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## Notice of Appeal.

(Filed March 12th, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill etc.

To:

MESSRS. PITNEY, HARDIN & SKINNER,
Solicitors for Defendant-Respondent.

PLEASE TAKE NOTICE that the General Investment Company, the complainant herein, hereby appeals from an order made in this cause on the tenth day of March, 1925, and from said entire Order and especially such parts thereof as deny a preliminary injunction to the complainant and hold that the meeting of stockholders of the defendant Company held March 4th, 1925, was in compliance with the opinion of the Court of

New Jersey State Library

*Notice of Appeal.*

Chancery made herein, to the Court of Errors and Appeals in the last resort in all causes.

HUDSPETH & DEMAREST,
Solicitors for Complainant.

I conceive there is good cause for appeal in the above stated cause.

ELMER W. DEMAREST,
Of counsel with Complainant
on Appeal.

(Served March 11th, 1925.)

## Bill of Complaint.

(Filed December 4th, 1924.)

## IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | On Bill, etc.<br>Bill. |

TO THE HON. EDWIN ROBERT WALKER, Chancellor of the State of New Jersey.

The Complainant, General Investment Company, a Corporation, respectfully shows that:

1. General Investment Company is a corporation duly organized and existing under the laws of the State of Maine and it brings this suit in behalf of itself and of all other seven per cent preferred stockholders of the American Hide and Leather Company who shall come in and contribute to the expenses thereof.

2. The defendant, American Hide and Leather Company, is a corporation, incorporated, organized and existing under the laws of the State of New Jeresy, pursuant to the provisions of An Act Concerning Corporations (Revision of 1896) and its several supplements and amendments, said defendant having been so incorporated on or about the 3rd day of May, 1899. On or about August

28, 1899, an amended certificate of incorporation was filed, a copy of which is hereto annexed, marked Schedule "A," and made a part of this bill of complaint.

3. As appears from said amended certificate of incorporation the total authorized capital stock of said defendant is $35,000,000, divided into 350,000 shares of the par value of $100 each and that of such total authorized capital stock 175,000 shares, amounting to $17,500,000 par value, are preferred capital stock and 175,000 shares, amounting to $17,500,000 par value, are common stock.

The total amount of preferred stock outstanding in the hands of the public is $12,548,300 par value and in addition, there is held in the treasury of the defendant company $451,700 par value of such authorized preferred stock.

The total amount of common stock outstanding is $11,500,000 par value. As set forth in its said amended certificate of incorporation and the stock certificates issued by said defendant.

> "The holders of Preferred stock shall be entitled to receive in each year, out of the surplus net profits of the corporation, a yearly dividend of seven percentum, payable quarterly, in January, April, July and October, if declared, before any dividend shall be set apart or paid on the Common stock, but shall not be entitled to any further dividend or share of profits. The dividends upon the Preferred stock shall be cumulative, so that, if in any year, dividends amounting to seven percentum are not paid upon the Preferred stock, the deficiency shall be payable subsequently, before any dividends are set apart or paid upon the Common stock, divi-

dends on the Common stock may also be declared quarterly in said months after providing for the quarterly dividend on the Preferred stock then accrued, The holders of Common stock shall be entitled to receive all moneys appropriated to dividends after the payment of said cumulative dividends on the Preferred stock. In case of liquidation or dissolution of the corporation, the holders of Preferred stock will be entitled to be paid in full both the principal of their shares and the accrued dividend charge before any amount is paid to the holders of Common stock, but, after the payment on any such liquidation or dissolution to the holders of the Common stock of its par value, the remaining assets and funds shall be divided pro rata among the holders of both classes of said Capital stock."

In the more than twenty-five years of its existence, the defendant has paid on its existing Preferred stock, dividends aggregating only thirty-seven and three-fourths percent (37¾%) and there have now accumulated on said Preferred stock dividends to the amount of one hundred and forty percent (140%) which remain unpaid, notwithstanding that said Company has undistributed surplus net earnings of about $5,000,000 which is sufficient to pay 40% dividends on the outstanding Preferred stock.

4. Complainant now is, and ever since October 11, 1918, has been the bona fide owner and holder of record of 100 shares of the seven percent (7%) Preferred stock of the defendant American Hide and Leather Company and, as such holder, is entitled to vote at all meetings of the stockholders of said defendant Company.

5. On or about October 23, 1924, the defendant Company caused to be sent out to its stockholders a notice of a special meeting of the stockholders of said Company to be held at its principal and registered office, No. 15 Exchange Place, Jersey City, New Jersey, on Tuesday, December 9, 1924, enclosing with said notice a printed letter from J. C. Lilly, the President of the defendant, addressed to the stockholders of said Company. A copy of each of said documents is hereto annexed, marked respectively Schedule "B" and "C" and made a part fo this bill of complaint.

6. As appears from said notice of meeting and letter above referred to, it is proposed at the said special meeting, called for the 9th day of December, 1924, to submit to the stockholders for action thereon an amendment of the certificate of incorporation of said Company, designed to provide for the re-classification of the unissued Preferred stock of the Company, so that 35,000 shares of an aggregate par value of $3,500,000 shall be an eight percent (8%) Cumulative Prior Preference stock having priority, both as to its principal of $100 a share and cumulative dividends at the rate of 8%, over the outstanding 7% Preferred stock and to provide for a decrease of capital stock by cancelling $1,000,000 of the unissued Preferred stock remaining, after changing into 8% Cumulative Prior Preference stock, the 35,000 shares above mentioned and the purchase for retirement, at not above par, of 30,000 shares of the outstanding Preferred stock; by cancelling and extinguishing 60,000 shares of the unissued Common stock, so that, on the consum-

mation of the plan, there would be outstanding $3,500,000 par value of the 8% Cumulative Prior Preference stock, $10,000,000 par value of the 7% Preferred stock and $11,500,000 par value of Common stock.

As a part of the plan to be submitted at said special stockholders' meeting, and to be carried out, if and when said amendments to the certificate of incorporation shall be authorized, it is proposed to purchase 30,000 shares of the existing outstanding Preferred stock for retirement, of which shares 15,000 are to be purchased from "a large banking corporation of New York City" which Complainant alleges to be the Chase Securities Corporation, at the price of approximately $69 a share, said 15,000 shares constituting all, or substantially all of said stock held by said Chase Securities Corporation, and 15,000 shares are to be purchased from the other stockholders generally, pro rata, at the price of $70 a share, all as more fully set forth in Schedules "B" and "C" hereto annexed. Complainant alleges that said 30,000 shares of Preferred stock, so proposed to be purchased for retirement, constitutes twenty-three and nine-tenths per cent (23$^{9}/_{10}$% of the $12,548,300 outstanding Preferred stock. It will therefore appear that on this purchase for retirement and decrease of stock, the Chase Securities Corporation will sell one hundred percent (100%) of its holdings, while the other stockholders will be permitted to sell and turn in for retirement only eleven and $^{95}/_{100}$ percent (11.95%) of their holdings and therefore the basis of retirement, not being pro rata among all the preferred stock-

holders, is unfair and illegal. In this connection Complainant avers that one reason why the words "approximately $69 per share" are used in referring to the stock to be purchased from the "large banking corporation" is that there is an undisclosed agreement between said Chase Securities Corporation and the defendant Company which Complainant believes provides for a commission or other compensation as well as interest upon the sums advanced by said Securities Corporation in the purchase of the 15,000 shares claimed to be owned by it to be paid in addition to the $69 per share, so that the ultimate cost to the defendant Company of the 15,000 shares so to be purchased from said Securities Corporation will exceed $70 per share.

On November 26, 1924, Complainant in writing requested of the defendant a copy of, or leave to inspect, the agreement between the defendant and Chase Securities Corporation in respect of said 15,000 shares, but said request has been wholly denied. Complainant says it verily believes that some of the directors of the defendant are personally interested in the stock claimed to be owned by said Securities Corporation and same was acquired in the open market at prices much lower than $69 per share in contemplation of the plan and scheme for its retirement hereinbefore set forth.

Complainant further avers that said Preferred stock sold on the New York Stock Exchange on the dates and at the prices as follows, to wit:

August, 1923, at $29¾ per share; January 3, 1924, at 50½; April 22, 1924, at 51; July 2, 1924, at 55; August 7, 1924, at 59; September

6, 1924, at 60½; October 10, 1924, at 62½ * * * and therefore its present purchase for retirement at $70 per share can be of no special advantage to said defendant.

7. Complainant further shows and charges that under the General Corporation Act of New Jersey and the common law, a corporation may not by any vote of stockholders, other than a unanimous vote, cause a retirement and decrease of the capital stock and thus compel a non-assenting stockholder, not only to sell his preferred stock at $70 a share but to waive and cancel his claim for an already earned accumulated dividend, amounting to 40% of the par value of his stock; that the said preferred stockholders are now entitled to have set aside and held in trust for their benefit the 40% in dividends which have been earned and are carried in surplus account of the Company, before there can be any valid retirement of or decrease in the Capital stock.

In this connection Complainant avers that the retirement by purchase of $3,000,000 par value of Preferred stock at a cost of $2,100,000 or more, will deplete the assets of the defendant Company, effect a serious and dangerous reduction of its working capital to the great injury of the Complainant and other preferred stockholders, who are now, in effect, creditors of the Company, to the extent of about $5,000,000, being the sum of net earnings already accumulated toward dividends on their stock and which, in equity, they are entitled to have paid to them, and this is a right which takes precedence to the principal amount of the Preferred stock sought to be retired.

Complainant further avers that the Amended Certificate of incorporation of defendant Company does not authorize the purchase of any of the Capital Stock of said Company or the use of any of its funds for that purpose, nor does it confer upon the directors any power, authority or discretion to withhold from the preferred stockholders, who are the owners thereof, the accumulated profits of said Company and that, therefore, it is the duty of the directors of the defendant to cause such accumulated profit to be distributed in the manner directed by Section 47 of the General Corporation Act and as in equity and good conscience is required by the contract existing between the defendant and its preferred stockholders as hereinbefore set forth.

Complainant therefore charges that said plan and scheme for the decrease of the Capital stock by the purchase and retirement of 30,000 shares of Preferred stock, as aforesaid, is in violation of the provisions of the General Corporation Act of the State of New Jersey, the common law and of the contract rights of Complainant and other preferred stockholders and is a legal fraud upon said Preferred stockholders.

8. Complainant further avers that the proposed creation of an 8% Cumulative Prior Preference stock to be exchanged for the existing 7% Preferred stock, is unauthorized by said General Corporation Act of New Jersey which, in Section 27 thereof, expressly limits the change of preferred stock into one or more classes of common stock and said plan is illegal and contrary to the laws of the State of New Jersey because there is no right, warrant or power there-

under for the creation of a preferred stock which shall be prior in point of right as to principal and dividends to an already existing preferred stock. In this connection, Complainant charges that such issue of an 8% Cumulative Prior Preference Preferred would be unfair to and in violation of the contract rights of the present preferred stockholders of said defendant Company, in that a fixed cumulative charge of 8% per annum in dividends is created which, together with the principal of such stock, and a premium of 15 percent thereon, shall be superior to the rights of the 7% Preferred stockholders, thus relegating the 7% Preferred stockholders from their present first position to a secondary position and, further, said issue of Prior Preference stock will be illegal and unfair in that it will immediately become a prior lien and charge, as to its principal and cumulative dividends upon the $5,000,000 which have been earned towards the cumulative dividends upon the 7% Preferred stock now remaining undistributed and which are carried in the Surplus account of said defendant. And said proposed issue of the 8% Prior Preference stock is further illegal in that it is made redeemable after three years at 115% and, if so redeemed, will result in the payment of an income to the holders of said Prior Preference Preferred, in excess of 8% per annum, as limited by Section 18 of the General Corporation Act. The said Prior Preference stock, proposed to be issued, is further illegal in that it will violate Section 48 of said General Corporation Act, which provides that nothing but money or property at its fair value, shall be considered as payment for any part of the Capital stock.

Complainant further charges that it is proposed to use all of the issue of said 8% Prior Preference stock in exchange for the present outstanding 7% Preferred stock, without the payment of one dollar into the treasury of the Company or increasing its property to any extent whatever.

The issue of said Prior Preference stock will be further injurious to the defendant company and all its stockholders, both proferred and common in this, that it will be a permanent obstacle in the way of the future financing of the Company's needs to meet and provide for an expansion of its business or to liquidate its indebtedness which, on September 30th, 1924, amounted to $4,129,683—including bank loans of $3,000,000—but exclusive of earned and unpaid dividends of about $5,000,000 on the 7% preferred stock. Complainant avers that there is nothing in the situation of the Company which warrants any reduction or re-classification of its outstanding Capital stock—on the contrary, the plan herein set forth involves the paying out of some $2,100,000 in an illegal and illadvised stock retirement, at a time when the defendant owes to the preferred stockholders $5,000,000 of actually earned accumulated dividends and some $4,000,000 to other creditors and when the total cash the Company had in bank and on hand September 30th, 1924, was $1,004,473.24 as appears by the balance sheet of that date furnished Complainant by the defendant, which balance sheet is hereunto annexed, marked Schedule "D," and made a part hereof. Complainant further says that it has been informed by two of the directors of the defendant, one of whom is its attorney,

that the funds for the retirement of the thirty thousand shares of preferred stock are to be provided from a reduction of the inventory of the Company and from the proceeds of the sale of some real estate at Milwaukee and other places which is not needed for the conduct of the Company's business and that it is the intention of the defendant, in the event that the transaction herein complained of is authorized at the stockholders' meeting on the ninth of December, 1924, to at once pay to the Chase Securities Corporation the purchase price of the fifteen thousand shares of preferred stock held by it, and later, at some time convenient to the defendant, to pay to the other stockholders the purchase price of the fifteen thousand shares to be sold by them. And Complainant further avers that, as the present preferred and common stocks of the Company can easily absorb all the dividends available from the net earnings of the defendant for many years to come, it is wholly unnecessary and improper to create and issue, without receiving therefor any money or property whatever another class of stock merely for the purpose of receiving dividends diverted from the present preferred stockholders who are entitled thereto.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That the defendant American Hide and Leather Company, the defendant in this suit, answer this bill of complaint, without oath, and each and every statement therein made.

2. That the said defendant and its stockholders be not only permanently, but during the pendency of this suit, subject to such orders as

the Court may make herein, be restrained and enjoined from:

(a) Proceeding at the meeting of stockholders called for December 9th, 1924, further than to organize and adjourn said meeting to a subsequent date.

(b) Purchasing in the name of the defendant company, or in the name of its agent or attorney for its account, any of the outstandinng shares of its preferred stock hereinbefore mentioned and described.

(c) Passing any motion or resolution authorizing any amendment of its Certificate of Incorporation.

(d) Voting on or adopting any motion or resolution, the effect of which will authorize the carrying out of the plans submitted to its stockholders, in the notice for the special meeting called for December 9, 1924, or any other scheme to amend the Certificate of Incorporation or to purchase or retire its present preferred stock or any part thereof or permit any other class of stock to be issued by it.

(e) Selling or disposing of any of its present assets for the purpose of carrying out the plan stated in its said notice for the special meeting of stockholders or from selling or disposing of any of its assets for any purpose except in the usual course of its business.

(f) Taking any action either by its stockholders, officers or Board of Directors which will authorize the disbursement of its present surplus to any persons except its present preferred stockholders, except to the extent that may be necessary for the purpose of carrying on its ordinary business.

3. That a decree may be made permanently restraining and enjoining the said defendant and that an injunction issue out of and under the seal of this Court to perpetually restrain and enjoin the said defendant from directly or indirectly taking any action to accomplish the plan of retirement of its present preferred stock, or the purchase of any part thereof, or the issue of the Eight percent Cumulative Prior Preference Stock described in the complaint herein, or of any other additional or new class of stock which will take priority as to the principal or dividends over the present outstanding Seven percent Preferred Stock or that will in any wise alter or impair the existing rights of the present Preferred Stockholders.

4. That if any of said Eight percent Cumulative Prior Preference Stock shall be issued before the final hearing in this cause, that it be decreed that all such stock so issued is wholly void and directed to be cancelled.

5. That a writ of subpoena issue commanding the said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

HUDSPETH & DEMAREST,
Solicitors for and of
Counsel with Complainant.

STATE OF NEW JERSEY, }
County of Hudson. } SS.:

CLARENCE H. VENNER, being duly sworn, according to law, on his oath deposes and says:

I am president of the General Investment Company, the complainant mentioned in the foregoing Bill of Complaint.

I have read the said bill of complaint, and the matters and things therein contained are true to the best of my knowledge, information and belief. Particularly is it true as stated in the bill of complaint that the General Investment Company is now and since October 11, 1918, has been the bona fide owner and holder of record of 100 shares of the Seven percent cumulative preferred stock of the American Hide and Leather Company.

Annexed to the bill of complaint, as Schedule "A," is a true copy of the Amended Certificate of Incorporation of said American Hide and Leather Company. Schedules "B" and "C" are, respectively, true copies of the notice for special meeting of stockholders, called for December 9th, 1924, and the circular letter of the president of American Hide and Leather Company, both of which were mailed on October 23rd, 1924, and received by the complainant herein on October 24th, 1924. Schedule "D" is a true copy of the balance sheet of the American Hide and Leather Company, as of September 30th, 1924, which was handed to this deponent on November 24th, 1924, by Mr. Claude Douthit, one of the directors of the American Hide and Leather Company; this balance sheet shows an undistributed surplus of $4,968,722.59.

The Seven percent preferred and common stocks of defendant American Hide and Leather Company have been dealt in on the New York Stock Exchange for many years and, as stated in the bill of complaint herein, there were sales of the 7% Preferred stock of said Company, on said Exchange, as follows: In August, 1923, at 29¾ per share; January 3, 1924, at 50½; April 22, 1924, at 51; July 2, 1924, at 55; August 7, 1924, at 59; September 6, 1924, at 60½; October 10, 1924, at 62½. As alleged in the bill of complaint herein, the American Hide and Leather Company, during more than twenty-five years of its existence, has paid dividends on its 7% Preferred stock, aggregating only thirty-seven and three-fourths percent (37¾%) and there has accumulated and remain unpaid one hundred and forty (140%) percent in dividends. My information with respect to this allegation has been derived from various reports and circulars issued by the said Company and from standard financial publications.

For the purpose of obtaining information in regard to the plan set forth in Schedule "B" hereto and which was not disclosed thereby, this deponent wrote and caused to be delivered by messenger on the day of its date, at the office of the American Hide and Leather Company, in the City of New York, a letter, of which the following is a true copy:

"GENERAL INVESTMENT COMPANY,
50 Broad Street.

"New York, November 12, 1924.

"J. C. Lilly, Esq., President,
American Hide & Leather Co.,
92 Cliff Street,
New York City.

"Dear Sir:

"Referring to the notice of a special meeting of stockholders, dated October 23, 1924, and your circular letter to the stockholders accompanying said notice, we beg to inquire the name of the large banking corporation of New York City from which it is proposed to purchase 15,000 shares of preferred stock at a price of approximately $69 per share and also the actual price, instead of approximate.

"As your circular letter is somewhat indefinite on the point, we would like to be informed whether it is the purpose of the Company to offer the 35,000 shares of proposed 8% prior preference stock to the present 7% preferred stockholders, pro rata, share for share, or its purpose to sell in the market the said 35,000 shares of 8% stock at par or less, and, with the proceeds, acquire 7% preferred stock at not more than its par value, pro rata or lowest offerings.

"We would ask you, also, to inform us whether any underwriting syndicate has been formed or is contemplated for the purpose of guaranteeing the carrying out of said plan and, if so, the names of those composing the syndicate and the amount of compensation to be paid in connection therewith.

"The stock books of your Company will disclose that we are the holders of 100 shares

of 7% preferred stock. An early reply will oblige.

"Yours truly,

"GENERAL INVESTMENT COMPANY,
By C. H. Venner,
Pres."

On the 13th of November, 1924, I wrote a letter and caused the same to be delivered on the day of its date by messenger at the office of said Company, of which the following is a true copy:

"New York, November 13, 1924.

"J. C. Lilly, Esq., President,
American Hide & Leather Co.,
92 Cliff Street,
New York.

"Dear Sir:

"Supplementing our letter of yesterday's date, we beg to ask for a copy of the Balance Sheet of the Company as of October 31 and, if that is not available, then for September 30, 1924.

"We would also inquire where the $2,100,000 required for the purchase of $3,000,000 7% Preferred Stock is coming from. We assume that the Company has not any such amount on hand available for such purpose. According to the Balance Sheets of December 31, 1922, and '23, the total cash on hand was $720,839 and $705,363 respectively. Even if the Company has as much as $2,100,000 now on hand, it would be forced to borrow money for current business.

"Yours truly,

"GENERAL INVESTMENT COMPANY,
By C. H. Venner,
President."

On November 15, 1924, I received from the Treasurer of said Company a letter, of which the following is a true copy:

"AMERICAN HIDE AND LEATHER CO.,
92 to 98 Cliff Street.

"New York, November 14, 1924.

"General Investment Company,
Mr. C. H. Venner, President,
50 Broad Street, N. Y. City.

"Dear Sir:

"Your letters of November 12th and 13th have been duly received and as Mr. Douthit, a member of the Executive Committee of our Company, is familiar with all of the facts in connection with the Recapitalization Plan, we would be glad to have you meet Mr. Douthit and obtain from him the information that you desire, and upon his return to the city, the latter part of next week, we will endeavor to arrange an interview.

"Yours very truly,

"AMERICAN HIDE & LEATHER CO.,
G. A. Hill,
Treas."

On Monday, November 17, 1924, I wrote and mailed to the Treasurer of said Company a letter, of which the following is a true copy:

"New York, November 17, 1924.

"George A. Hill, Esq.,
Treasurer, American Hide & Leather Co.,
92 Cliff Street,
New York City.

"Dear Sir:

"I beg to acknowledge the receipt of your

letter of November 14th and, while somewhat surprised that neither President Lilly nor yourself appear prepared to answer the inquiries contained in my letters of November 12th and 13th, I shall be glad to meet Mr. Douthit the latter part of this week, as you suggest.

"I shall depend upon you to arrange the meeting, which may be on an hour's notice to me by telephone, Broad 3826.

"Yours truly,

"GENERAL INVESTMENT COMPANY,
C. H. Venner,
President."

On November 18th, 1924, I wrote and caused to be delivered by messenger on the day of its date to the Treasurer of said Company, a letter, of which the following is a true copy:

"New York, November 18, 1924.

"George A. Hill, Esq.,
Treasurer, American Hide & Leather Co.,
92 Cliff Street,
New York City.

"Dear Sir:

"In advance of my interview with Mr. Douthit, which you are to arrange, I would like to have the balance sheet referred to in my letter of November 13th, as well as the name of the banking corporation referred to in my letter of November 12th.

"Yours truly,

C. H. Venner,
President."
"GENERAL INVESTMENT COMPANY,

On November 22nd, 1924, I received by mail

a letter from the Treasurer of said Company, of which the following is a true copy:

"New York, November 21, 1924.

"C. H. Venner, Esq., President,
General Investment Company,
50 Broad Street,
New York City.

"Dear Sir:

"I have your letter of the 17th inst, and will arrange the appointment with Mr. Douthit for you upon his return.

"While President Lilly and I are, of course, familiar with the details of the Plan of Readjustment, Mr. Lilly is rarely in New York and I am exceedingly busy with matters of pressing importance at this time. Mr. Douthit has devoted most of his time for the fast few months in connection with this matter and is in a position to give whatever time is necessary to making such explanations as you may desire. It is for this reason that we suggested Mr. Douthit see you.

"Very truly yours,

"G. A. HILL,
Treasurer."

On November 22nd, I wrote and caused to be delivered on the day of its date to the Treasurer of said Company, a letter of which the following is a true copy:

"New York, November 22, 1924.

"George A. Hill, Esq.,
Treasurer, American Hide & Leather Co.,
92 Cliff Street,
New York City.

"Dear Sir:

"Your letter of the 21st inst. was received

this morning, and I must express my regret that you have not found the time nor, apparently, inclination to answer the one inquiry contained in my letter of the 17th, to wit: the name of the New York banking corporation from which the Am. H. & L. Company proposes to acquire 15,000 shares of its own preferred stock.

"I do not know of any banking corporation in the City of New York whose corporate name could not be written on one line and yet you take eight lines to tell me something which does not interest me very much. I, therefore, again, most kindly, courteously but insistently ask you for that name and also for the Balance Sheet mentioned in my letters of November 13th and 18th which I assume you have already made up and your time would not be trespassed upon in sending me a copy, which could be made by any clerk.

"For personal reasons, I regret very much the necessity for this letter and I trust you will forgive me for entertaining the view that you are purposely evasive and dilatory.

"Yours truly,

C. H. VENNER,
President,
GENERAL INVESTMENT COMPANY."

Having waited ten days for said Company to inform me of the name of the large banking corporation in New York City from which it was proposed to purchase the 15,000 shares of Preferred stock, and the actual price, instead of approximate, to be paid therefor, and believing that it was not the purpose of the Company to disclosed that information—on November 22, 1924 I examined the list of stockholders of said

Company at the office of the Equitable Trust Company of New York City, the transfer agent of the American Hide and Leather Company, and from such examination learned that 15,000 shares of the Preferred stock were registered in the names of eight persons, all of whose addresses were given as 61 Broadway, New York City, which is the address of the Chase Securities Corporation, mentioned in the complaint herein, and satisfying myself that such persons were employees of said securities corporation.

On the morning of November 24, 1924, Mr. Douthit, one of the directors of the American Hide and Leather Company, telephoned me, suggesting that I meet him and Mr. Scott McLanahan, one of the directors and attorney of said Company, at the latter's office, 165 Broadway, at three o'clock on the afternoon of that day, and I did so.

At that time Mr. Douthit handed me a copy of the balance sheet of the American Hide and Leather Company as of September 30th, 1924, which is Schedule "D" to the complaint herein and Mr. McLanahan told me that it was the Chase Securities Corporation from which the American Hide and Leather Company proposed to purchase the 15,000 shares of Preferred stock. I thereupon asked him to tell me the actual price to be paid for that stock and all he would say on that subject was that $69 was the approximate price, but there were some expenses and charges which might be added thereto. I then inquired as to how the Company expected to pay for the 30,000 shares of Preferred stock and was inform-

ed that they expected to reduce the inventory of the Company by $1,500,000 and to sell some real estate located at Milwaukee and Chicago, not needed by the Company, from which they expected to realize about $500,000.

Mr. Douthit informed me that the Company then had about $1,000,000 in cash on hand. I then inquired of them as to when they intended to pay for the 30,000 shares of stock and Mr. McLanahan answered that it was proposed to pay the Chase Securities Corporation at once if the plan was approved at the stockholders' meeting and that the other stockholders would be paid for their 15,000 shares at some time later, at the convenience of the Company.

Mr. McLanahan also stated that, if the plan was approved at the stockholders' meeting, the Eight percent Cumulative Prior Preference stock would be issued in exchange for the outstanding Seven Percent stock, in the ratio of one (1) share of 8% stock for at least one (1) share, and perhaps one and a quarter (1¼) shares of the present 7% Preferred Stock. I stated to Messrs. Douthit and McLanahan that, as I understood the law of New Jersey, it was my opinion that the plan for the purchase and retirement of the 7% Preferred stock and the creation of an 8% Cumulative Prior Preference Stock to be exchanged for a part of the existing 7% Preferred stock, was unauthorized by and in violation of the General Corporation Act of New Jersey.

On Wednesday, November 26th, 1924, I wrote and caused to be delivered that day at the office of Mr. Scott McLanahan a letter, of which the following is a true copy:

"New York, November 26, 1924.

"Scott McLanahan, Esq.,
165 Broadway,
New York City.

"Dear Sir:

"At the close of our interview on Monday, the 24th, you stated, in substance, that if I desired further information in regard to the American Hide & Leather Company and the propositions to be submitted at the approaching special meeting of stockholders, you would be glad to furnish the same.

"May I ask you to tell me what contract or other arrangement exists between the A. H. & L. Co. and the Chase Securities Corporation, in re: the 15,000 shares of preferred stock?

"If the agreement is in writing, will you kindly furnish me with a copy of the same or allow me to inspect the original?

"Yours truly,

C. H. VENNER,
President,
GENERAL INVESTMENT COMPANY."

On December 3rd, 1924, I received by mail a letter from Mr. McLanahan, dated December 1st, but postmarked December 2nd, 1924, 7 P. M., the major part of which was both irrelevant and insolent. In it Mr. McLanahan flatly declined to give me the information requested in my letter of November 26th. He stated, however, in said letter, as follows:

"at the special meeting of stockholders to be held on the 9th inst. further information regarding the arrangement with the Chase

Securities Corporation will, of course, be available to the stockholders."

Deponent further says that, individually, he is now and, since November 14, 1918, has been the owner and holder of record of 200 shares of the Common Capital Stock of the American Hide and Leather Company and as such stockholder is in full sympathy with the purposes and grievances set forth in the bill of complaint herein of the General Investment Company.

CLARENCE H. VENNER.

Sworn to and subscribed at Jersey City, this 3rd day of December, before me.

John L. Keller,
Master in Chanc'y
of New Jersey.

SCHEDULE "A."

(2 - 5¢ I. R. Stamps Can.)

AMENDED CERTIFICATE OF INCORPORATION
of
AMERICAN HIDE AND LEATHER COMPANY.

STATE OF NEW JERSEY, SS.:

We, the undersigned, being all the incorporators of the American Hide and Leather Company, do hereby certify that the original certificate of incorporation of said Company was recorded in the office of the Clerk of the County of Hudson, in the State of New Jersey, on the 3rd day of May, 1899, in Clerk's Record No. , page , and filed on said 3rd day of May, 1899, in the office of the Secretary of State at Trenton, New Jersey, and that no part of the capital stock of said Company has been paid.

We do further, pursuant to the provisions of Section 1 of an Act of the Legislature of the State of New Jersey, entitled "A supplement to an Act entitled 'An Act concerning Corporations' (Revision of 1896) approved April twenty-first, one thousand eight hundred and ninety-six," amend such original certificate of incorporation so as to read as follows:

"STATE OF NEW JERSEY, SS.:

THIS CERTIFIES that we, Robert S. Green, Fred-

erick P. Voorhees and Edward M. F. Miller, do hereby associate ourselves into a corporation under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations," approved April 21st, 1896, and the acts supplementary thereto and amendatory thereof, for the purposes hereinafter mentioned, and to that end we do by this our certificate set forth:

FIRST: The name of such corportaion is

"AMERICAN HIDE AND LEATHER COMPANY."

SECOND: The location of its principal office in the State of New Jersey is at No. 60 Grand Street, in Jersey City, County of Hudson, and the corporation is to be registered with The Corporation Trust Company of New Jersey. The said Trust Company will be the agent in said principal office and in charge thereof upon whom process against the corporation may be served.

THIRD: The objects for which the corporation is formed are to carry on the business of tanning and currying of all kinds; to manufacture, cure and trade in skins, hides and leathers of all kinds and any and all articles and products in the manufacture or composition of which hides, skins or leather is an ingredient or factor; to make, purchase and sell manufactured articles made partly or wholly from hide, skin or leather of any kind and all like or kindred products; to acquire and dispose of rights to make and use the same, to slaughter animals and to pack, preserve, buy, sell and deal in and with the constituent parts of animals and animal products, and to manufacture and deal in any and all articles and products in the manufacture or composition

whereof such parts of animals or animal products are an ingredient or factor; to make, purchase and sell such other products or merchandise as may be conveniently or advantageously used or sold in connection with said skins, hides, leathers and animal products and said business or any part thereof; and to apply for, purchase, or otherwise acquire, and hold, own, use, operate, sell, assign or otherwise dispose of any and all inventions, improvements and processes used in connection with or secured under letters patent of the United States, or other countries, or otherwise, and grant licenses and rights in respect thereof. The corporation shall have power to purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock and the bonds or other securities or evidences of indebtedness of any other corporation or corporations of this or any other State, Territory or country, and, while owner of any such stock, may exercise all the rights, powers and privileges of ownership, including the right to vote thereon. The corporation shall also have power to have one or more offices, factories, depots and agencies outside of this State, and to carry on any part of its operations and business, and hold, purchase, mortgage, lease or convey real or personal property in any State or Territory of the United States and in any foreign country or place.

FOURTH: The total authorized capital stock of the corporation is thirty-five million dollars ($35,000,000), divided into three hundred and fifty thousand (350,000) shares of the par value of One hundred dollars ($100) each. Of such

total authorized capital stock, one hundred and seventy-five thousand (175,000) shares, amounting to seventeen million five hundred thousand dollars ($17,500,000) par value, shall be preferred capital stock, and one hundred and seventy-five thousand (175,000) shares, amounting to seventeen million five hundred thousand dollars ($17,500,000) par value, shall be common stock. The holders of preferred stock shall be entitled to receive in each year out of the surplus net profits of the corporation a yearly dividend of seven per centum, payable quarterly, in January, April, July and October, if declared, before any dividend shall be set apart or paid on the common stock, but shall not be entitled to any further dividends or share of profits. The dividends upon the preferred stock shall be cumulative, so that, if in any year dividends amounting to seven per centum are not paid on the preferred stock, the deficiency shall be payable subsequently, before any dividends are set apart or paid upon the common stock. Dividends on the common stock may also be declared quarterly in said months after providing for the quarterly dividend on the preferred stock then accrued. The holders of common stock shall be entitled to receive all moneys appropriated to dividends after the payment of said cumulative dividends on the preferred stock. In case of liquidation or dissolution of the corporation, the holders of preferred stock will be entitled to be paid in full both the principal of their shares and the accrued dividend charge before any amount is paid to the holders of common stack; but, after the payment on any such liquidation or dissolution to the holders of

the common stock, of its par value, the remaining assets and funds shall be divided pro rata among the holders of both classes of said capital stock. The amount of capital stock with which the corporation will commence business is twenty thousand dollars ($20,000).

FIFTH: The names and post-office addresses of the incorporators and the number of shares of preferred stock subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the corporation will commence business, are as follows:

| Name | Post-Office Address | No. Shares |
|---|---|---|
| Robert S. Green | Elizabeth, New Jersey | 75 |
| Frederick P. Voorhees | 330 W. 23rd Street, New York, N. Y. | 75 |
| Edward M. F. Miller | 40 Wall Street, New York, N. Y. | 50 |

SIXTH: The existence of the corporation shall begin on the third day of May, 1899, and shall be perpetual.

SEVENTH: The business of the corporation shall be managed by its directors, who shall respectively be shareholders therein and one of whom shall be an actual resident of this State. The directors shall have power to make and alter by-laws, but any by-law may be altered or repealed by the stockholders at any general or special meeting. The by-laws shall prescribe the number of directors necessary to constitute a quorum of the board of directors, which may be less than a majority. In case of an increase in the number of directors between the annual elections by the stockholders, the board of di-

rectors may elect the additional directors, who shall hold office until the next meeting of stockholders or until their successors shall be elected. The directors shall have power to hold their meetings, to have one or more offices and to keep the books of the corporation (except the stock and transfer books) outside of this State at such places as may from time to time be designated by them.

With the consent in writing or pursuant to the vote of the holders of two-thirds of the capital stock issued and outstanding, the directors shall have power and authority to sell, assign, transfer, convey or otherwise dispose of the property and assets of this corporation as an entirety or going concern on such terms and conditions as the directors shall deem fit, right and just, whether for cash or for securities of one or more corporations.

EIGHTH: The directors shall, from time to time, determine whether, and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of this State or authorized by the directors.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the third day of May, 1899.

ROBT. S. GREEN (L. S.)
FREDERICK P. VOORHEES (L. S.)
EDWARD M. F. MILLER (L. S.)

Signed and sealed in
the presence of:
Wm. G. E. See.

—o—

STATE OF NEW JERSEY, }
County of Hudson. } SS.:

BE IT REMEMBERED, that on this third day of May, 1899, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Robert S. Green, Frederick P. Voorhees and Edward M. F. Miller, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

WM. G. SEE,
Master in Chancery
of New Jersey."

IN WITNESS WHEREOF, we have hereunto set our hands and seals this twenty-eighth day of August, A. D. 1899.

ROBT. S. GREEN (L. S.)
FREDERICK P. VOORHEES (L. S.)
EDWARD M. F. MILLER (L. S.)

Signed and sealed in
the presence of
A. I. Drayton.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

BE IT REMEMBERED, that on this twenty-eighth day of August, 1899, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Robert S. Green, Frederick P. Voorhees and Edward M. F. Miller, who, I am satisfied, are the persons named in and who executed the foregoing amended certificate of incorporation and, I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein mentioned.

ALBERT I. DRAYTON.
Master in Chancery
of New Jersey.

(Endorsed)

"Received in the Hudson Co., N. J. Clerk's office Aug. 28th, A D.. 1899 and Recorded in Clerk's Record, No. , page .

JOHN G. FISHER,
Clerk."

"Filed Aug 28, 1899,
George Wurts,
Secretary of State."

SCHEDULE "B."

AMERICAN HIDE & LEATHER COMPANY
92 Cliff Street
New York City

*Notice of Special Meeting of Stockholders.*

October 23, 1924.

To the Stockholders of American Hide & Leather Company:

Notice is hereby given that a special meeting of the stockholders of American Hide & Leather Company will be held at its principal and registered office, No. 15 Exchange Place, Jersey City, N. J., on Tuesday the 9th day of December, 1924, at 11 o'clock in the forenoon to take action upon certain resolutions adopted by the Board of Directors of the Corporation at a meeting held on the 21st day of October, 1924, of which resolutions the following are copies:

I. RESOLVED, that the Board of Directors of American Hide and Leather Company hereby declares that in its judgment it is advisable:

1. That thirty-five thousand (35,000) shares of the unissued Preferred Stock of the Company be changed and re-classified into thirty five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock of the par value of One Hundred Dollars ($100.) each, with the preferences and voting powers or restrictions or qualifications thereof as stated and expressed in the proposed amended Article Fourth of the Certifi

cate of Incorporation of the Company, as hereinafter set forth.

2. That the authorized capital stock of the Company be decreased from

Thirty-five Million Dollars (35,000,000.), consisting of one hundred and seventy-five thousand (175,000) shares of Preferred stock of the par value of One Hundred Dollars ($100.) each, and one hundred and seventy-five thousand (175,000) shares of Common Stock of the par value of one Hundred Dollars ($100.) each,

to

Twenty-five Million Dollars (25,000,000.), to consist of thirty-five thousand (35,000) shares of Eight per cent. Cummulative Prior Preference Stock of the par value of One Hundred Dollars ($100.) each, one hundred thousand (100,000) shares of Preferred Stock of the par value of One Hundred Dollars each, and one hundred and fifteen thousand (115,000) shares of Common Stock of the par value of One Hundred Dollars ($100.) each, said respective classes of stock to have such respective designations, preferences and voting powers or restrictions and qualifications thereof as are stated and expressed in the Certificate of Incorporation of the Company as proposed to be amended, as hereinafter set forth.

3. That said decrease of the capital stock of the Company be effected by

(a) cancelling and extinguishing ten thous-

and (10,000) shares of the unissued Preferred Stock, of the Company, being all of the authorized Preferred Stock of the Company not heretofore issued, remaining after changing and re-classifying thirty-five thousand (35,000) shares thereof into Eight per cent. Cumulative Prior Preference Stock as aforsaid:

(b) purchasing for retirement at not above par, and retiring, thirty thousand (30,000) shares of the outstanding Preferred Stock:

(c) cancelling and extinguishing sixty thousand (60,000) shares of the unissued Common Stock of the Company, being all of the authorized Common Stock not heretofore issued.

4. That the Board of Directors of the Company be authorized to purchase from time to time for the Company, for retirement, at not above par, said thirty thousand (30,000) shares of Preferred Stock above referred to in the preceding paragraph numbered "3" hereof, and any part thereof, by any one or more of the following methods, as in the discretion of the Board may seem advisable, to wit:

(a) pro rata from each holder of shares of said stock;

(b) from Preferred Stockholders offering said stock to the Company at the lowest prices up to a total of not exceeding thirty thousand (30,000) shares, or any part thereof, all of said stockholders to be given equal opportunity to submit offerings;

(c) in the open market;

(d) by direct purchase at private sale.

All accumulated and accrued unpaid dividends, and the right to receive the same, on any of such shares of the outstanding Preferred Stock so as aforesaid purchase for retirement by the Company to be surrendered and extinguished.

5. That the Board of Directors be authorized from time to time to issue shares of said Eight per cent. Cumulative Prior Preference Stock up to the aforesaid total number of thirty-five thousand (35,000), for cash at not less than par, or in exchange for shares of outstanding Preferred Stock, share for share, or upon any other basis of exchange which to the Board may seem advisable and for the best interests of the Company, with such adjustment of dividends as shall be determined by the Board, or to sell said stock or any part thereof and with the proceeds of such sale to purchase shares of outstanding Preferred Stock for the Company, for retirement, at not above par, provided that for each share of said Eight per cent. Cumulative Prior Preference Stock issued at least one share of outstanding Preferred Stock shall be purchased or acquired, by the Company, so that at no time shall there be issued and outstanding more than a total of one hundred thousand (100,000) shares in the aggregate of both classes of Eight per cent. Cumulative Prior Preference Stock and Preferred Stock of the Company (unless and until the authorized amount of capital stock of both or either of said classes of stock be hereafter increased in the manner provided by law.)

6. That Article "Fourth" of the Certificate of

Incorporation of the Company, as heretofore amended be further amended so as to give effect to the foregoing proposed changes, and in certain other respects, so that the same shall read as follows:

"Fourth: The amount of the total authorized capital stock of the corporation is twenty-five million dollars ($25,000,000.), and the number of shares into which the capital stock is divided is two hundred and fifty thousand (250,000), of the par value of one hundred dollars ($100.) each, consisting of thirty-five thousand (35,000) shares of Eight percent. Cumulative Prior Preference Stock, one hundred thousand (100,000) shares of Preferred Stock, and one hundred and fifteen thousand (115,000) shares of Common Stock. Said shares of Eight per cent. Cumulative Prior Preference Stock shall be issued only if and when outstanding shares of said Preferred Stock at least equal in number to the number of shares of said Eight per cent. Cumulative Prior Preference Stock to be from time to time issued have been from time to time acquired by the corporation, by purchase, exchange or otherwise, so that at no time shall there be issued and outstanding more than a total of one hundred thousand (100,000) shares in the aggregate of both classes of Eight per cent. Cumulative Prior Preference Stock and Preferred Stock (unless and until the authorized amount of capital stock of both or either of said classes of stock be hereafter increased in the manner provided by law). Any and all such shares of outstanding Preferred Stock so as aforesaid acquired by the corporation by purchase, exchange or otherwise, shall be cancelled and retired and none of such stock so acquired shall be reissued; and all accumulated and

accrued unpaid dividends, and the right to receive the same, on any of such shares of the outstanding Preferred Stock so as aforesaid acquired by the corporation shall be surrendered and extinguished. Whenever a total of thirty-five thousand (35,000) shares of Preferred Stock shall have been acquired by the corporation as aforesaid and retired, and there shall have been issued a like number of shares of Eight per cent. Cumulative Prior Preference Stock as aforesaid, the total authorized capital stock of the corporation shall be further decreased in the amount of three million five hundred thousand dollars ($3,500,000.), so that the then remaining authorized capital stock shall be twenty-one million five hundred thousand dollars ($21,500,000.), divided into two hundred and fifteen thousand (215,000) shares of the par value of one hundred dollars ($100.) each, consisting of thirty-five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock, sixty-five thousand (65,000) shares of Preferred Stock, and one hundred and fifteen thousand (115,000) shares of Common Stock. The amount of capital stock with which the corporation will commence business is Twenty thousand dollars ($20,000.).

(a) The holders of the Eight per cent. Cumulative Prior Preference Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends from the surplus of the corporation or from the net profits arising from its business, at the rate of eight per cent. (8%) per annum and no more, accruing from the date of issue of such stock, payable quarterly on dates to be fixed by the by-laws of the corporation, or by resolution of its Board of Directors. Such dividends shall be payable before any dividends shall be paid upon or set apart for the Pre-

ferred Stock or the Common Stock of the corporation, and shall be cumulative, so that if in any quarterly dividend period, dividends at the rate of eight per cent. (8%) per annum shall not have been paid upon, or set apart for, the Eight per cent. Cumulative Prior Preference Stock, the deficiency shall be fully paid, or set apart for payment, before any dividends shall be paid upon or set apart for the Preferred Stock, or the Common Stock of the corporation. After full cumulative dividends upon the Eight per cent. Cumulative Prior Preference Stock for all previous quarterly dividend periods and the full installment for the then current quarterly dividend period shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the Board of Directors may declare dividends out of the then remaining surplus or net profits of the corporation on the Preferred Stock and, subject to the restrictions hereafter set forth, on the Common Stock of the corporation.

(b) After full dividends upon the Eight per cent. Cumulative Prior Preference Stock, as in this amended certificate provided, for all previous quarterly dividend periods and the full installment for the then current quarterly dividend period, shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the holders of the Preferred Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends from the then remaining surplus or net profits of the corporation, at the rate of seven per cent. (7%) per annum payable quarterly on dates to be fixed by the by-laws of the corporation, or by resolution of its Board of Directors, but shall not be entitled to any further dividend or share of profits. Such dividend shall be payable be-

fore any dividends shall be paid upon or set apart for the Common Stock of the corporation, and shall be cumulative, so that if in any quarterly dividend period, dividends at the rate of seven per cent. (7%) per annum shall not have been paid upon, or set apart for, the Preferred Stock, the deficiency shall be fully paid, or set apart for payment, before any dividends shall be paid upon or set apart for the Common Stock of the corporation. After full cumulative dividends upon the Preferred Stock for all previous quarterly dividend periods and the full installment for the then current quarterly dividend period (as well as the dividends upon the Eight per cent Cumulative Prior Preference Stock hereinbefore provided for) shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the Board of Directors may declare dividends out of the then remaining surplus or net profits of the corporation on the Common Stock of the corporation.

(c) The holders of Common Stock of the corporation shall be entitled to receive all moneys appropriated to dividends after all dividend requirements in respect of the Eight per cent. Cumulative Prior Preference Stock and the Preferred Stock, as in this amended Certificate provided and set forth, shall have been fully met.

(d) The Eight per cent. Cumulative Prior Preference Stock shall be subject to redemption, and may be redeemed in whole, or from time to time, in amounts of not less than 5,000 shares, at any time after three years from the issue thereof, on any quarterly dividend payment date, at the option of the corporation, on not less than ninety or more than one hundred days' notice to the holders of record of such stock, given by mail and by publication in such manner as may be pre-

scribed by the by-laws of the corporation or by resolution of its Board of Directors by the payment in cash for each share of such stock so to be redeemed, of one hundred and fifteen per centum (115%) of the par amount thereof and in addition thereto all dividends accumulated and unpaid thereon. If less than all the outstanding shares of such stock are to be redeemed, the redemption shall be made pro rata in such manner as may be prescribed by resolution of the Board of Directors. From and after the date fixed in such notice as the date of redemption (unless default shall be made by the corporation in providing moneys for the payment of the redemption price), all dividends on the Eight per cent. Cumulative Prior Preference Stock so called for redemption shall cease to accrue and all rights of the holders thereof as stockholders of the corporation, except the right to receive the redemption price upon surrender of the certificates of stock therefor, shall cease and determine.

Stock redeemed as aforesaid shall not be reissued, and shall be cancelled, and the same shall be deemed to be retired, and the authorized capital stock of the corporation shall be reduced by the amount of such stock so redeemed.

(e) No holder of the Eight per cent. Cumulative Prior Preference Stock shall, as such holder, have any right to subscribe for any shares of any stock, or any bonds or obligations which may be convertible into capital stock, of the corporation, which the corporation may hereafter issue.

(f) At all meetings of stockholders, each stockholder of the corporation, as shown by the records of the corporation, shall be entitled to one vote for each share of stock held by him.

(g) In the event of the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the Eight per cent. Cumulative Prior Preference Stock shall be entitled as among all stockholders, to receive first out of the assets of the corporation, the par value of their respective shares, plus an amount equal to the difference between the total amount of dividends declared and paid thereon, and eight per cent, per annum from the date of issue of said stock to the date of such dissolution or liquidation and no more, before any payment shall be made to the holders of the Preferred Stock or of the Common Stock of the corporation. The holders of the Preferred Stock shall then be entitled to receive out of the assets of the corporation then remaining, the par value of their respective shares and an amount which will equal the dividends accumulated and unpaid thereon, before any payment shall be made to the holders of the Common Stock.

After the payment on any such dissolution or liquidation to the respective holders of the Eight per cent. Cumulative Prior Preference Stock and of the Preferred Stock in full, of said amounts as hereinabove provided, the holders of the Common Stock shall then be entitled to receive out of the remaining assets of the corporation, the par value of their respective shares, and any assets and funds of the corporation then remaining shall be divided pro rata among the respective holders of the Preferred Stock and the Common Stock of the corporation."

II. RESOLVED that the Board of Directors deem it advisable, and propose, that the By-laws of this Company be amended by striking out the third sentence of Section 1, Article 2, reading as follows:

"The Board of Directors shall have the

power, without the assent or vote of the stockholders, to fix from time to time an amount of the accumulated profits of the Company to be reserved as working capital."

and inserting in lieu thereof, the following, to wit:

"The Board of Directors shall have the power, without the assent or vote of the stockholders, to fix and determine from time to time, and to vary, the amount of the working capital of the Company, and to appropriate or set apart reserves for any proper corporate purpose; to determine whether any, and if any what part of any surplus or net profits shall be declared in dividends and paid to the stockholders; to determine the time for payments for the declaration and payment of dividends, except as otherwise required by the Certificate of Incorporation of the Company; to direct and to determine the use and dispostion of any surplus or net profits over and above the capital stock paid in; and in its discretion, the Board of Directors may use or apply any such surplus or net profits in the purchase or acquiring of shares of the capital stock, or bonds or other obligations, of the Company, to such extent and in such manner and upon such terms as the Board of Directors may deem expedient and as may be permitted by law."

Also to take action on a resolution approving and ratifying any and all resolutions heretofore passed and actions heretofore taken by the Board of Directors and Executive Committee in connection with any of the propositions embodied in the foregoing resolutions.

By Order of the Board of Directors,

GEORGE A. HILL,
Secretary.

*Bill of Complaint—General Investment Co.,*

SCHEDULE C.

To the Stockholders of
AMERICAN HIDE AND LEATHER COMPANY:

For a long time it has been apparent to the directors and officers of your Company that a readjustment of its capitalization was absolutely necessary in order to place its capital stock liability in such relation to its earning power that the stockholders may participate in the earnings of the Company. From the organization of the Company in 1899 until 1921, the earnings of the Company, while substantial, were very largely used in the payment of interest and installments on the principal of $8,500,000. of First Mortgage Bonds, issued at the time of the organization, all of which have been paid off and retired. For that reason dividends on the Preferred Stock were, to a great extent, left unpaid and have accumulated to the point where they now amount to approximately 140% of the total Preferred Stock outstanding.

The present capitalization is:

| | Authorized | Outstanding |
|---|---|---|
| Preferred Stock | $17,500,000. | $13,000,000. |
| Common Stock | 17,500,000. | 11,500,000. |

Of the $13,000,000. Preferred Stock outstanding, 4,517 shares are held in trust for the use of the Company, so that the actual amount of Preferred Stock in the hands of the public is $12,548,300.

On this Preferred Stock there are now accumulated, accrued and unpaid dividends of 140%, or a total of $17,567,620.

The total par value of the Preferred Stock outstanding in the hands of the public plus the accrued unpaid dividends thereon amounts, therefore, to $30,115,920.

The mount required for dividends at the rate of 7% on the outstanding Preferred Stock is over $875,000. per year.

It is not reasonable to expect your Company to earn an amount annually sufficient to pay 7% on this outstanding Preferred Stock and in addition thereto the very large amount which would necessary in order to pay off the accrued dividends even over a long period of years.

After much study your Board of Directors has devised a plan for the readjustment of the capitalization of the Company, which is embodied in resolutions passed by the Board as set forth in the accompanying notice of a Special Meeting of the stockholders to be held on December 9th, 1924.

When the proposed changes as recommended by the Board of Directors in these resolutions are approved by the stockholders at the Special Meeting, the Company will be prepared to purchase 30,000 shares of the outstanding Preferred Stock for cash at a price not exceeding $70. per share.

In aid of this plan, the Board of Directors has made arrangements with a large banking corporation of New York City, for the purchase from it by your Company of 15,000 shares of Preferred Stock at a price of approximately $69. per share. It is proposed that the balance of 15,000 shares be purchased direct from the holders of the Preferred Stock pro rata at a price of $70. per share,

each stockholder to be requested to sell to the Company approximately 13% of his holdings (which will amount to a total of 15,000 shares, in addition to the 15,000 shares to be purchased as aforesaid).

When this transaction is complete, it is proposed that the 35,000 shares of new Eight Per Cent. Cumulative Prior Preference Stock, which the Stockholders are asked to authorize at the Special Meeting, will be utilized to acquire for retirement as large an amount of the then outstanding Preferred Stock as possible, on a basis of one share of new Prior Preference Stock for not less than one share of outstanding Preferred Stock.

Upon completion of the program as contemplated by this plan, your Company will have wiped out and extinguished a total

| | | |
|---|---|---|
| Preferred Stock capital and dividend liability of at least | | 15,600,000. |
| by the use of | | |
| Cash | $2,100,000. | |
| and | | |
| Par Value new Prior Preference Stock | 3,500,000. | |
| Total | $5,600,000. | 5,600,000. |
| Net capital stock and dividend liability extinguished | | $10,000,000. |

After this has been accomplished, the holders of the remaining outstanding Preferred Stock will be much nearer the possibility of receipt of back dividends on their remaining stock, and the common stockholder will have benefited by the extinguishment of $12,100,000, of capital and dividend liability ahead of his stock at a cost of $2,100,000. This $12,100,000, being made up as follows:

| | |
|---|---|
| Preferred Stock Purchased | $3,000,000. |
| 140% dividends accrued thereon extinguished | 4,200,000. |
| Accrued dividends (140%) extinguished on $3,500,000. Preferred Stock | 4,900,000. |
| Total | $12,100,000. |

A comparison of annual dividend requirements on the present capitalization and on the proposed adjusted capitalization is as follows:

PRESENT CAPITALIZATION

| | |
|---|---|
| Amount necessary to pay 7% on Preferred Stock outstanding | $ 878,381. |
| Amount necessary to pay accrued dividends on Preferred Stock, before any dividend can be paid on Common Stock | $17,567,620. |

ADJUSTED CAPITALIZATION

| | |
|---|---|
| Amount necessary to pay 8% on new Prior Preference Stock | $ 280,000. |
| Amount necessary to pay 7% on remaining Preferred Stock | 423,381. |
| Total | $ 703,381. |
| Amount necessary to pay accrued dividends on Preferred Stock before any dividends can be paid on Common Stock | $ 8,467,620. |

From the above figures we believe it will be obvious to every stockholder of the Company that it will be greatly to his advantage to consummate the readjustment of the capitalization of the Company provided for in the resolutions which the stockholders are asked to approve.

Each stockholder who cannot attend the meeting is earnestly requested to sign the enclosed proxy before a witness (who should also sign where indicated), and return the same in the enclosed envelope to the Company.

By Order of the Board of Directors,

J. C. LILLY,
President.

## SCHEDULE "D."

AMERICAN HIDE AND LEATHER COMPANY AND SUBSIDUARY COMPANIES

BALANCE SHEET, SEPTEMBER 30, 1924.

*ASSETS*

| | | | |
|---|---|---|---|
| Cost of Properties | | | $26,098,680.28 |
| Including 4517 shares Preferred and 2259 shares Common Stock of American Hide & Leather Co. held in trust | | | |
| Marketable Stocks of Domestic Corporations | | | 140,679.71 |
| Current Assets | | | 11,487,634.89 |
| Hides, Skins & Leather on hand and in process of manufacture and General Supplies | | $8,362,840.19 | |
| Sundry Debtors for Bills and Accounts Receivable | $2,226,163.90 | | |
| Less Reserve for Doubtful Debts and Discount | 240,706.56 | | |
| | | 2,025,447.34 | |
| Insurance Premiums Unexpired | | 64,607.66 | |
| Claims and Sundries | | 695.63 | |
| Prepaid Interest | | 29,570.83 | |
| Cash: | | | |
| In Bank and on Hand | | 1,004,473.24 | |
| | | | $37,726.994.88 |

*LIABILITIES*

| | | |
|---|---|---|
| Capital Stock | | $24,500,000.00 |
| *Authorized* | | |
| 175,000—7% Cumulative Preferred Shares Par Value $100.00 each | $17,500,000.00 | |
| 175,000—Common Shares Par Value $100.00 each | 17,500,000.00 | |
| *Issued* | | |
| 130,000—Preferred Shares | $13,000,000.00 | |
| Dividends accumulated thereon since 1899 ex- | | |

| | | | |
|---|---|---|---|
| | cept as to 37¾% declared to date | | |
| | 115,000—Common Shares | 11,500,000.00 | |
| | Current Liabilities | | 4,129,683.82 |
| | Bills Payable | 3,700,000.00 | |
| | Trade Accounts | 118,090.92 | |
| | Foreign Exchange | 111,546.49 | |
| | Wages Accrued | 67,741.93 | |
| 10 | Taxes Accrued | 118,881.32 | |
| | Savings Fund of Employees | 5,113.50 | |
| | Reserve for Savings Fund | 8,309.66 | |
| | | | 4,128,588.47 |
| | *Reserves* | | |
| | Reserve for Depreciation and Replacement of Tanneries | $3,751:581.19 | |
| | Reserve for Contingencies | 377,007.28 | |
| | Surplus: | | |
| | Per Annexed Account | | 4,968,722.59 |
| | | | $37,726.994.88 |

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## Order to Show Cause and Stay.

(Filed December 4th, 1924.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, etc.

Upon reading and filing the bill of complaint with the affidavits and schedules thereto attached, and it appearing to the Court that the prayer of said bill should be granted:

IT IS on this 4th day of December, A. D., 1924, on motion of Hudspeth & Demarest, Solicitors for the complainant,

ORDERED, that the defendant show cause before the Chancellor or such Vice Chancellor as may sit in his stead at the Chancery Chambers in Jersey City on the 15th day of December, 1924, at ten o'clock in the forenoon or as soon thereafter as the same may be heard, why an injunction pendente lite, during the pendency of this suit and until the further order of the Court should not issue out of this Court to restrain the defendant as prayed for in the bill of complaint.

AND IT IS FURTHER ORDERED, that in the meantime and until the further order of this Court, the defendant be enjoined and restrained from:

(a) Proceeding at the meeting of stockholders called for December 9th, 1924, further than to organize and adjourn said meeting to a subsequent date.

(b) Purchasing in the name of the defendant Company, or in the name of its agent or attorney for its account, any of the outstanding shares of its preferred stock hereinbefore mentioned and described.

(c) Passing any motion or resolution authorizing any amendment of its Certificate of Incorporation.

(d) Voting on or adopting any motion or resolution the effect of which will authorize the carrying out of the plans submitted to its stockholders in the notice for the Special Meeting to be held December 9th, 1924, or any other scheme to amend the certificate of incorporation or to retire its present preferred stock or any part thereof, or permit any other class of stock to be issued by it.

(e) Selling or disposing of any of its present assets for the purpose of carrying out the plan stated in its said notice for Special Meeting or from selling or disposing of any of its assets for any purpose except in its usual course of business.

(f) Taking any action either by its stockholders, officers or Board of Directors which will authorize the disbursement of its present surplus to any persons except its present preferred stockholders, except to the extent that may be necessary for the purpose of carrying on its ordinary business.

AND IT IS FURTHER ORDERED, that service of a

copy of the bill of complaint, and affidavits annexed thereto, and of this order, certified by the Solicitors for the complainant aforesaid, upon the agent of said Company appointed by it and upon whom process against it may be served, or any officer or director of the defendant, personally or by leaving a copy of said bill, affidavits and this order, certified as aforesaid, at its principal office in the State of New Jersey with the person in charge thereof within two days from the date hereof, shall be sufficient service of this order.

E. R. WALKER,
C.

Respectfully advised,

JOHN BENTLEY,
V. C.

## Defendant's Affidavits on Motion to Modify Stay.

(Filed December 8th, 1924.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } ss.:

GEORGE A. HILL, being duly sworn, according to law, on his oath says:

I am Treasurer of the above named defendant, American Hide & Leather Company.

Annexed hereto and made a part hereof is a true and correct copy of an agreement made by said defendant with Chase Securities Corporation under date of August 13th, 1924, relating to the proposed purchase by said American Hide & Leather Company, of 15,000 shares of its preferred stock from Chase Securities Corporation. This instrument is the contract between American Hide & Leather Company and Chase Securities Corporation referred to by the plaintiff in

his bill of complaint and moving papers herein.

GEORGE A. HILL.

Sworn to before me this
6th day of December, 1924.
Albert Fahner,
Notary Public,
New York County.
New York County Clerk's No. 4.
New York Register's No. 6062.
Certificate filed in Richmond County.
Commission expires March 30th, 1926.

—o—

New York, N. Y.,
August 13, 1924.

Chase Securities Corporation,
61 Broadway,
New York, N. Y.

Dear Sirs:

We are writing to confirm the proposed arrangements with you in connection with the Plan for the Readjustment of the Capitalization of this Company, as follows:

1. The Executive Committee of this Company has, by appropriate Resolution, approved and recommended to the Board of Directors of the Company a Plan for the Readjustment of its Capitalization, a copy of which is handed you herewith. This Plan provides, among other things, for the purchase of 30,000 shares of the present outstanding Preferred Stock of the Company, for cash, at not above par. In order to consummate the Plan, it is necessary that it re-

ceive the approval of two-thirds of the outstanding stock. The legality of the Plan, including the provision for the purchase of the outstanding Preferred stock, has been approved, subject to securing such stockholders' consent, by Pitney, Hardin & Skinner and by our other Counsel, copies of whose opinions we are handing you herewith. The arrangements herein proposed have also been approved in such opinions.

2. In furtherance of the consummation of the Plan, the Company desires to arrange with you for the purchase by the Company from you, in the event of the approval of the Plan by the holders of the requisite number of shares of stock, of a maximum of 15,000 shares of the present outstanding Preferred Stock of the Company or so much thereof, not exceeding said maximum amount, as you may acquire and hold as hereinafter provided, at a price equal to a maximum of $5 a share in excess of the average cost price per share of said stock to you, provided, however, that the Company shall not, in any event, pay more than $70 per share for any shares so acquired, plus the cost to you of carrying the shares so acquired. To that end, we understand that you are willing to make available for purchase by our Company upon the terms hereinafter set forth and subject to the conditions hereof, so much of said stock not exceeding said maximum amount, as may be acquired and held by a Trading Account which you propose to open and maintain to buy and sell the Preferred Stock of the Company in the open market.

We propose:

(a) That you endeavor in good faith (using,

of course, your own judgment as to when and at what price to buy or sell) to acquire as many shares of said stock as possible up to a total of not to exceed 15,000, at a price which, under the terms above mentioned, will make such stock available to our Company and that you will advise our Company from time to time and in any case not less than twice weekly, of the number of shares of said stock acquired by such Account;

(b) That as soon as such Account has acquired 15,000 shares of such Preferred stock at an average cost of not to exceed $65.00 per share, or in case you should conclude in your unrestricted judgment, that it is not likely that such Account will be able to obtain additional shares of such stock at a price sufficiently low to justify said Account in continuing its market operations, you notify the Company accordingly, and that within ten days after the receipt of such notice a meeting of the Directors of our Company will be held for the purpose of approving said Plan and that a meeting of the stockholders will be held within thirty days after such meeting of the Board of Directors for the purpose of submitting such Plan for the requisite stockholders' action;

(c) That, subject to the conditions hereinafter in paragraph (g) or elsewhere in this agreement set forth, you agree to hold whatever stock such account has acquired and purchased at the date of said notification, pending action by the Directors and stockholders as above provided, with the understanding that whatever balance of such Preferred Stock of this Company may be held in such Account when the Plan, either in its entirety or as to the portion thereof which con-

templates the purchase of 30,000 shares of the outstanding Preferred Stock of this Company, shall have been approved by the requisite vote of the stockholders, shall up to 15,000 shares of such stock, be sold by you to the Company and shall be purchased by the Company at the price above mentioned in paragraph 2 hereof, plus the cost to you of carrying the shares so acquired;

(d) That upon your acceptance of this proposition it is understood that the Company shall be obligated to purchase from you, at said price, the balance of the outstanding Preferred Stock remaining in said Trading Account at the time above mentioned, up to 15,000 shares, and that you will be obligated to deliver such balance of Preferred Stock to the Company at said price, such delivery and payment therefor to be made within ten days after the date when the requisite approval of the stockholders of the Company shall have been obtained as above provided.

(e) That in case the requisite approval of the stockholders is not obtained, the Company shall not be obligated to buy, and you shall not be obligated to delivery, any shares of the outstanding Preferred Stock of the Company that may be acquired, by said Trading Account;

(f) That unless a meeting of the stockholders of the Company, entitled to vote on the Plan, or on that portion thereof which relates to the purchase of the outstanding Preferred Stock of the Company, shall have been called and held within a peroid of 45 days after notice from you as aforesaid, and in any event within a period of 90 days from the date hereof, or within such further period as you may consent to in writing, you shall, at

your option, be relieved of any obligation to deliver to the Company any balance of Preferred Stock held in said Trading Account, even though the Plan should subsequently be approved by the requisite consent of the stockholders;

(g) That, anything herein to the contrary notwithstanding, if after you shall have given notice to the Company as above provided, proxies in favor of said Plan shall not be received in sufficient amounts to indicate in your judgment the early consummation of the Plan, or any developments in connection with the Plan or with the general affairs or business of the Company shall have occurred as a result of which, in the exercise of your unrestricted discretion, you shall conclude it is hazardous or otherwise inadvisable for said account to continue to hold the outstanding Preferred Stock theretofore acquired by it, you shall be entirely free to dispose of the same in whole or in part, in the market or otherwise, in such manner as you may determine, without any liability or accountability to the Company;

(h) That you agree to act as Fiscal Agent and Adviser of the Company in formulating the details of the Plan and in any matters that arise in connection therewith and that you also agree to act as Depositary, or procure the services of The Chase National Bank to act as Depositary, of any stock that may be required to be deposited in consummating the Plan, and that for your services in this connection, including the compensation of such Depositary, the Company shall pay you the sum of $25,000.00 on receipt of your acceptance of this agreement, and in addition to such expenses as you may incur for the services of your Counsel in connection with this agree-

ment or in connection with the formulation and consummation of said Plan;

(i) That you or your associates may form a group or syndicate for the purpose of maintaining such Trading Account, of which you will be Manager and in which you and your Associates may participate, with the understanding that all rights and obligations relating to said Trading Account as hereinabove provided shall inure to the benefit of and be binding upon such group or syndicate.

We are enclosing herewith a certified copy of the Resolution duly adopted by the Executive Committee of this Company, approving and authorizing the making of the arrangements outlined in this letter.

If the foregoing proposals are accepted by you, will you please be kind enough to execute your acceptance on the duplicate of this letter enclosed herewith for such purpose, and return the same to the Company, and thereupon this letter and your acceptance as thus indicated will constitute a contract between us.

Very truly yours,

AMERICAN HIDE & LEATHER CO.,
By J. C. LILLY,
President.

The foregoing is hereby approved and accepted:
CHASE SECURITIES CORPORATION,
By R. C. CLARKSON,
V. P

*Defendant's Affidavits on Motion to Modify Stay.*

**Affidavit of Scott McLanaan—on Motion to Modify Stay.**

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | On Bill &c. |

STATE OF NEW YORK,<br>County of New York, } ss.:

SCOTT MCLANAHAN. being duly sworn, according to law, on his oath says: I am and have for many years been a member of the Bar of the State of New York and am and have for some time been a member of the Board of Directors of the defendant, American Hide & Leather Company and of Counsel for said Company. My attention has been directed to the reference in the affidavit of Clarence H. Venner, annexed to the bill of complaint in the above entitled cause, wherein he refers to the receipt on December 3rd, 1924, of a letter from me, dated December 1st, 1924. Annexed hereto and made a part hereof is

a true copy of said letter.

SCOTT MCLANAHAN,

Sworn and subscribed to before me, a Notary Public, in and for the County of New York, in the State of New York, duly commissioned and sworn, as witness my official seal this 5th day of December, 1924.

JOSEPHINE M. POWER,
Notary Public, Queens County, No. 885.
Cer. Filed, New York Co. No. 148.
Cer. Fil'd Reg's office N. Y. Co. No. 6141.
Cer. Filed Kings Co. No. 73.
Cer. Fil'd Reg's Office Kings Co. No. 6066.

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December 1st, 1924.

Dear Sir:

I have your letter of the 26th ult. by hand, requesting further information regarding the arrangement referred to in circular letter of the American Hide and Leather Company to its stockholders regarding the purchase of 15,000 shares of preferred stock.

Since our interview on the 24th ult., I have refreshed my recollection of your past activities in situations of this general character, by reading the printed pamphlet entitled "A History of the Libel Suit of Clarence H. Venner against August Belmont."

In view of this amazing history showing a long but only partial list of the instances in which you

have endeavored to block corporate readjustments or reorganizations, and of the comments of the Courts in the various opinions in these cases, I feel that the presumption against your good faith in the present matter is practically conclusive and I am therefore unwilling to take the responsibility of giving you this further information. At the special meeting of the stockholders to be held on the 9th inst., further information regarding the arrangement with the Chase Securities Corporation will, of course, be available to the stockholders.

Very truly yours,

SCOTT MCLANAHAN,

CLARENCE H. VENNER, ESQ., Prest.,
General Investment Company,
50 Broad Street, City.

## Complainant's Answering Affidavit on Motion to Modify Stay (General Investment Company).

(Filed December 8th, 1924.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, &c.

STATE OF NEW JERSEY, County of Hudson. } ss.:

Clarence H. Venner, being duly sworn, on his oath deposes and says in answer to the affidavit of George A. Hill heretofore served upon the complainant, that the form of proxy sent to preferred and common stockholders of the defendant for the proposed meeting to be held on December 9th, 1924, provides that the persons therein named may represent the shareholders at said meeting to be held December 9th, 1924, or at any adjournment thereof, as will more fully appear by a copy of said proxy attached hereto and made a part hereof.

Deponent further says that at his interview with Mr. Scott McLanahan on November 24th, referred to in my previous affidavit dated De-

cember 3rd, 1924, said McLanahan told me that up to that time there had been received from stockholders proxies covering more than two-thirds of the outsanding capital stock to be voted in favor of the plans to be submitted at that meeting. As will appear from the copy of the agreement dated August 13, 1924, between the defendant and Chase Securities Corporation which is annexed to Mr. Hill's affidavit herein, there is a syndicate or other group of associates with said Chase Securities Corporation which is interested in said agreement, but neither the said agreement nor the affidavit of Mr. Hill in any way discloses who composes that syndicate and what the interest of the respective members of it are.

Deponent further says that to permit any business to be transacted at the special meeting to be held on December 9th, 1924, other than to adjourn to a future date, will result in serious embarrassment of an already dangerously critical situation.

The notice of motion by the defendant of an application to modify the stay heretofore granted recites at the conclusion thereof and as a reason for the application, "So as to permit the stockholders of said Company, at said meeting or any adjournment thereof to sign and deliver their written assent to the adoption of any or all of the proposals set forth in the call of notice of said meeting."

Deponent calls attention to Section 27 of the General Corporation Act which provides in substance that the certificate of amendment of a certificate of incorporation shall be signed by the

President and Secretary of the Company together with the written assent in person or by proxy of two-thirds in interest of each class of such stockholders.

It is therefore apparent that the official proxies in the form annexed hereto, which have been signed by more than two-thirds of each class of stockholders, as claimed by Mr. McLanahan, confer upon the persons named therein, the right to sign such assent for the stockholders, and therefore, it is not necessary to modify the stay for the reason alleged by the defendant.

The assent referred to can be signed by the holders of the proxies at any time after the amendment shall have been authorized by the stockholders, and it will not be necessary to again convene the stockholders for that purpose.

CLARENCE H. VENNER,

Sworn and subscribed to before me this 6th day of December A. D. 1924.

L. Edward Herrmann
Master in Chancery of New Jersey.

*Complainants Answering Affidavits on Motion to Modify Stay—General Investment Company.*

No. 2367.

*Preferred Shares.....*
*Common Shares.....*

Proxy.

AMERICAN HIDE AND LEATHER COMPANY.

*Special Meeting of Stockholders, December 9, 1924*

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, a stockholder of *American Hide and Leather Company,* a New Jersey corporation, does hereby constitute and appoint Messrs. Claude Douthit, Lindsey Hopkins, John C. Jay, J. C. Lilly, and Edgar M. Williams, or any one or more of them, the action of a majority of them to be in any event controlling, the true and lawful attorneys and proxies, or any of them, the true and lawful attorney and proxy, with full power to said attorneys and proxies, or any one of them, to appoint a substitute or substitutes, for and in the name, place and stead of the undersigned, to vote as fully and effectually as the undersigned might or could do and according to the number of votes that the undersigned would be entitled to vote if then personally present, at a Special Meeting of the stockholders of said Company, to be held at the principal and registered office thereof, No. 15 Exchange Place, Jersey City, N. J., on December 9, 1924, at 11 o'clock in the forenoon, and at any and all adjournments thereof, upon any resolution or proposition that may properly come before said meeting, and particularly to vote in favor of and consent to, and said

attorneys and proxies and their substitutes are, and each of them and his substitute is, hereby instructed to vote in favor of and to consent to each and all of the propositions specifically set forth in the notice of said meeting as recommended by the Board of Directors of said Company, and any and all resolutions or action proposed at such meeting approving of or adopting any resolutions theretofore passed or action theretofore taken by the Board of Directors or Executive Committee of said Company in reference to or in connection with the carrying out of any of said propositions so specifically set forth in said notice, and to sign for and on behalf of the undersigned the name of the undersigned to any consent or instrument in writing required to evidence the consent of the undersigned to any and all such resolutions and/or propositions; and the undersigned hereby ratifies and confirms all that said attorneys and proxies, or any one of them or their substitute or substitutes may lawfully do or cause to be done by virtue hereof.

WITNESS the hand and seal of the undersigned, this day of 1924.

In the presence of:

.....(L.S.)

.....*Witness*

*Note*—Stockholders unable to attend the meeting are requested to date and sign the above Proxy in the presence of a witness and return the same to the Company in the enclosed stamped envelope. Any and all revenue stamps, required by law, will be affixed and cancelled by the Company.

## Order on Motion to Modify Stay, for Examination of Defendant, etc.

(Filed December 8th, 1924.)

### IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill &c.

This matter coming on the heard upon notice of the complainant's motion to the defendant for an order to examine certain persons and records in relation to the matters alleged in the bill of complaint, in the presence of Elmer W. Demarest representing Hudspeth and Demarest, Counsel for Complainant, and Waldron M. Ward of Pitney, Hardin, and Skinner, representing the defendant herein, and the defendant having also given notice to the complainant of a motion to modify the stay made herein on the 4th day of December, 1924, as will appear by the notice of said motions duly filed herein, and the solicitor for the complainant having also moved that the bill of complaint herein be amended by striking out from line four, paragraph one thereof, the words "seven per cent preferred", and the Court having heard and considered the argument of amended, Clarence H. Venner, president of the complainant company, subject to the same ob-

counsel upon said respective motions, it is on this 8th day of December, 1924, ORDERED

(1) That the bill of complaint be amended by striking out of line four, paragraph one, the words "seven per cent perferred".

(2) That the complainant has leave to examine before his Honor, John Bentley, one of the Vice Chancellors of this court, at the Chancery Chambers in the City of Jersey City on Thursday the 18th day of December instant, at the hour of ten o'clock in the forenoon, J. C. Lilly, President of the defendant company, George A. Hill, Secretary and Treasurer of said defendant company, E. R. Tinker, Scott McLanahan, Claude Douthit and Frederick Thompson, and that said persons be produced by the defendant, if they be within the United States, for the purpose of said examination, together with the minute books of the Board of Directors and the Executive Committe of said defendant, and any other books, papers, letters or memoranda bearing upon the negotiations between the defendant company and the Chase Securities Corporation, including all reports and statements made by the Chase Securities Corporation to the defendant herein, respecting the matters complained of in the bill of complaint, subject to any lawful objection by the defendant as to the relevancy, competency and materiality of any such books, papers, letters or records.

(3) That at the said time and place the complainant shall produce for examination by the defendant, on matters relevant and material to the scope of the bill of complaint herein as

jections mentioned in the last preceding paragraph.

(4) That the restraint contained in the stay embodied in the rule to show cause heretofore made herein on the 4th day of December, 1924, be and the same hereby is modified so as to permit the meeting of the stockholders of the defendant, American Hide and Leather Company, called to be held on December 9th, 1924, to consider and act upon, on said date or at any adjournment thereof, any and all matters within the scope of the call of said meeting and to vote upon, adopt or carry, or reject motions and resolutions upon the matters within the scope of the call of said meeting and so as to permit the stockholders of said company, present at said meeting in person or by proxy, to sign and deliver their written assents in the manner and form contemplated by the statute to the adoption of any or all of such matters, provided that neither the said written assents nor the certificate contemplated by the statute, shall be filed in the office of the Secretary of State of New Jersey until the further order of the Court, and that in all other respects the restraint contained in said order of December 4th, 1924, be and the same is continued in full force and effect until the further order of the Court.

(5) That the return of the rule to show cause contained in the said order of December 4th, 1924, be and the same is hereby continued to the 18th day of December, 1924, at ten o'clock in the forenoon, at the Chancery Chambers in the said City of Jersey City.

Respectfully advised,

JOHN BENTLEY,
V. C.

E. R. WALKER,
C.

## Bill of Complaint (Joel and others).

### IN CHANCERY OF NEW JERSEY.

TO THE HON. EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

(Filed December 12, 1924.)

Complaining, show unto your Honor, your orators, Jacob B. Joel, of the City of Athens, Georgia, Ruth B. Bernstein, of the City and State of New York, Lena Helborn, of the City and State of New York, Hattie Helborn, of the City and State of New York, and Arodan Finance Corporation, a corporation of the State of New Jersey, who bring this suit in their own behalf and in behalf of all other stockholders of American Hide & Leather Company, who come in and contribute to the prosecution of this suit:

1. The defendant, American Hide & Leather Company, is a corporation incorporated, organized and existing under the laws of the State of New Jersey, pursuant to the provisions of "An Act concerning Corporations," (revision of 1896) and its several supplements and amendments, having been so incorporated or organized on or about the third day of May, 1899, by certificate of incorporation filed in the office of the Secretary of State of the State of New Jersey on said day. Prior to the payment of any part of the capital stock of said corporation, an amended certificate of incorporation was filed in the office of the Secretary of State of the State of New Jersey, on the twenty-eighth day of August, 1899. A copy of said amended certificate of incorporation is hereto annexed marked "Schedule 'A'" and made a part of this bill of complaint. Of the

total capital stock authorized by said amended certificate of incorporation, there have been issued and are now outstanding in the hands of the public 125,483 shares of preferred stock of the par value of $12,548,300. and approximately 115,000 shares of common stock of the par value of approximately $11,500,000.

2. Complainant, Jacob B. Joel, is and has been since January 17, 1923, the owner of 100 shares of said preferred stock of the defendant company, although said shares of stock stand of record on the books of said company in the name of Seligsberg & Co., Brokers.

Complainant, Ruth B. Bernstein, is and has been since October 23, 1922, the owner and holder of record of 200 shares of said preferred stock.

Complainant, Lena Helborn, is and has been since October 23, 1922, the owner of 50 shares of said preferred stock, although said shares of stock stand of record upon the books of the defendant company in the name of Seligsberg & Co.

Complainant, Hattie Helborn, is and has been since the first day of October, 1922, the owner of 50 shares of said preferred stock, although said shares of stock stand of record upon the books of the defendant company in the name of David Bernstein.

Complainant, Arodan Finance Corporation, is the owner of 800 shares of said preferred stock, although said shares of stock stand of record on the books of the defendant company in the name of David Bernstein.

As such stockholders, complainants, who are stockholders of record, are entitled to vote at all

meetings of stockholders of said company, and the other complainants, as the owners of said stock, have the right to direct the persons in whose name said shares of stock stand of record as to the manner in which said shares of stock should be voted.

3. Some time subsequent to the 23rd day of October, 1924, the defendant company sent out a notice of a special meeting of the stockholders of said company to be held at its principal and registered office, No. 15 Exchange Place, Jersey City, New Jersey, on Tuesday, the 9th day of December, 1924, with a proxy for use thereat, and also a circular to the stockholders of said company copies of said notice of special meeting, proxy and circular letter are hereto annexed marked Schedules "B", "C" and "D" respectively, and made a part of this bill of complaint.

4. As appears in the said notice and circular (Schedules "B" and "D"), the board of directors of the defendant company have declared it to be advisable in their judgment that some 35,000 shares of the unissued preferred stock of the company be changed and reclassified into 35,000 shares of 8% Cumulative Prior Preference Stock of the par value of $100 each. Said Prior Preference Stock to have the preference and rights more particularly set forth in said notice, chief of which being preference over all other stock of the company as to dividends and in case of dissolution of the company or distribution of its assets to the extent of the par value thereof together with accumulated dividends thereon; said notice also, as will appear from reference thereto, specifying the manner in which the pres-

ent preferred stock shall be decreased and acquired by the company and indicating the intention of the board of directors to submit to the said special meeting of the stockholders of the company the proposed amendment of the certificate of incorporation of the company so as to provide for such Prior Preference Stock; said circular also indicating the intention of the board of directors to submit to said special meeting of the stockholders the proposed amendment of the third sentence of Section 1 of Article 2 now reading.

> "The Board of Directors shall have the power, wthout the assent or vote of the stockholders, to fix from time to time an amount of the accumulated profits of the company to be reserved as working capital."

so that the same shall read as follows:

> "The Board of Directors shall have the power, without the assent or vote of the stockholders, to fix and determine from time to time, and to vary, the amount of the working capital of the Company, and to appropriate or set apart reserves for any proper corporate purpose; to determine whether any, and if any, what part of any surplus or net profits shall be declared in dividends and paid to the stockholders; to determine the time for payments for the declaration and payment of dividends, except as otherwise required by the Certificate of Incorporation of the Company; to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion, the Board of Directors may use or apply any such surplus or net profits in the purchase or acquiring of shares of the capital stock,

or bonds or other obligations, of the Company, to such extent and in such manner and upon such terms as the Board of Directors may deem expedient and as may be permitted by law."

5. On the 3rd day of December, 1924, complainants, through their solicitors, made written protest against approval of the proposed resolutions and the proposed amendment of the certificate of incorporation of the defendant company, and in response to such protest complainants' solicitors were advised that sufficient proxies had been received, of the same character as Schedule "C", to provide for the adoption of said plan, true copies of the letter written by complainants' solicitors and the reply thereto are hereto annexed and marked Schedules "E" and "F" respectively.

6. Said special meeting of stockholders was held on the 9th day of December, 1924, at the registered office of the defendant company at Jersey City, New Jersey. Complainants attended said meeting through their solicitors and at that time again protested against the approval of the resolutions of the board of directors and the proposed amendment of the certificate of incorporation of the company and the proposed amendment of the third sentence of Section 1 of Article 2 of the By-laws. Notwithstanding such objection and protest of complainants, such resolutions were, in fact purported to be approved at said meeting and the amendment of the certificate of incorporation purported to be authorized by the vote of common stockholders holding 88,645 shares of stock and the vote of

preferred stockholders holding 91,920 shares of stock. The attorneys mentioned in the proxies, Schedule "C", voting said shares of stock represented thereby to the extent of 88,645 shares of common stock and 91,520 shares of preferred stock in favor of such resolutions and said amendments. Included among the shares of preferred stock voted by said proxies were 15,000 shares of said preferred stock standing in the names of employees of the Chase Securities Corporation, which complainants charge, in fact, are shares of the stock owned by the defendant. It is shown that these shares are the 15,000 shares of preferred stock stated in the circular, "Schedule 'D'" to have been purchased by the company from a large banking corporation of New York City which large banking corporation of New York City complainants charge to be said Chase Securities Corporation. Protest was made at said meeting against voting said shares of stock on the ground that said shares of stock were held by record holders thereof for the Chase Securities Corporation as agents and representatives of the defendant corporation, but said shares were nevertheless voted by said proxies and counted in favor of the adoption of said resolutions and amendments. There were voted also in favor of said amendments and resolutions certain other shares of preferred and common stock which complainants believe and, therefore, charge were not properly voted at said meeting, so that in view of the considerations herein set forth, it is apparent that said resolutions and amendments were not approved by a vote of two-thirds of the stockholders of each class of stock, although

the defendant company and its officers and directors are asserting that said resolutions and amendments were, in fact, so approved. A copy of the agreement entered into between said Chase Securities Corporation and the defendant company is hereto annexed and marked, Schedule "G", and made a part of this bill of complaint. Complainants show that it is the intention of the defendant company, pursuant to such vote, to file in the office of the Secretary of State of the State of New Jersey, a certificate of amendment of the certificate of incorporation of the company accordingly and to proceed with the issuance of said Prior Preference Stock and the final consummation of the plan above outlined.

7. The preferred stock held by complainants is, by its terms and said original amendment of the certificate of incorporation of the defendant company, preferred over the common stock of the company which is the only other class of stock authorized by said original amended certificate of incorporation, both as to cumulative dividends of 7% per annum, and as to principal in case of the dissolution of the company or distribution of its assets. Since the organization of the defendant company, total dividend payments of 37¾% in all have been made, leaving an unpaid accumulation of dividends upon said preferred stock amounting to 140%. During this period, however, the defendant company has earned large sums of money in profits and has, out of such profits, paid large sums of money as interest upon its funded debt and the defendant company has, in fact, out of such profits paid off its entire funded debt amounting to in excess of two and one-half

million dollars. Your orators show that with the cancellation of the funded debt and with the earnings and surplus account of the defendant company as hereinafter set forth, the defendant company is in a position in which the preferred stockholders may reasonably hope for the resumption of dividends upon their preferred stock and the eventual discharge of the liability of the company to them for unpaid dividends thereon.

8. Complainants show that the defendant company as of the 31st day of December, 1923, by its balance sheet as of that date, had a surplus amounting to the sum of $4,631,092.25 after setting aside the sum of $4,091,113.82 for depreciation and building of plants and for contingencies, and estimating the properties of the defendant company at cost only. For the quarter ending September 30th, 1924, the defendant company made a gain of $100,474.12, and for the nine months' period ending September 30th, 1924, defendant company made a gain of $337,630.34.

9. Complainants charge in fact that the design of the board of directors in providing for the reclassification of unissued shares of stock and in recommending the creation of a new class of stock to be known as Prior Preference Stock and having a preference and priority over the preferred stock held by complainants, is to deprive complainants and the other preferred stockholders of the defendant company of the large accumulations of unpaid dividends amounting to 140% at a time when the condition of the defendant company is such that said preferred stockholders have every reason to hope for an early liquidation of the sums due to them. Complainants further

charge that the result of the adoption of the plan proposed by the board of directors will be to benefit largely the common stockholders of the defendant company by eliminating a large amount of arrearages of preferred dividends to which the holders of the preferred stock are entitled, and complainants charge that the amendment of Section 1 of Article 2 of the By-laws above referred to is another step in the plan of the board of directors to deprive the preferred stockholders of the share to which they are by their contract with the defendant company entitled in the earnings and profits of the defendant corporation. Complainants further show that the defendant company has for some time been in receipt of sufficient earnings and profits to justify the declaration of a dividend on the preferred stock and that the board of directors of the defendant company have purposely withheld the declaration of any such dividend in order to discourage the holders of the preferred stock of the company so as to make them believe that they would benefit from the adoption of the proposed plan and that this, in fact, to a large extent is responsible for the fact that the adoption of said plan has not been more largely resisted by the holders of the preferred stock of the company.

10. Complainants show that the plan of the directors for the creation of a new class of stock to be known as Prior Preference Stock and having preference over preferred stock held by complainants, and the plan of the board of directors for the amendment of Section 1 of Article 2 of the By-laws of the company, are unlawful and contrary to the provisions of "An Act concerning

Corporation." (Revision of 1896), and its several supplements and amendments, under which the defendant company is incorporated. Complainants further show that such plan and the proposed amendment of the certificate of incorporation and By-laws are in violation of the contract rights existing between complainants and the defendant corporation and as embodied in their preferred stock, that said plan, if consummated will result in the impairment of the contract rights of complainants and that no authority, warrant, or right, exists under the Constitution of the United States, or the Constitution and Laws of the State of New Jersey, for the consummation of said plan without the unanimous consent of all the stockholders of the defendant corporation, and the said plan and amendments therefore are ultra vires and illegal and should be restrained.

Your orators are without relief in the courts of law and therefore pray:

(1) That the defendant in this suit, American Hide & Leather Company, may without oath, an answer under oath being hereby waived, answer this bill of complaint and all the matters and things herein contained.

(2) That said American Hide & Leather Company, its board of directors, officers, tellers and inspectors may be enjoined and restrained from filing in the office of the Secretary of State of the State of New Jersey any certificate of amendment of the certificate of incorporation of said defendant company in the respects purported to have been approved at said meeting of December 9th, 1924, or from taking any steps or proceedings

whatsoever for the issuance of Prior Preference Stock or for the consummation in any respect whatsoever of the resolutions and amendments recommended by the board of directors of the defendant company and purported to have been adopted and approved at said stockholders' meeting on the 9th day of December, 1924.

(3) That your orators may have such other and further relief as shall be agreeable to equity and good conscience.

(4) That a writ of subpoena may issue directed to the defendant in this suit.

McCARTER & ENGLISH,
Solicitors for and of Counsel
with Complainants.

ARTHUR F. EGNER,
of Counsel.

SCHEDULE "A"

Copy of Amended Certificate of Incorporation American Hide & Leather Company.

SCHEDULE "B"

Notice of Special Meeting for December 9th, 1924

SCHEDULE "C"

Copy of Proxy for Special Meeting.

SCHEDULE "D"

Circular Letter of J. C. Lilly, Prest., which accompanied Notice of Special Meeting.

SCHEDULE "E"

December 3, 1924.

American Hide & Leather Company,
92 Cliff Street,
New York City.

Attention: J. C. Lilly, Esq.,
President.

Dear Sirs:

We represent preferred stockholders in your company owning in the aggregate one thousand shares of said preferred stock, which are of record on your books in the names of Seligsberg & Co., Ruth B. Bernstein and David Bernstein.

These stockholders have retained us to represent them in connection with the proposal to amend the Certificate of Incorporation of the company as outlined in the notice of special meeting of the stockholders sent out under date of October 23, 1924, and also in the circular letter sent out at the same time.

We note that with the notice of special meeting you have requested the execution of the proxies by the stockholders, and we would be obliged if you would be good enough to advise us how many proxies have been received by the company and as to whether it is the intention of the persons named in the proxies to vote upon the same for or against the adoption of the amendment and the approval of the matters set forth in the resolutions of the board of directors, passed at the meeting held October 21, 1924.

We should add that it is our view, and we

have so advised our clients, that the proposed plan is contrary to the laws of this State and is furthermore unfair to the preferred stockholders of the company in that the result of the plan will be to constitute a new class of preferred stock with rights superior to that of the present preferred stock, and will result in impairing the position of the present preferred stock and practically postponing for an indefinite time any hope of payment of the accumulation of preferred dividends. It is our view and we have so advised our clients that the plan cannot be adopted without the unanimous approval of the stockholders, and this approval our clients are not ready to give.

In view of the above, we deem it to be the duty of the directors of your company to refrain from taking any further steps in consummation of the plan outlined in the notice.

Will you be good enough to acknowledge receipt of this letter, answer the inquiries made therein and advise us whether, in view of the protest of our clients, any further steps will be taken by the company in connection with the consummation of this plan.

Respectfully yours,

McCarter & English.

SCHEDULE "F"

December 5, 1924.

McCarter & English, Esqrs.,
765 Broad Street.,
Newark, N. J.

Gentlemen:

Replying further to your letter of the 3rd inst., we note the objection of your clients to the proposed amendment of the Certificate of Incorporation of this Company.

The proxies received are all of the same character as the proxies sent your clients with the notice of the Special meeting.

At the present writing proxies have been received from holders of more than two-thirds of each class of existing stock.

We are advised that the proposed Plan is both legal and fair and we believe that if adopted, it will operate to the great advantage of this Company and its stockholders.

Very truly yours,

AMERICAN HIDE & LEATHER CO.
By George A. Hill,
Secretary.

## SCHEDULE "G"

Copy of Agreement with Chase Securities Corp'n.

STATE OF NEW YORK,
County of New York, } ss.:

RUTH B. BERNSTEIN, of full age, being duly sworn on her oath says:

I am one of the complainants named in the foregoing bill of complaint. I have read the same and the matters and things therein contained are true to the best of my knowledge and belief.

Particularly is it true that I am the owner of the shares of stock referred to in the bill of complaint in connection with my name.

The information set forth in said bill of complaint with respect to the surplus of the defendant company and its profits is taken from publications issued by said company.

It is furthermore true that the board of directors of the defendant company did submit to a special meeting of the stockholders of said company held on the 9th day of December, 1924, the proposed amendment of the certificate of incorporation of the defendant company more particularly referred to in the notice of special meeting (Schedule "B") annexed to the bill of complaint. I respectfully protest against the adoption of said amendment, inasmuch as I consider it to be against my interests as a holder of preferred stock in the defendant corporation. I have never in any way assented to the proposed amendment and have done nothing to waive any

rights which I may possess as stockholder of the defendant corporation to object to the adoption of said amendment.

The schedules annexed to the bill of complaint are true copies of said documents respectively.

RUTH B. BERNSTEIN,

Sworn to and subscribed before me this 10th day of December, 1924.
D. BLUM,
Notary Public,
New York Co. No. 273.
New York Register's No. 5165.
My commission expires March 30, 1925.

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STATE OF NEW JERSEY, County of Essex. } ss.:

ARTHUR F. EGNER, being duly sworn, according to law on his oath, says:

I am a member of the firm of McCarter & English, solicitors of complainants named in the foregoing bill of complaint. I attended on behalf of the complainants at the special meeting of the stockholders of the American Hide & Leather Company held at its registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the 9th day of December, 1924. At said meeting and before the resolutions referred to in the bill of complaint and the proposed amendment of the certificate of incorporation of the company so as to provide for the issuance of Prior Preference Stock and the proposed amendment of the By-laws of the company were voted upon, I pro-

tested on behalf of the complainants against the approval of said resolutions and the adoption of such amendments. Notwithstanding my protest said resolutions and the proposed amendment of the certificate of incorporation and By-laws of the company were passed by a vote of 88,645 shares of common stock and 91,920 shares of preferred stock. Included in the above votes were the votes of 88,645 shares of common stock and 91,520 shares of preferred stock voted in pursuance of the proxies of the form Schedule "C", annexed to the bill of complaint. Included in the shares of preferred stock so voted by the proxies were 15,000 shares of preferred stock standing of record on the books of the defendant company in the names of different persons. It was stated at said meeting by a stockholder of the company, and not denied, that these persons were, in fact, employees of the Chase Securities Corporation and that these shares of stock had been purchased by the Chase Securities Corporation and were held by it pursuant to the terms of the contract, Schedule "G", annexed to the bill of complaint, and protest was made against voting these shares of stock on the ground that they were, in fact, the property of the defendant corporation. Such protest was overruled and said shares of stock were voted.

Schedules "E" and "F" annexed to the bill of complaint are true copies of the letters of which they purport to be copies.

ARTHUR F. EGNER,

Sworn to and subscribed before me this 11th day of December, 1924.

EDITH S. POWELSON,
Notary Public for New Jersey.

## Order to Show Cause (Joel Bill).

(Filed Dec. 12, 1924.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

JACOB B. JOEL, et **als.**,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, etc.

This matter being opened to the court by McCarter & English, of counsel with complainants, and the court having filed the bill of complaint and affidavits thereto attached;

It is thereupon, on this 12th day of December, 1924, ORDERED that the defendant, American Hide & Leather Company, show cause before the Chancellor, at the Chancery Chambers in the City of Jersey City, New Jersey, on the 18th day of December instant, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the defendant should not be enjoined as prayed for in the bill of complaint; and

It is further ORDERED that meantime, and until otherwise directed, said American Hide & Leather Company, its directors, officers, attorneys, agents, tellers and inspectors do refrain and desist from filing in the office of the Secretary of State of the State of New Jersey any certificate of amendment of the certificate of incorporation of the

said defendant company in the respects purported to have been approved at the meeting of December 9, 1924, or from taking any steps or proceedings whatsoever for the issuance of Prior Preference Stock, or for the consummation in any respect whatsoever of the resolutions and amendments recommended by the board of directors of the defendant company and purported to have been adopted and approved at said meeting of stockholders on the 9th day of December, 1924; and

It is further ORDERED that a true copy, which may be certified by complainants' solicitors, of said bill of complaint and affidavits and of this order be served within one day from the date hereof upon the defendant, American Hide & Leather Company; and

It is further ORDERED that the complainants have leave to submit upon the return of this order to show cause such additional affidavits as they may be advised, provided, however, that copies of such affidavits be served at least two days prior to such hearing upon the defendant or its solicitors.

Respectfully advised, E. R. WALKER.
JOHN BENTLY
V. C.

## Order Permitting Amendment (Generaeral Investment Bill).

(Filed December 18, 1924.)

### IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | Order Permitting Amendment of Bill. |

It appearing to the court that due notice has heretofore been given by the complainant to the defendant, of a motion to amend the amended bill of complaint by the insertion of the paragraphs hereinafter mentioned and that said motion should be granted.

It is on this 18th day of December, 1924, ORDERED that the complainant have leave to amend the amended bill of complaint by inserting paragraphs 9, 10, 11 and 12 in the form herein set forth, to wit;

9. The special meeting of stockholders of defendant, referred to in paragraphs numbered "5" and "6" of the complaint herein, filed December 4th, 1924, was held on December 9th, 1924, at 11 A. M. at 15 Exchange Place, Jersey City, the time and place stated in the call for said meeting by leave of this court by order dated December 8th, 1924.

*Order Permitting Amendment—General Investment Bill.*

As soon as said meeting was organized and called to order and before any business had been transacted, the complainant, by its president, Clarence H. Venner, read a notice protesting against any action being taken at said meeting in respect of any of the propositions or matters mentioned in the notice dated October 23rd, 1924, calling said meeting, and stated some of the grounds for said protest. A copy of said notice and protest is hereto annexed, marked Schedule "E" and made a part hereof.

At the request of the complainant, the said notice was, by the Chairman of said meeting, who is the president of said defendant, ordered spread upon the minutes of said meeting.

10. Among the proxies held by the proxy committee and present at said meeting were eight purporting to represent 15,000 shares of the preferred stock of the defendant, as follows:

| | | | | |
|---|---|---|---|---|
| Harry S. Burroughs, Jr. | 61 | B'way | 2,000 | shares |
| George D. Casterline | " | " | 1,000 | " |
| Henry Hargreaves | " | " | 2,000 | " |
| George Holzman | " | " | 2,000 | " |
| John J. Schomp | " | " | 2,000 | " |
| Wm. H. Seron | " | " | 2,000 | " |
| Raymond S. Wilson | " | " | 2,000 | " |
| Henry A. Noll | " | " | 2,000 | " |
| | | | 15,000 | " |

The said proxies were produced, upon the demand of Clarence H. Venner, the president of complainant, a preferred stockholder, and who is, individually, the holder of common stock. Said

Venner immediately challenged and protested the right to vote under said proxies on the ground that said stock had been acquired by the defendant and was its property under the agreement between it and the Chase Securities Corporation, dated August 13th, 1924, a copy of which is attached to the affidavit of George A. Hill, the treasurer of said defendant, verified December 6, 1924, and filed in this cause, and that the above named persons, in whose names said stock was registered and who executed the proxies, were employees of the Chase Securities Corporation, which was the agent of the defendant appointed by the agreement of August 13th, 1924, hereinabove referred to and that, therefore, the whole of said 15,000 shares were disqualified and possessed no legal right to vote at said meeting on any of the questions submitted thereat, a copy of said agreement is hereto annexed marked Schedule "F" and made a part thereof.

The said objection and protest against the vote of said 15,000 shares of stock was overruled by the president of the defendant, acting as the chairman of said Special Meeting. Thereafter, as each proposition presented at said meeting was voted upon and, upon the presentation of the report of the inspectors, on the vote cast, the said challenge and protest against the voting of said stock was renewed and each time overruled by the chairman of said meeting. And the inspectors of election, disregarding the said challenge and protest, permitted said 15,000 shares of preferred stock to vote in favor of all of the propositions submitted at said meeting and counted said vote.

*Order Permitting Amendment—General Investment Bill.*

11. According to the report of the inspectors of election, there were cast on the several propositions numbered from 1 to 6 inclusive, as set forth in the call for the meeting, the following votes, except as hereinafter noted, to wit: 91,920 shares of preferred stock and 88,645 shares of common stock voted for and 418 shares of preferred stock and 200 shares of common stock voted against. The exception referred to is that, on the proposition numbered "6", to authorize an amendment of the certificate of incorporation—365 shares of preferred stock voted against. On the proposition to amend the By-laws, the vote was the same as on the other propositions numbered 1 to 6 inclusive. Complainant voted against all said propositions.

As heretofore alleged, in paragraph numbered "3" of the complaint herein, the outstanding capital stock of the defendant consists of $12,548,300 par value of 125,484 shares of preferred stock and $11,500,000 par value of 115,000 shares of common stock. Complainant therefore alleges that, if the 15,000 shares of preferred stock acquired by the defendant or held for it by its agent the Chase Securities Corporation, under the agreement of August 13th, 1924, was disqualified from voting at said meeting, then only 76,920 shares of preferred stock voted in favor of the several propositions submitted at said meeting and that said vote was less than the two thirds vote required, to wit; 83,656 shares, and that, therefore, all of said propositions failed of approval and the defendant company and its officers have not been authorized to carry out the whole

or any part of the plan set forth in its call for said meeting and submitted to the stockolders thereat.

12. Complainant further avers that among the stock voted at said meeting were 20,600 shares of Preferred Stock and 7,730 shares of Common Stock, registered in the name of Livingston & Co., a firm of stockbrokers doing business in the City of New York, of which firm Frederick E. Thompson, a director of the defendant, is a member—that complainant verily believes and so charges that substantially all of said shares, so registered and voted, belong to various clients of said firm—that said firm has no interest therein except that it may hold some or all of said shares as collateral security for sums owing to it by said clients and that none of said owners or pledgers have, on the books of said defendant, expressly empowered said firm as pledgee to vote thereon as provided in Section 37 of General Corporation Act of New Jersey—wherefore complainant charges that all said preferred and common shares in this paragraph mentioned were voted without authority and all votes cast thereon were and are null and void.

That the facts in this paragraph were known to said defendant, and Thompson, as well as to the inspectors of election acting at said meeting.

Complainant further alleges that deducting said 20,600 Preferred Shares from the 76,920 shares of preferred stock voted at said meeting, remaining after deducting the 15,000 shares held by the Chase Securities Corporation as agent for the defendant, would leave only 56,000 shares of preferred stock outstanding voting for said propo-

sitions, or a trifle less than 45 per cent of the outstanding Preferred Stock, instead of 66 2/3 per cent as required by Section 27 of the General Corporation Act of New Jersey.

And to amend the prayer of the bill of complaint by inserting a paragraph to be known as paragraph 5 in the following form and by changing the number of paragraph 5 of the present amended bill of complaint to paragraph 6.

5. That the 15,000 shares of stock voted by the Chase Securities Corporation, or its employees, and the stock voted by Livingston and Company at the stockholders' meeting of December 9th, 1924, be decreed to have been illegally cast and counted and that the result of the votes taken and proceedings of said meeting be decreed to be null and void.

Respectfully advised,

JOHN BENTLEY
V. C.

E. R. WALKER,
C.

*Order Permitting Amendment—General Investment Bill.*

SCHEDULE "E"

Jersey City, N. J. Dec. 9, 1924.

To the Stockholders of the American Hide and Leather Compnay, their proxies and representatives, assembled in Special Meeting on this date, and to Officers of said Company and persons in charge of said Meeting

TAKE NOTICE

that the undersigned preferred and common stockholders of the American Hide and Leather Company hereby protest against any action whatever being taken at this meeting, in respect of any of the propositions or matters mentioned in the notice dated October 23, 1924, calling this meeting, for the following reasons among others, to wit:

1. This meeting is called for illegal purposes in that the objects sought to be accomplished thereat are unauthorized by and in violation of the General Corporation Act of the State of New Jersey, under which the American Hide and Leather Company is incorporated.

2. The proposition to purchase and retire 30,000 shares of the existing 7% preferred stock is illegal, in that the basis of retirement is not pro rata but proposes to take from a single preferred stockholder its entire or 100% of its holdings, while from the other preferred stockholders only 11-95/100% of their holdings are to be taken.

3. The propostion to purchase and retire 30,000 shares of the 7% preferred stock is illegal in that it will deplete the assets of the Company and take from the preferred stockholders a large part

of their security for the accumulated dividends thereon amounting to some $5,000,000, which have been earned and the claim for which dividend is a liability which takes priority to the principal of said preferred stock and must be satisfied before there can be any retirement of the principal.

4. The plan and scheme for the retirement of the 30,000 shares of 7% preferred stock is, we believe, as to at least 15,000 shares therof, a scheme for the personal profit of some of the directors of the American Hide and Leather Company who, we believe, are associated with the Chase Securities Corporation in the purchase of 15,000 shares of said stock, at much lower than the retirement price and in the commission of $5 per share which is to be paid to the Chase Securities Corporation.

5. The proposition to create and issue 35,000 shares of 8% cumulative prior preference stock, to be sold for cash or exchanged for any of the present 7% preferred stock is illegal in that there is no authority under the General Corporation Act of New Jersey to issue a prior preference stock which shall take precedence to an already existing preferred stock, nor is there any authority under said Act to issue and exchange preferred stock for any other class of stock except common stock and said prior preference stock, if issued, will become a preferred charge upon all the assets of the Company, including the $5,000,000 of earned accumulated dividends upon the present 7% preferred stock and said proposed issue of 8% prior preference stock will alter and impair the vested rights of the existing 7% preferred stockholders and cannot be authorized or

issued without unanimous consent of the present stockholders.

6. The proposition to issue the 8% cumulative prior preference stock is further illegal in that it is proposed to make the same subject to redemption after three years at the price of $115 a share. Under the General Corporation Act of New Jersey, 8% is the limit which may be paid upon any preferred stock and there is no authority which permits the redemption of such stock at $115 per share thereby making a return to the preferred stockholder of more than 8%.

7. The issue of an 8% prior preference stock in exchange for any of the existing 7% preferred stock is illegal in that, under the General Corporation Act of New Jersey, stock may only be issued at par for cash or in payment for property acquired for use in the Company's business, neither of which purposes is contemplated by the plan adopted by the directors and to be submitted at this meeting.

8. The interest of said directors, if any, in the syndicate associated with the Chase Securities Corporation is not disclosed by the notice given for the special meeting or in the ciruclar of the President of the American Hide and Leather Company accompanying said notice.

The foregoing objections and grounds of protest are not exclusive.

GENERAL INVESTMENT COMPANY
By C. H. VENNER,
A Preferred Stockholder,
and
CLARENCE H. VENNER,
A Common Stockholder.

## Order Consolidating Causes.

(Filed December 18, 1924.)

### IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, etc.

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, etc.

On motion of Pitney, Hardin & Skinner, solicitors for the defendant in the above entitled causes, made in the presence of Elmer W. Demarest, of counsel for complainant, General Investment Company, and Arthur F. Egner, of counsel for complainants, Jacob B. Joel and others.

It is on this 18th day of December, 1924, ORDERED that the above entitled causes be and

hereby are consolidated, and that the said causes do hereafter proceed as one cause under the above title, without prejudice, however, to the rights of the complainants in the said respective causes to distinct relief therein, and without prejudice to distinct defenses by the defendant in the said respective causes.

Respecfully advised, E. R. WALKER,
C.
JOHN BENTLEY,
V. C.

**Depositions on Behalf of Complainant (General Investment Bill).**

(Filed December 18, 1924.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | On Bill, etc. |

Depositions taken December 12th, 1924, without a master or examiner in Chancery, before the stenographer, Mary T. Freeman, by agreement of counsel, certificate of a master or examiner being hereby waived. It is stipulated and agreed that the testimony so taken shall have the same force and effect as if the witness were produced at the time and place mentioned in the order of the court, dated December 8th, 1924.

APPEARANCES:

ELMER W. DEMAREST,
representing Hudspeth and Demarest,
Solicitors for the complainant.

WALDRON M. WARD,
representing Pitney, Hardin, and Skinner,
Solicitors for defendant.

*Depositions on behalf of Complaint—General Investment Bill.*

ROBERT CAREY, JR.,

Representing McCarter and English, appearing for the complainants in the suit entitled Jacob B. Joel and others, against the American Hide and Leather Co.

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FREDERICK EVERIT THOMPSON, being duly sworn, testified as follows:

BY MR. DEMAREST:

Q. Mr. Thompson, are you a director of the American Hide and Leather Company? A. I am.

20 Q. Are you a member of its Executive Committee? A. I am not.

Q. Were you, prior to August 13th, 1924, a member of the Executive Committee? A. No.

Q. Are you a member of the firm of Livingston and Company? A. I am.

Q. What is their business? A. Stock brokers.

Q. New York City? A. And other cities.

Q. Are you, either directly or indirectly, a

30 party to or a person to profit by the contract between the American Hide and Leather Company and the Chase Securities Corporation, dated August 13th, 1924? A. No.

Q. Is your firm? A. No.

Q. Did your firm of Livingston and Company act as brokers for the Chase Securities Corporation in acquiring the preferred stock of the American Hide and Leather Company? A. They didn't.

40 Q. Do you know what firm did act as broker? A. No.

Q. Is there, to your knowledge, any contract between the American Hide and Leather Company and the Chase Securities Corporation, supplemental in date, to that of August 13th, 1924, regarding the purchase and sale of the preferred stock of the American Hide and Leather Company? A. I don't remember any papers under date, Mr. Demarest. If you will be a little more explicit—is that the actual contract between them?

Q. Yes. A. I don't know of any.

Q. Did you ever hear of any supplemental contract? A. No.

Q. Or any contemporaneous contract? A. No.

Q. Did you attend the meeting of the Directors of the American Hide and Leather Company at which this contract of August 13, 1924, with the Chase Securities Corporation was authorized? A. I have attended all the Directors' meetings and if this was brought up at the directors' meetings, yes, frankly I don't remember whether it was discussed or not.

Q. Don't you remember voting upon the resolution that called for a meeting of stockholders to ratify that? A. Yes.

Q. Doesn't that refresh your memory as to whether you were at a previous meeting? A. Yes, I was.

Q. Do you know when and at what price the 15,000 shares of preferred stock of the American Hide and Leather Company, that has been acquired by the Chase Securities Corporation, was acquired? A. No, not at what price it was acquired.

Q. Do you remember when the Chase Securi-

ties Corporation began the purchase of that 15,000 shares of stock? A. Not exactly, no.

Q. Can you give a date, approximately? A. No.

Q. You can't? A. No, we were not parties to it.

Q. You were a member of the Board of Directors of the American Hide and Leather Company? A. But I don't know when they commenced to purchase it—I had heard of it, rumors, it was on the tape.

Q. Did you see any reports given by the Chase Securities Corporation as to the amount of stock it had purchased for the account of the American Hide and Leather Company and the price at which it was purchased? No, I never did.

Q. You understood that this 15,000 shares were being acquired by the Chase Securities Corporation for the American Hide and Leather Company? A. Yes.

Q. And from whom did you obtain this information? A. This agreement that was made, and it was common talk about the stock market; everybody knew it, knew they were acquiring the stock, not everybody, but a great many people knew it.

Q. Do you, as director of the American Hide and Leather Company, know of the terms of the contract of August 13, 1924, between the American Hide and Leather Company and the Chase Securities Corporation? A. Yes.

Q. Have you examined the contract? A. Looked it over.

Q. And approved of it? A. I did.

Q. What good reason, in your opinion, was

there for the provision in that contract that the Chase Securities Corporation might sell as well as purchase the stock of the American Hide and Leather Company? A. Because if a deal didn't go through, they would have to sell it on the market.

Q. I mean during the acquiring of that stock, purchase and sell? A. It is usual in a contract of that kind.

Q. You knew when you examined that contract and voted on it, did you not, that the contract provided for a trading account? A. Yes.

Q. What is the usual meaning of trading account? A. Buying and selling.

Q. It includes buying as well as selling? A. Yes.

Q. In acquiring 15,000 shares of the preferred stock of the American Hide and Leather Company for it, what could be the purpose of permitting a trading account, for selling as well as buying, to be established and authorizing the Chase Securities Corporation to sell as well as buy? A. For the best interests of the company, kill speculation.

Q. Would that permit this Chase Securities Corporation to purchase stock at a low price, resell it at a profit, and later buy it in for the American Hide and Leather Company at a higher price? A. If they wished.

Q. And you were cognizant of that? A. Yes.

Q. And favorable for it? A. I believed in the honesty of the Chase Securities Corporation.

Q. And did you think it was honesty on their part if they should purchase and make a profit on stock in addition to the Five Dollars per share commission? A. I certainly do.

Q. In your opinion, as director of the corporation, it was legitimate for the Chase Securities Corporation to obtain profits in excess of the Five Dollars a share by purchasing and selling stock through a trading account? A. No, I don't know and I don't think that they did it.

Q. You know they didn't? A. I am very sure they didn't.

Q. What information do you base that on? A. Believing in the honesty of the people.

Q. You know by the terms of the contract that was made possible? A. I do.

Q. And you don't believe that such terms were apprehensive? A. Not at all.

Q. Your firm of Livingston and Company acquired 20,600 shares of preferred stock, didn't they? A. If that is the figure, I don't remember it, around that figure.

Q. And 7,730 common stock? A. Yes, sir.

Q. Was that stock voted at the meeting of the stockholders of the American Hide and Leather Company held on the 9th of December? A. It was.

Q. Do you know if it was voted for or against the resolutions that were adopted at that meeting? A. For the resolutions.

Q. Were proxies given for the voting of it? A. Yes.

Q. To whom? A. To the members—names mentioned in that proxy.

Q. Was the proxy in the form and to the persons named in the form that I show you? A. Yes.

Q. Was there anything in the proxy besides what appears upon this form which I show you? A. No.

(Proxy offered on the part of the complainant and marked Exhibit C-1.)

Q. Who signed the proxy? A. I don't remember.

Q. Whose name was signed in the proxy? A. Livingston and Company, I presume.

Q. How did Livingston and Company acquire this stock? A. Purchased in the open market, in the exchange.

Q. As broker? A. As broker.

Q Not on its own account? A. No.

Q. As broker for whom?

BY MR. WARD: I object to the question on the ground that the answer called for would be irrelevant and immaterial and outside the scope of this issues presented by the bill of complaint in this case.

BY MR. DEMAREST: I suppose the proper course is the usual one—taking the answer of the witness and letting the court deal with the relevancy.

BY MR. WARD: Uuless the witess voluntarily answers, necessarily the court will have to determine whether the question is proper.

A. I refuse to answer, I can't answer that question—various clients in our office.

Q. Was any of this stock owned by Livingston and Company? A. Not a share.

Q. In whose name was the stock that was voted by Livingston and Company, the preferred and common stock that I have mentioned, standing—in whose name on the books of the corporation? A. In the name of Livingston and Company.

Q. Was any of that stock, stock for which certificates had been issued to your client and delivered to your company as a margin? A. I would not know that.

Q. Was any of the stock voted under the proxy given by Livingston and Company, stock for which the certificates had been issued to some person other than Livingston and Company, and which had been given to your company or deposited with it as margin for some trading company? A. I would not know.

Q. You would not know? A. No.

Q. Tell me, if you will, to the best of your knowledge, how many different clients owned the stock which Livingston and Company voted under these proxies at the stockholders' meeting? A. There might have been fifteen or twenty and there might have been fifty or one hunderd—may I explain to you? Our house is a wire house and there might be customers of our correspondents in other cities and they would authorize us, at clients' request, to transfer and deliver the proxy.

Q. Do you know when this stock that Livingston and Company voted at the stockholders' meeting by proxy on December 9th, was acquired? A. In the course of the last seven years, perhaps longer.

Q. Some of it recently and others a long time ago? A. Trading it long ago, we always were identified with the stock.

Q. Did the owners of this stock, that is the clients of Livingston and Company, sign any authorization to Livingston and Company to vote this stock at any meeting of the corporation?

By Mr. Ward: I object on the ground

that it is irrelevant and immaterial and not within the scope of the issue, and is a matter in which the complainant in the case has no right or interest.

A. I could not tell you, it was in writing in some instances and verbally in others. We might send a telegram saying we voted your stock, other times it might be a personal conversation. Most of the stock was voted by verbal consent to give the proxies. I might add that the firm of Livingston and Company never gives a proxy without the consent of the owners of the stock. Many people come into the office and ask for them but we always refuse as we claim we don't own the stock, it is our clients' stock.

Q. Where a written consent was given by the owner of the stock that Livingston and Company might have voted at the meeting of stockholders, what was done with that consent? A. It would be in the form of a telegram and probably destroyed.

Q. Was it filed with the Secretary of the American Hide and Leather Company? A. No.

Q. Did you file any consents? A. No.

Q. Let me finish—Did you file any consents from any of the owners of this stock which Livingston and Company voted which authorized the firm of Livingston and Company to either vote upon it at the stockholders' meeting or appoint a proxy to vote it? A. No.

Q. Have you any of the written consents of these clients who were holders of the preferred stock of the Amercian Hide and Leather Company in your possession? A. I think not—no.

Q. Do you know what was the date when the

books of the American Hide and Leather Company were closed for the purpose of voting at this stockholders' meeting held on the 9th of December? A. I don't remember.

Q. Well, now, do you remember—let me refresh your memory—was it not the 23rd of November? A. It might have been, I don't know, I will take your word for it.

BY MR. DEMAREST:

Q. Mr. McLanahan, do you know? A. I think it was before that—I beg your pardon—it was closed before November 23rd, closed more than twenty days before the meeting.

BY MR. DEMAREST:

Q. Do you remember whether any of the authorizations you say you received from your clients were given less than twenty days before the meeting of December 9th? A. No.

Q. They were not? A. No.

Q. They were all previous to that? A. Yes.

Q. Without any reflection, Mr. Thompson, is it customary for the brokers to destroy communications of the magnitude and importance as to voting their stock? A. I didn't say we had any.

Q. Do you know of a single written authorization given to Livingston and Company to vote this stock? A. No.

Q. Do you personally know of a certain verbal authorization? A. Many of them, practically all of them.

Q. It was not followed by anything in writing? A. No.

Q. And there was nothing filed with the of-

ficers of the American Hide and Leather Company? A. No.

Q. I understood you a few moments ago to say that your house, Livingston and Company, has a number of branch offices? A. Yes.

Q. And the preferred stock of the American Hide and Leather Company was traded in by clients of the various offices? A. Yes.

Q. Have you personal knowledge that prompts you to testify that in almost every instance verbal authority was given you to vote upon the stock at the meeting held last Monday? A. There was authority given to our branch manager and it authorized us to give it.

Q. Then that is the sole source of your information? A. And in some cases it was given directly to us by the clients.

Q. Were there any given to you personally or were you present when any were given? A. Yes, one or two, you are speaking of the branch offices or our correspondents?

Q. No, I want to know how many instances there are where the clients gave you the authority or where you were actually present when the verbal authority was given? A. I knew most of the holders of the stock and clients of our correspondents in the branch offices, and they would visit New York from time to time and talk over the situation with me and say they wanted to go along with the plan and wanted their proxies voted.

Q. And almost all of these people, whether New York clients or clients of the branch offices, gave you verbal authority to vote at this

meeting of the 9th of December? A. Gave us the right to give the proxies.

Q. How long ago was that verbal authority given—let me call your attention to what I want, before or after the proposed plan for reorganization was given? A. After the plan.

Q. In every one of these instances the authority was given verbally after the plan was known to the stockholders and notice given by the corporation? A. As far as I know, yes.

Q. Where are your branch offices? A. One in Providence, one in Greensboro.

Q. North Carolina? A. Atlanta, Augusta.

Q. Give the states in which you have offices? A. Providence, Rhode Island; Norfolk, Va.; Greensboro, North Carolina; Charlotte, North Carolina; Augusta and Atlanta, Georgia.

Q. Were you present at those offices where the clients were holders of the American Hide and Leather preferred stock when the verbal authority was given? A. No.

Q. And you mean that the holders who dealt with those branch officers called to see you in New York or you saw them in New York and they verbally gave you authorization— A. All the holders of the American Hide and Leather Company visit New York and they authorized the proxies because they were old friends of the management and were going along with them.

Q. And were all of the owners of these stock certificates representing clients of your house of Livingston and Company, margin traders with your house? A. Practically all.

Q. For whom this stock was sold on margin? A. Either bought or sold on margin.

Q. Can you produce a single written consent of any owner of the stock voted by Livinston and Company at the stockholders' meeting of December 9th? A. No.

By Mr. Ward:

Q. Mr. Thompson, did you take any active part in the negotiations of August 13th, with the Chase Securities Corporation? A. No.

Q. Can you state when you first learned of the interests and terms of that contract? A. At the directors' meeting.

Q. At a date subsequent to August 13th, the date on which the contract was dated? A. I knew there were negotiations going on, but the terms I saw at the directors' meeting.

Q. At the directors' meeting to which you refer, did the contract come before you as a part of the action of the Executive Committee for your ratification? A. Yes.

Q. May I ask you how many shares of stock of the American Hide and Leather Company you own in your own right? A. One hundred preferred and one hundred common.

Q. Can you state the most recent date on which you have bought or sold stock of the American Hide and Leather Company for your own account? A. I don't trade in my own account.

Q. How long has your holding continued for your one hundred shares of stock? A. It has been for some time, I have been a director for—

Q. Several years at least, you mean? A. Yes.

Q. Mr. Thompson, I understand you have planned a business trip to the south during the course of next week? A. Yes.

Q. When did you make those arrangements? A. Practically a month or six weeks ago.

Q. And you are intending to leave New York when? A. Tuesday.

Q. December 16th? A. Yes.

Q. And return when? A. Day before Christmas.

Q. That is all, thank you.

BY MR. DEMAREST:

Q. Do you remember the date or approximately the date of the directors' meeting at which the form of the contract between the American Hide and Leather Company and the Chase Securities Corporation was approved? A. I don't.

Q. Exact date or approximately? A. I can't remember.

Q. As near as he can give it?

BY MR. MCLANAHAN: It was on October 21st.

BY MR. DEMAREST:

Q. How long before the meeting of the Directors that ratified the contract of August 23rd, did you learn of the negotiations between the Hide and Leather Company and the Chase people? A. I would not want to say how long—I knew negotiations were going on for practically some time.

Q. Who conducted those negotiations on the part of the American Hide and Leather Company? A. I don't know.

Q. Didn't you receive the report or the advice upon making this contract from some officer of the company? A. Didn't I what?

Q. Didn't you receive the report or act upon

the advice given by some member of the American Hide and Leather Company that it was advisable to make it? A. On my own advice, my own knowledge of the company. I am connected with it for a long while and I knew the affairs of the company, I knew the condition of it, and the stock we were up against too.

Q. Do you know of any authority given by the Board of Directors to anyone to initiate these negotiations with the Chase Securities Corporation before the plan was finally formulated? A. That the Board of Directors—that certain men should take up negotiations?

Q. Yes? A. I don't remember anything like that. There might have been.

Q. Was your knowledge of the exact terms of the contract of August 23rd, obtained at or before the meeting of the Board of Directors—they authorized that contract on October 21st? A. I knew some of it before, but the exact wording of the contract itself I had at the directors' meeting.

Q. The gist of it you were acquainted with? A. Yes, some of it.

Q. Mr. Thompson, would you be willing to submit to me privately the names of the clients of Livingston and Compnay whose stock your firm voted at the meeting? A. I would be willing to, if the members of my firm consent to it. I would not want to take the responsibility myself, there are six other partners.

Q. If they are willing, will you kindly send them to me by mail? A. If they wish me to, I will. I am frankly willing but I don't think I should without first consulting my partners.

BY MR. WARD: I take it that the defendant maintains that the examination is not as extensive as counsel has examined; that necessarily the limit is as to the matters within the knowledge of the defendant company through its officers, directors or agents; that Mr. Thompson cannot be called upon to testify as to matters within his private knowledge except under the usual process of the court at or before the final hearing in the cause; that this examination is in the nature only as a party to the cause before hearing and that defines the limits of the examination.

BY MR. DEMAREST: I feel that I am entitled to the answer to that question. I don't want to violate any confidence between you and your clients, but I want the record to show that I am not waiving the right to know who those clients of your firm are, and who hold this American Hide and Leather Company preferred stock that was voted only. My inquiry goes no further as to their private business, and if you can furnish, with the consent of your partners, the names of those parties, the matter to be made public no further than is absolutely necessary, I shall be glad to have it. We will insist on an answer to that question on next Thursday.

## Testimony taken before Vice Chancellor.

(December 18, 1924)

IN CHANCERY OF NEW JERSEY.

Between:

GENERAL INVESTMENT COMPANY,

*Complainant,*

and

AMERICAN HIDE & LEATHER CO.,

*Defendant.*

Between:

JACOB B. JOEL, et als.

*Complainants,*

and

AMERICAN HIDE & LEATHER CO.,

*Defendant.*

Transcript of the testimony taken in the above-stated causes, on motion for injunction, at the Chancery Chambers in Jersey City, on Thursday, December 18, 1924, at 10 o'clock in the forenoon, before His Honor

JOHN BENTLEY, VICE CHANCELLOR.

*Testimony taken before Vice Chancellor.*

Appearances:

HUDSPETH & DEMAREST, by
ELMER W. DEMAREST, Esq.,
For General Investment Co.

McCARTER & ENGLISH, by
ARTHUR F. EGNER, Esq.
For Jacob B. Joel and others.

PITNEY, HARDIN & SKINNER, by
JOHN R. HARDIN Esq. and WALDRON M. WARD, Esq.,
For the Defendant.

MR. DEMAREST: I suppose it is my first move. We have given notice to the other side, which I have here, of a motion this morning to amend the bill of complaint. The amendment is based upon the developments in the testimony of Mr. Thompson, one of the witnesses who was to be produced by the defendant; but Mr. Thompson is to go away and we agreed to take his testimony the other day before a stenographer. I have that testimony here now and I will ask that it be filed. As I started to inform Your Honor, the amendment to the bill is based upon the testimony of Mr. Thompson as to what occurred at the stockholders' meeting, and it attacks the validity of the defendant's voting 15,000 shares of the preferred stock which we contend was owned by it and stood in the name of its agents who were employees of the Chase Securities Corporation, which was the agent of the defendant appointed by the agree-

ment of August 13th, 1924. So I have given notice of this motion, and I ask now that Your Honor grant leave to amend the bill. I might say, however, that I have interlined two things in the order to amend, which I don't think counsel will object to: One is on page 3, at the end of paragraph 11, after the words "numbered 1 to 6 inclusive", and I have interlined "Complainant voted against all said propositions"; and in the prayer there is an error where the word "corrected" is used and it should be "counted".

MR. WARD: We don't agree to Mr. Demarest's statement as to the provision of section 37 of the Corporation Act. There is no objection, however to the amendment. It technically ought to be regarded as a supplement to the bill. It is in regard to matters that were brought up after the bill was filed.

THE COURT: I suppose you make no objection to the amendment as a pleading?

MR. WARD: No.

MR. EGNER: I understand that Mr. Ward has a motion to consolidate the causes at this time.

MR. WARD: We ask that the two causes be consolidated, but on the understanding that it is without prejudice to the rights of the complainants in said respective causes to distinct relief and without prejudice to distinct defenses by the defendant in the said respective causes.

MR. EGNER: I might say, Your Honor, that the only possible objection I had in my mind

New Jersey State Library

to the consolidation of the causes was, I didn't want to be deprived of the benefit of waiting until after the meeting of the stockholders. I think it is all right.

THE COURT: It is without prejudice to the rights of the complainants.

MR. EGNER: Otherwise, I don't want the Court of Errors to say that we were premature; that's all.

THE COURT: My understanding is, then, that the defendant submits to this order, on the understanding that the distinctive rights of the parties complainant are to be adjudicated, but all to be done in one decree; is that right, Mr. Ward? I see Mr. Hardin is nodding his head.

MR. WARD: Properly speaking, my idea is that relief should be granted separately and there should be separate decrees, but the court to proceed as if it were one cause so that the testimony will not be duplicated. We agree to that in the terms of the order.

MR. DEMAREST: I will now read the deposition I mentioned a moment ago.

MR. WARD: There are some typographical errors in transcribing the testimony, but I suppose——

MR. DEMAREST: I haven't read it; I don't know. I noticed some misspelled words.

(Deposition read by Mr. Demarest.)

MR. DEMAREST: I presume we are now to proceed with the examination of these witnesses. I will call Mr. Hill.

*Testimony taken before Vice Chancellor.*

GEORGE A. HILL sworn on behalf of the complainants, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Mr. Hill, you are the Secretary and Treasurer of the American Hide & Leather Co. are you not? A. I am.

Q. Did you attend the meetings of stockholders held December 9, 1924? A. I did.

Q. Mr. Clarence H. Venner was present at that meeting, was he not? A. He was.

Q. Representing common stock held by him individually and also representing the General Investment Company? A. Yes, that is correct.

Q. Did Mr. Venner call for the minute-book, containing a record of the meetings of the directors and the executive committee? A. He did.

Q. This request was at first refused, was it not, by the Chairman of the meeting? A. No, sir; I understood it was never refused; he was told that it would be granted at the time it would be in order to present the minutes; that it had not yet arrived in the usual order of procedure.

Q. You don't remember any refusal? A. I do not remember that he was refused it.

Q. You remember Mr. Venner demanding the production of those minutes as a matter of right, do you not? A. Yes.

Q. And was that not after the first request for the production of those minutes was made? A. I think it was.

Q. You produced some minutes, upon the second demand, did you not? A. I produced all the

minutes that were germane to the meeting; yes, sir.

Q. But you stated that only extracts of the minutes were present and the minutes of all the meetings were not present, did you not? A. You mean by that, all meetings of the stockholders that had ever been held?

Q. Of the metings of the executive committee and directors. A. That had ever been held?

Q. No, that had been held during the year 1924. A. That request was not made of me until after the minutes had been presented, and then I told him that we had presented the minutes of the meetings of the directors of September 9 and October 21, and the meetings of the executive committee that had occurred at that time.

Q. Well, you did not present all the minutes of the meetings of the executive committee and the board of directors held during 1924, did you? A. No; I never do present more than the minutes that are approved at that meeting.

Q. Have you them here this morning? A. I have the same minutes that I had on December 9.

Q. You have not produced the missing minutes? A. No; I didn't understand that was the request.

Q. The minutes of all meetings prior to October 21 were removed from the book? A. Yes, from this holder that I carry with me.

Q. When did you extract those minutes that were not produced? A. I don't remember the date, but just prior to the meeting. This is a folder in which I keep the minutes between the anuual minutes of the stockholders, and when I attend the stockholders' meetings I exclude all

those that have been passed upon or that are not germane to the meeting.

MR. HARDIN: Anything that has to do with this matter you are welcome to. There's no use having any misunderstanding about this thing; there is no occasion for sharp practice here.

A. (continuing) Could I send over and get them?

Q. Yes, after the examination I will ask you to do that.

MR. HARDIN: We have got all the minutes here that relate to this subject.

MR. DEMAREST: All of them?

MR. HARDIN: Yes; and had them at the meeting also. I don't see any use in exploiting all the business of the directors and the company's business on this occasion.

MR. DEMAREST: You are anticipating something you don't need to anticipate.

THE COURT: Suppose you continue with your examination of this witness and then call for the production of whatever you want.

Q. Mr. Hill, do you know whether any payment has been made to the Chase Securities Corporation or to anyone else, on account of the purchase of 15,000 shares of preferred stock, under the contract of August 13th, 1924? A. You mean by the American Hide & Leather Co.?

Q. Yes. A. No; I know there has not been such a payment made.

Q. Has anyone made the payment to the Chase Securities Corporation for the American Hide &

Leather Company? A. I don't believe anybody has, because I can't conceive of any reason why they should do it, and I don't know of anybody that would do it.

Q. Has the $25,000 mentioned in the contract of August 13, 1924, to be paid to the Chase Securities Corporation for its services acting as agent, been paid? A. It has.

Q. When was that paid? A. I think it was on August 13th, the date of the agreement.

Q. Paid by The American Hide & Leather Company? A. Yes, sir.

Q. Out of what account? A. What do you mean by "out of what account"? To what account was it charged?

Q. Yes. A. It will be charged to the general expense of conducting the business.

Q. Not deducted from the surplus of the company? A. No, sir.

Q. Haven't any of the overhead charges of the Chase Securities Corporation, mentioned in the agreement of August 13th, been paid? A. Not by the American Hide & Leather Company, not one cent.

Q. Have the fees of the attorneys of the Chase Securities Corporation for legal advice and services to be performed, been paid by the American Hide & Leather Co.? A. They have not.

Q. Nothing has been paid on account of those items? A. No, sir; I know that.

Q. Have you received any bills from either the Chase Securities Corporation for these overhead charges, or from their attorneys? A. No, sir; the company has not received any such bills and do not know of any.

Q. So that those two items are uncertain? A. They are unknown to me and to anyone in the administration.

Q. Has any note been given by the American Hide & Leather Company to the Chase Securities Corporation? A. No, sir.

Q. Has the American Hide & Leather Company borrowed any money from anyone, for the purpose of carrying out the contract of August 13th? A. They have not, not a dollar.

Q. Do you know of any agreement other than that of August 13th. which is contemporaneous with or supplemental to that agreement, respecting the purchase of those 15,000 shares of stock? A. No, Mr. Demarest; I can say most positively there is no such agreement with anybody. The conditions are all mentioned in the agreement.

Q. Do you know when the first purchase of this block of 15,000 shares of stock was made by the syndicate? A. No. We would have no way of knowing that.

Q. Do you know the price at which they were purchased? A. I only know what I have been told as to the range of prices and the average price.

Q. Do you know what price the first stock was purchased by the syndicate? A. No, I do not.

Q. You remember that the agreement of August 13th provides that the Chase Securities Corporation was to render frequent reports of their operation under that agreement, do you not? A. Yes.

Q. Have they done that? A. I believe they have, yes.

Q. Well. didn't you, as Secretary of the company, get those? A. No, I did not.

Q. Whom were they given to? A. I would have to guess to whom they were given, or tell you as a matter of opinion; and you will bring that out in other testimony, anyway, will you not?

Q. But they weren't given to you as Secretary? A. They were not given to me. I would like to confine myself to the things I know of.

MR. WARD: If you are merely seeking to ascertain the price at which the stock was purchased—

MR. DEMAREST: I want to know when the first stock was purchased and when the last purchase was made.

THE COURT: This witnes says he doesn't know and doesn't want to guess at it.

Q. Do you know when the last stock of the 15,000 shares was purchased? A. No, I don't know.

Q. Have you the statements of the Chase Securities Corporation with you this morning of the purchase and the price at which the stock was obtained? A. No, I have not, Mr. Demarest.

MR. HARDIN: Since the meeting the other day of the American Hide & Leather Company it has received statements from the Chase Securities Corporation which has the information that Mr. Demarest wants. This witness is not acquainted with them.

Q. Do you know whether the syndicate has sold any of the preferred stock that it purchased in the market? A. Mr. Demarest, I don't know their operations at all, excepting as I get them by hearsay.

Q. Well, have you heard that they sold it? A. I heard that they have sold some, yes.

Q. You heard that they were selling that stock since August 13, 1924? A. Yes, under the terms of the agreement.

Q. Under the terms of the agreement? A. The agreement provides for that.

Q. Now, what was the purpose if the Chase Securities Corporation was to obtain in the open market 15,000 shares of this preferred stock for the American Hide & Leather Company that they should also sell stock? A. Mr. Demarest, that is foreign to the leather business; I don't know that; I don't know why they would do it excepting by conjecture, and you can do that as well as I can.

(Mr. Hardin hands counsel a paper.)

MR. DEMAREST: That isn't what we want, Mr. Hardin. What we want to know is when they first purchased stock, when they last purchased stock, and the price at which the stock was purchased.

Q. Do you know whether any shares of preferred stock in excess of 15,000 shares have been purchased by the Chase people for the account of the American Hide & Leather Company? A. I do not know it.

Q. Do you understand that there have been? A. I understand that there have not been.

Q. Have you had any correspondence with the Chase Securities Corporation since this agreement of August 13th has been in operation? A. No, none at all.

Q. None at all? A. None at all.

Q. So that you, as the Secretary and Treasurer of the Company, have in your possession no reports from the Chase Securities Corporation as to what they have done under that agreement of August 13th? A. I have nothing. You stated it correctly; I have nothing.

DIRECT EXAMINATION BY MR. EGNER:

Q. I note that paragraph B of the agreement of August 13th, with the Chase Securities Corporation, provides:

> "That as soon as such Account has acquired 15,000 shares of such preferred stock at an everage cost of not to exceed $65.00 per share, or in case you should conclude in your unrestricted judgment that it is not likely that such Account will be able to obtain additional shares of such stock at a price sufficiently low to justify said Account in continuing its market operations, you notify the company accordingly—"

and then the meeting will be called. Was any such notice given to you by the Chase Securities Corporation? A. I think people were delegated who received that information, and did receive it, yes.

Q. And then a meeting of the stockholders was called, in pursuance of such notice?

MR. HARDIN: Are you sure that you understood the question?

A. I understood the question this way, that I was asked if any communication had been submitted to the company.

MR. HARDIN: That isn't what he asked. You were asked whether you received that particular notice or not.

THE COURT: Suppose you let Mr. Egner examine him further.

MR. EGNER: I think the witness is very intelligent.

MR. HARDIN: If he understands the question.

THE COURT: Now, gentlemen, I shall have to insist that all arguments be addressed to me and not to one another.

MR. EGNER: Perhaps I had better reframe the question.

THE COURT: These questions may be stricken out, from that long question on.

Q. Mr. Hill, you are, of course, familiar with the agreement of August 13th, with the Chase Securities Corporation; now, referring particularly to paragraph B of that agreement it provides, does it not, that unless the account has acquired 15,000 shares of the preferred stock, or in case the Chase Company concludes that it cannot obtain that number of shares at a sufficiently low price, that they are to notify the defendant company and that a meeting of the stockholders is to be called within ten days after the notice; now, my question is this: Was any notice, either written or oral, pursuant to the provisions of that paragraph B of the agreement? A. It was given orally, yes.

Q. And to whom was that notice given? A. I believe it was given to Mr. Douthit.

Q. In what office? A. He is a member of the executive committee.

Q. Were you present when that notice was given? A. I was not.

Q. And was a meeting of the stockholders, in fact, called within ten days after the giving of that notice? A. I couldn't answer that intelligently.

CROSS EXAMINATION BY MR. WARD:

Q. Mr. Hill, are the certificates of stock of the 15,000 shares purchased by the Chase Securities Corporation in your possession as Secretary or Treasurer of the American Hide & Leather Company? A. They are not.

Q. Have certificates to that amount been tendered or delivered to you by the Chase Securities Corporation? A. They have not.

Q. Mr. Hill, referring to the demand of Mr. Venner at the meeting of December 9th, for certain minutes, I ask you whether this is a correct transcript of what happened at that time on that point:

> "MR. VENNER: I would like to have the minute book of this corporation produced. I wish to examine it, to see whether there are any minutes in that book bearing upon the questions to be submitted at this meeting which have not been presented in this notice to the stockholders."

To which the Chairman of the meeting is supposed to have replied as follows:

> "At this time we will not turn over to Mr. Venner the minutes of this company; in due

time we will present to the stockholders for inspection the minutes of the executive and directors' meetings pertaining to this."

Did Mr. Venner make that request and the Chairman of the meeting make that response? A. According to my best memory, I would say yes, that is so.

Q. Did you thereupon produce certain minutes of the directors? A. You mean immediately? I did during the meeting.

Q. Within a short time? A. Yes.

Q. Which minutes were those? A. The minutes of the directors' meeting of September 9 and October 21, and the minutes of several meetings of the executive committee.

Q. And had you gathered together those minutes as being the only minutes pertaining to the subject matter of the meeting? A. Yes, it was a complete record and, therefore, contained all pertaining to the meeting.

Q. And those minutes you have with you at the present time? A. I have them here this morning; yes, sir.

Q. Will you please testify what minutes you have by referring to them. A. The minutes of the meeting of the Board of Directors of September 9, 1924; October 21 1924; minutes of the meeting of the Executive Committee of July 14, 1924; August 4, August 6th, August 11th, August 13th, August 26th, September 22, October 16, October 20th, and December 1st.

Q. All in 1924? A. All in 1924.

*Testimony taken before Vice Chancellor.*

JOHN C. LILLY sworn on behaif of the complainant, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

MR. DEMAREST: We wish all the minutes of the meetings of the Executive Committee of the defendant company, for the year 1924, that were not produced at the meeting last week and that are not here today.

MR. WARD: What is the pertinency of this examination? Why should the record be burdened with the production of all the transactions of the company during the entire year?

THE COURT: What do you say, Mr. Demarest?

MR. DEMAREST: Why, we at least have the right to check them up; we want to see those minutes. We are not endeavoring to find out any other matter than that before Your Honor, but we wish to have those minutes and find what led up to the negotiations and the contract of August 23rd; and we would like to see what those minutes say on this plan.

MR. HARDIN: The minutes do not say anything.

MR. DEMAREST: We have a right to check that up.

THE COURT: I suppose you have. But, as I understood counsel, and the witness also assured you that they have now produced all the minutes that relate to this plan of reducing the capitalization. Is it your idea that, out of an abundance of caution, you ought to examine all the other minutes?

MR. DEMAREST: We would like to have any reference to these negotiations in those minutes. I know they say we have all the minutes that refer to this matter, but we would like to know that for ourselves. Mr. Venner, my client here, points out something to me, that the first minutes that are produced here are for October 21st. Now, this contract was made in August last.

THE COURT: No, no, early in July

MR. VENNER: No, the directors' meeting.

MR. HARDIN: The Executive Committee meeting minutes in July are here with reference to this subject Perhaps this matter can be laid aside until they are through examining the witnesses; they will then have the data before them. I want to say, there is not the slightest disposition to withhold anything that may, directly or indirectly, refer to this subject. In good faith we have endeavored to produce all of the minutes—and we did at the stockholders' meeting the other day—that bear on this subject—the minutes of the Directors, and they are here; and it seems to me unnecessary at this time to go into all the other records of the company, especially with the assurance that counsel has made. After they have examined this gentleman if they still think they ought to make a spy-glass search, we will produce them.

MR. DEMAREST: All right.

THE COURT: That seems to be perfectly agreeable, and it may obviate the entire demand.

Q. Mr. Lilly, what office do you hold in the American Hide & Leather Company? A. President.

Q. Are you a member of the syndicate known as the Chase Securities Corporation? A. I am not.

Q. Did you attend and preside at the meeting of the stockholders of the American Hide & Leather Company, held on the 9th of December, instant? A. I did.

Q. Were you one of the persons named in the proxies sent out to all the stockholders of the American Hide & Leather Company to vote at that meeting? A. I was.

Q. And did you, under those proxies, vote the stock that you were authorized to vote? A. I did.

Q. Now, among that stock were 15,000 shares of preferred stock in the names and amounts as follows, were there not:

| | | |
|---|---|---|
| George D. Casterline, | 61 B'way, | 1,000 shares |
| Harry S. Burrows, | 61 B'way, | 2,000 shares |
| Henry Hargraves, | " | 2,000 " |
| George Holzmann, | " | 2,000 " |
| John J. Schomp, | " | 2,000 " |
| William H. Seamon, | " | 2,000 " |
| Raymond S. Wilson, | " | 2,000 " |
| Henry A. Noll, | " | 2,000 " |

making a total of 15,000 shares. Did you vote the stock of these people and the amounts that I have read? A. Yes, that stock was voted.

Q. Where are these stockholders that I have named employed? A. That I cannot tell you.

Q. Do you know whether they are employees of the Chase National Bank or the Chase Securi-

ties Corporation? A. I don't know a thing about it.

Q. This is the stock, however, that was acquired by the Chase Securities Corporation under its contract with the American Hide & Leather Company, dated August 13th last, is it not? A. This particular stock that you have reference to? I don't know. As a member of the Proxy Committee, I voted the stock represented by the proxies sent in which were considered to be correct.

Q. Mr. Venner challenged the voting of that stock at the meeting held December 9th, on the ground that is was the 15,000 shares of stock mentioned in that agreement of August 13th, did he not? A. Mr. Venner challenged a particular block of stock. I don't recall the names that you brought out as representing that stock.

Q. He challenged it upon several occasions during the meeting, did he not? A. Several times.

Q. In fact, upon every vote that was put, did he not? A. Yes.

Q. Who passed upon the challenge that was made by Mr. Venner? A. Who passed upon it?

Q. Yes. A. I did.

Q. The inspectors of election did not pass upon the challenge, did they? A. The inspectors of election passed upon the by-laws, yes.

Q. Did they pass upon the challenges that Mr. Venner made to the voting of this stock? A. Yes.

Q. Are you sure of that? A. I feel quite sure.

Q. Do the minutes show it? A. I don't know whether they show it or not.

Q. Didn't you, as Chairman and President of the company, overrule Mr. Venner's objection when it was stated? A. Yes.

Q. Whom was it overruled by, you or the tellers? A. It was overruled by me.

Q. How was that stock, voted on these propositions, submitted? A. How was the stock voted?

Q. Yes, how was this 15,000 shares of stock voted?

THE COURT: For or against?

MR. DEMAREST: Yes, for or against the plan.

A. The stock, to my recollection, was voted for the plan.

MR. HARDIN: I am willing to go further and concede that the list of shares Mr. Demarest has read are Chase shares. I assume that is so; he has said so. If you say that 15,000 shares represents the stock I will concede that the proxy was termed a proxy and it was not a discretionary proxy.

THE COURT: Does that cover what you wanted to show?

MR. DEMAREST: I think so.

Q. Now, how many shares of the common stock were outstanding on the 9th of December? A. I don't know.

Q. Don't you know the total number of shares? A. No.

Q. Do you know approximately? A. I couldn't say. I would just be guessing at it.

MR. EGNER: Can't we stipulate that, Mr. Hardin?

MR. HARDIN: Sure.

MR. DEMAREST: All right, just put in how many shares were outstanding at that time.

MR. WARD: There were outstanding 130,000 shares of perferred stock, of which 4517 shares were held under the terms of a contract made many years ago for the benefit of the American Hide & Leather Company, except the matter, as a conclusion of law, they would be disbarred from voting.

MR. DEMAREST: Now the common stock, Mr. Ward.

MR. WARD: There were outstanding 115,000 shares of common stock of the defendant company on that date, less, subject to correction, 2259 shares of common stock held in the treasury of the company, under the same principles as the 4517 of preferred stock.

MR. DEMAREST: And the 2259 shares of common stock that you have mentioned voted?

MR. WARD: Said shares were not voted or any of them.

Q. Now, Mr. Lilly, the number of shares of common stock which were counted at the stockholders' meeting in favor of the various resolutions that were declared to pass, were 88,645, was it not? A. Just about, yes.

Q. And the number of shares of preferred stock that were similarly reported were 91,920? A. Yes.

Q. Do you know of a block of twenty odd thousand shares held by the firm of Livingston & Company?

MR. VENNER: Preferred stock.

A. I don't know a thing about it.

Q. Do you know who Livingston & Company are? A. I know they are brokers, yes.

Q. Do you know Mr. Frederic Thompson? A. Yes.

Q. Is he a director of the American Hide & Leather Co.? A. He is.

Q. And also a member of the firm of Livingston & Company? A. I believe so.

Q. Has he any connection with the so-called syndicate? A. I don't know what connection he has, if he has any. I don't believe he has. I don't know a thing about it.

Q. Did you vote that twenty odd thousand shares of stock held by Livingston & Company by proxy? A. That stock was voted by proxy.

Q. Who signed the proxy? A. The Proxy Committee.

Q. Who signed the proxy that authorized you to vote it?

MR. HARDIN: Produce it, Mr. Hill.

Q. Have you got it there? A. No.

MR. HARDIN: We will concede that Livingston & Company signed it.

Q. Do you know that Livingston & Company were not the owners of that stock, but that it belonged to purchasers of that concern who had purchased the stock on margin and they had given the certificates over to Livingston & Company as collateral for a loan?

MR. HARDIN: We will concede that that stock was assigned to Livingston & Company;

and, furthermore, that Livingston & Company were stockholders of record.

MR. DEMAREST: I am asking him whether he knew that the clients of Livingston & Company for whom the stock was purchased, were not the owners.

MR. HARDIN: You can ask him all you please but I can tell you that the Livingston & Co. proxy represented the shares outstanding on the books in the name of Livingston & Company.

MR. DEMAREST: Are you sure of that, Mr. Hardin?

MR. HARDIN: Yes.

THE WITNESS: Yes.

Q. (Question read by the stenographer.) A. I do not.

Q. How was that twenty odd thousand shares of stock voted by the proxy-holders? A. In favor of the plan.

Q. Has any money been paid by the American Hide & Leather Company to the Chase Securities Corporation on account of the stock purchased under the contract of August 13th? A. Not to my knowledge.

Q. Did you receive reports from time to time from the Chase Securities Corporation, showing the dates and prices at which this stock was acquired? A. I did not.

Q. Have you ever received any reports from Livingston & Company— A. Never.

Q. —stating when and at what prices they bought stock under that contract?

MR. HARDIN: You don't mean Livingston & Co.

MR. DEMAREST: No, I mean the Chase Securities Corporation.

A. I have not.

Q. Has the $25,000 mentioned in the contract of August 13th been paid to the Chase Securities Corporation? A. I belive it has.

Q. Do you know of any other sum of money that has been paid on account of this plan, by the American Hide & Leather Company to the Chase Securities Corporation? A. I do not.

Q. Do you know whether the syndicate, since August 13th last, has sold stock, as well as purchased stock? A. I do not.

Q. I mean the Chase Securities Corporation. A. Yes.

Q. You don't know anything about it? A. I know nothing about it.

Q. You know the contract between the American Hide & Leather Company and the Chase Securities Corporation provides that the latter may maintain a trading account and make sale of stock of the American Hide & Leather Company, as well as purchase, do you not? A. I know that was a part of the contract.

Q. What was the purpose of that clause? A. The Executive Committee decided to appoint one man to handle that transaction.

Q. Who was he? A. Mr. Douthit. They knew that the President of the Company had enough duties to perform running the company without the details of this plan. I am not familiar with

the plan except from reports Mr. Douthit at times has mentioned.

Q. So you, as President of the American Hide & Leather Co., don't know why the contract permitted the Chase Securities Corporation to sell stock as well as purchase. A. I do know as a member and as President of the Company what the purpose was. It was to benefit the stockholders. The reason for that was, if they knew that we had bought the stock they would run the market up. They were allowed to buy the stock on as low a basis as they possibly could and to turn it over to the company. That is my thought as to the intention of that part of the contract.

Q. Do you know when the first stock was purchased? A. I do not.

Q. Do you know at what price the first stock was purchased? A. I do not.

Q. Do you know when the last stock was purchased? A. I do not.

Q. Nor the price? A. I know the average total price.

Q. No, at what price, and when? A. I do not.

Q. The last stock was purchased? A. I do not.

Q. Are you a member of the Executive Committee of the American Hide & Leather Company? A. I am.

Q. Chairman of that Committee? A. Chairman of the Board.

Q. And have you attended the meetings of the Board of Directors and all meetings of the Executive Committee since this plan of acquiring stock was first started? A. I have.

Q. So that you are aware of all proceedings that

were taken by the Board of Directors and the Executive Committee of the defendant company? A. I am.

MR. WARD: At the request of counsel for complainant, the minutes produced this morning by Mr. Hill, the Secretary, are submitted to complainant for inspection.

THE COURT: You mean the minutes that he produced upon the stand?

MR. WARD: Yes, sir, and that he identified.

Q. Do you know of any contract contemporaneous with or supplemental to the contract of August 13, 1924, between the defendant company and the Chase Securities Corporation? A. No, I do not.

Q. Neither verbal nor written? A. No.

Q. Do you know whether any preferred stock of the defendant company in excess of the 15,000 shares, has been acquired by the Chase Securities Corporation? A. I do not.

CROSS EXAMINATION BY MR. WARD:

Q. Mr. Lilly, at the stockholders' meeting of December 9th how many shares of the preferred stock were counted as voting against the resolutions? A. That I cannot answer. It is just a few hundred.

Q. Do you recall whether it was 418 shares?

MR. DEMAREST: Put it in if you have the figures there and we will consent to it.

MR. WARD: Counsel are agreed that at the stockholders' meeting of December 9th 418 shares of preferred stock voted against the

resolution offered on the adoption of the plan, and holders of 200 shares of common stock voted against the same resolution.

MR. EGNER: Will it also be stipulated that prior to the voting upon these resolutions and the amendment counsel for the complainant in the suit of Jacob B. Joel and others, made a formal protest on behalf of their clients, their clients being the owners of 1200 shares of the preferred stock of the defendant company?

MR. WARD: I am afraid I canot stipulate to that in that form, Mr. Egner; but defendant admits that Mr. Egner made a protest on behalf of the complainant Joel holding 1200 shares of stock in all. That number of shares of preferred stock, however, was not cast against the resolution.

THE COURT: I suppose did not vote at all.

MR. EGNER: Did not vote at all except as to 200 shares of that stock that voted against it and 1000 did not protest.

THE COURT: 418 were common stock?

MR. WARD: 418 votes of preferred stock were cast against the plan, as I understand it, and 200 of them were voted by Mr. Egner, and the other shares did not vote.

MR. HARDIN: I would like Mr. Demarest to stipulate whether the proxies used at this meeting were uniform, the same proxy being used by Mr. Lilly, of the Proxy Committee, throughout. I want to show that there was no variation in the proxies, so that when Your Honor sees the proxy you will see the in-

structions to stockholders; that the proxies constituted a mere agency of the stockholders to do certain things.

MR. DEMAREST: Yes, we will agree to that.

Q. Mr. Lilly, you were present at a meeting of the Board of Directors held on October 21, 1924, were you not? A. Yes.

Q. And you presided at that meeting, did you not? A. Yes, I did.

Q. Now, do you remember a resolution, which I shall now read, being offered:

> RESOLVED, that the officers of the company be, and they hereby are, authorized to remove the office of the company heretofore maintained in New York City to Boston, Mass., and to make such disposition of the lease held by the company of its New York offices at 92 Cliff Street, as to such officers may seem advisable; and also to make and enter into a lease for such space and make any and all other arrangements as may be necessary or, in their judgment, advisable for the maintenance of the office of the company in Boston.

Do you remember that? A. I remember it; yes.

Q. Was that motion carried? A. I believe it was, yes.

Q. (Reading from Minute Book):

> On motion, duly seconded, it was Resolved, that the President and Treasurer of the company be, and hereby are, authorized to cause to be incorporated a corporation under the laws of the State of New York, and under the name of American Hide & Leather Company,

Inc., or such other appropriate name as may be decided upon by said officers, with such capitalization and other conditions and provisions as counsel may advise, and that upon the completion of the organization of said corporation said officers be, and hereby are, authorized to sell, convey and transfer to said corporation, all of the assets and property of this company, both real and personal, then located in the State of New York, in consideration of and in return for capital stock of said corporation of the total value if such stock have par value of said property and assets as now carried on the books of this company; and for that purpose, that said officers be, and hereby are, authorized to sign, execute, attach the corporate seal to and deliver in the name and for and on behalf of the company, such deeds, assignments, and or other instruments of transfer and conveyance as may be necessary to fully transfer and convey good title to such property and assets to such new corporation.

I will read further:

FURTHER RESOLVED, that upon the completion of the organization of said corporation and the conveyance and transfer to it of said property and assets, the proper officers of this company be, and hereby are, authorized to sign, execute, and file such instruments in writing as may be necessary and as counsel may advise, for the purpose of surrendering the authority of this company to do business in the State of New York, and that upon the filing of such instrument this company withdraw from all business activities in the State of New York, except such as may be, in the judgment of the officers of the company, desirable and as may be safely carried on by a foreign corporation in the

State of New York having no certificate of authority to do business in said State.

FUTHER RESOLVED, That the officers of the company be, and they hereby are, authorized to take such steps and to execute such other instruments in writing as may be necessary or advisable in order to fully carry out and effectuate the provisions and purposes of this resolution.

Was that resolution offered at that meeting? A. Yes.

Q. And adopted? A. Adopted.

Q. Was any notice of that resolution, or the object of that resolution, given to the stockholders of the American Hide & Leather Company?

MR. HARDIN: I can't see how this is related at the present time to anything we are concerned with.

THE COURT: I have been wondering myself.

MR. DEMAREST: I think it is pertinent on two grounds: The stockholders were given by this corporation absolutely no notice whatever of this extensive plan of reorganization and recapitalization, or the intended purpose of this company to change its entire organization and turn over its assets to a new corporation. That is one reason.

The other is, that among the resolutions passed at that meeting was an omnibus resolution, ratifying all the proceedings of the Board of Directors and of the Executive Committee, and that resolution was passed, and yet the very minutes that were intended to be ratified by the resolution is just what I have

read here. I think it is pertinent to show that there was a scheme that affected this recapitalization plan that was offered to the stockholders which the stockholders had the right to be apprised of and was withheld from them. Is certainly entered into the "advisability", as Mr. Hardin says, of this plan.

MR. HARDIN: No, it isn't related to this plan; it doesn't change a single dollar of assets of the American Hide & Leather Company. It has nothing to do with the matter before the court.

THE COURT: As I followed the language of the resolution, it provided merely for the changing of the locus of the corporation.

MR. HARDIN: That's all.

MR. DEMAREST: It goes much further than that. They can transfer all their property and their right and title——

MR. HARDIN: In New York.

MR. DEMAREST: And the business is to be carried on in Boston.

THE COURT: No, the New York business I thought was to be carried on in the state of New York by this company.

MR. DEMAREST: I think that is only optional, the way the resolution reads. It looks to me as though it permitted them to sell out the entire assets of the present corporation. If so, it has a direct bearing upon the recapitalization that they are offering at this time.

MR. HARDIN: I doesn't change the beneficial ownership of a dollar of the assets of the American Hide & Leather Company.

MR. DEMAREST: That is for the court to determine. It seems to me it does.

* * * * *

THE COURT: I am going to sustain the objection at this time; but if you insist that you would like to have more opportunity to examine that question I will permit you to reopen it later on.

MR. DEMAREST: May I take up another witness now? There may be some other matters that I might wish to examine Mr. Lilly about after I examine this resolution further.

MR. HARDIN: I have another question or two to ask Mr. Lilly.

Q. (Cross-examination resumed by Mr. Hardin): Mr. Lilly, let me ask you whether you recall being present at the meeting of the Executive Committee on August 6, 1924, at the office of J. & W. Seligman & Co. A. Well, yes.

Q. The minutes state that you were absent; have you any recollection of that? A. Why, I was absent from one of the meetings during that time and that is perhaps the meeting of the 6th of August.

MR. DEMAREST: I think we can stop where we are. We will now hand over Mr. Venner for examination by the other side, if they wish to examine him, except I might want to ask Mr. Lilly and Mr. Hill about some matters after we have examined these minutes.

MR. WARD: Do you intend to examine Mr. McLanahan and Mr. Douthit?

MR. DEMAREST: I don't think so. If we do later I will now reserve the right to call them.

MR. WARD: I don't want the matter left in that shape. Mr. McLanahan and Mr. Douthit are both here now, and if the other side wish to examine them they should exercise that privilege now.

MR. EGNER: I don't wish to examine them.

THE COURT: Then the complainants rest, with the exception of reserving the right to examine Mr. Lilly and Mr. Hill further. Mr. Demarest, if you wish a short time to confer and determine whether or not you are going to put in any more proofs you can take that now.

MR. DEMAREST: No, I think we have what we want here. The other testimony will only be repetition.

THE COURT: Mr. Ward, have you any proofs to submit?

MR. WARD: We have some affidavits.

MR. DEMAREST: Do you want to examine Mr. Venner, Mr. Ward?

MR. WARD: If we have that right. Shall I read the affidavits, if the court please?

THE COURT: If you are sufficiently familiar with them to give me the contents of them I would prefer to have you do that; if not, you may read them.

(Mr. Ward reads the affidavit of Mr. Downing, Mr. Douthit, also the affidavit of Mr. Hill relating to formal matters, which contains copy of by-laws and copy of certifi-

cate of incorporation; also statement of the net earnings from 1921 to 1923, which also sets forth the net result of the vote of the stockholders' meeting of November 9. 1922. Also an affidavit by the Assistant Secretary of the Chase Securities Corporation, setting forth the fact that Mr. Tinker, the President of the corporation, is to sail for Europe on November 29 an a business trip, and that he is still in Europe).

MR. WARD: If the court please, these affidavits are entitled *"General Investment Company vs. The American Hide & Leather Company,"* and they are offered in this manner because the cases have been consolidated.

DEFENDANTS REST.

MR. DEMAREST: I would like to recall Mr. Lilly for a few questions.

---

JOHN C. LILLY recalled on behalf of the complainants, testified as follows:

DIRECT EXAMINATION BY MR. DEMAREST:

Q. Mr. Lilly, from examination of the minutes it appears that the first meeting of the Executive Committee relative to the proposed plan of the corporation to retire this stock, was held on August 11th; is that right? A. I couldn't answer that from memory.

Q. (Counsel showing witness the minute book) It says, at the Midday Club, in Broad Street, New

York. Now, had there been any formal notice of that meeting given to members of the executive comittee? A. I presume so. We have formal notice of all meetings. The Secretary will answer that.

Q. And at that time there was offered a plan for the recapitalization of the company (showing book to the witness)? A. Yes.

Q. Now, two days later the next meeting of the executive committee was held, was it not? A. Yes.

Q. On August 13th? A. That is correct.

Q. At the office of J. & W. Seligman & Co.? A. Yes.

Q. Who are they? A. They are bankers in New York. They were kind enough to loan us their board room on that day.

Q. And a resolution was passed at that meeting, authorizing the President to make arrangements with the Chase Securities Corporation, 61 Broadway, for the purchase by the company for said corporation, and so forth, of this 15,000 shares of stock, was there not? A. Yes.

Q. Then you were the agent of the corporation authorized to carry on these negotiations? A. As President of the company and presiding officer at the meeting, I was delegated to sign the arrangement, yes.

Q. Well, you were delegated to do just exactly what the resolution said, were you not? A. Yes.

Q. Is there any resolution in this book that authorizes Mr. Douthit to carry on these negotiations with the Chase people in your stead? A. I couldn't answer that. I don't know what is put in the book there.

Q. Did you go to the Chase Securities Corporation in advance to fix the terms of the contract of August 13th? A. I did not.

Q. And have you had any negotiations with them personally in regard to this plan since? A. No.

MR. WARD: We have figures here that have been submitted by the Chase Securities Corporation to members of the Executive Committee, showing the carrying charges and expenses up to December 9, and if counsel for the complainants desire them, we would be very glad to put them in the record.

THE COURT: I want to take a recess of four or five minutes and that will give you an opportunity to see what disposition you want to make of that.

(The cause was then argued and briefs to be submitted.)

## Defendant's Affidavit on Rule to Show Cause.

(Filed December 18, 1924).

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*against*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } SS.:

HENRY G. FAHLBUSCH, being duly sworn, according to law, on his oath, says:

I am Assistant Secretary of Chase Securities Corporation, having its principal office at 61 Broadway, Borough of Manhattan, City and State of New York.

Mr. Edward R. Tinker, President of said Chase Securities Corporation, sailed for Europe on the White Star Line, SS. Majestic, on November 29, 1924, together with three members of his organization on important business in accordance with plans made a considerable time previously

and Mr. Tinker is still in Europe.

HENRY G. FAHLBUSCH.

Sworn to before me this
17th day of December, 1924

R. S. Wilson
Notary Public, Queens Co.,
Certificate filed in
Queens County Clerks No. 8782
New York County Clerks No. 573
Registered No. 5438
Kings County Clerks No. 113
Registered No. 6116
Commission expires March 30, 1925.

*Defendant's Affidavits on Rule to Show Cause.*

**Affidavit of Claude Douthit.**

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*against*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } ss.:

CLAUDE DOUTHIT, being duly sworn, according to law, on his oath says: I am, at present, temporarily residing at No. 108 East 82nd Street, New York City, State of New York.

Since March 5th, 1924, I have been a director and member of the Executive Committee of the Board of Directors of American Hide and Leather Company, the above named defendant herein.

For the past twelve months I have devoted practically all of my time to the business of said Company, chiefly since becoming a member of the Executive Committee, in connection with its financial affairs and in assisting in the preparation of the Plan for the Readjustment of the Capitalization of the Company, embodied in the resolutions adopted by the stockholders at the special meeting held on December 9th, 1924.

I am thoroughly familiar with the conditions which led up to the formulation of said Plan

and with its development and have personally carried on practically all of the negotiations on behalf of the Company with the bankers and others whose assistance was necessary in the carrying out of the Plan.

Annexed to the complainant's moving papers herein is a copy of the circular letter sent to the stockholders of the Company with the printed notice of the special meeting held on December 9th, 1924. For the sake of convenience, a copy is also attached hereto. This circular letter correctly states the capitalization of the Company and briefly the results which will be accomplished through the consummation of the Plan. As will be shown from this letter, unpaid dividends on $12,548,300 of outstanding Preferred Stock of the Company have accumulated to the extent where they now amount to approximately 140% of the par value thereof, or $17,567,620. For many years the directors of the Company have endeavored to devise a satisfactory plan for the funding or settlement of these unpaid dividends. It appears from records of the Company and its counsel, which I have examined, that no less than five different Plans have been proposed to the officers and directors of the Company during the past five or six years, but it was not until the past summer that, after much study, a Plan was formulated which proved to be satisfactory to the directors, counsel and bankers for the Company and which accomplished to a substantial extent, at least, the elimination of a very large portion of the burden of these accrued dividends. This is the Plan which is now attacked by the complainant herein, and which was approved at the

Special Meeting of the Stockholders held on December 9th, 1924, by holders of 91,920 shares of Preferred Stock and the holders of 88,645 shares of common stock, only 418 shares of Preferred Stock and 200 shares of Common Stock having voted against it.

Except for the unusual and extraordinary earnings of the Company during the "war period", that is, from 1915 to 1920, inclusive, and for the years 1901, 1909 and 1922, the Company, in its 25 years of existence, has never earned in any year, enough to pay the full dividend of 7% on its Preferred Stock. A statement of the net earnings of the Company, since its organization, is attached hereto, marked Exhibit "A".

In the opinion of the Board of Directors it was therefore, deemed improbable that the Company should, in the future, be able to earn enough to pay anything—or at the most, very little—on account of the accumulated dividends. Furthermore, this large and increasing dividend liability constitutes an obstacle in the way of any new financing or expansion by the Company and is a large factor in putting the capital liability of the Company grossly out of proportion to its earning power.

To meet this difficulty, the proposed Plan for the Readjustment of the Capitalization, eliminates by the purchase of 30,000 shares of the Preferred Stock, $3,000,000 of capital liability, and $4,200,000 of accrued dividend liability, and further, by the proposed exchange of $3,500,000 of new 8% Prior Preference Stock for $3,500,000 (or more) of Present Preferred Stock, eliminates $4,950,000 of additional accumulated dividend

liability, or a total of capital and dividend liability of $12,150,000.

The purchase of 30,000 shares of Preferred Stock as provided for in the Plan, is made possible only because of the fact that the Preferred Stock has for some time sold in the market for much less than par. The finances of the Company are and have not been such as to permit the use of a very large amount of its assets in the purchase of its Preferred Stock for retirement, but after careful study of the situation by the officers and directors of the Company and by its bankers, it was decided that the Company could well afford to use approximately $2,100,000 of its capital assets for this purpose without impairing its efficiency, earning capacity or necessary working capital disproportionately to the benefits to be derived.

At the time of the formulation of the Plan the Preferred Stock was selling in the market at about $60 per share. The Company was advised by its counsel that without the consent of two thirds of its stockholders, it was without legal power to purchase its Preferred Stock in the open market. As it would require at least from thirty to sixty days to call and hold a special meeting of the stockholders to obtain such authority, the directors felt that the Plan might become impossible of consummation through a rise in the price of the stock in the market pending the holding of the necessary meeting of stockholders, if no provision were made for an option and any considerable portion of the number of shares which the Company desired to buy. Consequently it was deemed desirable to arrange for an option on at

least 15,000 shares at a price which the Company could afford to pay and the only method of obtaining such an option, in the judgment of the directors was through a banking institution which would have the necessary means and organization with which to carry through such an operation.

It was also considered very desirable to obtain the assistance and support of a banking institution which would command the respect of the public and of the banks with which the Company was doing business, in carrying through the Plan.

Negotiations were therefore opened with the Chase Securities Corporation, of 61 Broadway, New York City. After consideration of the matter, that corporation stated that it would be willing to undertake to assist the Company in obtaining an option on 15,000 shares and also to act as the fiscal agent of the Company in carrying through the Plan for a fee of $150,000., (which should be paid in advance) and a profit on the stock purchased. This was, of course, prohibitive and negotiations were then started with the Guaranty Trust Company of New York City. The terms demanded by the latter institution however, were even higher and more burdensome than those first named by the Chase Securities Corporation.

The Executive Committee of the American Hide and Leather Company at that time almost despaired of being able to obtain any banking assistance on a basis which the Company could afford, but after further protracted conferences and strong personal appeals from some of the

directors of the American Hide and Leather Company, the Chase Securities Corporation finally agreed to the terms contained in the contract now before the Court and complained of by the complainant. The execution of the contract was authorized at a meeting of the Executive Committee of the American Hide and Leather Company held on August 13th, 1924, the date of the contract, and was ratified and confirmed by the Board of Directors at the next succeeding meeting held October 21st, 1924.

In the judgment of the members of the Executive Committee and of the Board of Directors of American Hide and Leather Company this contract is an extraordinarily favorable one for that Company. From a reading of the contract it will be seen that the Chase Securities Corporation ran the risk of an investment of nearly $1,000,000 without any compensation except the $25,000, which was paid for its services as fiscal agent and as Depositary in connection with the carrying through of the Plan. Unless the Plan were ratified by two-thirds of each class of the outstanding stock of the American Hide and Leather Company, the contract with the Chase Securities Corporation could not be carried through and that corporation would be left with 15,000 shares of the Preferred Stock of American Hide and Leather Company on its hands at a cost price close to the top of the market quotation. As the average daily sales of this stock on the New York Stock Exchange are comparatively small in number, probably not over 500 shares, it is obvious that it would be difficult to dispose of 15,000 shares in the market without

causing a severe decline in the price. If, on the other hand, the stockholders by a two-thirds vote of each class approved the Plan and authorized the carrying out of the contract, the maximum profit of Chase Securities Corporation would be five points, or a maximum of $75,000 on its investment of about $1000,000.

If the Plan should fail of ratification the limit of cost to the American Hide and Leather Company is the $25,000 fee for which, if the Plan were carried out, the Chase Securities Corporation obligated itself "to act as Fiscal Agent and adviser of the Company in formulating the details of the Plan and in any matters that arise in connection therewith" and "to act as Depositary, or procure the services of the Chase National Bank to act as Depositary, of any stock that may be required to be deposited in consummating the Plan." The possible loss to the Chase Securities Corporation was limited only by the price at which it might dispose of the 15,000 shares of stock if the Plan did not carry through.

In reference to the fee of $25,000, it should be noted that there are over 2300 stockholders of the American Hide and Leather Company, a large number of which are holders of Preferred Stock. The mere clerical work in connection with the handling of deposits of stock of these stockholders in carrying out the necessary details of the Plan would unquestionably cost thousands of dollars and it can readily be seen that there would be a very modest, if any, profit to the Chase Securities Corporation in performing these services. In addition to this consideration

there was also the advantage to American Hide and Leather Company in having the assistance of the Securities Corporation in other important matters in connection with the carrying out of the Plan.

By insuring its ability to purchase 15,000 shares at a price which it could afford to pay, the directors felt that the balance of the total of 30,000 shares required, or 15,000 shares, could reasonably be expected to be obtained from voluntary offerings by stockholders pro rata, and the Plan carried through.

Under said contract the Chase Securities Corporation gave the American Hide and Leather Company the benefit of any profit made on sales of said stock during the period of its operations and while deponent is informed and believes that a comparatively small number of shares, not exceeding 1000, were sold by Chase Securities Corporation, the profit on said sale was credited to American Hide and Leather Company, in calculating the net cost of said 15,000 shares to Chase Securities Corporation.

The reasons for making the contract with the Chase Securities Corporation were, therefore, as follows:

(1) To insure the ability of the Company to purchase if the Plan were ratified by the stockholders, a substantial portion of the 30,000 shares desired, at a price which the Company could afford to pay;

(2) To obtain the support and assistance of a large and strong financial institution as Fiscal Agent and Depositary in carrying out the Plan.

(3) To obtain the advantage which a close

connection and the moral support of such an important banking institution would give us with the other banking institutions with which the Company was doing business.

None of the directors of the American Hide and Leather Company have any connection whatever with Chase Securities Corporation or with the contract referred to, except Mr. Edward R. Tinker, who is President of Chase Securities Corporation, and a director of American Hide and Leather Company. Mr. Tinker, however, attended no meetings of the directors of the American Hide and Leather Company at which said contract or the said Plan were considered.

Said contract was approved at a meeting of the Executive Committee of the Board of Directors of American Hide and Leather Company held August 13th, 1924, at which the following members of said Committee were present:

John C. Jay
J. C. Lilly
Scott McLanahan
and deponent.

There were absent from this meeting

Lindsey Hopkins and
Edgar M. Williams,

both of whom, however, voted in approval and ratification of the contract at the meeting of the Board of Directors held October 21st, 1924. At the meeting of the Board of Directors held October 21st, 1924, at which said contract was considered and unanimously approved and ratified, the following directors were present:

J. C. Lilly
George A. Hill
Samuel Haight
Dindsay Hopkins
William C. Jackson
William W. Laird
Frederick E. Thompson
Edgar M. Williams
Frank P. Hulswit
Scott McLanahan
and deponent.

There were absent:
Dewees Dilworth
John C. Jay
and
Edward R. Tinker.

Previous to said meeting of the Board of Directors of said Company held October 21st, 1924, deponent had been informed by the Officers of Chase Securities Corporation that that corporation had in hand 15,000 shares of the Preferred Stock of American Hide and Leather Company for the purpose of said contract. Said contract had been purchased in the open market on the New York Stock Exchange by Chase Securities Corporation between the dates of August 20th, 1924 and October 21st, 1924, although owing to the sale of a small portion of said stock deponent is informed that a few later purchases were made after October 21st, 1924.

Deponent has made an investigation as to the purchase of said stock so made by Chase Securities Corporation and is informed and verily believes that not a share of said stock was pur-

chased directly or indirectly from any director of American Hide and Leather Company.

The members of the Executive Committee of American Hide and Leather Company are very large holders, if not the largest individual holders, directly or by representation, of the preferred stock of American Hide and Leather Company and practically none, or a very small proportion of the stock heretofore held by them has been sold during the past four or five months, as deponent is informed and verily believes after a thorough investigation of the matter. Said members of said Committee still hold or represent a very large proportion of said stock outstanding and have approved and adopted said Plan in the belief that it will greatly enhance the value of said preferred stock.

As to the merits of the Plan, particularly as it affects a preferred stockholder, it should be noted that he may exercise his option whether to sell approximately 12 per cent of his stock to the Company at $70., exchange a part of the remainder, approximately 25 per cent, for new prior preference 8 per cent stock and retain the balance; or to sell the 12 per cent and retain all of the balance; or sell none, exchange approximately 25 per cent for the new prior preference stock and retain all of the balance; or neither sell nor exchange and retain all of his present stock. In any case his position is greatly improved.

As an illustration of his position if he retains all of his preferred stock and, as an answer to complainant's contention that he will be greatly damaged if he retains the stock and the Plan is

carried out, we may take the following:

1. ASSET VALUE

PRESENT BASIS—BEFORE PLAN

| | |
|---|---|
| Assuming a value total assets applicable to preferred stock as | $12,500,000 |
| Shares outstanding | 125,000 |
| The value per share woul be | 100,00 |

NEW BASIS—AFTER CONSUMMATION OF PLAN

| | |
|---|---|
| Assets applicable | $12,500,000 |
| Deduct for purchase of 30,000 shares at $70. | 2,100,000 |
| Balance | $10,400,000 |
| Applicable to new prior preference stock | 3,5000,000 |
| Balance | $6,900,000 |
| Shares outstanding 65,000, or per share | $107.69 |

As the assets applicable to preferred stock are unquestionably greater than $12,500,000, the value of the remaining 65,000 shares of preferred stock is, of course, proportionately greater per share.

2. EARNINGS

PRESENT BASIS—BEFORE PLAN

| | |
|---|---|
| Assuming total net earnings per annum | $1,000,000 |
| Outstanding shares | 125,000 |
| Per share | $8.00 |

NEW BASIS—AFTER PLAN

| | |
|---|---|
| Total net earnings | 1,000,000 |
| Deduct for prior preference stock (8 per cent) | 280,000 |
| Balance for preferred stock | $720,000 |
| Outstanding 65,000 shares, or per share | $11.07 |

The benefits of the Plan from the standpoint of the Company are set forth in the circualr letter to the stockholders and need not be repeated here.

CLAUDE DOUTHIT.

Subscribed and sworn to before me this 17th day of December, 1924

Josephine M. Power
Notary Public, Queens County No. 885
Certificate filed New York County No. 148
Certificate filed Register's Office N. Y. Co. No. 6141
Certificate filed Kings County No. 73
Certificate filed Register's Office Kings Co. No. 6066

*Defendant's Affidavits on Rule to Show Cause.*

**Affidavit of Walter W. Downing,**

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*against*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } SS.:

WALTER W. DOWNING, being duly sworn, according to law, on his oath says:

I am Assistant Treasurer of Chase Securities Corporation, having its principal office at 61 Broadway, Borough of Manhattan, New York City, and am familiar with the transactions of said corporation under its contract with American Hide and Leather Company, dated August 13, 1924 in which it is contemplated that said American Hide and Leather Company should purchase 15,000 shares of its preferred stock from Chase Securities Corporation on the terms and conditions set forth in said contract.

No director of American Hide and Leather Company is or has been at any time interested with Chase Securities Corporation in the pur-

chase or ownership of said stock or any part thereof, or in said contract, except that Edward R. Tinker, President of said Chase Securities Corporation, and a director of American Hide and Leather Company, in addition to being interested as an officer of Chase Securities Corporation, in said contract and stock purchased pursuant thereto, is also indirectly interested therein to the extent of 1,667 shares of said 15,000 shares of stock. Said Edward R. Tinker did not participate in the action of the directors of American Hide and Leather Company in authorizing said contract with Chase Securities Corporation. Said 15,000 shares were purchased by Chase Securities Corporation from time to time after the making of said contract to October 27, 1924 in the open market on the New York Stock Exchange at varying prices ranging from $60.50 per share to 66.50 per share, making the average price of said stock to Chase Securities Corporation $63.65467 per share.

Said shares were so purchased by Chase Securities Corporation through a "trading account", which was carried for that purpose, between the dates above mentioned during which said shares were acquired, sales were also made of said stock to a total number of 500 shares and American Hide and Leather Company credited with the profit on these sales and received its benefit thereof in determining the average price of said stock to Chase Securities Corporation.

WALTER W. DOWNING.

Sworn to before me this
17 the day of December, 1924.

Julian E. Baldwain
Notary Public Queen's County Clerks No. 1391
Certificate filed in
New York County Clerks No. 616
Registers No. 6497
Kings County Clerks No. 193
Registers No. 6277
Commission expires March 30, 1926.

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**Affidavit of George A. Hill.**

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } ss.:

GEORGE A. HILL, being duly sworn, according to law on his oath says:

I am Secretary and Treasurer of American Hide and Leather Company, the above named defendant.

Attached hereto and made a part hereof,

marked "Exhibit A", is a true, correct and complete copy of the By-Laws of said Company as they existed prior to the amendment passed by the stockholders at the Special Meeting held December 9th, 1924, and also a true, correct and complete copy of the Certificate of Incorporation of said Company as it existed prior to said meeting, marked "Exhibit B"; also marked "Exhibit C", a correct statement of the net earnings of said Company for the years 1901 to 1923 inclusive.

The Certificate of Incorporation of American Hide and Leather Company as it was originally adopted provided, and still provides, in Article Seventh that, "the directors shall have power to make and alter by-laws." On August 31, 1899, the original By-Laws of the corporation were adopted by the Board of Directors at the time of the organization of the corporation containing the following provision:

"ARTICLE TWO.

Section 1. The Board of Directors shall have the power without the assent or vote of the stockholders, to fix from time to time the amount of the accumulated profits of the Company to be reserved as working capital."

I was present and acted as Secretary at and took the minutes of said Special Meeting of the Stockholders of American Hide and Leather Company held on December 9th, 1924. The vote in favor of the resolutions adopted by the stockholders at said meeting as recommended by the Board of Directors in the notice of said meeting was as follows:

In favor of said resolutions and each of them:
Preferred Stock, 91,920 shares
Common Stock, 88,645 shares.
Against the resolutions:
Preferred Stock, 418 shares,
Common Stock, 200 shares.

GEORGE A. HILL.

Sworn to before me this
17 day of December, 1924.
Josephine M. Power
Notary Public, Queens County No. 885
Certificate filed New York County No. 148
Certificate filed Register's Office N. Y. Co.
No. 6141
Certificate filed Kings County No. 73
Certificate filed Register's Office Kings
Co. No. 6066

## EXHIBIT C.

### Earnings.

| Year Ending | Net Earnings | | Dividends Paid |
|---|---|---|---|
| June 30, 1901 | $ 956,303.27 | | |
| " " 1902 | 406,877.20 | | |
| " " 1903 | 79,634.12 | (loss) | |
| " " 1904 | 291,272.71 | | |
| " " 1905 | 505,907.85 | | 2 % |
| " " 1906 | 244,387.86 | | 1 % |
| " " 1907 | 270,336.64 | | |
| " " 1908 | 13,438.23 | (loss) | |
| " " 1909 | 1,404,211.75 | | |
| " " 1910 | 696,590.46 | (loss) | |
| " " 1911 | 104,255.11 | | |
| " " 1912 | 422,820.05 | | |
| " " 1913 | 475,517.82 | | |
| " " 1914 | 107,205.52 | | |
| " " 1915 | 959,974.32 | | |
| " " 1916 | 1,643,265.80 | | |
| " " 1917 | 1,762,750.46 | | 7½% |
| " " 1918 | 2,385,613.03 | | 5 % |
| " " 1919 | 2,695,001.86 | | 9¾% |
| " " 1920 | 1,104,656.30 | | 9 % |
| Dec. 30, 1920 | 6,830,555.08 | (loss) | 3½% |
| " " 1921 | 550,920.05 | (loss) | |
| " " 1922 | 1,035,152.75 | | |
| " " 1923 | 38,998.34 | (loss) | |

## Excerpts from By-Laws.

SEC. 2. Special Meetings of the stockholders may be called by the president or by order of the executive committee or board of directors whenever they deem it necessary, and it shall be their duty to order and call such meetings whenever persons holding one-fourth of the capital stock of the Company oustanding shall in writing request the same. Such special meetings shall be held at the principal office of the Company in the same manner as the annual meeting.

SEC 3. At all meetings of the stockholders, each stockholder shall be entitled to one vote for each share held by him, which vote may be given either personally or by proxy, authorized in writing. The instrument authorizing a proxy to act shall be exhibited to the secretary and to the inspectors of election at the meeting, and shall be lodged with the secretary of he shall so request. No share or shares of stock which have been transferred on the books of the Company within twenty days next preceding any election shall be voted on at any such election.

SEC. 4. The holders for the time being of a majority of the stock issued and outstanding, represented in person or by proxy, shall constitute a quorum, for the transaction of business; but, in the absence of a quorum, the stockholders attending or represented at the time and place for which the meeting shall have been called, or at any adjourned meeting, may adjourn the meeting for a period not exceeding twenty days.

SEC. 5. Notice of the annual and of any special meeting of the stockholders shall be given to each

stockholder by posting the same in a postage prepaid letter, addressed to each stockholder at the address left with the secretary of the Company, or by delivering the same personally, at least ten days before such meeting, in addition to any publication or notice that may be required by law. The notice of a special meeting shall state briefly the object of the meeting, and no other business shall be transacted at such meeting. A failure to give or any defect or irregularity in giving the notice for the regular annual meeting shall not affect or invalidate the proceedings of the meeting.

SEC. 6. The stockholders may at each annual meeting choose by ballot two persons (who need not be stockholders) to act as inspectors of election at all meetings of the stockholders until the close of the next annual meeting. In case of a failure to elect inspectors, or in case an inspector shall fail to attend or refuse to serve, the stockholders at any meeting may choose an inspector or inspectors to act at such meeting.

ARTICLE II—BOARD OF DIRECTORS.

SEC 1. The Board of Directors shall have the general management and control of the property and business of the Company, and subject to the provisions of the statutes of New Jersey, and of the Certificate of Incorporation and By-Laws of the Company, may exercise all the corporate powers of the Company. Without predjudice to their general powers, they shall have such specific powers as may be conferred upon them by the Certificate of Incorporation or the By-Laws. The Board of Directors shall have the power, without

the assent or vote of the stockholders, to fix from time to time an amount of accumulated profits of the Company to be reserved as working capital. The Board shall consist of fifteen members, who shall be stockholders, and who shall be chosen for a term of one year or until the next annual meeting of stockholders. In case of vacancy in the Board resulting from death, resignation, disqualification or other cause, the Board shall have the power to appoint the members necessary to make up the full number of fifteen, but such appointment shall continue only until the next annual meeting of the stockholders. All directors shall hold their offices until their successors are elected and qualified.

SEC. 2. The directors shall act only as a board, and the individual directors shall have no power as such. A majority of the directors, at a meeting duly called, shall constitute a quorum for the transaction of business; but any less number may adjourn any meeting from time to time until a quorum shall be present.

SEC 3. The directors shall have the power to hold their meetings, to have one or more offices, and to keep the books of the corporation (except the stock and transfer books) outside of the state of New Jersey at such place as the board of directors may from time to time determine. Notice of regular meetings of the board shall be mailed by the secretary to each director at his last known post-office address at least three days previous to the time fixed for the meeting. Special meetings of the board may be called by the president, or executive committee, or by request of any three members, made in writing, on at

least one day's notice to each director, delivered to him personally, or mailed to him or sent by telegraph, or left at his residence or usual place of business.

ARTICLE III—EXECUTIVE COMMITTEE.

SEC. 1. The Board of Directors shall annually appoint an Executive Committee, which shall consist of five Directors, two of whom shall be the President and First Vice-President of the Company. The remaining members shall be appointed by and shall serve during the pleasure of the Board. They shall not be salaried officers or employees of the Company, and at least two of them shall reside in the City of New York, or in the vicinity thereof. Vacancies in such Executive Committee shall be filled by the Board of Directors.

Adopted April 4, 1922.

SEC 2. The Executive Committee shall have and exercise, subject to the control of the Board of Directors, all the powers of the Board requisite for the conduct, management and development of the Company's business, except such powers as may be conferred by these by-laws or as may be conferred by the Board of Directors, exclusively upon another committee or upon some officer of the Company. The Board of Directors shall fix the salaries or compensation of all officers of the Company who are members of the Executive Committee. The Executive Committee or Board of Directors shall fix the salaries or compensation of all other officers of the Company.

A majority of the Executive Committee shall be a quorum for the transaction of business, and the committee shall at all times act by the vote of a majority.

The Executive Committee may hold its meetings at any office of the Company, or at any place which the committee may deem proper, and may prescribe and regulate what, if any, notice shall be given of its meetings.

The Executive Committee shall keep minutes of its proceedings and shall report the same to the Board of Directors at each ensuing meeting of the Board.

## Opinion.

(Filed January 12th 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bills for Injunction.

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

Submitted January 3, 1925;
Decided January 12, 1925.

Hudspeth & Demarest, by
ELMER W. DEMAREST, ESQ.,
For Complainant Gen'l Investment Co.

McCarter & English, by
ARTHUR F. EGNER, ESQ.,
For Complainant Jacob B. Joel, et als.,

Pitney, Hardin & Skinner, by
JOHN R. HARDIN, ESQ., and WALDRON M. WARD, ESQ.,
For the Defendant.

BENTLY, V. C.:

Application for preliminary injunction, heard on bills and affidavits, defendant's affidavits, and examination of officers of the defendant company by complainants' counsel.

The bill was filed on behalf of the complainant General Investment Co. and all other 7 per cent preferred stockholders of the Defendant Company. After an order to show cause had been allowed, the restraint therein was modified so as to permit the stockholders' meeting to proceed to that point where a vote could be taken and all other proceedings preliminary to the filing of a certified copy of the amendments in the office of the Secretary of State, there appeared to be facts in this bill distinguishing the situation from those in *Grausman v. Porto Rican-American Tobacco Company* (122 Atl. 815); but after the stockholders' meeting had been held, there was filed another bill containing practically the same facts, and seeking the same relief on behalf of five other stockholders. The two suits have subsequently been consolidated and heard together.

The defendant is a corporation, organized in 1896. It is engaged in the business of manufacturing leather, leather products, and similar commodities. Its total authorized capital stock is fixed at $35,000,000, divided into 350,000 shares, one-half thereof being preferred, with accumulative, seven per cent dividends, and the

remaining half common. There are now 125,483 shares of preferred stock worth $12,548,300. at par, issued and outstanding, and 4,517 shares of such preferred stock held in the treasury of the defendant company. The total common stock outstanding is 115,000 shares, with a par value of $11,500,000. The preferred stock has the usual qualities to be found in shares so designated, entitling the owners thereof to the dividend indicated if and when declared, before the payment of any dividend upon the common stock, and it is then provided that accumulations of such dividends when deferred shall also be paid in advance of any dividend on the common stock, and that the preferred shall take precedence in the usual manner upon liquidation or dissolution. The accumulated arrears of dividends on the preferred stock now amount to $140. per share, although the surplus reserved by the company amounts to approximately $5,000,000. In this connection it should be said, that neither of the bills is framed to compel a declaring of dividends, and no facts are alleged to bring the case within the language of Mr. Justice Swayze, in *Murray vs. Beattie Mfg Co.* (79 N. J. Eq. 604), showing the right of the stockholders to such relief.

For the purpose, it is said, of reducing the capital debt of the defendant and make it more in reasonable proportion to the earning powers of the company, there was issued, on October 23, 1924, a notice of a special meeting of the stockholders of the defendant, for the purpose of passing upon a resolution of the Board of Directors designed to accomplish the same. It was

proposed, according to the tenor of this notice and resolution, to seek an amendment of the certificate of incorporation of the company so that a new issue be created by changing 35,000 shares of preferred into 35,000 shares of a new class of preferred stock, denominated "cumulative prior preference stock", of a par value of $100 each, with an eight per cent dividend, and to have priority both as to dividend and liquidation value over the preferred stock already described, and redeemable at 115 per cent after three years; also to reduce the authorized capital by cancelling the remaining 10,000 shares of unissued preferred stock of the 7 per cent variety then remaining unissued. It was then proposed to cancel 60,000 shares of the unissued common stock. Thus the new capital would consist of $3,500,000 par value of 8 per cent cumulative prior preference stock; $10,000,000 par value of the 7 per cent preferred stock; and $11,500,000 par value of the common stock. And, finally, the stockholders were to be asked to permit the purchase of 30,000 shares of the outstanding 7 per cent preferred stock for retirement, 15,000 shares thereof to be purchased from "a large banking corporation of New York City", which it now develops was the Chase Securities Corporation, a subsidiary of the Chase National Bank. The remaining 15,000 shares of such preferred stock it was proposed to purchase from the remaining stockholders, *pro rata,* based upon their respective holdings, at a price of $70 a share, in which connection, it should be said that, under an agreement of August 13, 1924, the price to be paid the Chase Securities Corporation was to consist of a fee

of $25,000, a premium of $5. for each share of stock so secured, or $75,000., the administrative expenses of the Chase Corporation in fulfilling its part of the contract, and such legal expenses as the last-named corporation should be put to in the premises. The average cost to the Chase Corporation of accumulating such shares of stock amounts to $63.65, making the price due to the Chase Corporation from the defendant $68.65, plus the pro rata portion of the other charges to each share of stock or, roughly, $70 per share.

The effect of the proposed plan, in the matter of reduction of capital indebtedness, may be synoptically expressed thus:

| To be extinguished | Mode of payment, |
|---|---|
| for cash, ....$3,000,000 ) | |
| accrued dividends ) | $2,100,000 in cash |
| thereon, .. $4,200,000 ) | |
| In exchange for new 8% stock, $3,500,000) | |
| Accrued dividends ) | $3,500,000 in new 8% stock |
| $4,900,000 ) | |
| Totals, $15,600,000 | $5,600,000 |
| $5,600,000 | |
| Reduction $10,000,000 | |

The vote at the stockholders' meeting showed a total of 91,990 shares of preferred and 85,645 shares of common stock in favor of the plan, or 8,335 shares of preferred and 11,979 of common stock over the necessary amount. The value of

the stock on the open market advanced from $29.75 per share in August, 1923, to $59. per share in August, 1924, when the contract between the defendant and the Chase Corporation was executed, and subsequently advanced to $62.50 on October 10, 1924.

Many of the points made by the complainants were presented to this court for decision in *General Investment Company v. Bethlehem Steel Corporation* (88 N. J. Eq. 237), when Vice-Chancellor Lane commented on their novelty and importance. Because of the exigencies of the World War, he declined to pass upon them but expressly based his determination upon a balancing of conveniences.

The complainants say, that to permit preferred stock to be issued with an 8 per cent dividend and redeemable at any time after three years at 115, exceeds the statutory maximum return upon such a class of stock and converts it into preferred stock bearing a dividend at the rate of 13 per cent per annum. This, clearly, cannot be so because the language of the very 18th section of the Corporation Act which limits the yield to 8 per cent, contains the furthur provision that it may "be made subject to redemption at any time after three years from the issuing thereof at a price *not less* than par." The 29th section, it is true, says that the company may decrease its capital stock "by the purchase at not above par of certain shares for retirement." As Vice Chancellor Lane pointed out in *General Investment Company v. Bethlehem Steel Corporation* (88 N. J. Eq. 237, at page 241), the legislature had two different objects in mind in

framing the two different sections. It must be clear that in the 18th section it was its purpose to permit the company to impress upon such shares an option in favor of itself to compel a shareholder to surrender up his stock at the end of three years, or such further period as might suit its convenience, for a sum designated; while in the 29th section it conferred upon the company authority to bargain for the purchase of stock upon which no such option existed but, for obvious reasons, fixed par as the maximum it should be permitted to pay. There is no repugnance.

It is also objected that, included in the stock voted in favor of the director's plan were the blocks acquired by the Chase Securities Corporation of 15,000 shares, and 20,600 shares of preferred, and 7730 shares of common voted by a company named Livingston & Company. It is said as to the former holding, that while the stock voted by the Chase Securities Corporation must be counted in the gross stock outstanding, it should not be permitted to be counted in favor of the defendant because it was stock owned by the defendant and, therefore, under the act without voting power. The answer to this, as the defendant points out, is the opinion of the Court of Errors and Appeals, in *U. S. Steel Corporation vs. Hodge* (64 N. J. Eq. 807). But, the complainants say, in addition, if these shares be considered as the property of the Chase Securities Corporation then they are not countable, because that company was voting its stock in favor of a contract for its own benefit. The answer to such objection is, that a stockholder

is under no fiduciary relations, either to the company or to his fellow stockholders, and he votes his holdings in any way most advantageous to himself. Mr. Justice Van Sickel dealt with a like objection in the *Hodge* case, at page 813 of the opinion. So far as the other holdings of stock are concerned, Livingston & Company is a stock broker which had purchased, for various of its customers, the number of shares of stock mentioned for those customers' accounts, but had taken the legal title in its own name and so registered the shares on the books of the company. Sections 33 and 40 of the Corporation Act, and the many cases decided under it, gave to Livingston & Company the privilege of voting as it did. Section 20 providing for a notation on the books of the company in case of hypothecating of stock, has nothing to do with the matter, that provision being intended to permit a transfer as collateral security without the owner parting with his right of franchise.

The main question raised and argued involves the matter of statutory authority to create a new class of preferred stock superior in its preference to the preferred stock now outstanding. The language of the resolutions refers to "re-classifying" 35,000 shares of the unissued authorized stock but, in effect, it would amount to inventing an entirely different creation than had been dreamed of when the certificate of incorporation was filed. It seems a most circuitous and awkward proceeding to go to the pains of reconstructing these nebulous, unissued shares into something entirely new, and neglect the direct proceeding of cancelling them and then

creating the new ones in the way presently to be pointed out. Call them what you may, they are an entirely new class of stock. The Standard Dictionary defines "creates", in its secondary meaning, "To produce, as a new construction out of existing materials." If a narrow construction is going to be given the word "create" in the 27th section, then that is exactly the action contemplated, namely, to produce the prior preference stock out of the existing unissued preferred stock. But I prefer to consider these as a new class.

It cannot be questioned that, in the absence of fraud, *ultra vires* action, illegality, or immorality, our courts will not substitute their respective judgments for that of the directors and stockholders in matters of business, and that this has been the policy pursued from the case of *Elkins v. Camden & Atlantic R. R. Co.* (36 N. J. Eq. 231) to date. Thus, the solution of the difficulty depends upon a construction of the pertinent provisions of the Corporation Act of 1896, as it stood before the amendment of 1901. The language of section 18 provided, that every corporation should have power "to create two or more kinds of stock, of such classes, with such designations, preferences and voting powers or restructions or qualifications thereof *as shall be stated and expressed in the certificate of incorporation.*" Standing by itself and considered as if there were no other provisions to be regarded, this would foreclose any corporation so circumstanced from subsequently creating any other class of stock after the organization of the corporate entity. But in the interpretation of statutes

there is no rule better esablished than that the entire act, and every part thereof, shall, if possible, be given effect and, so far as practicable, every provision thereof reconciled.

*James v. Dubois,* 16 N. J. Law, 285;
*Morris & Essex R. R. Co. v. Com'r R. R. Tax.,* 37 N. J. Law, 228.

In 1899, when the defendant was incorporated, the 27th section of the same act read as follows, so far as germane to this case:

> Every corporation organized under this act may change the nature of its business * * * * *create one or more classes of preferred stock* * * and make such other amendments, change or alteration as may be desired in manner following * * *

These were the things it might do even though the original certificate made no provision for them. As to these things the shareholders were at liberty to change their minds. It then provided the familiar machinery of amendment, upon a vote of not less than two-thirds in interest of each class of stockholders. The amendment of 1901, referred to above, added to the language of the 18th section I have already quoted, fixing the power of the incorporators to provide for the various classes of stock, the following words:—"or in any certificate of amendment thereof." From this amendatory language the complainants draw the conclusion that such power of change was forbidden to the stockholders of the company under the law as expressed when the company was formed and, therefore, on constitutional grounds not subject to change, for the reasons dealt with

in *Allen vs. Francisco Sugar Co.,* (92 N. J. Eq. 431) and the cases therein reviewed. As just intimated, if one were to close his eyes to anything in the act except the 18th section this position assumed by the complainants would be impregnable; but when read in light of the 27th section it becomes apparent that the legislature had no such thought or purpose in mind. The history of the act as originally drawn, and the scope and purposes apparent from a consideration of the entire instrument, show that the intention was to confer upon corporations organized pursuant to its provisions the broadest grounds of self-government consistent with safety to the public and fairness to all the stockholders. This being so, the unqualified permission granted by the 27th section to amend its certificate of incorporation so as to "create one or more classes of preferred stock" is to be read without qualification except as otherwise expressed in the act or required by established rules and principles of law. Of course, such stock could not be issued under the original certificate, undess provided for therein. But then the 27th section pointed out the means of amendment to remedy the oversight in the original certificate or to confer a power not thonght necessary at first. The complainants say that this is authority only for the creation of a new class of preferred stock, subordinate in preferences to preferred stock already outstanding. The act does not say so, nor do the rights of the existing preferred stockholders make such a construction necessary. The 27th section in clear and unambiguous language provides for an

amendment such as the one now under attack, and construing the 18th amendment in light of this permission it can be nothing more than this, that as the language stood in 1899 every corporation should have the power to fix the qualities of its various classes of stock "as stated and expressed in the certificate of incorporation", with the understanding, however, that the certificate meant was the certificate in its form at the time of the issuance of the new class of stock. In contemplation of law the original form of certificate of a corporation is no longer the certificate of the company after an amendment has been made. When any amendment of a document is effected, whether that document be a pleading in a cause, a contract, a statute, or otherwise, the amendment becomes incorporated in and a part of the document from that time forth, just as if included in the terms of the original language, and it was in this sense that the legislature spoke when it used the phrase "certificate of incorporation" in the original language of the 18th section of the act. It is illustrated by what is said in Daniels' P. and Pr. (6th Am. ed.) section 402:

> But, although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but a continuation of the original bill, and as forming a part of it; for both the original and amended bill constitutes but one record; so much so that, where an original bill is fully answered, and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken, *pro confesso,* generally, and an order to take the bill *pro confesso* as to the amendments only will be irregular.

To the same effect is the opinion in *Equitable Life Assurance Society v. Laird* (24 N. J. Eq. 319, affirmed in 26 N. J. Eq. 531). Why the amendment to the 18th section was adopted, I do not know. Perhaps, as counsel for the defendant intimates, at the instance of some over-cautious attorney who wished to "take a bond of fate." At any rate, it was unnecessary and a surplus use of language. Not a rare mistake.

*Pronick v. Spirits Distributing Co.,* (58 N. J. Eq. 97) does not support the argument of the complainants, but in fact, is direct authority against them, under my reading of The Corporation Act. In *Smith v. Eastwood Wire M'f'g Co.,* (58 N. J. Eq., 331) Vice Chancellor Emery, at page 333, after referring to the act becoming a part of every charter, says, in construing his own opinion in the *Pronick* case.

> "And in *Pronick v. Spirits Distributing Co.* * * * it was said that the same rule was to be applied to the general powers of amendment of certificates authorized at the time of organization."

*Allen v. Francisco Sugar Co.* (supra), and all cases cited therein and in the briefs for complainants, dealt with attempts to carry out schemes declared to be an unconstitutional invasion of property rights, and to attempt to apply them to the one at bar would be to argue in a circle. I referred to *Chicago City Ry. v. Allenton* (18 Wall. 233) in the *Grausman* case. But there, there was an attempt without authority from the legislature to increase the Capital Stock from $1,250,000 to $1,500,000 by the directors, without permission from the stockholders. *Day*

*v. U. S. Cast Iron Pipe & Foundry Co.,* dealt with the right of a preferred stockholder to prevent payment of dividends on the common stock until withheld, available and earned dividends for previous years on the preferred stock should have been paid. There was no consideration of the company's right to amend for the purpose of creating a new kind of stock.

This being the state of the law, it became a part of the charter of the company, subject to which every one is presumed to have purchased his stock.

*Meredith v. N. J. Zinc & Iron Co.,* 55 N. J. Eq. 211, affirmed 56 N. J. Eq. 454;
*Schwarzwalder v. Tegen,* 58 N. J. Eq. 319,
*Smith v. Eastwood Wire M'f'g Co.* (supra).

Therefore, the complaint of the minority stockholders is overborne by the statutory majority in favor of a change of the capital indebtedness sanctioned by law. For the reasons to which I have already adverted, I do not feel that I can give effect to the elaborate argument to show that the best methods have not been pursued to effect the desired result. It would be intolerable if this court should be charged with supervising the policies of every corporation as to their soundness, and, from the standpoint of the public, would be utterly subversive of the principle of majority rule. The complainants may suffer as they fear (only time can tell) but, if, as I have decided, the law allows the change to be made, and did when the company was formed, then they should not ex-

pect assistance from this court, especially in view of their representing a rather small minority.

Much has been said of the abuse to which such a scheme as the one under consideration might be used to unfairly deprive preferred stockholders of their property by a continuance of the proceedings from time to time until individual stockholders would become "tired out", so as to dispose of their individual holdings at great disadvantage. I have no apprehension of any such proceeding, and I am positive that there is no such motive now existing. If, in the future, the fears of the complainants in this respect are realized, any such attempt can be promptly and effectively suppressed. No extensive argument has been attempted here to show that the plan devised will be to the substantial benefit of all the stockholders of the company, for the reason that an examination of the condition of the company and the saving to be effected, as displayed in the statement of facts, must make it apparent to any disinterested person.

There has been expressed a further fear that the preemptive right of the present stockholders may not be observed in the distribution of the new class of preferred stock. As I said, in answer to a like objection in *Grausman v. Porto Rican-American Tobacco Co.*, (121 Atl. 895), the stockholders will have their remedy in that event.

There has been shown, however, a fact that places an entirely different aspect on the matter and must operate to render nugatory all that was done at the meeting of stockholders. In the notice calling the meeting of stockholders, the latter were acquainted with the fact that it was

proposed, among other things, to reduce the capital liability, provide for the issuing of a new class of stock, and the authorization to the board of directors to purchase for retirement at not above par 30,000 shares of the then outstanding preferred stock at a price not above par, in one of several different methods. There was nothing said—and "there's the rub"—or any intimation given about the source from which the block of 15,000 shares were to be procured. There was, in the president's letter to the stockholders, information that the directors of the company had "made arrangements with a large banking corporation of New York City, for the purchase from it by your company of 15,000 shares of preferred stock at a price of approximately $69. per share." No further information was given at any time to the stockholders, of the identity of the banking corporation referred to or any of the officers or directors thereof. Upon the return of the order to show cause there was filed, on behalf of the defendant; the affidavit of Claude Douthit, one of its directors, in which it was revealed that the banking corporation in question was the Chase Securities Corporation, and at page 8 of his typewritten affidavit it is said:

> None of the directors of the American Hide and Leather Company have any connection whatever with Chase Securities Corporation or with the contract referred to, except Mr. Edward R. Tinker, who is President of Chase Securities Corporation and a director of American Hide and Leather Company. Mr. Tinker, however, attended no meetings of the directors of the American Hide and Leather Company at which said contract or the said plan were considered.

Thus, it is made to appear by a part of the defendant's own proofs that Edward R. Tinker, at the time the contract was made with the Chase Securities Corporation, occupied the dual capacities of a director in the defendant corporaation and an officer in the company that was the other party to the contract providing for the acquiring of one-half of the 30,000 shares to be purchased and retired. Mr. Justice Van Syckel, in *United States Steel Corporation v. Hodge* (supra. at p. 813) said:

> The rule that directors cannot lawfully enter into a contract, in the benefit of which *even one of their number participates,* without the knowledge and consent of the stockholders, is so firmly entrenched in our jurisprudence that it is not open to debate.
> (The italics are mine).

It is true that later, in showing that the illegal act had been ratified and after demonstrating that such a contract is not void but merely voidable, he said:

> *A fortiori,* when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, *when the stockholders had notice of the directors' interest* the agreement will be unassailable in the absence of actual fraud or want of power in the corporation.
> (The italics are again mine).

In that case, however, it was pointed out that not only might it be fairly presumed that the stockholders knew that J. P. Morgan was a director of the steel company but, in addition, that the circular letter which accompanied the

call of the stockholders in that case expressly informed the latter, not only that the contract was with J. P. Morgan & Company but that a syndicate had been formed, "including some directors which will receive four-fifths" of the compensation to be paid the bankers. Then applying the rule stated by Mr. Justice Dixon, in *Gale v. Morris* (30 N. J. Eq., 285), it was pointed out that the stockholders were acquainted with all proper information long before they met and were in a position to have made up their minds whether they would ratify the contract or denounce it by voting down the proposed resolutions. In the case at bar, a very different situation is made to appear. It is disclosed that the plan under consideration was the fifth that had been devised, all previous ones having failed of approval, and, as Mr. Douthit says, this was the first one formulated "which proved to be satisfactory to the directors, counsel, and bankers for the company". Of course, it requires small experience to know that projects of this importance are never launched without submission to counsel and his favorable opinion, yet, notwithstanding the rule of law "so firmly entrenched in our jurisprudence", and the emphatic expressions used by Mr. Justice Van Syckel in the leading case of *U. S. Steel Corporation v. Hodge* (supra), there would appear to have been some reason for suppressing and withholding from the stockholders the information that one individual joined hands on the one side with the directors in their fiduciary relations to the stockholders (*Marr v. Marr,* 73 N. J. Eq. 643), and, on the others, with the syndicate which was dealing at arm's length

with the corporation in which the shareholders had invested their money. It is true that Clarence Venner, the president of the complainant, General Investment Co., in his quest for particulars about the circumstances surrounding the scheme, met with many obstacles and some rebuffs at the hands of the defendant's officers Some allowance must be made, however, for the weakness of human nature, and I can conceive of no monster of the jungle, or the most vivid imagination, that could unsettle the nerves of a corporation director when engaged in rejuvenating an embarressed company as the appearance of Mr. Venner in search of information (observation of Vice Chancellor in Bethlehem Steel Corporation case, supra). There is nothing to make it appear that any other stockholder was so treated. I do not believe that information about Tinker was withheld by any active fraud. Whether so or not, to permit such a violation of so salutary and necessary a rule of law would be, if consistently followed, to throw open the savings of investors to practices that would destroy all public confidence in the value of corporate stock.

It is established in *Stewart v. Lehigh Valley R. R. Co.* (38 N. J. Law, 505), that courts will not inquire whether a contract such as this seems a fair one. "Fraud is too cunning and evasive for courts to establish a rule that invites its presence." The same case and the many authorities there cited are also an answer to the protestation that the director took no part in the negotiations under attack. Mr. Justice Dixon, in the last-named case, says:

> Nor is it proper for one of a board of directors to support his contract with his company upon the ground that he abstained from participating as director in the negotiations for the final adoption of the bargain by his co-directors, the very words in which he asserts his right declares his wrong; he ought to have participated, and in the interest of the stockholders, and if he did not, and they had thereby suffered loss, of which they shall be the judges, he must restore the right he has obtained,—he must hold against them no advantage that he has got through neglect of his duty toward them.

It is true that in that case the director in question dealt with himself as a member of a partnership but the principle would apply equally had he been an officer of a corporation with which he was contracting in his *quasi* trust capacity. No one can read the opinion of Mr. Justice Dixon in the *Stewart* case or consider the reason for the rule and not regard as puerile any such transparent effort as to attempt concealment behind the form of incorporation. The rule is one of a stern morality.

> The rule is rigid and applies equally to cases of fair and of unfair dealing, and where the principal would have been no better off if the agent had strictly pursued his powers, and where the principal was not in fact injured by the agent's act.
>
> (Mecham on Agency, sect. 469)

As an officer of the Chase Securities Corporation he would have profited, it is immaterial whether much or little, directly or indirectly, by a hard bargain with the defendant.

However, in face of the large majority in favor of the new plan of capitalization, the otherwise apparently hopeless condition of the company, the advantage to be obtained for the great mass of stockholders by bringing the finances of the company at least one step nearer to the resumption of dividends, and the fact that I do not believe there was any conscious attempt to suppress information from stockholders, I feel that an opportunity should be afforded the defendant to repair the neglect with which I have just dealt. Therefore, I will withhold action for a period of ten days from the mailing of this opinion, so that if the defendant shall desire, it may give notice to the stockholders of another special meeting, for the purpose of again passing upon the resolution of the board of directors which have given rise to this suit. With such notice, or incorporated therein, there shall be given the information already withheld, to wit, the name of the Chase Securities Corporation, and the fact that Mr. Tinker was a member of he defendant's Board of Directors and the president of the Chase Securities Corporation at the time the contract was executed, as was done in the *Hodge* case (pp. 814-815). Of course, new proxies must be obtained after this information shall have been conveyed to the stockholders, and no proxy executed prior thereto shall be voted. Should the stockholders again adopt the resolutions of the board, I shall refuse any preliminary injunctions of the board, I shall refuse any preliminary injunction. It may be said that the defendant will be placed

at some disadvantage in again securing proxies to adopt the resolution by the necessary majority. If that be so it has itself to blame for a failure to perform its duty, and it would perhaps be strong proof of the strength of the position of the complainants.

On the other hand, if the defendant shall not have availed itself of this opportunity within the time limited. I will advise a preliminary injunction in accordance with the prayers of the respective bills.

## Order for Amendment of Blil (General Investment Case).

(Filed January 19, 1925.)

### IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*vs.*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | Order for Amendment of Bill. |

Upon motion of Elmer W. Demarest, solicitor for the complainant, in presence of John R. Hardin and Malcolm W. Ward, Solicitors for defendant, it is on this 19th day of January, 1925, ORDERED, that the prayer of the bill of complaint be amended by the addition under Paragraph 2 the following sub-divisors:

From taking any action the result of which will effect an exchange of its present preferred stock into another class of preferred stock hereafter to be issued or authorized.

Expending any portion of the present or future assets for the purchase or retirement of any of its present preferred stock until the accumulated dividends now earned thereon shall have been fully paid and satisfied.

And that the prayer of said bill be further amended by the addition of the following paragraph.

That the present seven percent preferred stock of defendant is entitled to a preferential lien upon the assets of defendant to the extent of present surplus or profit and loss credit and that any class of preferred stock hereafter authorized or issued shall be subordinate and inferior to the lien hereby declared in favor of said outstanding seven percent preferred stock and no dividends shall be paid on any other class of preferred stock until after the present seven percent stock shall have been paid in dividends an amount equal to the present accumulated surplus or profits of said defendant.

Respectfully advised E. R. WALKER,
C.
JOHN BENTLY
V. C.

**Supplementel Opinion.**
(Filed January 23rd, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bills for Injunction.

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

SUPPLEMENTAL OPINION.

Submitted Jan. 19, 1925.
Decided Jan. 23, 1925.

HUDSPETH & DEMAREST, by
ELMER W. DEMAREST, ESQ.,
For Complainant Gen'l Investment Co.

*Supplemental Opinion.*

McCarter & English, by
Arthur F. Egner, Esq.,
For Complainants Jacob B. Joel, et als.

Pitney, Hardin & Skinner, by
John R. Hardin, Esq., and
Waldron M. Ward, Esq.,
For the Defendant.

## *OPINION.*

Bentley, V. C.:

After receipt of the opinion originally filed in these cases, a further argument was presented on behalf of the defendant, to change my mind on so much thereof as dealt with the invalidity of the attempted ratification of the contract with the Chase Securities Corporation. It was said on behalf of the defendant that there is a distinction between a contract made by a director with himself individually, as in the case of *Gardner v. Butler* (30 N. J. Eq. 702), and a contract between two corporations having a common director or directors, and such seems to be the case, as would appear from the opinion of Vice-Chancellor Stevenson in *Robotham v. Prudential Insurance Company* (64 N. J. Eq., 673, pp. 709 et seq). I was in error in deciding as a matter of law that any contract between corporations having a common director was voidable as a matter of right at the instance of any stockholder. That however, was not the vice I had in mind or intended to cover. The vulnerableness of the defendant's position is, that while such a contract is not void it is voidable by the stockholders by

force of statute before amendment of the certificate of incorporation. Consequently, it became the duty of the company to give notice of all material facts affecting the contract to each holder of stock, so that he might be informed of everything of which he had a right to know. The defendant maintains that a contract such as the one under discussion is good if found to be fair by the court, and then unassailable by any stockholder, while, for example on the contrary, it would be enjoined on the objection of a stockholder if *ultra vires*. But my difficulty with the situation is not that at all, but that the requisite notice of the objectionable feature (to wit: Tinker's adverse interest therein) was never ocmmunicated to any of the stockholders before their meeting was held.

In *Robothan v. Prudential Insurance Company* (supra), *Metropolitan T. & T. Co. v. N. Y. & N. J. Telephone Co.* (44 N. J. Eq., 568); *U. S. Steel Corporation v. Hodge* (64 N. J. Eq., 807), there was either actual notice extended to the stockholder or ratification after knowledge had been obtained. In the last-mentioned case Mr. Justice Magie, speaking for the Court of Errors and Appeals, indicates some doubt as to the validity of a contract such as the one found in this case. But I think that there is nothing in it irreconcilable with the opinion in the *Robotham* case; that is to say, that it is not adverse to the rule that such a contract is good if ratified after its execution. But it is said in the telephone case, that the common director is disqualified because of his interest in the contract, the terms of which he undertook to fix. Of course, his action could

be ratified by the stockholders: "To sustain his capacity to do this would be like permitting one to be a judge in his own case. Had the contract been executed or entered into without objection, it would no doubt have not been void, but, at the most, only voidable." In *Marr v Marr* (73 N. J. Eq. 643) the defendant William A. Marr reduced to judgment claims he held against the corporation of which he was a director and, upon the execution sale thereunder, bid in property of the corporation for himself. From this opinion I am unable to see any such limitation upon the *rationale* of the cases such as *Gardner v. Butler* (30 N. J. Eq., 702), as is perceived by defendant's counsel. Marr was decreed by the Court of Errors and Appeals to be a trustee for his company and to hold its property as such. Chancellor Pitney points out for the Court of Errors and Appeals, that a director is not obliged to forego a just debt against the company he represents, but makes it very clear that before assuming an antagonistic attitude he must openly and unequivocally "relinquish his trust *pro hac vice*, not covertly but openly and with fair notice to his company". This requires something more than mere abstention from voting, if Mr. Justice Dixon's language meant anything in *Stewart v. L. V. R. R. Co.* (38 N. J. L. 505).

It would seem but necessary without argument to declare that any adverse interest in a proposed corporate proceeding by one of the directors should be communicated to the stockholders, where the latter are asked to ratify the same. Any other rule would permit the most ruthless destruction of the rights of the stockholders.

*Supplemental Opinion.*

Adroit management could frequently prepare a scheme in such innocent guise that ordinary stockholders would not be put upon their guard unless the full discharge of their duties by directors or officers presented the objectionable information which might cause individual stockholders to more carefully scan the proposed plan and seek competent advice thereon. Furthermore, if the law is to remain a scientific coordinated body of principles, doctrines and rules there is no reason that fiduciary agents, such as directors, should not be subjected to the underlying directions of the law pertaining to trustees, which they are, *sub modo,* as pointed out in the cases already mentioned. There is no rule better established than that "a trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests, so far as they are embraced in or depend upon the trust or confidential relation" (Pom. Eq. Juris, sec. 1077). In the previous opinion it would seem that the position herein assumed was made clear from the citations taken from Mr. Justice Van Syckel's opinion in the *Hodge* case. He was not given to ruminating, in his opinions, on academic questions, and it would seem impossible to read what he there said as to contracts made by a trustee without the knowledge or consent of the *cestui que trust* and its subsequent ratification without concluding that individual stockholders may defeat a plan submitted for confirmation, as the one under consideration. Ratification is impossible in the absence of notice or knowledge (*Western Nat. Bank v. Armstrong,* 152 U. S. 346). Mr Justice

VanSyckel, in the *Hodge* case, meant something when he said:

> The rule that directors cannot lawfully enter into a contract, in the benefit of which *even one of their number participates* without the knowledge and consent of the stockholders, is so firmly entrenched in our jurisprudence that it is not open to debate.
> (The italics are mine.)

While the language does not indicate that a contract between corporations having a common director is void, it certainly must mean exactly what the clear intent of the language indicates. He says that the presence of a single common director who participates in the benefit of the contract makes necessary the acquaintance of the stockholders with that fact when ratification of the latter body is sought and required. This was not a voluntary expression of the judge's individual opinion; the language was written in deciding one of the questions presented to the court for decision. It must follow, clearly, from his language that "the rule that directors cannot lawfully enter into a contract" renders the same unenforceable over the objection of the stockholders, and the subsequent language makes it just as certain that no pretended or attempted confirmation of the irregular action is effectual where the knowlehge with which he is dealing is withheld from the stockholders. Such withholding amounts to constructive fraud where the parties stand in a relation of confidence and trust, the one to the other, irrespective of actual fraud or any conscious effort at suppression (Pom. Eq. Jurisp. Sec. 1077. Returning to the

opinion in the *Hodge* case, it was shown that the fullest and most honest expression of the personal interest of some of the directors was made to the stockholders prior to the meeting. Why? Certainly not because it was an unnecessary act upon the part of the officers gratuitously made. Men do not go outside of their legal duties to raise obstacles in the way of their own plans. The giving of the notice was commented upon to show that without it the rules of law previously adduced would have defeated the desires of the company. Again, I say that while the presence of the common director does not render the contract with the Chase Securities Corporation void, nevertheless, the concealing of that fact from the stockholders, whether honestly or not, renders ineffectual as against a single protesting shareholder any vote that might be taken upon a certification to a stockholders' meeting. No one can say in advance what the effect would have been upon the sentiment of any stockholder had he known all that he was entitled to know. It may be that if a second meeting is held, under the terms that will be proposed, the result may be even more gratifying to the managers of the corporation. But, on the other hand, many of those entitled to vote may change their minds; and this they are entitled to do and no one is legally authorized to take this discretionary power from them.

It was further urged that sufficient notice of Mr. Tinker's dual interest was exhibited to the stockholders at the time of the meeting, and that it was their duty to be present. But it appears to me self-evident that such notice, considered

by the company of sufficient importance to be communicated at the meeting, comes then too late. The shareholder has a right at the time his proxy is sought by the corporate officers to rely upon their fairness and the discharge of their confidential duties, and that the unwary public should not be held to the consequences of an act secured by constructive fraud. Neither am I impressed with the argument that constructive notice was contained in the president's letter, to the effect that arrangements had been made with a large banking corporation for securing one-half of the preferred stock to be retired. *Gardner v. Butler* (supra) and *Koop v. Bohmrich* (49 N. J. Eq., 82) are not authorities for any such position as the defendant assumes, and it would be a strange proceeding if the legislature, by the 17th section of the General Corporation Act were to extend to the stockholders the opportunity to vote by proxy with one hand and with the other behind its back clothe their trustees with the opportunity to betray their trust, without judicial redress for the former. A more inequitable action could not be conceived and will not be assumed to exist by one branch of the government against another.

Finally, it is said that bills such as those under consideration are for the benefit of the corporation and will not lie at the suit of a stockholder. Counsel, however, very frankly and fairly admitted that it would have been a futile thing for the complainants or any other stockholders to have sought permission from the directors to have filed these bills in the corporation's name. (*Appleton v. Am. Malting Co.*, 65 N. J. Eq. 375).

*Supplemental Opinion.*

I consider the contract with the Chase Securities Corporation to be such an integral part of the entire scheme proposed by the directors as to be inseparable and, for reasons I have attempted to explain, the entire matter should remain as it stands. To accede to the request that the defendant or its agents should be permitted to still vote the original proxies unless withdrawn by the stockholders after notice, would permit the defendant to profit by its own wrong. Equitably, it should be compelled to retrace its steps, to the point where the wrong was committed, and after proceeding to right the same by giving the necessary notice and again securing proxies wherever possible, proceed to the meeting upon fair terms with the investors. However, in order that the matter may be brought to a head I will direct that, if it so pleases, the company may proceed in accordance with the option expressed in the previous opinion, provided notice be mailed to the stockholders on or before January 28th, 1925, or else apply, upon two days' notice, to be heard on the fixing of terms, when I will hear arguments. Otherwise, I will advise temporary injunctions, in accordance with my previous opinion, upon amendment, if necessary, of the bill filed by Joel et als., which may be done upon like notice or upon the hearing under any such notice given by the defendant as above provided for.

Application for any order or decree must be upon notice, when appropriate action will be taken with regard to preserving the subject matter pending appeal.

**Affidavit of Scott McLanahan on behalf of Defendant.**

(Filed January 30, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW YORK,
County of New York, } ss.:

SCOTT MCLANAHAN, being duly sworn, deposes and says:

I am a member of the Board of Directors of

*Affidavit of Scott McLanahan, on behalf of Defendant.*

American Hide and Leather Company, the above named defendant.

A special meeting of said Board of Directors was held on Wednesday, January 28th, 1925, at 3:30 o'clock in the afternoon, at which a quorum was present. Resolutions were unanimously adopted calling a special meeting of said Company to be held at its principal and registered office, No. 15 Exchange Place, Jersey City, New Jersey, on March 4th, 1925 at 11:30 o'clock in the forenoon, to consider and act upon resolutions passed by the Board at its meeting held October 21st, 1924, and also approving and authorizing the mailing to each stockholder, with the notice of said special meeting, of a letter advising the stockholders of the Opinion of the Vice Chancellor rendered herein, particularly as to the interest of Mr. E. R. Tinker a Director of American Hide and Leather Company and President of Chase Securities Corporation, in the contract made by American Hide and Leather Company with Chase Securities Corporation, dated August 13th, 1924.

Owing to the necessity for notification of the New York Stock Exchange of the closing of the books of the Company for the purposes of said meeting, and the labor entailed in preparing and mailing the notices of the special meeting, it is practically impossible to hold said meeting at an earlier date than March 4th, 1925 and it was physically impossible to arrange for the mailing of notice of such meeting on or prior to January 28th, 1925 as provided in the Opinion of the Vice Chancellor herein. Said notices will be mailed at the earliest possible date after obtaining

*Affidavit of Scott McLanahan, on behalf of Defendant.*

the list of stockholders from the stock transfer agent of the Company.

SCOTT MCLANAHAN

Sworn to before me this
29th day of January, 1925.

Josephine M. Power
Notary Public,
Queens County No. 885.
Certificate filed in New York Co. No. 148.
Certificate filed Reg's Office
N. Y. Co. No. 6141.
Certificate filed Reg's Kings Co. No. 78.
Cer. filed Reg's Office Kings Co. No. 6066.

## Order for Amendment of Bill (Joel Case).

(Filed January 30, 1925.)

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>JACOB B. JOEL, et als.,<br>*Complainants,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | On Bill, etc. Order Amending Bill. |

Application being made on behalf of the complainants, in the presence of counsel for the defendant, and no cause appearing to the contrary,

It is, on this 30th day of January, 1925, on motion of McCarter & English, solicitors for complainants, ORDERED that the bill of complaint be amended in the following particulars, that is to say:

By adding a new paragraph to be designated as paragraph 6-A, between paragraph 6 and paragraph 7, as follows:

"6-A. Complainants show that the large banking corporation named in the foregoing paragraph is the said Chase Securities Corporation. The fact that said large banking corporation is the Chase Securities Corporation was not disclosed in the notice of said meeting of stockholders, nor in the circular accompanying the same, and complainants show that it was also not disclosed in said notice or circular that one of the directors

of the defendant company, namely, Edward R. Tinker, is also a director and officer of said Chase Securities Corporation. The stockholders' proxies, referred to in the foregoing paragraph and pursuant to which the shares of stock referred to therein were voted, were given without any disclosure of the identity of the said banking corporation, or of the common directorship of Mr. Tinker in both corporations. Complainants charge that the identity of said banking corporation and the fact of said common directorship should have been diclosed by the defendant corporation in seeking said proxies and in giving notice of said meeting of stockholders."

Respectfully advised

E. R. WALKER,
C.

JOHN BENTLEY,
V. C.

**Notice to Produce, etc.**
(Filed March 9, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill etc.
Notice.

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

Messers. Pitney, Hardin & Skinner,
Solicitors for the Defendant.

PLEASE TAKE NOTICE that on Monday, the 9th day of March, 1925, upon the continuance of the argument of the motion for a preliminary injunction in this cause before the Honorable John Bentley, one of the vice chancellors of this Court,

at the Chancery Chambers, in the City of Jersey City, at ten o'clock A. M. to which time and place the said hearing has been by order of the said Court continued, we shall produce and read an affidavit of Clarence H. Venner, President of the General Investment Company, complainant in one of the above entitled causes, a copy of which affidavit is herewith served upon you for the purpose of showing that the defendant has not complied with the directions contained in the opinion and supplemental opinion of this Court in respect of the notices therein directed to be given to the stockholders of the defendant Company as to the purposes and matters to be brought before the meeting of stockholders, held March 4th, 1925, and in respect of the disclosures required by the said opinions to be made to the stockholders of the defendant Company concerning the interests of the directors of said defendant in the matter of the plan of recapitalization and the contract with the Chase Securities Corporation, mentioned in the Bill of Complaint.

And you are further notified that the complainant, General Investment Company, requests and demands that you produce before the Court, at the time and place above mentioned, Mr. Clarkson, the Vice President of the Chase Securities Corporation and the Secretary and Treasurer of said Chase Securities Corporation, whose names are unknown to the complainant, together with all books and papers of the Chase Securities Corporation, in relating to the Contract of August 13th, 1924, mentioned in the Bill of Complaint and any and all letters, writings, contracts and other written evidence, concerning the underwriting of the fifteen thousand (15,000)

shares of Preferred Stock of the defendant Company, mentioned in the contract between it and the Chase Securities Corporation for the purpose of enlightening the complainant and the Court as to the interests and relations of the officers and directors of the defendant Company, other than said E. R. Tinker, in the underwriting of said contract with the Chase Securities Corporation and their participation in the profits therefrom. Complainant desires and intends to prove by said witnesses, the details of the underwriting agreements and transactions mentioned upon Page 3 of the affidavit served herewith.

You are further requested and required to produce before the Court, at the time and place above mentioned, Scott McLanahan and Claude Douthit, two of the directors of the defendant Company, for the purpose of permitting the complainant to examine them as to their pecuniary and other interests and relations in and to the transaction between the defendant and the Chase Securities Corporation, concerning the contract of August 13th, 1924 and the underwriting syndicate formed under and pursuant to said contract.

And that they produce all papers and writings and other memoranda having any bearing on or relationship to the matters mentioned.

You are further requested and required to produce before the Court, at the time and place aforesaid, William A. Zimmerman, who acted as the Chairman of the Inspectors of Election at the Special Meeting of the stockholders of the defendant held March 4th, 1925.

HUDSPETH & DEMAREST.
Solicitors for Complainant.

## Affidavit on Behalf of Complainant (General Investment Bill.)

(Filed March 9th, 1925.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

Consolidated Actions. On Bills for Injunctions.

STATE OF NEW JERSEY, County of Hudson. } ss.:

CLARENCE H. VENNER, being duly sworn, on his oath says, that he is the President of the above named complainant, General Investment Company; that on February 9th, 1925, said Company received by mail from defendant, American Hide

& Leather Company, a notice dated February 4th, 1925, calling a special meeting of stockholders of said defendant, to be held on March 4th, 1925, for the purpose of considering and voting upon certain resolutions of the Directors of said corporation, adopted October 21st, 1924, and readopted on January 28th, 1925, having reference to the plan of recapitalization and proposed amendment of the Certificate of Incorporation, as more fully set forth in Schedule "B" to the complaint herein. Accompanying said notice of special meeting was a circular letter addressed by the President of said defendant, under date of February 4th, 1925, to the stockholders of American Hide & Leather Company, a copy of which is hereto annexed and made a part of this affidavit, as Schedule "A."

As will appear from said circular letter, disclosure is made as to the interest of Mr. E. R. Tinker, one of the Directors of the defendant and also President of the Chase Securities Corporation, in the underwriting of the 15,000 shares of the preferred stock of the defendant acquired under its contract with the Chase Securities Corporation, dated Auust 13th, 1924.

It further appears from said circular letter that no disclosure is made by the defendant with reference to the interest of any of its Directors, other than Mr. Tinker, in the underwriting of said contract for the purchase of the said 15,000 shares of preferred stock or in the profits or commissions resulting therefrom, nor is any disclosure made with respect to the special compensation of two of the Directors of the defendant, Messrs. Claude Douthit and Scott McLanahan, in connection with the said plan of recapitalization as

authorized by the Executive Committee of the Directors of the defendant or by the Directors on March 5th, 1924, and June 23rd, 1924.

At the special meeting of stockholders, held on March 4th, 1925, the Chairman of the meeting, Mr. Lilly, who is the President of the defendant, admitted in reply to questions from this deponent that a certain amount had been paid to Mr. Douthit and that a payment would be made to Mr. Scott McLanahan, or his firm, but the said Chairman, Mr. Hill, the Secretary and Treasurer of the defendant, and Mr. Claude Douthit, who were present at said meeting, refused to answer questions asked by this deponent as to the amounts so paid or to be paid to him.

Deponent says that the said Claude Douthit and Scott McLanahan hold no office in the defendant Company other than that of director and that the sums paid or agreed to be paid to them represent a bonus or gratuity in connection with said plan of recapitalization and should have been disclosed to the stockholders in the circular letter above referred to.

The said circular letter does not state that none of the directors other than Mr. Tinker are in any way interested as underwriters or otherwise in the purchase of said 15,000 shares of stock or in the profits and commissions to be paid or received therefrom or in any other expenditures of defendant's funds in connection with said plan of recapitalization.

Deponent further says that in the latter part of January, 1925, and after the last hearing before the Court, both he and Mr. Elmer W. Demarest, counsel for complainant, General Investment Company, were informed by one of the coun-

sel for the defendant who has been acting in these proceedings, that the Directors of said defendant Company had personally guaranteed the performance by said Company of its contract with the Chase Securities Corporation in relation to the purchase of and payment for the 15,000 shares of prefered stock. Deponent understood that the statement so made by defendant's counsel had reference to the underwriting of said contract with the Chase Securities Corporation and the commission of $5 a share to be paid for the purchase of said stock, the said underwriting being that which is referred to in said circular letter of February 4th, 1925, in connection with Mr. Tinker's participation therein.

For many years past, the New York law firm of Cravath, Henderson and deGersdorff has been and now is general counsel for the defendant company and, as deponent verily believes, has been paid a large annual retainer and, for many years past, said defendant has been represented in New Jersey by the law firm of Pitney, Hardin and Skinner. Mr. Scott McLanahan is a member of the New York law firm of Gleason, McLanahan, Merritt and Ingraham, whose employment in the matter was wholly unnecessary and involved an interest which should have been disclosed.

Deponent further states that at said special meeting of stockholders held on March 4th, 1925, as soon as the same was organized for business, he read and handed to the Secretary of said meeting to be spread upon its minutes, a notice of protest on behalf of General Investment Company and several other stockholders, a copy of which is hereto annexed as Schedule "B" and made a part of this affidavit.

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

Deponent was informed by Mr. Zimmerman, one of the Inspectors of Election at said meeting, that there were approximately 350 separate proxies to be voted by the Committee of Directors of the form a copy of which is hereto annexed as Schedule "C" and made a part hereof; that said 350 proxies represented approximately 93,000 shares of prefered and 82,000 shares of common stock.

None of said proxies so voted by the Directors' Proxy Committee had, at the time of the voting thereof on the several propositions submitted at said meeting, any documentary stamps affixed thereto as required by Sections 800 to 807 inclusive and Schedule "A" thereto of the Federal Revenue Act approved June 2nd, 1924, now in full force and effect.

Deponent further says that immediately upon the conclusion of the reading of the report of the Inspectors of Election, detailing the vote upon the several propositions, he protested against the reception and approval of said report upon all the grounds stated in the notice of protest read at the beginning of the meeting, which is Schedule "B" hereto, and upon the further grounds:

1. That the said Inspectors did not know whether the persons signing said proxies voted by the management were stockholders of said Company as they had only checked off said proxies from a typewritten list furnished by the Equitable Trust Company and not from the stock books themselves, as is by law required.

2. That, at the several times the said proxies were so voted by said Proxy Committee, no Federal Documentary Stamps were affixed thereto; that such proxies, in the absence of such

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

stamps, could not be voted and that the vote attempted to be cast thereon was null and void and of no effect whatever.

After said proceedings had been taken and said protests made, the Treasurer of the defendant Company handed to Mr. Zimmerman, Chairman of the Inspectors of Election, a few uncancelled documentary stamps of large denomination, with instructions to stick them upon a separate piece of paper.

This deponent charges that said proxies, having been voted in the manner aforesaid, could not be validated by any subsequent affixing and cancellation of documentary stamps and that the affixing of proper stamps to such proxies is a condition prerequisite to their use at any meeting.

CLARENCE H. VENNER.

Sworn to and subscribed before me this 6th day of March, 1925.

Mary Freeman,
Notary Public
of New Jersey.

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

SCHEDULE A.

AMERICAN HIDE & LEATHER COMPANY
92 Cliff Street
New York City.

February 4th, 1925.

*To the Stockholders of American Hide and Leather Company:*

At the Special Meeting of the Stockholders held on December 9th, 1924, to consider and act upon a proposed Plan of Readjustment of the Capitalization of the Company as set forth in the notice of the meeting, the holders of 91,990 shares of preferred stock and 88,645 shares of common stock, or considerably more than two-thirds of each class of stock outstanding, voted in favor of the Plan. 418 shares of preferred stock and 200 shares of common stock voted in opposition.

Just before the meeting, General Investment Company, of which Mr. Clarence H. Venner is President, the holder of 100 shares of preferred stock, filed a Bill in the Court of Chancery of New Jersey seeking to enjoin the carrying out of the Plan. Later a few other stockholders started a similar action, in all representing less than 1% of the outstanding stock of the Company. The two cases were consolidated.

The Court has rendered its opinion dismissing the objection to the Plan.

In referring to the advantages of the Plan, the Vice-Chancellor, in his opinion, said:

"No extensive argument has been attempted

here to show that the Plan devised will be to the substantial benefit of all the stockholders of the Company, for the reason that an examination of the condition of the Company, and the saving to be effected, as displayed in the statement of facts, must make it apparent to any disinterested person."

The Vice-Chancellor, however, in his opinion, calls attention to the fact that one of the directors of the Company, Mr. E. R. Tinker, is also president of Chase Securities Corporation, the banking corporation with which the Company had made arrangements, as stated in the circular letter to the stockholders of October 23rd, 1924, (copy of which is hereto attached) to purchase fifteen thousand (15,000) shares of the preferred stock of the Company, and that this fact was not stated in the circular letter, and holds that the stockholders' approval of the Plan was ineffective because that fact was not stated in the circular letter. Mr. Tinker is also a director and stockholder in Chase Securities Corporation, and indirectly through a Corporation in which he was interested, participated with Chase Securities Corporation, to the extent of 1,667 shares, in underwriting the acquisition of said 15,000 shares of said stock.

Appreciating the benefits of the Plan to the Company, however, the Vice-Chancellor says:

"However, in face of the large majority in favor of the new plan of capitalization, the otherwise apparently hopeless condition of the company, the advantage to be obtained for the great mass of stockholders by bringing the finances of the company at least one step nearer to the resumption of dividends,

and the fact that I do not believe there was any conscious attempt to suppress information from stockholders, I feel that an opportunity should be afforded the defendant to repair the neglect with which I have just dealt. Therefore, I will withhold action for a period of ten days from the mailing of this opinion, so that if the defendant shall desire, it may give notice to the stockholders of another special meeting, for the purpose of again passing upon the resolutions of the board of directors which have given rise to this suit. With such notice, or incorporated therein, there shall be given the information already withheld, to wit, the name of the Chase Securities Corporation, and the fact that Mr. Tinker was a member of the defendant's board of directors and the president of the Chase Securities Corporation at the time the contract was executed, as was done in the Hodge case (pp. 814-815). Of course, new proxies must be obtained after this information shall have been conveyed to the stockholders, and no proxy executed prior thereto shall be voted. Should the stockholders again adopt the resolutions of the board, I shall refuse any preliminary injunction."

Mr. Tinker attended no meetings of the Directors of the American Hide and Leather Company at which the contract with the Chase Securities Company was considered. A copy of the contract was produced at the special meeting of the stockholders on December 9th, 1924. The contract provides that in addition to a fee of $25,000 (which has been paid) as compensation for acting as Depositary of the stock of the Company and as Fiscal Agent for the Company in the carrying out of the Plan, Chase Securities

Corporation, if the stockholders of the Company should approve the Plan, should be paid for the 15,000 shares of preferred stock to be purchased from it, at the rate of $5 per share over the average cost of said stock to Chase Securities Corporation (but not in excess of $70 per share), plus its carrying charge and legal expenses.

The Vice-Chancellor in his opinion, states:

> "The average cost to the Chase Corporation of accumulating such shares of stock amounts to $63.35, making the price due to the Chase Corporation from the defendant $68.65 plus the pro rata portion of the other charges to each share of stock, roughly, $70 per share."

To comply with the opinion of the Court, therefore, your Board of Directors has called another special meeting of the stockholders to be held on Wednesday, March 4th, 1925, at 11:15 o'clock in the forenoon, to again consider and act upon the resolutions passed by the Board of Directors at its meeting held October 21st, 1924, and which have been readopted by the Board at a meeting held January 28th, 1925.

The Plan of Readjustment of the Capitalization of the Company has in no way been changed or modified and this second special meeting is called in accordance with the opinion of the Court, to enable the stockholders to confirm their previous action with full knowledge of the information above set forth.

Under the terms of said contract, Chase Securities Corporation has the right, on account of the unforseen delay in carrying out the terms of the contract, to cancel the same. It has not yet

done so and the Board of Directors believes that if the Plan of Readjustment is again approved by the stockholders at the special meeting to be held on March 4th, 1925, the contract with Chase Securities Corporation, which the Board regards as most advantageous to the Company, may still be carried out. The ratification of this contract will, however, be voted upon as a separate and distinct proposition.

The Board of Directors earnestly urge the stcokholders to support the Plan, and invite proxies from all who may not be able to attend in person the special meeting on March 4th, 1925. A proxy is enclosed herewith, the prompt return of which with your signature is earnestly requested, if your personal presence is impossible. The necessary revenue stamps will be attached by the Company.

By order of the Board of Directors,
J. C. LILLY,
President.

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The following is a copy of the circular letter which was sent to Stockholders with the notice of the Special Meeting held December 9th, 1924.

To the Stockholders of
AMERICAN HIDE AND LEATHER COMPANY:

For a long time it has been apparent to the directors and officers of your Company that a readjustment of its capitalization was absolutely necessary in order to place its capital stock liability in such relation to its earning power that

the stockholders may participate in the earnings of the Company. From the organization of the Company in 1899 until 1921 the earnings of the Company, while substantial, were very largely used in the payment of interest and installments on the principal of $8,500,000. of First Mortgage Bonds, issued at the time of the organization, all of which have been paid off and retired. For that reason dividends on the Preferred Stock were, to a great extent, left unpaid and have accumulated to the point where they now amount to approximately 140% of the total Preferred Stock outstanding.

The present capitalization is:

| | Authorized | Outstanding |
|---|---|---|
| Preferred Stock | $17,500,000. | $13,000,000. |
| Common Stock | 17,500,000. | 11,500,000. |

Of the $13,000,000 Preferred Stock outstanding, 4,517 shares are held in trust for the use of the Company, so that the actual amount of Preferred Stock in the hands of the public is $12,548,300.

On this Preferred Stock there are now accumulated, accrued and unpaid dividends of 140%, or a total of $17,567,620.

The total par value of the Preferred Stock outstanding in the hands of the public plus the accrued unpaid dividends thereon amounts, therefore, to $30,115,920.

The amount required for dividends at the rate of 7% on the outstanding Preferred Stock is over $875,000 per year.

It is not reasonable to expect your Company to earn an amount annually sufficient to pay 7% on this outstanding Preferred Stock and in addition thereto the very large amount which would

be necessary in order to pay off the accrued dividends even over a long period of years.

After much study your Board of Directors has devised a plan for the readjustment of the capitalization of the Company, which is embodied in resolutions passed by the Board as set forth in the accompanying notice of a Special Meeting of the stockholders to be held on December 9th, 1924.

When the proposed changes as recommended by the Board of Directors in these resolutions are approved by the stockholders at the Special Meeting, the Company will be prepared to purchase 30,000 shares of the outstanding Preferred Stock for cash at a price not exceeding $70. per share.

In aid of this plan, the Board of Directors has made arrangements with a large banking corporation of New York City, for the purchase from it by your Company of 15,000 shares of Preferred Stock at a price of approximately $69 per share. It is proposed that the balance of 15,000 shares be purchased from the holders of the Preferred Stock pro rata at a price of $70 per share, each stockholder to be requested to sell to the Company approximately 13% of his holdings (which will amount to a total of 15,000 shares, in addition to the 15,000 shares to be purchased as aforesaid).

When this transaction is complete, it is proposed that the 35,000 shares of new Eight Per Cent. Cumulative Prior Preference Stock, which the Stockholders are asked to authorize at the Special Meeting, will be utilized to acquire for retirement as large an amount of the then outstanding Preferred Stock as possible, on a basis of one share of new Prior Preference Stock for

not less than one share of outstanding Preferred Stock.

Upon completion of the program as contemplated by this plan, your Company will have wiped out and extinguished a total

| | | |
|---|---|---|
| Preferred Stock capital and dividend liability of at least | | $15,600,000. |
| by the use of | | |
| Cash | $2,100,000. | |
| and | | |
| Par Value new Prior Preference Stock | 3,500,000. | |
| Total | $5,600,000. | 5,600,000. |
| Net capital stock and dividend liability extinguished | | $10,000,000. |

After this has been accomplished, the holders of the remaining outstanding Preferred Stock will be much nearer the possibility of receipt of back dividends on their remaining stock, and the common stockholder will have benefited by the extinguishment of $12,100,000 of capital and dividend liability ahead of his stock at a cost of $2,100,000. This $12,100,000 being made up as follows:

| | |
|---|---|
| Preferred Stock Purchased | $3,000,000. |
| 140% dividends accrued thereon extinguished | 4,200,000. |
| Accrued dividends (140%) extinguished on $3,500,000 Preferred Stock | 4,900,000. |
| Total | $12,100,000. |

of the Company provided for in the resolutions on the present capitalization and on the proposed adjusted capitalization is as follows:

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

PRESENT CAPITALIZATION

| | |
|---|---|
| Amount necessary to pay 7% on Preferred Stock outstanding | $ 878,381. |
| Amount necessary to pay accrued dividends on Preferred Stock, before any dividends can be paid on Common Stock | $17,567,620. |

ADJUSTED CAPITALIZATION

| | |
|---|---|
| Amount necesary to pay 8% on new Prior Preference Stock | $ 280,000. |
| Amount necessary to pay 7% on remaining Preference Stock | 423,381. |
| Total | $ 703.381. |
| Amount necessary to pay accrued dividends on Preferred Stock before any dividends can be paid on Common Stock | $ 8,467,620. |

From the above figures we believe it will be obvious to every stockholder of the Company that it will be greatly to his advantage to consummate the readjustment of the capitalization of the Company provided for in the resolution which the stockholders are asked to approve.

Each stockholder who cannot attend the meeting is earnestly requested to sign the enclosed proxy before a witness (who should also sign where indicated), and return the same in the enclosed envelope to the Company.

By order of the Board of Directors,

J. C. LILLY,
President.

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

SCHEDULE B.

Jersey City, N. J., March 4, 1925.

To the Stockholders of the American Hide and Leather Company, their proxies and representatives, assembled in special meeting on this date, to the officers of said Company in charge of said meeting and the Inspectors of Election acting thereat:

TAKE NOTICE

That the undersigned stockholders of the American Hide and Leather Company hereby protest against any action being taken at this meeting in respect of any of the matters referred to in the notice dated February 4, 1925, calling this meeting, because

1. The plan and scheme for the amendment of the Certificate of Incorporation of said Company; the purchase and retirement of 30,000 shares of existing preferred stock and the creating and issuing of $3,500,000 of prior preference cumulative 8 percent stock are not authorized by and are in violation of the General Corporation Act of New Jersey and in violation of the contract or vested rights of the stockholders of said Company, all as more fully set forth in the bills of complaint in the actions of General Investment Company, Jacob B. Joel and others, complainants against the American Hide and Leather Company, now pending in the Court of Chancery.

2. The interest of the directors of the American Hide and Leather Company, other than that of Mr. E. R. Tinker, in the contract with the Chase Securities Corporation or its underwriting

syndicate, or in the profits or commissions paid or to be paid by said Company to said Chase Securities Corporation or said syndicate in connection with the purchase of 30,000 shares of preferred stock, or in respect of other compensation paid or to be paid to Messrs. Claude Douthit and Scott McLanahan, members of the board of directors of said American Hide and Leather Company, for alleged services in connection with said plan and scheme for recapitalization to be submitted and voted upon at this meeting, have not been disclosed to the stockholders of said Company in the printed notice calling this meeting, nor in the explanatory circular of the President of said Company, accompanying said notice nor in any other manner.

We charge that several of the directors of said Company, besides Mr. Tinker, are interested in said contract and in the profits and commissions derived or to be derived therefrom, or from other payments made or to be made by said Company in connection with or on acount of said plan and scheme, as already voted by the directors.

We therefore claim that such failure to disclose constitutes constructive fraud upon the stockholders of said Company and will vitiate all proceedings taken at this meeting and makes void all proxies solicited by the Company in favor of Claude Douthit, Lindsay Hopkins, John C. Jay, J. C. Lilly and Edgar M. Williams, to be used and voted at this meeting in approval of said plan and scheme of recapitalization and the amendment of the Certificate of Incorporation.

3. The proposed reduction and retirement of

the existing preferred stock will, if carried into effect, oust the preferred stockholders from control of the Company, in favor of the common stock which now has little or no intrinsic value, thus making it possible for any group of speculators or corporation wreckers to gain control of the Company through the purchase of the common stock at slight cost and by this means vote themselves into official positions at such exorbitant salaries as they may, in their discretion, deem best to fix.

4. We further protest against the reception or counting by the inspectors of election of any votes, by proxy or otherwise, on the 15,000 shares of preferred stock acquired by the Chase Securities Corporation under said contract, as agent for the American Hide and Leather Company, which shares are registered upon the books of said Company as follows:

| | | |
|---|---|---|
| Harry S. Burroughs, Jr., | 2,000 | shares |
| George D. Casterline | 1,000 | " |
| Henry Hargreaves | 2,000 | " |
| George Holzman | 2,000 | " |
| John J. Schemp | 2,000 | " |
| Wm. H. Semon | 2,000 | " |
| Raymond S. Wilson | 2,000 | " |
| Henry A. Noll | 2,000 | " |

We claim and insist that said 15,000 shares of stock are disqualified from voting on any of the propositions to be submitted at this meeting, as same have been bought for the American Hide and Leather Company for retirement and for the purpose of voting in favor of said plan and scheme for recapitalization and amendment of the Certificate of Incorporation, and that the voting of

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

said stock, under such circumstances, will constitute a fraud upon all the other stockholders of said Company and be illegal and void.

GENERAL INVESTMENT COMPANY,
By C. H. Venner,
President;

Clarence H. Venner

and

J. S. Bache & Co., as pledgee for S. Sheridan Felder; Edward E. Stevens, C. Albert Wettinger, and Frederick W. Clerk, by their attorney and agent under their respective proxies.
C. H. Venner.

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

SCHEDULE C.

*PROXY.*

Preferred Shares .....
Common Shares ..... 10

AMERICAN HIDE AND LEATHER COMPANY.

Special Meeting of Stockholders,
March 4, 1925.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, a stockholder of American Hide and Leather Company, a New Jersey corporation, does hereby constitute and appoint Claude Douthit, Lindsey Hopkins, John C. Jay, J. C. Lilly and Edgar M. Williams, or any one of them, the action of a majority of them to be in any event controlling, the true and lawful attorneys and proxies, or any of them, the true and lawful attorney and proxy, with full power to said attorneys and proxies, or any one of them, to appoint a substitute or substitutes, for and in the name, place and stead of the undersigned, to vote as fully and effectually as the undersigned might or could do and according to the number of votes that the undersigned would be entitled to vote if then personally present, at a Special Meeting of the stockholders of said Company, to be held at the principal and registered office thereof, No. 15 Exchange Place, Jersey City, N. J., on March 4, 1925, at 11:15 o'clock in the forenoon, and at any and all adjournments thereof, upon any resolution or proposition that may properly come before said meeting, and particularly to vote in favor of and consent to, and said

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

attorneys and proxies and their substitutes are, and each of them and his substitute is, hereby instructed to vote in favor of and to consent to each and all of the propositions specifically set forth in the notice of said meeting as recommended by the Board of Directors of said Company, and any and all resolutions or action proposed at such meeting approving of or adopting any resolution theretofore passed or action theretofore taken by the Board of Directors or Executive Committee of said Company in reference to or in connection with the carrying out of any of said propositions so specifically set forth in said notice, and to sign for and on behalf of the undersigned the name of the undersigned to any consent or instrument in writing required to evidence the consent of the undersigned to any and all such resolutions and/or propositions; and the undersigned hereby ratifies and confirms all that said attorneys and proxies, or any one of them, or their substitute or substitutes may lawfully do or cause to be done by virtue hereof.

WITNESS the hand and seal of the undersigned this ..... day of ..... 1925.

..... (L. S.)

In the presence of:

.....

Witness.

NOTE: Stockholders unable to attend the meeting are requested to date and sign the above Proxy in the presence of a witness and return the same to the Company in the enclosed stamped envelope. Any and all revenue stamps, required by law, will be affixed and cancelled by the Company.

*Affidavit of C. H. Venner on behalf of Complainant General Investment Bill.*

EXCERPTS FROM MINUTES OF STOCKHOLDERS' MEETING OF MARCH 4, 1925.

MR. VENNER: At a meeting of the directors of this Company held on March 4, 1924, the following resolution was adopted:

> "Resolved that the firm of Gleason, McLanahan, Merritt & Ingraham be retained by the company as special counsel from this date for the purpose of preparing in connection with the general counsel of the company and for the later consideration of the board a plan or plans for the readjustment of the capitalization of the company and for such other services as may be requested by the board of directors."

In connection with that resolution, Mr. Chairman, I would ask you whether the McLanahan referred to in that firm is Mr. Scott McLanahan, one of the directors of this company?

THE CHAIRMAN: Yes, sir.

MR. VENNER: Will you please state what, if any, compensation has been paid to Scott McLanahan in connection with this plan that is now before the stockholders?

THE CHAIRMAN: None.

MR. VENNER: Is it expected that he will present a bill for services?

THE CHAIRMAN: It is expected.

MR. VENNER: But the amount has not yet been determined?

THE CHAIRMAN: No.

MR. VENNER: At a meeting of the Executive Committee, held June 23rd, 1924, the following resolution was adopted:

> "Resolved, that Mr. Claude Douthit be re-

tained for special services for the company to be arranged either by the Executive Committee or the President of the Company, the term of service beginning June 1st and without a fixed date from the period of the said engagement and at the end of each month Mr. Douthit is to submit a statement to the Committee for ratification."

The Mr. Douthit referred to in that resolution is one of the directors of the Company?

THE CHAIRMAN: Yes.

MR. VENNER: And a member of the Executive Committee?

THE CHAIRMAN: Yes.

MR. VENNER: And those services were in connection with this plan which is now before the meeting?

THE CHAIRMAN: Not entirely.

MR. VENNER: But partly?

THE CHAIRMAN: It is possible, yes.

MR. VENNER: And has the Company paid him anything on account of those services?

THE CHAIRMAN: The Company has paid him on account of certain services rendered.

MR. VENNER: How much?

THE CHAIRMAN: I do not know offhand.

MR. VENNER: Perhaps Mr. Hill, the Secretary, can tell me. Mr. Hill?

THE SECRETARY: I hear you, but——

THE CHAIRMAN: Mr. Douthit has been paid a certain salary in connection with services for the Company as a whole, not any specific amount towards this plan and we really could not tell you how much will be even charged for this plan, if anything.

MR. VENNER: Is it not a fact that Mr. Douthit

was almost continuously employed from the 1st of June, 1924, down to October, 1924, in the preparation and the concoction of this plan and scheme for recapitalization and amendment of the certificate of incorporation?

THE CHAIRMAN: Partly.

MR. VENNER: He devoted a large part of his time to it, did he not?

THE CHAIRMAN: Part of his time.

MR. VENNER: And the object of the resolution was to pay him for that service, was it not?

THE CHAIRMAN: Not entirely.

MR. VENNER: Will you state how much has been paid to Mr. Douthit?

THE CHAIRMAN: I really don't know how much has been paid to Mr. Douthit.

MR. VENNER: Well, I will ask the Secretary, then—well, Mr. Douthit is here. I will ask him.

MR. DOUTHIT: Go ahead and and ask. I don't believe I have to answer you.

MR. VENNER: You can refuse to answer at your peril, that is all there is to it.

## Affidavit of George B. Hill on behalf of Defendant.

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, &c.

BETWEEN

JACOB B. JOEL, et als.,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW JERSEY, }
County of Hudson. } SS.:

GEORGE A. HILL, being duly sworn according to law on his oath says:

I am a resident of the State of New Jersey and am, and have been for many years, Secretary and Treasurer of American Hide and Leather Com-

pany, a New Jersey corporation, the above named defendant.

The supplemental Opinion of the Court herein affirming the first opinion of the Court to the effect that a second special meeting of stockholders of said Company should be called for the reasons as fully set forth in said opinions, was rendered on Friday, January 23rd, 1925. As soon as possible thereafter, namely, on Monday, January 26th, 1925, deponent duly sent out by telegram a notice of a special meeting of the Board of Directors of said Company to be held on January 28th, 1925, which was the earliest date at which said meeting could be held, after the giving of such notice, under the By-Laws of said Company.

At said meeting of the Board of Directors held on January 28th, 1925, the resolutions previously adopted by said Board on October 21st, 1924, as set forth in the notice of special meeting of stockholders held on December 9th, 1924, were readopted and a special meeting of stockholders called to be held on March 4th, 1925, to consider and take action thereon.

Notice of said special meeting to be held on March 4th, 1925, was duly given as appears from the affidavit of deponent of mailing of notices in accordance with the requirements of the By-laws of the Company, a copy of which affidavit is hereto annexed and the original of which was submitted to and made a part of the minutes of said special meeting of stockholders held March 4th, 1924.

A true copy of said notice is also annexed hereto.

With each of said notices of said special meeting there was also mailed to each stockholder of

record of the company a circular letter, of which a copy is hereto annexed.

As appears from said circular letter, there was fully disclosed to the stockholders therein all of the information in possession of the Board of Directors, as deponent is informed and verily believes, as to the interest of Mr. Edward B. Tinker under and in connection with the contract of the company with Chase Securities Corporation, dated August 13, 1924, which has already been referred to in the proceedings herein.

Deponent further says that as he is informed and verily believes, no other Director of defendant company has been or is in any wise personally interested in the contract of August 13th, 1924 between defendant company and Chase Securities Corporation, or in any group or syndicate formed by Chase Securites Corporation in connection with said contract and therefore there was no other interest of any Director in connection therewith to be disclosed to the stockholders.

Deponent has been present and has taken the minutes of every meeting of the Board of Directors since the election of Mr. Tinker as a Director of said company at the annual meeting of stockholders in March, 1924, and at none of said meetings has Mr. Tinker been present.

With said notice of said special meeting held on March 4th, 1925, there was also mailed to each stockholder a form of proxy, copy of which is also hereto annexed.

Under date of Feburary 10th, 1925, Mr. Clarence H. Venner, President of General Investment Company, one of the complainants herein, mailed to the stockholders of American Hide and Leather

Company a circular, copy of which is hereto annexed, marked for identification at the top thereof, "Venner Circular".

Said special meeting of stockholders was duly and regularly held on March 4th, 1925, at the principal and registered office of said company, No. 15 Exchange Place, Jersey City, New Jersey, at 11:15 o'clock A. M., in accordance with said notice thereof duly given as aforesaid:

Deponent was present at said meeting and acted as Secretary thereof.

The stock tranfer books of the defendant company were physically present in the room in which said meeting of stockholders was held, as well as a true and complete alphabetical list of all stockholders entitled to vote thereat certified by the Transfer Agent of the defendant company. The stockholders who voted at said meeting in person or by proxy were each and all of them stockholders of record of the defendant company and entitled to vote at said meeting.

The names of the stockholders present and those represented by proxy were duly taken and canvassed by deponent and by the Inspectors of Election duly appointed and acting. There were represented at said meeting stockholders in person holding 2313 shares of Preferred Stock and 361 shares of Common Stock and stockholders represented by proxy holding 93,915 shares of Preferred stock and 82,907 shares of Common Stock, or more than two-thirds of each class of stock outstanding and entitled to vote.

At said meeting, on motions duly made and seconded, each and every resolution as proposed and set forth in said notice of said meeting was

adopted by the affirmative vote of more than two-thirds of each class of stock outstanding and entitled to vote, to wit:

In favor of said resolutions and each and every one of them, there was voted 93,279 shares of Preferred Stock and 82,368 shares of Common Stock, out of a total outstanding and entitled to vote of not exceeding 125,483 shares of Preferred Stock and 112,741 shares of Common Stock.

In opposition to said resolutions there was voted 3,387 shares of Preferred Stock and 1,300 shares of Common Stock.

After the voting on said resolutions with the result as above stated, a stockholder present in person holding 600 shares of Preferred Stock. who had previously voted in opposition to said resolutions, namely, Mr. C. A. Hovey, requested permission to change his vote so that he should be recorded as in favor of said resolutions.

On motion seconded and carried by the vote of more than two-thirds of each class of stock, permission was given to Mr. Hovey to change his vote accordingly and the vote therefore became in favor of said resolutions 93,879 shares of Preferred Stock and 82.368 shares of Common Stock, and against said resolutions 2,787 shares of Preferred Stock and 1300 shares of Common Stock.

Deponent further says that all of the said shares of Preferred Stock and Common Stock voted against said resolutions were voted either by said Clarence H. Venner in person or as prory, or by Arthur F. Egner, Esquire, who is of Counsel for the complainants Jacob B. Joell and others in this suit.

The assent of stockholders to each and every of the said resolutions of the Board of Directors as set forth in the notice of meeting was at said meeting of the stockholders signed by holders of more than two-thirds of each class of stock, namely by the holders of 93,879 shares of Preferred Stock and 82,368 shares of Common Stock.

In addition to the resolutions as set forth in said notice of said meeting, the following resolutions were offered, seconded and adopted by a vote of 93,879 shares of Preferred Stock and 82,368 shares of Common Stock in favor and 2787 shares of Preferred Stock and 1300 shares of Common Stock opposed, said resolution being as follows:

(1) RESOLVED that the minutes of the meetings of the Board of Directors of this company held on October 21st, 1924 and on January 28th, 1925, and all action taken by said Board at said meetings as set forth in said minutes be, and the same hereby are, in all respects approved, ratified and confirmed.

(2) RESOLVED that the contract made by the American Hide and Leather Company with Chase Securities Corporation under date of August 13th, 1924, copy of which has been submitted to this meeting be, and the same hereby is, in all respects approved, ratified and confirmed and the Directors and officers of the company be, and hereby are, authorized to take such action and to duly execute and deliver such instruments in writing as in their judgment may be necessary or advisable for the performance of said agreement on the part of this company.

Said last two resolutions were offered and voted on separately and duly adopted as above stated.

At the beginning of said meeting the minutes of the meetings of the Board of Directors and Executive Committee held since the last annual meeting of the Company on March 5th, 1924, including the minutes of the meetings of the Board of Directors held October 21st, 1924 and January 28th, 1925, were laid before the stockholders for their inspection.

At the outset of said meeting, Mr. Clarence H. Venner, above referred to, filed a protest in writing with the Secretary of the meeting against any action being taken at the meeting in respect of any of the matters referred to in the notice thereof dated February 4th, 1925, for the reasons set forth in said protest.

As agoresaid, Mr. C. A. Hovey, one of the stockholders present, requested permission to change his vote from opposition to said resolution to support of the same, after full discussion at said meeting of the resolutions as offered and the Plan of Readjustment of the Capitalization of the company therein provided for, in which discussion Mr. Venner and other stockholders present took part. After the taking of the votes on the resolutions as set forth in the notice of the meeting, Mr. Venner objected to the reception of the reports of the Inspectors of Election on the several votes and resolutions on the ground that the proxies voted at the meeting did not each bear a 10c documentary stamp under the provisions of the Tax Laws of the United States. Deponent as Secretary of said company, however, had purchased and affixed to the report of the Inspectors at said meeting, to which was attached the corporate seal of the American Hide and Leather

Company and which report is filed as part of the permanent records of said company, Internal Revenue documentary stamps covering the full amount required by the United States Tax Laws, in accordance with the Rules and Regulations of the United States Treasury Department.

At said meeting Mr. Venner also protested against the validity of the action taken on the ground that there had not been disclosed to the stockholders in the circular letter sent out with the notice of said meeting above referred to, any information of the fact that Mr. Scott McLanahan, one of the Directors of the company, was a member of the law firm of Gleason, McLanahan, Merritt & Ingraham, in New York City, which has been retained by the company under resolution passed by the Board of Directors at a meeting held on March 5th, 1924, and that inasmuch as Mr. McLanahan might personally participate in fees received by said law firm for services rendered to the company in conection with the Plan of Recapitalization as embodied in the resolutions adopted at said meeting, that fact should have been disclosed to the stockholders in the circular letter accompanying the notice of said meeting; that there was not disclosed to the stockholders the fact that Mr. Claude Douthit, one of the Directors of the company, had been retained by the company on June 1st, 1924, for certain services which Mr. Douthit had thereafter rendered and was continuing to render to the company. Mr. Douthit has been rendering services to the company as Consulting Industrial Engineer since June 1st, 1924, and has been paid for

his services. He is still a member of the Board of Directors and is continuing to act for the company in the same capacity.

Deponent says that the amount which is or may become payable to the firm of Gleason, McLanahan, Merritt & Ingraham, in connection with services as mentioned above, does not represent a bonus or gratuity in connection with said Plan of Recapitalization, as alleged in the affidavit of Clarence H. Venner in this cause verified March 6th, 1925. Deponent further says that the amounts which may become payable to Mr. Douthit in connection with the employment above mentioned, do not represent such bonus or gratuity as likewise alleged by said Venner in said affidavit.

Deponent further says that such employment of the firm of Gleason, McLanahan, Merritt & Ingraham, of which Mr. McLanahan is a member, and of Mr. Douthit was authorized by resolutions of the Board of Directors and the minutes of the company containing said resolutions were submitted for examination to and examined by said Clearence H. Venner during the course of the hearing on the return of the rule to show cause in this matter on December 18th, 1924.

Referring to the allegation in the said affidavit of said Venner, that he was informed by Mr. Zimmerman, one of the Inspectors of Election at the special stockholders' meeting held March 4th, 1925. that there were approximately three hundred and fifty (350) separate proxies to be voted at said meeting, deponent says that said Venner was in fact informed by said Zimmerman in deponent's presence at said meeting that there were approximately seven hundred (700) proxies.

*Affidavit of George B. Hill on behalf of Defendant.*

Deponent further says in reference to the allegation in said affidavit of said Venner, that he protested against the reception and approval of the report of the Inspectors of Election upon the additional grounds, among others. "(1) that the said Inspectors did not know whether the persons signing said proxies voted by the management were stockholders of said company as they had only checked off said proxies from a typewritten list furnished by the Equitable Trust Company and not by the stock books themselves as is by law required," that although Mr. Venner had at an earlier stage of the meeting asked Mr. Zimmerman whether the proxies were checked against the stock books, he did not at the time of the reception of the report of the Inspectors of Election protest or take exception to the reception and approval of their report upon that ground.

Attached hereto is a copy of the annual report of said defendant company for the year ending December 31st, 1924, copies of which were submitted to the stockholders at special meeting on March 4th, 1925.

GEORGE A. HILL

Subscribed and sworn to this
9th day of March, 1925.
JOHN BENTLEY,
V. C.

*Affidavit of George B. Hill on behalf of Defendant.*

Before me personally appeared GEORGE A. HILL, who deposes and says that he is the Secretary of THE AMERICAN HIDE AND LEATHER COMPANY, that on February 9th, 10th, 11th, and 18th he mailed to Two Thousand Two Hundred and Twenty-nine stockholders of THE AMERICAN HIDE AND LEATHER COMPANY a notice of the annual meeting of the stockholders to be held at the office of the company No. 15 Exchange Place, Jersey City, New Jersey, on Wednesday March 4th, 1925, at 11:00 o'clock in the forenoon and that these Two Thousand Two Hundred and Twenty-nine stockholders constituted the full list of stockholders at the close of business Feburary 9th, 1925, that each notice was enclosed in an envelope addressed to the last known adress of the respective stockholders with postage prepaid.

GEORGE A. HILL,
Secretary.

Subscribed to and sworn to before me this 28 day of February, 1925.
Albert W. Gannon,
Notary Public
My commission expires.

*Affidavit of George B. Hill on behalf of Defendant.*

AMERICAN HIDE & LEATHER COMPANY
92 Cliff Street
New York City

*Notice of Special Meeting of Stockholders*
Feb. 4, 1925.

Notice is hereby given that a special meeting of the stockholders of American Hide & Leather Company will be held at its principal and registered office, No. 15 Exchange place, Jersey City, New Jersey, on Wednesday, the 4th day of March, 1925, at 11:15 o'clock in the forenoon, to take action upon certain resolutions adopted by the Board of Directors of the Corporation at a meeting held on 21st day of October, 1924, and readopted by the Board at a meeting held on the 28th day of January, 1925, of which resolutions the following are copies:

I. RESOLVED, that the Board of Directors of American Hide and Leather Company hereby declares that in its judgment it is advisable:

1. That thirty-five thousand (35,000) shares of the unissued Preferred Stock of the Company be changed and re-classified into thirty-five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock of the par value of One Hundred Dollars ($100.) each, with preference and voting powers or restrictions or qualifications thereof as stated and expressed in the proposed amended Article Fourth of the Certificate of Incorporation of the Company, as hereinafter set forth.

2. That the authorized capital stock of the Company be decreased from

Thirty-five Million Dollars ($35,000,000,), consisting of one hundred and seventy-five thousand (175,000) shares of Preferred Stock of the par value of One Hundred Dollars ($100.) each, and one hundred and seventy-five thousand (175,000) shares of Common Stock of the par value of One Hundred Dollars ($100.) each.

to

Twenty-five Million Dollars (25,000,000.), to consist of thirty-five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock of the par value of One Hundred Dollars ($100.) each, one hundred thousand (100,000) shares of Preferred Stock of the par value of One Hundred Dollars each, and one hundred and fifteen thousand (115,000) shares of Common Stock at the par value of One Hundred Dollars (100.) each, respective classes of stock to have such respective designations, preferences and voting powers or restrictions and qualifications therof as are stated and expressed in the Certificate of Incorporation of the Company as proposed to be amended, as hereinafter set forth.

3. That said decrease of the capital stock of the Company be effected by

(a) cancelling and extinguishing ten thousand (10,000) shares of the unissued Preferred Stock of the Company, being all of the authorized Preferred Stock of the

Company not heretofore issued, remaining after changing and reclassifying thirty-five thousand (35,000) shares thereof into Eight per cent. Cumulative Prior Preference Stock as aforesaid:

(b) purchasing for retirement at not above par, and retiring, thirty thousand (30,000) shares of the outstanding Preferred Stock;

(c) cancelling and extinguishing sixty thousand (60,000) shares of the unissued Common Stock of the Company, being all of the authorized Common Stock not heretofore issued.

4. That the Board of Directors of the Company be authorized to purchase from time to time for the Company, for retirement, at not above par, said thirty thousand (30,000) shares of Preferred Stock above referred to in the preceding paragraph numbered "3" hereof, and any part thereof, by any one or more of the following methods, as in the discretion of the Board may seem advisable, to wit:

(a) pro rata from each holder of shares of said stock;

(b) from Preferred Stockholders offering said stock to the Company at the lowest prices up to a total of not exceeding thirty thousand (30,000) shares, or any part thereof, all of said stockholders to be given equal opportunity to submit offerings;

(c) in the open market;

(d) by direct purchase at private sale.

All accumulated and accrued unpaid divi-

dends, and the right to receive the same, on any of such shares of the outstanding Preferred Stock so as aforesaid purchased for retirement by the Company to be surrendered and extinguished.

5. That the Board of Directors be authorized from time to time to issue shares of said Eight per cent. Cumulative Prior Preference Stock up to the aforesaid total number of thirty-five thousand (35,000), for cash at not less than par, or in exchange for shares of outstanding Preferred Stock, share for share, or upon any other basis of exchange which to the Board may seem advisable and for the best interests of the Company with such adjustment of dividends as shall be determined by the Board, or to sell said stock such sale to purchase shares of outstanding Pre- or any part thereof and with the proceeds of ferred Stock for the Company, for retirement, at not above par, provided that for each share of said Eight per cent. Cumulative Prior Preference Stock issued at least one share of outstanding Preferred Stock shall be purchased, or acquired, by the Company, so that at no time shall there be issued and outstanding more than a total of one hundred thousand (100,000) shares in the aggregate of both classes of Eight per cent. Cumulative Prior Preference Stock and Preferred Stock of the Company (unless and until the authorized amount of capital stock of both or either of said classes of stock be hereafter increased in the manner prvided by law.)

6. That Article "Fourth" of the Certificate of Incorporation of the Company, as heretofore amended, be further amended so as to give effect

to the foregoing proposed changes, and in certain other respects, so that the same shall read as follows:

"Fourth: The amount of the total authorized capital stock of the corporation is twenty-five million dollars ($25,000,000.), and the number of shares into which the capital stock is divided is two hundred and fifty thousand (250,000), of the par value of one hundred dollars ($100.) each, consisting of thirty-five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock, one hundred thousand (100,000) shares of Preferred Stock, and one hundred and fifteen thousand (115,000) shares of Common Stock. Said shares of Eight per cent. Cumulative Prior Preference stock shall be issued only if and when outstanding shares of said Preferred Stock at least equal in number to the number of shares of said Eight per cent. Cumulative Prior Preference Stock to be from time to time issued have been from time to time acquired by the corporation, by purchase, exchange or otherwise, so that at no time shall there be issued and outstanding, more than a total of one hundred thousand (100,000) shares in the aggregate of both classes of Eight per cent. Cumulative Prior Preference Stock and Preferred Stock (unless and until the authorized amount of capital stock of both or either of said classes of stock be hereafter increased in the manner provided by law). Any and all such shares of outstanding Preferred Stock so as aforesaid acquired by the corporation by purchase, exchange or otherwise, shall be cancelled and retired and none of such stock so acquired shall be reissued; and all accumulated and accrued unpaid dividends, and the right to receive the same, on any of such shares of

the outstanding Preferred Stock so as aforesaid acquired by the corporation shall be surrendered and extinguished. Whenever a total of thirty-five thousand (35,000) shares of Preferred Stock shall have been acquired by the corporation as aforesaid and retired, and there shall have been issued a like number of shares of Eight per cent. Cumulative Prior Preference Stock as aforesaid, the total authorized capital stock of the corporation shall be further decreased in the amount of three million five hundred thousand dollars ($3,500,000.), so that the then remaining authorized capital stock shall be twenty-one million five hundred thousand dollars $21,500,000.), divided into two hundred and fifteen thousand (215,000) shares of the par value of one hundred dollars ($100.) each, consisting of thirty-five thousand (35,000) shares of Eight per cent. Cumulative Prior Preference Stock, sixty-five thousand (65,000) shares of Preferred Stock, and one hundred and fiteen thousand (115,000) shares of Common Stock. The amount of capital stock with which the corporation will commence business is twenty thousand dollars ($20,000).

(a) The holders of the Eight per cent. Cumulative Prior Preference Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends from the surplus of the corporation or from the net profits arising from its business, at the rate of eight per cent. (8%) per annum and no more, accruing from the date of issue of such stock, payable quarterly on dates to be fixed by the by-laws of the corporation, or by resolution of its Board of Directors. Such dividends shall be payable before any dividends shall be paid upon or set apart for the Preferred Stock or the Common Stock of the corpora-

tion, and shall be cumulative, so that if in any quarterly dividend period, dividends at the rate of eight per cent. (8%) per annum shall not have been paid upon, or set apart for, the Eight per cent. Cumulative Prior Preference Stock, the deficiency shall be fully paid, or set apart for payment, before any dividends shall be paid upon or set apart for the Prefered Stock or the Common Stock of the corporation. After full cumulative dividends upon the Eight per cent. Cumulative Prior Preference Stock for all previous quarterly dividend periods and the full installment for the then current quarterly dividend period shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the Board of Directors may declare dividends out of the then remaining surplus or net profits of the corporation on the Prefered Stock and, subject to the restrictions hereinafter set forth, on the Common Stock of the corporation.

(b) After full dividends upon the Eight per cent. Cumulative Prior Preference Stock, as in this amended certificate provided, for all previos quarterly dividend periods and the full installment for the then current quarterly dividend period, shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the holders of the Preferred Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends from the then remaining surplus or net profits of the corporation, at the rate of seven per cent. (7%) per annum payable quarterly on dates to be fixed by the by-daws of the corporation, or by resolution of its Board of Directors, but shall not be entitled to any further dividend or share of profits. Such dividend shall be payable before any dividends shall be paid upon or set apart for the Common Stock of the corporation, and

shall be cumulative, so that if in any quarterly dividend period, dividends at the rate of seven per cent. (7%) per annum shall not have been paid upon, or set apart for, the Preferred Stock, the deficiency shall be fully paid, or set apart for payment, before any dividends shall be paid upon or set apart for the Common Stock of the corporation. After full cumulative dividends upon the Preferred Stock for all previous quarterly dividend periods and the full installment for the then current quarterly dividend period (as well as the dividends upon the Eight per cent Cumulative Prior Preference Stock hereinbefore provided for) shall have been paid, or declared and a sum sufficient for the payment thereof set apart, the Board of Directors may declare dividends out of the then remaining surplus or net profits of the corporation on the Common Stock of the corporation.

(c) The holders of Common Stock of the corporation shall be entitled to receive all moneys appropriated to dividends after all dividend requirements in respect of the Eight per cent. Cumulative Prior Preference Stock and the Preferred Stock, as in this amended Certificate provided and set forth, shall have been fully met.

(d) The Eight per cent. Cumulative Prior Preference Stock shall be subject to redemption, and may be redeemed in whole, or from time to time, in amounts of not less than 5,000 shares, at any time after three years from the issue thereof, on any quarterly dividend payment date, at the option of the corporation, on not less than ninety or more than one hundred days' notice to the holders of record of such stock, given by mail and by publication in such manner as may be prescribed by the by-laws of the corporation or by resolution of its Board of Directors, by

the payment in cash for each share of such stock so to be redeemed, of one hundred and fifteen per centum (115%) of the par amount thereof and in addition thereto all dividends accumulated and upaid thereon. If less than all the outstanding shares of such stock are to be redeemed, the redemption shall be made pro rata in such manner as may be prescribed by resolution of the Board of Directors. From and after the date fixed in such notice as the date of redemption (unless default shall be made by the corporation in providing moneys for the payment of the redemption price), all dividends on the Eight per cent. Cumulative Prior Preference Stock so called for redemption shall cease to accrue and all right of the holders thereof as stockholders of the corporation, except the right to receive the redemption price upon surrender of the certificates of stock therefor, shall cease and determine.

Stock redeemed as aforesaid shall not be re-issued, and shall be cancelled, and the same shall be deemed to be retired, and the authorized capital stock of the corporation shall be reduced by the amount of such stock so redeemed.

(e) No holder of the Eight per cent, Cumulative Prior Preference Stock shall, as such holder, have any right to subscribe for any shares of any stock, or any bonds or obligations which may be convertible into capital stock, of the corporation, which the corporation may hereafter issue.

(f) At all meetings of stockholders, each stockholder o fthe corporation, as shown by stockholders of the corporation shall be entitled to one vote for each share of stock held by him.

(g) In the event of the dissolution or liquidation of the corporation, whether voluntary, or involuntary, the holders of the Eight

per cent. Cumulative Prior Preference Stock shall be entitled as among all stockholders, to receive first out of the assets of the corporation, the par value of their respective shares, plus an amount equal to the difference between the total amount of dividends declared and paid thereon, and eight per cent. per annum from the date of issue of said stock to the date of such dissolution or liquidation and no more, before any payment shall be made to the holders of the Preferred Stock or of the Common Stock of the corporation. The holders of the Preferred Stock shall then be entitled to receive out of the assets of the corporation then remaining the par value of their respective shares and an amount which will equal the dividends accumulated and unpaid thereon, before any payment shall be made to the holders of the Common Stock.

After the payment on any such dissolution or liquidation to the respective holders of the eight per cent. Cumulative Prior Preference Stock and of the Preferred Stock in full, of said amounts as hereinabove provided, the holders of the Common Stock shall then be entitled to receive out of the remaining assets of the corporation, the par value of their respective shares, and any assets and funds of the corporation then remaining shall be divided pro rata among the respective holders of the Preferred Stock and the Common Stock of the corporation."

II. RESOLVED that the Board of Directors deem it advisable, and propose, that the By-Laws of this Company be amended by striking out the third sentence of Section 1, Article 2, reading as follows:

"The Board of Directors shall have the power, without the assent or vote of the stockholders, to fix from time to time an

amount of the accumulated profits of the Company to be reserved as working capital."

and inserting in lieu thereof, the following, to wit:

"The Board of Directors shall have the power, without the assent or vote of the stockholders, to fix and determine from time to time and to vary, the amount of the working capital of the Company, and to appropriate or set apart reserves for any proper corporate purpose; to determine whether any, and if any, what part of any surplus or net profits shall be declared in dividends and paid to the stockholders to determine the time for payments for the declaration and payment of dividends, except as otherwise required by the Certificate of Incorporation of the Company; to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion, the Board of Directors may use or apply any such surplus or net profits in the purchase or acquiring of shares of the capital stock, or bonds or other obligations, of the Company, to such extent and in such manner and upon such terms as the Board of Directors may deem expedient and as may be permitted by law."

Also to take action on a resolution approving and ratifying a contract between American Hide and Leather Company and Chase Securities Corporation dated August 13th, 1924, for the purchase of 15,000 shares of preferred stock of American Hide and Leather Company, for the price and on the terms set forth in said contract referred to in the letter to the stockholders of American Hide and Leather Company of even date with this notice and enclosed herewith; and also to

take action on a resolution approving and ratifying any and all resolutions heretofore passed and actions heretofore taken by the Board of Directors and the Executice Committee in connection with any of the propositions embodied in the foregoing resolutions.

By Order of the Board of Directors,
GEORGE A. HILL,
Secretary.

*Affidavit of George B. Hill on behalf of Defendant.*

TO THE STOCKHOLDERS OF

AMERICAN HIDE AND LEATHER COMPANY

— *Caution* —

Your Directors are asking you to again approve the so-called plan of recapitalization set forth in the circular notice dated October 23rd, 1924, and voted upon at the special meeting held December 9th, 1924, the consummation of which has been enjoined by the New Jersey Court of Chancery, pending another special meeting of stockholders, after which the stockholders' suit, brought December 4th, will be appealed to the Court of Errors and Appeals, unless the stockholders fail to approve the plan by the required vote.

May we respectfully suggest that, before executing any proxies to be voted for the directors' plan, you give some consideration to the legal and financial aspects of the case, including your own right to object to the impairment of your contract and diversion of your property.

Many corporations have been wrecked in consequence of unwise or dishonest plans recommended by directors and unwittingly approved by stockholders, who are too prone to sign proxies whenever requested so to do. Afterwards, when protest is too late, they gaze upon the ruin which their own neglect has invited and then condemn the directors.

A stockholder is a partner and, if under no other obligation, he owes to himself the duty of scrutinizing the acts and schemes of directors elected to represent but not misrepresent him.

The Interstate Commerce Commission, in one of its reports on the former reckless management of the New York, New Haven & Hartford Railroad Company, expressed its opinion of the duty and sorrows of stockholders in the following language:

> "On this directorate were and are men whom the confiding public recognize as magicians in the art of finance and wizards in the construction, operation and consolidation of great systems of railroads."
>
> "The public, therefore, rested secure that with the knowledge of the railroad art possessed by such men, investments and travel should both be safe. Experience has shown that this reliance of the public was not justified as to either finance or safety."
>
> "We sympathize with the small stockholders of these companies we shall permit and take any proper action which will relieve them * * * * It is unfortunate that the widows and orphans must suffer, but they, in theory, are responsible for the management which their action, or possibly their failure to act, has sanctioned. If the stockholders of these properties, instead if vilifying the critics of the New Haven, had given some attention to the charges made, their property would today be of greater value and the problem an easier one."

We express no opinion as to whether our directors are more expert financial "magicians" than were George F. Baker, J. Pierpont Morgan, William Rockefeller, Theo. N. Vail, Lewis Cass Ledyard, T. DeWitt Cuyler and Samuel Rea, then President of the Pennsylvania R. R. Co.—who were among the "New Haven" directors thus

critised by the Interstate Commerce Commission.

SOME VITAL OBJECTIONS TO THE PLAN.

1. The plan will add nothing to the assets or earning power of the Company but, on the contrary, will unnecessarily deplete the assets by using $2,100,000 cash to acquire 30,000 shares of existing seven per pent preferred stock, which is not a matured liability at a time when the current liabilities due, or shortly to become due, amount to about $4,000,000.

In addition there will be expenses of at least $150,000 including $100,000 commissions paid or to be paid to the Chase Securities Corporation for its alleged service in acquiring in the open market 15,000 shares of preferred stock at an average cost of less than $64 per share. The other $50,000 will doubtless be expended in counsel fees and for the service of two directors especially retained to concoct this abortive plan.

When this stock was purchased the New York Stock Exchange Commission rate was 15 cents a share which on the 15,000 shares would amount to only $2,250, whereas the "Chase" commission amounts to $6.67 per share or ten per cent on the cost of the stock. Interest at six per cent is charged on the account when money was a drug at from two to three per cent.

The contract with the Chase Securities Corporation further provides that a syndicate may be formed for the purpose of acquiring the 15,000 shares.

In view of the excessive commission charged for the slight services render, it may be pertinent to inquire whether any of our directors are to share in the profits of this syndicate or in the fabulous commissions.

However this may be, it cannot escape notice that the character of the "Chase" contract not only was not disclosed to the stockholders but was actually misrepresented in President Lilly's circular letter of October 23rd, 1924, in which he asked for your proxies.

Is it not a fair inference that this failure to disclose was prompted by the fear that the contract was of such a nature that it could not withstand criticism?

You may also well pause to consider that while the directors are expending your money in generous commissions to promote an entirely useless plan thy leave you shivering for dividends.

2. It does not provide for the payment of *that part* of the *accumulated* seven per cent dividend *which has been actually earned*—viz.: about $5,000,000—or 40 per cent—now standing to the credit of surplus account and which the preferred stockholders are entitled to have paid to them before there shall be expended any money for the principal of the stock.

A claim for earned dividends on cumulative stock takes precedence.

3. It would be most unjust to thrust ahead of the present seven per cent stock and its $5.-000,000 of actually earned but unpaid divi-

dends a new eight per cent cumulative stock which will at once become a prior lien upon the assets including the $5,000,000 surplus now in equity belonging to the seven per cent preferred stockholders.

In short, it will result in confiscation of property accumulated for the benefit of the seven per cent preferred stockholders.

4. The issue of $3,500,000 Prior Preference 8% Cumulative Stock without obtaining therefor any money or property to increase the assets of the Company is most ill-advised and dangerous, as it will create a permanent obstacle in the path of raising additional capital to meet the requirements of increased business or to retire floating debt, which in time of financial stringency may become necessary.

5. The rate of eight per cent on the Prior Preference Preferred is unreasonably high—and, coupled with possible redemption in three years at 115,—would make the cost of this unnecessary luxury 13 per cent per annum. To the unprejudiced mind this must appear ridiculous, especially as the Company is not raising thereby any new capital and no emergency exists to compel such extraordinary terms.

The directors claim that the issue of the eight per cent stock is necessary so that the Company may have outstanding some stock on which to pay dividends. They seem to forget that the seven per cent preferred stock has existed for more than 25 years; that there is unpaid thereon more than 140 per

cent and that it is capable of absorbing in dividends all the net earnings now or hereafter available for such purpose. Why more paper counters? It will be as easy to pay 2½ per cent on $12,500,000 seven per cent preferred as 8 per cent on $3,500,000 Prior Preference Stock and the present stockholders will then continue to hold their claim for accumulated dividends to be satisfied out of future prosperity.

6. Under the proposed plan the present preferred stockholders are confronted with the proposition of selling at 70 a part of their holdings—exchanging another part for the new prior preference stock, waiving in each case all claim to their 140 per cent accumulated dividends, and retaining still another part of the stock or in the alternative continuing to hold all their 7 per cent preferred and permitting $3,500,000 of 8 per cent stock to be created which as to principal and dividends will be a lien upon the property and its earnings prior to the present seven per cent preferred.

This is a monstrous proposition and should be vetoed by every stockholder who has any conception of his rights.

7. If any recapitalization plan were necessary, it would not be at all difficult to devise one, within the law, which would adequately protect all interests including provision for the earned accumulated dividends on the preferred stock, without wasting $100,000. in commissions for the trivial services of any Syndicate.

SOME LEGAL REASONS AGAINST THE PLAN.

We are contending in the pending suit that the Corporation Act of New Jersey does not authorize but clearly forbids the plan and we believe the highest court will so hold.

Briefly stated, our points are, in part:—

A—Until the earned accumulaed dividend—about $5,000,000—has been paid, the Company may not use its funds to retire any part of the principal of its Preferred Stock.

B—That the existing 7% stock has a preferred claim on the assets of the Company, first, for its accumulated dividends and, second, for its par value.

C—That a new class of stock cannot be created to take precedence to the vested rights of the present preferred stockholders without their unanimous consent.

D—That there is no authority to issue stock except for money or property for the use of the Company at its fair value and it is proposed to issue the prior preferred stock without receiving any money or property therefor.

E—That one class of preferred stock may not be converted into another class of preferred but only into common stock as the law specifically provides.

F—That an eight per cent preferred stock cannot be redeemed at a higher price than 100. A stock bearing a less rate of dividend may be redeemed at a premium if thereby the dividends and the premium together do not exceed the limit of eight per cent per annum permitted to be paid. Otherwise, an eight per cent stock might be is-

New Jersey State Library

sued at par and after three years be redeemed at $200 per share or more, which would be repugnant to all principles of law and equity.

G—That the 15,000 shares of Preferred Stock acquired by Chase Securities Corporation as agent for the Leather Company in aid of this plan is disqualified to vote.

It is elementary that a corporation may not directly or indirectly vote upon its own stock.

GENERALLY.

It is the utmost importance to the stockholders of the American Hide and Leather Company that this recapitalization plan be defeated either at the meeting on March 4th, 1925, or in the Courts.

Doubtless may of you are interested in the Preferred Stocks of other Corporations, incorporated in New Jersey and elsewhere and it should require no argument to demonstrate that the rights and preferences of such stockholders must be kept inviolate or chaos will follow. When one invests in a preferred stock, he is entitled to feel secure that his contract rights will not be invaded and his security made valueless by the mistakes or machinations of directors.

Should our contentions in this case be not upheld by the Courts, then so far as New Jersey Corporations are concerned the word preferred to designate a class of stock will become a misnomer and a deception to ensnare the unwary—and there is likely to follow a great depreciation in and very poor market for such securities when it is once realized that "preferred" really means "deferred."

In order to defeat this plan at the stockholders'

meeting it will be necessary for the holders of more than one-third of the preferred or common stock either to vote against it or to abstain from voting personally or by proxy.

We are convinced that the plan should be defeated as inimical to the best interests of the stockholders, a large number of whom we are certain will share this view, when they dispassionately review the facts.

We therefore most earnestly urge that you refuse to give your proxy to the management and also to vote against the plan should you personally attend the meeting on March 4, 1925.

We do not solicit and prefer not to receive proxies.

The foregoing is respectfully submitted in order that the stockholders may have the fullest information on the subject and, by withholding their proxies, assert their right to protect their stock against the proposed ruthless destruction.

GENERAL INVESTMENT COMPANY,
A Preferred Stockholder.

CLARENCE H. VENNER,
A Common Stockholder.

50 Broad Street,
New York,
February 10, 1925.

P. S. The plan is so much against your interests that the directors have sought to prevent this circular from reaching you. We have arranged with the Equitable Trust Company, the Transfer Agent, to address our envelopes to the stockholders, but on learning of this, a director

of the Leather Company who is also acting as its Counsel, instructed the Trust Company to refuse to carry out the arrangement made. This most conclusively shows that the directors mean to keep you in the dark.

In the event that you have given your proxy to the management, your interest requires that you at once revoke it and notify the Company and us to that effect.

## IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY, PANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER PANY,

*Defendant.*

On Bills for Injunction.

BETWEEN

JACOB B. JOEL, et als.

*Complainants,*

*and*

AMERICAN HIDE & LEATHER PANY,

*Defendant.*

Decided Jan. 23, 1925.

Excerpts from the opinion of Vice Chancellor Bentley in above cases—

In re: Contract with Chase Securities Corporation—

"After receipt of the opinion originally filed in these cases, a further argument was

presented on behalf of the defendant, to change my mind on so much thereof as dealt with the invalidity of the attempted ratification of the contract with the Chase Securities Corporation." . . . . . "The vulnerableness of the defendant's position is, that while such a contract is not void it is voidable by the stockholders by force of statute before amendment of the certificate of incorporation. Consequently, it became the duty of the company to give notice of all material facts affecting the contract to each holder of stock, so that he might be informed of everything of which he had a right to know."

"It would seem but necessary without argument to declare that any adverse interest in a proposed coporate proceeding by one of the directors should be communicated to the stockholders, where the latter are asked to ratify the same. Any other rule would permit the most ruthless destruction of the rights of the stockholders. Adroit management could frequently prepare a scheme in such innocent guise that ordinary stockholders would not be put upon their guard unless the full discharge of their duties by directors or officers presented the objectionable information which might cause individual stockholders to more carefully scan the proposed plan and seek competent advice thereon."..

"There is no rule better established than that 'a trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests, so far as they are embraced in or depend upon the trust or confidential relation' (Pom. Eq. Juris. sec. 1077)."

After referring to the opinion of Mr. Justice Van Syckel for the Court of Errors in the Hodge case, the Vice Chancellor continues:

"It must follow, clearly, from his language that 'the rule that directors cannot lawfully enter into a contract' renders the same unenforceable over the objection of the stockholders, and the subsequent language makes it just as certain that no pretended or attempted confirmation of the irregular action is effectual where the knowledge with which he is dealing is withheld from the stockholders. Such withholding amounts to constructive fraud where the parties stand in a relation of confidence and trust, the one to the other, irrespective of actual fraud or any conscious effort at suppression (Pom. Eq. Jurisp. sec. 1077)."..... 10

"Again, I say that while the presence of the common director does not render the contract with the Chase Securites Corporation void, nevertheless, the concealing of that fact from the stockholders, whether honestly or not, renders ineffectual as against a single protesting shareholder any vote that might be taken upon a certification to a stockholders' meeting. No one can say in advance what the effect would have been upon the sentiment of any stockholder had he known all that he was entitled to know. It may be that if a second meeting is held, under the terms that will be proposed, the result may be even more gratifying to the managers of the corporation. But, on the other hand, many of those entitled to vote may change their minds; and this they are entitled to do and no one is legally authorized to take this discretionary power from them."..... 20 30

"The shareholder has a right at the time his proxy is sought by the corporate officers to rely upon their fairness and the discharge of their confidential duties, and that the unwary public should not be held to the consequence of an act secured by constructive fraud. Nei- 40

ther am I impressed with the argument that constructive notice was contained in the president's letter, to the effect that arrangements had been made with a large banking corporation for securing one-half of the preferred stock to be retired. Gardner v. Butler (supra) and Knoop v. Bohmrich (49 N. J. Eq. 82) are not authorities for any such position as the defendant assumes, and it would be a strange proceeding if the legislature, by the 17th section of the General Corporation Act, were to extend to the stockholders the opportunity to vote by proxy with one hand and with the other behind its back clothe their trustees with the opportunity to betray their trust, without judicial redress for the former. A more inequitable action could not be conceived and will not be assumed to exist by one branch of the government against another."

"I consider the contract with the Chase Securities Corporation to be such an integral part of the entire scheme proposed by the directors as to be inseparable and, for reasons I have attempted to explain, the entire matter should remain as it stands. To accede to the request that the defendant or its agents should be permitted to still vote the original proxies unless wihdrawn by the stockholders after notice, would permit the defendant to profit by its own wrong. Equitably, it should be compelled to retrace its steps, to the point where the wrong was committed, and after proceeding to right the same by giving the necessary notice and again securing proxies wherever possible, proceed to the meeting upon fair terms with the investors."

*Affidavit of George B. Hill on behalf of Defendant.*

# TWENTY-SIXTH REPORT

TO THE STOCKHOLDERS

OF THE

# AMERICAN HIDE AND LEATHER COMPANY

BEING FOR THE FISCAL YEAR ENDING

## DECEMBER 31, 1924

---

JOHN C. LILLY, President
GEORGE A. HILL Secretary and Treasurer

---

*DIRECTORS*

| | |
|---|---|
| DEWEES DILWORTH | EDGAR M. WILLIAMS |
| LINDSAY HOPKINS | SAMUEL HAIGHT |
| JOHN C. LILLY | JOHN C. JAY |
| E. R. TINKER | SCOTT McLANAHAN |
| CLAUDE DOUTHIT | GEORGE A. HILL |
| FRANK T. HULSWIT | WM. WINDER LAIRD |
| WM. C. JACKSON | FREDERICK E. THOMPSON |

---

*EXECUTIVE COMMITTEE*

| | |
|---|---|
| CLAURE DOUTHIT | SCOTT McLANAHAN |
| JOHN C. LILLY | JOHN C. JAY |
| LINDSAY HOPKINS | EDGAR M. WILLIAMS |

---

*TRANSFER OFFICE*

THE EQUITABLE TRUST COMPANY OF NEW YORK
37-43 WALL STREET, NEW YORK

---

*Affidavit of George B. Hill on behalf of Defendant.*

*GENERAL COUNSEL*

CRAVATH, HENDERSON & deGERSDORFF

---

*AUDITORS*

PRICE, WATERHOUSE & COMPANY

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*To the Stockholders of the*
AMERICAN HIDE AND LEATHER COMPANY,

The Directors submit herewith a consolidated statement of the accounts of this Company and its subsidiary companies for the year ending December 31, 1924, which is certified by Messrs. Price, Waterhouse & Co.

The operations for the year resulted in a profit of $537,219.85 after all charges as compared with a loss of $38,998.34 for the previous year. Sales increased $1,500,000.00 over the previous year in spite of the fact that the country's production of shoes decreased nearly 38,000,000.

It will be noted that bank loans and inventories are showing a very substantial reduction.

On behalf of the Directors,

JOHN C. LILLY,
President.

Boston, Massachusetts, March 2, 1925.

---

*Affidavit of George B. Hill on behalf of Defendant.*

AMERICAN HIDE AND LEATHER COMPANY
AND SUBSIDIARY COMPANIES

BALANCE SHEET AS AT DECEMBER 31, 1924

*ASSETS*

| | | | |
|---|---|---|---|
| *Cost of Properties* | | | 10 |
| Including 4,517 shares of preferred and 2,259 shares common stock of American Hide and Leather Company held in trust | | $26,144,408.03 | |
| *Stock of Outside Corporations* | | 140,679.71 | |
| *Current Assets* | | | |
| Hides, skins and leather on hand and in process of manufacture and general supplies | $7,660,595.26 | | |
| Trade debtors for notes and accounts receivable | $1,907,735.96 | | |
| Less Reserve for doubtful debts and discounts | 174,480.25 | | |
| | 1,733,255.71 | | |
| Miscellaneous investments and advances including net current assets of foreign selling company | 440,243.53 | | 20 |
| Insurance premiums unexpired and prepaid interest | 98,432.53 | | |
| Cash in bank and on hand | 676,156.54 | | |
| | | 10,608,683.57 | |
| | | $36,893,771.31 | |

*LIABILITIES*

| | | | |
|---|---|---|---|
| *Capital Stock* | | | 30 |
| Authorized: | | | |
| 175,000 shares of 7% cumulative preferred of $100.00 each | $17,500,000.00 | | |
| 175,000 shares of common of $100.00 each | 17,500,000.00 | | |
| Issued: | | | |
| 130,000 shares of preferred (Dividends accumulated thereon since 1899 except as to 37¾% paid to date) | $13,000,000.00 | | |
| 115,000 shares of common | 11,500,000.00 | | |
| | | $24,500,000.00 | |
| *Current liabilities:* | | | 40 |
| Notes payable | $2,500,000.00 | | |
| Trade account, wages and taxes accrued, etc. | 555,983.97 | | |
| | | 3,055,983.97 | |

| | | |
|---|---|---|
| *Reserves*: | | |
| For depreciation and rebuilding of plants | 3,796,824.47 | |
| For contingencies | 372,650.77 | |
| | | 4,169,475.24 |
| *Surplus*: | | |
| Per annexed account | | 5,168,312.10 |
| | | $36,893,771.31 |

AMERICAN HIDE AND LEATHER COMPANY
AND SUBSIDIARY COMPANIES

SURPLUS ACCOUNT

DECEMBER 31, 1924.

| | |
|---|---|
| Balance at January 1, 1924 | $4,631,092.25 |
| *Add*: | |
| Net profits for year ending December 31, 1924 after all charges and provision for Federal Income Tax | 537,219.85 |
| Balance December 31, 1924 | $5,168,312.10 |

On behalf of the Board of Directors,
GEORGE B. HILL,
Treasurer.

We have audited the books and accounts of the American Hide & Leather Company and its subsidiary companies for the year ending December 31, 1924.

During the year only actual additions and extensions have been charged to property accounts and in our opinion sufficient provision has been made for depreciation.

The inventories of hides and skins and other materials and of finished and processed leather have been valued at prices not in excess of cost or market, whichever was lower.

We have verified the cash, notes and other se-

curities by actual inspection or by certificates from the depositaries and are satisfied that proper provision has been made for all ascertainable liabilities and for doubtful debts and discounts.

We certify that, in our opinion, the annexed consolidated balance sheet sets forth the true financial position of the American Hide & Leather Company and its subsidiary companies at December 31, 1924.

PRICE, WATERHOUSE & COMPANY.

Boston, Massachusetts,
March 2, 1925.

## Affidavit of William A. Zimmerman on behalf of Defendants.

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, &c.

BETWEEN

JACOB B. JOEL, et als.

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW JERSEY, County of Hudson. } SS.:

WILLIAM A. ZIMMERMAN, being duly sworn according to law on his oath says:

That he is and has been since March 5th, 1924, a duly elected and acting Inspector of Election of American Hide and Leather Company, the above named defendant; that he attended at the special

*Affidavit of William A. Zimmerman on behalf of Defendant.*

meeting of stockholders of the defendant company held on March 4th, 1925, and was present during all of said meeting and that he diligently and faithfully performed the duties of the office of Inspector of Election at said meeting, together with Philip J. Joenig, the other Inspector of Election duly elected and acting; that said Inspectors made report of the several votes of stockholders at said meeting, which reports were received and adopted by said meeting and that said reports truly and correctly stated the results of the votes taken thereat.

Deponent further says that he has read the accompanying affidavit of George A. Hill, Secretary of said defendant Company, and that as to the matters and things therein stated in relation to the proceedings at said meeting and the votes cast thereat, said affidavit is in all respects true and correct.

WILLIAM A. ZIMMERMANN

Subscribed and sworn to this
9th day of March, 1925.

JOHN BENTLEY,
V. C.

## Affidavit of Claude Douthit on behalf of Defendant.

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

BETWEEN

JACOB B. JOEL, et als.

*Complainant,*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW JERSEY,
County of Hudson. } SS.:

CLAUDE DOUTHIT, being duly sworn according to law, on his oath says:

That he is one of the Directors and a member of the Executive Committee of the defendant Company; that he has ascertained the prices at which the preferred stock of the defendant company has sold on the New York Stock Exchange within the period hereinafter mentioned and says that

*Affidavitt of Claude Douthit on behalf of Defendant.*

the lowest price at which said preferred stock has sold since January 1st, 1925 on the New York Stock Exchange is sixty seven (67), and the highest price at which the same has sold since January 1ts, 1925 is seventy-five and seven-eights (75⅞). Deponent further says that the closing price of said stock on said Exchange on Friday, March 6th, 1925 was seventy-two (72).

Deponent further says that no express notice of cancellation of the contract of August 13th, 1924, between this company and Chase Securities Corporation has been served upon the defendant company by Chase Securities Corporation.

CLAUDE DOUTHIT,

Subscribed and sworn to this 9th day of March, 1925.

JOHN BENTLEY,
V. C.

**Affidavit of Scott McLanahan on behalf Defendant**

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

BETWEEN

JACOB B. JOEL, et als.

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

STATE OF NEW JERSEY, County of Hudson. } SS.:

SCOTT MCLANAHAN, being duly sworn according to law, on his oath says:

That he is one of the Directors of the defendant company; that he has read the affidavit verified by Clarence H. Venner March 6th, 1925, made

in the above entitled cause and has noted therein the statement that said Venner and his Counsel, Elmore W. Demarest, Esquire, "were informed by one of the Counsel for the defendant who has been acting in these proceedings, that the Directors of said defendant company had personally guaranteed the performance by said company of its contract with the Chase Securities Corporation in relation to the purchase of and payment for the 15,000 shares of preferred stock."

Deponent says that he is unable to understand to what statement by any person representing the defendant company reference can be made and is confident that this allegation is the result of a misunderstanding as it is not the fact that the Directors of the defendant company have personally guaranteed the performance by said company of said contract.

Deponent says that he is informed and believes Waldron M. Ward, Esquire, of Pitney, Hardin & Skinner, Solicitors for the defendant company, was absent from his office on business during Friday, March 6th, 1925 until early in the evening of that day and is further informed that said Waldron M. Ward made efforts to reach deponent on the telephone at his residence during the evening of said day, but that deponent was absent therefrom at that time; and that deponent had no knowledge of the notice served by the complainant General Investment Company in the above cause until the morning of the following day, Saturday, March 7th. After learning of the nature and contents of such notice, deponent communicated by telephone with a responsible rep-

resentative of the Chase Securities Corporation and stated to him the substance of so much of said notice as purports to demand the production by the defendant company before the court on Monday, March 9th, 1925, at 10 A. M. of R. C. Clarkson, Vice President of Chase Securities Corporation, together with the books and papers of Chase Securities Corporation relating to the contract of August 13th, 1924. In response to that communication deponent was informed by the representative of the Chase Securities Corporation that they would be unable to produce Mr. Clarkson and the books and records of the company at said time and place.

SCOTT MCLANAHAN,

Subscribed and sworn to this 9th day of March, 1925.

JOHN BENTLEY,
V. C.

## Memorandum of Vice Chancellor.

COURT OF CHANCERY OF NEW JERSEY

VICE CHANCELLOR'S CHAMBERS.

John Bentley,
V. C.

Jersey City N. J. March 9, 1925.

Hudspeth & Demarest, Esq'rs.,
15 Exchange Place, Jersey City.
Pitney, Hardin & Skinner, Esq'rs.,
Prudential Building, Newark.
McCarter & English, Esq'rs.,
Prudential Building, Newark.

Gentlemen:

In considering the additional proofs in General Investment Company, et als. v. American Hide & Leather Company, I have determined, as I have indicated this morning, that there is no merit in the further objections presented against the capitalization plan, in view of the two overwhelming votes by the stockholders. There has been nothing shown to indicate any interest possessed by Mr. Douthitt, or Mr. McLanahan that would put either of them in a position of temptation with regard to their duty as directors of the defendant company, and, therefore, it seems to me nothing to bring their activities within the rule that I applied in the instance of Mr. Tinker.

In accordance with the understanding of this morning, I will advise an order refusing a preliminary injunction and discharging the order to show cause herein, but will simutaneously advise

an order preserving the subject matter of the appeal until an application can be made to the Court of Errors and Appeals on the 17th inst.

Very truly yours,

JOHN BENTLEY.

JB:ARB

## Order Continuing Stay.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| BETWEEN<br>GENERAL INVESTMENT COMPANY,<br>*Complainant,*<br>*and*<br>AMERICAN HIDE & LEATHER COMPANY,<br>*Defendant.* | On Bill &c. |

An order having been made in the above entitled cause dated March 10th, 1925, discharging the rule to show cause therein made in December 4, 1924 and vacating the restraint contained in the said rule to show cause, and complainant having given notice of an intention to appeal forthwith from said order to the Court of Errors and Appeals, and to make application to the Court of Errors and Appeals on Tuesday, March 17, 1925, for a stay pending the determination of the appeal:

It is on this 10th day of March, 1925, on motion of Hudspeth & Demarest, Esquires, Solicitors for complainant, ORDERED by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, that the operation and effect of so much of said order dated March 10th 1925, in the above entitled cause, as vacates the restraint contained in the said rule to show cause of Decembere 4, 1924, be and hereby is stayed pending such application to the Court of Errors and Appeals to be made on March 17, 1925, and the disposi-

tion thereof by the Court of Errors and Appeals; provided, and it is a term of this order, that complainant shall have filed and served such notice of appeal and shall have given notice of argument thereof at the March, 1925, term of the Court of Errors an Appeals, on or before said 17th day of March, 1925.

Respectfully advised, E. R. WALKER, C.

JOHN BENTLEY, V. C.

(Smilar Order in Joel Case.)

## Order on Return of Rule to Show Cause.

IN CHANCERY OF NEW JERSEY.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill etc.

This matter coming on to be heard on the return of the rule to show cause made in the above entitled cause on December 4, 1924, (together with the cause pending in this court wherein Jacob B. Joel and others are complainants and American Hide & Leather Company is defendant) in the presence of Elmer W. Demarest, Esquire, of counsel for complainant, and John R. Hardin, Esquire, and Waldron M. Ward, Esquire, of counsel for defendant; and the court having read the affidavits and other proofs submitted by the respective parties, and having heard and considered the arguments of counsel; and the court having rendered an opinion on January 12, 1925, and a suplemental opinion on January 23, 1925, and the matter having been continued for the purpose of permitting the defendant to call and hold another meeting of its stockholders pursuant to the said opinions, and it now appearing

*Order on Rule to Show Cause.*

that such meeting has been called and held in compliance therewith:

It is on this 10th day of March, 1925, ORDERED by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, that said rule to show cause be and hereby is discharged and the restraint therein contained be and hereby is vacated.

Respectfully advised, E. R. WALKER, C.
JOHN BENTLEY, V. C.

(Similar Order in Joel Case.)

## Notice of Motion for Stay Pending Appeal.

(Filed March 12th,, 1925.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

GENERAL INVESTMENT COMPANY,

*Complainant-Appellant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant-Respondent.*

BETWEEN

JACOB B. JOEL, et, als.,

*Complainants-Appellants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant-Respondent.*

To:

PITNEY, HARDIN & SKINNER, ESQS.
Solicitors for Defendant-Respondent.

Gentlemen:

PLEASE TAKE NOTICE that on Tuesday, the 17th day of March, 1925, at the hour of 11 o'clock in the forenoon or as soon thereafter as the same may be heard, we shall apply to the Court of

Errors and Appeals at the State House, Trenton, N. J. for a continuance of the stay heretofore granted in the Court of Chancery in said cause, pending the hearing and determination of the appeal in the Court of Errors and Appeals in accordance with the prayer of the Bill of Complaint herein.

Respectfully yours,

HUDSPETH & DEMAREST,
Solicitors for General Investment Co.

McCARTER & ENGLISH,
Solicitors for Jacob B. Joel, et als.

(Service Acknowledged, March 10, 1925.)

## Petition of Appeal.

(Filed March 12th, 1925.)

## NEW JERSEY COURT OF ERRORS AND APPEALS.

GENERAL INVESTMENT COMPANY,
*Complainant-Appellant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,
*Defendant-Respondent.*

To the Honorable, The Court of Errors and Appeals in the last resort in all cases:

The Petition of the General Investment Company, a corporation, the appellant in the above entitled cause, respectfully shows:

1. That your petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, dated March 10th, 1925, in a cause wherein the petitioner is complainant and the American Hide and Leather Company is defendant, in this respect, to wit:

The said order discharges a rule to show cause and stay therein contained, made in said cause, December 4th, 1924, and vacates the restraint contained therein and further that said order finds that the proceedings had at a meeting of the stockholders of the defendant, held March 4th, 1925, were regular and in compliance with the directions of the Court of Chancery, contained in its opinion and supplemental opinion heretofore rendered.

2. Your petitioner humbly appeals from said order and the judgment of said Court, on the grounds that the same is erroneous; that the restraint contained in said order to show cause should not have been vacated but should have been continued until final hearing of this cause and that the defendant did not comply with the opinion and supplemental opinion of this Court made herein and give to the stockholders, in advance of said meeting, the information and disclosures of the purpose of said meeting, to which they were entitled.

Your petitioner, therefore, prays that the said order of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises, as to this Honorable Court shall seem meet.

HUDSPETH & DEMAREST,
Solicitors for General Investment Co.
(Served March 11th, 1925.)

Formal Answer filed by Defendant-Respandent.

## Notice of Appeal (Joel Case).

(Filed March 12, 1925).

## IN CHANCERY OF NEW JERSEY.

BETWEEN

JACOB B. JOEL, et als.,

*Complainants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant.*

On Bill, etc.

The complainants, Jacob B. Joel, Ruth B. Bernstein, Lena Helborn, Hattie Helborn and Arondan Finance Corporation, hereby appeal from the order made in this cause on the 10th day of March, 1925, and from said entire order to the Court of Errors and Appeals in the last resort in all causes.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Complainants, Jacob B. Joel, Ruth B. Bernstein, Lena Helborn, Hattie Helborn and Arodan Finance Corporation.

---

I conceive there is good cause for appeal in the above stated cause.

ARTHUR T. EGNER,
Of counsel with complainants-appellants above named.

## Petition of Appeal (Joel Case).

(Filed March 12th, 1925.)

IN CHANCERY OF NEW JERSEY.

Between:

JACOB B. JOEL, et als.

*Complainants,*

and

AMERICAN HIDE & LEATHER CO.,

*Defendant.*

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS in the last resort in all cases:

The petition of Jacob B. Joel, Ruth B. Bernstein, Lena Helborn, Hattie Helborn and Arodan Finance Corporation, the appellants in the above entitled cause, respectfully shows:

1. That your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date March 10th, 1925, in a cause wherein the petitioners are complainants and American Hide & Leather Company is defendant, in this respect, to wit: That the said order discharges a rule to show cause made in said cause on December 4th, 1924, and vacates the restraint contained in said order to show cause.

2. And your petitioners humbly appeal from said order and the judgment therein contained as aforesaid, on the ground that the same is errone-

ous in that said restraint should not have been vacated, but should have been continued pending the final hearing of this cause.

Your petitioners, therefore, pray that the said order of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

McCarter & English,
Solicitors for and of Counsel
with Complainants-Appellants.

(Formal Answer Filed by Respondent.)

# New Jersey Court of Errors and Appeals.

Between:

GENERAL INVESTMENT COMPANY.

*Complainant-Appellant,*

and

AMERICAN HIDE & LEATHER CO.,

*Defendant-Respondent.*

On Appeal From Order in Chancery Denying Preliminary Injunction.

BETWEEN

JACOB B. JOEL, et als.,

*Complainants-Appellants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,

*Defendant-Respondent.*

## BRIEF OF APPELLANT, GENERAL INVESTMENT COMPANY.

The above two causes have been consolidated by order of the Court of Chancery for the purposes of argument and final hearing. The bills

of complaint were filed upon different dates and at different stages of the transactions complained of. Separate orders denying preliminary injunctions have been made, but the questions involved in both cases are, to a large extent, the same.

This brief will be supplemented by the brief filed in behalf of the Appellant Joel, et als, which will deal with some questions not argued in this brief but the contentions of both briefs are intended to apply to both cases.

## Prefatory.

The main questions involved in this appeal have never been determined by this Court and are of very grave importance to the many thousands of stockholders, resident and non-resident, especially those holding preferred stocks, in companies organized under the General Corporation Act of New Jersey.

They may be summarized as follows:

1. Whether a corporation whose original certificate of incorporation authorized only the issue of Seven percent Cumulative Preferred stock and Common stock, large amounts of which have been outstanding for many years, may, without unanimous consent of both classes of stock, amend its certificate under Section 27 so as to create $3,500,000 Eight percent Cumulative Prior Preference stock, which in respect of principal and dividends shall have priority over the existing old Seven percent Preferred stock, and issue said new Eight percent Prior stock in exchange at par for the old Seven percent Preferred at par or less.

We answer No. Section 27 would seem not to

authorize such a transaction as it specifically provides that Preferred stock may be changed into one or more classes of Common stock and *not* that one class of Preferred may be changed into another class of Preferred.

2. Whether in a case like this, where there are accumulated unpaid dividends of 140 percent on the existing Seven percent Preferred, of which 40 percent or about $5,000,000 have been earned but not distributed and are carried in Surplus Account and on which the present Seven percent Preferred stock has a prior claim, a company may, without unanimous consent, create a new class of Eight percent Preferred which will at once become a prior lien on all the assets of the Company—including the surplus of $5,000,000 earned toward the accumulated unpaid dividends on the existing Seven percent Preferred.

We answer No, because a claim for actually earned dividends on Cumulative stock must take precedence.

3. Whether such Eight percent Prior Preference stock may be redeemed after three years at 115 percent with accrued dividend.

We answer No. Under Section 18 the dividend on a preferred stock is limited to Eight percent per annum and redemption in three years at 115 would make the actual dividend to the holder and cost to the company 13 percent per annum. If an 8 percent stock may be redeemed at 115 percent why may it not be redeemed at 200 and thus deprive the inferior stocks of their share in the assets? We concede that a *six* per cent Preferred Stock might be redeemed

after three years at 106 as thereby the cost to the Company and dividend to the stockholders would not on the average exceed the limit of Eight percent per annum.

4. Whether such new 8 percent Preferred stock, which contributes nothing to the property of the company, can be made a prior lien on the assets, thus forcing the present Preferred stock into a secondary position, without unanimous consent. Would this not constitute a fundamental violation of contract between non-assenting Seven percent Preferred stockholders and the corporation?

THE RETIREMENT THROUGH PURCHASE OF 30,000 SHARES OF 7 PERCENT PREFERRED.

5. Whether the assets of the company may be distributed to stockholders through purchase of their stock except on a ro rata basis. In this case the Chase Securities Corporation has purchased and holds, as agent for the defendant, 15,000 shares of Preferred and it is proposed to give the other seven percent Preferred stockholders, as a whole, the privilege of selling to the company 15,000 shares at $70. per share.

The 30,000 shares sought to be retired amount to 23 9/10 percent of the total outstanding Preferred of $12,548,300—but the percentage to be purchased from the general body of stockholders amounts to but 11 95/100 percent. The directors and other insiders may have unloaded upon Chase Securities Corporation a large part of the stock it acquired for the defendant. Thus there is

discrimination and favoritism in the proposed retirement.

6. Whether a corporation may, without unanimous consent, use its assets to retire any part of an existing Preferred stock, when such stock has a preferred claim on the assets to the extent of $5,000,000 for dividends actually earned and accumulated but remaining unpaid.

We answer No, because earned accumulated dividends take precedence and, until they are satisfied, no part of the assets may be used to retire the principal of the stock. To do so would be deprivation of property.

CONTRACT WITH CHASE SECURITIES CORPORATION —FAILURE TO DISCLOSE INTEREST OF DEFENDANT'S DIRECTORS.

7. It is alleged in the bill and more specifically in plaintiff's affidavit of March 5, 1925 after the holding of the second special meeting of the stockholders, that some of defendant's directors other than Mr. Tinker are interested in the "Chase" contract or in the profits of commissions to be derived therefrom or in other expenditures to be made from the funds of defendant in connection with said recapitalization.

There has been a total failure to disclose such interest or to deny that it exists. One of defendant's attorneys has admitted that the directors "guaranteed" the performance by defendant of the Chase contract. We contend that the guaranty took form of an underwriting of the 15,000 shares, such as is admitted Mr. Tinker participated in to the extent of 1667 shares. Said contract shows

that the defendant agreed to pay a commission of $5 per share for purchasing the 15,000 shares on the Stock Exchange—where the established commission was then 15 cts. per share and that in addition $25,000 commission was paid the Chase Corporation at time of signing the contract. The other $75,000 commission furnishes the profit to the underwriters among whom we claim are a number of defendant's directors besides Mr. Tinker.

STOCK DISQUALIFIED FROM VOTING.

8. Whether the 15,000 shares of Preferred stock acquired by Chase Securities Corporation as fiscal agent for the defendant as an aid in carrying out the plan was free stock to be voted on the questions submitted at the stockholders' meeting.

We answer No. Said stock was outstanding. but only as collateral for the monies advanced for the benefit of the defendant in its purchase, and, while so held, could not be voted. Deducting this stock from the 93,000 shares of Preferred stock voted in favor of the plan left only 78,000 shares so voting which was some 5600 shares less than two-thirds of the outstanding Preferred, so that, if the plan were otherwise legal, it lacked approval by the necessary vote. The right to vote the 15,000 shares was duly challenged at the meeting (p. 239).

## Statement of Facts.

The defendant, American Hide & Leather Company, was incorporated May 3rd, 1899, under the provisions of "An Act concerning Corporations" (Revision of 1896) and the supplements and amendments thereto.

Previous to the commencement of its business, an amended certificate was filed August 28th, 1899 (Case p. 28).

The authorized capital stock of the defendant is $35,000,000 divided into 350,000 shares of the par value of $100 each. The authorized capital was equally divided between the Commmon and the Preferred class of stock, making $17,500,000 Preferred and $17,500,000 common. Of the Preferred stock there is in the hands of the public $12,548,300 par value, $451,000 is held in trust for the company, leaving authorized and unissued $4,500,000 par value.

Of the Common stock $11,500,000 par value has been issued and is outstanding, leaving the balance of $6,000,000 in the treasury of the company.

The amended certificate of incorporation contains the following provisions:

> "The holders of Preferred stock shall be entitled to receive in each year, out of the surplus net profits of the corporation, a yearly dividend of seven percentum, payable quarterly, in January, April, July and October, if declared, before any dividend shall be set apart or paid on the Common stock, but shall not be entitled to any further dividend or share of profits. The dividends upon the

Preferred stock *shall be cumulative,* so that, if in any year, dividends amounting to seven percentum are not paid upon the Preferred stock, the deficiency shall be payable subsequently, before any dividends are set apart or paid upon the Common stock, dividends on the Common stock may also be declared quarterly in said months after providing for the quarterly dividend on the Preferred stock then accrued. The holders of Common stock shall be entitled to receive all moneys appropriated to dividends after the payment of said cumulative dividends on the Preferred stock. *In case of liquidation* or dissolution of the corporation, the holders of Preferred stock will be entitled *to be paid in full both the principal* of their shares *and the accrued dividend* charge before any amount is paid to the holders of Common stock; but, after the payment on any such liquidation or dissolution to the holders of the Common stock of its par value, the remaining assets and funds shall be divided *pro rata* among the holders of *both* classes of said Capital stock."

Both classes of stock have equal voting privileges and as a greater number of shares of Preferred stock have been issued and are outstanding, the control of the corporation is and has at all times been in the hands of the Preferred stockholders.

In the more than past twenty-five years of its existence, the defendant has paid on its existing Preferred stock dividends aggregating only 37¾% and there have accumulated on said Preferred stock, unpaid dividends amounting to 140%.

At the time the bill was filed, the company had accumulated, to September 30, 1924, an undis-

tributed surplus from net earnings of $4,968,722.59, equal to about 40%, in dividends upon the outstanding Preferred stock. The annual statement of the company, rendered since the institution of this suit, shows net profits for the year 1924 of $537,219.85, increasing the present surplus on December 31, 1924, by that amount—to $5,168,-312.10.

Complainant is and, since October 11th, 1918, has been the owner and holder of One hundred (100) shares of the 7% Preferred stock of the defendant and is entitled to vote at all meetings of the stockholders of the defendant company.

On or about October 23rd, 1924, the defendant company caused to be sent to stockholders, notice of a special meeting of its stockholders, to be held at its principal office in Jersey City, December 9th, 1924, (Case p. 36)) enclosing therewith a printed letter from J. C. Lilly, president of the defendant, addressed to the stockholders (Case p. 47).

As appears by said notice and letter, a resolution previously adopted by the board of directors was to be submitted to the stockholders, proposing an amendment of the certificate of incorporation to provide for a re-classification of the unissued Preferred stock of the defendant, so that 35,000 shares of an aggregate par value of $3,500,000 should be issued, said stock to be known as "8% Cumulative Prior Preference stock"", having priority both as to its principal and accumulated dividends, at the rate of 8% over the present outstanding 7% Preferred stock and to provide for a decrease of the capital stock by cancelling $1,000,000 of the unissued Preferred stock after changing into

8% cumulative Prior Preference stock the 35,000 shares above mentioned.

The plan also proposed the purchase for retirement at not above par, of 30,000 shares of outstanding Preferred stock and to cancel 60,000 shares of unissued Common stock, so that, on consummation of the plan, there would be outstanding

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$3,500,000 par value 8% Cumulative Prior Preference stock.
$10,000,000 par value 7% Preferred stock.
$11,500,000 Common stock.

By said plan, for the purpose of reducing the present 7% Preferred stock to $10,000,000 and creating the issue of $3,500,000 8% Cumulative Prior Preference stock, it was proposed to pur-
20 chase 30,000 shares of the existing outstanding Preferred stock for retirement, by the purchase of 15,000 shares from "a large banking corporation of New York City" at the price of approximately $69 a share and the balance of 15,000 shares from present shareholders proportionately, if accepted by the present Preferred stockholders, otherwise to be purchased in open market. The date of purchase, price and terms of payment of
30 the stock to be purchased from present stockholders were neither fixed nor guaranteed.

The notice of stockholders' meeting and the circular gave no information as to the identity of the "large banking corporation of New York City" and the complainant sought this information (complainant's letters November 12th, November 13th, November 17th, November 18th, November 22nd, 1924, Case pp. 18-19-20-21-22). Subse-

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quently and on November 26th complainant, by letter, requested a copy of the contract with the Chase corporation or permission to inspect the same, which was refused him in a letter from Scott McLanahan, one of the directors and attorney for the company, dated December 1st, 1924 (Case p. 64).

After the institution of this suit and the issue of the order to show cause why an injunction should not issue to restrain the defendant from carrying out its plan, the defendant served affidavits in opposition to said order to show cause; complainant was advised that the "large banking interest" was the Chase Securities corporation (which is a subsidiary or *alter ego* of the Chase National Bank of New York) and was furnished with a copy of a letter, dated August 13th, 1924, from the defendant to the Chase Securities corporation, which the defendant claims is the contract between it and the "large banking corporation" (Case, p. 57).

The seller of this stock will hereinafter be referred to as Chase and the contract as the Chase contract.

This information, identifying Chase, the terms of the contract between the defendant and Chase and the fact that one Edward R. Tinker, was a director, both of the defendant corporation and Chase, was never given to the stockholders before the meeting of December 9th, 1924.

An examination of the Chase contract discloses that on its date, August 13th, 1924, it was not a stockholder but that it was to purchase for the defendant in aid of the plan for re-capitalization, "a maximum of 15,000 shares of present outstand-

ing Preferred stock * * * at a price equal to a maximum of $5 a share, in excess of the average cost per share to you, provided, however, that the company shall not, in any event, pay more than $70 per share for any share so acquired, plus the cost to you of carrying the shares so acquired."

The contract further authorizes "a *trading account* which you (Chase) propose to open and maintain to *buy and sell* the Preferred stock of the company in the open market."

Chase was further authorized to use its own judgment as to when and at what price to buy or sell to acquire said stock. If Chase found, in its "unrestricted judgment," it could not acquire 15,000 shares of Preferred stock, the defendant company agreed, within ten days after notice to that effect, to call a meeting of stockholders to approve the purchase of such stock as had been acquired.

By section H of the agreement, Chase agreed to act as fiscal agent and advisor of the defendant in formulating the details of the plan, to act as depository or procure the services of the Chase National Bank as depository for the stock to be acquired for which the defendant agrees to pay Chase $25,000 upon acceptance of the agreement and in addition thereto "such expenses as you (Chase) may incur for the services of your counsel in connection with this agreement or in connection with the formulation and consummation of said plan."

Section I authorizes Chase "or your associates to form a group or syndicate for the purpose of maintaining such *trading account,* of which you will be the manager and in which you and your associates may participate."

The acceptance by the Chase Securities corporation, signed by its vice president, is appended to the agreement (Case, p. 62).

Before the date of the stockholders' meeting called for in the notice, Chase obtained the 15,000 shares of Preferred stock. The market for the Preferred stock of the defendant upon the New York Stock Exchange was $29.75 per share in August, 1923, $50.50 per share in January 3rd, 1924, $51 per share, April 22nd, 1924, $55 per share July 2nd, 1924, $59 per share August 7th, 1924, $60.50 per share September 6th, 1924 and $62.50 per share October 10th, 1924.

The 30,000 shares of Preferred stock proposed to be purchased for retirement constitutes 23 3/10% of the present outstanding stock of that issue. The purchase of 15,000 shares from Chase was the purchase of its *entire* holdings of Preferred stock, while the acquisition of the remaining 15,000 shares pro rata from other present Preferred stockholders, either by purchase or exchange of their holdings for new Prior Lien Preference 8% stock amounts to 11 95/100% of the stock held and owned by them. While the terms of purchase of the Chase stock were fixed and made definite by the contract of August 13th, 1924, and the defendant company, subject to ratification of the plan by the stockholders, obligated itself to perform that contract; no terms upon which the defendant was to acquire the 15,000 shares from shareholders, either by purchase or exchange, were determined nor was a binding obligation offered them.

The above statement describes the situation as it stood December 4th, 1924, when the complain-

ant filed its bill of complaint and obtained the order dated December 4th, 1924, directing the defendant to show cause why an injunction *pendente lite* should not issue as prayed for in the bill of complaint, which order further stayed all proceedings at the proposed meeting of stockholders of December 9th, restrained the defendant from purchasing any further shares of outstanding Preferred stock, passing any resolutions amending its certificate of incorporation, taking any action to carry out the plan of re-capitalization submitted, selling any part of its assets and paying or encumbering any portion of its surplus (Case, Order to Show Cause, p. 53).

Paragraphs 7 and 8 of the bill set out in detail the objections to the proposed plan (Case, pp. 9-10), and they are especially referred to without repetition, but are summarized generally in the preface of this brief.

The prayer of the bill, as filed, was to restrain any action of the stockhloders to be held December 9th, except for organization and adjournment purposes, to restrain the defendant from purchasing any of its outstanding preferred stock, passing any resolution to amend its certificate or to carry out the plan of re-capitalization submitted, selling or disposing of its assets for said re-capitalization purposes, expending its surplus except in the ordinary course of business, issuing the contemplated 8% Cumulative Prior Preference stock and declaring null and void any Prior Preference stock already issued.

Under the order to show cause, and before the argument thereof, complainant took the deposition of Frederick E. Thompson, a director of the

company and a stockholder, showing that the brokerage firm of which he was a member had signed proxies for the voting of stock which it had purchased for its clients on margin, without the consent required by Section 37, Corporation Act (Thompson's testimony pp. 112-113-114).

Testimony of the president and secretary of the defendant were taken before the Vice Chancellor (Case, pp. 136 and 125). This should be read in conjunction with the affidavits attached to the bill and submitted by the defendant upon the argument of the order to show cause before the court.

By order dated December 8th, 1924, the stay granted complainant was modified to permit the defendant to hold its meeting of stockholders to act upon the various matters within the scope of the call but to refrain from amending its certificate or filing the assents of the stockholders to the amendment, as required by law. By said order the bill was amended in an unimportant detail.

By order dated December 18th, 1924, the bill of complaint was amended by averments charging illegality and irregularity in the proceedings of the meeting of stockholders held December 9th, in that a protest setting forth the objections contained in the bill of complaint had been presented by the complainant at said meeting of stockholders, that proxies had been illegally executed and voted for the 15,000 shares of stock held for the benefit of Chase and the defendant company, whereas said Chase was the agent of the defendant and said stock could not be legally voted, that 20,600 shares of Prefered and 7,773 of Common stock in the name of Livingston & Company, (identified by Frederick E. Thompson in his tes-

timony) were illegally voted in favor of said plan, wherefore a two-thirds vote of said stockholders was not cast in favor of said plan. The prayer of the bill was also amended in accordance with the above averments.

After the stockholders' meeting of December 9th and when it was known that the plan submitted had been approved by the stockholders and that it was the intention of the company to put into operation its proposed re-capitalization plan, the bill of Joel, et als., was filed, alleging practically the same matters charged in the bill of the General Investment Company and praying for the same relief.

The modification of the complainant's stay had the effect of resolving the defendant's threat to re-capitalize into a certainty of purpose to do so. The plan, except for the formal amendment of the certificate and filing the reports of the stockholders' meeting with the Secretary of State, which had previously been restrained by the Vice Chancellor, had been completed.

Here, then, were two bills before the court, that of the complainant herein, filed in advance of the stockholders' meeting, and that of Joel, filed after the proceedings held at the stockholders' meeting. The bill of the General Investment Company, as amended, covers the situation after the stockholders' meeting.

Upon application of the defendant, these two suits were consolidated for the purposes of argument and final hearing. Since the order of consolidation the proceedings have been the same in both the suits. Duplicate orders have, by consent been omitted from the record.

After final argument upon the order to show cause of Dec. 4th, 1924, after the stockholders'

meeting and after the complainants had amended their bills charging irregularities in the proceedings of the stockholders' meeting, and the directorship of Mr. Tinker in both the defendant company and Chase, the court, by its opinion held that the stay should not be continued for the reasons assigned by the complainants but that the company had failed to make proper disclosure to the stockholders of Mr. Tinker's dual directorships and that a new meeting of stockholders should be held after proper notice and disclosure of Mr. Tinker's interest and that unless the defendant should comply with these terms, the stay should be contineud until final hearing.

Upon the announcement of this opinion, the defendant obtained a re-argument, after which the court, by supplemental opinion, filed January 23, 1925, revised its former opinion in certain respects but continued the injunction until a new meeting of stockholders should be called and held in compliance with the directions contained in the supplemental opinion.

On March 4th, 1925, after the defendant had issued a notice to stockholders (Case, p. 259) of a special meeting to again consider the plan of re-capitalization, a meeting of stockholders was held. It is claimed by defendant that the notice of this meeting is in compliance with the Vice Chancellor's directions. The complainant, General Investment Company, again presented a protest against the sufficiency of the notice and the regularity of the proceedings, which was overruled.

At this meeting, under interrogation by the president of the General Investment Company, the president of the defendant company admitted

that Scott McLanahan, a director of the defendant company, had been retained by the company as special counsel in the matter of re-capitalization, and was to be compensated for his services although he had at that time received no remuneration. It was further admitted by the president of the company that Claude Douthit, a director of the defendant company, had been employed and had received partial compensation for services in connection with the re-capitalization plan. The president and secretary of the defendant company, as well as Mr. Douthit, refused to disclose the amount he had received or was thereafter to be paid. (Case p. 245)

The portion of the minutes of the stockholders' meeting showing this incident appear at page 245 to 247 of the Case. By affidavit it appears that Cravath, Henderson & De Gersdoff, were counsel of the defendant company under an annual retainer. (Case p. 227.)

Notwithstanding the protest of the complainant (Case, p. 239) the 15,000 shares of Preferred stock held by the representatives of Chase under the contract of August 13th, 1924, as well as the stock held by Livingston & Company for its clients, was again voted, although consents of the clients of Livingston & Company were not filed as required by section 37 of the statute.

On March 9th, 1925, on final argument of the order to show cause, (to which date same had been continued for the purpose of permitting the defendant to comply with the Vice Chancellor's directions as to the disclosures of interest to be given to stockholders before the meeting of March 4th) objection was made by the complainant, and affidavits were presented to the court showing all the proceedings at the stockholders' meeting

March 4th, above referred to, and the regularity of the proceedings which it was insisted were not in compliance with the directions of the court, especially because disclosure had not been made of the relations of Mr. McLanahan and Mr. Douthit with the plan, and their pecuniary interest therein.

On March 10th, the court informed counsel by letter (Case, p. 297) that these objections were overruled upon the grounds stated in the letter.

On March 10th, the order now appealed from was made, together with an order that extended the stay contained in the original order to show cause, until application for a stay be made to this Court on the first day of the term.

This appeal, therefore, brings before this Court the question whether the order to show cause, dated December 4th, 1924, should have been continued by reason of the allegations in the bill originally filed in anticipation of the action of the stockholders, the amended bill showing the action of the stockholders at their special meeting of December 9th, and the question of whether the notice of the meeting of stockholders held March 4th, 1925, was a full disclosure of such facts regarding McLanahan's and Douthit's employment as should have been made known to the stockholders and which were not discoverable or discovered until the date of said meeting.

The discussion of the legal questions involved will be under the general heads and in the order that they are stated in the preface to this brief.

The attention of the Court is especially directed to a special notice contained in the call for meeting of stockholders held March 4th that resolutions would be offered (a) to amend the by laws to provide that the

"Board of Directors should have power without the assent or vote of the stockholders, to fix and determine from time to time and to vary the amount of working capital—to determine whether any, and if any, what part of any surplus or net profits shall be declared in dividends and paid to stockholders—to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the Board of Directors may use or apply *any such surplus or net profits in the purchase or acquiring shares of the capital stock—and upon such terms as the Board of Directors may deem expedient*" and (b) a resolution "approving and ratifying" a contract (between the defendant and Chase) and also "approving and ratifying any and all resolutions heretofore passed and actions heretofore taken by the Board and Executive Committee *in connection with* any of the propositions embodied in the foregoing resolutions."

The first resolution was contained in the call for the stockholders' meeting of December 9th (p. 46) as was the second, except that portion referring to the Chase contract. The effect and intention of these resolutions, which were adopted at the meeting of March 4th, are important. *Both were a part of the defendant's general scheme to deprive the present preferred stock of all value and compel the holders thereof, by tiring them out, to sell their holdings "upon such terms as the Board of Directors may deem expedient."*

Before the meeting of December 9th (when it was divulged in reply to the complainant's inquiries at the meeting) no notice of the Chase contract, or its terms, was given to stockholders. At the meeting of March 4th it was attempted to cure all infirmities of the plan by a blanket resolution approving, without disclosure or previous

opportunity to examine, all action in "connection with any of the propositions embodied in the resolutions." The complainants' protest to this procedure appears at pp. 239-242. These resolutions can not be said to have had an idle purpose. As an integral and indispensable part of the whole plan their intended function becomes obvious.

## POINT I.

**The plan to issue "Prior Lien 8% Cumulative Stock" and exchange the same for existing "Preferred 7% Stock" is not authorized by Section 18 nor Section 27 of the Corporation Act and is ultra vires. There is no existing statutory power to amend the certificate of incorporation for this purpose.**

This question has not been passed upon by the courts of this state.

*Berger vs. U. S. Corporation,* 63 N. J. Eq. 506, 809 and *General Investment Co. v. Bethelehem Steel Corporation,* 88 N. J. Eq., 240, are clearly distinguishable from the present case. The former case is not opposed to the rule stated in:

> *Commercial Natl. Bank v. Burch,* 141 Ill. 519:

which holds that, even in the absence of fraud, a purchase of its own stock by a corporation for cash or property, if prejudicial to a stockholder, will not be sustained. In the present case the

purchase by the discriminating method proposed is prejudicial to the present preferred stockholder while the exchange for a more onerous class of stock is still more so.

In *General Investment Co. v. Bethlehem Steel Corp.* (supra) the two classes of preferred stock were *pari passu.*

The defendant, by its amended certificate of incorporation filed Aug. 28, 1899, established and defined the rights of the preferred stockholders—i.e.—seven per cent cumulative dividends per annum, out of the surplus net profits and, "in case of liquidation or dissolution will be entitled to be paid both the principal of their shares and the accrued dividend charge before any amount is paid to the holders of common stock but after the payment on any such liquidation or dissolution to the holders of the common stock of its par value" the remaining assets and funds shall be divided pro rata among the holders of *both classes* of said capital stock."

When the amended certificate was filed the Company exhausted its power under Sec. 18 to establish the rights of preferred stockholders. Sec. 18 does not contemplate that after having fixed such rights by an amended certificate, the corporation may go on repeatedly amending its certificate so as to alter or impair the vested rights of preferred stockholders without first obtaining the consent of *all* the stockholders.

Nor does Section 27 help the defendant with respect to its plan to create an 8 per cent Cumulative Prior Preference stock to be exchanged for part of the existing 7% Preferred stock, because that section expressly and clearly limits the "change of Preferred stock into one or more classes of Common stock".

This language is equivalent to a prohibition

that no corporation shall create any kind of preferred stock which shall take priority as to principal or dividends over an outstanding issue of preferred stock and may not change an existing preferred stock into preferred of any other class or preference. Manifestly that provision of Sec. 27 was inserted for the express purpose of preventing the impairment of Preferred stock rights, as attempted in this case.

The rights thus vested in the existing preferred stock by the amended certificate may not be impaired without unanimous consent.

Under no Section of the Corporation Act may a corporation, without *unanimous* consent of the preferred stockholders, wipe out an existing liability due to them for dividends which have been earned but not paid upon cumulative preferred stock, by shifting their stock into stock of some other class.

See Section 47 as to payment of dividends.

These accumulated dividends which have been earned upon the preferred stock, now amounting to 40 per cent, should be paid to the preferred stockholders before any part of such stock is purchased for retirement.

It is an abuse of discretion on the part of defendant's directors to withold such dividends.

The accumulated dividends so far as earned constitute a trust fund in favor of the preferred stockholders and impress a lien upon the assets, ahead of the principal of the stock, which may not be impaired or dissipated by using the funds of the company in retirement of any part of the principal of its preferred stock.

Sec. 48—provides that "nothing but money

shall be considered as payment of any part of the Capital stock of any corporation organized under this Act except as hereinafter provided in case of the purchase of property."

Sec. 152—provides, in substance, that a corporation may issue capital stock at par in payment for property, real and personal, and the stock of any other corporation necessary or desirable for its business and also for the amount actually paid for labor performed and it is further provided therein "that no fictitious stock shall be issued."

Surely under this section the defendant can find no authority for the issue of new Prior Preference stock in exchange for the existing Preferred stock.

It is not proposed to issue the Prior Preference stock either for cash, in payment for property, real or personal, necessary or desirable for its business or in payment for labor performed.

The defendant company by this plan is not adding to its capital assets. No expansion of business requiring greater capital is contemplated. The necessities of the world's war, upon which *General Investment Co. vs. Bethlehem Steel Co.* was decided, are past history. No serious financial trouble is present or threatens. The Company shows an accumulated surplus of $5,000,000. and has been prosperous.

On the other hand, it proposes to cancel its present unissued stock and issue a new class of preferred stock to retire a like amount (about one-fourth) of existing preferred stock. Its capital position is not changed except to the extent of accrued unpaid dividends upon the stock to be retired. But the new stock is more oppressive than the present preferred. It carries an 8% dividend rate and is redeemable at 115. The ex-

cessive commissions of $500 per 100 shares, counsel fees and carrying fees of the Chase Corporation to be paid by the defendant dissipate the company's assets. The proposed Prior lien stock is not only to be given preference in the payment of principal and dividends, but it takes from the present preferred stockholders the surplus account that has accumulated while they have forborne their dividends.

Possibly the present earned surplus has been illegally withheld and already belongs to them. No annual authorization from stockholders to retain those profits as required by Sec. 47 is shown to have been given. It can not be controverted that they are harmed and not benefited by the proposed plan.

The intention of our statute to treat preferred stockholders as a preferred class is shown by Sec. 18 providing that they shall not be personally liable and the recent decision of this court in

*Day v. U. S. Cast Iron Pipe Co.* 126 Atl. 302;

and that of the Court of Chancery in

*Grausman v. Porto Rican Amer. Tob. Co.* 121 Atl. 895.

In the present case the corporation has been in the control of its preferred stockholders by reason of the greater number of shares of that class issued. Under the proposed plan they will constitute a minority. The common stockholders either alone, or in conjunction with the contemplated new class, will control. This is an additional detriment involved in the plan.

Accumulated and unpaid interest is a liability.

*Storrow v. Texas Con & Com Mfg. Assn.* 87 Fed. 612. 92 Fed. 5.

Unpaid dividends on preferred stock create the relationship of debtor and creditor.

L. R. A. (N. S.) 1034;
American Cases 213.

The present case, of course, involves the construction of the New Jersey statute. The statutes of other states differ in phraseology, but the established general equity rule is clearly against the defendant's plan.

*Milhado v. Hamilton,* 28 Law Times R. 578-80; aff. 29 L. T. R. 364,

contains an opinion by Vice Chancellor Malins which reasons as the appellant here contends. The same reasoning was applied in the following cases, which show the necessity for unanimous consent of stockholders of an existing class to authorize preferences ahead of them and the surrender of vested rights.

*Kent vs. Quicksilver Mining Co.,* 78 N. Y. 159;
*Campbell vs. Az Co.,* 122 N. Y. 455;
*Bard vs. Banigan,* 39 Fed. 13;
*Guinness vs. Lands Corporation,* L. R. 22 Ch. Div. 349.

In none of the cases below cited where our courts have dealt with the power to amend certificates of incorporation, whether before or since the enactment of the Corporation Act of 1896, has such plan, as in the present case, been legalized:

*Pronick v. Spirits Distributing Co.,* 58 N. J. Eq. 97;
*Wilcox v. Trenton Potteries Co.,* 53 Atl. 574;

*Loyd v. Penn. El. Veh. Co.*, 75 N. J. Eq. 263;
*Sterling v. Watson Co.*, 88 Atl. Rep.
*Roberts v. Roberts Wicks Co.*, 32 L. R. A. (N. S.) 1034;
*Kean v. Johnson*, 9 N. J. E. 401;
*Allen v. Francisco Sugar Co.*, 110 Atl. Rep. 38.

## POINT II.

**No new class of stock which takes away the rights of present preferred stockholders in the defendant's surplus can be legally issued.**

The statute recognizes the right of a corporation to issue stock, Common and Preferred, and bonds. the Common stockholder is a mere partner, assuming all the risks incident to the business and receiving only what remains after the payment of all the preferences and the debts of the corporation. The Preferred stockholder occupies a different position. He and the Common stockholder ordinarily possess equal voting powers and rights to divide the company's assets but he is entitled to such preferences as are given by statute or the contract—the certificate of incorporation. His dividends may be paid only out of earnings but when earned, his right to them becomes a contractual debt of the corporation to that extent. The bond holder is a creditor of the corporation entitled to be paid his debt before distribution of the concern's assets. Bond holders or general creditors of the corporation are the only class for whose benefit this surplus may be

taken from the class of stockholders to which the complainant belongs.

Section 127 of the statute does not permit bonds to be issued in exchange for Preferred stock under conditions unfavorable to stockholders. That section limits the rate to 5%, permits payment of principal only at par or less and forbids their issue unless dividends have been declared and paid for at least one year upon the stock to be retired. A bond issue would be much less burdensome.

But under the present plan, in exchange for no benefit whatever, a new class of stockholders, investing no money and representing a proposed issue less in amount than even the arrears of Preferred dividends, is given not only a first lien for the re-payment of their principal and dividends but recourse to the surplus built up out of unpaid Preferred dividends. This is not a payment of dividends out of *earnings* as the statute requires. It is payment of dividends from the working capital provided by the present Preferred stockholders to pay future dividends. The present Preferred stock represents a preference in the corporation's assets of $240 per share, including accumulated dividends. While the Preferred stockholders have, for the benefit of the company and its Common stockholders, permitted their profits to accumulate and supply a working capital to the concern it is now proposed to deprive them of this fund and give it to another, whose interest has not yet come into being.

Our courts have heretofore been inclined to leave the question of management to the directors of corporations. As to the exercise of business discretion this is reasonable. Questions of expansion, meeting financial obligations, provid

ing necessary working capital and the like are properly left to the honest discretion of directors or officers of corporations. But the present case with respect to this diversion of surplus from the real owner without contemplated expansion or pending financial embarrassment and making of it a fund to pay the dividends upon a new class of stock to be created is quite distinguishable. The inequity of such scheme must be obvious. The rights of the present stockholder in his surplus can not be swept away from him by a ⅔ vote. His right can not be violated except with his consent. In such a situation the discretion of directors and ratification by ⅔ of the stockholders should not be permitted to violate vested contractual rights. Such construction of the statute would violate the fundamental law and impair a contract.

The defendant has argued below, and probably will here, that such right to violate the complainant's vested rights is implied from the statutory authority to issue different classes of stock, overlooking, however, the limitation in Section 27 that Preferred stock may only be changed for Common. Some courts have, possibly with a degree of personal comfort, declined to interfere with the discretionary powers of directors given them by stockholders. But the question here is quite afar from substituting the judgment of the court for that of officers or directors. It is safeguarding the contractual rights of one class of stockholders against the attempted oppressive acts of other stockholders. The question is an equitable one.

From another angle the case calls for the intervention of a court of equity.

As above observed, Common stockholders are

generally known to assume the ordinary risks of business. Preferred stock is properly understood to possess certain preferences implied by its name. While these preferences vary with the terms of the "charters" they are usually offered to the investing public with the allurements of the preferences given to the stock. The financial condition of the corporation, preference as to payment of principal and dividends, the terms of redemption and all other supposed advantages are paraded, and inquired into and considered by the investor. Such investments are now so enormous as to require adequate and settled protection. But if the theories and proposed plan of the defendant are to be pronounced the law of this state, it will be of no avail for an investor to inquire as to the guarantees and preferences given to his stock or the financial condition of the company, and wholly unsafe for him to invest, as any preferred class of stock will be subject to *deferment.* Any subsequent Preferred stock with prior preferences will be subject to the same risk. Any accumulated earnings which give the stock a value will be equivalent to the fictitious financial statement of a merchant. In the latter instance the merchant would be criminally liable while the corporation would be licensed by statute and precedent. Such construction of the statute is unreasonable. It was not the legislative intent. Such construction would make the Preferred stocks of any corporation organized under the New Jersey Statute of such doubtful value that they would be shunned as unsafe investments. Any plan that accomplishes this purpose, even if not designedly dishonest, becomes a fraud upon stockholders which should not be sanctioned by

reason of frigid precedent. The "rule of reason" must prevail.

Corporations with respect to the issue of stock have only such powers as are conferred by the statute.

*Hodge vs. U. S. Steel Corp.*, 64 N. J. E. 90—111;
*Berger vs. U. S. Steel Corp.* Supra.

By the latter case, bonds issued in exchange for Preferred stock must be offered pro rata.

## POINT III.

**The issue of "Prior Preference 8% Stock" redeemable at 115 is unauthorized by Statute.**

The proposal to make the Prior Preference 8% stock redeemable after three years at a premium of 15% is unauthorized by the Corporation Act and void.

Section 18 expressly limits the amount to be paid upon Preferred stock to *not exceeding* 8% per annum.

The redemption of an 8% stock at a premium will give the holder more and cause the company to pay more than 8% per annum.

The rule of amortization applies here and cannot be disregarded.

If it were a 3% stock it could be fairly contended that redemption after three years at 115 would not violate the statute for in such case the difference between 3 and 8% per annum would amount to 15% in 3 years—and if it were a 5% stock it might be made redeemable after 5 years at 115.

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It is undeniable that the redemption of an 8% Prior Preference stock at 115 at the end of 3 years would cost the company, and the holder would receive, an average rate of 13% per annum. If legal to redeem at $115 why not $200 or more per share and thus deprive subsequent stock of all value?

By Section 18 of the statute the legislature has prescribed a precise method of retiring Preferred stock. The dividends are limited to 8%. Dividends are merely distributed profits and the premium of $15 per share in the present instance is nothing but the declaration of a bonus dividend in excess of 8%.

*Knickerbocker Ice Company vs. Assessors,* 73 N. J. L. 583;
*Goldstein-Feinberg Co. vs. Board of Assessors,* 83 L. 61.

The attempt to dissipate the present Preferred stockholders' surplus by the retirement of the proposed new class of Prior Lien stock at 115 is as reprehensible as using the assets of a corportion to retire capital stock as against the lien of bondholders, which our courts have held illegal.

*Hoyt vs. du Pont de Nemours Co.,* 88 N. J. E. 196.

## POINT IV.

### The proposed 8% Prior Lien Preferred Stock cannot obtain prior lien upon existing assets when it contibutes neither property nor new capital to the Corporation.

The proposed scheme of the defendant is in this respect unique. We have been able to discover no similar case as a precedent to the inequity and the situation is glaring. In the present instance the defendant corporation has not lost money. It has acquired surplus by withholding dividends. The present assets, surplus and capital of the Company have been contributed by the present stockholders. Under the contemplated substituiton of one class of preferred stock for another, the new stock furnishes no new capital and purchases no property. The proposed plan is to raise some cash to retire existing 7% Preferred stock by the sale of the present assets of the Company. Upon such a negligible proposition as this the Statute does not intend that the assent of two-thirds of the present stokholders shall deprive a dissenting present stockholder of his profits or security.

We most earnestly contend that, until at least the earned surplus of about $5,000,000 has been distributed in payment of part of the accumulated dividends no portion of the assets which stand as security for those dividends may be used to retire any part of the principal of the seven percent stock for the reason that earned accumulated dividends take precedence to principal of stock and must first be paid.

## POINT V.

**The proposed plan to purchase all the stock held by the Chase Securities Corporation with the Company's assets is an illegal, discriminating and confiscatory method and, therefore, void.**

The 30,000 shares of preferred stock sought to be retired comprises 23 9/10% of that issue outstanding. By the purchase of 15,000 shares from the Chase Securities Corporation the amount of holdings of other existing Preferred stockholders to be redeemed is reduced to 11 95/100% of their holdings. If it is fair that 15,000 shares shall be purchased from one holder why should not the entire 30,000 shares be purchased from that holder and the remaining stockholders be entirely deprived of the right to sell? Such discrimination would be equally fair with the present plan. The defendant's argument will probably be that its purchase through the Chase Corporation is equivalent to having purchased direct in open market and that its offer to purchase at the same price from present preferred stockholders as is to be paid to the Chase Corporation is equitable. This argument is not true. In addition to the price to be paid to the Chase Company for its stock, the Corporation has paid it $25,000. The defendant further agrees to pay carrying charges and counsel fees of the Chase Corporation, while such offer is not made to the present stockholders. The inducement made to the present Preferred stockholder is a phantom promise only. He is not apprized whether he is to be given an opportunity to sell

his 7% Preferred or to exchange it for the Prior Preference Stock. He is, and for nearly thirty years has been a stockholder whose investment has been subject to the uncertainties of the defendant's business. He now is placed in a position where he is told that the Company proposes to buy 15,000 shares from him or in the open market. He is threatened with the resolution amending the By-Laws of the Company, which will permit the defendant to forever bar him from dividends and use the accumulation of the profits upon his stock for the purchase and retirement of the present 7% Preferred stock. The resolution passed at the stockholders' meeting March 4th, can have had no other purpose. Such plan may be and probably is of benefit to the present common stockholder, who has under the existing certificates of Incorporation contracted with the preferred stockholder that the latter shall have paid to him the dividends upon his stock, before the Common receives dividends in liquidation. But without unanimous consent, can present preferred stockholders be, by such discrimination and confiscation of their earned profits, compelled to comply with so inequitable a proposition? This State has long frowned upon discrimination of this character.

*Jackson's Administrator vs. Plank Road Co.* 31 N. J. L. 277;

*Wilcox vs. Trenton Potteries,* 53 Atl. Rep. 474.

The denial of this right to discriminate or impair prior rights has been uniformly held illegal.

See Cases collected, 3 L. R. A. (N. S.) 1034.

It was admitted by the president of the defendant at the annual stockholders' meeting held December 9th, that the present condition and outlook of the defendant was prosperous, with forebodings of a good year. The statements analyzed in the brief of counsel for the Appellant Joel show that the financial condition of the Company has steadily improved.

Aside from its consequences the proposed plan of the defendant is then without merit. The special advantages given to the Chase Corporation by the contract of August 13th, 1924 are also negligible to present stockholders. That contract expressly authorizes the Chase Company to speculate. If the purpose of the contract was to purchase stock for the defendant, what reason was there for authorizing it to sell and conduct a trading account or to allow "Chase" and its Associates, including Tinker, to participate?

Case pp. 57-62.

The Chase Corporation had the right to cancel the contract at any time but has not done so.

The "Chase" contract appears by the affidavit of Venner (p. 226) to have been guaranteed by the directors of the defendant (p. 227) against loss even if the Chase Corporation decided to withdraw from its obligation upon which it had been paid $25,000 in cash.

## POINT VI.

### The defendant cannot, without unanimous consent, use its present assets to retire existing preferred stock.

As previously stated the consideration for the proposed retirement of present Preferred stock is to consist of cash to be raised by the sale of present assets of the defendant, the balance of cash required to be paid from the surplus and lastly the exchange of present stock for proposed prior lien stock. As has been previously argued such existing assets of the Corporation as exceed the par value of the stock issued are profits of which the complainant has been deprived. They are the present working capital of the Corporation, which under Section 47 of the Statute, should have been distributed among the stockholders who have not consented to their retention. This especially applies to the earned surlus upon which the Preferred stockholders have a prior claim. Can it be said that the new 8% Prior Lien Preferred Stock can be given this working capital to pay future dividends in case in any given year the Corporation makes no profits? No previous attempt appears to have been made by any Corporation of this State to accomplish this purpose. The point has not been decided by our Courts. Neither do we find authorities passing upon any similar audacious attempt in any other jurisdiction. The reasoning of the authorities herein under Points I and V would appear opposed to any such plan had it been suggested in those cases. After an exhaustive search, we regret our inability to quote any case in point. The absence of such authority does not detract from our argument, but reinforces it.

## POINT VII.

**The notice for the meeting of stockholders held March 4th, 1925, does not make such disclosure of the plan as equity requires.**

As above observed, the Vice Chancellor continued the stay in the order to show cause of December 4th, 1924, on the ground that a proper disclosure of the transactions had not been given to stockholders at the time the call for the meeting was issued.

The disclosure that Mr. Tinker, a director of the defendant and also president and a director of the Chase Securities Corporation, was financially interested in the plan was not disclosed until after the first stockholders' meeting held December 9th, 1924 (Douthit affidavit, p. 167), at the hearing before the Vice Chancellor. Both the original and supplemental opinion (Printed case, pp. 178-207) continued the stay obtained by the complainant and gave the defendant an opportunity to cure the wrong.

Among the other objections to the regularity of the meeting, which are still insisted upon by the complainant, (for they apply to the stockholders' meeting of March 4th, 1925 as well) were the voting of 15,000 shares of Chase stock by the dummies in whose names that stock had been registered and the voting of 20,600 shares of stock by Livingston & Company, a stock brokerage house, in margin accounts of its clients, from whom it had not received authorization to vote for the plan as required by sections 37 and 38 of the statute. (See testimony of Thompson, a director of the defendant and partner in Living-

ston & Co., p. 106). We shall not repeat here the cases construing this statute which are collected at page 33 of the phamplet compiled by Messrs. Treacy & Milton.

It cannot be denied that these 15,000 shares of stock were purchased by Chase as agent of the defendant in aid of the plan of re-capitalization. The contract shows it. Thus, these shares are merely held as collateral for their cost for the account of the defendant, and in such a situation they are wholly shorn of voting power. If these 15,000 shares are deducted from the 93,000 shares voted at the meeting in favor of the plan, the necessary two-thirds vote was not obtained.

Aside from the Statute, see:

*American Railway vs. New Haven,* 101 Mass. 398;

Noyes on Inter-Corporate Relations, Second Ed., p. 514.

After the supplemental opinion of the Vice Chancellor directing a new meeting to be called, complainant ascertained the facts stated in the affidavit of Clarence H. Venner (p. 227), that directors of the defendant company had guaranteed the performance of the contract with the Chase Securities Corporation. The affiavit of Scott McLanahan (p. 295) is not a rebuttal of the Venner affidavit for it was stated in open court that he was not the defendant's attorney referred to.

At the stockholders' meeting of March 4th, 1925, (printed case, pp. 245-247, extract of minutes) it is shown that it was divulged at that meeting that Mr. McLanahan had been retained by the defendant, but had yet not been paid for special services as counsel in relation to the plan and that Mr. Douthit (who had also been employ-

ed in relation to the re-capitalization plan, had received some compensation and was to receive further remuneration. Both McLanahan and Douthit are directors of the defendant Company. The minutes show that the details of the employment and remuneration, when they were discovered, were refused to the complainant in response to its demands.

The affidavit of Venner (p. 227) shows that Cravath, Henderson and deGersdorff, of New York, were general counsel for the defendant under annual retainer. Such concealment does not comply with the Vice Chancellor's directions that full disclosure of the plan should be given. In this instance the pecuniary interest of these two directors was not and could not have been discovered earlier. McLanahan's letter to Venner, dated December 1st, 1924 (p. 65), refused information regarding the Chase contract. At the stockholders' meeting, March 4th, 1925, the President, Secretary and Mr. Douthit, when requested, refused to give information concerning the compensation and services of McLanahan and Douthit (pp. 245-247). *This reticence and resistance of the defendant would appear to confirm the conviction of the complainant that there somewhere exists an undisclosed agreement among the officers and directors of the defendant inimical to the complainant's rights.*

The law upon this question as applied to the present case appears in the Vice Chancellor's opinion (pp. 199-204) and is further elaborated in the supplemental opinion (pp. 208-215). With the reasoning of that opinion we agree and deem it unnecessary to cite further authority, but with the *application* of that opinion to the now-disclosed relations of Mr. McLanahan and Mr. Douthit we disagree. The interest of these two gentlemen

to us seems as important as that of Mr. Tinker. If so, it was the duty of the defendant to disclose this information to stockholders in the notice of the meeting of March 4th, 1925. Unless it is disclosed, the defendant may pay out a very large sum of money to these two directors, far in excess of the value of any services which they have rendered, or may render and in which compensation the other directors may participate. It should be remembered that fraud is charged in the bill.

The attitude of defendant's officers at the meeting emphasizes the necessity of full disclosure. It should require no argument to demonstrate that the rights and preferences of Preferred stockholders must be held inviolate or chaos will follow. When one invests in a preferred stock, he is entitled to feel secure that his contract rights will not be invaded and his security made valueless.

Should our contentions in this case be not upheld then, so far as New Jersey corporations are concerned, the word "preferred" to designate a class of stock will become a misnomer and a deception to ensnare the unwary, and there is likely to follow a great depreciation in and very poor market for such stock when it is once realized that "preferred" really means "deferred."

For the above reasons we submit that the complainant is entitled, until final hearing, to protection by an injunction pendente lite to the extent provided by the Order to Show Cause, dated December 4th, 1924 (printed case, p. 54).

Respectfully submitted,

HUDSPETH & DEMAREST,
Counsel with Complainant-Appellant General Investment Company.

March 23, 1925.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

# New Jersey Court of Errors and Appeals.

*Between*

JACOB B. JOEL, *et als.*,
Complainants-Appellants,

and

AMERICAN HIDE & LEATHER COMPANY,
Defendant-Respondent.

} On Bill, etc.

## BRIEF FOR COMPLAINANTS-APPELLANTS.

This is a bill filed by Jacob Joel and four other stockholders of the defendant company seeking to enjoin the consummation of a plan for the readjustment of its capital stock, as more particularly set forth in a notice sent to the stockholders of the company under date of October 23, 1924 (p. 36).

The complainants are all holders of preferred stock, owning in the aggregate 1,200 shares of said stock of the par value of $120,000 which they have held for a number of years. They have no other interest in this suit than protecting what they believe to be their rights, as such preferred stockholders, from an unwarranted invasion thereof. The bill in this cause was prepared without any knowledge upon the part of complainants or their counsel of the fact that another bill had already been filed by the General Investment Company. The two suits are entirely independent and in no way the product

of concerted action between the complainants therein. They have been consolidated by the order of the Vice Chancellor, for the purpose of convenience only and without prejudice to the respective rights of the complainants.

Inasmuch as the appellants in this suit are owners of preferred stock only, we propose, in this brief, to discuss the plan as it affects what we submit to be the inviolable rights of these appellants arising out of their contract with the defendant corporation.

The question involved is a most important one and has never, as far as we are aware, been discussed before this Court. Its decision, therefore, will undoubtedly have an important bearing upon the rights of innumerable holders of preferred stock in the many corporations of this State formed under the provisions of the Act of 1896.

The defendant was incorporated in the year 1899, under amended certificate of incorporation filed on August 28, 1899 (p. 28).

The certificate of incorporation (see p. 30) conferred power upon the corporation to purchase and hold, or dispose of the shares of stock and the securities "of any other corporation or corporations". It gave no express power to purchase its own shares of stock.

The total authorized capital stock of the corporation was stated to be $35,000,000 divided into 175,000 shares of common stock and 175,000 shares of preferred stock, all of the par value of $100 each. In the absence of any special provision as to voting power, the control of the corporation vested equally in the two classes of stock.

The holders of the preferred stock were declared to be entitled to receive in each year, out of the surplus net profits of the corporation, a yearly dividend of seven per centum, to be declared before any dividend should be set apart or paid on the com-

mon stock. The dividends on the preferred stock were made cumulative, so that any deficiency in dividends should be payable before any dividends were set apart or paid upon the common stock. In case of liquidation or dissolution of the corporation, the holders of the preferred stock were to be entitled to be paid in full, both principal of their shares and accrued dividends thereon, before any payment to the holders of the common stock, but "after the payment, on any such liquidation or dissolution, to the holders of the common stock of its par value, the remaining assets and funds shall be divided pro rata among the holders of both classes of said capital stock". From the above, it is plain that at the time the new plan was proposed by the management of the defendant corporation, the preferred stockholders had, under their contract, a first charge against the profits of the defendant for dividends, and, in case of liquidation or dissolution, a first claim against the assets for both the principal of and accumulated dividends upon their shares; and, in addition, after the payment of the par amount of the common stock, a further claim to a pro rata division of the remaining assets.

At the time the plan was proposed, there were issued and outstanding 125,483 shares of preferred stock having a par value of $12,548,300, and 115,000 shares of common stock having a par value of $11,500,000 (p. 75). The control of the corporation was, therefore, at that time, as it is now, vested in the preferred stock.

There are at this time accumulated dividends of one hundred forty per centum to the credit of the preferred stock.

As appears from the balance sheet of the defendant as of December 31, 1924 (p. 287), the company (figuring its properties at cost only, which it is reasonable to assume, in view of the increase

in all values of physical properties since the War, is no doubt a most conservative estimate) had assets sufficient, not only to take care of its stock liability on the preferred and common stock, but provide also a surplus of $5,168,312.10.

The amount necessary to pay the accrued dividends on the preferred stock would be $17,567,620 (see p. 47), or a total for principal and dividends of $30,115,920. According to the balance sheet, therefore, upon dissolution there would be available for the common stock a total of $29,668,312.10 (without counting reserves), or almost sufficient to answer the entire requirement of the preferred stock. In other words, upon a dissolution basis the preferred stock has a book value of two hundred and forty per centum. As to the large surplus of $5,168,312.10 which has been accumulated out of earnings the preferred stockholders undoubtedly have a special claim.

The defendant company is in no financial need, but, upon the contrary, in a splendid condition. It has just completed a profitable year. We are not embarrassed, therefore, by the suggestion that the business necessities of the defendant call for surrender and sacrifice on the part of its stockholders. No new financing of the defendant company is involved. The plan is one which affects the rights of the stockholders as between themselves alone. It is of no concern to the corporation as distinguished from its stockholders. The arrears of preferred dividends are not a liability which can in any way be embarrassing to the defendant company as interfering with its credit or otherwise. As further evidence of the strong position of the defendant it may be pointed out that at the end of the year 1924 it had current assets of $10,608,683.57, as against current liabilities of $3,055,983.97, and, in addition to the surplus above mentioned, reserves for depreciation, re-

building of plants and contingencies amounting to $4,169,475.24.

In this situation the new plan is announced, in which it is proposed to do the following:

1. Change and reclassify 35,000 shares of unissued preferred stock into 35,000 shares of eight per centum cumulative prior preference stock having priority, both as to dividends and principal, over the remaining preferred stock.

2. Decrease the authorized capital stock from $35,000,000, by the cancellation of unissued shares of preferred and common stock, as well as by the purchase of additional shares of preferred stock for retirement, so that the authorized capital stock of the company shall be $21,500,000 divided into 215,000 shares, consisting of 35,000 shares of eight per cent. cumulative prior preference stock, 65,000 shares of preferred stock, and 115,000 shares of common stock.

3. Alter the present By-law, which gives the Board of Directors power to reserve out of the accumulated profits, a working capital only so that the Board of Directors shall, among other things, have power to "use or apply any such surplus or net profits in the purchase or acquiring of shares of capital stock or bonds, or other obligations of the company, to such extent and in such manner and upon such terms as the Board of Directors may deem expedient, and as may be permitted by law."

Thus the plan proposes, without in any way increasing the financial resources of the company, or bringing anything into its treasury, to accomplish the following results:

1. Give preference as to lien to the re-classified shares of preferred stock as eight per cent.

cumulative stock to the extent of $3,500,000. Thus, not only giving preference to the reclassified stock over the old stock, but also increasing the rate of dividend from seven per cent. to eight per cent.

2. Transfer the control of the company from the preferred stock to the common stock.

3. So alter the By-laws as to permit the surplus earnings in the future to be diverted from dividends and applied to still further purchases of preferred stock.

The preferred stockholder is, therefore, confronted with the alternative of selling his stock, which on a dissolution basis has a book value of $240 per share, for $70 a share, or retaining his stock and submitting to the prior charge for the principal and dividends of the prior preference stock and to the transfer of the control of the company from the preferred stock to the common stock.

We respectfully submit that such a plan can only be consummated with the unanimous consent of the stockholders.

**No foundation is found in the statute or authorities for this violation of the appellants' contract rights.**

This Court has time and again upheld the sanctity of the contract existing between a corporation and its stockholders, and between the stockholders themselves. In many cases attempts to change the contract, by substituting something other than the stockholder was entitled to insist upon, have been restrained.

In the recent case of *Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431, reported below 92 N. J. Eq. 391, it appeared that the company had been incor-

porated in 1899. About a month after its incorporation the statute was passed permitting a corporation to lease its property and franchises. The defendant corporation proposed to make a lease to a Cuban corporation of all its lands and personal property (p. 392). The views of the Vice Chancellor were stated by him as follows at page 393:

> "The power to give a lease to another corporation was not a lawful act which the corporation might undertake at the time of its incorporation, and therefore such power could not have been in the minds of the incorporators or included within the objects set forth in their certificate. This statute is merely the consent of the state that the stockholders may do the thing therein provided for, but it cannot alter the contract as between the stockholders themselves, or as between the stockholders and the company, unless all agree to accept the act as a modification or amendment to their charter. Einstein *v.* Raritan Woolen Mills, 74 N. J. Eq. 624; Colgate *v.* United States Leather Co., *supra.*"

This Court by Justice Kalisch upheld the conclusion of the Vice Chancellor. In his opinion Justice Kalisch said, with respect to the act authorizing the lease (p. 433):

> "The learned Vice Chancellor further held that the act was inapplicable because it did not come into existence until a month after the organization of the appellant company so that it alters a contract between the stockholders.
>
> "It is clear from the decisions of our courts that before the passage of the statute the transaction contemplated to be transacted by the appellant company could not have been lawfully accomplished without the consent of all the stockholders. The complainant, in the present case, is the dissenting stockholder. The principle referred to is first clearly and forceably enunciated in a very able and learned opinion of Cortlandt Parker, embraced in a

report made by him as master in Chancery, in Kean *v.* Johnson, *et al.*, 1 Stock. 401, at which page the first two headnotes express the legal rule applicable to the present case.

"'Where a board of directors, or a majority of stockholders deviate from the originally contemplated undertaking the "rights" of other and dissenting stockholders are "affected," as against them they cannot legally do it.'

"'A majority of stockholders in a prosperous corporation cannot, at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged. The contract is that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes.' This case was decided in 1853.

"The doctrine proclaimed in that case was followed by a long line of cases which are cited in the opinion of the court below."

The Court then cited *Black* v. *Delaware & Raritan Canal Co.*, 24 N. J. Equity, 455, and *Mills* v. *Central R. R. Co.*, 41 N. J. Equity, 1. The Court then continued (p. 434):

"The doctrine, recognized by the cases cited, springs from the organic law which forbids the legislature from passing any law impairing the obligations of contract, or depriving a party of any remedy for enforcing a contract which existed at the time the contract was made."

It was contended by the defendant in the *Allen* case that because the complainant had acquired his stock after the passage of the leasing act he was to be considered as a stockholder whose rights were fixed by statute at the time he bought his stock. This contention was overruled as an attempt to formulate a rule which would tend to inextricable confusion (p. 435).

The rights of the complaining stockholders, therefore, are fixed as of the date of the incorporation of the company.

In *Meredith* v. *Zinc & Iron Company,* 55 N. J. Equity, affirmed 56 N. J. Equity, 454, Vice Chancellor Pitney said (p. 218):

> "It is conceded on all hands that the original certificate of organization of this company forms a contract between the several stockholders, which, except by unanimous consent, cannot be affected by any change in it made by virtue of any subsequent act of the legislature, but that it can only be effectually changed by virtue of some act of the legislature then in force, which can and should be, so to speak, read into the contract."

The fact that the corporation act provides that it may be amended or repealed at the pleasure of the legislature and that every corporation created under the act shall be bound by such amendment, does not aid the defendant. This reservation in the statute has been made by the State for its own benefit, and has been construed not to affect or change the rights of corporators as between each other.

This Court in the *Allen* case, 92 N. J. Equity, 431, page 435, said:

> "Nor does it authorize the state to authorize one part of the stockholders, for their own benefit, at their mere option, to change their contract with the other part; and that the power is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified and cannot be done by substituting a different thing. Chief Justice Beasley, in New Jersey Midland Railroad Co. *v.* Strait, 35 N. J. Law (at p. 325), speaks approvingly of the doc-

> trine above enunciated. And this court, speaking through Mr. Justice Van Syckel, in Berger *v.* United States Steel Corporation, 33 N. J. Eq. (at p. 824) says: 'It must be conceded that it is firmly settled in our jurisprudence that the rights reserved in this sixth section to amend, alter or repeal charters extends only to the modification or destruction of rights as between the state and the corporation, but that the rights of the stockholders *inter sese* can in no respect be impaired, except in so far as impairment may result from an alteration required by the public interest.' "

The same view was taken by Vice Chancellor Howell in *Einstein* v. *Raritan Mills,* where he said (74 N. J. Eq. 624, p. 629):

> "I must hold that this act is merely the consent of the state that the stockholders may, if they all agree, do the things which are provided for in that act. But if all the stockholders do not agree, the act cannot be held to be a portion of the charter of the corporation or an amendment thereto. This is specifically held in Kean *v.* Johnson, 9 N. J. Eq. (1 Stock) 417; Zabriskie *v.* Hackensack Railroad Co., 18 N. J. Eq. (3 C. E. Gr.) 178; Black *v.* United Railroad and Canal Companies, 24 N. J. Eq. (9 C. E. Gr.) 455; Mills *v.* New Jersey Central Railroad Co., 41 N. J. Eq. (14 Stew.) 1, and many other cases which have engrafted this doctrine into our law so deeply as to be beyond disturbance."

Nor is there anything contrary to the view above expressed in *Berger* v. *United States Steel Corporation,* 63 N. J. Equity, 809. This Court found it unnecessary to determine what the true limitation upon the legislative power was under the general grant of power to make alterations and said:

> "Under the General Corporation act of 1896, there is a general grant of power to make alterations without words of limitation, and the

provision is declared to be part of the charter of every corporation organized under it.

"It is unnecessary, however, to determine, in this case, what the true limitation upon the legislative power is; where the boundary line is which cannot be over-stepped."

The resolution which was the subject of attack in the *Berger* case was upheld, because it was found that it worked perfect equality among the stockholders.

In *Pronick* v. *Spirits Distributing Co.*, 58 N. J. Equity, 97, where the effort was to reduce the dividend on complainant's preferred stock, Vice Chancellor Emery held that "such alteration would impair the obligation of the contract created by the stock certificates issued under the company's charter".

*The plan is also objectionable in that no regard whatever is paid to the preemptive right of all stockholders to subscribe for a new issue of stock.*

See:

*Way* v. *American Grease Co.*, 60 N. J. Equity, 263, p. 269;

*Wall* v. *Utah Copper Co.*, 70 N. J. Equity, 17;

*Morganstern* v. *American Smelting Co.*, 57 N. J. Equity, 358.

The new preferred stock may, at the option of the directors, be disposed of to any persons and in one of the following ways; for cash, at not less than par, or in exchange for outstanding preferred stock share for share, "or upon any other basis of exchange which to the board may seem advisable and to the best interest of the company", or "to sell said stock or any part thereof".

The learned Vice Chancellor, while recognizing the authority of the cases just discussed, considered them inapplicable and based his decision upon what

he conceived to be the effect of Section 27 of the Corporation Act, as it was at the time of the incorporation of the defendant company.

Section 27 then provided as follows:

> "27. Every corporation organized under this act may change the nature of its business, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, change the location of its principal office in this state, extend its corporate existence, *create one or more classes of preferred stock,* and make such other amendment, change or alteration as may be desired, in manner following:"

The learned Vice Chancellor found in this section authority for the creation of an additional class or classes of preferred stock, notwithstanding the fact that such additional classes of preferred stock might take away preferences previously accorded to former issues.

The importance of this ruling is manifest. If the view of the Vice Chancellor is sound and this proposed issue of prior preference stock may be justified under the statute, then it is obvious that there is no limit to the creation of new classes of preferred stock. Any corporation may at intervals issue new classes of preferred stock, thereby deposing from a position of temporary preference, classes of preferred stock previously issued. The seriousness of the situation from the investing public's point of view, is further emphasized when we call to mind the numerous corporations of this State which have outstanding large issues of preferred stock without voting power. Under Section 27 of the Act, the amendments provided for therein require the approval of the stockholders *having voting power only,* and, hence, under the view announced below, every preferred stockholder of a corporation formed under the act of 1896, faces the possibility of hav-

ing his preference interfered with and perhaps, for all practical purposes, destroyed often without any vote upon his part and subject to the desires of the holders of the other classes of stock possessing voting power.

Investors in preferred stocks of New Jersey corporations have always believed that they were justified in relying upon the statements of their certificates of stock and of the charter in respect to the preferences and rights attaching to their holdings. Preferred stockholders have never considered themselves as partners in the venture to the extent that common stockholders are such. Preferred stockholders have made their investment and accepted a comparatively low rate of return in the supposed confidence that they could rely upon a special and prior charge in their favor as against both earnings and assets. How illusory this confidence is if the voting stockholders, whose interests may be entirely different from those of the preferred stockholders, may at will create additional classes of stock with more favorable preferences!

An intention such as this should not be attributed to the Legislature, unless there be no other reasonable construction of the language employed in the Act.

In this connection, the language of Judge White in his opinion for the Judges voting to affirm in *Day* v. *United States Cast Iron Pipe & Foundry Co.*, 126 Atlantic, 302, is quite applicable:

> "In view of these decisions and of this corporation's general charter provisions expressly designating without qualification the stock here involved as 'preferred stock', and limiting its interest in earnings to a definite percentage in accordance with the second half of section 18 of the Corporation Act, and also giving it priority in payment of principal at par out of assets in case of dissolution, we think the stock obviously appears to fall within that class designated in the act as preferred,

> which the Legislature (in its desire to assist business enterprises by encouraging the investment therein of capital at a limited and contingent upon profits interest rate) clothed, except as against creditors, with many of the attributes of bonds, and which it clearly intended expressly to protect in the manner specified in the second half of the eighteenth section above referred to.
>
> "This being so, if the policy of the legislation is to be defeated and the seeming security thereby tendered is to be destroyed by the language of the preference clause or clauses of the articles of incorporation, that language must be so clear and challenging that its purpose can neither be misunderstood nor overlooked."

It is important to point out that Section 27 of the act, as it was at the time of the incorporation of the defendant company, did not, as that section now does, permit the change of common stock into one or more classes of preferred stock, nor the change of preferred stock into one or more classes of common stock. It should be noted also that Section 18 of the act, which refers to preferred and other stocks, as it existed at the time of the incorporation of the defendant company, required that the classes of stock, designations, preferences and voting powers, or restrictions, or qualifications thereof should be stated *"and expressed in the certificate of incorporation"*. It was not until the year 1901, some two years after the incorporation of the defendant company, that Section 18 was amended so as to provide that the designations, preferences, voting powers, restrictions, or qualifications thereof should be as stated and expressed *"in the certificate of incorporation, or in any certificate of amendment thereof"*.

The provisions of the statute with which we are now concerned are Sections 18 and 27. In them are now found, as in 1899, the provisions with re-

spect to preferred and other stocks, and changes after organization. Reading these two sections together, it is apparent that the Legislature was not unmindful of properly protecting preferred shareholders through appropriate limitation upon the part of corporations in the creation of classes of preferred stock. In other words, we submit, the effect of these sections is that a classification of preferred stocks having been once adopted, it may not thereafter be changed, so as to substitute for that which the preferred stockholder purchased, an entirely different kind of stock.

As already shown, Section 18, as it existed in 1899, provided that every corporation should have the power to create "two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restrictions, or qualifications thereof as shall be stated and expressed in the certificate of incorporation". Nothing was said about any certificate of amendment and the section referred obviously to the power of the corporation to provide for different classes of stock in the certificate of incorporation itself.

Section 27 was designed to permit of changes after organization. The pertinent provision is that any corporation may by amendment "create one or more classes of preferred stock". Obviously that was intended to apply only to such corporations as might not in their original certificates of incorporation have provided for "two or more kinds of stock" as permitted by Section 18. The complete clause "create one or more classes of preferred stock", refers to a single act of creation. It cannot, we submit, apply to a corporation which has already covered that subject in its certificate of incorporation by the creation of "one or more classes of preferred stock". Either in its original certificate, or in an amendment, a corporation may once create preferred stocks of one or more classes,

but having done that and having disposed of such stocks to the public, it cannot, under this language, create still further classes of stock with preferences disturbing those already given. There cannot be two "creations" of this kind.

The controlling provision of Section 27 is quite like that of Section 18. The first section provides for the creation of two or more kinds of stock, contemplating common and preferred. The second permits the creation of preferred stock of one or more classes, but it does not permit a corporation which has already announced one set up of preferred stocks thereafter to determine upon an entirely different set up. There is a single act of creation permitted, that is, the establishment of "one or more classes of preferred stock". That cannot apply to a corporation which already has "one or more classes of preferred stock", with preferences, designations and voting powers set forth in the certificate of incorporation pursuant to the provisions of Section 18.

The Court below has construed Section 27 as though it read, "create a class of preferred stock, or create additional classes of preferred stock". And even if we were to admit, for the purpose of argument, that new classes of preferred stock may be established by amendment, it by no means follows that they may under the statute be made superior in preferences to existing stock.

We again submit that the reasonable construction of the act is that which limits a corporation to classification of its preferred stock once and for all and requires it to keep faith with those relying upon its representations. In no other way can safety to the large number of preferred shareholders in corporations of this state be assured.

**The plan, if consummated, will illegally transfer the control of the defendant company from the preferred shareholders to the common shareholders.**

How much this plan is designed for the benefit of the common stockholders, as against the preferred stockholders, appears nowhere more clearly than from the result of the plan upon the control of the corporation.

As already shown, under the original certificate the authorized capitalization resulted in equality as between the common and preferred stock in the control of the corporation. As an actual fact, at the time of the announcement of this plan the preferred shareholders controlled the corporation by reason of the fact that more shares of preferred than of common stock were issued and outstanding in the hands of the public. By this plan of amendment, however, the scheme of equality contained in the original certificate is destroyed in favor of the common stock and the actual control of the corporation is passed from the preferred stock to the common stock. Thus, pursuant to the amendment (see p. 41) the result will be that the capital stock will be reduced to $21,500,000, consisting of 100,000 shares of preferred stock (both prior preferred and old preferred), and 115,000 shares of common stock. Thus, by this clever and disingenuous plan, the control of the corporation is taken from the preferred stockholders, to whom in equity all its assets belong, in view of their large dividend accumulations, and is transferred to the common stockholders, who, upon the dissolution of the company at this time would receive practically nothing upon their shares of stock. How much consideration for their rights may the preferred stockholders expect when, by this enforced surrender of their own pref-

erences, the control of the corporation has passed to the common stockholders.

Assuming the right of the defendant corporation to reduce its different classes of capital stock, that reduction must be made with equality and not so as to reduce the stockholders' proportionate share in the control of the corporation.

This follows from the principles discussed in *Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 28, and *Way* v. *American Grease Co.*, 60 N. J. Eq. 263.

This Court in *Morganstern* v. *American Malting Co.*, 87 N. J. Eq. 358, recognized this rule, but refused to interfere with a reduction of stock, for the reason that the complainants were seeking relief for the benefit of themselves only and had been offered in the court below additional shares of stock, sufficient to make their proportionate share in the management of the corporation equal to what it had been under the former issue. No such offer has been made in this case, nor is it apparent how any such offer could be made under the plan.

In this respect also the plan interferes with the contract rights of the appellants.

**The plan is furthermore unfair and oppressive as against the preferred shareholders.**

The certificate of incorporation of the defendant company contained no provision for the redemption of the preferred stock, and indeed, no provision could have been made for the redemption of the stock under the statute at any price less than par. Here, the management of the defendant corporation, acting solely in the benefit of the common stockholders, says to the preferred stockholders, "Accept $70.00 for your stock and all its accumulation of dividends, or run the chance of getting no

dividends at all." And here we must not forget the new By-law, which evidences so clearly the intention of the management to devote all profits in the future to the purchase of still further shares of preferred stock from those who may become weary and submit to any terms which the management may see fit to give them.

Stripped of all atmosphere and subterfuge, we have an effort in the interest of the common stock to force the preferred stockholders to do one of two things—either dispose of their preferred stock at less than par, or continue to hold their stock, and, as a practical matter, give up all hope of dividends in the future. The obvious injustice of this as against a stockholder who has a legal right to accumulated dividends amounting to one hundred and forty per cent., with a surplus of some $5,000,000, every cent of which equitably belongs to the preferred stockholders, is most manifest. We have virtually a condemnation of the preferred shareholders' stock at a price fixed by the company and with no other alternative to the preferred stockholders than continuing to hold their stock and facing a long stretch of dividendless years.

In passing upon the equity of the plan, we must view the situation from the standpoint of the preferred stockholder who is unwilling to sell his stock and who desires to keep it with its accumulation of one hundred and forty per cent. of back dividends. As against this stockholder the inequity of the plan is manifest, because from a first claim against the assets and profits he is relegated to the position of a second claim; as against $3,500,000 of prior preference stock and as against an annual charge against the earnings of $280,000, the amount needed to pay eight per cent. on the new prior preference stock. While the circular (see p. 50) points out that upon the present capitalization $878,381 is needed to pay the seven per cent. divi-

dend, on the preferred stock, and that upon the adjusted capitalization but $703,381 will be needed to pay the dividends on the prior preference stock and the remaining preferred stock, the fallacy of that argument and the injustice as far as the preferred stockholders are concerned, is that the preferred stockholders have an interest in every cent of the $878,381 of profits, whereas, the preferred shareholders have an interest only in that part of the $703,381 which is in excess of $280,000 per annum, upon which the holders of the prior preference stock have first claim.

The company's history of net earnings, attached to the affidavit of Mr. Hill (p. 177), shows conclusively what the above figures will mean to the preferred shareholders who hold their stock if the present plan goes through. It means that they will never receive any dividends, and that it is the intention of the board of directors that they never shall receive any dividends, is borne out further by the new By-law. Is it an unreasonable assumption that under the authority of this By-law, the board of directors will go ahead, in lieu of declaring dividends on the preferred stock, and from time to time purchase for retirement the shares of such of the preferred stockholders whom the non-dividend policy of the board of directors may tire into the disposal of their stock at a sacrifice?

As stated, the net earnings of this company in the past disclose that the company is not at all likely during a series of years, to have available for distribution even enough profit to pay the first dividend charge of $280,000 on the prior preference stock, and that means, of course, that with each year that this dividend is omitted, an additional $280,000 comes in ahead of the preferred stockholders' hope of dividend, and after a year of no dividend, therefore, $560,000 of profits must become available before the preferred stockholders

can hope for dividends, and so on. We think this demonstrates completely the inequity of the plan as against the preferred stockholders and their perfectly hopeless condition as far as dividends are concerned if this prior charge is placed before them.

If we take the history of the net earnings of the defendant corporation, we may pick out years at random and see how they justify the argument we now make. In the year 1903, the company suffered a loss of the sum of $79,000. Obviously, if the company had had prior preference stock at that time, $280,000 for dividends would not have been available, that would have made in the year 1904 a prior charge of $560,000. Neither in that year, nor in the years 1905, 1906 and 1907 did the company make enough profit, even if all profits could be rendered available for dividends, sufficient to discharge this amount, and in the year 1908 another loss was suffered, so that to the fast accumulating total of prior preference dividends would have been added another $280,000.

And if we pass the War period, omitting the year 1920 in which the extraordinary loss was incurred, and again consider what would have happened had there been a prior preference stock at that time, the same thing becomes manifest.

Thus, in the year 1921, there was a large loss and quite apparently the $280,000 could not have been paid. In the year 1922 there was a profit sufficient to have paid all the dividends, assuming, of course, that all of it could properly have been used for dividends. But in the year 1923 there was again a loss, so that the year 1924 would have been reached with an unpaid dividend for 1923.

For the year ending December 31, 1924, the company made a profit of approximately $537,000. The injustice of the plan, as against the non-assenting preferred stockholder, becomes apparent, we sub-

mit, when we consider what will happen if the plan is adopted, upon the very unlikely assumption that the company will be able to disburse that entire sum on account of dividends. If that entire sum were disbursed upon the present preferred stock, there would be sufficient to disburse approximately four and one-quarter per cent. upon the preferred stock (outstanding without respect to the plan). On the other hand, if out of that $537,000 a prior preference of dividend of $280,000 were paid, that would leave a balance of $257,000. Now, even assuming that the directors do not expend this balance, if they expend it at all, in the purchase of additional shares of preferred stock (pursuant to the new By-law), and again making the unlikely assumption that this entire sum would be paid in dividends upon the preferred stock, that would be the equivalent of approximately two and eight tenths per cent. only on the preferred stock outstanding (less the 35,000 shares re-classified into prior preference stock) as against four and one-quarter per cent. on the other assumption.

These figures, we submit, demonstrate the inequity of the plan.

The plan is *ultra vires*. The complainants will sustain irreparable injury if it is consummated and that is sufficient to justify the issuance of a preliminary injunction.

> *Elkin* v. *Camden & Atlantic Railroad Co.*, 36 N. J. Equity, 5.
>
> *Carver* v. *Southern Iron & Steel Co.*, 78 N. J. Equity, 81.

And in conclusion, it is well to repeat the language of Mr. Justice Bradley, in *Chicago City Railway* v. *Allerton*, 18 Wall. 233, quoted as follows by Vice Chancellor Howell in *Einstein* v. *Raritan Woolen Mills, supra:*

> "'Second, as it respects the constituency or capital and membership. This is the next

most important fundamental point in the constitution of a body corporate; to change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member; even when the additional stock is distributed to each stockholder *pro rata* it would often work injustice, because some of the stockholders might be unable to take their respective shares and might thus lose their relative interest and influence in the corporate concerns.' I take it that when Mr. Justice Bradley speaks of the consent of the stockholders he means the consent of every shareholder, and that a mere majority, however large, would not have the power to interfere with the rights and property of the minority."

Respectfully submitted,

ARTHUR F. EGNER,
Of Counsel with Complainants-Appellants.

# New Jersey Court of Errors and Appeals

*Between*

GENERAL INVESTMENT COMPANY,
*Complainant-Appellant,*

*and*

AMERICAN HIDE & LEATHER COMPANY,
*Defendant-Respondent.*

*Between*

JACOB B. JOEL and others,
*Complainants-Appellants,*

*and*

AMERICAN HIDE & LEATHER COMPANY,
*Defendant-Respondent.*

*On Appeal from Court of Chancery.*

We have been obliged to prepare this brief in advance of the receipt of the briefs for the appellants, and, therefore, to anticipate their arguments. We are, therefore, obliged to develop and present our argument without relation to the order in which appellants' points are presented by them, and perhaps at greater length than would otherwise be necessary.

## BRIEF OF ARGUMENT FOR RESPONDENT.

### Preliminary Statement.

These appeals have been taken by the complainants-appellants in the above-entitled causes, consolidated for hearing by the Court of

Chancery, from orders advised by Vice-Chancellor Bentley discharging orders to show cause and denying preliminary injunctions to restrain respondent from proceeding with a plan of readjustment of its capital stock.

It does not seem necessary to incorporate in this brief at length the amendment to the charter of the respondent under attack. It is set out in the resolutions of the directors incorporated in the notice of the special meeting of the stockholders on December 9, 1924 (Case, pp. 36-46), and repeated in the directors' resolutions set forth in the notice of the special meeting of the stockholders on March 4, 1925 (Case, pp. 259-270).

The charter of the defendant Company, as theretofore amended and effective when the amendatory proceedings now under criticism were instituted, was attached to the bill of complaint in both the General Investment Company and the Joel cases, and is printed in the record pages 28 to 33.

The orders to show cause made on filing the respective bills of complaint, and the exhibits and affidavits annexed thereto, will be found in the record, in the General Investment Company case, pages 53 to 55, and in the Joel case, pages 92 and 93.

Prior to the disposition of the cases by the Vice-Chancellor amendments were made to the General Investment Company bill, by permission of the Court, which are set forth in the record, pages 94 to 102 and pages 205 to 206, and an amendment was made to the Joel bill, by permission of the Court, which is set forth in the record, pages 219 to 220.

The bill in the General Investment Company case was filed on December 4, 1924, and the restraint contained in the order to show cause, as first made, restrained the holding of the stockholders' meeting on December 9th. This restraint was modified, on notice from the respondent, by order dated December 8, 1924, set forth in the record, pages 71 to 73, the modification permitting the meeting of the stockholders called for December 9, 1924, to be held, and the certificate of amendment and consent of stockholders to be signed, but not filed in the office of the Secretary of State, the restraint being continued in other respects.

The Joel bill was not filed until December 12th, after the meeting of the stockholders had been held. The order to show cause thereon restrained the respondent from filing in the office of the Secretary of State a certificate of amendment in the respects purported to have been approved at the stockholders' meeting on December 9, 1924, or from taking any steps or proceedings whatsoever for the issuance of prior preference stock, or for the confirmation in any respect whatsoever of the resolutions and amendments recommended by the board of directors and adopted and approved at the meeting of the stockholders on December 9, 1924.

The returns of the respective orders to show cause were at the same time, and for purposes of hearing the causes were consolidated. The respondent filed answering affidavits and exhibits and, after hearing arguments of counsel, Vice-Chancellor Bentley, on January 12, 1925, filed his opinion overruling the objections to the plan except insofar as related to the failure of the Company in the notices to stockholders to disclose,

with a sufficiency to meet the Vice-Chancellor's views, the fact that Mr. E. R. Tinker, one of the directors of the American Hide & Leather Company, was also a director and President of the Chase Securities Corporation, and having through some arrangement with that corporation, with which the respondent Company had no part, an interest as a participant, through another corporation of which Mr. Tinker was also a director and stockholder, to the extent of 1,667 shares, under the contract between the respondent Company and the Chase Securities Corporation for the purchase of 15,000 shares of the preferred stock of the respondent Company involved in the consummation of the general plan.

After the opinion of the Vice-Chancellor (Case, p. 183) was filed, further argument was had before him and a supplemental opinion (Case, p. 207) was filed on January 23rd, the result of which was that, while the Vice-Chancellor decided against the essential legal contentions of the appellants, he re-affirmed his views as to the failure to disclose the interest of Director Tinker in relation to the Chase Securities Corporation contract, but permitted the Company, in accordance with the option expressed in the original opinion, to give notice on or before January 28, 1925, of another special meeting for the purpose of again passing upon the resolutions of the board of directors, such notice to incorporate particulars as to the Chase Securities Corporation and the interest of Mr. Tinker, new proxies to be obtained and no prior proxy to be voted. The Vice-Chancellor stated that, should the stockholders again adopt the resolutions of the Board, he would refuse any preliminary injunction.

The Company proceeded in accordance with the Vice-Chancellor's opinion and the second meeting was called, with full disclosure, and held on March 4, 1925.

There is much in the Vice-Chancellor's original and supplemental opinion from which we respectfully dissent, particularly,

(a) As to his statement of the legal effect of co-directors in contracting corporations, especially where there is but one co-director;

(b) In his view of the effect of that co-relationship upon the statutory action of stockholders for amendment of the charter and the like;

(c) In his view of the effect of the failure of the notice to disclose such co-relationship in such a proceeding;

(d) In his view of the effect of disclosure at the stockholders' meeting to their proxies;

(e) In his view that the effect of the co-relationship on the Chase Securities Corporation contract, vitiated the entire statutory proceeding.

These questions are not now before this Court. In view, however, of the interest which the Vice-Chancellor's opinions have elicited among the members of the bar in this and other states, we deferentially suggest that, for the sake of exactitude, it should clearly appear in the opinion of this Court that those questions are not dealt with in the disposition of these appeals (or as the case may be).

At the first meeting of the stockholders of the Company held December 9, 1924, the plan was approved by the following vote:

*In Favor.*

Preferred Stock .....91,920 shares
Common Stock .....88,645 shares

*Against.*

Preferred Stock ..... 418 shares
Common Stock ..... 200 shares

At the second meeting held on March 4, 1925, the plan was re-approved by the following vote:

*In Favor.*

Preferred Stock .....93,879 shares
Common Stock .....82,368 shares

*Against.*

Preferred Stock ..... 2,787 shares
Common Stock ..... 1,300 shares

(Case, p. 176; pp. 251-3.)

At the second meeting the contract with the Chase Securities Corporation was separately submitted and ratified by the same vote.

After the second meeting orders were advised by Vice-Chancellor Bentley in both cases, on March 10, 1925, discharging the rules to show cause and the restraint therein contained. (Copy of order, Case, pp. 301-2.)

On the same day the Vice-Chancellor also advised orders in both cases, staying the operation and effect of so much of the orders last referred to as vacated the restraint contained in the orders to show cause, pending application to the Court of Errors and Appeals to be made on March 17, 1925, and the disposition thereof by the Court of Errors and Appeals, provided the

complainants should in the meantime have filed and served notice of appeal and should have given notice of argument for the March Term of the Court of Errors and Appeals on or before the said 17th day of March, 1925.

The complainants have complied with the proviso and have perfected their appeals and the cases are upon this term's list.

On March 17, 1925, on notice by the complainants-appellants, motion was made in their behalf for a continuation of the stay pending the disposition of the appeals by this Court. After partial argument the motions were continued until the hearing of the appeals.

No good purpose will be served by any extended analysis of the respective bills of complaint and the exhibits and depositions found in the record. References to pertinent parts thereof will be made in the course of the argument.

In the second meeting of the stockholders, the proceedings of which are described in the affidavit of George B. Hill (Case, pp. 248-257), Mr. Clarence H. Venner, President of the General Investment Company, made specific objection to the validity of the action of the stockholders approving the plan, on the ground that no disclosure had been made to the stockholders in the notice of the meeting as to the terms of the employment of Mr. Scott McLanahan, one of the directors of the Company and a member of the firm of Gleason, McLanahan, Merritt & Ingraham, in New York City, under retainer by the Company, and that inasmuch as Mr. McLanahan might personally participate in fees received by said law firm for services rendered to the Company in the plan for recapitalization the terms should have been disclosed; that there had not

been disclosed to the stockholders in the notice of the meeting the fact that Mr. Claude Douthit, one of the directors of the Company, had been retained by the Company on June 1, 1924, for certain services which Mr. Douthit had rendered and was continuing to render.

A notice was presented to the stockholders' meeting, copy of which is set forth in an affidavit of Mr. Venner (Case, pp. 239-242), charging without substantiation of any kind that several of the directors besides Mr. Tinker were interested in the Chase Securities Corporation contract and in the profits and commissions derived or to be derived therefrom, or from other payments made or to be made by the Company in connection with or on account of the plan and scheme as already voted by the directors.

In the same affidavit (Case, p. 226) deponent Venner alleges that the said Claude Douthit and Scott McLanahan held no office in the defendant Company other than that of director, and that the sums paid or agreed to be paid to them represented a bonus or gratuity in connection with the plan of re-capitalization and should have been disclosed to the stockholders in the circular letter above referred to.

This affidavit was filed after the second meeting, but before the order below was signed, and was considered by the Vice-Chancellor before the orders appealed from were signed.

It affirmatively appears that no other director than Mr. Tinker had any interest in the Chase Securities Corporation contract (Case, p. 167, l. 10; p. 173, l. 10), and there is not the slightest suggestion of proof in the case other than the allegation of affiant Venner

that any bonus or gratuity is to be paid to either Mr. McLanahan or Mr. Douthit in relation to the plan of re-capitalization, and it is not perceived that the allegation in the affidavit, unsupported by proof, is entitled to any attention in this case. In the General Investment Company original bill of complaint (Case, p. 8, ll. 26-34) the complainant charged generally that some of the directors of the respondent were personally interested in the stock claimed to be owned by the Chase Securities Corporation.

On the return of the orders to show cause on December 18, 1924, it appeared by affidavit of Walter W. Downing (Case, pp. 172-173), filed in behalf of the defendant Company, that Edward R. Tinker, a director of the defendant Company, was also President of the Chase Securities Corporation and also indirectly interested, as hereinabove described, as a participant through another corporation, in that contract. In the same affidavit it affirmatively appeared that no other director was interested in that contract.

Also on the day of the return of the orders to show cause the minutes of the directors of the defendant Company, including those with reference to the employment of Gleason, McLanahan, Merritt & Ingraham and of Mr. Douthit, were submitted for examination to and examined by Mr. Venner (Affidavit of Hill, Case, p. 256, ll. 21-31); this appears not only by the affidavit of Mr. Hill but also in the record of the testimony taken before the Vice-Chancellor. (See Case, p. 146, l. 10.) This sufficiently disposes of any suggestion that the appellant had no knowledge of their employment until at the stockholders' meeting of March 4. Indeed, in the prepared written protest which Mr. Venner read at the

outset of that meeting (Case, p. 227, l. 35), specific reference was made thereto (Case, p. 240, l. 10). The appellant, General Investment Company, had procured an order that the respondent Company produce before the Vice-Chancellor, on the return of the order to show cause, on December 18, 1924, J. M. Lilly, President of the Company; George A. Hill, Secretary and Treasurer of the Company; E. R. Tinker, Scott McLanahan, Claude Douthit and Frederick Thompson, if they be within the United States, for the purpose of examination, together with the minute books of the board of directors and the executive committee of the respondent. (Copy of order, Case, p. 72.)

Mr. Tinker was in Europe and could not be produced. The deposition of Mr. Thompson was taken by consent and read at the hearing. (Case, pp. 106-120.)

The other gentlemen were present for examination and the required minutes and records were also produced. Counsel for the appellants examined Mr. Hill and Mr. Lilly (Case, pp. 125-156). After the conclusion of Mr. Lilly's examination Mr. Ward, of counsel for the Company, asked counsel for the appellants whether they intended to examine Mr. McLanahan and Mr. Douthit, and Mr. Demarest replied, "I don't think so. If we do later I will now reserve the right to recall them." Mr. Ward rejoined, "I don't want the matter left in that shape. Mr. McLanahan and Mr. Douthit are both here now and if the other side want to examine them they should exercise that privilege now." Mr. Egner, of counsel for the Joel appellants, returned, "I don't wish to examine them." No answer was made by Mr. Demarest. The Court then said,

"Then the complainants rest, with the exception of reserving the right to examine Mr. Lilly and Mr. Hill further." (Case, p. 152, l. 40, to p. 153, l. 17.) It thus appears that full opportunity was given the appellants to examine Mr. McLanahan and Mr. Douthit and the opportunity refused. Certainly the appellants can have no advantage here, out of unsupported general allegations as to Messrs. McLanahan and Douthit, in the face of such a record. Messrs. McLanahan and Douthit were again in court on March 9, 1925, pursuant to notice (Case, p. 223, l. 20), but they were not then examined on this belated quest of Mr. Venner for further "enlightenment."

The statement that one of counsel for respondent has admitted that respondent's directors have guaranteed its performance of the Chase Securities Corporation contract, is without basis (Case, p. 295, l. 20) as well as utterly immaterial.

So far as Mr. Tinker is concerned the Vice-Chancellor in his original opinion certainly gave all possible adverse effect to any want of information on the part of the stockholders, and the approval of the stockholders at the second meeting, after re-submission on full notice, and after full discussion thereat, ratified in all respects the action of the directors in making the contract and the contract itself. Any objection to that contract on the grounds originally alleged against it cannot now be made. Its ratification by the stockholders was made by more than a two-thirds vote of both classes of stock, and a majority would have been sufficient for that purpose.

The respondent Company has outstanding (after deducting shares held in trust for its benefit) the following capital stock:

| | |
|---|---|
| *Preferred Stock:* 125,483 shares.... | $12,548,300 |
| This is preferred as to assets and dividends, bears 7% cumulative dividends, and is entitled to par and accrued dividends in case of liquidation. | |
| Since incorporation in 1899, dividends have been paid on the preferred aggregating 37¾%, leaving arrearages amounting to 143½%; the aggregate amount of the dividends in arrears is therefore ..... | 18,006,810 |
| There is, therefore, a total charge for par and arrearages of dividends prior to the common stock at the rate of $243.50 per share, amounting in all to ..... | $30,555,110 |
| *Common Stock:* 112,741 shares..... | $11,274,100 |

The bill of complaint of the General Investment Company is a class bill "in behalf of itself and of all other 7% preferred stockholders of the American Hide & Leather Company who shall come in and contribute to the expenses thereof." The words "7% preferred" were eliminated by amendment December 8, 1924 (Case, p. 72, l. 10).

Paragraph 4 of this bill sets up the ownership by appellant of 100 shares of said preferred stock. The bill itself does not allege any ownership by the appellant of common stock, but it appears in the concluding paragraph of

the affidavit of Clarence H. Venner, attached to the bill of complaint (Case, p. 27), that he, Venner, individually owns 200 shares of common stock and that as such common stockholder he "is in full sympathy with the purposes and grievances set forth in the bill of complaint herein of the General Investment Company." He has, however, asked of the Court no relief by independent bill or otherwise as a common stockholder.

The bill of complaint in the Joel case is a class bill by those appellants "who bring this suit in their own behalf and in behalf of all other stockholders of the American Hide & Leather Company who come in and contribute to the prosecution of this suit." The appellants in the Joel bill have no common stock, and no other preferred stockholders or any common stockholders have come in as parties complainant.

It therefore appears that the objections brought before the Court are by preferred stockholders only and that no common stock has instituted any litigation in opposition to this plan.

It should also be noted that, under date of February 10, 1925, Mr. Clarence H. Venner, President of the General Investment Company, mailed to the stockholders of the respondent Company a circular in relation to this plan. (Case, p. 250, l. 37.) This circular, copy of which is in the record (Case, pp. 271-284 and should bear the caption "Venner Circular"), was signed "General Investment Company, a Preferred Stockholder. Clarence H. Venner, a Common Stockholder." The Court will find on reading this notice that its subject matter deals with the supposed injustice of the plan to the preferred stockholders. This circular is interesting in re-

lation to the action of the stockholders taken at the meeting on March 4, 1925. It is headed with the word *"Caution"* and concludes with the statement that it is submitted in order that the stockholders may have the fullest information and assert their right "to protect their stock against the proposed ruthless destruction." To it is appended a P. S.—"The plan is so much against your interests that the directors have sought to prevent this circular from reaching you. * * * This most conclusively shows that the directors mean to keep you in the dark. In the event that you have given your proxy to the management your interest requires that you at once revoke it and notify the Company and us to that effect." The circular, with its extended argument against the plan, gave the stockholders further notice of the subject matter of the meeting of which they had been formally notified by the Secretary of the Company, and makes the action of the stockholders in approving the plan at the meeting of March 4th much more than usually impressive, as their action was taken after caution against the management and extended presentation of the objections that the appellants now urge. Not only has this plan been twice approved by the stockholders, but the second approval has been in the face of the actual presentation to their attention of every conceivable objection educated ingenuity could suggest.

The essential feature of the corporate plan involved is the purchase for retirement from holders willing to sell of 65,000 shares of present preferred stock which would result in the extinction of capital liability as follows:

| | |
|---|---|
| Par value of 65,000 shares..... | $ 6,500,000 |
| Arrearages of dividends on the same | 9,327,500 |
| Total ..... | $15,827,500 |

This is proposed to be done:

| | |
|---|---|
| (1) By the purchase of 30,000 shares for cash out of the present *capital* assets of the Company at not to exceed approximately $70 per share ..... | $ 2,100,000 |
| (2) By the purchase of the other 35,000 shares at not to exceed $100 per share in cash, the funds for which are to be obtained through the issue and sale of not to exceed 35,000 shares of a new class of Prior Preference 8% cumulative stock having a par value of..... | 3,500,000 |
| Total outside cost of extinction of above capital liability of $15,827,-500 ..... | $ 5,600,000 |

So far as the plan involves the purchase of 30,000 shares of the present preferred stock at approximately $70 per share it does not invade the *surplus* of the Company. Any assertion to the contrary is manifestly without warrant, as very clearly if the purchase and requirement be consummated there will be an actual residue of *capital* assets of approximately $30 per share to the pro rata advantage of the continuing stockholders. Not only does the plan not invade *surplus* for its accomplishment, it actually by indirection increases *capital* assets. It is a step in the *decrease of capital* under Section 29 of the statute.

Moreover, no preferred stockholder is required to part with his stock. If unwilling to sell a portion of his stock for retirement, he may retain all.

The extinguishment of the stock purchased and the arrearages of dividends thereon will increase his pro rata share in the remaining capital and surplus of the Company and enhance his prospects of receiving the arrearages of dividends. This necessarily results from the extinction of net capital liability of over $10,000,000 now represented by outstanding stock which will be retired.

The appellant, General Investment Company, holds 100 shares of preferred stock. The appellants Joel and others hold 1,200 shares of preferred stock, of which only 200 shares are of record in their names.

In response to the complaint that the plan might operate injuriously to the appellants in that they might be the victims of preferential treatment by the purchase of shares of others (a complaint not justified by the equity of the plan), the Company offered in the court below, and repeats the offer here, that it is and has at all times been willing to accord to the appellants the fullest rights which any stockholder could possibly have. The Company expressed its willingness in the court below, and repeats the offer here, to purchase from appellants immediately either the *full proportion* of their stockholdings which they would be entitled to offer if the purchase were made pro rata from all stockholders, *or all of their stock* at the exact price payable under the terms of the Chase Securities Corporation contract. The appellants are not, of course, required to accept this offer and they may, if

they like, keep their shares without contradiction of the plan, but it seems apparent that, in the face of this offer to purchase all or a pro rata part, they cannot be equitably permitted to enjoin the Company from extinguishing shares of other stockholders, with dividend arrearages of $143.50 per share, at a price which they themselves are unwilling to accept. If it be that the plan denies to them the equal right to offer shares for retirement, the wrong is personal to themselves. If the Company concedes the exercise of that right to them what basis remains for the continuance of injunction against purchase and retirement of the shares of other stockholders who are willing to accept?

The Court's attention should perhaps be directed to a substantial difference in the frame of the bill of complaint in the Joel case. As originally framed and presented it contained no attack upon the proposed plan, except as to the legality of the creation by charter amendment of a new class of prior preference stock, with preference and priority over the preferred stock held by the appellants. No criticism was offered of the plan so far as related to the purchase and retirement of 30,000 shares of the present preferred stock, either through the Chase Securities Corporation contract or from stockholders generally. After the first decision of the Vice-Chancellor the Joel bill was amended by inserting a new paragraph 6 (a) (Case, pp. 219-220), setting up objection to the Chase Securities Corporation contract because of the want of disclosure of the Tinker interest emphasized in the opinion of the Vice-Chancellor. This amendment was to bring the Joel bill within the purview of the Vice-Chancellor's opinion, and to secure the benefit of the restraint he was willing to give if

the defendant Company did not exercise the option to re-submit the plan anew to another meeting of the stockholders. By the re-submission and the approval of the stockholders, after full disclosure, the objection introduced into the Joel bill by amendment has been disposed of and the attack of the appellants in that bill is limited, as originally, to the legality of the creation of the new prior preference stock.

The numerous other objections, technical and inconsequential in character so far as the merits of the plan and its effective approval by the stockholders are concerned, are, therefore, to be considered as presented only by the General Investment Company and supported by a stockholder of 100 shares out of a total issued and outstanding of 125,483 shares (preferred stock only).

Boiled down to real residuum, the attack of the appellants is directed to the creation of a new prior preference stock through the issuance of which it is proposed to effect the purchase for retirement of 35,000 shares of the present preferred stock. This does not, as we see it, necessarily preclude, even if resolved against the legality of such a new prior preference stock, the first step in the plan of the purchase of 30,000 shares of the present preferred stock for cash out of the present capital assets of the Company at approximately $70 per share, forthwith extinguishing a capital liability of $7,305,000 at an approximate cost of $2,100,000.

The book value at December 31, 1924 (Annual Report of December 31, 1924, Case, pp. 285-289), of the assets of the respondent Company, if the net book assets be applied exclusively for the benefit of and divided by the outstanding shares

of preferred stock, was approximately $230 per share. After the retirement of 30,000 shares at $70 per share, the same figure would be approximately $275 per share, and after the further retirement of 35,000 additional shares at $100 per share, the same figure would be approximately $370 per share.

These figures are convincing that the first step in the plan, the purchase and retirement of 30,000 shares at approximately $70 per share, would be advantageous to appellants and all other stockholders by itself, even if the second distinct step, the purchase for retirement of 35,000 shares through the issue and use of the proceeds of the prior preference stock, should not be consummated.

On net book value of present assets the common stock is absolutely worthless. After the change, if completely consummated, the net book assets would be sufficient to cover the par of 35,000 shares of new 8% Prior Preference shares, the par and accrued dividends of the remaining 65,000 shares of present preferred stock, and to leave a surplus for common stock of over $8,225,000.

Sundry deductions, favorable and unfavorable in the operation of the plan, if considered in its effect upon the stockholders solely from the prospective earning standpoint in the light of the past history of the corporation, can be imagined. We submit that the better test of prospective advantage is to be found in the asset values of the corporation rather than in speculation about future earnings. But, in any event, it seems to be absolutely beyond dispute that the chance of the present stockholders, as to all their shares, if they retain all, or, as to

such part as they retain if they come in under the plan, to ultimately receive their deferred dividends, is promoted and made much more probable by the extinguishment, through the plan, of capital liability of over $12,000,000, represented by the extinguishment of now outstanding shares of the par of $3,000,000 and accumulated dividends of over $9,100,000.

Evidently the very large majority of the present preferred stockholders have concluded that the plan affords a better chance of ultimate restoration of the corporate prosperity from the stockholders' standpoint than the present set-up, and, in connection with the ~~offer~~ effort of the appellants to substitute their judgment for that of the directors of the corporation and of the large majority of the stockholders of the company, the Court may well be reminded that the appellant, General Investment Company, bought its stock in October, 1918 (Bill, Case, p. 5, par. 4), with a then dividend liability of 111½%, and that the appellants in the Joel case bought their stock in October, 1922, and January, 1923 (Joel Bill, Case, p. 75), with a then accrued dividend liability of over 130%.

The appellants can make no special appeal to the Court as unwarned unwary investors in a security of first issue, acquired on a prospectus justifying expectation of high return. They bought their shares when they were already in dividend arrears to an amount greater than their par, and were evidently speculating then as now.

At both meetings, the resolution authorizing the purchase of 30,000 shares for retirement was voted on apart from the resolution authorizing the issue of 35,000 shares of the new prior pref-

erence stock for the purpose of the retirement of an additional 35,000 shares of preferred stock. The latter step involves the exercise of further discretion by the directors. Each step may stand alone.

While it is evident that the directors and an overwhelming majority of the stockholders believe that the whole program would be advantageous, the appellants themselves have made no real claim of any disadvantage, legal or actual, to the first step. It obviously spells advantage to all and disadvantage to none.

Considered of itself the appellants' proportionate interest in the $2,100,000 of the Company's *capital* assets (the amount required to extinguish $7,305,000 of capital liability by purchase and retirement of 15,000 shares) is at the rate of $16.73 per share. The General Investment Company holds 100 shares and its interest on that basis is $1,673. Appellants Joel and others hold 1,200 shares, and their interest on that basis is $20,076. Any possible supposable invasion of appellants' rights, so far as this first step is concerned, can be adequately and fully protected by a bond, a method recognized by this Court as appropriate to protect wrongs personal to complaining stockholders who object to corporate action deemed advantageous by the directors and an overwhelming majority of the stockholders. *Meredith* v. *Zinc & Iron Co.*, 55 N. J. Eq. 211, affirmed on opinion below 56 N. J. Eq. 454; *Morganstern* v. *American Melting Company*, 87 N. J. Eq. 358. Such a bond the Company has proffered itself ready to give in the memorandum filed in opposition to the motion for a stay, on which argument was partially had on the opening day of the term, to which memorandum reference is made.

We also contend that the doctrine of convenience invoked by Vice-Chancellor Lane in the case of *General Investment Co.* v. *Bethlehem Steel Corporation,* 88 N. J. Eq. 237, has application here. Vice-Chancellor Bentley, in his opinion below, did not regard the case as helpful on the questions presented here because it went off on the doctrine of convenience. We later call attention to the fact that Vice-Chancellor Lane did not conceal his views on the merits. The weakness of appellants' appeal to equity to defeat the plan now before the Court on the balancing of advantages to the corporation and its stockholders as against any possible impairment of appellants' rights, justifies application of the *Bethlehem case* as authority here. An appeal was taken in that case to this Court and application was made to this Court for a stay pending determination of the appeal. The stay was denied and the appeal was abandoned. We are not permitted to know what moved this Court in denying the stay applied for by the then appellant, but this Court must have been in accord with the denial of relief by the Court of Chancery, either on the ground on which the Vice-Chancellor put it or on the merits of the case. Either way the case is authority here for the denial of a preliminary injunction. As in the *Bethlehem case,* any possible damage appellants as individuals can possibly suffer by consummation of the plan can be compensated by damages at law. Appellants can be left to their legal remedy for the injury to them, if any, and equity served in its larger relation to the advantages and desires of the corporation and the overwhelming majority of its stockholders. Vice-Chancellor Bentley, in his opinion below, truly said of this plan that its advantages were

obvious to any disinterested person, and it may be further said that the arguments advanced have not seriously questioned the advantage of the plan to the corporation and the stockholders as a whole. Is the appellants' charter contract any more strong, from the angle of the right to equity protection, than a contract for the sale of real estate, the breach of which is presumed to imply irreparable damage? Are not appellants here demanding specific performance by indirection of their so-called preferred stock contract against the respondent Company and the large body of their stockholders included in the overwhelming majority approving the plan? And would a court of equity, under like conditions of advantage and disadvantage to the respective parties, exercise its discretionary jurisdiction on direct appeal for specific performance of a contract for the sale of real estate? We submit that equity should not interfere in the present case, and that the appellants should be left to their legal remedies. The fact that, in all human probability, the plan would be of advantage to the appellants and that they would not be able to show themselves adversely affected if the plan should be consummated, is added reason why equity should not enable them to prevent the corporation and the large body of its stockholders from enjoyment of the benefits of the plan.

The Court will consider the situation of the parties and weigh the relative hardship in granting or denying an injunction. If appellants be denied a preliminary injunction, the injury is not irreparable. They may be remitted to their legal remedy, or a bond may be ordered to be given by the defendant. Vice-Chancellor Lane so ordered

in *General Investment Company* v. *Bethlehem Steel Corporation,* 88 N. J. Eq. 237, 244, and in the unreported case of *Brugler* v. *United Shoe Machinery Corporation* (June 4, 1917) (referred to by him in *General Investment Co.* v. *Bethlehem Steel Corp., supra).* The same course was followed in *General Investment Company* v. *Pennsylvania Steel Company,* 233 Fed. 407. On this point also we beg to refer to our Brief on the Motion for a Stay.

A preliminary injunction, even if afterwards vacated, will, on the other hand, work irreparable injury to the company and the interests of the great majority of its stockholders. The loss of the benefits of the plan cannot be repaired by appellants under any form of relief.

**The Plan is Fair and Equitable.**

It may be proper, at the outset, to recall the language of this Court in *Berger* v. *United States Steel Corporation,* 63 N. J. Eq. 809, at p. 812:

> "In the presence of the fact that over ninety-nine per cent. of all the stockholders in attendance at the meeting—voted in favor of the resolution, it cannot reasonably be expected that the Court is impressed with the belief that the complainant will suffer any substantial injury by the consummation of the scheme. Nevertheless, if it appears that the proposed action is without legal authority, the complainant cannot be denied the relief which she seeks, but, in passing upon this controversy, the greatest care must be observed that this overwhelming majority of the shareholders are not deprived of their rights by the very few dissentients."

In this case it is alleged the appllants hold approximately one-half of one per cent. of the

outstanding shares having voting power, although only 300 shares out of an aggregate alleged holding of 1,300 shares are of record in their names (Case, p. 5, l. 35; p. 75, l. 10). Obviously, the company can have no knowledge whether the other 800 shares are in fact owned by appellants, or when they were acquired.

It should be emphasized at the outset that there is no complusion upon the present preferred stockholders either to sell, exchange or retain their shares.

It is, we submit, conclusively demonstrated in the illustrations and figures contained in the circular letter to the stockholders which accompanied the notice of the special meeting, (Case p. 47) and in the affidavit of Claude Douthit (Case, p. 170) that the plan provided for in the resolutions adopted by the stockholders will be of great advantage to the present preferred stockholders and to the company under almost every conceivable condition which may arise and from every standpoint.

In seeking, however, for a possible condition in the affairs of the corporation which might result in a disadvantage to a holder of the present preferred stock who declined to sell any part of his holdings for cash at $70 per share or to exchange any part thereof for the new prior preference stock, counsel for Joel, in his brief below, made the extreme assumption that the earnings of the company might in the future be barely enough to pay the dividend on the new prior preference stock and argued that in such case a present preferred stockholder who holds all of his stock will be at a great disadvantage.

It is true that if this condition should arise in any one year or should continue for a number of

years, the position of such a preferred stockholder might be less fortunate than if the plan were not carried out and the Board of Directors should see fit to declare such small earnings in dividends.

But, we submit, this is the only case in which such would be the result. And the answer to this proposition is that a present preferred stockholder will be given the option and privilege of avoiding the possibility of such a condition by selling a portion of his holdings at $70 per share (which is certainly not less than the value of his shares if the earnings should so result) and exchanging a substantial portion of the balance for new prior preference stock and thereby realizing a greater return on his total investment than he could if the plan were not carried through and the earnings of the corporation were so small as to permit of a dividend of only 2 per cent. or 3 per cent. on his stock.

It is doubtful whether, under this plan, the creation of the prior preference stock can in any material degree be considered an injurious amendment of appellants' contract. If other members of the same class of stock were called forward and given a superior rank, without the extension of the same privilege to appellants, they might have cause for complaint. Under the plan for the exchange of a portion of their holdings, however, they are advanced to the superior rank to the same extent and in the same proportion as all others of the same class, if they will accept. They may not complain of subordination to a class of stock which is offered to them.

An overwhelming majority of the stockholders of both classes, as evidenced by the votes at the meetings held on December 9, 1924, and March 4, 1925, have twice approved of the plan and will doubtless take advantage of its opportunities and thereby realize in cash and in a superior new stock a value on their present holdings which they could not otherwise hope for, and at the same time retain sufficient of their present holdings to reap the benefit of any substantial increase in the earnings of the company which will permit the payment from time to time of not only current but a portion of the accrued unpaid dividends on their present preferred stock.

The plan of readjustment under consideration is a result, as appears from the papers submitted, of long and careful consideration by the Board of Directors, counsel and bankers for the company, and can be demonstrated mathematically to be for the benefit of shareholders as well as for the company if carried out, except only in two extreme cases, viz., first, the case of a present preferred shareholder who refuses to sell or exchange any of his stock, later facing a liquidation of the corporation with net assets of less than $7,700,000; and, second, the case of such a stockholder in the event of the net earnings of the company available for dividends in the future amounting to barely more than the dividend requirements on the prior preference stock. And in both cases any possible disadvantage may be avoided by joining in the plan as contemplated by it.

There is, therefore, no basis for the complaint of "compulsion" upon the preferred stockholders. If they decline the options offered, and

their position is deemed by them to be made worse, it is the result of their volition.

We submit, therefore, that the plan meets every test of fairness and equity to all shareholders and to the company when it is considered in the light of the present condition of the affairs of the company. The capital liability has from the organization of the company, as is demonstrated by its history of earnings, been grossly out of proportion to its earning capacity, and this condition is aggravated every year by additional accumulations of unpaid dividends on the preferred stock. It is only by some such plan as now under consideration and which has been approved by such an overwhelming majority of the stockholders, that the company may hope to adjust its capitalization and capital liability to its earning capacity to such an extent as to lend reasonable assurance of future participation by the stockholders in its earnings to the extent to which they are entitled thereto. Otherwise, any small payment of dividends on account of arrearages would amount simply to throwing money into an ever-deepening abyss, and the credit position of the company, as well as the market value of its stock, would steadily decline.

**The Legal Objections to the Plan.**

The procedure to amend the company's charter and to retire shares, here challenged, has been taken under authority of Sections 27 and 29 of the General Corporation Act of 1896. Both sections, so far as needed to support the action taken by the directors and stockholders of the company, antedate its incorporation in 1899, and are a part of the charter contract. *Sections*

*4 and 5, Corp. Act of 1896; Meredith* v. *New Jersey Zinc Co.*, 55 N. J. Eq. 211; aff'd 56 N. J. Eq. 454 on opinion below; *Berger* v. *United States Steel Corporation,* 63 N. J. Eq. 809.

By way of preface this Court's attention may be appropriately directed to its own declaration as to the purpose and construction of Section 27, as to amendments, and its related Section 29, as to the retirement of shares, and particularly as to the use of the power of amendment under Section 27 in association with the retirement of shares under Section 29.

The present Section 27 of the Act of 1896 is the lineal descendant of Section 33 of the Act of 1875. (See Table in Corbin's New Jersey Corporation Act, 1896 Edition.)

As to the purpose of the Act, in specific relation to the capacity of corporations to amend their charters by a two-thirds vote of stockholders, and to the capacity of corporations to retire their shares by a two-thirds vote of the holders, this Court has said, speaking by Mr. Justice Van Syckle, in *Berger* v. *U. S. Steel Corporation,* 63 N. J. Eq. 809, at page 814:

> "It is important to notice that this legislation" (Section 29) "favors the capacity of corporations to retire their shares, by a two-thirds vote of the holders thereof, as it has provided every available way in which it can, with any degree of facility, be exercised, and, also, that this Court adopted the opinion of Vice-Chancellor Pitney, in *Meredith* v. *New Jersey Zinc Co.,* 14 Dick. Ch. Rep. 257, which held that, under the thirty-third section of the Act of 1875, which authorized a corporation 'to change the nature of its business,' the corporation might purchase a reducing plant outside of this

State and engage in business where it was located.

"The Vice-Chancellor said: 'It is fairly inferable that the thirty-third section was intended to prevent a few dissentient stockholders, as here, from setting up their wills against the will of a large majority, and the statute should be so construed as to further that object.'

"A liberal, and not a narrow, construction must therefore be given to the language of the twenty-seventh and twenty-ninth sections of the Act of 1896, in order to give effect to the intent of the Legislature manifested in this broad and comprehensive grant of authority to retire shares of stock."

And in the same case, at pages 825-6, this Court, after referring to Sections 4 and 5 of the Act of 1896, said:

"The language of the fifth section of the Act of 1896 is very broad: 'This Act and all amendments thereof shall be a part of the charter of every corporation heretofore or hereafter formed under it.'

"It is difficult to perceive how any substantial force can be accorded to it, unless some amendment may be made which may affect the rights of stockholders *inter sese* to some extent."

(After citing English cases construing Section 50 of the English Companies' Act of 1862):

"While these cases are not controlling in this forum, they are instructive, as the declarations of very learned judges, exercising broad equity power, that the original articles of the company do not constitute such a fast-bound contract, between the shareholders *inter sese,* as to create vested rights which could not be unfavorably affected by an alteration of the articles in pursuance of the power given by Section 50 of the Companies' Act of 1862."

(Referring to the case of *Schwarzwaelder* v. *German Mutual Fire Insurance Co.*, 14 Dick. Ch. Rep. 589, decided by this Court in 1899):

> "This Court held that, under this Act of 1899, a mutual insurance company organized in 1893, cannot transform itself into a joint stock company against the will of a member who acquired membership by contract with the company made before the passage of the Act of 1899. The rule adopted in Kean *v.* Johnson, *supra,* was properly adhered to. In reading the opinion of Mr. Justice Dixon it cannot escape attention that it was not even suggested that if the company had been organized after the passage of the Act of 1899, the transformation could have been successfully assailed for illegality."

It is quite true that in the *Berger* case from which the above quotations are made, this Court did not express any final conclusion as to the effect of Section 5 of the Act of 1896, but the observations of the Court are none the less dispositive of loose talk about vested rights in dealing with charter amendments made by corporations pursuant to legislation in effect at the time of original incorporation. We have cited these observations, because in this case, as in the *Berger* case, no appeal will be made to support the validity of the plan approved by the stockholders to legislation effective subsequent to the charter of the defendant company. The provisions of the Act of 1896, on which we rely, antedate the year 1899, in which the defendant company was organized.

Stated briefly and simply the legal steps involved in the plan for the readjustment of the capitalization of the respondent under consideration and which have been twice approved by an

overwhelming vote of both classes of the outstanding stock, are as follows:

1. The reduction of the capital stock by
   (a) cancellation of 10,000 shares of unissued preferred stock and 60,000 shares of unissued common stock; and
   (b) purchasing for retirement at not above par and retiring 65,000 shares of outstanding preferred stock.

2. The creation of 35,000 shares of new prior preference stock to take the place of at least an equal number of outstanding shares of preferred stock which are to be acquired by purchase or exchange and retired.

1. (a) There is, of course, no question as to the right of the corporation to cancel and extinguish unissued stock.

The method of creating the new prior preference stock in this instance is, of course, one merely of convenience. The defendant corporation has had, since its organization, 45,000 shares of authorized preferred stock which have never been issued. Instead of cancelling and reducing this preferred stock by 35,000 shares and then creating the new prior preference stock to the same number of shares, the resolutions passed by the stockholders provide simply for the reclassification of 35,000 shares of this unissued preferred stock into new prior preference stock, or amending the terms of the unissued stock. The method, however, is unimportant. The result is that the corporation is creating 35,000 shares of a new class of preferred stock, as authorized by the statute.

(b) As there are over 140 per cent. unpaid accumulated dividends attaching to each share of present outstanding preferred stock, obvi-

ously any purchases of this stock by the company at less than par, and involving the surrender and cancellation of all claims to such back dividends on the part of the stock so purchased, is bound to result not only in advantage to the company but to the remaining shareholders. It is obvious that the purchase and retirement under these conditions require no use of surplus.

Appellant Joel and associates made no objection to this purchase in the Court below. Appellant General Investment Company makes objection only to the purchase of 15,000 shares from the Chase Securities Corporation and apparently urges that the respondent company should have purchased such shares during the year 1923 when the market price was lower than $70, a procedure which would have been then illegal, without action by stockholders under Section 27 or 29, because, if purchased out of capital it would have violated Section 30, and if out of surplus, it would have amounted to an unequal distribution of surplus among the holders of stock in arrears as to dividends.

We cannot believe that the Court will regard the objections of General Investment Company, either as to the expediency or legality of the purchase of the 30,000 shares as proposed at a price not exceeding $70 per share, as worthy of serious consideration. We have none the less discussed the matter in a later part of this brief.

2. The only question raised, we submit, with any degree of manifest sincerity by appellants, is as to the right of the corporation to create the new prior preference stock by a two-thirds vote of its shareholders and the retirement by

the use of such new prior preference stock or the proceeds thereof, of at least an equal number of shares of present outstanding preferred stock. We will, therefore, address ourselves first to this question, believing, as we do, that the other objections raised are either incidental to this question or are so obviously unsound as to be worthy of little consideration. We also believe that the purchase and retirement of 30,000 shares as proposed from funds available for such purchase in the corporate treasury are so demonstrably advantageous to the corporation and its preferred stockholders, including the appellants, that this much of the plan should not be interrupted even if the Court should enjoin the issue of the new 8 per cent. prior preference shares as twice approved by the overwhelming majority of the present preferred stockholders.

**The company has the right to create a new class of preferred stock with the consent of two-thirds of each class of its outstanding stock.**

This is the main proposition in this case. Appellants dispute the right.

The controlling statute (Section 27 of Corporation Act), *as it existed at the time of the organization of the American Hide & Leather Company,* reads as follows (omitting clauses unimportant in this inquiry):

> "Every corporation organized under this act may * * * increase its capital stock * * * *create one or more classes of preferred stock,* and make such other amendment, change or alteration as may be desired in manner following," etc. (providing for the consent of the holders of two-thirds of the outstanding stock).

This statute is part of the contract between the original stockholders, as we have already stated. Authorities seem superfluous, but we again cite:

Secs. 4 and 5, *Corporation Act;*

*Meredith* v. *Zinc & Iron Co.*, 55 N. J. Eq. 211, affirmed *per curiam,* 56 N. J. Eq. 454;

*Berger* v. *U. S. Steel Corporation,* 63 N. J. Eq. 809.

It may tend to brevity to consider first the arguments against the proposition.

(1) Appellants contend that to create by amendment one or more classes of preferred stock without unanimous consent of the stockholders, is, in this case, a violation of the original contract between the stockholders. Yet, they do not deny that the statute existing at the time of the incorporation of the company, as above quoted, is part of the original contract between the stockholders.

A corporation may issue mortgage bonds by action of its directors without authorization by stockholders, thus subordinating an existing class of preferred stock. Cannot the preferred stockholders, with the consent of two-thirds of their own number, create a mere prior preference stock?

How is the creation of a new preferred stock by two-thirds of the present preferred and common stockholders voting by classes any more of a violation of the contract between the stockholders than would be the creation of one class of preferred stock by two-thirds of the common stockholders of a corporation having only common stock outstanding?

Appellants did not attempt to answer this question on the argument below.

If the company had outstanding ten million dollars par value of common stock and the holders of two-thirds of that stock voted to create an issue of preferred stock, could it be said that the contract between the stockholders is violated?

And if one class of preferred stock, why not another class at a later time? The statute does not set any limits as to the number of classes of preferred stock that may be created, nor as to the time when this may be done.

The possibility of the creation at some future time of one or more classes of preferred stock, in addition to the one originally established, is deemed to have been in contemplation of the stockholders when the corporation was organized. The fact that the legislative authority existed prior to the incorporation of the company removes all necessity of discussing the question of the constitutionality of a legislative act subsequent to the incorporation purporting to grant such authority without the consent of all the stockholders.

(2) Appellants none the less, claim that the creation of this new stock is unwarranted in law, because of an unfavorable effect as they could have the Court believe, on the present preferred shareholders.

Respondent contends that the effect will be most beneficial upon the present shareholders.

But if the creation of this stock is lawful and accomplished in the manner provided by the statute, this Court will not, we submit, in the

absence of a showing of fraud, concern itself with the effect.

The Board of Directors and stockholders must be left to decide their own questions of business expediency.

This rule was well stated by Vice-Chancellor Emery in *Berger* v. *U. S. Steel Corporation,* 63 N. J. Eq. 506, as follows (at p. 519):

> "The reasonableness or judiciousness, in its business aspect, of a reduction of the preferred stock of the Steel Corporation, and the distribution of capital resulting therefrom * * * is * * * altogether a matter of management of the affairs of the corporation, upon which the decision of the directors and stockholders, given in the manner required by law, is final, so far as relates to its business aspects."

On this point the Court of Errors was in agreement with him, 63 N. J. Eq. 809, 829. And see *Ellerman* v. *Chicago Junction Ry.,* 49 N. J. Eq. 217, 232.

(3) The most vigorous expression of the appellants' argument is, that, if they do not wish to accept their *pro rata* share of the new prior preference stock, they must, therefore, sit by and see their existing priority displaced, and this is alleged to be a species of compulsion. In logic, the same argument might as well be made against every new issue, whether of stock of an equal or superior rank, for, if the existing stockholder does not wish to subscribe to his *pro rata,* he must submit to share his interest in the corporate assets or subordinate them, as the case may be, to the incoming stockholder.

(4) Of no greater validity is the argument of appellants that they have rights in the existing

surplus which are subjected to the rights or claims which will vest in the holders of the prior preference stock. No stockholder has a lien or specific interest in any portion of the corporate property until the directors determine to make a distribution thereof. All of the property, whether representing capital or surplus, is vested in the corporation and it is at the risk of the enterprise. Necessarily, therefore, it is subject to the rights which may be accorded to any new stockholders who are admitted in accordance with law. If preferred stockholders now have any special right in the surplus, it is only that, if and when the same is distributed, it be divided among them before any payment be made to the common stockholders, until their arrearages are satisfied. This right will not be disturbed.

This same question is actually and necessarily involved in every case in which a corporation has a dollar of surplus and issues new stock. The appellants contend for an utterly impractical doctrine, namely, that, whenever new stock is issued by a going corporation, the new stock must be excluded from any interest in the existing surplus. The effect would be that no matter how often stock be issued, and of whatever class, an account must be taken at the time of issuance and the new stock must be tagged with special marks defining, by way of exclusion, its rights in capital and surplus at the moment of issuance. Of course, stock cannot be issued in that way and cannot be dealt with in that way on the exchanges, where every share of stock of the same class, regardless of the date of issue, must have the same rights.

If newly issued stock has any special value because it has back of it an existing surplus, that value is in the ordinary case secured to the existing stockholders by their pre-emptive right to subscribe to the new issue. Bear in mind that the new prior preference stock in this case is of a limited amount, that it issues without appurtenant dividend arrearages, and that it will be offered to the existing stockholders. How then are the appellants legally injured if, as an incident to a lawful issue, the prior preference stock takes rank superior to the existing preferred stock with respect to all of the corporate assets, and if also appellants are offered the opportunity to take their share of the issue, and are also, in effect, permitted to pay therefor by the sale of a part of their existing stock. Appellants cannot be legally injured by the creation of a new class of stock ranking superior to their existing stock when they are offered the opportunity to exchange existing stock for the superior stock.

The whole argument for appellants on this branch of the case may be summed up by the statement that it is precisely the same argument which was made for the preferred stockholders in the U. S. Steel litigation and rejected on most thorough consideration by this Court as well as by a learned Federal Judge in *C. H. Venner Co.* v. *U. S. Steel Corporation,* 116 Fed. 1012. The only distinction is, that in the Steel case dissenting preferred stockholders were obliged to see a bond issue (which of course spread over all assets whether representing capital or surplus) placed above their stock, while in this case, it is only a new class of stock which is given prior rank.

In attack upon the retirement of the preferred stock of the Steel Corporation, through the issue of bonds, involved in the above-cited Federal case, it was argued that the act of 1902 impaired the obligation of a contract, the contract alleged to be impaired being:

> "the contractual relations established by the holders of the different securities by reason of the respective amounts of such securities of different classes, the differing rates of interest thereon, their different measures of participation in profits, or dividends, or assets, which were prescribed when the corporation was organized, and the present holders bought their stock."

Judge Lacombe said:

> "Certainly permanency in the relative proportions of the different securities was no part of the contract."

So, we contend, permanency in the exact relative interest of a certain class of stock in the surplus existing at any time is not a term of the contract, or, if a term, is a term subject to the effect of the incidental consequences of a lawful amendment under Section 27.

In *Stevens* v. *U. S. Steel Corporation,* 68 N. J. Eq. 373, a bill to compel the declaration of a dividend on the common stock, Vice-Chancellor Stevenson said (p. 375):

> "Until a dividend is declared the entire assets of the corporation, including surplus or accumulated profits, in whatever form they exist, belong to the corporation, and the corporation owes no debt in respect thereto to the stockholders as individuals."

It was apparently contended for the complainant in that case that a special duty lay upon the Board of Directors to declare a dividend on the common stock when funds were available there-

for, because, by withholding same, the surplus so available might subsequently be absorbed in the payment of cumulative dividends on the preferred stock. The Vice-Chancellor's answer to this argument was, giving it all possible force, that the duty of the directors to preserve and make use of the surplus for the benefit of the corporation was paramount to such supposed equity of the common stockholders.

In this case, the Board of Directors at this time deem it their duty to preserve this surplus. They also deem it in the interest of the company to retire a substantial amount of the preferred stock with its accumulated dividend arrearages, and it is their judgment that, in the choice of ways and means of financing such retirement, new prior preference stock should be issued. In this, their judgment is supported by the stockholders, and the effect upon the rights of the existing preferred stockholders in the surplus is a mere incidental consequence.

Let it be borne in mind, also, that the dividend requirement on $3,500,000 of prior preference stock will be only $280,000 per annum, and that, under the improving condition of the company, the current earnings should, on the average, be amply sufficient to meet that dividend requirement. Such being the case, no resort will be necessary to the existing surplus, and the rights of the preferred stockholders therein will not be jeopardized. In fact, if repetition be permissible, the prospect of a distribution of a portion thereof among the preferred stockholders who retain their stock will, if the plan be carried through, be substantially enhanced. If not less than $6,500,000 of preferred stock be retired, the dividend arrearages will, in the aggregate, have

been more than cut in half, and, in the course of time, it might be deemed prudent by the Board of Directors to begin the liquidation of the arrearages, a task now so formidable as to appear hopeless.

If the creation of the new preferred stock is not a violation of the contract between the stockholders, what other objections are raised against it?

(5) It was said below, and will doubtless be repeated here, that Section 27 "did not, as it now does, permit the change of common stock into one or more classes of preferred stock, nor the change of preferred stock into one or more classes of common stock."

Neither of such changes are here contemplated or involved.

Nor is this a "change" of one class of preferred stock into another class of preferred stock, as argued by appellants. The power to "change" preferred stock into common stock and common stock into preferred stock, introduced into Section 27 since 1896, by amendment, is probably a power which may be compulsorily exercised under the statute, a power which is perhaps not subject to inference and requires expression.

The process in this case is not compulsory, but voluntary. It is truly a sale of a new class of stock and a purchase of an old class of stock with special rights and claims arising out of the dividend arrearages.

(6) It was suggested below, although not very vigorously urged, that prior preference stock cannot be issued in exchange or sub-

stitution for the preferred stock. A similar view prevailed in the Court below in the Berger case, but was overthrown on appeal. If the new stock can be issued for cash, and the proceeds used to purchase the old, no valid reason is perceived why the purchase may not be made by direct exchange, rather than by indirection.

If prior preference stock can be created, the power to do so cannot be curtailed by the purpose of the issue; provided, of course, the purpose be lawful. It is, of course, true that there may be cases, which can be dealt with by the Courts effectively when they arise, in which powers conferred by the statutes may be exercised in ostensible conformity thereto, but in reality with the ulterior substantive purpose of effecting that which is forbidden by the act or clearly subversive of the contract. For instance, the power to dissolve or merge or to make a lease of all of the corporate assets, may be exercised in form ostensibly in compliance with statute, but in reality so as to accomplish a violation of the charter contract in a manner not permitted by the power of amendment. This would be a fraud upon the power.

In this case, the prior preference stock will probably be issued for cash at not less than par. That issue will be lawful. The proceeds will be issued to purchase existing preferred stock for retirement. That use of the proceeds will be lawful. Two rights do not make a wrong. It cannot, therefore, be argued by appellants that the prior preference issue is illegal because of the purpose of its issue. There would, therefore, seem to be no reason why the prior preference stock may not be issued directly in exchange for the preferred stock, if this is, in the discre-

tion of the directors, the more convenient mode of procedure. Such an exchange is merely a combination of a lawful sale of the prior preference stock and a lawful purchase of the preferred stock for retirement.

(7) It was also said that Section 18 of the act "as it existed at the time of the incorporation of the defendant company, required that the classes of stock, designations, preferences, and voting powers, or restrictions or qualifications thereof, should be stated and expressed in the certificate of incorporation." And that it was not until 1901 that the words "or in any amendment thereof" were added.

The logic of this argument is, either (a) that prior to 1901 no new class of preferred stock could be created by an amendment, or (b) that prior to 1901 a new class of preferred stock could be created by an amendment which, of necessity, would rank prior to the existing common stock, but could not be given rank prior to existing preferred stock. We find no basis in the statute for such distinction.

Section 27, providing for an amendment creating one or more classes of preferred stock by consent of two-thirds of the holders of the outstanding stock, was in existence at the time of the incorporation of defendant corporation and, furthermore, Section 18 *then* provided, in its last clause, "unless its *original* certificate of incorporation shall otherwise provide, no corporation shall create preferred stock, except by authority given to the Board of Directors by a vote of at least two-thirds of the stock voted at a meeting of the common stockholders, duly called for that purpose," showing plainly that the creation of a preferred stock by amendment

(and necessarily a statement of its preferences and voting powers or restrictions or qualifications thereof) was contemplated by Section 18. Evidently the words "or in any certificate of amendment thereof" were later added for the sake of greater clarity and completeness in connection with other more important changes in this section. Furthermore, Section 18 expressly provides that "the power to increase or decrease the stock as in this act elsewhere provided shall apply to all or any of the classes of stock." Since that power could be exercised only by amendment, it is doubly clear that the authorized amounts as well as respective rights of classes of preferred stocks could be so changed by virtue of the original language of the section.

> And, we submit, the language (of Section 18): "at no time shall the total amount of the *preferred stocks* exceed two-thirds of the actual capital"

shows that the number of classes of preferred stocks might be, from time to time, changed, of course by amendment.

On this point see the opinion of the Vice-Chancellor (Case, p. 194).

Sections 8, 18 and 27 are *in pari materia.* Section 18 authorizes a corporation to have distinct classes of stock. Section 8 provides that the classes of stock shall be described in the certificate of incorporation. Section 27 permits, in general, the amendment of the certificate of incorporation and, in particular, the increase of capital stock and the creation, by amendment, of one or more, in other words, new and additional, classes of preferred stock.

Let us examine further the logical effect of the destructive argument of appellants.

There are many sections in the Corporation Act referring to the "certificate of incorporation," and the provisions or contents thereof, in which the Legislature has not taken the pains to add "or in any amended certificate of incorporation."

There are also numerous sections in the act referring to the by-laws of the corporation, their force, scope and contents, in which no reference is made to any amendment thereof.

Under appellant's argument, therefore, whereever the words "certificate of incorporation" or "by-laws" are used in the statute, it means the original certificate of incorporation or the original by-laws and not an amended certificate of incorporation or amended by-laws. To illustrate:

Section 1, sub-division I: Every corporation shall have succession for the period limited in its certificate of incorporation. Therefore, it cannot extend its period of duration by amendment, notwithstanding the express permission in Section 27 to extend its corporate existence.

Section 1, sub-division VI: Every corporation has power to make by-laws for the government of its affairs. Therefore no amended by-laws can provide for the government of its affairs, nothwithstanding Section 11 permitting their amendment.

Section 8 provides that the certificate of incorporation shall set forth:

1. The name of the corporation;
2. The location of its principal office;
3. Its objects;

4. The amount of its authorized capital stock;

6. The period of its duration;

7. Provisions for the regulation of its business and the distribution of powers.

Therefore, none of these matters can be dealt with by amendment because, under the logic of appellant's argument, they are necessarily embalmed in the certificate of incorporation, since the Legislature has failed to provide that these matters may be set forth in an amended certificate of incorporation.

Section 11 permits the power of alteration of the by-laws to be conferred upon the directors by the "certificate of incorporation."

Section 12 provides for the manner of election of directors pursuant to the "by-laws" and permits the classification of directors pursuant to the "certificate of incorporation," and the distribution of the voting power among different classes of stock.

Not to weary the Court further, we merely point out that the following sections also contain references to "certificate of incorporation" or "by-laws" without express indication that the subject matter may be also dealt with in an amended certificate of incorporation or amended by-laws, viz., Sections 13, 14, 15, 20, 32, 36, 39, 41, 44, 97 and 105.

In short, it clearly appears from an examination of the statute that where the Legislature has merely used the term "certificate of incorporation," it means the certificate of incorporation as it exists from time to time, whether in original form or in amended form. And this is the proper construction of Section 18.

(8) It was said that after having provided originally for one class of preferred stock the company could not thereafter by amendment create an additional class of preferred stock.

But this is an express contradiction of the language of Section 27 above quoted, and no case was cited in support of the contention.

It might just as well be argued that a corporation which issued only one class of stock, impliedly agreed with its stockholders that, without the consent of all the stockholders, it would not amend its certificate of incorporation so as to authorize the issuance of another class of stock. It is clear that there is no such implied agreement because the provisions of the statute expressly authorize an amendment of the certificate of incorporation so as to provide for an issuance of preferred stock. It follows that inasmuch as the company at the time of organization might have provided for three classes of stock, so now having provided in its certificate of incorporation only two, it may amend its certificate so as to provide for the issuance of a third class. In other words, where the certificate of incorporation provides for two classes of stock, the implication that it will not issue a third class is no greater than the implication that a corporation which has only one class of stock will not issue a second class.

Again, it was said that while a second preferred stock might be created, "a preference prior to a previous preference" cannot be created, thus recognizing that an intermediate preference might be imposed on this common stock, but not on a contemporaneously created preferred stock.

No cases were cited in support of this remarkable distinction and the real contract between the stockholders, including the provisions of Section 27, was ignored. The authority for the proposed amendment, which appellants claimed cannot be found, arises from the statute itself, and is not confined to the creation of a second or third preferred stock only.

The case of *Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431, was cited, as being a direct authority in support of appellants' contention.

That case is wholly beside the point and the question at issue there is not involved here. We rely on the statute as it existed at the time of the incorporation of the company, and it is not necessary to consider the effect of subsequent amendments to the statute, which was one of the questions involved in the Allen case.

Arguments based on analogy to the relative rank of mortgages are unsound. A mortgage is a conveyance in pledge. It is wholly inconsistent with the nature of such a conveyance that the mortgagor can subsequently re-convey a prior estate to a subsequent mortgagee, although it might be remarked that even liens can, in some cases, as under certain provisions of the maritime law, be displaced in favor of those who make the latest advances.

The appropriate analogy involving mortgages in relation to capital stock supports the right to create new preferential shares having priority over existing issues. Even without consent of stockholders prior liens by mortgage, as well as unsecured liens, can be created whenever in the business judgment of the directors required for the corporate interests. Surely a stockholder is

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*per se* no more adversely affected by a prior stock lien created with the consent of two-thirds of the same class of stockholders than by a prior mortgage lien created without their consent. The same logic would paralyze all corporate financing without stockholders' consent. The statute declares that corporations shall have power to borrow money. The same statute declares that, with the statutory consent of the stockholders, the corporation may create a new stock issue. No one stockholder has a veto power on the exercise of statutory authority incorporated into the charter at the birth of the corporation.

The possibility of the election on the part of the present stockholder to exchange his holdings pro rata for the new preferred not only preserves the pre-emptive right of the present stockholder, but saves him the trouble of subscribing in cash to the new issue to assure the enjoyment of his pre-emptive right, pending the retirement of the same or a greater number of his present shares out of the cash proceeds of the new shares. The method of direct exchange is even more advantageous to the present shareholders than the issue of new shares for cash and the subsequent retirement, by use of the cash, of an equal or greater number of the present shares.

(9) It is argued that the plan will shift control of the Company from the preferred to the common stockholders.

It is true that there are now a slightly larger number of shares of preferred than of common outstanding, and that after the plan is consummated, the balance will be slightly otherwise.

If, as argued, the control of the Company is now in the hands of the preferred stock, it may be presumed that the present Board of Directors represents the preferred stockholders. Is that Board engaged in a deliberate plan to benefit the common stock at the expense of the preferred? The members of the Executive Committee, who formulated the plan and negotiated the Chase contract, are according to Mr. Douthit's affidavit (Case, p. 169, l. 10) very large holders of preferred. Another director, Mr. Thompson, is a member of the firm of Livingston & Co., brokers, whose record holdings of preferred stock were approximately 20,600 shares as compared with 7,730 shares of common stock (Case, p. 110, l. 20).

As the proportionate voting power of each share of the preferred stockholder who retains his stock is not decreased by the plan, but increased (from 1/125,483 to 1/95,483), clearly he is not legally or actually injured by shifting of voting power as between groups of other stockholders. *Morganstern* v. *American Malting Co.*, 87 N. J. Eq. 358. This is a mere incidental consequence of the retirement of a portion of the preferred stock.

In *Berger* v. *United States Steel Corporation, supra,* the result of the retirement was to reduce the voting power of the preferred stock, as a whole, from 50 per cent. to 38.8 per cent., but this point was apparently not regarded as worthy of attention.

(10) No other arguments against the right of the company to *create* new preference stock were offered in appellants' briefs below, but the *terms* of the proposed new stock were claimed, in the brief for General Investment Company,

to be illegal, in that the rate of dividend is 8 per cent. and the stock is made subject to redemption after three years from date of issue at 115 per cent. of its par value. We discuss that point elsewhere.

(11) All other arguments of appellants against the issue of the prior preference stock were based on its alleged unfairness to the present preferred stockholders, which we also discuss elsewhere.

Appellants' claim that the creation of prior preference stock treats their contract as a mere "scrap of paper," is a colorful statement of their contentions. We reply that the company and the majority of its stockholders are quite as insistent on their contract rights as are the appellants; and that the latter seek to "sink without a trace" the specific provisions of those essential terms of the contract found in Section 27 of the Statute.

**Discussion of the Power to Create a Prior Preference.**

This question has never heretofore been the subject of judicial determination in the Courts of New Jersey, although the question came squarely before the Court of Chancery in the case of *General Investment Company* v. *Bethlehem Steel Corporation,* 88 N. J. Eq. 237.

The Vice-Chancellor in that case, after pointing out the very serious injury that would be done in the event of a decision in favor of the complainant, stated that he preferred to place his "decision squarely upon the ground that a court of equity may, where application is made

to it for preliminary injunctive relief, by a professional agitator, weigh conveniences." Nevertheless he stated in his opinion (p. 243):

> "Lest this opinion may be misunderstood, I desire to add that as presently advised, I am not at all in doubt as to how I should decide this case upon the merits."

It is clear from this statement of the Vice-Chancellor that he had no doubts as to the legality of the creation of the new class of preferred stock in that instance and as to the right of the corporation to do so. In that case, moreover, the certificate of incorporation of Bethlehem Steel Corporation provided that the holders of the preferred stock, as created at the time of the incorporation of the company, should "be entitled to these dividends in preference to dividends on *any other stocks.*" In our case there is no such language in the certificate of incorporation.

The Bethlehem Steel case was appealed, and this Court denied a stay. The appeal was subsequently abandoned.

In the case, relied on by appellants, of *Pronick* v. *Spirits Distributing Co.*, 58 N. J. Eq. 97, where a very different question arose, the certificate of incorporation provided that the preferred stock "shall have preference over the common stock and *of any other stock at any time issued.*" No such provision is contained in the certificate of incorporation of this company, and there is no such language present upon which to base an argument that the creation of a new preferred stock in the future was expressly or impliedly barred by the stockholders in their original certificate of incorporation. The Pronick case arose on a charter granted prior to

1896, and not subject under the then law to any general power of amendment. And that case involved a direct disturbance of an express term of the contract, in that the attempt was made to lessen the fixed rate of dividend.

There is no provision in the corporate contract in the instant case which is in the slightest degree altered by the creation of a prior preference stock. No doubt the incorporators might, under Section 8 (VII) of the statute, have to some extent contracted away the exercise of the power of amendment, but they did not.

The rights of preferred stockholders cannot be determined by a mere nomenclature.

*Elkins* v. *Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 233, 236;

*Lloyd* v. *Penna. Elec. Vehicle Co.*, 75 N. J. Eq. 263.

The charter definition of the preferred stock of the defendant is, in substance, as follows:

> "The holders of preferred stock shall be entitled to receive in each year out of the surplus net profits of the corporation a yearly dividend of seven per centum * * * if declared, before any dividend shall be set apart or paid on the common stock, but shall not be entitled to any further dividend or share of profits. The dividends upon the preferred stock shall be cumulative, so that, if in any year dividends amounting to seven per centum are not paid on the preferred stock, the deficiency shall be paid subsequently, before any dividends are set apart or paid upon the common stock. * * * In case of liquidation or dissolution of the corporation, the holders of preferred stock will be entitled to be paid in full both the principal of their shares and the accrued dividend charge before any amount is paid to the holders of common stock * * *"

The full extent of the contract rights of the preferred stock may be summarized as preference over the common stock as to assets and dividends.

The following cases relied on by appellants are completely distinguishable:

*Allen* v. *Francisco Sugar Co.*, 92 N. J. Eq. 431;

*Black* v. *Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455;

*Kean* v. *Johnson*, 9 N. J. Eq. 401;

*Mills* v. *Central R. R. Co.*, 41 N. J. Eq. 1.

In none of these leading cases was the proposed action authorized by a statute in force when the corporate contract was made. In each case there was involved a complete subversion of the corporate enterprise, namely:

In *Allen* v. *Francisco Sugar Co.*, a lease of the entire property;

In *Black* v. *Delaware & Raritan Canal Co.*, a lease of the property and franchises for 999 years;

In *Kean* v. *Johnson*, a sale of all of the property;

In *Mills* v. *Central R. R. Co.*, a lease of the property and franchises for 999 years.

The cases, *Einstein* v. *Raritan Mills*, 74 N. J. Eq. 624, and *Chicago City Railway* v. *Allerton*, 18 Wall. 233, 21 L. ed. 902, were cases involving increase of stock in the absence of charter authority.

It may be well to repeat here certain provisions of the statute as they existed at the time of the incorporation of the company.

Section 2 of the Act of 1896 provides:

> "In addition to the powers enumerated in the first section of this act and the powers specified in its charter or in the act or certificate under which it was incorporated, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this act, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation; and shall be governed by the provisions * * * in this act contained * * *"

Section 5 provides:

> "* * * this act and all amendments thereof shall be a part of the charter of every corporation heretofore or hereafter formed hereunder * * *"

Section 8 provides:

> "The certificate of incorporation shall set forth—
>
> * * * * * * *
>
> "IV. * * * a description of the different classes of stock, if there be more than one class created by the certificate, with the terms on which preferred shares are created * * *"

Section 18 provided:

> "Every corporation shall have power to create two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restriction or qualification thereof, as shall be stated and expressed in the certificate of incorporation; and the power to increase or decrease the stock, as in this act elsewhere provided, shall apply to all or any of the classes of stock; but at no time shall the total amount

> of the preferred stocks exceed two-thirds of the actual capital paid in cash or property; * * *"

Section 27 provided:

> "Every corporation organized under this act may * * * increase its capital stock * * * create one or more classes of preferred stock, and make such other amendment, change or alteration as may be desired" * * * by consent of two-thirds of the stockholders, etc.

Based upon the clear language of the statute, we submit that there is no escape from the conclusion that a corporation organized thereunder could, in the first instance, or subsequently by amendment, create one or more classes of stock with such preferences as two-thirds of the stockholders might consent to, including a new class prior in preference to existing classes. No case in New Jersey has held otherwise, and, so far as it goes, the case of *General Investment Company* v. *Bethlehem Steel Corporation* (*supra*) is authority for the affirmative of the proposition.

In *Berger* v. *U. S. Steel Corporation* (*supra*), this Court said, pages 814, 815:

> "A liberal, and not a narrow, construction must therefore be given to the language of the 27th and 29th sections of the Act of 1896, in order to give effect to the intent of the legislature manifested in this broad and comprehensive grant of authority to retire shares of stock."

And with at least as much reason, like liberality should be accorded in the interpretation of the other provisions of these sections.

The charter contract should not be construed in the narrow and restrictive sense contended for by appellants. The legislature has con-

ferred the right to create new classes of stock, and to change and amend, in the broadest language. It has established the proper safeguard, the necessity of consent by the affirmative vote of two-thirds of the stockholders (regardless of whether the remainder are in opposition or merely indifferent). Questions as to any change in the contract other than one directly altering a positive stipulation should be resolved by the suffrage of the stockholders. They are most concerned and best able to judge of the wisdom of the change. The Courts should not enable the technical objections of the dissentient to outweigh the substantial welfare of the majority, and prevent the adjustment of corporate capitalization to the needs of expansion, to the condition of the corporation, to the changing methods of finance, or to the situation of the security market. Especially, if the right to create prior preference stock is denied, every corporation must resort to bond issues for most new financing, and even, *e. g.,* in this case, to secure funds with which to make advantageous purchase of its own stock for retirement. And such denial, by compelling increase of indebtedness rather than of capital, would be highly detrimental to the financial interests of corporations of this State, their creditors and stockholders. Such a precedent would be serious and dangerous.

The question is of great importance. The trend of modern economic life is toward the execution of most of the manufacturing, industrial and commercial processes, and the supply of public utilities, by large corporate units. A feature of this situation which has become more and more evident in recent years is the continuous need for the infusion of new capital in

all of these fields. Labor costs tend constantly to rise; hence material worked up by labor rises in cost; taxation constantly increases, and so do administrative and distribution costs. The only solution of the problem of keeping down the costs of products and service is in the efficient organization of industry and the employment of labor-saving devices on a large scale. All of this requires continuous additional investment of capital in large amounts. It is probable that those industries, in which the contribution of capital is relatively highest, are those which are most successful in controlling the aggregate cost of production, and, therefore, the ultimate cost to the consumer. It is clear that the financial structure of such an economic organization is more sound, if the needs for new capital are in large part met by contributions from stockholders rather than by the creation of indebtedness.

We know that we are justified in saying that many New Jersey corporations have created new classes of preferred stock ranking prior to existing classes (as have corporations in other States under similar legislation), and we believe that we are justified in saying that the opinion of the members of the bar who are in constant contact with corporate problems of this nature supports the legality of the creation of stock having prior preference. It is desirable that the question be now set at rest by the authoritative decision of this Court.

It is our belief that, if this Court were to hold that a New Jersey corporation cannot create preferred stock with priority over existing classes of stock (in the absence of contractual stipulations to the contrary), the decision would

so disturb the methods and accepted views of corporate financing that there would be a further exodus from this State of large organizations incorporated here with resulting loss in franchise and inheritance taxes to this State.

In the following cases in other jurisdictions the Courts have sustained the right of the stockholders by a vote of a portion thereof, usually two-thirds, to amend their articles of incorporation by creating a new and superior class of preferred stock even where a preferred class was already in existence.

*Morris* v. *American Public Utilities Co.*, (Del.); 122 Atl. 696;

*Salt Lake Automobile Co.* v. *Keith-O'Brien Co.*, 143 Pac. 1015 (Sup. Ct. of Utah 1914).

In that case the statute was much less liberal than the New Jersey statute.

*In re Sharood Shoe Corp.*, 192 Fed. 945 (Dist. of Minn. 1912).

For convenience, we have abstracted these cases in an appendix.

**There is no illegality, under Section 18 of the Corporation Act, in making an 8 per cent. preferred stock redeemable at 115.**

As to the rate of dividend and redemption price, no cases are submitted in support of appellant General Investment Company's objection and the statute is ignored.

Section 18, as it existed when the company was incorporated, provided (P. L. 1896, p. 283):

> "* * * And such preferred stocks, may, if desired, be made subject to redemption at not less than par, at a fixed time

> and price, to be expressed in the certificate thereof; and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, not exceeding eight per centum per annum * * * and such dividends may be made cumulative."

These provisions are continued in the amendment of 1901 (P. L. 1901, p. 245; 2 Comp. Stat., p. 1609), except that the redemption must be "after three years from the issue thereof," as is provided in the present case.

It is significant that the provision for redemption at *not less than par* immediately precedes the provision for dividend rate of eight per cent. It is clear that it was the legislative intent, as well as part of the contract of the stockholders in this case, that preferred stock might be made redeemable at more than par and still bear dividends at eight per cent. This construction of this section is universally accepted, except by Mr. Venner.

The same point was raised in *General Investment Company* v. *Bethlehem Steel Corporation,* 88 N. J. Eq. 237, wherein the Vice-Chancellor tersely said (p. 241):

> "* * * it would seem that had the legislature intended that the stock might not be made redeemable for more than par, it would not have in express terms provided that it might be made redeemable at *not less* than par."

We are at this time dealing only with a right proposed to be reserved for the benefit of the company, not with a proposed expenditure of funds in the exercise of such a right.

Appellants will be offered an equal right to subscribe to the new prior preference stock,

and therefore, an equal right to share in the benefits of a redemption at more than par, if ever the stock be redeemed.

**The objection that due regard is not given to the pre-emptive rights of the stockholders to subscribe to the new issue of stock, is untenable.**

Vice-Chancellor Lane in *General Investment Company* v. *Bethlehem Steel Corporation* (*supra*) in speaking of the pre-emptive rights of subscription, said:

> "If the reason for the rule fails, the rule is not to be applied."

The rule admits of some debate in its application, but the reason for the rule is satisfied if there be no injustice done the stockholders in changing their relative voting rights or rights in the assets of the corporation.

In the present case the amendment adopted by the stockholders provides that for every share of new prior preference stock issued, at least one share of the existing preferred stock must be acquired and retired (Case, p. 40, l. 20). It is clear, therefore, that the voting rights of stockholders who retain their stock will not be changed. They will have at least as great a proportionate voice in the company as heretofore.

Furthermore, as every share of existing preferred stock that is acquired and retired waives its right to its share in the accumulated surplus of the company based on the unpaid dividends, the remaining preferred shareholders are better off as to their respective shares in the surplus than if the existing stock to the extent of 35,000 shares, with dividend arrearages, were allowed

to remain outstanding and were not surrendered in exchange for the 35,000 shares of new prior preference stock without claim upon the assets for unpaid dividends.

It is manifest that directly, or indirectly, the pre-emptive right or its equivalent will be enjoyed by the preferred stock when prior preference stock is issued; it must be recognized if the prior preference stock is issued for cash, and if issued in exchange for preferred stock, the holders of the latter will be accorded the right to make the exchange on a basis of equality.

The plan does not injuriously affect appellant's interest in the earnings of the company. This may be illustrated by the application of an amount equal to the full dividend on the existing preferred stock, $875,000. For convenience, we apply the figures to a holding of 100 shares.

Earnings of $875,000 per year are at the rate of $7 per share—on 100 shares..$700.00

If the stockholder retains all his stock, neither selling to the company or exchanging for the new prior preference stock, the balance of earnings, after allowance of $280,000 for dividends on the new prior preference stock is $595,000. This (applied to the 60,000 shares of preferred which will remain outstanding) is at the rate of $9.91 per share—on 100 shares...$991.00

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If the stockholder accepts the plan, he first sells his pro rata (15,000/125,000), 12 shares, for $70 per share, or $840. If this be invested at 6%, the income is....$ 50.40

He still has 88 shares, and then exchanges his pro rata (35,000/95,000), 32 shares, for new prior preference stock. The dividends at $8 per share are..... 256.00

This leaves in his hands 56 shares of old preferred. The balance of the earnings available therefor is, as above shown, $9.91 per share—making..... 554.96

Total .....$861.36

If the earnings are more or less, the result is more or less favorable. Even if the earnings should be low during any year, acceptance of the plan is beneficial. Assume earnings of $280,000.

Applicable to 125,000 shares now outstanding, at rate of $2.24 per share—on 100 shares .....$224.00

Sell 12 shares for $840; interest at 6% thereon is .....$ 50.40

Exchange 32 shares for new prior preference stock. Dividend at $8 per share is ..... 256.00

Total .....$306.40

The question, however, is premature. *Grausman* v. *Porto Rican-American Tobacco Co.*, 95 N. J. Eq. 155, 165 (affirmed, but not on the merits, 95 N. J. Eq. 223). The right of preemption attaches to the *issue* of stock, and it is not necessary or convenient or usual to expressly incorporate reference thereto in the *authorization* of stock. With as much reason might the authorization enumerate other legalities attaching to the issuance of shares, such, *e. g.*, as the

requirements of stamp tax laws, the prohibition against issuance at less than par, and the like.

A denial of this right would give rise to an action at law, and should not, under the circumstances, lead to relief in equity. *Meredith* v. *Zinc & Iron Co.*, 55 N. J. Eq. 211, 220; aff'd *per curiam*, 56 N. J. Eq. 454.

Both as to voting rights and interests in the assets of the corporation, the existing preferred stockholders and common stockholders will be benefited by the substitution of 35,000 shares of the new prior preference stock for an equivalent number of shares of the existing preferred stock.

**As to the contract with the Chase Securities Corporation.**

The proposed purchase of 30,000 shares of the present preferred stock was apparently not criticized or objected to below by the appellant Joel and his associates. It was criticized by the appellant, General Investment Company, apparently on the ground that it "is not a means contemplated by the statute for the purchase of stock."

Section 27 of the Corporation Act (2 Comp. Stat. 1612) provides:

> "Every corporation organized under this act may * * * decrease its capital stock" with the consent of two-thirds interest of each class of stock having voting powers.

Section 29 provides:

> "The decrease of capital stock may be effected * * * by the purchase at not above par of certain shares for retirement * * *"

Section 29 of the Act expressly permits a corporation to effect a decrease in its capital stock

by purchasing "certain shares for retirement," and no restriction or limitation is imposed as to the method by which or persons from whom such certain shares shall be purchased.

The purchase of "certain" shares for retirement is in strong contrast to the compulsory methods of reduction specified in the preceding language of the statute, and permits purchases as and when and from whom they can advantageously be made, provided there be no fraud or malversion of assets.

The case of *British and American Trustee and Finance Corporation* v. *Couper,* (1894) A. C. 399, 63 L. J. Ch. 425, involved a reduction of capital under the section of an act authorizing companies

> "to pay off any capital which may be in excess of the wants of the company."

It was held by the House of Lords that this power permitted the purchase of shares from certain stockholders only.

Lord MacNaghten, in his opinion, dealing with a similar objection, said:

> "With all deference, I venture to think that mode of stating the proposition is really begging the question. It assumes that the person whose shares are to be purchased is getting a preference—an undue advantage for himself at the expense of his fellow-shareholders. But why should that assumption be made? The person whose shares are bought gets money or money's worth. The persons on whose behalf the company buys have their own shares improved by the value of the shares extinguished. If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the Court say that there is a preference on the one side or on

> the other? If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all others of the same class. There may be no real inequality in the treatment of a class of shareholders although they are not all paid in the same coin, or in coin of the same denomination."

This view is further supported by the following language in Section 29, "or by retiring shares owned by the corporation." This implies the power to make prior purchases, necessarily from those willing to sell. If counsel for General Investment Company were correct in his contention that the Chase Securities Corporation were an agent for respondent, and that these 15,000 shares belong to the latter (as he argues with respect to voting these shares), then the retirement of those shares plainly falls under this permitted method of decrease of stock.

The method of acquiring outstanding preferred stock as provided for in the Chase Securities contract, was in effect approved by the Court of Errors and Appeals in the case of *Hodge* v. *U. S. Steel Corporation,* 64 N. J. Eq. 807.

The method adopted in that case was practically identical with that here followed. In that case the Steel Corporation desired to acquire $200,000,000 par value of its outstanding preferred stock and entered into a contract with Mr. J. P. Morgan, one of its directors, and others, whereby, subject to the approval of the stockholders, the corporation agreed to purchase from Morgan and associates $80,000,000 par value of its preferred stock for the same

amount in bonds of the corporation, which stock the Morgan syndicate purchased prior to the action of the stockholders, in order to assure the success (in part at least) of the plan. The contract was approved by more than two-thirds of both classes of outstanding stock of the corporation at the meeting of stockholders called for that purpose, just as in the present instance the contract with the Chase Securities Corporation was laid before the meeting of stockholders first on December 9, 1924, and again on March 4, 1925, with full notice of the interest of the common director Tinker, and approved by more than two-thirds of each class of the outstanding stock.

It should be noted furthermore, that the Morgan contract was before the Court of Errors and Appeals on two occasions and was exhaustively considered and approved, first in the case of *Berger* v. *U. S. Steel Corporation,* 63 N. J. Eq. 809, reversing 63 N. J. Eq. 506, and second, in the Hodge case above referred to.

Indeed, a careful reading of the Berger case will, we submit, conclusively dispose of every objection raised in this case.

Further, the Chase contract is in its essence not the purchase of 15,000 shares from a *single stockholder* (as against any possible criticism from the angle of objection as against a pro rata basis), but a method of securing through the contract certain shares for retirement from *many stockholders* willing to sell at the market, plus a reasonable profit to the intermediate purchaser for the service and risk involved in the acquisition. If the corporation had announced its purpose and itself gone into the open market, it is exceedingly unlikely that it

could have secured the stock at a maximum approximate price of $70 per share. The directors had concluded that it was wise to buy at that price, taking into consideration the funds available and the advantages obtainable. The contract was made subject to the subsequent approval of the stockholders of the contract, and of the purchase by the corporation for retirement of not more than 15,000 shares. The Chase Corporation took all this risk, and the profit to it, in the event of ratification and acquisition for retirement by the stockholders, was a business question, the answer to which by the directors has now been approved, with complete knowledge on their part, by the stockholders. The legal question involved is not, therefore, whether under the act a corporation can buy for retirement a block of 15,000 shares of stock from a single stockholder, but whether, by contract, the corporation can acquire certain shares for retirement not exceeding 15,000 in number, at a price not above par. This method of retirement is not compulsory and the purchase in the open market, through an intermediate owner, by contract expressly referring to the purpose of the corporation, subject, without risk to the corporation in the meantime, to the approval of the stockholders, as required by the statute to justify the retirement contemplated, was in harmony with reasonable measures to assure success of the plan, and within the construction of the same statute by this Court in the *Berger case.*

The reasons for making the contract with Chase Securities Corporation are set forth at length in the affidavit of Claude Douthit (Case, p. 159). It is highly advantageous to the company in that it secures to it the absolute

right to purchase 15,000 shares of the outstanding preferred stock at much less than par, namely (at the date of the stockholders' meeting), $69.65 per share. The affidavit of Walter W. Downing (Case, p. 172), states that these 15,000 shares were purchased in the open market on the Stock Exchange by Chase Securities Corporation, from time to time after the making of the contract until October 27, 1924, at varying prices ranging from $60.50 to $66.50 per share.

The stock was in fact accumulated by the Chase between August 13, 1924, and October 27, 1924, in the open market, at prices ranging between $60.50 and $66.50 per share, the average cost to the Chase being $63.65 per share (Case, p. 173, l. 20). The Chase sold, during the process of accumulation, 500 shares, and gave the respondent Company the benefit as the contract required of the profit in computing the average price (*id.*).

Mr. Douthit made oath that, to the best of his information and belief, not a share of that block of stock was purchased directly or indirectly from any director of the Company (Case, p. 168, l. 40).

At this point it may be well to call attention to the fact, of which counsel for General Investment Company was apparently unmindful, that the right of respondent to purchase for retirement its own preferred stock in the open market without the previous authorization of its stockholders, is a question of extreme doubt, and, in fact, counsel for the company advised it, as is shown in the affidavit of Douthit (Case, p. 162, l. 25), that it had no such right.

Counsel for appellant, General Investment Company, first stating that the "plan of retiring present preferred stock might have been accomplished more advantageously at one-half the present price to be paid the Chase Corporation," argued apparently seriously in the Court below that the company might have purchased its own shares in the open market during the year 1923 at a price much less than $69 per share.

Even if the company had then been in a position to use part of its surplus for that purpose, such an operation, in view of the accumulated unpaid dividends due on the outstanding preferred stock, would have been of doubtful legality.

Furthermore, even if it had had the legal right to do so, the company would be justly open to severe criticism if it had speculated in its stock in the open market, which counsel for General Investment Company apparently believed it should have done, with no authorization from stockholders.

It was, of course, desirable, if not essential, in order to accomplish the retirement of a substantial number of its outstanding shares with the 140% of unpaid dividends thereon, with advantage to the company and its remaining stockholders, that it should be enabled to purchase such shares at a price below par and which it could afford to pay. In the judgment of its officers and Board of Directors, it could afford to pay $70 per share. The obvious procedure, therefore, was to obtain an option on as many shares as reasonably possible at a price not exceeding that figure. This is only ordinary business sense. A prior public announcement that

the corporation proposed to buy 30,000 shares at $70 would certainly have greatly enhanced the price of available stock. Camp meeting methods are not helpful to a purchaser.

Counsel for General Investment Company on the one hand objects to the purchase of 15,000 shares from Chase Securities Corporation and on the other hand contends that the corporation should have purchased stock in the open market up to the number of 15,000 shares. It is difficult to appreciate the consistency of this position. If purchases had been made in the open market any one stockholder might have sold all of his stock to the company and the iniquity of such purchase would presumably have been just as great as in the purchase of all the stock of Chase Securities Corporation. Furthermore, in the method advocated by counsel for General Investment Company, the stockholders of the company would have had no opportunity to approve or disapprove of the proposed purchase, whereas in the present case the stockholders were apprised of the arrangement with the Chase Securities Corporation and given an opportunity of passing upon it before consummating the purchase.

With apparent seriousness, counsel for General Investment Company argues that the stock might have been purchased at no greater expense than the usual broker's commission. This necessarily implies a purchase in the open market by the company, with its own funds, prior to action by stockholders. This, we have seen, would have been illegal.

The profit which the Chase will receive, if the restraint be lifted (but which it would not have received if the stockholders had rejected

the contract, or on other contingencies), is compensation for (a) its service in purchasing the stock to the best advantage; (b) the use of its funds pending the completion of the transaction; (c) the risk of loss, possibly great, in case the contract had been rejected by the stockholders (as it would have been if, for instance, a severe slump in the market had taken place), or in case the contract were enjoined (as it has been to this time), or in case the market price of the stock suffered a large decline through any one of many possible causes.

We submit that the method followed by the company in making the contract with Chase Securities Corporation was an exercise of good business judgment and sound common sense and that it has in all essential respects been approved by this Court in the Berger and Hodge cases.

It amazes us that counsel for General Investment Company renews in this Court its complaint that it is not accorded the right to sell 23 per cent. of its holdings at $70. Its refusal to consider the offer of the respondent to purchase that percentage, or up to 100 per cent. of the holdings of all of the appellants, at that price, effectually forecloses further complaint on that ground. That offer (first made in open court by counsel for the company on December 8, 1924, and since repeated at every opportunity) extended all relief which appellant could ask on the ground of denial of a pro rata right to sell to the company shares for retirement. On this point we beg to refer to our Brief of the Argument on the Motion for a Stay.

**The stock in the name of the brokers, Livingston & Company, was entitled to be voted at the stockholders' special meetings.**

Section 20 of the General Corporation Act (2 Comp. Stat., p. 1610) provides:

> "The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer."

Section 37 of the General Corporation Act (2 Comp. Stat., p. 1623) provides:

> "Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent the same at all meetings of the corporation, and may vote thereon as a stockholder, and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote thereon as a stockholder, unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his proxy may represent said stock and vote thereon."

Section 40 of the General Corporation Act (2 Comp. Stat., p. 1624) provides:

> "In case the right to vote upon any share of stock shall be questioned, the inspectors of the election shall refer to the stock books of the corporation to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote."

Section 3 of the Uniform Stock Transfer Law of 1916 (P. L. 1916, p. 398) provides:

"3. Nothing in this act shall be construed as forbidding a corporation.

"(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends and to vote as such owner."

In the case of *Canadian Improvement Company* v. *Lea,* 74 N. J. Eq. 234, Vice-Chancellor Garrison, construing Section 37 of the General Corporation Act, said (at p. 250):

"I think this statute was intended to apply to cases in which the stock was transferred to one as 'pledgee,' or, at least, to cases in which the transfer gave notice to the corporation that the transferee was a pledgee. Certainly, as between the corporation and the parties, the corporation was not intended by this statute to have the burden cast upon it of determining the question, as between the parties, as to whether the transfer was in pledge or not. The duty of the corporation is to recognize the registered holder shown on its transfer books.

"As was said in the case of *Argus Printing Company,* 12 L. R. A. 781: 'It would indeed be a startling doctrine that "the legality of business transacted at stockholders' meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock." '

"In the same case it is clearly pointed out that the right of a pledgor to vote upon stock, the legal title to which is vested in his pledgee, must be obtained by application to a court of equity for a proxy, and that court, if it finds that the pledgee is under an obligation to give a proxy, will so decree."

In the case of *Matter of Election of Directors of Long Island Railroad Company* (N. Y.), 19 Wend. 35, it was said, relating to a challenge of votes cast by pledgees in whose name the stock was registered:

> "The inspectors were not to inquire beyond the transfer-book. Any private agreement or understanding between the individual holding the title to the stock in due form and others is a matter between themselves, with which the corporation have no concern."

In *Murray* v. *Beattie Manufacturing Co.*, 79 N. J. Eq. 604, at page 609, this Court said:

> "The unanimous assent of the stockholders to the by-laws of 1900 was an assent only of the persons owning the legal title to the stock. This is all that is necessary, for, under the statute, they alone have the right to vote, and trustees are expressly authorized to represent the stock held in trust and to vote thereon as a stockholder."

In *Schmidt* v. *Marconi Wireless Telegraph Co.*, 86 N. J. L. 183, this Court held, in an action for damages by a stockholder for refusal to accept his subscription to new stock, that (p. 185):

> "The right to subscribe depended upon a double condition—*first,* that the subscriber was in fact a stockholder of the company; and, *second,* that he appeared to be such on the books of the company."

See also:

*Commonwealth* v. *Dalzell,* 152 Penn. St. 217, 25 Atl. 535, 34 Am. St. 640;

*Haynes* v. *Griffith,* 16 Idaho 280, 101 Pac. 728;

*14 Corpus Juris,* 904.

Under Section 20 of the Corporation Act, a transfer to a pledgee is deemed to be absolute, unless expressed to be made as collateral security only on the transfer books.

Section 37 is intended merely to govern the respective rights of the pledgor and pledgee, where the stock is so registered.

Livingston & Co. had full legal title. It does not appear but that the stock had not been paid for by their customers; and the customers may never at any time have had title thereto. It does appear, however, that Livingston & Co. had authority from their customers to vote as they did (Case, p. 113).

Their right to vote the stock could not be raised collaterally by third persons. The corporation was bound to recognize their authority.

**The 15,000 shares of preferred stock accumulated by the Chase Securities Corporation were entitled to be voted by the record owners at the stockholders' special meetings.**

Appellants endeavor to vitiate the voting of these 15,000 shares on the ground that the shares were indirectly owned by respondent company and therefore under Section 38 of the General Corporation Act could not be voted at the meeting.

This section reads (2 Comp. Stat. 1623):

> "Shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly."

The contract with the Chase Securities Corporation is not an agency contract.

It is a contract for a direct purchase and sale in the nature of an option. The purchase was (when these shares were voted) wholly executory. The shares were held by the Chase Securities Corporation in the names of its nominees, and were unpaid for by the respondent company.

Appellants also attack the right to vote these shares on the ground that the holder (Chase Securities Corporation) was interested in the result of the vote.

In a long line of cases in this State it has been well established that a stockholder may vote his stock at a meeting of stockholders in such manner as may be of the greatest benefit to him personally and that he is not a trustee for other stockholders or for the corporation in this respect.

In *United States Steel Corp.* v. *Hodge,* 64 N. J. Eq. 807, this Court said (at p. 813):

> "The insistment that the votes of members of the syndicate who were also directors of the company, cannot be lawfully counted in order to constitute a two-thirds vote in favor of the resolution to reduce the amount of preferred stock, is without any foundation in reason or in law.
>
> "They voted upon that resolution not as directors, not in their fiduciary capacity, but solely in the right of the shares of stock held by them. A most valuable privilege, which attaches to the ownership of stock in corporation, is the right to vote upon it at any meeting of stockholders. As to that resolution, considered by itself, as stockholders, they owed no greater duty to their co-stockholders than those stockholders owed to them.
>
> "Like other stockholders, they had a right to be influenced by what they conceived to

be for their own interest, and they cannot lawfully be denied that right; nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company."

In *Merriman* v. *National Zinc Corporation,* 82 N. J. Eq. 493, a bill was filed by a stockholder to set aside contracts which were claimed to be fraudulent, but which had been ratified by the vote of more than two-thirds of the stockholders of the defendant corporation. The force of the vote of confirmation was attacked on the ground that the stockholders were interested in the result. On this point, Vice-Chancellor Leaming said at page 500:

"It is undoubtedly true that some of the stock which was voted for the approval of these contracts was owned by persons who expected to become associated with Howard in a corporation which would take over these contracts and operate under them. While their votes could not lawfully authorize a wanton or fraudulent disposition of the assets of the corporation, the rules defined in *United States Steel Corporation* v. *Hodge, supra,* render it clear that they were not disqualified from voting their stock by reason of their personal interests. In the Hodge Case directors who were interested in the bankers' contract which was before the stockholders' meeting for approval were held to have been privileged to vote as stockholders, and no question was there raised against the right of interested stockholders to vote who were not directors. There appears to be no such recognized trust relation between stockholders of a corporation as will impose upon one who may be interested in a transaction, the authorization of which is being acted upon at a stockholders' meeting, the burden of establishing his good faith in the vote which he casts. The

action may be so clearly detrimental to the interests of the corporation itself as to render it a fraudulent destruction of the rights of minority stockholders; but the personal interests of a stockholder will not in itself deny such stockholder the right to cause his stock to be voted in the line of his personal interests. The rule, as stated by Judge Thompson, in his work on 'Corporations,' is as follows:

> 'It is well settled that the stockholders do not hold fiduciary relations to each other in the sense that one is prevented from voting at a stockholders' meeting on a question in which he has an individual interest.' ''

In *Colgate* v. *United States Leather Company*, 73 N. J. Eq. 72 (reversed on other grounds in 75 N. J. Eq. 229), Vice-Chancellor Emery dealing with a similar objection said:

> ''The general rule under our decisions is, that the individual stockholders are not trustees for each other, but each may, as a member of the general corporate body, exercise his individual right and vote equally with other stockholders on the ratification of a contract in which he is interested, and ratification or adoption of the contract is valid, even if carried by his vote.''

In *Windmuller* v. *Standard Distilling & Distributing Co.*, 114 Fed. 491, dealing with a proceeding for the dissolution of a New Jersey corporation, District Court Judge Kirkpatrick, citing authorities in support of his conclusion, said (at p. 494):

> ''I have not been referred to any authority which holds that one stockholder is in any sense a trustee for other stockholders, or that he is debarred from voting on his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy. Directors, by whom-

> soever elected, are the representatives of all the stockholders, and, as such, are charged with the duty of administering the affairs of the company for the equal benefit of their *cestuis que trustent*. But the doctrine is new that the stockholders are trustees one for another, or that an interest of one stockholder, which in the judgment of another stockholder may seem to be adverse to his own, can operate to prevent him from voting on his own stock as he sees fit."

In another suit between the same parties, in the Circuit Court for the Southern District of New York, involving the same question, Circuit Court Judge Lacombe, in an opinion reported in 115 Fed. 748, agreed with Judge Kirkpatrick "in the conclusion that a majority stockholder may vote to dissolve even if he be influenced to that course by a wish to destroy a contract beneficial to the corporation, but onerous to himself."

As the 15,000 shares owned by Chase Securities Corporation was not held by it as agent for the respondent company, Chase Securities Corporation had the right to vote the stock at the stockholders' meeting in favor of the plan and in approval of its own contract with respondent company.

In any event, Section 27 of the Corporation Act provides that the amendments creating one or more classes of preferred stock, to become effective, must be approved by two-thirds in interest of each class of the stockholders *"having voting powers."*

Any stock owned by the corporation itself, under Section 38, has no voting powers.

It necessarily follows, therefore, that if the 15,000 shares of stock in question were owned by the respondent company at the time of the

special meetings of stockholders, or were otherwise disqualified, they were not shares having voting powers and should not therefore be included in calculating the two-thirds percentage of stock outstanding required for the adoption of the resolutions.

Deducting 15,000 shares from the 125,000 shares of preferred stock outstanding, would leave 110,000 shares entitled to vote; two-thirds thereof would be 73,333. Deducting 15,000 shares from the 93,000 shares of preferred voted for the resolutions would leave 78,000 shares not challenged, or considerably more than two-thirds.

Leaving these 15,000 shares out of account, more than two-thirds of the remaining preferred stock having voting powers, voted in favor of the resolutions.

Precisely the same point was involved in the U. S. Steel Corporation litigation, *supra,* under closely parallel facts, even including the protest of Mr. Venner at the stockholders' meeting, and was decided against the contention of the appellants.

**As to Revenue Stamps on the Proxies.**

At the special stockholders' meeting of March 4, 1925, Mr. Venner, *after* the vote had been taken, lifted on high the bundle of proxies voted thereat, which had been before his view during the meeting, and dramatically called attention to the absence therefrom of Federal Revenue stamps. Less conspicuously, perhaps, but effectively, the company's officers had duly complied with the requirements of the Revenue Act (Case, p. 229; p. 254, l. 30).

Stamps in large denomination had been procured and were duly affixed to a record of the stock voted by proxy. This convenient method of procedure is commonly followed, and is sanctioned by the Government.

See Corporation Trust Company "War Tax Service" for 1925, page 774, quoting ruling of Commissioner of Internal Revenue:

> "Reference is made to your letter of May 2, 1922, in reply to the letter from this office dated April 26, in regard to the affixing of documentary stamps of large denominations covering the amount of stamp tax incurred under the provisions of section 10, Title XI, of the Revenue Act of 1921.
>
> "In reply you are advised that where the number of proxies required in voting at a stockholders' meeting is sufficiently large to warrant the purchase of stamps of large denominations in payment of the stamp tax on such proxies, the stamps may be affixed to a permanent record of the corporation and signed by the secretary of such corporation, provided the corporate seal is affixed thereto. This permanent record should accompany the proxies for which the stamps were canceled.
>
> "In the event that the special certificate of election mentioned in your letter remains with the proxies in question, such certificate should bear the documentary stamps properly canceled and be retained in the office of the corporation for inspection by the officers of the Bureau of Internal Revenue. (Letter to The Corporation Trust Company, signed by Deputy Commissioner F. G. Matson, and dated May 27, 1922.)"

The matter is, however, immaterial. The United States Supreme Court, in dealing with a failure to stamp a deed under the Revenue Act

of 1914, said in the case of *Cole* v. *Ralph,* 252 U. S. 286, 293; 64 L. Ed. 567, 576:

> "*As to the absence of revenue stamps,* it is true that the deeds showing title in some of the plaintiffs—they were produced in evidence over the defendant's objection—were without the stamps required by the Act of October 22, 1914, chap. 331, §22, Schedule A. 38 Stat. at l. 762. But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid and inadmissible as evidence while not properly stamped. Those words were carefully omitted, as will be seen by contrasting §§6, 11, 12 and 13 of the Act of 1914 with §§7, 13, 14 and 15 of the Act of June 13, 1898, chap. 448, 30 Stat., at l. 454, Comp. Stat., §§6318i, 6318j, 6318k. From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped, and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties, fines and imprisonment. The decisions upon which the defendant relies arose under the earlier acts, and were based upon the presence in them of what studiously was omitted from the later one."

That the same rule applies under the existing law will appear from the subjoined comparison of the relevant provisions of the Acts of 1914 and 1924.

## Revenue Act of 1914.

Sec. 5. "* * * there shall be levied, collected, and paid, for and in respect of the several * * * documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for or in respect of the * * * paper upon which such * * * shall be written or printed, by any person * * * who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, * * * the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

Sec. 6. "That if any person shall make, sign, or issue * * * any instrument, document, or paper of any kind * * * without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person * * * shall be deemed guilty of a misdemeanor * * *."

Sec. 22. "* * * the Commissioner * * * is authorized to prescribe such method for the cancellation of said stamps as substitute for or in addition to the method provided in this Act, as he may deem expedient."

SCHEDULE A.

"* * * proxy for voting at any election for officers of any incorporated company * * * 10 cents."

## Revenue Act of 1924.

TITLE VIII.

Sec. 800. "* * * there shall be levied, collected, and paid, for and in respect of the several * * * documents, instruments, matters and things mentioned and described in Schedule A of this title, or for or in respect of the * * * paper upon which such * * * are written or printed, by any person who makes, signs, issues, * * * the same, or for whose use or benefit the same are made, signed, issued, * * * the several taxes specified in such schedule.

Sec. 802. "Whoever—

"(a) Makes, signs, issues or accepts, * * * any instrument, document, or paper of any kind * * * without the full amount of tax thereon being duly paid;

* * * * * * *

"Is guilty of a misdemeanor * * *."

Sec. 805. "The Commissioner * * * shall prescribe such method for the affixing of said stamps in substitution for or in addition to the method provided in this title, as he may deem expedient."

SCHEDULE A.

"9. Proxy for voting at any * * * meeting for the transaction of business, of any corporation * * * 10 cents."

## Conclusions.

To close our argument, we quote further from *Berger* v. *U. S. Steel Corporation, supra,* 63 N. J. Eq. 809, at p. 829:

> "The action challenged in the case *sub judice* is that of the directors, fortified and upheld by the approving vote of more than two-thirds of the shareholders.
>
> "The plan was adopted by the requisite vote, with full knowledge of its purport, communicated in the circular letter accompanying the call of the stockholders' meeting, and therefore, in the absence of fraud, it is not the province of this court to substitute its judgment for that of the directors and shareholders, and declare that a less expensive or more beneficial plan could have been resorted to successfully. * * *
>
> "The means adopted to acquire the benefit of the authorized retirement became part of the business of the company, with which this court can interfere to no greater extent than it can with other lawful corporate transactions."

The plan is fair; it is legal; it has been validly adopted by the stockholders.

**The orders of the Court of Chancery discharging the orders to show cause and vacating the interim restraint, should be affirmed, with costs.**

Respectfully submitted,

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WALDRON M. WARD,
Counsel for Respondent,
American Hide and Leather Company.

March Term, 1925.

## APPENDIX.

*Salt Lake Automobile* v. *Keith-O'Brien Co.*, 45 Utah 218, 143 Pac., 1015 (1914).

A corporation with both common and preferred stock in equal amounts increased its capital stock and created a third class of prior preference stock entitled to a higher rate of cumulative dividends than the original preferred stock. Neither class of preferred stock was entitled to vote. The creation of this third class of stock was attacked by a dissenting preferred stockholder who claimed that unanimous consent was necessary. The Court overruled this contention, holding the issue to be valid. The Court said:

> "In our judgment, where the right of amendment exists, as under our statute, there can be no distinction between an amendment authorizing the issuance of preferred stock and one which authorizes both the issuance of such stock and the classification thereof. The same legal principle is involved in both cases."

The relevant statute of Laws of Utah 1913 is as follows:

> "The articles of incorporation may provide that the capital stock shall be divided into different kinds and classes, and define the rights and privileges that each kind and class of stock shall possess, and the power to vote may be confined by the articles to such kinds and classes of stock as may be designated therein. When not otherwise provided in the articles, at all meetings, each shareholder shall be entitled to one vote for each share of stock which he or she may have in his or her own right, or held by him or her in trust for others, as shown by the books of the corporation, and such

votes may be given in person, or by an authorized agent, or by proxy."

It will be noted that these provisions are not nearly as broad as the New Jersey provisions.

The Court further says with reference to the right of a preferred stockholder to object to the creation of prior preference stock:

"* * * We are also convinced that the right of amendment as set forth in the authorities cited herein is in consonance with reason and justice, and in no way conflicts with or invades the vested rights of any stockholder. While much has been said respecting the relation which a preferred stockholder bears to the corporation and to the holders of common and preferred stock of another class, and that in any event he is only a stockholder and not a creditor, yet it is recognized by practically all the courts that the issuing of preferred stock is a very convenient, and under certain circumstances may be the only practical, means a corporation has of raising the necessary funds to maintain its credit, and may even become necessary to prevent bankruptcy and dissolution. In no event has a preferred stockholder a specific lien upon the assets of the corporation. At most he has but a conditional promise or obligation of the corporation to pay, and in case the corporate business is discontinued, and its affairs are wound up, he, as against the common stock, or inferior classes of preferred stock, may be and ordinarily is, entitled to preference. He, however, by reason of the right to amend and change the articles of incorporation, takes his stock subject to such right. In the very nature of things, therefore, the issue and sale of preferred stock cannot affect the rights of stockholders, whether holders of common or preferred stock, in a greatly different way than such right is affected by the issue of promissory

notes or other unsecured obligations. Such obligations do not, as against the company or its creditors, constitute liens like mortgages."

*In re Sharood Shoe Corporation,* 192 Fed. 945 (Dist. Minnesota, 1912). The corporation had outstanding common and preferred stock. The preferred stockholders were entitled to receive cumulative dividends of 7 per cent. and in case of liquidation to be paid in full before any amount should be paid to the holders of common stock. The preferred stockholders were not entitled to vote except after default. The original articles of incorporation provided for 10,000 shares of preferred stock and 5,000 shares of common stock, and 8,690 shares of preferred stock and 1,680 shares of common stock had been issued. The amendment provided for a rearrangement of shares so that there should be 4,000 of first preferred stock and 2,000 common stock, and 9,000 of preferred stock, and in the 9,000 of preferred stock should be included all of the preferred stock outstanding. The Court held that the amendment could not be attacked by any stockholder, but based its decision in part upon acquiescence or estoppel. It was of the opinion, however, that the statutes of Minnesota justified the arrangement. The relevant statute reads as follows:

"The purpose for which every such corporation shall be established shall be distinctly and definitely specified by the stockholders in their articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds to any other purpose: Provided, that such articles of association may be amended in any respect which might have been lawfully made a part of such original articles,

at any meetings of such stockholders, by a majority vote of all the shares of stock represented in such corporation, upon giving notice of a meeting of such stockholders to be held for the purpose of making such change, in the same manner as provided in section four of this act for the first meeting of the corporation, except that notice of change shall not be waived as therein provided. * * * Provided, further, that no such new or amended articles shall change the general nature of its business, or be operative or valid to alter, modify, or change such original articles, until the same shall be published and the certificate of the purposes for which said corporation is formed as set forth in such new or amended articles, in the same manner and with the like formality that the original articles are now required to be published and the certificate thereof recorded; and when so adopted, published, and the certificate aforesaid recorded, the said amended articles shall be substituted for and taking place of the original articles so amended."

The Court says (p. 951):

"What is the real effect of the amendment in question? So far as giving a preference with reference to dividends and the division of the property upon dissolution is concerned, it is nothing more than a mortgage. The directors of the corporation, without any authority from the shareholders, could have borrowed $150,000 from the subscribers and secured it by a mortgage upon the entire assets of the corporation. That mortgage would have created a lien prior to the existing common and preferred stockholders. The only thing which the amendment does which could not have been done by a mortgage is the taking from the preferred and common stockholders the right to vote.

How can it be said that this amendment materially changed 'the nature and purposes of the corporation or of the enterprise for the prosecution of which it was created'? If it worked no such material change, then it was not fundamental. Was it not designed 'to enable the corporation to conduct its authorized business * * * more beneficially'? If it was, then the stockholders when they became such impliedly assented that such amendment might be made. *Mower* v. *Staples,* 32 Minn. 284, 286, 20 N. W. 225."

*Morris* v. *American Public Utilities Co.,* (Del.) 122 Atl. 696.

Held, under statutory provisions almost identical with those of the New Jersey act, that a preferred stock could be subordinated to two new classes of preferred stock. At p. 701 the Chancellor said:

"3. With respect to (a) it would seem plain that only a preference is involved. The original preferred stock enjoyed under the articles of incorporation a preference over the common stock. Nowhere was it provided that it should itself be free from the burden of a preference in favor of classes of stock to be created. When it was issued it was the senior among the then authorized classes. Now it is junior to two new classes, because by the amendment, if it is not converted as specified, it is stripped of its original identity and is changed into a new stock known as 'six per cent. preferred stock' which is subordinate to the prior preferred stock and the participating preferred stock. What has occurred, therefore, is that the preference which the original preferred stock enjoyed has been changed or altered. This is not so, however, when it is thought of in relation to the common stock,

for the amendment in nowise touches or disturbs the preference over the common stock which the certificate originally created. But it is so when it is thought of in its relation to earnings and assets, for in relation to these it no longer stands first in claim after debts but third, following after the two new classes. In this sense, the preference originally enjoyed by the preferred stock has been altered or changed. Section 26, which as before indicated is to be read into the original certificate of incorporation, in that portion of it which provided that no change or alteration in the preferences of any class of stock shall be made unless a majority of the shares of the class concerned in the change votes in favor thereof, very clearly indicates that a change or alteration of any preference may be made. One of the conditions upon which the complainants as preferred stockholders enjoyed this preference was that it might at any time be changed and altered upon the approval of a majority of its holders. It is apparent that the change now being considered was made in strict pursuance of one of the terms of the contract which the members of the corporation had adopted for their governance. There can be no valid objection under this head.''

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