumstances as they exist today, holding companies have become a necessity when it is desired to retain a number of corporations under one control. The cost is small compared with ownership of the major part of the stock of each company,—the control of a controlling interest being all that is required. This plan is in general use and equity, like the business world, is inclined to prune rather than to uproot this new growth.

Minority Interests Protected

The trust obligation formerly resting upon the directors, in their relations with the company and with the stockholders who have elected them to office, is thereafter transferred to the holding company.

Minority interests still retain every right; and the court will scrutinize "with earnest, if not severe, vigilance, any pecuniary transactions which

may be had between the parties thus circumstanced."[46]

Manipulation of the control of a corporation so as to enable another company to buy in the remaining shares at an inadequate price, will not be countenanced by equity;[47] and the bringing of needless suits to waste its property and to destroy its business, with the object of procuring a monopoly for the holding company, will warrant a restraining order, at the request of any stockholder.[48]

Oppressive Acts Restrained

The power to take and permanently to hold shares of the capital stock of another company is not a general right. Unless it is expressly conferred by the charter, or is necessary to carry those powers into effect, the right is deemed withheld; for no corporation obtains any extension of its chartered powers by implication. Only the plain terms of its charter can confer those powers, and the right to hold the shares of other companies must be specifically and directly conferred.[49]

In some instances there is a primary duty to the State that will not permit the control to be transferred in any manner which will relieve the company of the burden of responsibility imposed by its charter. This special rule is most frequently applied in cases of railroads and other corporate bodies possessing special privileges, in return for public service.[50] The element of unlawful restraint of trade will also be considered by the court in reaching its final decision.

A corporation duly authorized to acquire the permanent ownership of shares in other companies,

i.e., a holding company, may lawfully receive those shares and issue its own stock in return.

It has the right to vote at all meetings of stockholders,[51] receive dividends,[52] and exercise the same privileges as a natural person.[53]

But the transfer of the control to the holding company must not operate to defraud persons not parties to the agreement, and the rights of the minority will be protected.[54]

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[2] Medical & Surg. Society v. Weatherly, 75 Ala. 248.
[3] State v. Rombauer, 46 Mo. 155; Curry v. Scott, 54 Pa. 270.
[4] People v. Goss & Philips Mfg. Co., 99 Ill. 355; Shipley v. Mechanics' Bank, 10 Johns (N. Y.) 484.
[5] People v. Cummings, 72 N. Y. 433.
[6] Com. v. Phoenix Iron Co., 105 Pa. 111.
[7] Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 198.
[8] Brown v. Deluth, etc., Co., 53 Fed. 889; Swope v. Villard, 61 Fed. 417; Chicago v. Cameron, 22 Ill. App. 91.
[9] Swope v. Villard, 61 Fed. 417.
[10] Heath v. Erie Ry. Co., 8 Blatchf. 387.
[11] Dodge v. Woolsey, 59 U. S. 331; Foss v. Harbottle, 2 Hare (Eng.) 461.
[12] Ryan v. L. A. & N. W. Ry. Co., 21 Kan. 365; Stahn v. Catawba Mills, 53 South Car. 519.
[13] Wengel v. Palmetto Brewing Co., 48 S. C. 80; Mason v. Harris, L. R. 11 Ch. Div. (Eng.) 97; Sage v. Culver, 147 N. Y. 241.
[14] Torrey v. Toledo Portland Cement Co., 150 Mich. 86.
[15] Nash v. Hall, 11 Misc. (N. Y.) 468; affirmed, 90 Hun. 354.
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[19] St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393.
[20] Davenport v. Dows, 18 Wall (U. S.) 626.
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[22] Mawhinney v. Bliss, 124 App. Div. (N. Y.) 609.
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[30] Robbins v. Butler, 24 Ills. 387.
[31] Taylor v. Salmon, 4 Mylne & Craig 134.
[32] Chicago, Rock Island & Pacific Ry. v. Union Pacific Ry. Co., 47 Fed. Rep. 15.
[33] Dodge v. Woolsey, 59 U. S. (18 How.) 331.
[34] Horn Silver Mine Co. v. Ryan, 42 Minn. 196.
[35] Franey v. Warner, 96 Wis. 222.
[36] Miner v. Belle Isle Ice Co., 93 Mich. 97.
[37] Gamble v. Queens County Water, 123 N. Y. 92.
[38] Macklem v. Fales, 130 Mich. 66.
[39] Sparrow v. E. Benent & Sons, 142 Mich. 441.
[40] Jacobus v. Amer. Mineral Water Mach. Co., 38 Misc. (N. Y.) 371; 77 Supp. 898.
[41] Farmers' Loan & Trust Co. v. New York & N. R. R., 150 N. Y. 410.
[42] Forester v. Boston & Montana Co., 21 Montana 544.
[43] Pierson v. Cronk, 26 Abb. N. C. (N. Y.) 25.
[44] Barr v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 444.
[45] People v. North River Sugar Refining Co., 121 N. Y. 582.
[46] Memphis, etc., R. R. Co. v. Woods, 88 Ala. 644.
[47] Farmers' Loan & Trust Co. v. N. Y. & N. R. R. Co., 150 N. Y. 410; Macklem v. Fales, 130 Mich. 441.
[48] George v. Central R. R. Co., 101 Ala. 607.
[49] De La Vergne Co. v. German Savings Institute, 175 U. S. 40.
[50] Thomas v. West Jersey R. Co., 101 U. S. 71.
[51] Davis v. U. S. Elec. P. & L. Co., 77 Md. 35.; Market St. Ry. Co. v. Hellman, 109 Cal. 571.
[52] Royal Bank of India's Case, L. R. 4 Ch. Ap. 252.
[53] National Bank v. Case, 99 U. S. 628.
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CHAPTER III.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Watered Stock.

"Watered Stock" is a subject which concerns minority stockholders, as well as the investing public, and the correction of this abuse has involved the courts in the consideration of the nature of capital stock and the equivalent that should be transferred to the corporation in exchange for its shares.

Means of Payment.

According to the earlier decisions, subscriptions to the capital stock are payable only in money; but it is the present rule that by agreement the subscriptions may be paid in cash, labor or property.[1]

Original Contract Controls

The mode of payment may be provided for by the terms of the corporate charter, or by the statute regulating the organization of companies; in either event, the provision will be deemed a part of the original contract between the members and the corporation.[2]

When money-payment is required, it has been held that there is no authority to receive checks as the equivalent for cash.[3]

Fictitious Valuations.

While it is apparent that courts can lean over much on the side of virtue, still the evil they have sought to correct is by no means an easy matter to overcome.

Overvaluation is difficult to detect, and can often be concealed, or at least excused, on the ground of the fluctuation of prices from time to time.

Best Judgment of Directors Required

But when these transactions are subjected to judicial scrutiny, directors are held to the exercise of their best judgment in obtaining fair treatment for the corporation; and the acceptance of property at an overvaluation in payment for its shares will no more be approved than would be the acceptance of counterfeit or depreciated currency.[4]

Stock for Services.

Main Consideration Convenience of Company

The same rule is in force regarding a stock issue in exchange for services. Where it is more convenient, the shares of capital stock may be used instead of cash for this purpose; obtaining subscriptions, procuring loans and advertising are among the items of labor that have been met in this way. But unless by special agreement, the company cannot be compelled to accept the subscription price in any form except cash; and where directors vote themselves shares in return for their labor in promoting the enterprise, the court will interfere, to set aside such a transaction.[5]

Minority stockholders, however, are not dependent upon the courts alone for their rights regarding the issuance of "watered stock"; the statutes

of the various states quite generally prohibit this evil.

Rules Relaxed for Newly Organized Company

At an early stage of the corporation's existence this rule is less stringently applied than when the company has grown into an active concern, with a recognized value for its shares,[6] and not even creditors can object where the smallness of the original capital stock has caused the corporation to increase the amount and to dispose of the new shares at the best figure obtainable, even though that figure is less than par.

Donated Shares.

Fund of Treasury Stock

A common device is for the company to deliver over shares in return for property, and to receive back a donation of a portion of those shares into its treasury, for re-issue, at its discretion, as fully paid stock. This plan has received the sanction of the courts,[7] and where the element of fictitious value is not present, affords a useful means of equipping the corporation with a fund of free full-paid stock, through the friendly interest of those who are concerned in its success.

The amount of issued stock affects only the interest of the stockholders themselves; for although the creditors possess rights that are superior to those of the owners of shares, yet creditors, as a class, are not concerned with the number of portions into which the profits or property is divided, after the debts are paid.

Since the stockholders are the only persons concerned, it follows that they can consent to the issu-

ance of additional shares in any form they desire, provided no statutory provision intervenes.[8]

Rights of Minority.

Dissenting Stockholder May Enjoin Abuse

In cases where all do not consent, a different rule prevails; and the dissenting stockholder may stop the issue by an injunction,[9] provided he takes this step promptly.[10]

As we have already seen, secret agreements as to rebates on the purchase price are discountenanced by the courts on the ground that they amount to a preference between members; and the issuance of gratuitous stock would be even more subject to this objection.

Stock-Bonuses.

Stock-Bonus With Bonds

In one instance, a bonus of stock has been given so frequently and for so long that it has now grown into a custom, and even the courts are not entirely opposed to such a gift. This instance is where a corporation has a bond-issue to be disposed of, and the investor in the bonds demands an allowance of shares in the company as a bonus, on the ground that his capital is adding to the permanent value of the property, and that the return of this capital with interest is not a complete compensation for the risk. Under this view, the stock ceases to be merely a bonus, and becomes a part of the consideration for the loan; certainly, if no stock were thus given in the deal the cash returns would be less on the loan; in many instances, the plan would fail altogether.

While this appears to be the practical result of

Courts Oppose Such Issues

the situation, the courts in general are opposed to such issues of bonus stock, and will refuse to confirm such transactions, when brought to their notice by a dissenting stockholder.[11]

Probably a different rule would be adopted in cases where it could be clearly shown that the stock-bonus was a partial consideration for the loan.

Partly Paid Stock.

Another form of stock-watering consists in an issue of shares in return for only a portion of their face-value paid into the treasury of the company; but here the remedy is obvious,—especially where the rights of creditors are involved,—and consists in the requirement that every holder of those shares shall pay to the company the balance due on his subscription.

Stock Dividends.

Stock-dividends also may become a means of watering stock where the new issue is not represented by assets previously added to the possessions of the corporation. But where stock of this description is a *bona fide* affair and stands for extra earnings or accumulated surplus,—it is highly esteemed both by the investing public and the courts, since it means an increase of the sum invested in the corporation, and this in turn results in greater security for creditors and for all persons having dealings with the enterprise.

Adding Profits to Principal Increases Assets

On the other hand, if the stock represents "water" and not actual value, any stockholder may

secure a prohibitory order from a court of equity, enjoining actual delivery of the shares.

Combinations.

The most extensive means of watering stock yet remains for consideration. It consists in the combination of various corporations into one large concern, and furnishes an opportunity for building aggregations of capital of a size not dreamed of by the originators of the individual companies.

These combinations or amalgamations,—if the corresponding term employed in England is used,—partake of the nature of things good or evil, according to the measure of honesty and good judgment exercised by the managers of the uniting interests; but the good fortune attending the particular venture is often the result of matters outside of the business itself. Thus, radical changes in the tariff would without doubt disturb, if they did not destroy, many companies where the benefits of the statute have been included along with the value of the charter itself and every other imaginable possession, when fixing the total amount of the capital stock.

Consolidation Main Source of "Watered Stock"

In such cases, preferred stock usually represents the value of the properties of the several companies entering into the arrangement, and is used at a liberal appraisal in payment for the stock of the constituent companies; whereas the shares of common stock offered to the confiding public represent hope and expectation.

Since the size of the modern business corporation has made possible the hiding of the real values be-

hind such vast stock values, a new era has been inaugurated and the old landmarks changed,—so that it is no longer possible to lay down fixed rules that will surely obtain the active supervision of the courts in such matters. Business men no longer are guided by the amount of the capital stock as a certain indication of the assets which are behind and give value to the shares; investors now inquire in every instance into the extent of the property, instead of the amount of issued stock, and in the end the market's quotations reflect with reasonable accuracy the consensus of their opinions.

Vast Capital Stock Hides Real Value

The incautious, the ignorant, and the speculative suffer, as in other departments of life; the most that the courts can do, under present conditions, is to require that all the earnings, if any, shall be divided among the stockholders, leaving the question of stock value to be governed by the results as they appear when time and experience have settled the matter.

Device Deceives Public

In times of prosperity specious and plausible arguments can be found for valuations that in a period of depression appear to savor of recklessness, if not of fraud.

Courts, in such cases, cannot make men wise; they can at most strive to keep them honest, or at least to hold the scales of justice with an evenness that will inspire the people with confidence in the fairness of the public tribunals.

When the inequality between the estimated and the real value can be established, courts of equity will intervene and confine the capital stock of the corporation within reasonable limits.

It is repeated that the courts do not and cannot undertake to make or unmake bargains where the parties themselves are satisfied. Where the excess in value is not so great as to shock the conscience of the court or to amount to a fraud upon the public, no ground for interference by equity is shown.

Courts Do Not Make Bargains

The final result must be left to be decided in accordance with the laws that govern the success of business enterprises generally, and the functions of the courts confined to passing upon individual questions as they arise in regular course.

Dividends Paid from Principal.

The payment of dividends out of principal is a question that frequently arises in corporation matters, and is everywhere opposed by the courts. The desire to make the company appear prosperous and to increase the market value of its shares is the usual motive. If the directors have been themselves deceived as to the value of certain assets, and they would have acted differently had the true situation been known to them, they may be relieved from the obligation to return the amount of the dividend to the treasury of the company;[12] but where they have been guilty of intentional wrong, or of gross negligence, they are personally liable to the company, and any stockholder who has not ratified the transaction may make an effective protest in the courts.[13] If it is not too late, the court will enjoin payment, otherwise the directors must reimburse the company.

Notwithstanding the apparent absence of con-

nection between the subjects of watered stock, and the payment of unearned dividends, these abuses in reality are closely associated in many ways. Thus, the fact that the new shares add no profit-producing element of assets to the company, and represent nothing of real value, makes it apparent that dividends upon such shares of capital stock can be paid only by reducing, to some extent, the profits that otherwise would have gone to the owners of the original shares; or by depleting the treasury, through the withdrawal of the funds required for that purpose.

Otherwise Directors Must Reimburse Company

The real burden, as is usual in all cases of illicit transactions, falls upon the minority stockholder. No offsetting advantage accrues to him in connection with the original transaction from which the issue of watered stock arose, and yet he is equally involved in the inevitable collapse in stock value arising from the discovery of the source of the fictitious dividend, on the part of the investing public.

Minority Stockholder Usually Injured Party

In such instances as these, the value of recourse to a court of equity for protection or relief, requires no comment; for without such aid the minority stockholder will be compelled to submit to many forms of oppressive acts on the part of the control.

CHAPTER III.: CITATIONS.

[1] Farwell v. Great Western Telegraph Co., 161 Ill. 522.
[2] Rensselaer & Washington Plank Road Co. v. Barton, 16 N. Y. 460.
[3] Knox v. Childersburg Land Co., 86 Ala. 180.
[4] Wetherbee v. Baker, 35 N. J. Eq. 501.
[5] Ex parte Daniell, 1 De Gex & J. (Eng.) 372.
[6] Handley v. Stutz, 139 U. S. 417.

AUTHORITIES REFERRED TO IN CHAPTER III.—*Continued.*

[7] Pullman v. Railway Equipment Co., 73 Ill. App. 313; Otter v. Brevoort Petroleum Co., 50 Barb. (N. Y.) 247.

[8] Avon Springs Sanitarium Co. v. Kellogg, 125 App. Div. (N. Y.) 51.

[9] Fisk v. Chicago, R. I. & P. R. Co., 53 Barb. (N. Y.) 513; Fitzpatrick v. Dispatch Pub. Co., 83 Ala. 604.

[10] **Taylor v. South &** North Alabama R. Co., 13 Fed. 152; Parsons v. Joseph, 92 Ala. 403.

[11] Stutz v. Handley, 41 Fed. 531; Handley v. Stutz, 139 U. S. 417.

The view adopted in New York does not invalidate stock given as a bonus. Christenson v. Eno, 106 N. Y. 97.

[12] Witters v. Sowles, 31 Fed. 1.

[13] Gratz v. Redd, 4 B. Mon. (Ky.) 178; Hill v. Frazier, 22 Pa. 320.

CHAPTER IV.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Powers of Stockholders—Common and Preferred.

Everything which a corporation can lawfully do relates back to some meeting of the stockholders, or to its chartered powers. Officers conduct the corporation's affairs only by authority delegated to them as its servants or agents.

Therefore, in order to ascertain the powers lawfully vested in the management, it is necessary to examine with care the creating statutes, the charter and the resolutions adopted at the stockholders' meetings conferring those powers.

The requirements for regular procedure in conducting such meetings should be studied with equal care.

Common Stock.

Requirements for Effective Meeting

The owner of minority shares may insist that every meeting of the stockholders shall be convened:

(*a*) Upon due notice to its members;

(*b*) At a proper time and place;

(*c*) With requisite number of members present or proper amount of shares represented; and

(*d*) With officers necessary to conduct the meeting.[1]

(*a*) Stockholders' meetings differ from those of directors in that any number more than one may transact business at a duly called meeting, in the absence of expressed provision to the contrary;[2] but this makes it the more imperative that every member shall have notice of the meeting.

(*b*) To be binding, the notice must specify time and place; though in the case of stated meetings which are fixed by the articles of incorporation or the by-laws, notice is a matter of courtesy and not of right, as every member is presumed to know the regulations of the company.

Notice of Meeting

Meetings called at other times for a special purpose are not regular unless the notice contains information regarding the nature of the business which will come before the meeting; and no other matters can be legally transacted thereat.[3]

What It Should Contain

Unless some other provision is made by law or is contained in the charter or by-laws, personal notice must be given a reasonable time before the day of meeting; but the means of notifying the members is generally provided for in the regulations of the company.

Special Meetings

(*c*) Where all the members are present and consent, the meeting may proceed without notice. A meeting may be legally adjourned if there is not a sufficient number present to transact business.[4] An adjourned meeting is in effect a continuation of the original meeting.

Adjourned Meetings

Whatever business may be transacted at a meeting of the corporation may be lawfully taken up and disposed of at an adjourned meeting; and no new notice is required.[5]

Fraud Vitiates Meeting

Where a meeting is not held in accordance with the provision of the charter or by-laws, or of any statutory requirement, and a substantial right is affected, or where the element of fraud can be shown, a court of equity will intervene to prevent the meeting or to set aside its acts.[6]

Great Latitude Permitted

Individual members have great latitude at meetings of stockholders, and may change their votes at any time before the result is announced;[7] prior to that time the polls may be reopened to let in a tardy voter. The vote itself may be given in any form that is usual in the company's meetings; in the absence of objection, a verbal vote, or by the uplifted hand, is sufficient for the purpose.

The same latitude prevails regarding the minutes of the meeting itself; and while it is usual to have such records kept and recorded in the books of the company, they are not final.

Minutes

Where extracts under seal are offered in court, they are evidence of what took place; but oral evidence is always admissible to explain or to dispute them, and in case they are omitted, lost or destroyed, the record may be proved by the testimony of those who were present at the meeting.

Silence Waives Defects

Since the members who were present and did not object cannot afterward dispute the regularity of the meeting, it is readily seen that the matter of deciding as to the legality of the method used in

fixing the time and place and otherwise calling the meeting is of very great importance.

Meetings Outside of Parent State.

Home State Proper Place of Meetings

The courts, in some cases, have set aside meetings held without the confines of the creating state; but the corporation, through its agents, may carry on business in other states. A corporation has its domicile in the state from which it derived its existence, and official acts, especially annual meetings of stockholders, should be transacted therein.[8]

Right to Vote.

Unrecorded Owner Can Vote

The right of the owner of shares to vote at the meetings of the company is unquestioned. He need not be a stockholder in the sense that his name is enrolled on the books of the company; it is sufficient that he is able to show affirmatively that the present ownership is in him.[9]

The owner of pledged stock may vote at corporate meetings,[10] and his action is binding on the party with whom the stock is pledged.

Recording of Transfer Not Imperative

The right of the owner to vote and to represent his shares of stock, independently of whether he is the recorded owner, has an important bearing upon his legal standing before the courts.

As the representative of an interest, he is qualified to take steps to protect his rights, even where the officers refuse to concede his ownership, or to aid him in any way; and he may compel the proper officers to register the transfer through a writ of mandamus.[11]

Power of Proxy.

Where a written proxy contains limitations, the party voting it has no power to exceed the authority conferred;[12] but a general proxy grants all the powers of the owner for that meeting,[13] and a power of proxy in blank may be filled in by the voting party.[14]

Limitation of Voting Power.

An agreement by the owner to vote his stock for a specified purpose, in consideration of a gift or other advantage, is void because opposed to the dictates of public policy.[15]

If a person subscribes for shares of stock, he consents that the majority shall control, except for an improper purpose;[16] a minority stockholder, however, always possesses the right to demand a hearing and present his views to the meeting before final action is taken.[17]

Majority Controls

The majority stockholders, while they have the legal right to manage and control the business and affairs of the corporation by and through their voting powers, will be required to act fairly, properly, and without oppression toward other stockholders.[18]

Incompetent Persons Should Appear by Representatives

Courts will not inquire into the mental ability of individual stockholders to transact business; they will take notice only of the capacity of the whole body, in meeting assembled, to conduct its affairs. Therefore, to safeguard the interests of every person, when any stockholder is an imbecile, insane, or under full age, the court will, upon petition,

appoint some person to represent him at such meetings.[19]

The indirect application of the company's property, profits, or means of profit, to their own benefit, by any portion of the members of the corporation, in fraud of their own associates, is incapable of being authorized or ratified by a vote of a majority or by any act or omission of the incorporated body.[20]

Majority Must Deal Fairly

These rules do not require enlargement. They are fundamental, and because of their fairness, are in accordance with the course which will be followed by those who desire the prosperity of the enterprise and of every associated interest.

Exclusive Right to Dissolve Corporation.

Corporations which do not pay dividends, or have no occasion to continue to exist, may be dissolved by authority and direction of a vote of the stockholders. This privilege of deciding between corporate life or death, pertains exclusively to the stockholders, and the directors are bound by the will of the owners of a majority of the capital stock,[21] expressed at a regularly called stockholders' meeting.

Mis-use or non-use is not sufficient to accomplish this end; action by the stockholders themselves is imperative, unless the court has declared the charter forfeited, or the period of duration named in the charter has expired. Whatever the course pursued, the life of the company will continue sufficiently long to enable the officers to dispose of its property, pay its debts, and divide the surplus

Dissolution of Corporation—How Conducted

among the stockholders. In cases where the difficulties of the corporation are the result of abuses and fraudulent acts on the part of the directors, a court of equity will set aside those acts and endeavor to place the company in a position to conduct its affairs on a paying basis. Any minority stockholders may petition the court for such redress.

Preferred Stock.

The rights of the owners of preferred stock are in most cases similar to those which pertain to the holders of common stock.

Preferred Stock Defined

Shares of preferred stock belong to that special class of securities which is entitled to dividends from the income or earnings of the corporation before any profits are paid to other stockholders.

It is usual to arrange and agree to the nature and amount of the preferred stock at the time when the corporation is incorporated. If this step is attempted at a later period, any holder of shares

Rights of Minority

of the common stock may apply to the court and secure an injunction against the stock-issue, on the ground that the creation of a preference in dividends reduces the value of the common shares.[22]

Provisions for Preference.

By far the greater number of these forms result from the agreement contained in the charter or by-laws, although the issue may be authorized by the resolutions of stockholders, and in the absence of other records the terms may be found set forth in the certificate itself.

Sometimes the preference takes the form of a right to exchange the stock for bonds or common shares, in addition to the guarantee of fixed returns. At other times, in rare instances, half shares have been issued, one half being deferred to the remainder, which thereby becomes in effect preferred stock; and in another case a telephone company agreed that the dividends upon the preferred stock should consist of rights to send messages free of charge. Many strange forms of precedence occur in connection with the infinite varieties which preferred stock assumes; and some of these forms appear in the decisions.

Forms of Preference

Where the control is deemed vital, and the organizers do not wish to endanger the power of the majority at the corporate meetings, the preferred stockholders reserve for themselves the right to elect a majority of the board of directors;[24] in other cases the voting power is expressly withheld from the preferred stock.[25]

Certain forms of preference stock include special provisions, viz: (*a*) when a dividend of a certain percentage has been paid on the preferred stock and an equal dividend upon the common shares, the remaining income is divided equally between both classes; or (*b*) when a dividend of specified amount has been paid on the preferred stock, the remaining profits are divided between the two classes, either by paying an equal share to each class of stockholders, or by distributing the remaining surplus on a *pro rata* basis.

Not all of these stipulations are in favor of the preferred stockholder; thus, the company may re-

Corporation May Reserve Rights

serve the right to retire all the preference stock at a stated price and time, or to exchange it for other forms of the securities of the company. An agreement to guarantee dividends without regard to earnings is permissible during the construction period; but if continued beyond such period the contract will not be enforced by the courts.[26]

Special Forms of Priority.

By permission of the legislature, corporations may create special forms of preferred stock, each with differing requirements and privileges. To illustrate: The securities of the Erie Railroad are said to include preferred stocks in so many special forms as to constitute, when taken together, a study in corporate finance.

Rights Pertaining to Preferred Stock.

Members Must Fare Alike

But whatever the wording of the certificates, or whatever the underlying agreement between the parties, neither the terms of the contract nor the partiality of the management will be permitted to grant to one member advantages over others of the same class, either in the amount of dividends, or the date when such income is paid. The preferred stockholder is entitled to insist upon the dividends the company agreed to pay when the money was obtained,[27] and can therefore assert his rights in the familiar forms which pertain to the ownership of the common shares.

Preferred stock does not carry with it a preference over the creditors of the corporation. The

owner of preferred shares is in all respects a member of the corporation, and as such—unless restricted by statute or special agreement made by the officers of the corporation at the time of issue—is entitled to vote at the election of officers of the company and to have a voice in the management of the corporation.

Creditors Have Prior Rights

Dividends on Preferred Stock.

The source from which the dividends are declared consists of the net earnings. These, in turn, have been declared to be, in the case of a railroad, "the gross receipts, less the expenses of operating the road to earn such receipts."[28]

The reasonableness of the charges, and the necessity for deducting those items prior to meeting the dividends on the preferred stock, are questions which have frequently been decided through suits in equity. It is well established, however, that while preferred shares confer prior rights, this is not equivalent to a guarantee, but the preferred stockholder must accept "the chances of the enterprise in which he has embarked."[29]

Source of Dividends

The owner is entitled to insist upon considerate treatment on the part of the management, and an English court has held that since dividends are dependent upon the earnings of each particular year, it is unfair to deprive the preferred stock of all returns in order to complete extensive repairs within one annual period.[30] In America a different rule permits the directors to exercise a reasonable discretion in the matter of diverting income into im-

Cumulative Feature Explained

provements. The preferred stockholder must accept the result of the best judgment of the board. A court of equity will intervene only in cases where the management does not show clearly that the improvement benefits the property.[31]

Unless it is otherwise expressly agreed, the general rule requires that dividends on preferred stock which fall in arrears shall be paid when the treasury is able to meet those charges, but without interest. Accordingly, all preferred stock is cumulative, unless the contrary appears in the contract, or unless provision is made by statute to govern the matter.[32]

Right of Preferred Stockholders on Dissolution.

It is generally supposed, on the part of business men, and not infrequently by members of the bar, that preferred stock will receive first money, the balance to be divided among the holders of common stock, but in reality the insertion of a covenant in the agreement itself is the only sure method to insure such a division. The rule as to accumulation does not extend to the application of funds or other property of the corporation at the time of the winding up of the affairs of the corporate body; unless otherwise specified in the agreement, the proceeds will be divided ratably among all the members, the common stock sharing equally with the preferred.[33]

Unless Otherwise Provided, Assets Equally Distributed

Remedies Available.

The subject of remedies available to the owners of preferred stock is particularly important.

Separate Interests of Common and Preferred Stock

At this point the interests of the two classes of stock, namely, the common and preferred, will be found to diverge, in certain particulars, and knowledge of the remedies available for the protection of the rights of the preferred becomes of particular importance to investors in those shares.

Situations arise when no dividend has been earned upon the common stock, and where the directors, in their discretion, have the power to improve the property by diverting from owners of preferred shares the fund that otherwise would be used to pay dividends.

An abuse can be shown only where the board of directors yield to the pressure of the control, and particularly of the holders of the common shares, and employ this power in a selfish effort to secure some benefit for the holders of the common stock from income that should belong exclusively to the owners of preferred shares.

Diverging Interests.

Rights of Preferred Stockholders Jeopardized

The interests of the two classes of stock, namely, the preferred and common, are so far separated as at times to become antagonistic; and occasions of this description call for active measures on the part of the preferred stockholder to insure the recognition and protection of his right to an income from the common venture.

In these cases, the distinction between the powers of the law courts and the relief conferred by courts of equity is especially apparent.

Enforcement of Dividend Rights.

Protection Courts Afford

When a dividend has been declared, but is left unpaid for more than a reasonable time, any stockholder may bring an action at law to recover his share of the dividend, which, by the act of the board of directors, has become his personal property. An action at law will also lie where junior issues of stock have received a preference in dividends.[34]

However, these rights in law are confined within narrow limits. In fact, few instances will be found where the preferred stockholder is warranted in basing his hope for relief upon his strictly legal rights.

Courts of equity, on the contrary, where wrongs of this description are shown, will enjoin the payment of a dividend upon the common stock until the just claims of the preferred stockholders have been fully met.[35]

Occasions When Courts Interfere

In ordinary cases, the actual determination of the time within which the dividend shall be paid, or the amount of profits which the owner of stock, preferred or common, shall receive, will be left to the discretion of the directors; but occasions may arise in which the interference of the courts will be required to accomplish an equitable division of the profits.

In brief, stockholders, either common or preferred, may apply for relief in every instance where their rights are impaired, and when the exercise of their own powers will not suffice to rectify the wrong.

CHAPTER IV.: CITATIONS.

[1] People v. Batchelor, 22 N. Y. 128.

[2] Ex parte Willcocks, 7 Cowen (N. Y.) 402; Craig v. First Presbyterian Church, 88 Pa. St. Rep. 42; Brown v. Pacific Mail S. S. Co., 5 Blatch. (U. S.) 525.

[3] In re British Sugar Refining Co., 3 Kay & J. 408.

[4] Ellworth Woolen Mfg. Co. v. Faunce, 79 Maine 440; Rutherford Boiling Spa. Co. v. Franklin Trust Co., 58 N. J. Eq. 584.

[5] Scadding v. Lavant, 5 Law & Eq. Rep. (Eng.) 16; Warner v. Mower, 2 Vermont 385; Smith v. Law, 21 N. Y. 296.

[6] Johnston v. Jones, 23 N. J. Eq. 216; People v. Albany & Susquehanna R. R. Co., 55 Barb. (N. Y.) 344; State v. Smith, 15 Or. 98; Com. v. Patterson, 158 Pa. St. 476.

[7] State v. McCann, 64 Mo. App. 225.

[8] Freeman v. Mechias Water Power Co., 38 Maine 345; Holbrook v. Ford, 153 Ill. 633; Mitchell v. Vermont Copper M. Co., 47 How. (N. Y.) 218; affirmed, 67 N. Y. 280; Port Royal R. R. Co. v. Hammond, 58 Ga. 527.

[9] People ex rel Allen v. Hill, 16 Cal. 113.

[10] City of Spokane v. Amsterdanach, 22 Wash. 172.

[11] Page 34.

[12] Cumberland Coal & Iron Co. v. Sharman, 30 Barb. (N. Y.) 553.

[13] Columbia National Bank v. Matthews, 85 Fed. 934.

[14] Ex parte Duce, 13 Ch. Div. 429.

[15] Woodruff v. Wentworth, 133 Mass. 309.

[16] Meeker v. Winthrop Iron Co., 17 Fed. 48.

[17] Commonwealth v. Cullen, 13 Pa. 133.

[18] Brewer v. Boston Theatre, 104 Mass. 395.

[19] Stebbins v. Merritt, 10 Cushing (64 Mass.) 27.

[20] Gregory v. Patchett, 33 Beav. 595; Atwood v. Merryweather, 5 Eq. L. R. (Eng.) 464.

[21] Slee v. Bloom, 19 Johns (N. Y.) 456; Mobile & O. R. Co. v. State, 29 Ala. 573; Hancock v. Holbrook, 40 La. Ann. 53; Skinner v. Smith, 134 N. Y. 240.

[22] Kent v. Quicksilver Min. Co., 78 N. Y. 159; Melhado v. Hamilton, 28 L. T. Rep. 578; affirmed, 29 L. T. Rep. 364.

[23] Re Brighton, etc., Ry., L. R. 44 Ch. D. (Eng.) 28; Wilson Lumber Co. v. Greene, etc., Co., 127 Iowa 350.

Preferred stock secured by mortgage: Miller v. Rotterman, 47 Ohio 141.

Dividends sought to be preferred over claims of creditors: Williston v. Michigan Southern & N. I. R. Co., 13 Allen (Mass.) 400.

Special stock, under the Massachusetts statutes: American Tube Works v. Boston Machine Co., 139 Mass. 5.

[24] Mackintosh v. Flint, 32 Fed. Rep. 350.

[25] Miller v. Rattermann, 47 Ohio St. 141; State v. Swanger, 190 Mo. 561.

[26] Richardson v. Vermont & M. R. Co., 44 Vt. 613; Lockhart v. Van Alstyne, 31 Mich. 76.

[27] Westchester, etc., R. R. Co. v. Jackson, 77 Pa. St. 321.

AUTHORITIES REFERRED TO IN CHAPTER IV.—*Continued.*

[28] Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445.
[29] St. John v. Erie Ry. Co., 22 Wall (U. S.) 136.
[30] Dent v. London Tramways Co., 16 Ch. Div. 344.
[31] McLean v. Pittsburgh Glass Co., 159 Pa. 112.
[32] Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157.
[33] Hale v. Cheshire R. Co., 161 Mass. 443.
[34] West Chester & P. R. R. Co. v. Jackson, 77 Pa. 321.
[35] Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157.

CHAPTER V.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Duties of Directors.

Directors are the mind and soul of the corporation. They are the trustees of its property and the guides of its affairs.

It is in this connection, namely, by decreeing that the directors in their capacity as trustees for every interest and for every stockholder, must be held to a strict account in the management of the affairs of the company, that courts of equity regulate the powers of the majority and protect the minority.

Equity Regulates Corporations Through Directors

If the stockholder wishes to retain his independence and to deal as an individual with the corporation, he should decline the appointment when nominated for the office of director; for acceptance will amount to an implied agreement to conform to the rules that prevent the director from having interests adverse to the company.

While no power exists to compel any stockholder to accept the position of director, that office when it is once entered upon carries with it obligations as well as privileges. This fact should be clearly understood in advance by candidates for the office.

Director a Trustee.

Much discussion has taken place as to whether the director is in fact a trustee; but it is now well established that his position is one of this confidential nature, and that he is chargeable with corresponding duties toward the company.[1]

Director Is Trustee

These duties are very general, and comprise everything connected with the management of the corporation's affairs, as well as with the protection of its interests.

Directors appoint agents for the company, and in many states the executive offices are filled by vote of the directors instead of by the stockholders direct.

At directors' meetings contracts are made and other routines of business are transacted. Every person who deals with a corporation is presumed to know the limitations placed upon the power of the board of directors by the charter or by-laws, and also the limits of the powers of the officers or of any agent the company may appoint; hence it is wise for those who have business with the corporation to inspect the corporate papers and learn the extent of the powers thereby conferred.

Business of Corporation Transacted by Board

Duration of Office.

The election of directors is among the inherent powers of stockholders.

Directors may hold office beyond their original term and until the election of their successors. This course is legal and may be continued indefinitely.

Office Continues While Duties Remain

The business and property of the corporation must be cared for; and since the directors are regarded in law as its trustees, no lapse of time is sufficient to cause a vacancy while duties remain to be performed.

Faithful Service Required.

Directors are not insurers of the fidelity of the agents they appoint, nor can they be held responsible for losses that flow from the acts of agents; but for their own neglect of duty they are liable.[2] Any form of management by which the director becomes interested adversely to the corporation in contracts which are made with it, is an abuse which the courts will not sanction.[3] Such contracts, as we shall see later, are not in themselves void; but they will be declared void by the courts, if attacked by the corporation or some one in its behalf, and the profit obtained by the director will be turned into the treasury of the corporation, on the theory that he was acting as its trustee.

Adverse Interests Not Allowed

Lord Elden declared this rule of equity to be founded upon the duty of the courts to protect the weaker from the stronger, it being always presumed in court proceedings that the trustee has greater knowledge of the facts and circumstances which govern the situation, and that the trusting person is the weaker party because in comparison with the trustee he is ignorant in those matters.[4]

Limitation of Rule.

These rules, if applied without any allowance for special cases, would render the lot of a director too

Rules of Conduct Permit Reasonable Latitude

hard, and prevent desirable persons from accepting office. Accordingly, since the director is often called upon to institute new lines of business in which agents must be employed and risks taken, it is a well recognized principle that he is not liable for mistakes of judgment, but only for gross inattention, neglect or acts of fraud in which he is himself concerned.[5]

Thus, a stockholder will not be successful in charging a director with misconduct in withholding dividends for the purpose of accumulating a very large surplus in the company's treasury, unless bad faith is shown;[6] and circumstances may arise where it is best for the company to make a contract with a director, as an individual, instead of with a third party. If the transaction is carried on openly and in good faith, it will be sustained by the courts, after inquiry into all the facts.[7]

Enough has been stated to show the general duty which a director owes to his company. This is not a trust in the full legal sense; rather is it a confidence reposed in his wisdom, and it implies a watchfulness on his part over the company's affairs. Where he is wanting in these qualities, the courts will scrutinize his conduct, and will insist upon fair dealing.

Meetings of Directors.

Procedure for Meetings

The same rules which govern stockholders' meetings apply to meetings of directors and the time and place where they are held.[8] These details are fixed by the by-laws. Where all the directors are

present and consent, a legal meeting may be held without notice.[9]

Routine business can be transacted at a meeting of directors held under a general notice; but where special or unusual matters are to be considered, it is necessary that the subjects should be specified in the notice.[10]

Home State as Affecting Official Acts

While it is rightly considered the safer practice to arrange all corporate meetings so that they will occur within the confines of the home state, in accordance with the principles that the corporation can exercise its powers in other states only through agents, in some quarters there is a tendency to broaden this ruling. Mortgages created by the directors at meetings held in another state have been declared legal.[11]

Tending to Rule Broaden

Where the legality of securities, or some other important question is involved, this element of uncertainty should be avoided; but where it is imperative that the matter shall be passed upon and action taken beyond the home jurisdiction, the objection may be remedied by ratification at a subsequent stockholders' meeting held within the parent state.[12]

Ratification

When every member of the board of directors is present and participates in the proceedings without objection, such action is binding, and all irregularities are cured.[13] This procedure presents a convenient method for ratifying and confirming actions of previous meetings where only a quorum was in attendance, and where the regularity of some measure is in doubt.

Directors Represent Corporation.

Stockholders Not Authorized to Interfere

Directors, when in session, represent the corporate body. They alone can decide what contracts shall be entered into by the company. Even the stockholders have no right to interfere.[14]

Must Act in Session

They possess no binding power as individuals. All their acts must be performed while in session. The law clearly intends that the company shall have the benefit of a full and free discussion of every question, and that each in its turn shall receive careful consideration prior to the board's decision, which is final.

Limitations of Power of Board

Notwithstanding this latitude, there are fixed limits to the powers of the directors. Thus, while the directors may make a general assignment for the benefit of creditors, when the company, in their opinion, is in a failing condition,[15] yet they have no right to change the amount of the capital stock,[16] nor are they empowered to enter into contracts that alter the general purpose of the corporation.[17]

In cases where the situation calls for action by the stockholders, it is the duty of the directors to send out the necessary notice, and the courts will require this to be done.[18]

Resignations.

The directors may resign at any time by notice given either orally or in writing, and if no liability to the corporation has been incurred by reason of negligence or any fraudulent act, the relation ceases at once.

But if misconduct in office is shown, equity will require that the trusteeship shall continue until

the injurious acts have been undone and full amends have been made, to the end that the corporation may be placed as nearly as possible in the position it would have occupied if faithful services had been performed. Liability for Wrongful Act Continues

In those states where the director is required to own qualifying shares of the capital stock, the sale of his shares is a disqualifying act which is held to amount to a resignation,[19] but this does not relieve him of responsibility for previous illegal acts.

Rules of Trusteeship Applied.

While the director continues the relationship with the company, however, he is held to a strict account and must deal with the affairs of the corporation according to the rules which govern other classes of trusteeship.

Directors are held to a strict measure of care, duty, fidelity and disability. Honest and faithful administration of corporate affairs and the fidelity of the trustee to his trust are what the laws aim at.[20]

Even a formal release by the board of directors will not remove the liability of a director who has committed wrongful acts while in office, and thereby has wasted the funds of the corporation.[21]

Any management by which directors become interested adversely to the corporation, in contracts made with them, or become parties to any transactions to which the corporation is also a party, may be canceled at the election of the corporation or of the party whose rights are sacrificed.[22] Restitution Required

Instances of the enforcement of these rules occur frequently in the reported cases.

Where the interested director has by his deciding vote carried the resolution in his own favor, the contract is not binding upon the corporation, even though the director acted in good faith.[23]

Adverse Interest Disqualifies Director

Under similar circumstances where the resolution received the affirmative vote of one of two disqualified directors, and certain notes in which both were interested were thereby renewed, it was decided that a lawful majority was not obtained and that the resolution could not be sustained as to the disqualified director who did not vote.[24]

The rule illustrated by these cases requires that a disinterested majority shall vote upon every resolution in which a contract is involved; otherwise, the resolution may be canceled and set aside.

Benefits of Efficient Control.

The duties of a director have been indicated in the preceding pages. Where he honorably performs his duties, the director is entitled to be looked upon with esteem, for no company can successfully carry out the purposes for which it was created without supervision of its business by a governing board. While self-interest may lead directors to give careful attention to the corporation's affairs because they possess a substantial interest as stockholders, still it should be remembered that those duties secure protection and prosperity for others as well as the advancement of the individual interests of the directors themselves.

CHAPTER V.: CITATIONS.

[1] Hoyle v. Plattsburgh R. R. Co., 54 N. Y. 314; Taylor v. Chichester R. R. Co., L. R. 2 Exch. (Eng.) 356.
[2] Briggs v. Spaulding, 141 U. S. 132.
[3] McGourkey v. Toledo & O. C. R. R., 146 U. S. 536.
[4] Gibson v. Jeyes, 6 Vesey 266.
[5] Sperings's Appeal, 71 Pa. St. Rep. 11.
[6] Burden v. Burden, 159 N. Y. 287.
[7] Twin Lick Oil Co. v. Marbury, 91 U. S. 587.
[8] Page 58.
[9] Bank v. Johnston, 133 Cal. 185.
[10] In re Argus Co., 138 N. Y. 557.
[11] Bassett v. Monte Christo Mine Co., 15 Nev. 293; Wood Hydraulic Hose Mining Co. v. King, 45 Ga. 34.
[12] Wood v. Corry Water Works Co., 44 Fed. 146.
[13] Minneapolis Times Co. v. Nimocks, 53 Minn. 581; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314.
[14] Sims v. Brooklyn St. R. Co., 37 Ohio St. Rep. 557.
[15] Dana v. Bank of United States, 5 Watts & S. (Pa.) 243.
[16] Eidman v. Bowman, 58 Ill. 444.
[17] Stevens v. Davison, 18 Grat. (Va.) 819.
[18] People v. Cummings, 72 N. Y. 433.
[19] Sturgess v. Vanderbilt, 73 N. Y. 384; In re St. Lawrence Steamboat Co., 44 N. J. Law, 529.
[20] McIntyre v. Ajax Mining Co., 17 Utah 213.
[21] Gilbert v. Finch, 173 N. Y. 455.
[22] McGourkey v. Toledo & O. C. R. Co., 146 U. S. 536; 36 Lawyers' Annotated Rep. 80.
[23] Higgins v. Lansingh, 154 Ill. 301; Gildersleeve v. Lester, 68 Hun. (N. Y.) 532.
[24] Smith v. Los Angeles Immigration and Land Co-operative Assn., 78 Cal. 289.

CHAPTER VI.

[NUMBERS IN TEXT REFER TO AUTHORITIES AT END OF CHAPTER.]

Stockholder's Defenses.

In addition to the matters a minority shareowner may undertake affirmatively for the protection of his individual rights or in the interest of the entire corporate body, there exists a class of defensive acts that lie within his province, when the management is ignorant of the true state of affairs, or is negligently or fraudulently conducting the business. This line of procedure is known as Stockholder's Defenses, and the questions are those that may be raised by minority stockholders when they are called upon to defend themselves against the results of corporate mismanagement, or of fraudulent use of the powers of control.

Minority's Right to Defend

Acts Invalidating Subscription.

Thus, subscribers to stock may set up the defense that there is no corporate body duly constituted in conformity with the statute, or that the law itself is unconstitutional; and if successful in proving the necessary facts, he will be freed from his subscription.[1]

Again, where the corporation has been duly or-

ganized and qualified to do business, but the particular issue of shares of capital stock is wholly unauthorized, the subscriber may show the true condition, and protect himself and the corporation from all liability for the illegal stock issue.[2]

Incorporators Must Proceed Regularly

An allegation of changes in the corporate purposes or the charter may also be interposed to invalidate the acts sought to be enforced. Any subsubstantial change in the plan submitted to the subscriber through the prospectus will furnish a valid ground for rescinding the contract to purchase shares of the capital stock.

Thus, a corporation with $35,000 of capital stock is not identical with a proposed company with $30,000 capital, and in the absence of knowledge and consent such increase releases a subscriber from an agreement to purchase shares.[3]

Every charter contains a contract with the subscriber on the part of the company, that the ends sought to be accomplished are truthfully stated, and that the company will abide by the terms of that instrument.

Charter Constitutes Contract

Material changes are vital, and unless performed in strict accordance with the statute, or ratified, the stockholder is released from his contract when a corporation enters upon a course different from that originally contemplated by the parties to the agreement.[4]

Defense Concerns Minority.

These alterations in the original purpose are naturally the result of a change in the plans of the majority, and accordingly the members associated

with the minority interests are most often the persons compelled to interpose these defenses. The main distinction and the turning point in each case consists in whether the departure from the terms of the charter is a deviation that is material in law.

Equity Protects Minority

The minority stockholder who finds that his position is seriously altered to his disadvantage may with confidence present his defense to a court of equity and ask to be relieved from burdens due to the illegal or oppressive acts of others.

Thus, a party who has subscribed to the capital stock of a railroad corporation, will not be bound to take the shares if the original road is divided into three roads, with no unity of interest.[5]

Other phases of the right of the minority stockholder to defend his rights, are when the enterprise has been allowed to lapse, through the abandonment of every effort to secure subscriptions to the capital stock during a long period of years;[6] or when fraudulent representations were made which induced the stockholder to become a member of the corporation.[7]

Fraudulent Representations.

An instance in point is where a person of property, but who could not read, was informed that by the terms of the articles of incorporation no subscriber was liable until $20,000 had been subscribed; and this statement was false.[8] In this case the contract was set aside and the subscriber released from all obligation to become a member of the corporation and to purchase shares.

Where the managers of the subscription who are the majority in control of the enterprise persuade persons to become members of the corporation by misleading statements contained in a prospectus and in a report upon the condition of the company, a court of equity will release a stockholder from any obligation to pay for stock subscribed for under these circumstances.[9]

Fraud Vitiates Subscription Contract

To avail himself of this right, the stockholder must repudiate the contract promptly, after discovery of the deceit.[10]

Conditional Subscriptions.

Sometimes the subscription is made conditional upon the performance of certain particulars on the part of the incorporators,[11] or that certain things shall be done within a specified time, or to a given amount.[12] In every contract of this description, the subscriber is released unless the conditions are complied with on the part of the corporation.[13]

Corporation Must Comply With Terms

Secret Agreements.

The board of directors have no right by secret compact or otherwise to release those who stand in friendly relations from obligations to pay for shares of capital stock.[14] Such secret arrangements are tinged with fraud,[15] and unless rescinded will release the remaining subscribers; otherwise there would exist a state of preference which would leave all the risk of the enterprise to be borne by those who were not in the favored class.

Favoritism Is Tinged With Fraud

Other Individual Defenses.

Other defenses which the minority shareholder may interpose consist in showing to the court that the burden of the corporate debt has been increased without the consent of the stockholders,[16] or that the entire capital stock has not been issued. Unless there is some provision in the statutes, articles of incorporation, or the subscription-contract to the contrary, the stockholder has consented to assume the duties of membership in the corporation only upon condition that the full issue of stock is subscribed.[17] It is an abuse of control to proceed with the enterprise until the issue has been completely financed, and an actual waiver by the subscriber must be shown to bind him as a consenting party.[18]

Equitable Principles Control

This is the general rule, and it appears to be in accordance with the equitable principle that a contract must be completed before it becomes binding upon the parties.

Still, there are decisions that adopt the contrary view,[19] and each contract of subscription must be construed in accordance with the rulings that prevail in the jurisdiction where it was executed.

The defenses specified above are for the most part personal to the individual subscriber or stockholder, and concern him only as a member of the class of investors who have in some one or more of numerous ways been imposed upon or defrauded by the management, at the time when the association was being formed, or during the later stage of complete incorporation. The main purpose they

serve is to protect the subscriber or stockholder from fraudulent schemes and the demands of creditors based upon obligations to which he has not consented, and resulting in claims he is under no moral obligation to pay.

Fraudulent Neglect to Defend.

Minority May Protect Corporation

There is another and broader field where the stockholder may act as the protector of the entire rights and property of the corporation, and this opportunity occurs when the management, through neglect, collusion or fraud has failed to interpose a valid defense in an action against the corporation.

This is in exact accord with the instances where it has already been shown that courts will permit the injured stockholder to institute proceedings, making the corporation a party, to the end that the negligent or guilty act may be prevented, and the corporation, and through it the stockholders, may secure redress. In the one class it is the sins of omission as in the other it is those of commission which must be dealt with and overcome by powers of equity.

When an action is brought against a corporation, the fact that in law it is an independent being requires that it shall interpose its defense through the officers who exist for the purpose; provided, of course, the company possesses a valid defense.

Right Is Based on Official Neglect or Fraud

The loss resulting from the law-suit will, first of all, fall upon the property of the corporation, and accordingly the protection of its assets should proceed through the customary official channels.

Minority May Interpose Defense.

But where, in such a case, the corporation neglects to proceed diligently and in good faith, any stockholder is privileged to take this step in behalf of the company, after reasonable efforts to prevail upon the officers to perform their duty have failed.[20]

Courts Recognize and Enforce This Rule to Defend Minority

Individual stockholders may file a defense in a suit to foreclose a mortgage upon the property of a railroad corporation, where the transaction discloses indications of the existence of fraud on the part of the directors and the interests of the stockholders are endangered by those acts.[21]

Rule in Federal Courts.

The practice in the United States courts provides a remedy as effective, though differing somewhat in the method of obtaining relief. Where the directors of a bank refused to take proper measures to resist the collection of a tax which they themselves believed was imposed upon them in violation of their chartered rights, this refusal amounted in law to a breach of trust. When these facts were presented to the Federal Court it permitted a stockholder to file a bill in chancery asking for such protection and relief as the case might require.[22]

Affirmative Relief

The means of relief thus afforded very closely resembles the action brought by the minority stockholder to restrain oppression, fraud or illegal acts of any description; indeed, the same underlying principles are involved in equal degree whether the individual stockholder prosecutes or defends in

Both Forms Redress

behalf of his corporation, since all have one general purpose in view—the assistance and protection of the corporation.

In Conclusion.

Protection of Minority a Province of Equity

Attacks upon the rights of minority stockholders are less numerous and flagrant than occurred in former times; but abuses still exist. Equity remains the only refuge of the small investor, and when oppressed by the power of a predatory control, he will find his surest protection through asserting his rights in a court of equity.

CHAPTER VI.: CITATIONS.

[1] Heaston v. Cincinnati & F. W. R. Co., 16 Ind. 275.
[2] Kampman v. Tarver, 87 Tex. 491.
[3] Newport Cotton Mill Co. v. Mims, 103 Tenn. 465.
[4] McCray v. Junction R. Co., 9 Ind. 358; Snook v. Georgia Improvement Co., 83 Georgia 61.
[5] Fulton Co. Sup'rs v. Mississippi W. & R. Co., 21 Ill. 337.
[6] Fountain Ferry Turnpike Road Co. v. Jewell, 8 B. Mon. (Ky.) 140.
[7] Upton v. Englehart, 3 Dill. 496.
[8] Wert v. Crawfordsville & Alamo Turnpike Co., 19 Ind. 242.
[9] Crump v. U. S. Min. Co., 7 Grat (Va.) 352.
[10] City Bank of Macon v. Bartlett, 71 Ga. 797; Cedar Rapids Ins Co. v. Butler, 83 Iowa 124.
[11] Mansfield, C. & L. M. R. Co. v. Stout, 26 Ohio 241.
[12] Burrows v. Smith, 10 N. Y. 550.
[13] Memphis K. & C. Rl. Co. v. Thompson, 24 Kon. 124.
[14] Burke v. Smith, 16 Wall (U. S.) 395.
[15] Tuckerman v. Brown, 33 N. Y. 297.
[16] Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356.
[17] Orynski v. Loustaunan, 15 S. W. (Tex.) 674.
[18] Portland & F. R. Co. v. Spillman, 23 Or. 587; Stearns v. Sopris, 4 Colo. App. 191.
[19] Hamilton & Deansville P. R. Co. v. Rice, 7 Barb. (N. Y.) 157; Mathis & Pridham, 1 Tex. Civ. App. 58; Auburn Opera House & P. Assn. v. Hill, 32 Pac. (Cal.) 587.
[20] Kirtland v. Purdy University, 7 Lea. (Tenn.) 243; Kanawha Coal Co. v. Ballard & Welch Coal Co., 43 W. Va. 721.
[21] Bayliss v. Lafayette M. & B. Ry. Co., 8 Biss 193; Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410.
[22] Dodge v. Woolsey, 59 U. S. (18 How.) 331.

PRECEDENTS.

FORM I.

(Cited, Page 16.)

Ultra Vires and Abuse of Joint Control. Suit for Equitable Relief.

IN CHANCERY OF NEW JERSEY.

BETWEEN

CALVIN O. GEER and the C. H. VENNER COMPANY,

Complainants,

AND

AMALGAMATED COPPER COMPANY,

Defendant,

On Bill, &c.

Supplemental Bill.

TO THE HONORABLE, THE CHANCELLOR OF THE STATE OF NEW JERSEY.

Humbly complaining, your orators Calvin O. Geer, of East Orange, in the said State, and the C. H. Venner Company, a Body Corporate of the State of New Jersey, in behalf of themselves and of all other stockholders of the Amalgamated Copper Company who are in the same situation and who shall come in and contribute to the expense of this suit, respectfully show:

1. That on the Twenty-fifth day of April, A. D. Nineteen hundred and one, your orator Calvin O. Geer exhibited his original Bill of Complaint in this Honorable Court against the Amalgamated Copper Company, the defendant hereinafter named as a defendant, thereby stating

That he was the owner and holder of one hundred and four shares of

the capital stock of said Company; that the Amalgamated Copper Company was a body corporate of New Jersey and incorporated April 27, 1899, under an act entitled "An act concerning corporations," approved April 7, 1875, and the several supplemetns thereof.

That the total authorized capital stock of said Company as expressed in its certificate of incorporation was seventy-five million dollars, divided into seven hundred and fifty thousand shares of one hundred dollars each, and that it had not been increased or diminished since; that the location of its principal office was 243 Washington Street, Jersey City; that the New Jersey Corporation Agency was the agent therein; that the objects for which the Company was formed was specially set forth in its certificate of incorporation, a certified copy of which was thereto annexed.

That the Boston & Montana Consolidated Copper and Silver Mining Company was a body corporate of Montana.

That the Butte & Boston Consolidated Mining Company was a body corporate of New York.

That your orator, Geer, was not a stockholder in either of said companies; that it had within a few days come to his knowledge that it was contemplated and intended on the part of the Directors of the Amalgamated Copper Company to take over upon terms detrimental to the interest of the stockholders of said company the capital stock and properties of the said Boston & Montana Company and Butte & Boston Company.

That this knowledge was derived from the issuance and publication of certain notices or circular letters to the stockholders of said two last-named companies respectively, copies of which were annexed to said bill as schedules.

That as appeared by said notice to the stockholders of the Boston & Montana Company it was proposed to absorb or take over the said Company by the said Amalgamated Copper Company by the method of exchange of stock of said Amalgamated Copper Company for the stock of said Boston & Montana Company, or by the payment by said Amalgamated Copper Company of three hundred and seventy-five dollars in cash per share for the stock of the said Boston & Montana Company.

And, as appears by the said notice to the stockholders of said Butte & Boston Company, it was proposed to absorb or take over that Company and its property by the said Amalgamated Copper Company by exchange of the stock of said Amalgamated Copper Company for the stock of said Butte & Boston Company, or by the payment by said Amalgamated Copper Company of ninety-two dollars and fifty cents in cash per share for the stock of said Butte & Boston Company.

And it was also, among other things, in said bill set forth that the present authorized capital stock of said Boston & Montana Company is 150,000 shares of the par value of twenty-five dollars per share, making a total capitaliza-

tion of $3,750,000, the whole of which said stock has been issued; and that the present authorized capital stock of said Butte & Boston Company is 200,000 shares of the par value of ten dollars per share, making a total capitalization for that Company of $2,000,000, the whole of which has been issued.

That by a printed and published report of the said Boston & Montana Company, dated December 31, 1900, it appears that its total balance of assets on that date was the sum of $5,665,872.91, and that its outstanding bonded debt then was $600,000.

That the said Boston & Montana Company is involved in numerous and heavy litigations in the State of Montana, which said litigations are specifically referred to in said bill.

That in such litigations, or some of them, several of the mining properties which had been operated by said Company are not now operated by it because of injunctions prohibiting the operation of said mines, and that consequently such revenue or income as was produced by said mines, the operation of which has been so enjoined, is now cut off from the said Company.

And that the acquisition or purchase of said stock of said Boston & Montana Company at the said rate or price of three hundred and seventy-five dollars per share will involve the expenditure of $56,250,000, and that this expenditure, or any approximate expenditure of the funds, or exchange of property or stock of said Amalgamated Copper Company for the acquisition of the stock of said Boston & Montana Company would be excessive and would be an unconscionable expenditure, without any approximate value to be received therefor and be unwarranted by any reasonable care or conservation of the rights or interest of the stockholders of the said Copper Company and would be in actal fraud thereof, and especially so as to those stockholders who are not stockholders of said Boston & Montana Company.

That as to the Butte & Boston Company it owned or claimed to own property in Montana, the extent of which was not known to the complainant; that it passed through the hands of a receiver; that its properties were sold by the Receiver and bid in by the reorganization committee for one million dollars, and that its capital was then reduced to two million, and that no addition to its holding has since been made; that it never paid any dividend until December, 1900; that its property or the alleged title or rights thereto are largely in litigation, and that it is involved in numerous and heavy law suits which threaten the tenor of its property; and that it was under a heavy bonded indebtedness, amounting as nearly as the complainant could state upon information and belief, to the sum of at least one million dollars.

And that the acquisition or purchase of the stock of said Butte & Boston Company at said rate of ninety-two dollars and fifty cents per share would involve the expenditure of $18,500,000; and that this expenditure or any

similar or approximate expenditure of the funds or exchange of property or stock of the Amalgamated Copper Company for the acquisition of the stock of said Butte & Boston Company would be grossly excessive, and would be an unconscionable expenditure, without any approximate value to be received therefor and be unwarranted by any reasonable care or conservation of the rights or interest of the stockholders of the said Amalgamated Copper Company, and would be in actual fraud thereof, and especially so as to those stockholders who are not stockholders of said Butte & Boston Company.

And that the acquisition of the stock of said two foreign companies would inevitably involve said Amalgamated Copper Company in all of the uncertain, desperate and costly litigations in which the said two companies are now involved.

And said original bill also specifically sets forth the powers or some of them conferred upon the Directors of said Amalgamated Copper Company, and their Executive Committee, in and by its certificate of incorporation, a copy of which certificate of incorporation was thereto annexed.

And also sets forth that said Board of Directors or the Executive Committee thereof, are in such absolute control of all of its affairs and business that the stockholders thereof are deprived of all voice in the conduct of said affairs and business, except only as to such matters as they are protected in by statute and by the protective aid and assistance of the courts.

And said bill also sets forth, upon information and belief, that many, if not all of the directors of the said Amalgamated Copper Company are largely personally interested as stockholders of the said Boston & Montana Company and as stockholders of said Butte & Boston Company; and that Henry H. Rogers, William G. Rockefeller and Albert G. Burrage, three of the Directors of said Amalgamated Copper Company, are also Directors of said Butte & Boston Company; and that the disposition of the stock of said two companies at or upon such terms as are indicated by the aforesaid circulars, copies of which are annexed to said bill, would be most highly advantageous to all holders of stock of said two respective companies, but greatly disadvantageous to the stockholders of said Amalgamted Copper Company, except such as are also stockholders of said two other companies or either of them.

And charging that the proposed disposition of the stock of said Boston & Montana Company and Butte & Boston Company to said Amalgamated Copper Company upon either of the basis indicated by said circular notice is in pursuance of a scheme to unload upon said Amalgamated Copper Company and have it accept and pay for the stock of said two other companies at exorbitant and excessive figures, established and fixed in fraud of the stockholders of the Amalgamated Copper Company; and this without submission of the project to the stockholders of said Amalgamated Copper Company and taking advantage of the presumed protection of the unusual clause contained in the

incorporation certificate of said Amalgamated Copper Company, delegating or assuming to delegate to the Directors, or to the Executive Committee, the full power and authority which are expressed in said certificate and which, according to their phraseology, pretend to give to said Board or Committee the power to act in the matter without assent or vote of the stockholders.

That the stock was widely scattered; that the notice given was short; that the complainant feared that the deal would be carried out without proper opportunity for the stockholders to act upon it; and that it would require $74,750,000 to pay for the stock of the said two companies, and that this amount was within $250,000 of the entire capital of the Amalgamated Copper Company, and would require that amount to be raised in cash or by the issue of stock, thereby depreciating the value of the present holders.

And that he feared that the Directors or Executive Committee would forthwith hypothecate or create liens upon all of its present holdings of property to raise the money needed and thereafter increase the capital stock to the detriment of the stockholders; and that the accomplishment of that scheme would be contrary to equity and good conscience, and to use a corporate property beyond the scope of the corporate power of the Company.

He prayed an injunction against the Amalgamated Copper Company, its Directors and officers, from purchasing or taking over any of the stock of the said Boston & Montana Company and Butte & Boston Company under the terms of said published notice, or any terms in excess of their actual true value, and without submission to the stockholders, and from hypothecating, purchasing, mortgaging or creating any lien upon the assets of the Company or any indebtedness or obligation thereon, and from issuing new or additional capital stock for the purpose of procuring money therefor, and otherwise and in such manner and to such extent as the exigencies of the case might require, and for other and further relief, and for an injunction *pendente lite* and process of subpoena.

And thereupon and under date of April 25, 1901, an order to show cause was made in said cause, returnable on the sixth day of May, 1901, why an injunction should not issue as prayed in the bill of complaint and *interim* stay in accordance with the prayer of said bill.

And that afterwards, and on or about the third day of May, nineteen hundred and one, your orator, The C. H. Venner Company, presented its petition alleging that it was the owner and holder of one hundred shares of the capital stock of the Amalgamated Copper Company, the said defendant; that the above-entitled suit was by its terms as set forth in the bill of complaint brought in behalf of the complainant and all other stockholders of the Amalgamated Copper Company who are in the same situation and who should come in and contribute to the expenses of the suit; that the bill was filed for the purpose of restraining the Amalgamated Copper Company, its officers,

directors and agents, from purchasing or contracting for, by way of exchange or for cash, or contracting to purchase or take any of the stock of the Boston & Montana Consolidated Copper and Silver Mining Company, or of the Butte & Boston Consolidated Mining Company, therein mentioned, upon or under certain published notices therein set forth, copies of which were annexed to said bill of complaint and to their petition, and that it was in the same situation with regard to the subject matter of said suit, and willing to contribute to the expense thereof, and prayed that it might be admitted as a complainant therein.

Upon which, and on the fourth day of said May last mentioned, the said C. H. Venner Company was, by order of the Chancellor, admitted as a party complainant in said suit.

And afterwards the defendants named in said bill filed their answer, and such proceedings were had in said cause that by an order made in the cause on the twentieth day of May, nineteen hundred and one, the said order to show cause was dismissed; to which said bill of complaint and all proceedings thereon had, now on file in the Office of the Clerk of this Court, your orators for greater certainty beg leave to refer.

2. Your orators further show that since the filing of said original bill of complaint, and the admission of said complainant, The C. H. Venner Company, the situation of the matters therein set forth has changed: in that, by their notice dated at Boston, May 27th, 1901, Messrs. Kidder, Peabody & Company, the bankers mentioned in the bill of complaint, have issued to the stockholders of the Butte & Boston Consolidated Mining Company, a Notice, in the words and figures following, to wit:

[*Notice from Bankers to Stockholders.*]

And also under the same date issued another notice to the stockholders of the Boston & Montana Consolidated Mining Company, in the words, and figures, to wit:

[*Notice from Bankers to Stockholders.*]

By which it will be perceived that the said bankers have now made an offer to the Amalgamated Copper Company, which, if accepted, will enable them to deliver to the stockholders of the Butte & Boston Consolidated Mining Company one share of Amalgamated Copper Company stock for each share of Butte & Boston Consolidated Mining Company stock owned by such stockholder; and that the directors of the said Amalgamated Copper Company have called a stockholders' meeting for the sixth of June, nineteen hundred and one, to pass upon said offer, and if accepted, to authorize the issue of the necessary stock for the purpose, and that the intention of the parties is, in case said stockholders' meeting should act favorably upon their proposition, to instantly close the matter and consummate the deal; and further that all of the large stockholders of said company who have been consulted by them

have consented to the exchange upon the basis of one share of the capital stock of Amalgamated Copper Company, of the par value of one hundred dollars, for one share of the stock of the Butte & Boston Consolidated Mining Company, the par value of which is ten dollars: And that further, that in case they were not willing to accept of the transfer on the basis of share for share of stock, that then they would pay to the stockholders of the Butte & Boston Consolidated Mining Company the sum of ninety-two dollars and fifty cents in cash per share for their stock, provided the exchange of stock with the Amalgamated Copper Company was effected in accordance with the offer of that company, thereby fixing the value, in their offer, of the stock of the Butte & Boston Consolidated Mining Company, at ninety-two dollars and fifty cents per share. And that the same facts are true with reference to their offer to the stockholders of the Boston & Montana Consolidated Copper and Silver Mining Company, with the exception that the proposition there is to exchange four shares of Amalgamated Copper Company's stock of the par value of one hundred dollars each, for one share of the Boston & Montana Consolidated Copper and Silver Mining Company's stock, of the par value of twenty-five dollars; and that the cash price fixed for that stock was three hundred and seventy-five dollars per share, but also in that case conditioned upon the contract for an exchange of stock by the Amalgamated Copper Company, being ratified.

3. And your orator further shows that afterward, and under date of May twenty-second, nineteen hundred and one, the said defendant Amalgamated Copper Company, sent out a notice to its stockholders, entitled, in the name of the Company, and signed by William G. Rockefeller, its Secretary, in the words and figures following, to wit:

AMALGAMATED COPPER COMPANY.

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS.

Notice is hereby given that a special meeting of the stockholders of the Amalgamated Copper Company will be held at the Company's office, No. 243 Washington Street, Jersey City, New Jersey, on the sixth day of June, 1901, at ten o'clock in the forenoon, to take action upon the following resolutions passed by the Board of Directors at a meeting duly held at the office of the Company in the City of New York, May 21, 1901:

"*Resolved*, that it is advisable that the Capital Stock of this Company be increased from $75,000,000 to $155,000,000.

"*Resolved*, that a meeting of the stockholders of the Company be and the same is hereby called, to be held at the Company's office, in the City of Jersey City, New Jersey, on the sixth day of June, 1901, at ten o'clock in the forenoon, to take cation on the above resolution.

"*Resolved,* that there be submitted to the said meeting of the stockholders the question of the advisability of acquiring the stocks of the Boston & Montana Consolidated Copper and Silver Mining Company and of the Butte & Boston Consolidated Mining Company, either for cash or by issuing therefor full-paid stock of this Company.

"*Resolved,* that the stockholders be notified that there will be submitted at such meeting the report of a Special Committee appointed by the Board to consider the terms of the acquisition of said stocks, together with such recommendation, if any, as the Board may make with respect thereto."

May 22, 1901.

WILLIAM G. ROCKEFELLER, *Secretary.*

From which it will be perceived that the Company, at its meeting on the sixth of June instant, proposes to do two things, one to increase the Capital Stock of the Amalgamated Copper Company from seventy-five millions to one hundred and fifty-five millions, and that the Directors have already passed a resolution to that effect, and the other that there will be submitted to the meeting of stockholders the question of the advisability of acquiring the stocks of the Boston & Montana Consolidated Copper and Silver Mining Company and of the Butte & Boston Consolidated Mining Company, either for cash, or by issuing therefor full paid stock of the Amalgamated Company.

4. And your orators further show that at the prices named in the two notices of Messrs. Kidder, Peabody & Company, to the stockholders of the Boston & Montana Consolidated Copper and Silver Mining Company and the Butte and Boston Consolidated Mining Company, the sum to be paid in stock, if the transaction be stock, is exactly eighty million. the amount named as the proposed increase of stock, and further that by the terms of the cash offer made by the bankers it is to be effective only in case the Amalgamated Copper Company consent to the transaction on the stock basis; and your orators believe and here charge, that the intention of the Directors of the Amalgamated Copper Company is to carry the transaction out upon the basis of a transfer of stock, and that whether the bankers aforesaid purchase the stock at the prices named for cash, or for stock, in either case the intention is to turn in the stock so acquired by the bankers, to the Amalgamated Copper Company, on the basis of a transfer of stock; and as your orators believe and here charge, that whatever may be done by the stockholders at their meeting in the way of consummating this deal, whether for stock or otherwise, is at present at least, intended to be upon the stock basis aforesaid.

5. And your orators further show that it is publicly rumored, and your orators believe and here charge it to be a fact, that of the stock of the Butte & Boston Consolidated Mining Company, at least one hundred and seventy-

three thousand shares are owned by the Directors of the Amalgamated Copper Company and their close associates, namely, H. H. Rogers, and William Rockefeller, and their New York associates, eighty thousand shares; T. W. Lawson, thirty-three thousand shares; A. C. Burrage, twenty thousand shares; James Phillips, Jr., ten thousand shares; J. Edward Addicks, ten thousand shares; Brown, Riley & Company, twenty thousand shares—in all one hundred and seventy-three thousand out of the two hundred thousand of the capital stock of the Butte & Boston Consolidated Mining Company, of whom, as appears by the Annual Report of the Butte & Boston Consolidated Mining Company, dated the fifteenth day of January, nineteen hundred and one, Messrs. Rockefeller, Burrage and Phillips, Jr., together with William J. Riley, whom your orators believe to be a member of the firm of Brown, Riley & Company, appear as Directors of the Butte & Boston Consolidated Mining Company.

6. And your orators further show that while they do not know, and therefore are not able to set forth the holdings of the Directors and Officers of the Amalgamated Copper Company in the Boston & Montana Consolidated Copper and Silver Mining Company, yet it appears by the circular letter of Messrs. Kidder, Peabody & Company to the stockholders of the last named company, bearing date the twenty-sixth of April last, that over ninety per cent of the shares of that company had been deposited with them under the terms of their Directors' Circular of April fifteenth, a copy of which circular is annexed to the original bill of complaint herein, and inasmuch as it is improbable for a large number of individual stockholders, widely scattered, to have been reached by Messrs Kidder, Peabody & Company's circular of April fifteenth, and to have responded by that time, your orators charge that the gentleman last above named, and those closely associated with them, are interested salo in the stock of that company to a large extent.

And your orators further charge that a Resolution of the Board of Directors of the Amalgamated Copper Company was passed at a meeting of that Board on the twenty-first day of May, nineteen hundred and one, as set forth in the notice above mentioned.

7. Your orators further show that under the same date as the said notice of said meeting, to wit, the twenty-second day of May, nineteen hundred and one, a circular was sent out to the stockholders of the Amalgamated Copper Company by the Directors, under the signature of William G. Rockefeller, their Secretary, calling attention to the notice of the special meeting of stockholders for June sixth, therein stated to be enclosed, and enclosing a proxy for their signature made to James Stillman, Robert Bacon, A. R. Flower and James Jordan, stockholders in the Amalgamated Copper Company, and urging that while they have not large interests, they have some interests, and they are selected because they have a small interest, thereby

creating a reasonable inference that there was no Director of the Amalgamated Copper Company who had not some interest as a stockholder of the Boston & Montana Consolidated Copper and Silver Mining Company or the Butte & Boston Consolidated Mining Company.

And your orators further show that in the same enclosure a proxy was sent out to the stockholders of the Amalgamated Copper Company, naming the said James Stillman, Robert Bacon, A. R. Flower and James Jordan, or any of them, as attorneys to vote at such special meeting of June sixth, which notice was sent out in the name of the Amalgamated Copper Company, thereby evincing the intention on the part of the Directors of the Amalgamated Copper Company to carry the matter in the name of the Company itself, and to give an official character to the proxy. To which circular letters and proxy your orators for greater certainty beg leave to refer; and copies thereof are hereto annexed.

8. Your orators further show that the annual meeting of the Amalgamated Copper Company took place in Jersey City on the third day of June instant, and your orators are informed and believe that after election of Directors said annual meeting was adjourned to the seventh, or some subsequent day of June instant, and that at a meeting of the Directors of that Company held on or about the sixth day of May last, a notice was published that the Transfer Books of the Company would be closed until the fourth day of June instant; but that afterwards, and after the order made in this case on the twentieth day of May last, and at the time of the calling of the meeting of June sixth above mentioned to pass upon the resolution of the Directors as to the increase of stock and the ratification of the agreement of purchase, a new notice was published that the Transfer Books would be closed until the eighth day of June instant; and your orators charge that the object of this change was to prevent the transfer of stock in the meantime, and until after the meeting of the stockholders had been held, with the desire and intention to prevent any holder of stock not transferred from transferring it in the meantime for the purpose of protecting his rights, or otherwise.

9. And your orators further show that they verily believe and here charge that a sufficient majority of the stock of the Amalgamated Copper Company is controlled by the Directors thereof, and those closely associated with them to approve at their stockholders' meeting not only of the resolution of the Board of Directors to increase the capital stock of the Amalgamated Copper Company to one hundred and fifty-five millions of dollars, as stated in their notice, which is an increase of eighty millions of dollars, but also to approve of and accept the offer mentioned in the notice of Messrs. Kidder, Peabody & Company, to take over the shares of the Butte & Boston Consolidated Mining Company at the price of one share of Amalgamated Copper Company to one share of Butte & Boston Consolidated Mining Company, and

to take over the shares of the Boston & Montana Consolidated Copper and Silver Mining Company at the price of four shares of Amalgamated Copper Company for one share of Boston & Montana Consolidated Copper and Silver Mining Company.

10. And your orators further show, as stated in the original bill filed by your orator Calvin O. Geer, and in the petition to be admitted as a Complainant, filed by your orator, The C. H. Venner Company, that they are the holders and owners of stock of the Amalgamated Copper Company as therein stated, namely: the said Calvin O. Geer, one hundred and four shares, and the said The C. H. Venner Company, one hundred shares.

11. And your orators further show that they are advised and here charge that the property of the Butte & Boston Consolidated Mining Company consists of the following items.

[*Description of Properties in detail.*]

And they are advised and here charge that the values of these properties do not exceed the following:

[*List with estimated values of the separate Properties.*]

12. And your orators further show that a number of the properties above set forth as alleged in the original bill, are closed down at this time, and have been for a long time, by reason of litigation.

17. And your orators further show that if the stockholders of the Amalgamated Copper Company have the power to change the proposition to a cash basis, and should decide to do so, that still that Company would be paying at the rate of upwards of sixteen times the value of the property, even on that basis, and further, that the cash suggestion demonstrates that the proposition is to pay in stock of the Butte & Boston Consolidated Mining Company at the rate of one hundred dollars, for stock conceded by the proposed vendors to have a cash value of only ninety-two dollars and fifty cents ($92.50).

And your oratosr charge that under the law, the proposition to purchase either for cash or stock the stock of the Butte & Boston Consolidated Mining Company, at prices beyond the value of the property, even if authorized by a vote of a majority of its stockholders, is *ultra vires* the corporation, and cannot be legalized as against the objection of any stockholder.

18. And your orators further show that so far as the property of the Boston & Montana Consolidated Copper and Silver Mining Company is concerned, the properties of that Company, together with their values, are as follows:

[*Description and values of Properties in detail.*]

25. And your orators further show that under the plan disclosed in the published notice of May twenty-seventh, of Messrs. Kidder, Peabody & Com-

pany to the stockholders of the Boston & Montana Consolidated Copper and Silver Mining Company and proposed to be presented for ratification to the stockholders of the Amalgamated Copper Company at its meeting on June sixth instant, it appears that the price at which the property of the Boston & Montana Consolidated Copper and Silver Mining Company is to be taken over is at the rate of sixty million of dollars, or at nearly three times its actual value, or if the stockholders have the power to change the proposition of the Directors and to take the same at a cash value and decide to do so, then at the prices therein named of three hundred and seventy-five dollars per share, it is at a price of fifty-six million two hundred and fifty thousand dollars, or in excess of two and one-half times its actual value.

26. And your orators are advised and here charge that a transaction of this kind, even with the consent of a majority of the stockholders, is beyond the power of the corporation as against the objection of any stockholder, and your orators as stockholders object to the consummation of this deal and charge that the same is for the reasons above given *ultra vires* the corporation, and in fraud of their rights as such stockholders.

27. And your orators further show that it is plain from the foregoing facts that the intention of the Directors of the Amalgamated Copper Company is to unload upon the Amalgamated Copper Company their holdings in the Butte & Boston Consolidated Mining Company and the Boston & Montana Consolidated Copper and Silver Mining Company at a greatly exorbitant price, and by the purchase to extinguish competition between the three corporations which heretofore have been competitors, and our orators are advised and here charge that a purchase with a view to extinguishing competition is *ultra vires* the corporation and against public policy and ought to be decreed to be void.

[*The Bill here pleads a section of the Montana Constitution prohibiting trusts.*]

Wherefore your orators charge that the purchase aforesaid is of the utmost danger to the interests of your orators as stockholders, and is *ultra vires* the corporation, contrary to public policy, and contrary to the constitution and statutes of Montana as aforesaid, and for all the reasons herein given will result in an irreparable injury to your orators and the other stockholders in said corporation.

And your orators respectfully charge, under the foregoing facts, that there is herein set forth a fraudulent transaction contemplated by the Directors of the defendant Company, either in connection with other parties or amongst themselves, and with other stockholders of the corporation, such as will result in serious injury to the corporation and to the interests of the other stockholders, and that at least three of the Directors of the defendant Company, Messrs. H. H. Rogers, William G. Rockefeller and Albert C. Burrage, are

acting for their own interests in a manner detrimental and destructive of the corporation and of the rights of the stockholders other than themselves and those associated with them, and that the holders of a large majority of the stock of the defendant are, on the sixth day of June, about to authorize the issue of a large amount of additional stock of the defendant company for the purpose of carrying out this deal, and are about to pursue such an oppressive and illegal course in the name of the corporation and in violation of the rights of your orators and the other stockholders dissenting therefrom.

28. In consideration whereof and forasmuch as your orators are without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief in this honorable Court, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said defendant, the Amalgamated Copper Company, to the best of its knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, without oath, oath being hereby waived, and that as fully and particularly as if the same were here repeated and it distinctly interrogated with reference thereto, and that the said Amalgamated Copper Company, its officers, directors and agents may be restrained and enjoined from purchasing or taking over, either for stock of the Amalgamated Copper Company or for cash, the stock of the Butte & Boston Consolidated Mining Company and of the Boston & Montana Consolidated Copper and Silver Mining Company, or either of them, or any of the stock of either of said companies, either upon the terms mentioned in the circular letters of Messrs. Kidder, Peabody & Company hereinbefore, and in the original bill in this cause, set forth, or either of them, or at any other price, in excess of the true value of the said stocks, and from purchasing or taking over said properties at all at any price, and from carrying out or consummating the deal proposed in the circular letters of the said Messrs. Kidder, Peabody & Company, suggested in the resolution of the Board of Directors of the Amalgamated Copper Company of May twenty-second, nineteen hundred and one, and from adopting any resolution at the meeting of stockholders of the Amalgamated Copper Company to be held on the sixth day of June, nineteen hundred and one, or any adjourned meeting thereof, or any other meeting, ratifying the resolution of the Directors to increase the capital stock, or taking any other action to increase the capital stock from seventy-five million dollars to one hundred and fifty-five million dollars, or to increase it to any other sum, for the purpose of purchasing the stocks of the Butte & Boston Consolidated Mining Company and the Boston & Montana Consolidated Copper and Silver Mining Company, or either of them, or any part thereof, and from approving of or otherwise acting upon the resolution of the Directors of the Amalgamated Copper Company passed upon the twenty-first day of May last, mentioned in their published call for said meet-

ing of stockholders, and from purchasing and taking over said stocks or either of them at any price, and that the whole proposal to purchase said stocks and each of them and any part thereof be decreed by this court to be *ultra vires* the corporation, contrary to public policy and void, and that the said Amalgamated Copper Company, its officers, directors and agents may be further and otherwise enjoined in such manner and to such extent as the exigencies of the case may require and as may be agreeable to equity and good conscience, and for such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orators not only the State's Writ of Injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Amalgamated Copper Company, its officers, directors and agents, restraining them and each of them in manner aforesaid, but also the State's Writ of Subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said Amalgamated Copper Company, therein and thereby commanding it to appear before your Honor in this Honorable Court, at a certain day and under a certain penalty therein to be expressed, then and there to answer the premises, and to stand to, abide by and perform such order and decree as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

ISAAC S. TAYLOR,

Solicitor and of Counsel with Complainant, Calvin O. Geer.

McGEE & BECK,

Sol's for and of Counsel with Complainant, The C. H. Venner Company.

RICHARD S. HARVEY,

of New York Counsel.

FORM II.

Cited, Pages 21, 43.)

Ultra Vires Act. Suit for Equitable Redress.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA.

IN AND FOR THE COUNTY OF SILVER BOW.

JAMES FORRESTER AND JOHN MACGINNIS, Plaintiffs, vs. BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Montana corporation; BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a New York corporation; ALBERT S. BIGELOW, LEONARD LEWISOHN, CHARLES VAN BRUNT, WILLIAM J. LADD, JOSEPH S. BIGELOW, JOSEPH G. RAY, JOHN KLEPETKO, G. H. HYAMS, JOHN F. FORBIS, J. H. VIVIAN, and JOHN DOE and RICHARD ROE, whose true names are unknown. Defendants.	COMPLAINT.

Come now the above named plaintiffs, stockholders in the Boston & Montana Consolidated Copper and Silver Mining Company, a corporation of Montana, and bring this action in their own behalf as such stockholders, and in behalf of all other stockholders of said corporation who may wish to join with them herein, and for cause of action against the above named defendants allege:

1. That the Boston & Montana Consolidated Copper and Silver Mining Company, hereafter called in this complaint the Montana Company, is a corporation organized and existing under the laws of the State of Montana, with its principal office and place of business at Butte City, Montana, and doing business in Silver Bow County, in said State.

2. That the Boston & Montana Consolidated Copper and Silver Mining Company, of New York, hereinafter in this complaint called the New York Company, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business in the County, City and State of New York.

3. That the defendants, Albert S. Bigelow, Leonard Lewisohn, Charles Van Brunt, William J. Ladd, Joseph S. Bigelow and Joseph G. Ray, are stockholders in said Montana Company and Directors therein, and constitute the Board of Directors of said Company, and that said Albert S. Bigelow is the President of said Company.

4. That the defendants, Frank Klepetko, G. H. Hyams, John F. Forbis and J. H. Vivian, and John Doe and Richard Roe, whose true names are unknown to plaintiffs, are stockholders in said Montana Company, or hold proxies from stockholders therein, authorizing them to vote certain stock in favor of a certain proposition mentioned in Exhibit A hereto attached, at a meeting of the stockholders of said Montana Company, to be held on the sixth day of June, eighteen hundred and ninety-eight, or at some subsequent time.

5. That said defendant, Boston & Montana Consolidated Copper and Silver Mining Company, of Montana, called herein the Montana Company, is a mining corporation; that the same was organized under the laws of the Territory of Montana as such on the ..... day of June, eighteen hundred and eighty-seven, for the purpose of carrying on mining, milling and smelting ores, within the Territory and State of Montana, and selling ores and owning and operating mines and mining claims within said Territory and State, and doing such other business as was incidental or necessary to enable it to carry on its said business of mining, milling and smelting ores within the State of Montana, and dealing in and selling ores.

That it was incorporated for the purpose of carrying on said business in Montana, for a term of twenty (20) years from the date of its incorporation.

That the capital stock of said Montana Company consists of one hundred and fifty thousand shares of the par value of twenty-five dollars per share. That said defendant Montana Company has ever since its organization and incorporation been engaged in carrying on the business for which it was incorporated, in the Territory and State of Montana, and has acquired numerous valuable mining properties, rights and claims, and extensive and

valuable mining franchises, a smelting and reduction plant in the State of Montana, and is possessed of large and valuable assets and property, all of which are more particularly described in Exhibit A hereto attached and made a part hereof.

That said property, rights, franchises and assets of said defendant are of the value of about thirty million dollars. That said defendant is solvent and has been for a long time carrying on its business with great profit to itself and its stockholders. That for the year eighteen hundred and ninety-seven it had a net income from its business of $3,016,436.98, and paid during said year dividends amounting to twelve dollars per share on its capital stock to the stockholders thereof, said dividends amounting in the aggregate to the sum of one million eight hundred thousand dollars, and that after paying said amount and dividends it had a large surplus in its treasury, and that it should still have a large amount of money in its treasury. That in comparison to the value of its property and the amount of its net profits and income it is but little indebted, and that said defendant could conduct and carry on within the State of Montana and under its laws its said business, and derive large net profits therefrom, and pay to its said stockholders large dividends during each and every year until the expiration of the time for which it was incorporated.

6. That the plaintiffs are the owners and holders of one hundred (100) shares each of the capital stock of said defendant Montana Company, which shares of stock are entered upon the books of said Company in the names of said plaintiffs. That the plaintiff, James Forrester, is a citizen and resident of the State of New York, and that the plaintiff, John MacGinnis, is a citizen and resident of the State of Montana.

7. That the rights, privileges, duties, obligations and liabilities of the New York Company and its stockholders are different from those of the defendant Montana Company and its stockholders, and that the laws of New York impose different conditions on said New York Company and its stockholders from those imposed upon the Montana Company and its stockholders by the laws of Montana.

8. That the above named Directors and officers of the Montana Company organized or caused to be organized the defendant New York Company for the purpose of transferring or having transferred to it all of the properties, privileges, assets and franchises of the Montana Company, of which they were the Directors, in exchange for the capital stock of the New York Company, which capital stock they intended to exchange share for share with the stockholders of the Montana Company for their shares of stock in said Company.

That said directors did on the ..... day of April, eighteen hundred and ninety-eight, at a meeting held outside of the State of Montana,

and without notice to the stockholders of said Montana Company, wrongfully and unlawfully and without right or authority, and without the consent and against the wish of these plaintiffs and other stockholders in the Montana Company, cause to be executed in the name of the Montana Company a deed of conveyance to the New York Company, conveying unto it all the property, franchises, rights and assets of the said Montana Company, which property, franchises, rights and assets are more particularly described in Exhibit A heheto attached, and caused said deed of conveyance and all of said property to be delivered to the said New York Company, and accepted therefor the capital stock of the New York Company.

That the said New York Company accepted said deed and took possession of said property and thereafter caused said deed to be filed for record and recorded in the office of the County Clerk and Recorder of Silver Bow County, Montana, and said defendant New York Company now claims to be the owner of all of the property, rights, franchises and assets of the Montana Company under and by virtue of said deed of conveyance; and said Directors and officers of the Montana Company are now insisting that the plaintiffs and all other stockholders of the Montana Company shall exchange their stock in that Company for shares of stock in the New York Company and become stockholders thereof, against which these plaintiffs protest and have refused and do refuse to assent to the acts of said Directors or to exchange their stock for stock in the New York Company or become stockholders therein, and have made their protest and objection against the same and made their demand on said Montana Company and its directors, as set forth in a written notice and demand, a copy of which is hereto attached, marked Exhibit B, and made a part of this complaint, by delivering the same to said Company at its office in Butte, Montana.

That the said acts of the defendants, the officers and Directors of the Montana Company, in organizing or causing to be organized said New York Company, and in causing said deed of conveyance for the property of the Montana Company to be made thereto for the capital stock of the New York Company, and in receiving said capital stock, were all done without the consent of these plaitniffs or that of all of the stockholders of the Montana Company and without any meeting of the stockholders of the Montana Company having been called or held for the purpose of considering or authorizing said acts to be done or assenting thereto, and that said acts have not been assented to or in any way ratified by these plaintiffs.

10. That thereafter, and on the ..... day of April, eighteen hundred and ninety-eight, said defendant Directors of the Montana Company, through the defendant A. S. Bigelow, as President of said Company, notified the stockholders of said Company, or some of them, of the acts of the Directors heretofore alleged and theretofore done, by mailing to the

stockholders a statement of what had been done, and a notice of stockholders' meeting, which statement and notice is in the words and figures following, to wit:

BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY.

BOSTON, Mass., June 6, 1898.

DEAR SIR: The Directors have decided after long deliberation and as a result of the agitation of the question by our counsel, both in the West and East, for the past two years, that it is important to place the Company under the laws of an Eastern State. The State of New York has been selected as offering the most favorable inducements in which to locate. A corporation has accordingly been organized in that State under the same name, with the same capital stock, and in all respects identical with that of the present Company. All the property and assets have been transferred to the New York Company, which is now conducting the business under the same conditions as heretofore. The stock of the New York Company is now held by this Company and will be exchanged share for share for the stock of this Company as soon as the transaction has been ratified by the stockholders' meeting, which is to be held in Montana on June sixth, eighteen hundred and ninety-eight. In the mean time the Directors consider it important that the transfer be adopted by the stockholders. To that end you are requested to sign the accompanying proxy and consent at your very earliest convenience, so that the transaction may be properly consummated.

By order of the Directors:

A. S. BIGELOW, *President.*

That the plaintiffs have declined to give proxies as requested, or to assent to the acts done by the Directors, or to the proposition submitted in said notice, and do now protest against the acts of said Directors and against any ratification or confirmation thereof by the stockholders of said corporation, and bring this action on behalf of themselves and all other stockholders similarly situated or who may wish to join as plaintiffs herein, and for the purpose of preventing said scheme of the Directors from being carried into effect or being ratified by a vote of the stockholders or any stockholders of the Company, and to prevent the adoption by the stockholders of said Company of said deed heretofore mentioned, and for the purpose of having said deed to the New York Company cancelled and set aside, and the property of the Montana Company placed in the hands of a receiver of this court and

sold and its business affairs wound up and the proceeds distributed to its creditors and stockholders, or for such other relief as may be just and equitable.

And plaintiffs allege that the statement contained in said notice to the effect that the New York corporation is in all respects identical with that of the Montana Company, and that said New Yrok Company is now conducting the business under the same conditions as the same was heretofore conducted by the Montana Company is not true. And plaintiffs further allege that the New York Company and its powers and duties, and the rights and liabilities of the stockholders therein, are essentially different from those of the Montana Company and its stockholders. That the purposes for which the said New York Company has been formed, as stated in its articles of incorporation, are principally as follows:

[*Extract from Articles of Incorporation.*]

12. Plaintiffs further allege that the defendants, the Directors of the Montana Company, have wrongfully and unlawfully conspired together to do the acts and things hereinbefore alleged, and have in the execution of said conspiracy done all of said acts and things against the rights of these plaintiffs as stockholders in the Montana Company and all other stockholders of that Company who have not assented thereto and who may refuse to assent thereto, and that said Directors have called a meeting of the stockholders of said Montana Company, to be held at Butte City, on the sixth day of June, eighteen hundred and ninety-eight, or at any adjourned time thereafter, for the purpose of procuring their unauthorized and wrongful acts aforesaid to be assented to and adopted by the stockholders of said Company, and have caused to be published in "The Mining and Railway Review," a weekly newspaper of Butte City, Montana, a notice calling said meeting and stating the object and purpose of the same, a copy of which notice is hereto attached, marked Exhibit A, and made a part of this complaint, as fully and to all intents and purposes as if set out herein in full. That said Directors have called said meeting and caused said notice to be published, assuming to call said stockholders' meeting and have the same held under the provisions of Sections 1012-3, of the Civil Code of Montana, and for the purpose of having represented by person or by proxy three-fourths of the capital stock of said Montana Company at said meeting, or an adjourned meeting thereof, and voting or causing or procuring to be voted in person or by proxy two-thirds or more of the capital stock of said Montana Company in favor of the adoption of their said acts and in ratification thereof, and of the execution and delivery of the deed before mentioned to the New York Company. That said Directors have conspired together to secure control of three-fourths of the capital stock of said Montana Company in person or by proxy,

to have the same represented at said stockholders' meeting and voted in favor of ratifying their wrongful and unauthorized acts before mentioned, and that they will be able, by means of the stock held by themselves and by proxies secured from other stockholders under the representation that said proposed change mentioned in the notice aforesaid will be for the benefit of the stockholders, to represent and have voted by such proxies in connection with their own stock at least two-thirds of the entire capital stock in favor thereof, and of said proposition mentioned in the notice for stockholders' meeting, and that the other defendants, save the corporations above named, will join with them and vote the stock held by them in person or by proxy to ratify the said acts of the Directors, and in favor of the proposition mentioned in said notices, unless they are restrained by the injunction order of this court, and that all of said defendants, save the corporations, are threatening to and will organize and hold said stockholders' meeting on June sixth, eighteen hundred and ninety-eight, and will at said meeting, unless so restrained and enjoined by the order of this court, vote in person or by proxy more than two-thirds of the capital stock of said Montana corporation in favor of said proposition mentioned in said notices, and that they will thereupon and thereafter claim and assert that all of the property of the Montana corporation has thereby been legally sold and conveyed by it and its stockholders under the authority of said Sections 1012-3 of the Civil Code of Montana and in accordance with their provisions, to the New York Company, and that the Montana Company will have no further interest .herein and will thereby be dissolved.

13. That the said defendant Directors and the other stockholders of said Montana Company whose stock shall be voted at said meeting in favor of said proposition will thereupon and thereafter claim and contend that these plaintiffs and all other stockholders whose stock is not voted in favor of said proposition will be bound by the action of said stockholders' meeting, and that their rights in said Montana Company as stockholders will thereby be terminated and that the only right remaining to them as stockholders of said Montana Company will be to accept shares of stock in the New York Corporation for the shares of stock held by them in the Montana Company.

That said New York Company will continue in the possession of all of the property and assets of the Montana Company, and will carry on mining and smelting operations and business with the property thereof, and deal with the same under the powers of its Articles of Incorporation, and will only account to its stockholders, that is, to such persons as exchange their shares of stock in the Montana Company for shares of its capital stock, and will dispute the rights of these plaintiffs and other stockholders in the Montana Company not assenting thereto, to any right or interest in said property and business, and that said defendant, the New York Company, is threatening to

do so, and will do so unless restrained and enjoined by the order of this court therefrom, and this court shall appoint a receiver to take charge of and manage all of the property and business of the Montana Company for the benefit of its creditors and stockholders.

14. Plaintiffs further allege that if said acts heretofore mentioned and threatened to be done, and which will be done by the defendants unless restrained by the injunction order of this court therefrom, are permitted to be done, the same will cast a cloud upon the title of the defendant Montana Company and its stockholders to its said property and that the acts of said defendant Directors of said Company already done, and particularly the making and delivery of the deed to the New York Company before mentioned, have cast a cloud upon the Montana Company's title to its property and upon the rights of these plaintiffs and all other stockholders of said Company similarly situated, and these plaintiffs and other objecting stockholders will, unless aided by the injunction order of this court, be obliged to bring numerous actions to protect their interests as stockholders against the acts done and threatened by the defendants.

15. Plaintiffs further allege that said deed to the New York Company purports to be the deed of the Montana Company, but that the same and all of the before mentioned acts of the Directors and officers of said Montana Company are *ultra vires* fraudulent and void as to said company, and to these plaintiffs and all other stockholders who may join with them in this action and who have not assented thereto, and that said deed casts a cloud upon the Montana Company's title to all of its property and upon the rights of the plaintiffs as stockholders in said Company and prevents them from enjoying their rights as such therein; and that if said deed be adopted by a vote of two-thirds of the stockholders of said Montana Company and the acts of the said Directors aforesaid are ratified at a meeting of said stockholders, such vote and ratification will further cast a cloud upon the title of the Montana Company to its property and upon the rights of the plaintiffs as stockholders in said Company.

And plaintiffs further show that all of the property of the Montana Company is described in or included within the deed before mentioned and that said deed should be declared null and cancelled and set aside by the decree of this court herein. That the Directors and officers of said Montana Company will not endeavor to have said deed cancelled and said property restored to the possession and control of said Montana Company.

16. And the plaintiffs upon their information and belief allege that if this court shall not interfere by its injunction order, said defendants will organize a stockholders' meeting and in person and by proxy vote and allow to be voted more than two-thirds of the capital stock of said Montana Company in favor of the proposition stated by the Directors in the notice before

mentioned, and that thereafter the said New York Company will mortgage or otherwise encumber the property of said Montana Company.

That some, if not all, of the above Directors are stockholders in the Butte & Boston Consolidated Mining Company, a corporation organized under the laws of the State of New York, and were materially interested in the formation of said Company. That said Company acquired the property and assets of the Butte & Boston Mining Company, a Montana corporation which had theretofore become insolvent, and at the same time assumed many of the liabilities of said Montana corporation. That the said Butte & Boston Consolidated Mining Company was formed for the purpose of acquiring the property, privileges and assets of the Butte & Boston Mining Company and taking the same over unto itself, and thereafter carrying on the mining, smelting and other business which said Company had theretofore been carrying on in the State of Montana, and that said Butte & Boston Consolidated Mining Company has, since it acquired said property and business, been carrying on such business in the State of Montana. That the business of said Butte & Boston Mining Company was not profitable to its stockholders and it became insolvent and was placed in the hands of a receiver.

That the business of said Butte & Boston Consolidated Mining Company has not been and is not prosperous and that said Company has not paid any dividends or profits to its stockholders since its organization. That some of the defendant Directors were interested in large money demands against the Butte & Boston Mining Company at the time it became insolvent, for advances made on its account, and particularly Leonard Lewisohn, and that the defendant Albert S. Bigelow had guaranteed large obligations of said Company and was personally liable on account thereof at the time said receiver was appointed. That such of the Directors, defendants herein, as were interested in the affairs of the Butte & Boston Mining Company by reason of such claims and obligations, were active in forming the Butte & Boston Consolidated Mining Company and promoting the formation thereof with the purpose in part of so arranging such obligations as to secure to themselves through the business of the said Butte & Boston Consolidated Mining Company and the management, manipulation and sale of its stock to other parties against said obligations, and that said defendant Directors are large holders of the capital stock of the Butte & Boston Consolidated Mining Company.

That the subscribers for the capital stock of the Butte & Boston Consolidated Mining Company were large owners and holders of the capital stock of the Butte & Boston Mining Company. That they were allowed to take stock in the Butte & Boston Consolidated Mining Company under an agreement to pay certain assessments into its treasury, and that the assessments which said defendants as such stockholders were to pay were not actually paid in money into the treasury of said Company. That their said investment

in the said stock of the Butte & Boston Consolidated Mining Company is not profitable, and that the said New York Company was organized with the power to acquire the stock of other corporations and to acquire and carry on the business or property of any company engaged in similar business and to undertake the liabilities of such Company and to guarantee the payment of dividends on the shares of its stock, for the purpose, in addition to the purposes stated in said notices before mentioned, of acquiring the property and business or the stock of said Butte & Boston Consolidated Mining Company and of operating its business and property, and that it is the intention of said defendant Directors, upon their acts aforesaid being ratified, to have the New York Company purchase the capital stock of said Butte & Boston Consolidated Mining Company or take over its property and business and assume its liabilities, and in case it takes over the business of said Butte & Boston Consolidated Mining Company and assumes its liabilities, to operate tts said property and business in connection with the business belonging to the Montana Company, which they have wrongfully delivered to the New York Company, and to have the New York Company undertake and guarantee the payment of dividends upon stock in the Butte & Boston Consolidated Mining Company.

That it is further their intent to so arrange matters in such transaction that any and all claims and obligations held or to which any of them are bound on account of the business of the Butte & Boston Mining Company or the said Butte & Boston Consolidated Mining Company, will be settled and discharged, and that the effect of all this will be to the personal advantage and benefit of such Directors and against the interests of these plaintiffs; and that said Directors and officers of said Montana Company have surrendered and abandoned all of its property and business to the New York Company in furtherance of their fraudulent intentions as aforesaid.

17. That said New York Company is engaged in mining, smelting and converting to its use large quantities of valuable ores containing gold, copper and silver, from the mines and mining claims of the Montana Company, situated within the State of Montana, and will continue to do so unless enjoined therefrom by the order of this court, and unless this court shall appoint a receiver to take charge of all of said property for said Montana Company, its stockholders and creditors. That said Montana Company and these plaintiffs have no means of ascertaining the amount or value of the gold, copper and silver which said New York Company extracted or which it will hereafter extract from said mines and mining claims belonging to the Montana Company, and that it will continue to extract valuable ores and minerals therefrom and convert the same to its own use, and that said Montana Company and these plaintiffs will have no means of ascertaining the amount or value of such ores, and that said acts on the part of said New York Company will

daily decrease the value of the mining property of the Montana Company.

That the said New York Company has no property or assets of its own, and that any judgment at law which might hereafter be obtained against it for the extraction and conversion of ores from the mines, mining claims and mining property of the Montana Company and for damages for its unlawful use and occupation of the property of said Company would be worthless.

18. And plaintiffs upon their information and belief allege that there are stockholders of said Montana Company, including the Directors and defendants aforesaid, owning a majority of the capital stock of said Company, who have assented or will assent to the before mentioned acts of said Directors, and who will insist upon the same being adopted and the conveyance of all of the property and rights of said Montana Company to the New York Company being affirmed, and said New York Company continuing in the possession and use of the property and business of the Montana Company.

Plaintiffs, therefore, aver that by reason of all of the matters and things stated and alleged, the said Directors are not proper persons to have or be given any further charge or control of said Montana Company, its property, business or affairs; and that by reason of the wish of the persons owning a majority of the stock of said Company to have said acts of the Directors ratified, and the scheme proposed in the before mentioned notices carried out, and said New York Company continue in possession and use of the property and business of the Montana Company that said Directors cannot be removed or other suitable persons elected as Directors who would carry out the purpose of said corporation, and protect the interests of all its stockholders, and that in consequence of all the matters before alleged a receiver for said corporation should be appointed and its property and business carried on by him under the direction of the court during the pendency of this action, and that upon final judgment setting aside said acts of the Directors and cancelling said deed, its entire property should be sold and the proceeds thereof, after payment of its creditors, distributed to its stockholders.

WHEREFORE, Plaintiff prays:

1. That the court grant unto them an order to show cause, directed to all the defendants, requiring them on a day certain to show cause, if any they have, why said defendants, Montana Company, Albert S. Bigelow, Leonard Lewisohn, Charles Van Brunt, William J. Ladd, Joseph S. Bigelow, Joseph S. Ray, Frank Klepetko, G. H. Hyams, John F. Forbis and J.. H. Vivian, should not be enjoined from voting either in person, or as proxy or agent or attorney for any other person, and from allowing to be voted in person or by proxy any shares of the capital stock of the Boston & Montana Consolidated Copper and Silver Mining Company, of Montana, at a meeting of the stockholders noticed for June sixth, eighteen hundred and ninety-eight, or at any other meeting of the stockholders of the said Company, or at all, in favor of

selling the whole of the property of the corporation as mentioned in Exhibit A hereto attached, or in favor of any proposition therein mentioned conveying or attempting to convey the mining property of the Montana Company to the New York Company, during the pendency of this action, and that they be restrained therefrom until the hearing of said order to show cause, and until the further order of the court.

The said defendant Boston & Montana Consolidated Copper and Silver Mining Company, of New York, be required to show cause why it should not be enjoined from using the property mentioned in Exhibit A, or carrying on or conducting business therewith, and from mining or extracting ores from the mines or mining claims therein mentioned during the pendency of this action; and that all of the defendants show cause why a receiver should not be appointed to take charge and manage, under the direction and control of this court, all of the business and property of the Boston & Montana Consolidated Copper and Silver Mining Company, of Montana, which is mentioned in Exhibit A, and all other assets and property of said defendant.

2. That upon the hearing of said order to show cause the court grant an order of injunction enjoining the defendants from doing any of the acts or things complained of or charged in said complaint as threatened and as above requested in this prayer for a restraining order, and from attempting to convey the property of the Montana Company to the New York Company.

That a receiver of all the property, business and effects of the Boston & Montana Copper and Silver Mining Company, of Montana, be appointed to take charge of and manage the business and affairs of said corporation during the pendency of this suit, and particularly the property and assets mentioned in Exhibi A hereto attached; and that the defendant Boston & Montana Consolidated Copper and Silver Mining Company, of New York, be ordered and required to deliver the same to said receiver, and that it be enjoined from using the same or mining or extracting any ores therefrom and from removing or disposing of any ores, concentrates or matter, the product of any such property.

3. That upon the final hearing of this cause all of the acts of the defendant Directors and the officers of said Montana Company be declared to be null and void, and that the deed of conveyance heretofore given to said New York Company by the officers and Directors of the Montana Company and executed in its name, for all of the property and rights mentioned or described in Exhibit A of this complaint, which deed is recorded on Page 173 of Book 29, Deed Records of Silver Bow County, Montana, be by decree of this court declared null and cancelled, and that said New York Company be forever enjoined from asserting any claim thereunder to said property.

That said receiver upon judgment being entered, declaring said acts of the Directors void and cancelling said deed, be directed to sell all of the

property therein mentioned, and all other property of the Montana Company, and pay all the expenses of receivership and all debts of said Company, and distribute the remainder of the proceeds of such sale to the stockholders of said Montana Company.

For such other and further relief as may seem meet and in accordance with the rights of the parties and the rules of equity, and for costs of suit.

ROBERT B. SMITH,
JOHN J. MCHATTON,
CLAYBERG & CORBETT,
Attorneys for Plaintiffs.

FORM III.

(Cited, Page 44.)

Oppression by Majority. Suit for Equitable Relief.

SUPREME COURT—CITY AND COUNTY OF NEW YORK.

WM. R. BARR AND MYRON P. BUSH

vs.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, THE ERIE RAILWAY COMPANY, HUGH J. JEWETT, RECEIVER, &C., AND THE SUSPENSION BRIDGE & ERIE JUNCTION RAILROAD COMPANY.

The complaint of the above named plaintiffs represents to the Court as follows:

1. That on or soon after the twelfth day of October, eighteen hundred and sixty-eight, a corporation by the name of The Suspension Bridge & Erie Junction Railroad Company (one of the defendants aforesaid, and hereinafter called the Bridge Company), was formed under the laws of this State for the purpose of constructing a railroad therein. That the last named corporation has continually since existed and pursued its organization. That Hugh J. Jewett (the person who is in his capacity as Receiver hereinafter mentioned) is now the President of said Bridge Company, and that said Jewett is also the President of the defendant, the New York, Lake Erie & Western Railroad Company, which last corporation is hreinafter called the Western Company.

2. That the articles of association, or charter of said Bridge Company, authorize, or purport to authorize, the issue of capital stock in the nominal amount of one million of dollars, in shares of one hundred dollars each, but

that certificates for no more than five hundred thousand dollars in nominal amount, being five thousand shares of one hundred dollars each, have yet been issued.

3. That of the first and original issue of the stock of and by said Bridge Company, and of certificates for the same, was a series of certificates executed in due form for one hundred shares each, bearing date November first, eighteen hundred and seventy, and among said certificates were three such certificates issued to and in the name of the plaintiff, William R. Barr, viz: Certificates Nos. 21, 22 and 23, each for one hundred shares; and there was also issued to him, at or about the same time, Certificate No. 24, for thirty-five shares of said stock. That the plaintiff has continually, since receiving said certificates and shares (which was soon after the date thereof), been the holder and owner of said Certificates Nos. 21 and 22, and of the shares they represent, being two hundred of said shares. And on information and belief the plaintiffs allege that said Jewett, Receiver, has become the owner and holder of all the residue of said shares so issued to and so formrly owned by the plaintiff, Barr, except nine shares thereof; and that said Jewett acquired ownership of the same as hereinafter mentioned, and has voted upon the same. That said nine shares the plaintiff, Barr, now owns, and the same are represented by the stock certificate of said Bridge Company, duly executed in its name and on its behalf, and bearing date on the twenty-ninth day of May, eighteen hundred and seventy-four, at or about which time said Barr received the same; said nine shares being a part of the said thirty-five shares, represented in said original certificate for thirty-five shares. And the plaintiff, Barr, is now the holder and owner of two hundred and nine shares of the capital stock of the said Bridge Company, and of certificates for the same.

4. That the plaintiff, Myron P. Bush, is, and, ever since the year eighteen hundred and seventy-one, has been the holder and owner of eighty shares of the capital stock of said Bridge Company, and of certificates for the same, being a part of the stock issued under date of November first, eighteen hundred and seventy, to E. A. Buck, and now standing on the books of said Bridge Company in the name of said Buck.

Second. That during the year eighteen hundred and seventy, and for a long time prior thereto, there was and there still is in existence in this State a railroad corporation known as the Erie Railway Company, which owned and operated, or operated under one or more leases for long terms, a line of railroad connecting Jersey City with Buffalo and Dunkirk; and that over that road there was a large amount of trade and travel between parts of the United States and Canada. There was a railroad in Canada known as the Great Western Railroad, which had a connection with Suspension Bridge over the Niagara River, and which had far better connections with the New York Central than with the road of the said Erie Railway Company; and the interest

of the last named company required a railway connection available for its use between Buffalo and said Suspension Bridge, a distance of about twenty-three miles. The formation of said Bridge Company was promoted by those in the interest of said Erie Railway Company, and the intention was that said Bridge Company should make a road between Buffalo and said Suspension Bridge that should be available for the advancement in part of the business interests of said Erie Railway Company, and unsuccessful efforts were made to secure the building of said connecting road by said Bridge Company and those promoting the building of said connecting road before the making of the contract for the building of the same, hereinafter mentioned.

Third. That on or about the twenty-eighth of May, eighteen hundred and seventy, said Bridge Company authorized a mortgage of its property and its franchises, and the issue of one million in nominal amount of its bonds, of one thousand dollars each, with interest coupons attached, for interest at seven per cent per annum, payable in July and January of each year, for which said bonds said mortgage was to be a security. Both said proposed bonds in the amount of one million dollars and said proposed mortgage as security for the same, were not long after said date duly created and issued by and in the name and under the corporate seal of said Bridge Company, and the same, as the plaintiffs on information and belief allege, are now valid and outstanding, and the interest on the said bonds have been paid since their creation, either by said Erie Railway Company, by said Jewett as Receiver, or by said Western Company as lessee, assignee or purchaser of the property and lease hereinafter mentioned.

Fourth. That on or about the seventh day of June, eighteen hundred and seventy, said Bridge Company made a contract, dated June seventh, eighteen hundred and seventy, with one Mortimer Smith, as party therein named of the first part, of which, as the plaintiffs on information and belief allege, a copy in the handwriting of said Smith appears in one of the books of records or minutes of said Bridge Company now in the hands of defendants, Jewett or said Western Company, for the procuring of the right of way and for the building of and the finding material for the proposed road of said Bridge Company from Buffalo to Suspension Bridge, and connecting the same with the road of said Erie Railway Company and the said Great Western Railroad Company at said Suspension Bridge, and for other purposes, as said contract will show. And said contract contained the further provision, as these plaintiffs on information and belief allege, by which said Bridge Company, party of the second part of said contract, agree to mortgage its road to secure one million dollars of bonds, "and to issue said bonds to the party of the first part "(said Smith), in part payment for said work, and five hundred thousand "dollars in the capital of the said Company of the second part in full payment "therefor, which stock and bonds are to constitute the whole of the stock and

"debt of the party of the second part." And said Smith, as party of the first part, was to have all said bonds and said five hundred thousand dollars in stock under and in consideration of the execution of said contract.

And by said contract the Erie Railway Company was to guarantee the payment of the principal and interest of said bonds.

On information and belief, these plaintiffs allege that said Smith, by himself or others, executed and performed said contract, and became entitled to receive, and did, by himself or others, receive said bonds guaranteed as aforesaid, and stock from said Bridge Company, being the same bonds and stock herein elsewhere mentioned; and that no other bonds or stock of said Bridge Company have ever been issued except the one million dollars of bonds and the five hundred thousand dollars of stock issued under and in consideration of the execution and part execution from time to time of said contract, and as it contemplated.

Fifth. That soon thereafter, and while said road of said Bridge Company was being completed under said contract, the said Erie Railway Company leased the franchises and road of said Bridge Company, and agreed to pay as rent therefor thirty per centum of its gross earnings, and that the rent that should be paid in each year should not be less than one hundred and five thousand dollars, which said lessee agreed absolutely each year; and otherwise agreed, as more fully appears in said lease, a copy of which is hereto attached, marked Exhibit A, and made a part of the complaint; and said lease was duly executed and delivered, both by said Bridge Company and by said Erie Railway Company, and the latter Company received said leased road and property, and operated the same as lessee, and took the earnings and profits of the same until the appointment of said Jewett, as Receiver, as hereinafter mentioned, when said Jewett, as Receiver, operated said leased property and took the income and profits of the same until said leased property was delivered by said Receiver to said Western Company as assignee or purchaser, since which the last named Company has operated and held said leased road, and has received the income and profits under said lease, and has paid seventy thousand dollars a year as rent under said lease, and no more.

That all of said bonds were guaranteed by said Erie Railway Company as said contract and lease provided for, and the interest on the same, being a part of said rent, was paid by the last named Company, or was caused to be paid by said Erie Railway Company, until said Receiver was appointed, and such part payment was afterwards made by him so long as he operated said Erie Railway.

And on information and belief, these plaintiffs allege that the additional amounts of rent to be absolutely paid above seventy thousand dollars a year, that is, thirty-five thousand dollars a year, was, by the parties to said lease and its assignees, understood and intended to be paid to or appropriated to

paying seven per cent annually as a dividend or interest to or for the benefit of the holders of said five hundred thousand dollars of stock; and that any larger amount of rent or share of earnings that might be paid would also be for the purpose of such dividend or interest.

And that before the issue of such stock, and in pursuance of such understanding, the Erie Railway Company caused its guaranty and agreement to be printed upon each certificate, and its seal and the signature of its Secretary to be thereto affixed, whereby said Erie Company not only remained liable to pay said rent in full to the lessor, but became liable to have the same applied in proper proportion to paying dividends on said stock; and said guaranty was in form following, as will appear on the production of said stock certificates, viz:

CERTIFICATE OF GUARANTEE.

> In accordance with the terms of a lease of the Suspension Bridge & Erie Juunction Railroad, executed July thirteenth, eighteen hundred and seventy, as part of the rent to be paid therefor, the Erie Railway Company has bound itself to pay to the holder hereof a semi-annual dividend of three and one-half per cent on the shares herein named, on the first day of January and July of each and every year, commencing on the first day of January, eighteen hundred and seventy-one, subject to the provisions of said lease.
>
> In witness whereof, the said Erie Railway Company has caused the signature of its Secretary and its corporate seal to be affixed hereto.

Of which said Erie Railway Company was aware when it took possession under said lease, and of which said Receiver and said Western Company were respectively aware upon taking possession by virtue of the same lease.

And on information and belief, these plaintiffs further state, that said Erie Railway Company, during part of the time it operated said leased property, also paid or provided the money for paying the said dividends so contemplated as payable on said five hundred thousand dollars of stock, but made default in paying the same on and after the first of January, eighteen hundred and seventy-two.

Sixth. That on or about the twenty-sixth day of May, eighteen hundred and seventy-five, the Erie Railway Company, having become unable to pay its debts, the defendant, Hugh J. Jewett, was appointed Receiver of the property and franchises of the said last named Company by the Supreme Court of the State of New York, in an action therein depending, wherein the People

of the State of New York were plaitniffs, and the said Erie Railway Company and others were defendants, and took possession of and operated the roads and leased lines, and received the earnings of said Company, including the income of said leased property as being a part of the property of the Erie Railway Company.

And on or about the fifteenth day of June, eighteen hundred and seventy-five, said Jewett was also appointed Receiver of the mortgaged property and franchises of said Erie Railway Company in two suits then depending in said Court for the foreclosure of certain mortgages on said property and franchises; and under the last named appointment said Receiver took possession of said leased and mortgaged property and franchises, claiming said lease and the property and franchises thereunder as being embraced as a part of said mortgaged property of the Erie Railway Company, and as such Receiver said Jewett held and operated the road of said Bridge Company and received and used the income and profits from the same, and paid or caused to be paid the interest on said bonds as part of the rent aforesaid; but said Receiver did not pay and wrongfully refused to pay the sums required to be paid under said guaranty on said stock certificates, and wrongfully refused more than seventy thousand dollars per year of said rent, and kept and wrongfully retained the thirty-five thousand dollars per year residue of said rent; nor did said Receiver pay any portion, but wrongfully withheld the whole of the gross earnings under said lease, if any there were beyond said seventy thousand dollars per year.

That said Jewett has therefore to such extent illegally withheld income of said leased property, and a part of the rent due for the same during the whole period of his operating said Bridge Company's road, and has, when requested, refused and denied his obligation to pay the same, and the same is still due from him.

These plaintiffs, on information and belief, further state, that while said Jewett, as Receiver, has ceased to hold said leased property as Receiver, and has delivered the same to or for the new Company, defendant herein, designated as the Western Company, he is still a Receiver and holds money applicable to discharge his obligations as such Receiver, and he holds the stock of said Bridge Company as Receiver, a part of which he has purchased as such Receiver, and a part of which he received from said Erie Railway Company and others as part of the property held by it at the time of said Jewett's appointment.

Seventh. And on information and belief, these plaintiffs state, that in eighteen hundred and seventy-two, after the Erie Railway Company had as aforesaid refused to pay said thirty-five thousand dollars a year part of said to perform said guaranty, said Bridge Company and its officers demanded said rent, or to perform said guaranty, said Bridge Company and its officers de-

manded said rent and performance, but were met by refusals and by efforts to secure delay by negotiations, and said negotiations resulted in the election of P. H. Watson (then President of said Erie Railway Company) and S. L. M. Barlow, B. W. Blanchard and Charles L. Atterbury (also officers of the last named Company), to be Directors of said Bridge Company, in October, eighteen hundred and seventy-three.

And the plaintiffs in like manner allege, that said election was in large measure carried by the vote of stock of said Bridge Company, which said Erie Railway Company had purchased for the purpose of getting control of said Bridge Company, with the intent of using said control to avoid the payment of said rent; said Erie Railway having itself, by its attorney, said Attebury, voted on six hundred and fifteen shares, and controlled the vote of other shares of the sixteen hundred and seventy-five shares which were voted at the election of October, eighteen hundred and seventy-three; and said Attebury and the other inspectors certified that said Barr voted on three hundred and thirty-five shares, which was the fact, and that E. A. Buck voted on two hundred and twenty shares at said election, as appears also by the records of said election, now in the possession of said Receiver or Western Company; and the plaintiffs allege that of the stock so (and since) voted upon him, two hundred and nine shares are the same as are now owned by the plaintiff, Barr; that eighty shares of the two hundred and twenty shares voted upon by said E. A. Buck, are the same now owned by the plaintiff, Bush; and that the residue of shares so voted was stock issued for the same reason and consideration as the said stock of said plaintiffs.

Eighth. And these plaintiffs, on information and belief, allege that from about the date aforesaid, said Erie Railway Company and its officers and representatives, wrongfully refusing to pay said rent in full, and denying its liability so to do, and for the purpose of enabling it or them to purchase said Bridge Company stock at a low figure, conspired together to compel the holders of said stock to part with the same for less than its par, or true value, and that said conspiracy and wrongful effort have been and now are continued by the other defendants: the said Bridge Company being now and for a long time past in the control of the said Erie Railway Company, or of the other defendants, or some of them.

That by reason of said conspiracy and threat, the plaintiff, Barr, was, on or about the twenty-ninth day of May, eighteen hundred and seventy-four, induced to accept, and the Erie Railway Company has paid him, at the rate of eighty dollars per share, being ten thousand and fifty dollars for one hundred and twenty-six shares of said stock; and said Company bought stock at the same rate of Mr. Eldridge, one of the Directors. And on information and belief the plaitniffs allege, that all of said five thousand shares of stock, but eight shares in the name of one Sterling, the eighty shares now owned by the

plaintiff, Bush, and the shares owned by said Burr, have been purchased by some of the defendants at very low rates, though said Company agreed to pay fifty dollars per share for a large amount thereof, and so successful were the efforts of said conspirators to depress said stock and get control of the same, after they had acquired a large part thereof, that notwithstanding the Board of Directors of the Erie Railway, on the fifteenth day of May, eighteen hundred and seventy-four, authorized the purchase of the same up to an average rate of sixty per cent of the par value thereof, said Company and its officers or representatives compelled the sale thereof at prices as low as ten per cent of said par value, which is the largest sum they will now pay to either of said plaintiffs for their stock, though said Erie Railway Company had once agreed to pay the plaintiff, Barr, several times that price for the stock he now holds. And the plaintiffs, on information and belief, allege, that the refusal, at a later date, to pay a larger sum than ten per cent of the par value of said stock has been made only because, having acquired a controlling amount of the shares, the defendants believe they can prevent the plaintiffs from receiving any dividends or other income from the ownership of their stock.

And the defendants now control and manage said Bridge Company for purposes of their own, and in disregard of the rights of the plaintiffs, and for the exclusive benefit of the lessee, and its assigns.

Ninth. That about the fourteenth day of July, eighteen hundred and seventy-four, the defendant, Hugh J. Jewett, became the President of the said Erie Railway Company, in place of said Watson, and has continued said President until this date, or within a few months of it.

That, as these plaintiffs allege on information and belief, said Erie Railway Company, or said Jewett, having as aforesaid acquired a vast majority of said Bridge Company stock before October, eighteen hundred and seventy-seven, was, on the tenth day of that month, elected first a Director, and then the President of said Bridge Company, and he has continually since been such President, and nearly every Director since has been, and every Director and officer now is, an officer or agent of the defendant, the Westrn Company, which last namd Company, as the successor in law of said Erie Railway Company, and the purchaser and assignee of said lease, claims and holds the said leased property, and takes its income solely under and by virtue of said lease. And these plaintiffs in the same manner allege, that a certificate of the Secretary of said Bridge Company, who is also the Secretary of the defendant, the Western Company, of the first of December, eighteen hundred and seventy-nine, shows that, of the stock of said Bridge Company, said Jewett, as Receiver, then owned or held, four thousand six hundred and ninety shares; that the thirteen Directors altogether owned or held thirteen shares; that W. R. Barr owned or held two hundred and nine shares; that E. A. Buck owned or held eighty shares, and that one Sterling, Trustee, held eight shares, the

same being in all said five thousand so issued; it thus appearing there are only eight shares, besides those of the plaintiffs, not owned by the defendants and acquired as aforesaid. And further the plaintiffs say, that the management of the said Bridge Company is now wholly in the interest of said Receiver, or said Western Company, and those they represent; and that, without the aid of the Court, these plaintiffs have no means of causing a demand by said Bridge Company of said unpaid rent or earnings, or of enforcing its payment, or having any dividend declared; and that the defendants are practically both lessor and lessee under said lease, and are interested and using their interests and authority to defeat the plaintiffs of their just rights, and in preventing any dividend being declared on said stock.

Tenth. That in one of the aforesaid suits for the foreclosure of a mortgage, dated February fourth, eighteen hundred and seventy-four, and known as the second consolidated mortgage, under which said Jewett was made Receiver by said Erie Railway Company, and in which the Farmers' Loan & Trust Company were plaintiffs, and the Erie Railway Company and others were defendants, a final judgment of foreclosure and sale was entered, on or about the seventh day of November, eighteen hundred and seventy-seven; and that thereunder and in pursuance of the same, and of the orders of the Supreme Court of the State of New York, a sale was made of the franchises and property covered by the last named mortgage on or about the twenty-fourth day of April, eighteen hundred and seventy-eight, and that a purchase was made of the same at public auction (in due form of law to pass title to the same to the purchasers by a committee who purchased the same for a Company to be formed under the laws of this State. That such Company was formed, the same being the defendant, the said Western Company, and the last named Company took title to said property and franchises by conveyance, purchase and delivery from said committee, whereby the last named Company became possessed of all said property and franchises so covered or claimed to be covered by said foreclosed mortgage, and that among the property so covered and claimed to be covered was said leased property and franchises of said Bridge Company, and each of said purchasers took possession and enjoyed said leased property and franchises and the income of the same by virtue of such sale and purchase; and said Western Company having taken such possession June first, eighteen hundred and seventy-eight, now retains, and enjoys, and controls the same, and the income thereof, solely by virtue of said lease, and the facts aforesaid, but refuses to pay thirty-five thousands dollars of rent, while paying said seventy thousand dollars of rent, and is by reason of said facts liable to pay said rent in full and thirty per cent of the gross earnings of said leased property.

Eleventh. On information and belief these plaintiffs further state, that at all stages of the facts and proceedings referred to, the defendants knew

of said contract, and of the provisions of said lease and of the rights and claims of the plaintiffs.

That is has been the known duty of those who have controlled said Bridge Company to demand and collect the said rent remaining in arrears, and that they have wilfully refused and neglected to do so, with the intent and purpose aforesaid.

That said Bridge Company has had and now has no expenses that could absorb any material portion of said rent, but the same could and should have been collected and distributed in dividends, and it was a violation of duty to these plaintiffs on the part of the officers of said Bridge Company not to make such collection and distribution; that the said leases and their assigns, and said Receiver and the defendant, have neglected to keep any proper or adequate account of the gross or net earnings of said Bridge Company, or of its road under said lease, whereby it is made difficult to determine what have been the gross earnings of the same or the thirty per cent of the value of the same; and that for the proper protection of these plaintiffs in the future, it is necessary that a full and clear account of such earnings should be kept.

WHEREFORE, the plaintiffs pray that an account may be taken of the earnings of the leased property and franchises of said Bridge Company during the period that the same has been held or operated by the defendant, the Erie Railway Company, and the defendant, Jewett, Receiver, and the defendant, the Western Company, respectively; and also of the amount of the specific rent in arrear, and what portion is due to each period aforesaid, and from whom; that the same may be ordered paid in proper proportion to the plaintiffs respectively, or the whole adjudged to be paid to said Bridge Company; and said Bridge Company may be required to pay the proper proportion of the same to the plaintiffs respectively. That the defendants respectively may be adjudged to keep proper and adequate accounts, which shall in the future show the gross annual earnings of said leased property; that the defendant, the Bridge Company, may be required from time to time to demand and collect the rent and gross earnings due under said lease, and to make the proper dividends to the plaintiffs from such earnings and from the rent to be collected; that the defendant, the said Western Company, may be adjudged to be the assignee liable according to the terms of said lease, and the plaintiffs may have all other and further relief to which they may be entitled, and their costs.

ELIHU ROOT,

Attorney for Plaintiffs.

FORM IV.

(Cited, Pages 17, 42, 45, 88.)

Abuse of Joint Control. **Equitable Defense.**

NEW YORK SUPREME COURT—COUNTY OF WESTCHESTER.

THE FARMERS' LOAN & TRUST COMPANY, AS TRUSTEE,

Plaintiff,

vs.

THE NEW YORK & NORTHERN RAILWAY COMPANY, THE NEW YORK LOAN & IMPROVEMENT COMPANY, AND THE LINCOLN NATIONAL BANK OF THE CITY OF NEW YORK, ARTEMUS H. HOLMES AND ALFRED R. PICK,

Defendants.

The defendant Alfred R. Pick, on behalf of himself and the other persons similarly situated, who own and hold preferred and common stock of the New York & Northern Railway Company, appearing by Simon Sterne, his attorney, and the defendant Artemus H. Holmes, owner and holder of stock of said New York & Northern Railway Company, appearing by Holmes & Adams, his attorneys, unite in the following answer, and jointly allege and show to the Court as follows, to wit:

DEFENCE NUMBER TWO.

And these defendants, for a further and separate defense to the complaint in this action, repeating the allegations hereinbefore contained, show that the defendant, The New York & Northern Railway Company, organized and

existing under the laws of the State of New York, to wit, an act of the Legislature of the State of New York, entitled "An Act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases"; being Chapter 430, Laws of 1874, passed May 11, 1874, and the cast amendatory and supplementary thereof, is a railroad corporation owning and operating a line of railroad extending from One Hundred and Fifty-fifth Street, in the City and County of New York, at a point in connection or junction with the Manhattan Railway Company, and running thence northerly and westerly across the Harlem River, and through the counties of New York, Westchester and Putnam, and terminating at or near Brewsters, in the Town of Southeast, in the County of Putnam, in the State of New York, at a junction with the railroads of the New York & New England and New York & Harlem Railroad Companies. That it also owns and operates a branch line extending from Cortlandt Station on its said main line, to Getty Square, in the Town of Yonkers, County of Westchester. That it owns valuable terminals and terminal property in the City of New York; that it owns a valuable bridge built over and extending across the Harlem River, and other valuable bridges, trestles and viaducts; that its said line of railway is of great value and is of great public utility, convenience and necessity; that it lies midway between and parallel to the lines of railroad of the New York Central & Hudson River Railroad Company and the New York & Harlem Railroad Company, which latter railroad is leased to the New York Central & Hudson River Railroad Company, and both are under the same management and control. That the main line of the defendant railway company is fifty-four and six-hundredths (54.06) miles; that the Yonkers branch is three and ten-hundredths (3.10) miles; that the Mahopac Falls branch is four and five-hundredths (4.05) miles, being in all sixty-one and twenty-one-hundredths (61.21) miles, with second track and sidings of twenty-three and ninety-seven-hundredths (23.97) miles; making a total mileage of eighty-five and eighteen-hundredths (85.18) miles. That in addition to said lines of railway the said defendant railway company owns valuable stations and depots along its line of railway and also thirty-two (32) acres of terminal property of very great value in the City and County of New York, situated upon, at and under the Harlem River, and that it also owns a large amount of expensive railway equipment and supplies necessary for the maintenance and operation of its railway, and that with a single exception, to wit, the railroad system owned and controlled by the said New York Central & Hudson River Railroad Company and its allied corporations, it is the only railway company having an entrance by rail into the City of New York, and that the said entrance by rail into the City of New York is of very great, peculiar and increasing value to itself and as an inducement to other railway corporations to enter into contracts with it for the use of its road.

These defendants further show, and refer the Court to the recitals of the said second mortgage mentioned in the complaint herein, that prior to the year eighteen hundred and eighty-seven the said railroad and property, the subject of this action, was owned and operated by a railroad corporation organized and existing under the laws of the State of New York, called the New York City & Northern Railroad Company. That by reason of improvident financial operations and management upon the part of said last named corporation, the said New York City & Northern Railroad Company about the year eighteen hundred and eighty-two became involved and unable to pay the interest charges upon certain mortgages upon its said railroad and property. That thereafter certain proceedings were commenced and had in the Supreme Court of the State of New York for the foreclosure of the said mortgages, and actions were brought against said last named corporation by various creditors, more particularly the New York Loan & Improvement Company, one of the defendants herein. That pending said proceedings, a certain plan for the reorganization of the said New York City & Northern Railroad Company was entered into and adopted under and pursuant to the laws of the State of New York hereinbefore mentioned, by the owners and holders of the bonds issued under the said mortgages of the New York City & Northern Railroad Company, which plan was accepted by the stockholders of the said New York City & Northern Railroad Company, or some of them, and which plan, and the details of which, are set forth in the articles of incorporation of the defendant railway company and in the mortgage to the Farmers' Loan & Trust Company, dated October 1, 1887, and referred to in the complaint herein. That the said plan, among other things, provided for the formation of a new corporation, to be called the New York & Northern Railway Company, which said new Company was to obtain and operate the said railroad and property; that the said new company was to create and issue, and did create and issue, under the said reorganization, securities as follows:

First mortgage gold bonds to the amount of $1,200,000, payable forty years from their date, with interest at the rate of five per cent, per annum, said mortgage being dated October 1, 1887.

Second mortgage gold bonds, payable forty years from date, to the amount of $3,200,000, with interest at the rate of four per cent, per annum, said mortgage being dated October 1, 1887.

Preferred capital stock to the amount of $6,000,000.

Common capital stock to the amount of $3,000,000.

That the said first mortgage bonds were to be sold and were sold for after the rate of seventy-five per cent of the par value of the said former cash at par, the proceeds being intended to be applied and were applied as in said plan set forth.

That the said second mortgage bonds were issued to the former bond-

holders of the said New York City & Northern Railroad Company at and after the rate of seventy-five per cent of the par value of the said former bonds, to the amount of $2,772,750; that the remainder thereof was issued as in said plan set forth.

That the preferred stock was issued to the said former bondholders for the balance of their holdings and as in said plan set forth.

That the common stock was issued to the holders of the former stock of the New York City & Northern Railroad Company, share for share, upon the payment of the sum of ten dollars per share.

That by the terms of said second mortgage, it was provided that the first eight coupons attached to the bonds issued thereunder, should be payable only from net earnings of the Company, as defined in the said mortgage; and that the first coupon, the payment of which was obligatory on the new company, was the coupon maturing on the 1st of June, 1892.

And these defendants further show that it was also provided in the said mortgage that the income, tolls, profits, benefits and advantages pertaining to, or to arise or accrue from, the said railway and railways and property, and the maintenance and operation thereof, should become part of the security for the payment of the said bonds and of the coupons thereto appertaining. That for the purpose of determining the proper application of the earnings of the said company, the said mortgage contains a specification of the proper charges to be made against the gross earnings of the company, and that such specification declares that such charges shall include the general expenses actually incurred in operating the railroads and works of the defendant railway company, and keeping the same and its rolling stock, equipments and appurtenances in good condition and repair, the annual taxes, assessments and expenses of keeping up the organization of the defendant railway company, the sum of sixty thousand dollars ($60,000) for the annual interest charges upon the first mortgage bonds.

And these defendants further show that in the said second mortgage it was provided that the trustee thereof, upon default of the payment of the principal or the interest of said bonds thereby secured, or any part of said principal or interest, when by the terms thereof the said principal or the said interest may become due and payable, shall not proceed against the defendant railway company by reason of such default as in said mortgage provided, except upon the written request of the holders of $2,000,000, in amount of said bonds then outstanding and unpaid or unredeemed, it being intended by said provision and provisions that the defendant railway company shall not be harassed by litigation or the said mortgage foreclosed, except in good faith and by all or nearly all the owners of said second mortgage bonds, who may have purchased the same for purposes of investment and income.

And these defendants further allege that it was a strong inducing element and part of the consideration by which the acquiescence of the then bond and stockholders to the plan and reorganization was obtained, and it was the understanding and expectation upon which the said plan and reorganization was finally adopted, that the peculiar value of the property of the New York City & Northern Railway Company, together with its commanding position for terminal purposes for the City of New York, was such that it was reasonable to expect that, taking into consideration the growing commerce and constantly increasing population of the city, its property and such commanding position would, within the near future, make it of great value to roads seeking entrance to the City of New York in competition with the lines now operated by the New York Central & Hudson River Railroad Company, and that such constantly increasing traffic and population would expectations were rapidly being realized in the increasing values of such of reorganization, and that, therefor, said plan and reorganization was ultimately make valuable all the securities and stock provided for in the plan adopted so as to save to the then existing stockholders the equities and values represented by their stock. And defendants allege that about the time when the conspiracy and practices were devised to absorb the said defendant railway by the New York Central & Hudson River Railroad Company such property of the defendant.

These defendants further show that heretofore, and through and immediately upon and after the reorganization of the defendant railway company about the year 1887, The New York Loan & Improvement Company, one of the defendants in this action, acquired and became the owners of a large amount of the said second mortgage bonds, and of the preferred and common stock of the present corporation. That ever since the formation and organization of the present corporation, and continuously thereafter, and until after the last annual meeting of the said New York & Northern Railway Company in October, 1892, and thereafter the said Loan & Improvement Company owned or controlled a majority of the second mortgage bonds and of the preferred and common stock of the said defendant railroad company. That at the annual meeting of the stockholders of said defendant railway company held in October, 1888, and at every subsequent annual meeting of the said stockholders, the said Loan & Improvement Company, by its ownership of a majority of the common and preferred stock of the said defendant railway company, controlled absolutely the said railway corporation, and by means of said control, elected directors and officers of said defendant railway company who represented the interests of it, the said Loan & Improvement Company.

That at the annual meeting of the stockholders of the defendant railway company held in October, 1892, the following persons were elected directors:

C. T. BARNEY,	J. J. BELDEN,
A. M. BILLINGS,	H. F. DIMOCK,
O. H. PAYNE,	W. C. WHITNEY,
T. DENNY,	G. COPPELL,
R. M. GALLOWAY,	G. G. HAVEN,
R. S. HAYES,	W. MERTENS,

G. W. SMITH.

That of the said directors Messrs. Barney, Belden, Billings, Dimock and Whitney, were directors of the said Loan & Improvement Company; and of the other directors, all except Messrs. Coppell, Hayes and Mertens, were stockholders of and interested in the said Loan & Improvement Company; and this defendant further shows that the said Board of Directors (acting under the control and direction of the said Loan & Improvement Company and well knowing that in the event of a failure to pay the coupons of the said second mortgage bonds, which would mature after the 1st of December, 1891, the said Loan & Improvement Company would control the foreclosure of the mortgage securing the same, and that under a sale by reason of such foreclosure they could acquire the title to all of the said mortgaged premises for the benefit of themselves, and to the exclusion of the minority holders of the preferred and common stock) failed and neglected to apply the net earnings of the said railway in accordance with the provisions and agreements contained in the said mortgage.

And these defendants further allege that instead of using the moneys earned during the years 1891 and 1892 for the purposes of paying the coupons which accrued and default on the payment of which is sought to justify the proceedings herein, the Board of Directors of the said railway company, for the purpose of furthering the sale of said property in their own interest as herein set forth, and to enable the said property to be absorbed and acquired by some other railroad corporation, failed to apply the said money for such purposes, but applied the same for unnecessary betterments and improvements on the road, so as to increase its value for such purposes and to the detriment of these defendants, and others similarly situated with them.

And these defendants further show that the gross earnings of the said defendant railway company amounted to the following sums for the following fiscal years, ending on the 30th of June of each year specified, excepting for the years 1889 and 1890, when the said fiscal years ended on the 30th of September, that is to say

September 30, 1890	536,769.33	
September 30, 1889	$567,212.62	
June 30, 1891	483,326.00	(nine months)
June 30, 1892	521,216.80	
Total	$2,108,674.75	

That the fixed charges by way of interest on the first mortgage during the said four years amounted to $240,000. That a large part of the said remaining earnings have, by the acts of the Board of Directors of the said defendant railway company, been applied to purposes other than the operating expenses, taxes and necessary betterments; and that the application of such earnings to such other purposes was made by the direction of said board for the purpose of increasing the value of the security held for the second mortgage bonds and in disregard of the rights and interests of the said minority stockholders, and in vilation of the terms and provisions contained in said second mortgage.

And these defendants allege that if the said directors had complied with the terms and provisions of the said mortgage, the said earnings would have been amply sufficient to pay the said coupon maturing on June 1, 1892, amounting to $64,000, and there would at present be no defaulted coupon under which a foreclosure of the said property could be had.

And this defendant further alleges and charges that the said misapplication of the earnings of the Company was made with the object and intent of bringing about such default in order that the said holders of the majority of the second mortgage bonds and of the preferred stock and of the common stock would, by means of foreclosure, destroy the interests of the minority stockholders, and thus reorganize the said corporation and its property in such manner as to secure for themselves the entire advantage and benefit thereof.

WHEREFORE, these defendants demand that the complaint herein be dismissed, with costs, and that they may have such other affirmative and additional relief, or both, as the Court may deem proper in the premises and as may be just.

SIMON STERNE,

Attorney for Defendant Alfred R. Pick,

Office and Post Office Address, 56 Beaver Street, New York City, N Y.

HOLMES & ADAMS,

Attorneys for Artemas H. Holmes, one of the Defendants aforesaid,

15 Broad Street, New York.

FORM V.

(Cited, Page 38.)

Oppression by Directors and Officers. Suit in Equity to Obtain Redress.

SUPREME COURT—NEW YORK COUNTY.

THE SARANAC & LAKE PLACID RAILROAD COMPANY, vs. CHARLES E. ARNOLD AND ALFRED J. VOYER.	*Trial to be had in the County of New York.*

The plaintiff, by Forster & Speir, its attorneys, complaining of the defendants and alleges on information and belief as follows:

1. That the plaintiff is a domestic corporation organized and existing under the laws of the State of New York.

2. That in all times hereinafter mentioned the defendant Charles E. Arnold was the plaintiff's President and was one of the plaintiff's Directors, and was duly elected and qualified as such President and Director.

3. That at all the times hereinafter mentioned the defendant Alfred J. Voyer was the plaintiff's Treasurer and was one of the plaintiff's Directors and was duly elected and qualified as such Treasurer and Director.

4. That between June 23, 1893, and March 23, 1896, the defendants collected and received money and property belonging to the plaintiff and withheld and retained from the plaintiff money and property to which the plaintiff was entitled, to the amount of $23,321.69, for their individual use and benefit, no part of which has been paid to the plaintiff, though payment thereon has been duly demanded from the defendants.

5. That the defendants collected and withheld for their individual use and benefit the said sum of $23,321.69, which the plaintiff owned or was

entitled to, by means of their powers as the plaintiff's President, Treasurer, and as the plaintiff's Directors, Trustees and agents, and by means of their fiduciary relations to the plaintiff; that if any part of said money was collected or withheld by the defendants pursuant to any alleged contract or arrangement with the plaintiff, such pretended contract was and is illegal and void because it was and is made in violation of the defendants' trust and fiduciary relation towards the plaintiff, and was made by the defendants as the plaintiff's Trustees with themselves as individuals, for the purpose of their individual enrichment and gain, and as a part of a scheme contrived by the defendants for the purpose of mutually aiding each other in obtaining from the plaintiff money and property to which they were not entitled, by means of a breach of their fiduciary relations towards the plaintiff for their individual gain and profit; that if any such contract was made between the defendants as individuals and the defendants or either of them as the representatives of the plaintiff, it was a breach of the defendants' fiduciary relation towards the plaintiff, and for the purposes of their individual profit and gain, and was illegal, void and without consideration.

6. That the said sum of $23,321.69 was received by the defendants as the money of the plaintiff and for the plaintiff's use and benefit.

7. That no part of said sum has been paid to the pliantiff, though payment of the same has been duly demanded of the defendants.

WHEREFOR, the plaintiff demands judgment against the defendants for the sum of twenty-three thousand three hundred and twenty-one dollars and sixty-nine cents, with interest thereon from March 23, 1896, besides the costs of this action, and for such other and further relief as to the Court may seem just.

FORSTER & SPEIR,

Plaintiff's Attorneys,

52 Wall Street, New York City.

FORM VI.

(Cited, Page 44.)

Suit in Equity by Attorney General to Set Aside Trust Agreement.

SUPREME COURT OF THE STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

vs.

THE NORTH RIVER SUGAR REFINING COMPANY,
Defendant.

Amended Complaint.

The People of the State of New York, by their Attorney-General, upon leave of Court duly granted, in this their amended complaint, on information and belief, allege:

1. For a first cause of action, that defendant is a corporation created and organized under and pursuant to the Act of the Legislature of New York, passed February 17, 1848, and entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," and the acts amendatory thereof; that defendant's certificate of incorporation, filed on or about the tenth of February, 1865, declares its name to be "The North River Sugar Refining Company," its place of business in the City of New York, and its object the manufacture and sale of sugar, syrups and molasses; that in violation of law and in abuse of its powers, and in the exercise of privileges and franchises not conferred upon it, defendant, on or about the first of October, 1887, in the City of New York, together with the other subscribers thereto, entered into and become a party to and carried out the following agreement, namely:

[*Trust Deed.**]

That thereafter, and under and pursuant to the provisions of said agreement, the capital stock of defendant was transferred to said Board, "The

*For copy of Trust Deed, see Helliwell on Stock and Stockholders, page 694.

Sugar Refineries Company," and in lieu thereof certificates were issued by said Board; that, pursuant to said agreement, such of the parties thereto as were not then incorporated became corporate bodies, and their capital stock was transferred to said Board and certificates issued in lieu thereof, that the greater part in number and value of said certificates is owned by the members of said Board; that by means of said agreement, and the powers thereby conferred upon said Board, said Board monopolizes the manufacture and sale of refined sugar in the State of New York, and is enabled to control at will the production and price of said sugar in said State and in the United States; that, in exercise of the powers conferred by said agreement, said Board controls the action of defendant and the other corporations, parties to said agreement, in the conduct of their business, and controls and regulates the production and price of refined sugar in the State of New York and in the United States; that in the exercise of the said powers said Board has limited the production and increased the price of said sugar in said State and in said United States, and that said agreement constitues a combination to do an act injurious to trade and commerce, to which combination defendant is a party.

2. For another and separate cause of action, plaintiffs, repeating the allegations of the preceding count, aver that, for and during the year 1888, defendant willfully neglected and omitted, and still willfully neglects and omits, to make, file and publish any report as prescribed and required by Section 12 of the act by and under which defendant was created a corporation.

3. For another and separate cause of action, plaintiffs, repeating the allegations of the first above count, aver that, in December, 1887, defendant went out of business and ceased its operations, and thenceforth to the present time omitted and neglected to refine or manufacture or sell sugar, syrups or molasses, and has failed and still fails to do any business or to exercise its powers.

WHEREFORE, plaintiffs demand judgment that defendant, the North River Sugar Refining Company, be dissolved, its charter vacated, and its corporate existence annulled; that it be enjoined from acting as a corporation, and a Receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

CHAS. F. TABOR,
Attorney General,
Plaintiff's Attorney.

FORM VII.

(Cited, Pages 22, 40.)

Sale of Office. Action at Law by Company to Recover Price.

NEW YORK SUPREME COURT—NEW YORK COUNTY.

DAVID MCCLURE, RECEIVER OF THE LIFE UNION,
Plaintiff,
vs.
WILLIAM H. LAW,
Defendant.

The plaintiff, appearing herein by Herbert B. Turner, his attorney, complaining of the defendant, alleges and respectfully shows to this Court, on information and belief:

I. That The Life Union, hereinafter referred to, was on and prior to the 29th day of November, 1893, a domestic corporation and engaged in the business of life insurance on the co-operative or assessment plan.

II and III. (Allegations showing the appointment, etc., of the Receiver.)

IV. That between the 16th day of June, 1891, and the 27th day of June, 1892, this defendant was president and a director of the said The Life Union, and as such director it was his duty to protect and preserve the property of said corporation.

V. That the said defendant, while such president and director, entered into an agreement with a majority of his co-directors of said corporation, by which he and said majority of the directors agreed, in consideration of the payment to him and them of the sum of fifteen thousand dollars, or thereabouts, to resign as director and directors of said The Life Union, to sell for said sum his position as president and director to one Louis P. Levy, and to turn over the assets and control of said corporation to said Louis P. Levy, or such person as he might designate.

VI. That said defendant, in utter disregard of the duty which he owed to The Life Union as director, received from the said Levy the sum of fifteen thousand dollars, or thereabouts, and resigned as president and director of said corporation, and he, and a majority of the directors of said corporation, wrongfully, unlawfully and fraudulently and in utter disregard of the rights of said corporation, allowed the said Levy to be elected president of the said The Life Union, and transferred the control and management of said corporation to said Levy.

VII. That in consideration of the aforesaid transfer to said Levy, this defendant received the sum of three thousand dollars, which he applied to his own use, and divided the balance among the directors of said The Life Union, who were acting with him.

VIII. That the said sum of three thousand dollars, so as aforesaid applied by the defendant to his own use, was the property of the said The Life Union and its creditors, and its unlawful appropriation by the defendant has damaged the said The Life Union and its creditors in the sum of three thousand dollars.

WHEREFORE the plaintiff demands judgment against the defendant, William H. Law, for the sum of three thousand dollars, with interest thereon from the 27th day of June, 1892, besides the costs of this action.

HERBERT B. TURNER,
Plaintiff's Attorney,
22 William Street,
New York, N. Y.

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