Index.

	Page
Bill of Complaint	1
Answer	7
Replication	28
Case	29

TESTIMONY.

William H. LaBoyteaux:	
Direct	127
Cross	142
Direct (continued)	325
Cross (continued)	326
Direct (continued)	343
Thomas J. Prindiville:	
Direct	204
Cross	261
Cross (continued)	274
Re-direct	315
Re-cross	324
Re-direct (continued)	332
Royall Victor:	
Direct	269
Emery H. Sykes:	
Direct	339
Cross	340

EXHIBITS.

Complainant's Exhibits:

		Page
1.	Letter	30
2.	Certificate	347
3.	Statement of earnings	33
4.	Minute book No. 3	33
5.	Balance sheet	350
6.	Balance sheet	352
6a.	Letter	192
7.	Letter	201
8.	Letter	209
9.	Letter	212
10.	Letter	213
11.	Letter	214
12.	Telegram	216
13.	Telegram	216
14.	Letter	216
15.	Letter	217
16.	Letter	218
17.	Letter	219
18.	Enclosure with Exhibit 17	222
19.	Letter	230
20.	Letter	233
21.	Letter	235
22.	Letter	236
23.	Letter	237
24.	Letter	246
25.	Telegram	246
26.	Letter	248
27.	Letter	249
28.	Letter	250
29.	Letter	252
30.	Letter	255
31.	Letter	256

		Page
32.	Letter	257
33.	Letter	259
33a.	Partnership articles	358
34.	Telegram	342
35.	Shares	362
35a.	Dividends certificate	363
36.	Dividends certificate	365
37.	Dividends certificate	367

DEFENDANT'S EXHIBITS:

1.	Amended certificate of incorporation	370
1a.	Copy of certificate of amendment of charter	400
2.	Minute book No. 1	54
3.	Stock certificate	401
4.	Dividend certificate	404
5.	Minute book	79
6.	Stock distribution agreement	83
7.	Committee report	406
8.	Stock distribution agreement	408
9.	Letter	100
10.	Letter	101
11.	Schedule of dividends	102
12.	Statement	103
13.	Statement	104
14.	Proxies	410
15.	Letter	112
16.	Letter	113
17.	Letter	114
18.	Letter	114
19.	Stock book	115
20.	Letter	116
21.	Letter	119
22.	Letter	123
23.	Stock transfer book	126
24.	Telegram	341

	Page
24a. Stock book Nos. 1 to 250	346
25. Stock book Nos. 251 to 500	346
26. Certificate book No. 1	347
27. Certificate book No. 2	347
Opinion	417
Final Decree	431
Notice of Appeal	432
Petition of Appeal	433
Answer to Petition of Appeal	434

Bill of Complaint.

IN CHANCERY OF NEW JERSEY

THOMAS J. PRINDIVILLE,
Complainant,
against
JOHNSON & HIGGINS,
Defendant.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

Complaining, your orator, Thomas J. Prindiville, shows unto your Honor:

First Cause of Action:

1. That the defendant is a corporation organized and existing under the Laws of the State of New Jersey.

2. The complainant, for a number of years before the year 1911, was the owner of one-half of the capital stock of Prindiville & Co., a corporation organized under the Laws of the State of Illinois. That defendant at said time was the owner of the other one-half of the capital stock of said Prindiville & Co. That said Prindiville & Co. had for a number of years before that time and ever since has been and is now conducting a very large and lucrative insurance brokerage business.

New Jersey State Library

3. That in or about said year, 1911, this complainant sold and delivered to the defendant, all of his said shares of stock of said Prindiville & Co., which, together with the stock owned by said defendant, gave said defendant control of said Prindiville & Co., and which control said defendant ever since that time has had and still has. That this complainant received from said defendant, in part payment for his said stock in said Illinois corporation, which said stock defendant still owns, one hundred and twenty-five (125) shares of the common capital stock of the defendant corporation, of the par value of One hundred dollars ($100) each, for which said defendant, in or about May, 1911, issued to the complainant its stock certificate No. 413, which said certificate of stock this complainant ever since has held and still owns and holds.

4. That said defendant out of the net earnings of said defendant company for the year 1918, which amounted to more than 205% of the common capital stock of said defendant corporation declared and paid two dividends totaling two hundred and five (205) per cent on some of the outstanding common capital stock of said defendant, but not upon the aforesaid one hundred twenty-five (125) shares of stock owned and held by this complainant.

That said defendant company has refused and still refuses to declare a dividend of two hundred and five per cent on said stock of this complainant, although it has declared such dividends on other common stock of said company, and refuses to declare any dividend on the aforesaid stock held by this complainant, and refuses to pay any dividends to this complainant on his said stock.

That said defendant has a very large amount of net earnings which are undistributed and are available and ought to be applied to the payment of dividends on said common stock held by this complainant, over and above said two hundred and five (205) per cent dividend but which said defendant wrongfully refuses to declare as dividends or to pay to this complainant as dividends on said one hundred and twenty-five shares of common capital stock of said defendant, owned and held by complainant.

Your orator further states that unless this said defendant is compelled by a mandatory injunction of this court, it will continue to refuse to declare any dividend out of the accumulated present or future earnings of said company on the aforesaid common capital stock held by this complainant.

FOR A SECOND AND FURTHER CAUSE OF ACTION, YOUR ORATOR STATES:

5. That the defendant is a corporation organized and existing under the Laws of the State of New Jersey.

6. That this complainant, in and for many years last past, has been the holder of record of certificate No. 413, for one hundred and twenty-five shares of the common capital stock of the defendant corporation, of the par value of One hundred dollars each.

7. On information and belief, that the defendant is about to pay, and will, unless restrained by this court, pay to James B. Dickson, Henry W. Lowe, William W. Curtin, William H. Davidge, Stephen C. Hunter, William R. Coe, W. Harvell la Boyteaux,

George V. Coe, John Appleton Haven Hopkins, Willis H. Botsford, William N. Davey and John S. Keegan, and others, who are a large majority of the directors of said defendant corporation, as alleged salaries since January 1st, 1919, an amount equal to one-half of the net earnings of said defendant corporation for the year 1919, and which said one-half is greatly over One million dollars ($1,000,000).

On information and belief, that the amount which the defendant corporation will pay said parties, as alleged salaries as above set forth, is about One million dollars over and above fair, legitimate or proper salaries or compensation for any and all services which said parties have performed for said company, and that unless said defendant is restrained by this court, it will make such payments to said parties and to others, and will, unless restrained by this court, from year to year hereafter pay out a very large proportion of the earnings of said defendant company, amounting to very many hundreds of thousands of dollars every year, as alleged salaries, over and above fair, legitimate or proper salaries or compensation for any and all services performed or to be performed for said defendant.

That the effect of such payments will be to very largely decrease the value of the aforesaid stock of this complainant in said defendant company, and will very largely decrease the amount of money which will be available for the payment of dividends upon said stock.

IN CONSIDERATION WHEREOF and forasmuch as your orator has not a complete and safe remedy in the premises of and by the strict rules of common law, to the end therefore:

1. That said defendant, Johnson & Higgins, may, without oath, an answer under oath being hereby waived, make true, full and perfect answer to all and singular the premises as fully and particularly as if the same were here again repeated and

2. That by the order and decree of this honorable Court, said defendant and its directors may be decreed to declare and may be enjoined from refusing to declare a dividend or dividends on the aforesaid one hundred and twenty-five shares of stock of your orator the same amount per share as the dividends per share heretofore declared or paid by the defendant during the year 1919, on common stock or to holders of common stock of the defendant company other than your orator, and from refusing to pay such dividend or dividends to your orator; and

3. That the defendant and its directors may be enjoined and restrained from refusing hereafter to declare and pay to your orator, upon said one hundred and twenty-five shares of stock, the same proportionate amount of dividends that it declares and pays upon any or all of the other common stock of said company; and

4. That the defendant may be enjoined and restrained from paying to the parties named in paragraph 7 hereof, or any director, officer or employee of said defendant corporation, or other persons, any amount as salary or otherwise, over and above the fair value of the services rendered by any or all such persons; and

5. That your orator may have such other and further relief in the premises as to your Honor shall

seem meet and shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered to grant unto your orator not only the State's most gracious writ of injunction issuing out of and under the seal of this Honorable Court to be directed to said defendant, Johnson & Higgins, its officers, directors, agents, servants and employees, enjoining them and each of them as hereinbefore prayed; but also to grant a writ of subpoena issuing out of and under the seal of this Honorable Court to be directed to said Johnson & Higgins therein and thereby commanding it on a certain date and under a penalty therein to be inserted to be and appear before your Honor and this Honorable Court then and there to answer all and singular the premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and as shall be agreeable to equity and conscience.

And your orator as in duty bound will ever pray, etc.

McCARTER & ENGLISH,
Solictors for and of Counsel with the Complainant.

Robert H. McCarter,
Royall Victor,
Henry Wollman,
Counsel.

Answer.

IN CHANCERY OF NEW JERSEY.

Between: THOMAS J. PRINDIVILLE, Complainant, and JOHNSON & HIGGINS, Defendant.	On Bill, etc. Answer.

The answer of Johnson & Higgins, defendant, to the bill of complaint of Thomas J. Prindiville, complainant.

ANSWER TO FIRST CAUSE OF ACTION:

1. This defendant admits the allegations of Paragraph 1.

2. This defendant admits the allegations of Paragraph 2, except that it denies that prior to the year 1911, Prindiville & Co., conducted a very large and lucrative insurance brokerage business.

3. This defendant admits the allegations of Paragraph 3, except that it has no information as to whether the complainant still owns and holds stock certificate No. 413 for 125 shares of the common stock of this defendant, referred to in said paragraph, and calls upon the complainant to make proof thereof.

4. This defendant denies the allegations of Paragraph 4 of the bill of complaint, and as to the earnings of this defendant for the year 1918, and the rights

of the complainant therein, and the dividends declared and paid out of the earnings for that year, prays reference to the particulars thereof hereinafter completely stated.

ANSWER TO SECOND AND FURTHER CAUSE OF ACTION:

5. This defendant admits the allegations of Paragraph 5.

6. This defendant admits the allegations of Paragraph 6.

7. Answering the allegations of Paragraph 7 of the bill of complaint this defendant shows that on or about the 16th day of January, 1919, pursuant to the charter and by-laws of this defendant hereinafter more particularly mentioned and referred to, the salaries to be paid to the several persons mentioned in said paragraph (other than William W. Curtin) were fixed by the board of directors in the aggregate at one-half the profits of the corporation after payment of all losses and charges and expenses and after deduction of such reserves as it might be deemed wise or necessary to make, such aggregate being, therefore, equal to the net profits of the corporation as defined in its certificate of incorporation, such compensation to continue until modified by action of the board of directors and the aggregate amount thereof to be subject to apportionment by the board and to regulations respecting the time and manner of payment; on or about the 6th day of March, 1919, the board of directors of this defendant, supplementing the aforesaid action taken by said board on or about January 16, 1919, fixing the compensation for the period beginning January 1,

1919, and ending December 31, 1919, determined that the aggregate therein fixed, after deducting the sum of $2,500 to be paid to J. D. Barrett, should be distributed among the persons named in the said Paragraph 7 of said bill of complaint (excluding William W. Curtin), by the percentages definitely named in said resolution; it was by said resolution further provided that, on account of the compensation so fixed and determined, there should be paid monthly to said persons (excluding William W. Curtin) the amounts specifically named in said resolution; the monthly payments so as aforesaid authorized on account of compensation have been made by this defendant; the total aggregate amount distributable as salaries under the resolution of the board of directors aforesaid, for the year beginning January 1, 1919, and ending December 31, 1919, has not yet been ascertained, but when so ascertained the aggregate will be distributed by this defendant, after credit of all payments on account thereof, in accordance with the aforesaid action of the directors, which action was in strict accordance with the charter and by-laws of this defendant, and pursuant to the same method practiced by this defendant ever since its organization and under which the said complainant during the entire time of his connection with this defendant, from the year, 1911, to and including the year, 1918, received similar compensation and salary. This defendant denies that any compensation was paid during the year 1919, to William W. Curtin named in said paragraph. This defendent denies that the amount which this defendant will pay the said persons named in said Paragraph 7 of said bill of complaint (excluding William W. Curtin) as salaries under and by reason of the action of the directors afore-

said, or otherwise, will be about $1,000,000 over and above fair, legitimate or proper salaries or compensation for any and all services performed by said persons for said company, and alleges the truth to be that the amount so to be paid by this defendant, under the action of the directors aforesaid, will be in exact accordance with the charter and by-laws of this defendant and according to the practices of this defendant from the time of its incorporation, and will be in no way excessive, illegitimate or improper, but, on the contrary, under the charter and by-laws of this corporation and the methods and practices thereof from the time of its incorporation, the amounts received and to be received by the said persons named in said Paragraph 7 of the bill of complaint (excluding William W. Curtin), as fixed and determined by the action of the directors of this defendant as aforesaid, will be fair, legitimate and proper salary and compensation to said several persons for their services to this defendant during the year 1919. This defendant denies that the effect of such payments will be to decrease, largely or otherwise, the value of the stock of the said complainant or to decrease the amount of money available for the payment of dividends on said stock, and shows that the amount available for dividends on the capital stock of this defendant, by whomsoever owned, is determined in accordance with the methods and practices which have prevailed ever since the organization of this defendant and during the entire period that the said complainant has been a stockholder of this defendant.

ANSWER TO FIRST AND SECOND CAUSES OF ACTION AS MAY BE APPROPRIATE TO EITHER OR BOTH.

8. This defendant further answering shows this defendant was incorporated under an act of the legislature of the State of New Jersey entitled, "An Act concerning corporations" (revision of 1896), and the several acts supplemental thereto and amendatory thereof, on or about the 13th day of June, 1899, with a capital of $500,000, consisting of $250,000 of preferred stock and $250,000 of common stock. On December 23, 1899, the capital stock of this defendant was increased, pursuant to the statute in such case made and provided, from $500,000 to $700,000, of which increase $100,000 was preferred stock and $100,000 was common stock. On December 23, 1902, the certificate of incorporation of this defendant was amended, pursuant to the statute in such case made and provided, by increasing the number of directors from eight to twelve. On February 4, 1903, the capital stock of this defendant was further increased, pursuant to the statute in such case made and provided, from $700,000 to $850,000, said increase consisting of $150,000 of common stock. On May 6, 1911, the capital stock of this defendant was further increased, pursuant to the statute in such case made and provided, from $850,000 to $1,000,000, said increase consisting of $150,000 of preferred stock. On May 5, 1914, the charter of this defendant was amended, pursuant to the statute in such case made and provided, by providing that losses may be paid out of any surplus reserve fund, or, failing the establishment of such fund, out of surplus, and that the losses so paid shall not go to diminish the net profits of the year so far as fixing

the amount of dividends or the amount of salaries of executive officers and directors is concerned, and also by providing authority to the corporation to pay losses from any surplus reserve fund, or, failing the establishment of such fund, from accumulated surplus, and providing that losses so paid shall not go to diminish the net profits for the year so far as fixing the amount of dividends and the amount of salaries of executive officers and directors is concerned. Defendant appends to this answer and makes a part thereof a copy of the certificate of incorporation of this defendant as amended.

9. This defendant after its incorporation adopted by-laws which were in effect prior to the time when the said complainant became a stockholder and thereafter, under Article XII of which it was provided that holders of stock should be entitled to a certificate signed by the president or vice-president, each certificate for shares of preferred stock to bear this statement:

"The preferred stock shall be entitled to non-cumulative dividends at the rate of not to exceed eight per cent per annum for each fiscal year, ending on the thirty-first day of December, payable to the limit of eight per cent out of any and all net profits or out of any accumulated surplus, and before any dividends are set apart or paid upon the common stock. The preferred stock shall not be entitled to any other dividends. The holders of preferred stock shall not have the right to vote for directors or officers of the corporation, but shall have the right to vote upon all other matters properly coming before the stockholders.

"In the event of the dissolution of the corporation the holders of preferred stock shall be entitled to receive the par value of their preferred shares out of the funds and assets of the corporation before any payment shall be made therefrom to the holders of common stock."

And each certificate for shares of common stock to bear this statement:

"The common stock shall be subject to the prior rights of the holders of preferred stock, as declared in the certificate of incorporation.

"In the event that any share or shares of the common stock of the corporation becomes the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock, unless and until he shall surrender, or cause to be surrendered, the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall, from the time of surrender, be subject to reissue under the direction of the board of directors, and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the corporation); but the new holder or holders of such

stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends."

By Article XIII of said by-laws it was provided that all certificates of stock surrendered for transfer should be cancelled by the president or treasurer at the time of surrender, and that the shares of common stock surrendered under the provisions of the certificate of incorporation in exchange for certificates entitling the holder to dividends for a period of ten years, might be transferred to the treasurer of the corporation as such, or to any other trustee appointed by the directors, for the benefit of the corporation and subject to re-issue under the direction of the board of directors.

By Article XV of the said by-laws it was provided that the compensation of directors and of the executive officers of the corporation should be fixed by the directors; that such compensation might be specific in amount or measured by a share of the profits of the corporation, but that in neither case should the aggregate compensation of the directors and executive officers for any year exceed the net profits of the corporation as defined in the certificate of incorporation.

Copy of said by-laws, as in effect since January, 1916, is appended to this answer and made a part thereof. The provisions of said by-laws in this paragraph particularly referred to were in effect at and

from the time the said complainant became a stockholder of this defendant, and the certificates of stock of the said complainant, not only common stock certificate No. 413 for 125 shares mentioned in said bill of complaint but other certificates of stock of this defendant held by said complainant for shares both preferred and common, were in full accordance with these by-laws.

10. From the organization of this defendant to the present time the salaries of the executive officers and directors have been fixed by the board of directors in the early part of each year in the aggregate at one-half the profits of the corporation, after payment of all losses and charges and expenses and after deduction of such reserves as it may be wise or necessary to make, and being, therefore, equal to the net profits of the corporation as defined in the certificate of incorporation, and such aggregate has been subject to apportionment by the board and to regulations respecting time and manner of payment, the apportionment being accomplished by percentages of the aggregate fixed by the board and continuing until modified by the board. The remaining one-half of the profits of the corporation not apportioned to compensation of the executive officers and directors constituted the fund from which dividends, preferred and common, were paid, thus accomplishing the definition of the net profits of any year, so far as dividends are concerned, set forth in the certificate of incorporation of this defendant, and the compensation of the executive officers and directors being, by the method pursued, measured by a share of the profits of the corporation through the percentages fixed by the board of directors in accordance with the charter and by-laws of this defendant.

No change was made in the method, either of fixing salaries or in the practice as to dividends, after the said complainant became a stockholder, and from the time he became such stockholder he participated in the salaries and dividends, that is to say during the years 1911, 1912, 1913, 1914, 1915, 1916, 1917 and 1918, in strict accordance with the charter and by-laws and the practice of the corporation without objection or criticism as to method or practice.

11. The said complainant is the owner of 100 shares of the preferred stock of this defendant represented by certificate No. 66 for 50 shares dated July 10, 1911, certificate No. 80 for 20 shares dated January 23, 1912, and certificate No. 122 for 30 shares dated January 14, 1913. All of said certificates contain the provisions relating to the preferred stock of this defendant found in the certificate of incorporation of this defendant and in the by-laws of this defendant, reference to which, so far as necessary, is hereby made.

12. Complainant is the holder of record not only of 125 shares of the common stock of this corporation mentioned in the bill of complaint and therein identified as certificate No. 413, but 115 other shares which he has received at different times under the operations of the provisions of the certificate of incorporation as hereinafter particularly explained. The additional shares so held by him not mentioned in the bill of complaint are represented by certificate No. 469 for 7 shares dated February 19, 1913, certificate No. 485 for 18 shares dated February 27, 1913, certificate No. 518 for 15 shares dated February 28, 1916, certificate No. 519 for 17 shares dated February 28, 1916,

certificate No. 520 for 33 shares dated February 28, 1916, and certificate No. 531 for 25 shares dated November 22, 1917. All of said certificates, inclusive of certificate No. 413 for 125 shares, referred to in the bill of complaint, bear on their face the provisions of the certificate of incorporation as follows:

"In the event that any share or shares of the common stock of the corporation becomes the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock, unless and until he shall surrender, or cause to be surrendered, the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon such stock for the next succeeding period of ten years, and such stock shall, from the time of surrender, be subject to re-issue under the direction of the board of directors, and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the corporation); but the new holder or holders of such stock so re-issued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as aforesaid, and prior to the re-issue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after

what time the holder of the stock shall be entitled to receive dividends."

All of the certificates of stock held by the complainant, except certificate No. 413 for 125 shares referred to in the bill of complaint, were received by complainant through distribution to complainant and others, actively engaged as officers, directors or employees in the service of the corporation, of common stock of this defendant surrendered to the corporation pursuant to the provisions of the charter and by-laws of this defendant, by officers, directors or employees of the corporation ceasing to be actively engaged in its service, who thereby and thereupon became disentitled to dividends upon such stock until the surrender of the said stock and the certificate therefor to the corporation, and who, upon such surrender to the corporation, had received from the corporation, in exchange therefor, a certificate entitling the holder to such dividends as might be declared upon said stock for the next succeeding period of ten years. The stock so surrendered thereupon became subject to re-issue under the direction of the board of directors, and by means of such re-issue the complainant accquired the certificates of common stock held by him (other than certificate No. 413 for 125 shares mentioned in the bill of complaint), with full notice on the face of the certificates of the conditions of re-issue, and in each case stamped or written upon the face of the certificate was a statement indicating at and after what time said complainant, if otherwise qualified, should be entitled to receive dividends, such statement being in each case in the following form:

Answer

"This stock is re-issued pursuant to the certificate of incorporation and by-laws of the corporation, and to a resolution of the board of directors duly adopted on the day of 19 . The holder of this stock, when otherwise qualified, shall be entitled to receive such dividends as may be declared by the corporation thereon after the day of 19 ."

Certificate No. 469 for 7 shares was re-issued to the complainant, the statement stamped or written thereon in the form aforesaid, showing that such re-issue was pursuant to resolution of the board of directors duly adopted on the 18th day of December, 1912, and that the holder, when otherwise qualified, was entitled to receive such dividends as might be declared by the corporation thereon after the 9th day of February, 1922.

Certificate No. 485 for 18 shares, as indicated by like statement stamped or written thereon, was re-issued to the complainant pursuant to resolution of the 18th day of December, 1912, and the holder, when otherwise qualified, was entitled to receive dividends declared after the 1st day of January, 1922.

Certificate No. 518 for 15 shares, as indicated by like statement stamped or written thereon, was re-issued to the complainant pursuant to resolution adopted on the 19th day of January, 1916, and the holder thereof, when otherwise qualified, was entitled to receive dividends declared after the 21st day of March, 1924.

Certificate No. 519 for 17 shares, as indicated by like statement stamped or written thereon, was re-issued to the complainant pursuant to resolution adopted on the 19th day of January, 1916, and the holder

thereof, when otherwise qualified, was entitled to receive dividends declared after the 21st day of January, 1925.

Certificate No. 520 for 33 shares, as indicated by like statement stamped or written thereon, was re-issued to the complainant pursuant to resolution adopted on the 19th day of January, 1916, and the holder thereof, when otherwise qualified, was entitled to receive dividends declared after the 14th day of January, 1926.

Certificate No. 531 for 25 shares, as indicated by like statement stamped or written thereon, was re-issued to the complainant pursuant to resolution adopted on the 21st day of November, 1917, and the holder thereof, when otherwise qualified, was entitled to receive dividends declared thereon after the 17th day of January, 1927.

13. From the beginning of the corporation to the present time, the requirement of the charter and by-laws appearing upon the face of the certificates of common stock, that in the event that any share or shares of the common stock becomes the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock until the surrender thereof to the corporation, has been strictly enforced, and upon such surrender the corporation has issued in exchange therefor certificates entitling the former holders of the stock to such dividends as might be declared

upon such stock for the next succeeding period of ten years. The stock itself has, either at once or after a while, been re-issued to officers, directors or employees of the corporation actively engaged in its service pro rata to then holdings, pursuant to resolution of the board of directors, and if such pro rata was varied it was by agreement. In such re-issue, and in agreements for distribution among officers, directors or employees of the corporation actively engaged in its service, for distribution other than on a pro rata basis, the complainant has again and again participated, and now holds, by operation of the charter provision, 115 shares of common stock coming to him under the resolutions of the directors, and entitled to dividends (if the holder thereof is otherwise qualified) at the times hereinbefore particularly mentioned.

14. Said complainant was absent in the naval service of the United States from the month of June, 1917, until the month of December, 1918, and, notwithstanding such absence, received from this corporation not only the dividends on his preferred stock and his common stock, so far as he was entitled to dividends on said common stock, but also the percentage of salary and compensation fixed and determined by the directors at the beginning of the year 1917, for that year and the beginning of the year 1918, for that year, pursuant to the methods and practices of this defendant from the time of its incorporation and hereinbefore explained.

15. During the month of December, 1918, the directors of this defendant had under discussion the salary percentages for the year 1919, and it was assumed that the said complainant would, by the first of January of

1919, have returned to active duty, and it was determined by the directors that the salary percentage of the said complainant should be for the year 1919, as it was at the time when he left for the naval service and as it had been continued during his absence, and notice of this determination was given to the said complainant.

The said complainant thereupon, both orally and in writing, expressed his dissatisfaction with the percentage, the reason given for such dissatisfaction being in no way based upon the method or practices of this defendant in fixing and determining salaries and compensations pursuant to its charter as theretofore, but solely to the expressed feeling of the said complainant that the percentage awarded to him was not as great as he thought it should be and, particularly, that two of the directors, Messrs. Lowe and Davy, were receiving a larger percentage than himself. At a special meeting of the directors of this defendant held on the 23rd day of December, 1918, the salary percentage to be given the complainant for the year 1919, was further discussed and the objections of the complainant considered and the complainant was, after such meeting, informed by the president of this defendant, that he was instructed to advise complainant that all of the directors agreed that complainant's salary percentage for 1919, from this defendant should be exactly the same as it was at the time he left and as continued during his absence, and that the salary committee had been instructed accordingly.

By letter dated December 30, 1918, to the president of this defendant the complainant wrote renewing his dissatisfaction and refusing to accept the determination of the directors, in said letter informing the said

president that a situation had been created which he, the said complainant, could not accept, and that he had therefore asked his counsel to confer with the president on a fair value for his Johnson & Higgins holdings and offering, in consideration of a prompt and satisfactory consideration for the same, to agree not to engage in the insurance or brokerage business for a year from January 1, 1919. The letter containing this information was delivered to this defendant at its New York office through counsel of the complainant. The percentage of salary thus rejected by the complainant had been determined and fixed in accordance with the methods and practices of this defendant from its organization, and in which the said complainant from the time he became a stockholder of this defendant had annually acquiesced and participated. The complainant, after such rejection, absented himself from the service of this defendant, and by his own definite choice abandoned any and all association with the business of this defendant and then and from thenceforth ceased to be an officer, director or employee of this defendant actively engaged in its service. From just before and since the first day of January, 1919, the complainant has been endeavoring, through himself and his attorneys, to dispose of whatever interest he might have in the stock of this defendant to his former associates, and has had no participation in the conduct of the business of this defendant.

16. This defendant further shows that the said complainant has not only ceased to be an officer, director or employee of this defendant actively engaged in its service, for the reasons and on account of the happenings hereinbefore set forth, but he has also connected himself with another business organization en-

gaged in the same line as this defendant, and has been by reason of such connection in active opposition derogatory to the business of this defendant and in competition therewith, and, in association with such competitive activities, has endeavored to entice away from this defendant employees long connected with its service, and has generally antagonized the interests and business of this defendant.

17. The aggregate amount for salaries for the year 1919, and the percentages thereof to the executive officers and directors actively engaged in the service of the corporation were fixed and determined in accordance with the charter and by-laws of this corporation, in exact compliance with the methods and practices which have prevailed since the organization of this defendant and during the entire time that the said complainant was connected therewith. Complainant has received all dividends declared and payable on the preferred stock of this defendant held by him. Dividends on all of the common stock have been determined and declared in accordance with the charter and by-laws of this defendant in the same manner as from the organization of this defendant and during the entire time that the said complainant was connected therewith, and dividends in the common stock have been paid to such persons as are entitled thereto, either as holders of stock or of dividend certificates. When the complainant ceased to be an officer, director or employee of this defendant actively engaged in its service, as and from the first day of January, 1919, he thereby and thereupon became, under the provisions of the certificate of incorporation of this defendant. disentitled to dividends thereafter declared upon the common stock held by him, so far as the holder of

said stock was entitled to dividends thereon, unless and until he should surrender or cause to be surrendered the said stock and the certificates therefor to this defendant, upon which surrender he was entitled to receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as might be thereafter declared upon said stock, payable to the holder thereof, for the next succeeding period of ten years. Although the dividends for the year 1918, on said common stock have been ascertained and declared, the complainant has not complied with the charter and by-laws of this defendant relative thereto and has not surrendered his said common stock and the certificates therefor to this defendant, although this defendant has been ready and is ready to deliver to him, in exchange therefor, a certificate entitling him to such dividends as may be declared upon said stock, payable to the holder thereof, for the next succeeding period of ten years, in accordance with the provisions of said charter and by-laws as set forth in the certificates of common stock held by him and to the statements endorsed on such certificates relative to the time of entitlement to dividends hereinbefore particularly described and set forth.

18. Defendant shows that it is ready and willing in all respects to comply with the provisions of the charter and by-laws of this defendant, and to in all respects extend to the said complainant his full rights and privileges as defined by said certificate and by-laws and as enjoyed by and enforced against the common stockholders of this defendant from the time of the organization of this defendant and in accordance with which the said complainant accepted and held the common stock of this defendant, and this defendant is advised and shows that said complainant is not en-

titled to dividends on the common stock of this defendant held by him unless and until he complies with the provisions of the charter and by-laws of this defendant with reference thereto.

19. This defendant further shows that the said complainant has for many years acquiesced and participated in the salaries and dividends on the common stock fixed and determined under the charter and by-laws of this corporation by the same methods and practices to which he now objects; that he has year by year, ever since his becoming a stockholder in this defendant, accepted the salary and dividends so fixed and determined without objection or protest to such methods and practices or to the charter and by-laws of this defendant, as interpreted and applied from the organization of this defendant to the present time; that he has acquiesced in the surrender by former officers, directors and employees of this defendant, actively engaged in its service, and ceasing to be such, of their common stock to this defendant, and in the issue by this defendant in exchange therefor of certificates entitling such former stockholders to such dividends as might be declared upon their said stock during the next succeeding period of ten years; that he has officially participated, as a director of this defendant, in the re-issue by this defendant of the stock so surrendered, but without entitlement of the holders of such re-issued stock to dividends thereon until ten years from the time of surrender of the stock to the corporation as aforesaid; and that he has himself personally received stock so re-issued and is now the holder thereof.

And this defendant is advised, and alleges, that the said complainant is, under such circumstances, equitably estopped to now question the determination of salaries and the payment of dividends pursuant to the

charter and by-laws of this defendant in accordance with the methods and practices of this defendant from the time of its incorporation and during the entire time of his stockholding therein; and that he cannot in equity and good conscience, having ceased to be an officer, director or employee of this defendant actively engaged in its service, object to the salaries fixed and determined, as hereinabove set forth, for the executive officers and directors of this defendant for the year 1919, or by like methods and practices for any subsequent year, or successfully assert any right to dividends upon common stock held by him, unless and until he shall surrender or cause to be surrendered the said common stock and the certificates therefor to this defendant, and accept in exchange therefor a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, or after such surrender and exchange to assert any right to dividends, except in compliance with the provisions of the said charter and by-laws of this defendant, and the provisions of the common stock certificates now held by him, and any statements thereon indicating at and after what time the holder of the stock shall be entitled to receive dividends.

20. This defendant denies that the said complainant is entitled to the relief prayed for by him in his said bill of complaint, or any part of it, and prays that it may be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

PITNEY, HARDIN & SKINNER,
Solrs. & of Counsel for Defendant.

(Annexed to answer was copy of certificate of incorporation as amended and copy of by-laws of defendant, which appear herein as exhibits.)

Replication.

IN CHANCERY OF NEW JERSEY.

Between: THOMAS J. PRINDIVILLE, Complainant, and JOHNSON & HIGGINS, Defendant.	On Bill &c. Replication.

The complainant joins issue on the answer of the defendant Johnson & Higgins.

McCARTER & ENGLISH.

Solicitors for and of Counsel with Complainant.

Case.

IN CHANCERY OF NEW JERSEY.

Between:

THOMAS J. PRINDIVILLE,
Complainant,
and
JOHNSON & HIGGINS,
Defendant.

Transcript of short hand notes of testimony taken in the above-entitled matter before his Honor, John H. Backes, vice chancellor, at the Chancery Chambers in the City of Newark, New Jersey, in the presence of Mr. Robert H. McCarter, Mr. Henry Wollman, Mr. Royall Victor and Mr. Eustace Seligman, for complainant, and Mr. John R. Hardin, Mr. A. H. Larkin and Mr. F. W. M. Cutcheon, for the defendant.

Mr. McCarter opened for the complainant.
Mr. Hardin opened for the defendant.

Mr. McCarter: We have joined issue with the averments of the answer and are ready to produce what proof is necessary on our side. The questions are really largely a question of law. Mr. Wollman will present the evidence on our side.

Mr. Wollman: If your Honor please, as we understand it, and as stated by Mr. Hardin, there is now outstanding authorized common stock in the amount of 372,900 shares and outstanding of preferred stock, 450,000. Now, I will ask Captain Seligman to read extracts from the minutes of the board of director of the corporation, of May 17, 1911, showing the pur-

chase by Johnson & Higgins of the complainant's stock in the corporation of Prindiville & Co., an Illinois corporation engaged in the insurance business, one-half of the capital stock of which company was owned by Mr. Prindiville, the complainant here, and one-half of the capital stock was owned by Johnson & Higgins, the defendant here. In 1911 Johnson & Higgins, the defendant, bought the complainant's stock in Prindiville & Co., and that is how Mr. Prindiville got into this new company. I will ask to have the minutes of the corporation read.

The Court: Offer the book in evidence.

Mr. Wollman: I offer minute book of Johnson & Higgins, No. 2.

Book marked Exhibit C1.

Mr. Seligman: I read from page 247, Exhibit C1, meeting of May 17, 1911:

"The chairman stated that a communication had been received from Mr. Thomas J. Prindiville, looking towards the sale by him of his holdings of stock in the insurance corporation of Prindiville & Co., as of January 1st, 1911.

"The secretary then read the following letter:

" 'May 17th, 1911.

" 'W. R. Coe, Esq.,
" 'President Johnson & Higgins,
" '49 Wall Street,
" 'New York City.

" 'Dear Sir:

" 'I am willing to sell and deliver to Johnson & Higgins fifty (50) shares of the full paid non-assessable capital stock of the corporation of Prindiville & Com-

pany, a corporation organized under the laws of the State of Illinois, with a total capitalization of $10,000; said fifty shares being one-half of the entire capital stock of said corporation, for the sum of twelve thousand five hundred dollars ($12,500) in cash. If you prefer, I will accept in lieu of the $12,500 in cash that amount in par value of the common capital stock of your company. All taxes and other charges against the said stock of Prindiville & Company have been paid and met, and I represent that the corporation is duly organized and validly existing.

" 'Will you kindly advise me whether you desire to avail yourself of this offer, and the method of payment you wish to adopt, and upon receipt of the payment I will assign and transfer to you by proper instruments of assignment such capital stock of the Prindiville & Company.

" 'Yours truly,

" '(Signed) THOMAS J. PRINDIVILLE.'

"The proposition having been considered by the directors and the value therein expressed having been approved by them, it was, upon motion of Mr. W. W. Curtin seconded by Mr. George V. Coe,

"Resolved that the proposition submitted by Mr. Prindiville be accepted by issuing to him $12,500 in par value of the Common Capital stock of the corporation, and that the officers be and they are hereby authorized, empowered and directed to do any and all acts or things necessary to carry the same into full effect, and to issue said common stock of this corporation as in said proposition mentioned. Carried unanimously. * * *

"The chairman then announced that 125 shares of the common stock of the corporation of the par value

of $12,500 had been delivered to Mr. Thos. J. Prindiville in exchange for 50 shares of the capital stock of the corporation of Prindiville & Co.

"The chairman then announced that nominations for filling the vacancy in the Board of Directors would be in order.

"Mr. Thomas J. Prindiville, who being duly qualified by the requisite stock ownership, was nominated by Mr. J. A. H. Hopkins and seconded by Mr. Geo. V. Coe but only for the term until the next annual meeting of the stockholders.

"There being no further nominations, the chairman declared the nominations closed, and on motion duly seconded the secretary was instructed to cast one ballot for Mr. Prindiville.

"The secretary cast the ballot and reported the ballot cast as follows for director, to serve until the next annual meeting of shareholders in May, 1912, Mr. Thos. J. Prindiville.

"The chairman thereupon declared Mr. Prindiville duly elected.

"Mr. Prindiville thereupon took his seat as a director."

Mr. Larkin: Between the resolution accepting the offer and the action of the board in electing Mr. Prindiville director the minutes show a recess was taken.

Mr. Wollman: The answer admits that we got this 125 shares of stock but they say they do not know whether we still have it; therefore I am offering in evidence the original certificate, produced by the complainant and issued by the defendant, Certificate No. 413.

Certificate marked Exhibit C2.

Mr. Hardin: I do not think possession proves ownership.

Mr. Wollman: They say we were not a prosperous concern. I wish to offer a statement of the earnings of the company of Prindiville furnished to us by the defendant within the last two or three days of the net earnings of Prindiville & Co. for 1911, and subsequent years.

Paper marked Exhibit C3.

Mr. Seligman (reading): "Statement of net earnings of Prindiville & Co., 1911, $54,874.52; 1912, $57,765.25; 1913, $68,832.52; 1914, $64,765.42; 1915, $110,665.09; 1916, $125,769.31; 1917, $83,365.37; 1918, $69,533.67; 1919, $32,370."

The Court: What relevancy has that to this case?

Mr. Wollman: To show we were purchasers of that stock for real value.

The Court: That is not disputed.

Mr. Wollman: They dispute it in the answer and we have to recognize the answer.

As to the dividend declared in 1919, which is the subject of contest in this case, we offer in evidence the minutes of the defendant corporation containing the resolution of March 6, 1919, declaring a dividend of 105 per cent out of the earnings of 1918, which is the beginning of the time that they refused to recognize our rights to dividends.

Mr. Seligman: We offer minute book No. 3 in evidence.

Book marked Exhibit C4.

Mr. Seligman (reading from page 203, Book 3):

"On motion of Mr. LaBoyteaux duly seconded by Mr. Keegan it was

"Resolved that a further dividend of 105% upon the common stock be declared on account of the profits of the fiscal year ending December 31st, 1918, payable on or after March 11, 1919, to all holders of common stock of record on December 31, 1918, except as otherwise provided in the certificate of incorporation and except in the case of common stockholders of record on such date in respect of whose shares dividend certificates have been issued in which case to the holders of record on such date of such dividend certificates, without prejudice to the declaration and payment of a further dividend upon the common stock on account of such net profits. Carried."

Mr. Wollman: Now, we offer in evidence extract from the minutes of March 19, 1919, of Johnson & Higgins, showing declaration of a dividend in addition of fifty per cent out of the earnings of 1918.

Mr. Seligman (reading from page 207, Book 3):

"Resolved, that a further dividend of fifty per cent (50%) upon the common stock be declared on account of the net profits of the fiscal year ending December 31st, 1918, payable on or after June 9th, 1919, to all holders of common stock of record on December 31, 1918, except as otherwise provided in the certificate of incorporation and except in the case of common stockholders of record on such date in respect of whose shares dividend certificates have been issued in which case to the holders of record on such date of such dividend certificates. Carried."

Mr. Wollman: Now, we offer in evidence extract from the minutes of June 18, 1919, showing a declaration of a dividend of twenty per cent out of the earnings of 1919.

The Court: You mention 205 per cent in 1918, you have only shown 155 per cent.

Mr. McCarter: The dividends out of the earnings of two years, 1918 and 1919 amount to 205 per cent.

The Court: You are going to show more?

Mr. McCarter: Yes, sir.

Mr. Seligman (reading from page 213, Book 3):

"Resolved, that a dividend of twenty per cent (20%) upon the common stock be declared from the net profits of said six months, payable on or after June 30th, 1919, to all holders of common stock of record on that date except as otherwise provided in the certificate of incorporation, and except in the case of common stockholders of record on such date in respect of whose shares dividends certificates have been issued and unexpired in which case to the holders of record on such date of such dividends certificates, upon such common stockholders and dividends certificates holders executing an agreement in the form dated June 11th, 1919, in connection with the preceding dividend on the common stock. Carried."

Mr. Wollman: We now offer in evidence minutes of Johnson & Higgins of August 20, 1919, showing the declaration of a dividend of fifty per cent out of the earnings of 1918.

Mr. Seligman (reading from page 218, Book 3):

"Resolved, that a further dividend of fifty per cent (50%) upon the common stock be declared on account of the net profits of the fiscal year ending December 31st, 1918, payable on or after September 4th, 1919, to all holders of common stock of record on December 31st, 1918, except as otherwise provided in the certificate of incorporation and except in the case

of common stockholders of record on such date, in respect of whose shares dividends certificates have been issued, in which case to the holders of record on such date of such dividends certificates, such common stockholders having executed an agreement in the form dated June 11th, 1919, in connection with the preceding dividend on common stock. Carried."

Mr. Wollman: Before I make the next offer I want to ask Mr. Seligman to read the resolution of November 19, 1919, declaring a dividend of 50 per cent which was immediately rescinded and changed to 44 per cent.

Mr. Hardin: Before that is done may I ask Mr. Wollman if he thinks that the minutes that were read of June 18, 1919, Vol. 3, page 213, refers to a dividend out of the earnings of 1918. To my mind it plainly refers to earnings of 1919.

Mr. Wollman: I said that.

Mr. Seligman (reading from page 222, No. 3):

"On motion of Mr. Lowe duly seconded by Mr. Barrett it was resolved that a further dividend of fifty per cent (50%) upon the common stock be declared on account of the net profits of the fiscal year ending December 31st, 1918, payable on or after December 10th, 1919, to all holders of common stock of record on December 31st, 1918, except as otherwise provided in the certificate of incorporation and except in the case of common stockholders of record, on such date in respect of whose shares dividends certificates have been issued in which case to the holders of record on such date of such dividends certificates, such common stockholders having executed an agreement in the form dated June 11th, 1919, in connec-

tion with the preceding dividend on common stock. Carried."

Mr. Wollman: We now offer in evidence the resolution of December 4, 1919, rescinding the one that Mr. Seligman has just read, declaring a dividend in lieu thereof of 44 per cent out of the earnings of 1918.

The Court: Just a modification.

Mr. Wollman: Yes, sir.

Mr. Seligman (reading from page 224, Book No. 3):

"The president called attention to the fact that at the time of the adoption of the resolution declaring a 50% dividend upon the common capital stock from the earnings of the year ending December 31st, 1918, the chairman of the board was, he was and the board were, of the belief that there remained that amount of surplus net earnings for that year, but that after a careful examination of the figures it developed that but 44% and a fraction of surplus net earnings remained available for that purpose.

"The president further stated that he was of the opinion that the amount of the dividend should be reduced so as to conform to the facts and that the declaration of any greater amount than there was available was prohibited; that he had taken the matter up with counsel, who was of the opinion that the only dividend that may lawfully be declared from the remaining surplus earnings of the year 1918, should be entered so as not to exceed the amount thereof. Consequently he suggested that the minutes of the meeting be amended by the adoption of the following resolution, which resolution in effect would change the

amount of the dividend to be declared from 50 per cent to 44 per cent.

"Resolved, that a further dividend of forty-four per cent (44%) upon the common stock be declared on account of the net profits of the fiscal year ending December 31st, 1918, payable on or after December 10th, 1919, to all holders of common stock of record on December 31st, 1918, except as otherwise provided in the certificate of incorporation and except in the case of common stockholders of record on such date in respect of whose shares dividend certificates have been issued, in which case to the holders of record on such date of such dividend certificates. Such common stockholders have executed an agreement in the form dated June 11th, 1919, in connection with the preceding dividend on common stock which resolution was duly seconded and unanimously carried."

Mr. Wollman: Now, we offer in evidence extract of minutes of Johnson & Higgins of February 18, 1920, declaring a dividend of 55 per cent out of the earnings of 1919—pardon me, I wish first to offer resolutions of December 4, 1919, declaring a dividend of 25 per cent out of the earnings of 1919.

Mr. Seligman (reading from page 228, Book No. 3):

"Resolved, that a further dividend of 25 per cent upon the common stock be declared on account of the profits of said fiscal year payable on or after December 31st, 1919, to all holders of common stock of record on that date except as otherwise provided in the certificate of incorporation and except in the case of common stockholders of record on such date in respect of whose shares dividends certificates have

been issued and unexpired in which case to the holders of record on such date of such dividends certificates, such common stockholders and dividends certificates holders having executed an agreement in the form dated June 11th, 1919, in connection with the preceeding dividend on common stock. Carried."

Mr. Wollman: Now, I offer the resolution of February 18, 1920, of Johnson & Higgins, declaring a dividend of 55 per cent out of the earnings of 1919.

Mr. Hardin: I might call your Honor's attention to the fact that we are getting into dates which are after the filing of the bill, but we have no objection.

The Court: They may file a supplemental bill.

Mr. Seligman (reading from page 243, Minute Book No. 3):

"Mr. Davidge presented the recommendation of the finance committee made at its meeting held February 17th, 1920, that a further dividend of 55 per cent be declared on the common stock on account of the net profits of the fiscal year of 1919, payable on or after March 10th, 1920, to all stockholders of record on December 31st, 1919.

"On motion of Mr. LaBoyteaux duly seconded it was

"Resolved that a further dividend of fifty-five per cent (55%) upon the common stock be declared on account of the net profits of the fiscal year ending December 31st, 1919, payable on or after February 26th, 1920, to all holders of common stock of record in the certificate of incorporation and except in the case of common stockholders of record on such date on December 31st, 1919, except as otherwise provided

in respect of whose shares dividends certificates have been issued and unexpired in which case to the holders of record on such date of such dividends certificates subject however to the agreement in the form dated June 26th, 1919, executed by the common stockholders and dividend certificate holders in respect to all subsequent dividends payable to holders of common stock or dividends certificates."

Mr. McCarter: I will state for your Honor's information—you have not read the pleadings at length—that the answer concedes that those dividends that have been thus declared were paid to and received by the other stockholders of record except the complainants and they set up in confession and avoidance their alleged reasons for having failed to pay the complainant the dividends.

Mr. Hardin: We do not concede anything after the filing of the bill.

The Court: I presume any decree that may be made with reference to the 1918 dividends will control your action.

Mr. Hardin: Absolutely.

Mr. McCarter: The only reason why the resolution of February 18, 1920, was introduced was to make the record complete for that year.

The Court: I understand these minutes are admitted —the declaration of dividends are conceded by the answer.

Mr. McCarter: Yes, sir; and also conceded that the complainant did not get his.

Mr. Wollman: Now, we offer the balance sheet of the defendant company of December 31, 1918, showing surplus and undivided profits of $1,998,000.

Mr. Hardin: With notes.

Mr. McCarter: I do not think the notes amount to a hill of beans. They endeavor to tell the story with reference to the balance sheet at the bottom of the paper. They furnish us with this paper and we offer the paper in evidence, and call your Honor's attention to the fact that we do not feel bound by the notes at the foot of the paper.

Mr. Hardin: We furnished the balance sheet with the notes which were thoroughly understood by the complainant.

Paper marked Exhibit C5.

Mr. Wollman: We wish to offer in evidence balance sheet of the defendant corporation of December 31, 1919, furnished to us by counsel for the defendant showing a surplus of undivided profits over and above reserve of $1,180,000.

Paper marked Exhibit C6.

Mr. Wollman: With reference to salaries I wish to offer resolution of the directors of January 16, 1919, fixing the salaries of the directors at a lump sum at one-half the net profits of the company.

Mr. Seligman (reading from page 198, Minute Book No. 3):

"On motion of Mr. Davey duly seconded by Mr. Dickson it was resolved that for the year beginning January 1st, 1919, the compensation of the directors, including the executive or general officers (but excluding the secretary and treasurer) be and is hereby fixed in the aggregate at one-half the profits of the corporation after payment of all losses and charges and expenses and after deduction of such reserve as the finance committee may deem it wise or necessary to make, being therefore, equal to the net profits of the corporation as defined in the certificate of incorporation, such compensation shall thereafter continue

until modified by the action of the board and such aggregate shall be subject to apportionment by the board and the board may also make regulations respecting time and manner of payment. Carried."

Mr. Wollman: Now, we offer resolution of March 6, 1919, two months after that, determining the percentages of division among the directors.

Mr. Seligman (reading from page 203, Minute Book No. 3):

"On motion of Mr. LaBoyteaux duly seconded it was resolved that supplementing the resolution passed at the meeting of the board held January 16, 1919, fixing the compensation of the directors for the period in said resolution stated, beginning January 1st, 1919, and ending December 31st, 1919, the compensation of the directors, including the executive or general officers but excluding the secretary and treasurer, be and is hereby fixed as follows, subject to change at any duly convened meeting of the board of directors: J. D. Barrett, $2,500. After deducting the foregoing amount the balance of the profits of the corporation available as directors' salaries shall be distributed as follows:

Jas. B. Dickson	2%.
W. H. Davidge	3 1/2%.
S. C. Hunter	3%.
W. R. Coe	12 1/2%
W. H. LaBoyteaux	17%.
G. V. Coe	17%.
J. A. H. Hopkins	6%.
W. H. Botsford	11%.
W. N. Davey	10%
H. W. Lowe	10%.
J. S. Keegan	8%.

"The percentages and salary above named being the aggregate amount voted at the meeting held January 16, 1919, as compensation of the directors including the general or executive officers (but excluding the secretary and treasurer). If the services of any of the above named directors shall be for shorter time than the full year, then his compensation shall be at the rate of 1/12th of the stated yearly compensation for each full month of service."

Mr. Wollman: Now, I wish to offer in evidence directors resolutions of January 5, 1920, distributing among these directors just named $750,000 on account of salaries for the year 1919.

Mr. Seligman (reading from page 235, Minute Book No. 3):

"Mr. G. V. Coe then offered the following preamble and resolution which was duly seconded by Mr. Botsford.

"Whereas the treasurer having reported that there are net profits available sufficient to make a distribution of $750,000 on account of directors' salaries,

"Resolved that the sum of $750,000 be distributed from the 1919 earnings of the corporation in pursuance of Article IV of the certificate of incorporation in payment on account of salaries of executive officers and directors (but excluding the secretary and treasurer), subject nevertheless to advances made to them on account of salaries and subject also to repayment by them to the treasurer of any sum which upon completed accounts for the twelve months shall be found to be in excess of the amount to which said officer or director is entitled. Carried."

Mr. Wollman: We offer in evidence resolution of February 18, 1920, directing an additional distribution of $952,754.35.

Mr. Seligman (reading from page 242, Minute Book No. 3):

"Mr. Davidge reported that at the finance committee meeting of February 17, 1920, it having been determined that the amount available for directors' salaries for the year 1919 was $952,754.35, it is recommended that the balance of such amount not yet distributed be distributed forthwith.

"Mr. Davey then offered the following preamble and resolution which was duly seconded.

"Whereas the accounts and books of the corporation having been closed show a balance available for directors salaries for 1919 of $952,754.35 as per resolution passed at the meeting held March 6, 1919.

"Resolved, that the treasurer be and hereby is instructed to distribute this amount forthwith in pursuance of Article IV of the certificate of incorporation in payment of salaries of executive officers and directors for the year 1919 (but excluding the secretary and treasurer) subject nevertheless to advances heretofore made to them on account of salaries. Carried."

Mr. Wollman: We now offer the resolution of January 21, 1920, fixing the directors' salaries at one-half the earnings of the company for 1920.

Mr. Seligman (reading from page 238, Minute Book No. 3):

"On motion of Mr. G. V. Coe duly seconded by Mr. Botsford it was resolved that for the year beginning January 1st, 1920, the compensation of the

directors including the executive or general officers but excluding the secretary and treasurer, be and is hereby fixed in the aggregate at one-half the profits of the corporation after payment of all losses and charges and expenses and after deduction of such reserves as the finance committee may deem it wise or necessary to make, being therefore equal to the net profits of the corporation as defined in the certificate of incorporation, such compensation shall thereafter continue until modified by the action of the board and such aggregate shall be subject to apportionment by the board and the board may also make regulations respecting time and manner of payment and

"Resolved, that for the year beginning January 1st, 1920, and ending December 31st, 1920, the compensation of the general or executive officers of the corporation, excluding the secretary and treasurer, be fixed as follows subject to change at any duly convened meeting of the board of directors by the unanimous vote of the directors present at such meeting: J. D. Barrett, $2,500. After deducting the foregoing amount the balance of one-half of the profits of the corporation as above provided shall be distributed as follows:

W. W. Curtin	None
W. H. Davidge	3.5
W. R. Coe	13.
W. H. LaBoyteaux	18.
G. V. Coe	18.
J. A. H. Hopkins	None
W. H. Botsford	12.5
W. N. Davey	11.5
H. W. Lowe	11.5
J. S. Keegan	9.5
H. B. Sexton	2.5

"The percentages and salary above named being the aggregate amount voted at this meeting as compensation of the board of directors including the general or executive officers (but excluding the secretary and treasurer). If the services of any of the above named directors shall be for shorter time than the full year, then his compensation shall be at the rate of 1/12th of the stated yearly compensation for each full month of service."

Mr. Wollman: All these minutes read are minutes of the directors. Now, we will read the minutes of the directors of February 18, 1920, authorizing the purchase of all preferred stock of the company out of the net profits at $115 per share.

Mr. Hardin: I would like to know the relevancy of that. I object. I do not think it is concerned in this controversy at all.

Mr. McCarter: One of the allegations we make here is that they are piling up a large surplus and not paying it in dividends. Then the question would come up whether they had a right instead of paying this out in dividends to pay it out for preferred stock. They are buying this in at $115 where the charter does not give them any power to do it.

Mr. Hardin: This is not a bill filed in the corporate right. It is a bill filed in the the individual right.

The Court: The moment the dividend is declared it is a debt owing by the company.

Mr. Hardin: Unquestionably.

The Court: I will let it in.

Mr. Seligman (reading from page 243, Minutes Book No. 3):

"On motion of Mr. Curtin duly seconded it was

"Resolved, that the executive officers of the corporation be and are hereby authorized and instructed to purchase for account of the corporation all of the preferred stock of the corporation which it may be offered by the holders thereof at a price of not exceeding $115 per share and accrued interest and that such of the net profits and/or the accumulated surplus of the corporation as may be required for the purchase or acquisition of the stock be used for that purpose. Carried."

The Court: What year?

Mr. Wollman: 1920.

Mr. Hardin: And subsequent to the bill.

The Court: It may become an issue, but it is not within the issue.

Mr. McCarter: The object we have in offering this resolution is to indicate, by the best proof, that they have this surplus attributable to dividends and instead of applying it to dividends they are purchasing, by resolution, since this suit was commenced, preferred stock at a sum not exceeding $115.

The Court: The bill does not seek to restrain that action.

Mr. McCarter: Not specifically.

Mr. Hardin: I call your Honor's attention to the part of the charter which I read to your Honor in my opening allowing the purchase of stock of the corporation by the corporation.

Mr. McCarter: That is our case.

COMPLAINANT RESTS.

The Court: Why the differentiation in percentage in salary to the directors? I notice some of the directors receive no salary—one or two. Is the large percentage because of service and the small percentage because they are not employed?

Mr. Hardin: They may not be employed to a sufficient extent to deserve in the judgment of the company larger salaries.

The Court: Are the large amounts because of greater service?

Mr. Hardin: Yes, or longer service in the business. In 1899 they started out and the relation which existed between them was as partners and as men go out or get older as a rule their percentages decrease and younger men come in at small percentages which advance until they get up to the top.

I am surprised that this case is to be tried without putting in the certificate of incorporation of the company or any matter which illuminates the description in the stock certificates, but by the methods that prevail I suppose it is impossible to take advantage of any lapse by the complainant in that regard.

The Court: Offer it yourself if you wish.

Mr. Hardin: I offer the certificate of incorporation of the defendant and the by-laws. I haven't a certified copy here, but if the printed book is satisfactory we will use that for both the certificate of incorporation and the by-laws.

Mr. McCarter: All right.

Printed book marked Exhibit D1.

Mr. Hardin: We have asked the complainant to produce his stock certificates. Are they here?

(Certificates produced.)

Mr. Hardin: We have, produced by the complainant pursuant to notice, stock certificates of the defend-

ant corporation standing in the name of Thomas J. Prindiville; Certificate No. 66, fifty shares, preferred stock, issued July 10, 1911; Certificate No. 80, twenty shares, preferred stock, issued January 23, 1912; Certificate No. 122, thirty shares preferred stock, issued January 14, 1913; Certificate No. 469, seven shares, common capital stock, in the name of Thomas J. Prindiville, dated February 19, 1913; Certificate No. 485, eighteen shares, common capital stock, dated February 27, 1913; Certificate No. 518, fifteen shares common capital stock, dated February 28, 1916; Certificate No. 519, seventeen shares, common capital stock, dated February 28, 1916; Certificate No. 520, thirty-three shares, common capital stock, dated February 28, 1916; and Certificate No. 531, twenty-five shares, common capital stock, dated November 22, 1917.

The Court: Are the certificates uniform?

Mr. Hardin: The certificates are uniform.

The Court: Common and preferred uniform?

Mr. Hardin: No; they are uniform with each other.

The Court: I suppose a copy of each should be written right into the record.

Mr. Hardin: I want to call your Honor's attention to the fact that, as I said, the preferred stock certificates are all similar in form, three of them, and the common stock certificates which I have offered in evidence just now are similar in form and they all bear endorsements printed thereon to this effect:

"This stock is reissued pursuant to the certificate of incorporation and by-laws of the corporation, and to a resolution of the Board of Directors duly adopted on the 18th day of December, 1912. The holder of this stock, when otherwise qualified, shall be entitled to receive such dividends as may be declared by the

corporation thereon after the 31st day of January, 1922."

And similar endorsements on the other certificates referring to other resolutions and other dates when dividends will commence.

The Court: Why 1922?

Mr. Hardin: Because there is a dividend certificate out against this stock during that time.

The Court: I see.

(Copy of preferred stock certificate):

"Number 80 20 Shares

"JOHNSON & HIGGINS

"Incorporated Under the Laws of the State of New Jersey.

"Capital Stock $1,000,000

"Perferred Stock $500,000 Common Stock $500,000

"This Is to Certify, That Thos. J. Prindiville is entitled to twenty shares of the preferred capital stock of Johnson & Higgins, transferable only on the books of the company by the holder thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

"The preferred stock shall be entitled to noncumulative dividends at the rate of not to exceed eight per cent per annum for each fiscal year ending on the thirty-first day of December, payable to the limit of eight per cent out of any and all net profits or out of any accumulated surplus, and before any dividends are set apart or paid upon the common stock.

"The preferred stock shall not be entitled to any other dividends.

"The holders of preferred stock shall not have the right to vote for directors or officers of the corporation, but shall have the right to vote upon all other matters properly coming before the stockholders.

"In the event of the dissolution of the corporation the holders of preferred stock shall be entitled to receive the par value of their preferred shares out of the funds and assets of the corporation before any payment shall be made therefrom to the holders of the common stock.

"Dated, Jersey City, N. J., January 23rd, 1912.

"W. R. COE,
"President.

"(Seal.)
"E. B. Schriver,
"Treasurer

(Endorsed):

"For value received hereby sell, assign and transfer unto
shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint
attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

"Dated,
"In the presence of

"Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever."

(Copy of common stock certificate):

"Number 485 18 Shares

"JOHNSON & HIGGINS

"Incorporated Under the Laws of the State of New Jersey.

"Capital Stock $1,000,000

"Preferred Stock $500,000 Common Stock $500,000

"This is to Certify, That Thos. J. Prindiville is entitled to Eighteen shares of the common capital stock of Johnson & Higgins, transferable only on the books of the company by the holder thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

"The common stock is subject to the prior rights of the holders of $500,000 of the preferred stock of the company as declared in the certificate of incorporation. In the event that any share or shares of the common stock of the corporation becomes the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation, actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared

upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them and with or without specific consideration (any consideration, however, to be the property of the corporation), but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends.

"Dated, Jersey City, N. J., February 27th, 1913.

"(Seal.)

"W. R. COE,
"President.

"E. B. Schriver,
"Treasurer."

(Stamped on face of certificate):

"This stock is reissued pursuant to the certificate of incorporation and by-laws of the corporation, and to a resolution of the Board of Directors duly adopted on the 18th day of December, 1912. The holder of this stock, when otherwise qualified, shall be entitled to receive such dividends as may be declared by the corporation thereon after the 31st day of January, 1922."

(Endorsed):

"For value received hereby sell, assign and transfer unto
shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint
attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

"Dated,

"In the presence of

"Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever."

Mr. Hardin: I next wish to offer in evidence minute book of Johnson & Higgins, No. 1, calling special attention now to the initial meeting—the first stockholders' meeting—held on the 13th day of June, 1899, with all the incorporators present and all the stock that was outstanding at that time which, it is stated in the minutes, had been fully paid in, page 20 of this book.

Book marked Exhibit D2.

Mr. Hardin: It shows the adoption of the by-laws by the stockholders and the election of eight directors. Next I call attention to the first meeting of the directors of the corporation, page 23 of this book, and election of officers.

The Court: Are you going to read something into the record?

Mr. Hardin: Yes, sir (reading from page 25, Minute Book No. 1):

"The president then stated that a communication had been received by him from the copartnership firm of Johnson & Higgins, looking toward the sale by said copartnership firm to this company of the business of said copartnership firm as insurance brokers, insurance agents, agents of underwriters and of insurance companies, adjusters of averages and their kindred business, all as conducted by them in New York and in other places (excepting the business as now conducted by said copartnership firm in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco), together with the accounts, good will and other assets of such business, for certain stock of the corporation, and that said copartnership firm had made or handed to him for submission to the directors of this company the following proposition in writing:

"'JOHNSON & HIGGINS

"'Average Adjusters and Insurance Brokers

"'No. 69 Wall Street

"'New York, June 14, 1899

"'To the Corporation of Johnson & Higgins, Organized under the laws of the State of New Jersey:

"'We propose to assign to you by proper instrument of transfer the business of our copartnership of Johnson & Higgins as insurance brokers, insurance agents, agents of underwriters and of insurance companies, adjusters of averages and our kindred business, all as conducted by us in New York and in other places (excepting our business as now conducted in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco), together with the accounts,

good will and other assets of such business, subject to such current liabilities of the business as may be deemed incidental thereto, in exchange for Two thousand four hundred and ninety (2,490) shares of your common capital stock of the par value of Two hundred and forty-nine thousand dollars ($249,000) and Five hundred (500) shares of your preferred capital stock of the par value of Fifty thousand dollars ($50,000) all stock to be full paid stock.

" 'If our proposition is accepted the transfer is to be made and the stock is to be issued on or before 30th day of June, 1899.

" 'Yours truly,

" 'JOHNSON & HIGGINS.'

"Which proposition having been considered by the directors, and the values therein expressed having been approved by the directors, it was on motion of Mr. Freeman, seconded by Mr. Patton, Jr.

"Resolved, That the proposition submitted by the copartnership firm of Johnson & Higgins be accepted, and that the officers of the company be authorized, empowered and directed to do any and all acts necessary to carry the same into effect, and to issue the stock of the company in payment for the property in said proposition mentioned."

The meeting then adjourned. The Board of Directors was then constituted and had nobody in it of the firm of Johnson & Higgins, making this proposition. There was then held a special meeting.

The Court: What is that?

Mr. Hardin: It was an independent board, this initial Board of Directors had nobody in it connected with Johnson & Higgins. The meeting I have just

read was held on the 14th day of June and on the 27th day of June there was a special meeting of the stockholders of the company consisting of the incorporators and persons to whom the shares had been assigned by the incorporators for qualification as directors. All of the stock was present at this stockholders meeting and at this meeting this action was taken (reading from page 28, Minute Book No. 1):

"The chairman then stated that the object of the meeting was as set forth in the waiver of notice upon file, to ratify the action of the Board of Directors of the Company at a meeting held on the 14th day of June, 1899, in accepting the proposition of the copartnership firm Johnson & Higgins for the transfer to the company of certain property, rights and good will in exchange for capital stock of this company, as set forth in the minutes of the said meeting of directors.

"The secretary submitted to the stockholders the said proposition of Messrs. Johnson & Higgins, and the action of the Board of Directors of the company thereon, Mr. King then offered the following resolution:

"Resolved, That the action of the Board of Directors of this company at a meeting held on the 14th day of June, 1899, in accepting the proposition of the copartnership firm of Johnson & Higgins for the transfer to the company of certain property rights and good will in exchange for capital stock of the company, as set forth in the minutes of said meeting of directors be, and the same hereby is, in all respects, approved and ratified.

"A vote being taken, there were cast in favor of the resolution ten votes, representing all the shares

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of the stock of the company issued and outstanding, and none in opposition thereto. Whereupon the chairman declared the resolution unanimously adopted."

I next direct attention to the minutes of the special meeting of the directors held the 30th day of June, 1899. This is still the original board before any substitutions had been made (reading from Minute Book No. 1, beginning on page 30):

"On motion of Mr. Freedman duly seconded, the directors by unanimous vote.

"Resolved that for the six months from July 1st, 1899, to January 1st, 1900, the compensation of the directors, including that of the executive or general officers, be and it hereby is fixed in the aggregate at one-half of the profits of the corporation after payment of all losses and of all charges and expenses of the year, being therefore equal to the net profits of the corporation as defined in the certificate of incorporation, and such compensation shall thereafter continue until modified by action of this board, and such aggregate shall be subject to apportionment by the board, and the board may also make regulations respecting the time and manner of the payment."

Your Honor may perhaps recall that it is word for word with the resolutions and actions taken in the years 1917 and 1918.

"The president reported that the copartnership of Johnson & Higgins had delivered to the corporation, an assignment of its assets and good will as contemplated by the proceedings at the last meeting of the directors, and the same was approved and ordered to be extended on the minutes, as follows:"

Then follows a copy of the bill of sale, the grantors being William Krebs, John D. Barrett, John H. Gourlie, James B. Dickson, Stephen Loines, William W. Curtin, W. E. Lowe and William Brockie, composing the copartnership of Johnson & Higgins.

The Court: Johnson & Higgins were not members.

Mr. Hardin: No, they were simply names. I find in the minutes a beautiful action of this corporation year after year paying a pension to Mr. Higgins, one of the founders. This was an old business, not a new business, at the time it was incorporated. The consideration named is $250,000 par value of 2,500 shares of common capital stock of the corporation, and 500 shares par value of preferred stock of the corporation.

The Court: Did the firm get all of the outstanding stock?

Mr. Hardin: All the authorized stock.

The Court: No, not authorized, issued stock.

Mr. Hardin: Yes, by transfer. You will note that there were eight members in that firm and there were eight directors. Now, in these minutes of this meeting of June 30, 1899, after the acceptance of the bill of sale and issuance of the stock to Johnson & Higgins we find the resignations of these original directors. First two of the original directors, Cornell and Fain, resigned and the board elected in their places Mr. John D. Barrett and John H. Gourlie and thereupon a resolution was passed as follows (page 32, Minute Book, No. 1):

"Resolved, that there be paid to Mr. Barrett for his compensation as director and general or executive officer of the Corporation Sixteen 75/100 (16 75/100) per cent of the aggregate amount heretofore voted as

the compensation of the Board of Directors (including general or executive officers) and that the treasurer of the corporation be, and he hereby is authorized to pay to Mr. Barrett $1,250.00 per month on account of such compensation, subject to his agreement to refund any payments which may prove excessive."

Your Honor will recall that they had at the initial meeting voted a salary of fifty per cent of the earnings. This appropriates of the half 16 75/100 to Mr. Barrett. There is an exactly similar resolution as to Mr. Gourlie, 16 75/100 per cent. Then after the passage of those resolutions Mr. Barrett and Mr. Gourlie entered the room and took their seats. Then Wilson and Freedman resigned in turn and in their places were elected Stephen Loines and William W. Curtin, two of Johnson & Higgins' partners and then resolutions were passed with reference to the compensation of Messrs. Loines and Curtin and Mr. Loines was given 16 75/100 of the aggregate amount, $1,250 per month drawing account and Mr. Curtin was given 10 per cent of the aggregate amount with a drawing account of a thousand dollars per month. Then Mr. Loines and Mr Curtin entered the room and took their seats. Then Notman and Patton resigned as directors and in their places William E. Lowe and William Brockie were elected, two of the Johnson & Higgins partners, and a motion was passed fixing the compensation of Mr. Lowe at 10 per cent of the aggregate amount theretofore voted by the Board of Directors with a drawing account of a thousand dollars a month, and Mr. Brockie eight per cent of the aggregate amount theretofore voted for directors with a drawing account of a thousand dollars a month. Mr. Brockie and Mr. Lowe then entered the room. Then Mr. Larkin and

Mr. VanBrunt presented their resignations and Mr. Larkin's retirement called for a new presiding officer and Mr. Barrett took the chair. Then in the place of the last two resigning directors Mr. William Krebs and Mr. James Dickson, the two remaining partners, and completing the eight members of Johnson & Higgins, were elected and the board resolved that Mr. Krebs should have five per cent of the aggregate amount, with a drawing account of $833.33 per month and Mr. Dickson should have 16 75/100 per cent with a drawing account of $1,250 per month. Then they proceeded to elect new officers in the place of those whose offices had been vacated by the retiring directors and Mr. William Krebs was made president of the board. Then they resolved to have seven vice presidents and the vice presidents so elected were Mr. Barrett, Mr. Gourlie, Mr. Dickson, Mr. Loines, Mr. Curtin, Mr. Lowe and Mr. Brockie. This business was departmental and these men represent various heads in the organization. Mr. Dickson was elected treasurer and Mr. Loines was elected secretary. They started with $250,000 of preferred stock and $250,000 of common stock authorized and they issued all the common stock but only issued $50,000 of the preferred stock.

Now, on page 37, after this board had been reorganized, we find the following resolution:

"Upon motion of Mr. Gourlie duly seconded it was unanimously

"Resolved that the following be adopted as the form of dividends certificate provided for in the Fourth Article of the certificate of incorporation, such dividends certificate be in one principal section, with nine

coupon sections the body of the principal section to read as follows:

"No. Shares

"Johnson & Higgins.
"Dividends Certificate.

"This Is to Certify that
or the registered owner of this certificate is entitled to receive any dividends that may be declared by the corporation in respect of shares of the common stock of the corporation on or after this date and prior to the day of 19 , the stock referred to in this certificate having been surrendered and this certificate having been issued pursuant to the Fourth Article of the certificate of incorporation and pursuant to the by-laws of the corporation.

"This certificate is transferable only upon the books of the company by the holder thereof, or by duly authorized attorney, upon surrender of this certificate properly endorsed.

"In Witness Whereof, the corporation has caused this certificate to be signed by its president or vice president and its corporate seal duly attested to be affixed in the City of New York this day of , 19 .

"JOHNSON & HIGGINS,
"By

"President.

"Attest:
"Secretary."

Then at the same meeting, on page 38, is this resolution:

"Upon motion of Mr. Gourlie duly seconded, it was then unanimously

"Resolved, that the following be adopted as the words to be written or stamped upon the face of each certificate of common stock reissued after surrender as provided in the Fourth Article of the certificate of incorporation, to wit: 'The holder of the shares of stock represented by this certificate shall be entitled to receive only such dividends as may be declared by the corporation in respect thereof on or after the day of , 19 .'"

Then there are sundry amendments to the by-laws as originally adopted, none of which seem to affect the sense of the articles. The minutes are in evidence and if I am wrong about that I can easily be corrected.

Then there were resolutions passed allotting the right to subscribe for preferred stock to the then stockholders, that is the authorized preferred stock that was taken up by the sale.

Now, Book 2 of the minutes, page 235. This book is already in evidence. Minutes of the meeting of February 15, 1911. The minutes begin on page 234. On page 235:

"Mr. Davidge reported that the committee on distribution of retired stock recommends the distribution of 325 shares of common stock now standing in the name of the treasurer of Johnson & Higgins as trustee, which was received from the estate of William Brockie"—

You will recall he was one of the members of the original firm of Johnson & Higgins and came in as a stockholder at the beginning:

"Said distribution to be on a pro rata basis to the holders of common stock (as of record February 15th, 1911), now actively engaged in the service of the corporation—its officers, directors or employees."

And the committee recommended that no action at that time be taken as to distribution of 175 shares of common stock received from the estate of William Brockie. They had 175 shares left that was not affected at that meeting.

I now refer to the meeting of the corporation held Wednesday, June 21, 1911, found in Minute Book No. 2, page 252. Mr. Prindiville, as already appears from complainant's case, had been elected a director prior to that time and he was present at this meeting.

"Mr. Barrett on behalf of the advisory committee reported that the 175 shares of the common stock the corporation received from the estate of Wm. Brockie which the board at the May meeting instructed should be distributed pro rata to common stockholders of record as of May 16th had been distributed as follows: J. D. Barrett three shares, S. Loines two shares, Jas. B. Dickson two shares, W. W. Curtin twenty shares"—

And so on through the list.

The Court: Mr. Prindiville's name does not appear there as a distributee.

Mr. Hardin: No. He was present at the meeting. This was a distribution which had been arranged before he came into the corporation, back in February.

Page 254; same meeting, we find this:

"On motion of Mr. Hopkins duly seconded it was

"Resolved that T. J. Prindiville, having been elected a director of the corporation, his percentage of salary be fixed at 3.10 per cent of the entire amount heretofore allotted by the board to directors' salaries, and for the full period beginning January 1st, 1911, and ending December 31st, 1911, also

"Resolved, that inasmuch as this allotment of 3.10 per cent will necessitate a rearrangement of the salary percentages of all directors for the year 1911, the percentage agreed upon at the meeting held January 18th, 1911, be revised. Such revised percentages being as below mentioned."

And then they are all set forth and Mr. Prindiville appears as 3.10 per cent. That was June 21st, 1911, the very first meeting Mr. Prindiville attended after he came in, and the salary percentages for the year 1911 had been fixed by resolution in January. They took him back to the beginning and gave him the percentage for the full year and readjusted the other percentages, which meant a surrender on the part of some of the rest to fit the plan. And after a recital of the various percentages the resolution goes on—

"The percentages above named being of the aggregate amount voted as compensation of the Board of Directors, including the general or executive officers, but excluding the secretary and treasurer at the January meeting of the board.

"If the service of any of the above-named directors shall be for shorter time than the full year, then his compensation shall be at the rate of one-twelfth

of the stated yearly compensation for each full month of service, excepting as to Mr. T. J. Prindiville, who shall receive full benefit of his agreed percentage for the period begun January 1st, 1911, to May 17th, 1911, during which time the details of his election to the board were being arranged."

Took care of him regardless of the fact that he was not one of their board during the interval from the early part of the year.

"Resolved, also that the provision as to monthly payments to directors shall remain as per resolutions adopted at the meetings of January 18th, 1911, and May 17th, 1911. Carried unanimously."

Your Honor asked me about the authorized stock at the beginning and the amount that was issued to the members of the firm of Johnson & Higgins for the business. Your Honor appreciates during that interval since the organization of this organization there have been amendments to the charter, all of which are supported by minutes and about which I imagine there is no controversy, accomplished in a lawful way from time to time until the authorized stock at the present time is more than that authorized at the beginning.

The Court: Authorized or issued?

Mr. Hardin: Both. All of which appears by the minutes and can be backed up if desired, but it seems a waste of time.

The Court: The amendments appear on pages 1 and 2 of this exhibit.

Mr. Hardin: There is a little historical statement showing dates and details of the amendments.

I next refer to the meeting of December 28, 1911, beginning on page 268, and I make special reference to the bottom of page 271:

"On motion of Mr. Davidge duly seconded by Mr. Curtin it was resolved that a committee of four be appointed by the chair to take under advisement the matter of apportionment among the directors and the officers of the allotment which may be voted by the board out of the net earnings for the year 1912, to cover salaries of directors and officers, and report its views at the regular monthly meeting of the Board in January, 1912. Carried.

"The chairman thereupon appointed as the above committee Mr. Davidge, Mr. Hunter, Mr. LaBoyteaux, Mr. H. W. Lowe."

Mr. Prindiville was present at that meeting at which this committee was appointed for that purpose.

On January 17, 1912, Minute Book No. 2, page 274, the committee reported. Mr. Prindiville was present at the December meeting at which the committee was appointed, but I do not think he was present at this meeting but he took the salary all right. At page 275 is this report:

"On motion of Mr. Davidge duly seconded by Mr. Curtin it was Resolved that for the year beginning January 1st, 1912, the compensation of the directors, including the executive or general officers but excluding the treasurer and secretary, be and is hereby fixed in the aggregate at one-half the profits of the corporation, after payment of all losses and charges and expenses and after deduction of such reserves as the finance committee may deem it wise or necessary to make, being therefore, equal to the net profits of the corporation as defined in the certificate of incorporation, and such compensation shall thereafter continue until modified by the action of the board; and

such aggregate shall be subject to apportionment by the board and the board may also make regulations respecting time and manner of payment, and

"Resolved, that for the year beginning January 1st, 1912, and ending December 31st, 1912, the compensation of the general or executive officers of the corporation, excluding the treasurer and secretary, be fixed as follows, subject to modification at any duly convened meeting of the Board of Directors by the unanimous vote of the directors present at such meeting.

"To J. D. Barrett,	$2,500
"To Stephen Loines,	2,500
"To William E. Lowe,	2,500

"After deducting the foregoing amounts, the balance of one-half of the profits of the corporation, as above provided for, shall be distributed as follows:

"Jas. B. Dickson	3%
W. W. Curtin	5 3/4%
W. H. Davidge	9 1/2"
S. C. Hunter	9 "
W. R. Coe	18 1/4"
W. H. LaBoyteaux	12.2 "
G. V. Coe	13.7 "
J. A. H. Hopkins	9.5 "
W. H. Botsford	5 "
W. N. Davey	5 "
H. W. Lowe	5 "
T. J. Prindiville	4.10 ""

The Court: That is his initial—

Mr. Hardin: Second year. He was in in 1911, this is 1912.

"The percentages and salaries above named being the aggregate amount voted as compensation of the Board of Directors, including the general or executive officers (but excluding the treasurer and secretary) at this meeting. If the services of any of the above-named directors shall be for shorter time than the full year, then his compensation shall be at the rate of 1/12th of the stated yearly compensation for each full month of service, and, Resolved, that the treasurer of the corporation be and is hereby authorized to pay each of the following the sums set opposite their names respectively each month on account of such compensation, subject however, to an agreement from each director or general or executive officer to refund any portion thereof which may prove excessive."

Then follows a list of the drawing account allowed each one and Mr. Prindiville's drawing account is $800 and the largest is $3,000 to Mr. W. R. Coe, who also got the largest percentage of the profits. The committee on percentages then asked to be discharged and on motion they were discharged. I understood your Honor's question as to "initial" that you meant as to Mr. Prindiville. Of course your Honor understands the language I have been reading is almost word for word with the language in the initial meeting of the corporation.

The Court: When I made the remark I meant that was the initial meeting at which Prindiville was present.

Mr. Hardin: Yes. I had also been talking about the initial meeting of the corporation. An exactly similar resolution has been passed all the way down the line. I am going to put them in later but just now I haven't the intervening years.

Next we come to page 285, Minute Book No. 2. It appears that Mr. Prindiville had been elected to fill a vacancy. I do not know the exact date of the annual meeting.

The Court: What was he prior to that? Was he not a director prior to that time?

Mr. Hardin: Yes, but to fill a vacancy which expired at that time. The directors were classified and so many elected each year for a period of three years, and when Mr. Prindiville came in he came in by election of the directors and was to serve until the date of the next annual meeting, as provided in the by-laws. At the next annual meeting he was elected to fill a vacancy which had not expired, so he had served as director from prior to the annual meeting of 1911, having been originally elected by the directors, and then in 1911 he had been elected for a year and now he comes in to a regular class.

The Court: Has the Board been increased in number?

Mr. Hardin: Since the original eight, yes. I will take up the details of that later. They had gotten up to 15, I think, at this time. The number since, I think, has been reduced somewhat.

On December 18, 1912, Volume 2 of the minutes, page 303, we find a report of the advisory committee recommending that 446 of the 946 preferred shares of the corporation still unissued be sold, and the committee also recommended the distribution of 211 shares of common stock, now standing in the name of the treasurer of Johnson & Higgins as trustee, which stock was turned in by John D. Barrett and others, said distribution to be on a pro rata basis to the holders of common stock as of record of January 14, 1913,

then actively engaged in the service of the corporation, its officers, directors or employees.

At the same meeting of December 18, 1912, we find the following resolution at page 306, Volume 2.

"Resolved, that the recommendation of the Advisory Committee that the 211 shares of common stock now standing in the name of the treasurer of Johnson & Higgins as trustee, which were received from

John D. Barrett,	61 shares
Jas. B. Dickson	50 "
Stephen Loines,	50 "
William E. Lowe,	50 "

be distributed, said distribution to be on pro rata basis to the holders of common stock as of record January 14th, 1913, then actively engaged in the service of the corporation, its officers, directors or employees, be adopted, and that the Advisory Committee proceed with such distribution with instructions to report the details of the distribution at the next meeting of the Board. Carried."

The next meeting of the Board was held January 15, 1913, and begins on page 308, Volume 2, of the minutes:

"Mr. Dixon, on behalf of the Advisory Committee, reported that the two hundred and eleven (211) shares of the common stock of the corporation, received from

J. D. Barrett,	61 shares
J. B. Dickson,	50 "
Stephen Loines and W. E. Lowe	50 "

which the Board at the last December meeting instructed should be distributed pro rata to 'Common stockholders of record as of January 14th, 1913,' had been distributed as follows:

J. D. Barrett,	3	shares
J. B. Dixon,	3	"
Stephen Loines,	3	"
W. W. Curtin,	24	"
W. E. Lowe,	3	"
W. H. Davidge,	24	"
S. C. Hunter,	24	"
W. R. Coe,	21	"
W. H. LaBoyteaux,	23	"
Geo. V. Coe,	27	"
J. A. H. Hopkins,	20	"
E. J. Shriver,	2	"
H. R. Howard,	1	"
W. H. Botsford	11	"
W. N. Davey,	9	"
H. W. Lowe,	6	"
T. J. Prindiville,	7	shares"

The Court: Was the original issue divided among the co-partners?

Mr. Hardin: Yes; all the common stock has always been held by active people.

The Court: What about the preferred?

Mr. Hardin: Not always that way. It is investment stock, and when these men have gone out, they kept their preferred stock often as an investment or to dispose of any way they pleased.

The Court: That they had a right to do.

Mr. Hardin: It had no voting power. It was merely investment stock. The common stock repre-

sented the life of the corporation. It was a closed body that was operating this business.

The Court: Was the original issue divided equally between these parties or according to their interests?

Mr. Hardin: No, according to their interests.

At that same meeting this resolution was passed, beginning at the bottom of page 309, Volume 2:

"On motion of Mr. Davidge, duly seconded by Mr. Curtin, it was Resolved that for the year beginning January 1st, 1913, the compensation of the Directors, including the executive or general officers, but excluding the treasurer and secretary, be and is hereby fixed in the aggregate at one-half the profits of the corporation after payment of all losses and charges and expenses, and after deduction of such reserves as the Finance Committee may deem it wise or necessary to make, being therefore, equal to the net profits of the corporation as defined in the certificate of incorporation and such compensation shall thereafter continue until modified by the action of the Board. And such aggregate shall be subject to apportionment by the Board, and the Board may also make regulations respecting time and manner of payment, and

"Resolved, that for the year beginning January 1st, 1913, and ending December 31st, 1913, the compensation of the general or executive officers of the corporation, excluding the treasurer and secretary, be fixed as follows, subject to modification, at any duly convened meeting of the Board of Directors, by the unanimous vote of the Directors present at such meeting.

To J. D. Barrett,	$2,500
Stephen Loines,	2,500
W. E. Lowe,	2,500

after deducting the foregoing amounts, the balance of one-half of the profits of the corporation as above provided for shall be distributed as follows."

Then follows the percentages and Mr. Prindiville's percentage for the year 1913 was 4.60 per cent.

"The percentages and salaries above named being the aggregate amount voted at this meeting as compensation of the Board of Directors, including the general or executive officers (but excluding the treasurer and secretary). If the services of any of the above-named Directors shall be for shorter time than a full year, then his compensation shall be at the rate of 1/12th of the stated yearly compensation for each full month of service and

"Resolved, that the treasurer of the corporation be and hereby is authorized to pay each of the following the sums set opposite their names respectively, each month on account of said compensation, subject, however, to an agreement from each Director or general or executive officer to refund any portion thereof which may prove excessive."

And the drawing account as far as Mr. Prindiville was concerned, was $1,200 a month.

Page 316, Volume 2:

"Mr. Davidge offered the following preamble and resolution which was duly seconded by Mr. Loines:

"Whereas, two hundred shares (200) of common stock of the corporation, standing in the name of W. W. Curtin, have been transferred into the posses-

sion of Wilfrid H. Robertson, who is not an officer, director or employee of the corporation, who is desirous of obtaining a retirement certificate for the same as provided for in Article IV of the certificate of incorporation, be it

"Resolved that the treasurer of the corporation is hereby authorized and instructed to transfer the said two hundred (200) shares of common stock to the treasurer of the corporation as trustee, and to issue a retirement certificate for the same to Wilfrid H. Robertson. Carried."

Every time a man would go out you would find a resolution of that sort.

Mr. McCarter: Why do you say he had gone out, Mr. Hardin?

Mr. Hardin: He had parted with some of his stock. He may not have gone out, but whenever they parted with their stock they had to—this is done to prevent the sale of stock.

Mr. McCarter: I simply want to call your attention to the fact that he did not go out, and we desire to call your Honor's attention to the fact that it is a case of this man desiring this thing. It was not compulsory.

Recess.

Mr. Hardin: Your Honor will remember as we were adjourning, I had just read a minute referring to the surrender of 200 shares of common stock standing in the name of W. W. Curtin, and for the purpose of illustrating how the stock was surrendered and

the dividend certificate went out, I would like to show your Honor this. I have here Mr. Zimmer, if they want him called, for the purpose of identifying this stock book.

Mr. McCarter: No.

Mr. Hardin: Here is certificate 491 in the name of W. W. Curtin, for 200 shares, common stock certificate in the ordinary form. This is the stock certificate which was surrendered and contemporaneously there was a retirement certificate, according to the minute book, in the name of Wilfrid H. Robertson, retirement certificate No. 71, shown on the stub, covering 200 shares of stock certificate No. 491. I suppose that we can take out one of these certificates to get the form.

The Court: Offer the certificates.

Mr. Hardin: I offer in evidence original stock certificate 491 in the name of W. W. Curtin, dated March 17, 1903, being certificate No. 491, with transfer from Curtin to Wilfrid H. Robertson, and dividend certificate No. 71 for 200 shares in the name of Wilfrid H. Robertson, identified with stock certificate No. 491.

Papers marked Exhibits D3 and D4.

Mr. Hardin: I now refer to minute book No. 2, page 341, minutes of the meeting of January 21, 1914:

"On motion of Mr. Davidge, duly seconded by Mr. H. W. Lowe, it was

"Resolved, that for the year beginning January 1st, 1914, the compensation of the directors, including the executive or general officers, but excluding the treasurer and secretary, be and is hereby fixed in the ag-

gregate at one-half the profits of the corporation after payment of all losses and charges and expenses, and after deduction of such reserves as the Finance Committee may deem it wise or necessary to make, being therefore equal to the net profits of the corporation as defined in the certificate of incorporation, and such compensation shall thereafter continue until modified by the action of the Board; and such aggregate shall be subject to apportionment by the Board and the Board may also make regulations respecting time and manner of payment, and

"Resolved, that for the year beginning January 1st, 1914, and ending December 31st, 1914, the compensation of the general or executive officers of the corporation, excluding the treasurer and secretary, be fixed as follows, subject to modification at any duly convened meeting of the Board of Directors by the unanimous vote of the directors present at such meeting:

"To J. D. Barrett,	$2,500
Stephen Loines,	2,500
W. E. Lowe,	2,500

"After deducting the foregoing amounts the balance of one-half of the profits of the corporation as above provided shall be distributed as follows:

Jas. B. Dickson,	3.
W. W. Curtin,	5.
W. H. Davidge,	8.
S. C. Hunter,	8.50
W. R. Coe,	12.20
W. H. LaBoyteaux,	13.25
G. V. Coe,	14.75

J. A. H. Hopkins,	10.60
W. H. Botsford,	6.10
W. N. Davey,	6.50
H. W. Lowe,	6.50
T. J. Prindiville,	5.60,

the percentages and salaries above named being the aggregate amount voted at this meeting as compensation of the Board of Directors, including the general or executive officers (but excluding the treasurer and secretary.) If the services of any of the above-named directors shall be for shorter time than the full year, then his compensation shall be at the rate of 1/12th of the stated yearly compensation for each full month of service."

And then follows the usual table of monthly drawings which as to Mr. Prindiville was $1,250 a month.

Mr. McCarter: We are prepared to say that down to the year 1919 exactly the same set of resolutions were passed yearly. In 1919 they were passed, but at separate meetings, one in January and the other in March, and therefore it seems to us unnecessary to go through all this unless your Honor desires it. We concede that.

The Court: You might give Mr. Prindiville's percentages. I suppose they were changed—increased, or you may read into the record the percentages of all.

Mr. Hardin: I have prepared a map which, when the time comes, I want to submit to your Honor, from 1899 to date, of all the percentages, not only Mr. Prindiville, but everybody else.

The Court: Take up the year 1915 now.

Mr. Hardin: There are other things besides the percentages that I am interested in.

The Court: Go on your own way, except that you need not read the whole resolution.

Mr. Hardin: I understand. On page 347, minute book No. 2, it appears that 50 shares of common stock standing in the name of W. W. Curtin, having been transferred to the possession of Robertson, who was not an officer or director or employee, who is desirous of obtaining a retirement certificate for the same as provided in Article IV of the certificate of incorporation; be it

"Resolved, that the treasurer of the corporation is hereby authorized and instructed to transfer the said 50 shares of common stock to the treasurer of the corporation, as trustee and to issue a retirement certificate for the same."

The one we have already in evidence related to 200 shares of the Curtin stock. This relates to 50 shares of the Curtin stock.

Mr. McCarter: Have you the dividend certificate for that?

Mr. Hardin: It is in the book, if you would like to see it.

At the annual meeting held Wednesday, May 6, 1914, Mr. Prindiville was elected director for the term of three years.

I offer in evidence shareholders' minute book.

Book marked Exhibit D5.

Mr. Hardin: Volume 3 of the minutes, page 28, directors' meeting of January 20, 1915, we find a resolution as to the retirement of 50 more shares of the common stock of Curtin which had been transferred out of his name to Wilfrid H. Robertson, who was not an officer, director or employee of the corporation, and a retirement certificate authorized.

Now in the minute book, meeting of February 25th, 1915, beginning on page 29, Volume 3, you will find the usual resolution about the percentages and appropriation of salaries and the ascertainment of the percentages from which it appears Mr. Prindiville's percentage for the year 1915 was 5 66/100 per cent, and he had a drawing account of $1,250 per month.

The Court: Read all the percentages.

Mr. Hardin (reading): "Jas. B. Dickson, 3; W. W. Curtin, 3.80; W. H. Davidge, 7; S. C. Hunter, 7.50; W. R. Coe, 11.70; W. H. LaBoyteaux, 13.25; G. V. Coe, 14.75; J. A. H. Hopkins, 11; W. H. Botsford, 7.10; W. N. Davey, 7.80; H. W. Lowe, 7.50; T. J. Prindiville, 5.66."

Mr. McCarter: Is there any objection to my calling the Vice Chancellor's attention to the fact that appears on the back of that dividend certificate issued to Mr. Curtin?

Mr. Hardin: Not at all.

Mr. McCarter: Your Honor will recall that the resolution recites, Whereas, Curtin has retired, and all that, and that Robertson was not connected with the company, the certificate is issued. Now, the certificate produced that was issued to Robertson because of his not being connected with the company, appears on the back the very next day to have been registered in Mr. Curtin's name, so that this stranger to us wasn't as strange as it would seem to be.

Mr. Hardin: The only stranger was Mr. Prindiville, apparently.

Minutes book 3, page 64, monthly meeting of the directors of January 19, 1916:

"For the Advisory Committee, its chairman reported the recommendation of the Committee that 408 shares

of common stock now standing in the name of the treasurer of Johnson & Higgins, as trustee, which stock was received

400 shares from W. W. Curtin,

8 shares from E. J. Schriver,

be distributed, said distribution to be on pro rata basis to the holders of common stock as of record January 18, 1916, then actively engaged in the service of the corporation, its officers, directors or employees."

On page 68 appears:

"On motion of Mr. H. W. Lowe, duly seconded, it was

"Resolved, that the recommendation of the Advisory Committee that the 408 shares of common stock now standing in the name of the treasurer of Johnson & Higgins as trustee, which were received, 400 shares from W. W. Curtin, and 8 shares from E. J. Schriver, be distributed, said distribution to be on pro rata basis, to the holders of common stock as of record January 18, 1916, then actively engaged in the services of the corporation, its officers, directors or employees, be adopted, and that the Advisory Committee proceed with such distribution with instructions to report the details of the distribution at the next meeting of the Board."

At the same meeting there is the usual resolution about the appropriation of half the net profits for compensation and distribution of salaries. Would you like to have the percentages? In which it appears the percentages for the year 1916 were as follows: "Jas. B. Dickson, 2 per cent; W. W. Curtin, none; W. H. Davidge, 6.6; S. C. Hunter, 6.5; W. R. Coe,

11.4; W. H. LaBoyteaux, 15.25; G. V. Coe, 15.25 per cent; J. A. H. Hopkins, 12; W. H. Botsford, 7.1; W. N. Davey, 7.8; H. W. Lowe, 7.5; T. J. Prindiville, 5.6; J. S. Keegan, 3."

The drawing account, so far as Mr. Prindiville is concerned, is $1,500 per month and the minutes show that Mr. Prindiville was present at that meeting.

At the meeting held on February 16, 1916, book 3, page 73:

"For the Advisory Committee, Mr. Dickson reported that pursuant to the direction of the Board and by virtue of mesne assignment of the common stockholders, the distribution of the 408 shares of common stock has been accomplished in accordance with the understanding and agreement of the common stockholders."

The Court: Does the report show who got the stock?

Mr. Hardin: The report does not. The minutes that I have just read shows the accomplishment of the distribution of 408 shares and there is an original paper which I am going to offer in evidence which reads as follows:

"For and in consideration of value received, we, the undersigned stockholders of record as of January 8th, 1916, of the corporation of Johnson & Higgins, and entitled to pro rata participation in 408 shares of common stock to be distributed as authorized by the Board of Directors, at a meeting of the corporation on January 19th, 1916, hereby waive all our rights to a pro rata distribution of said stock and hereby authorize and direct that said distribution be made among the

certain below-mentioned stockholders and on the basis below appearing, viz:

W. H. LaBoyteaux,	80	shares,	dividend bearing	in	1923.
George V. Coe,	40	"	"	"	1923.
J. A. H. Hopkins,	29	"	"	"	1923.
W. H. Botsford,	4	"	"	Dec. 1,	1918.
" " "	4	"	"	in	1919.
" " "	51	"	"	in	1923.
" " "	5	"	"	in	1924.
Thomas J. Prindiville,	15	"	"	"	1924.
" " "	17	"	"	"	1925.
" " "	33	"	"	"	1926.
Henry W. Lowe,	15	"	"	"	1924.
" " "	17	"	"	"	1925.
" " "	33	"	"	"	1926.
W. N. Davey,	15	"	"	"	1924.
" " "	16	"	"	"	1925.
" " "	34	"	"	"	1926.

and the executive officers are hereby authorized, empowered and directed to make such distribution accordingly. It is agreed that a copy of this waiver be filed with the records of the corporation.

In witness whereof we have hereunto set our hands and seals this 21st day of January, 1916."

That is the agreement among the common stockholders for the distribution of that stock, signed by Mr. Prindiville.

I offer that in evidence.

Paper marked Exhibit D6.

The Court: How did they get new blood in?

Mr. Hardin: Keegan, for instance. The last resolution read brings a man named Keegan in.

The Court: How did he get in?

Mr. Hardin: Just as you pick up a new partner.

The Court: Did he have to contribute?

Mr. Hardin: He had to acquire 50 shares of stock.

The Court: From whom?

Mr. Hardin: From the corporation.

Mr. McCarter: Is this the corporation or co-partnership?

Mr. Hardin: Yes, corporation. At this meeting of January 19, 1916, minute book 3, page 64, there is a meeting at which this distribution of stock, 408 shares to which I referred was ordered on the pro rata basis. Mr. Coe, who was then president, retired from the presidency and became chairman of the Board. On page 69 appears this letter:

"January 18, 1916.

Mess. Johnson & Higgins,
New York City.

Dear Sirs:

I propose to sell and deliver to you all my interest in the various insurance and adjusting accounts secured and/or controlled by me, against which you have heretofore been allowing me a stated compensation per annum, and to sell you also all my good will in such accounts not already acquired by you.

This I agree to do in exchange for the sum of $5,000 in cash or at my option $5,000 par value of your common capital stock.

Yours truly,
JNO. S. KEEGAN."

"On motion of Mr. LaBoyteaux, duly seconded by Mr. Hunter,

"Whereas, in the judgment of the Board of Directors the value of the various insurance and adjusting accounts, good will and property to be acquired by the corporation from Mr. Keegan under his proposition of January 18th, 1916, fully equals the sum of $5,000,

"Resolved, that said proposition be and the same hereby is accepted by the corporation; and further

"Resolved, that the executive officers of the corporation be and they hereby are authorized, empowered and directed to do all or any of the acts or things necessary, convenient and proper to carry into effect the said proposition and its acceptance, and in the event that the said J. S. Keegan elects to receive payment in cash to pay the sum of $5,000 to him in cash, and in the event that he elects to take common capital stock of the corporation to the extent of $5,000 par value, instead of cash, to issue such stock to him in payment of said insurance and adjusting accounts, good will and property under said proposition. Carried.

"The secretary then read the following letter:

" 'January 19, 1916.

Mess. Johnson & Higgins,
New York City.

Dear Sirs:

I hereby transfer to you all my right, title and interest in and to the various insurance and adjusting accounts secured and/or controlled by me, against which you have been heretofore allowing me a stated compensation per annum, and I hereby transfer and

assign to you my entire good will not already so transferred and assigned in consideration of the delivery to me of 50 shares of your common stock.

Yours truly,

JNO. S. KEEGAN.'

"The treasurer then appeared and reported that in accordance with the request of Mr. Keegan there had been issued to him a certificate for 50 shares of the common stock of the corporation.

"The chairman announced that Mr. Keegan having secured the common stock shares necessary for qualification as a director of the corporation, was eligible for the existing vacancy and might be elected at this meeting but only for the term until the next annual meeting of the stockholders occurs. He asked the pleasure of the Board.

"Mr. Keegan was thereupon nominated by Mr. Dickson and seconded by Mr. Loines.

"There being no further nominations, the chairman declared the nominations closed, and on motion, duly seconded and carried, it was

"Resolved, that the secretary cast one ballot for Mr. J. S. Keegan for director to fill the existing vacancy and until the next annual meeting of stockholders in May, 1916.

"The secretary cast the ballot and the chairman declared Mr. J. S. Keegan duly elected a director.

"Mr. Keegan being present, took his seat on the Board."

That is the way they got their young men in.

The Court: Yes, but when the authorized capital stock is exhausted, what then?

Mr. Hardin: Oh, they always had stock. Still

got stock. Death and old age has taken away a lot of men who were active in this business.

The Court: Then their stock is returned to the corporation?

Mr. Hardin: Yes, sold again, reissued.

The Court: Not sold, but handed over to the people remaining.

Mr. Hardin: Call it what you may, it has been handled in the way that the certificate of incorporation said it should be handled.

The Court: I am not criticizing that, but it seems to me that after the death of nine out of ten, the tenth director owns the company, under their scheme.

Mr. Hardin: Of course, that is not the case. I don't know exactly what is in your Honor's mind, but what happens is, as a director retires, the stock itself, subject to the dividends certificate for ten years, goes back to the corporation and lays in the corporate treasury, and presently it is reissued to somebody else.

The Court: Not somebody else, but members of the concern that are stockholders.

Mr. Hardin: The then members, that was the practice. The articles merely gave authority for its reissue. Every time it went out, it went out pro rata to all the existing common stockholders, or if they departed from the pro rata arrangement, it was by agreement among themselves and the new directors that had come in participated in that distribution.

The Court: They only got in by having new stock issued to them.

Mr. Hardin: In consideration of their worth to the concern.

The Court: New stock, but none of the old retired stock.

Mr. Hardin: Not necessarily. I haven't made the analysis. I think it may be found that it was not always new stock. It didn't make any difference. The stock, when it got back, minus the dividend privilege, could be issued by the corporation under any conditions that it wanted. They could sell it if they wanted to. It was an asset of the corporation.

The Court: Sell it to an outsider?

Mr. Hardin: Couldn't sell it to an outsider, because it would immediately be subject to the dividends certificate and have to be turned right back. All the new men that came in, with a few exceptions like Mr. Prindiville, who got in by the purchase of his interest in Prindiville & Co.—there have been other instances where men came in in like manner by transferring their business to the corporation and got common stock for it—but ordinarily new blood that has been brought in has been brought in from the organization itself; men who have been trained in the corporation and have reached a stage where they could not be retained—had the good will of accounts that they controlled which made it worth while to attach them to the corporation and those men were brought into the corporation by the stock method we have been describing in the case of Mr. Keegan.

Now, in Volume 3 of the minutes, page 104, meeting of January 17, 1917, we have the committee's report as to the apportionment of the directors' salaries for the year beginning January 1, 1917, and ending December 31st, 1917. The percentages were as follows:

"James B. Dickson, 2 per cent; W. W. Curtin, none; W. H. Davidge, 6.4; S. C. Hunter, 6.3; W. R. Coe, 10.5; W. H. LaBoyteaux, 15; G. V. Coe, 15; J. A.

H. Hopkins, 12; W. H. Botsford, 8.5; W. N. Davey 7.8; H. W. Lowe, 7.5; T. J. Prindiville, 6; J. S. Keegan, 3."

I am reading now from the report of the committee set forth in the minutes of the meeting of that date, page 105. A committee was appointed, known as the Committee on Percentages, which consisted of W. R. Coe, G. V. Coe, J. A. H. Hopkins and T. J. Prindiville. I happen to have that original report, signed by the complainant, and I would like to offer that in evidence.

Paper marked Exhibit D7.

Later in that same meeting there was a resolution passed with the percentages as set forth in the report and drawing account, which, in Mr. Prindiville's case, was $1,500 per month.

On page 108, same meeting, it appears that Mr. William H. Davidge had transferred 200 shares of common stock in the name of the corporation and desired a retirement certificate. He transferred in the name of William H. Davidge to the name of Adrian H. Larkin, "who is not an officer, director or employee of the corporation, who is desirous of obtaining a retirement certificate for the same as provided for in Article IV of the certificate of incorporation." The treasurer was authorized to issue the retirement certificate.

Page 117, of the meeting of April 18, 1917, it appears:

"The chairman announced that Mr. Prindiville had advised him that he was a member of the Naval Reserve and expected to be called out for military service at any time. The chairman stated that in view of

the resolution passed by this Board at its meeting of January 19th, dealing with directors' salaries, it appeared to him that consideration by the Board was necessary on account of Mr. Prindiville's probable inactivity in the affairs of the corporation, and on motion made by Mr. LaBoyteaux and duly seconded, it was

"Resolved, that during the period of Mr. Prindiville's military service, he be given leave of absence and that his salary continue in full force during his military service in the current fiscal year. Carried."

In May, 1917, at the annual meeting of the corporation, Mr. Prindiville was again elected director for three years, minute book, Volume 3, page 119.

At a meeting held November 21, 1917, on page 140 of minute book 3, it was resolved that 200 shares of common stock standing in the name of the treasurer, which stock was received from W. H. Davidge, be distributed, "said distribution to be on a pro rata basis to the holders of common stock as of record November 20th, 1917, then actively engaged in the service of the corporation as officers or directors, and that the Advisory Committee be instructed to direct the distribution accordingly and the transfer be made at the office of the corporation, at Jersey City, New Jersey."

Mr. McCarter: While it is not directly in order, I might call your Honor's attention to the fact that the very day Mr. Larkin received Mr. Davidge's stock he retransferred it back to Mr. Davidge—I mean the certificates of participation—as appears by the record book here, and Mr. Davidge, at that time, of course, and ever since, down, as far as we know, to the present time, has been actively connected with the con-

cern. If you want to have that offered now—or will you take my statement?

Mr. Hardin: What offer?

Mr. McCarter: The transfer.

Mr. Hardin: I haven't any objection to any transfers of any kind. I do not see why it should be done at the present minute.

Mr. McCarter: I thought it was well to have the sequence appear.

Mr. Hardin: Now, your Honor will remember, with reference to the stockholders' agreeement with reference to the distribution of the 408 shares in 1916, which was offered in evidence and is Exhibit D6—I have a similar stockholders' agreement with reference to the distribution of 200 shares of November 20, 1917, which I have just referred to. This agreement reads as follows: "For and in consideration of value received, we, the undersigned, stockholders of record as of November 20, 1917, of the corporation of Johnson & Higgins, and entitled to pro rata participation in 200 shares of common stock to be distributed as authorized by the Board of Directors at a meeting of the corporation on November 21st, 1917, hereby waive all our rights to a pro rata distribution of said stock and hereby authorize and direct that said distribution be made among the certain below-mentioned stockholders and on the basis below appearing."

And in that distribution, Mr. Prindiville received 25 shares, becoming dividend bearing in 1927. The particular paper was not signed by Mr. Prindiville because he was then absent in the navy. I will produce it if I can find it. I will presently produce a letter

from Mr. Prindiville in which he assents to that distribution—approves of it, and the stock certificate is already in evidence.

Paper marked Exhibit D8.

Mr. Hardin: The meeting held December 19, 1917, page 142, Volume 3, the Advisory Committee reported the distribution of the 200 shares of stock that I have just been referring to, and at the next meeting the president submitted a letter received from Mr. T. J. Prindiville, dated December 26, 1917, advising him that he was receiving pay from the United States Government in the amount of $2,500 per annum, and authorizing the deduction of the same from his compensation from Johnson & Higgins.

"On motion duly made and seconded, it was Resolved that the deduction proffered should not be made from the compensation payable to Mr. Prindiville for the year 1917."

At the meeting of February 20, 1918, Volume 3, page 150, there is the customary motion fixing the aggregate of one-half the net profits—no; this is in two resolutions. Mr. McCarter said 1919; I think he meant 1918. The first resolution is at page 151. This is the break.

The Court: Should be one-half and later on qualified that.

Mr. Hardin: In the first resolution the drawing account was fixed.

"Resolved, that pending the report of the Committee on Directors' Percentages, and further action by this Board, the treasurer of the corporation be and is hereby authorized to pay to each of the following the sum set opposite their names."

The reason I am directing your Honor's attention to it is not only to the change, but to the fact that Mr. Prindiville's name is omitted both from the percentage and drawing account.

The Court: He is in in 1918.

Mr. Hardin: At first. The Committee on Percentages did not report until the meeting of May 15, 1918. Then comes that usual resolution, minute book No. 3, page 168, and if your Honor wants the list of percentages, I will read it or I will read the resolution.

The Court: As to percentages only.

Mr. Hardin: "J. B. Dickson, 2 per cent; W. W. Curtin, none; W. H. Davidge, 3 1/2 per cent; S. C. Hunter, 3 per cent; W. R. Coe, 12 1/2 per cent; W. H. LaBoyteaux, 17 per cent; George V. Coe, 17 per cent; J. A. H. Hopkins, 6 per cent; Willis H. Botsford, 11 per cent; W. N. Davey, 10 per cent; Henry W. Lowe, 10 per cent; Thos. J. Prindiville, none; J. S. Keegan, 8 per cent."

Minute book No. 3, page 175, minutes of the meeting held June 19, 1918, there is recorded a letter as follows:

"June 18, 1918.

H. R. Howard,
Secretary Johnson & Higgins,
New York City.

Dear Sir:

I now desire to avail myself of the provision of the articles of incorporation and by-laws, under which I am entitled to sell the corporation 200 shares of my

holdings of common capital stock and to receive in payment therefor dividends certificates.

As I have indicated to some of the Board I desire to have this transfer dated as of January 2nd, 1918, and would ask that you kindly cause the issue in payment of my shares, of dividends certificates to read, as of such date.

Yours truly,

WM. H. DAVIDGE."

A resolution was passed authorizing the transfer of the stock to the treasurer of the corporation and to issue dividends certificates for the same to Mr. Davidge as director.

There is a similar letter at the same meeting, dated June 19, 1918, from S. C. Hunter as to 400 shares of the common capital stock and similar resolutions for its transfer and the issue of dividends certificates.

In Volume 3 of the minutes, page 192, meeting held December 23, 1918, we find the following minute:

"The president referred to the resolution adopted by the Board at its meeting on April 18th, 1917, giving to our director, Mr. T. J. Prindiville, leave of absence during the period of his military service, and stated that Mr. Prindiville had reported as having now been released from active duty and had asked that the Board reinstate his salary percentage for the year 1918, less a deduction of $5,000, the pay received by him from the U. S. Government. After an informal discussion it was agreed that Mr. Prindiville's request be granted."

The meeting then adjourned until Thursday, December 26, and at that meeting, page 193, the presi-

dent stated that the purpose of the meeting was to take formal action in amending the resolution in respect to salaries in accordance with the decision of the Board at its last meeting on December 23rd, and on motion, it was

"Resolved, that, whereas our director, T. J. Prindiville, to whom leave of absence during the period of his military service was granted at the meeting of this Board on April 18th, 1917, has reported himself as having now been released from active military service and ready to take up his work in connection with the corporation, and

"Whereas, T. J. Prindiville has asked the Board of Directors that reconsideration be given by them to the question of his salary compensation for the year 1918, be it

"Resolved, that supplementing and amending the resolution passed at the meeting held on May 15, 1918, fixing the compensation of the directors for the period in said resolution stated, beginning January 1st, 1918, and ending December 31st, 1918, the compensation of the directors, including the executive or general officers (but excluding the secretary and treasurer) be and is fixed as follows, subject to modification at any duly convened meeting of the Board of Directors, by the unanimous vote of the directors present at such meeting."

And the percentages are revised—restated. Perhaps, as they have already gone in the minutes as they were originally fixed, the restatement should be read, also.

"J. B. Dickson, 2 per cent; W. W. Curtin, none; W. H. Davidge, 3 per cent; S. C. Hunter, 3 per cent;

W. R. Coe, 11.6 per cent; W. H. LaBoyteaux, 16.5 per cent; G. V. Coe, 16.5 per cent; J. A. H. Hopkins, 6 per cent; Willis H. Botsford, 10.1 per cent; W. N. Davey, 9.3 per cent; Henry W. Lowe, 9 per cent; Thos. J. Prindiville, 6 per cent; John S. Keegan, 7 per cent.

"The percentages and salaries above named being the aggregate amount voted at the meeting held February 20th, 1918, as compensation of the Board of Directors, including the general or executive officers (but excluding the secretary and treasurer)."

At the meeting of December 18th, 1918, minute book No. 3, page 189, there was a motion that Mr. W. R. Coe, H. W. Lowe and W. H. Botsford be appointed a committee to take under advisement the matter of apportionment among the directors and the officers of the allotment out of the earnings covering the salaries of directors and officers and report at the regular meeting in January, 1919.

The Court: Is Mr. Prindiville retired or fired?

Mr. McCarter: That remains to be seen.

Mr. Hardin: We say he retired.

Mr. McCarter: We say he was fired.

Mr. Hardin: Now, if your Honor please, it was the custom of this corporation from 1900 forward —it having begun to do business in the middle of the year—to declare in midyear of the current year, a dividend out of the earnings of that year to the common stock. This custom began in June, 1900. In that particular year it was 15 per cent and almost every year—I find references here, June 17, 1903, 20 per cent out of the earnings of 1903; June 15, 1904, there was a 20 per cent dividend out of the 1904 earnings; June 20th, 1905, 20 per cent dividend out of the 1905

earnings; 1906, there was 20 per cent dividend out of 1906 earnings; 1907 on June 17th, 20 per cent out of the earnings of that year; June 17, 1908, 20 per cent dividend out of the 1908 earnings; June 16, 1909, 20 per cent dividend out of the 1909 profits; June 15, 1910, 20 per cent out of the 1910 profits, and in June of each year, in the succeeding years forward, that was the custom of the company, 20 per cent dividends, June 10, 1919.

The Court: Was there a resolution for dividends in 1919?

Mr. Hardin: Yes, that was put in by the other side. What I am trying to do is—I have prepared a table showing the common stock and preferred stock dividends for the years 1917, 1918 and 1919, instead of going through the resolutions. I have tabulated it.

Mr. McCarter: I think we consent subject to any correction that might be made.

Mr. Hardin: All right. This corporation has from the beginning had an annual accounting and the dividend resolutions that have been passed have always been particular to designate the earnings as of a particular year.

The common capital stock dividends in 1917 were declared by three different resolutions, June 20th, 1917; December 17, 1917; and March 29, 1918, aggregating $745,800, preferred stock dividends during the same period, $36,000, making a total of $781,800.

The Court: I understand in 1918 they declared dividends of 249 per cent.

Mr. Hardin: More than that.

The Court: Of the earnings of 1918.

Mr. Hardin: Yes.

The Court: Out of the half; the other half going to the employees. 500 per cent.

Mr. Hardin: Yes. During 1918, June, 20 per cent; December, 1918, 25 per cent; March 6, 1919, 105 per cent; March 19, 1919, 50 per cent; August 20, 50 per cent; 50 per cent November 19, corrected on December 4th to 44 per cent. As I understand it, Mr. Prindiville has received the dividends out of the earnings of 1918, declared on June 19 and December 18, 1918, so he has had 45 per cent of the dividend of 1918 already. There is no dispute in this case as to those.

Mr. Seligman: The explanation of that is that the 249 per cent which your Honor is referring to consists of dividends declared during 1919 out of 1918 earnings, and the dividends which Mr. Hardin is referring to are dividends paid during 1918 out of the 1918 earnings and declared in 1918 and as to that there is, as Mr. Hardin says, no dispute.

The Court: Declared in 1918, 45 per cent, and declared in 1919 as of 1918, 249 per cent.

Mr. Seligman: Which he did not get.

Mr. McCarter: They concede he was there during 1918.

Mr. Larkin: No; we concede he was not there, but paid him just as though he was there. Mostly elsewhere.

Mr. Hardin: The corporation does not deny Mr Prindiville's right to dividends, but we say he has got to turn in his stock before he gets the right to collect the additional dividends.

The Court: Did they force him to retire and if they forced him to retire, had they the right to?

Mr. Hardin: That will be for your Honor to say, what happened to him.

The Court: I do not know what happened to him.

Mr. Hardin: I say, whatever happened to him, it is our contention, under this charter, he retired and ceased to be active.

The Court: Had the Board of Directors a right to retire him?

Mr. Hardin: It is our contention, having become inactive, he has ceased to have the right to dividends until he turns his stock in and takes his dividends certificate. We do not concede that he was fired, as my friend McCarter said; that is, perhaps, a proposition that your Honor will have to decide.

Mr. McCarter: You do concede he was active enough during 1918 for the purposes of salary and yet you claim he was inactive enough not to be entitled to share in the dividends.

Mr. Hardin: He was in the war and conditions were not normal.

The Court: Did he work for the company in the same capacity in 1919?

Mr. Hardin: He hasn't worked at all for the company. He has got up a concern of his own. He is working on his own hook bucking against Johnson & Higgins. That is what the fact is. I hadn't got that far yet.

Now, I call for letter from Mr. LaBoyteaux to Mr Prindiville, dated December 24, 1918.

Mr. Seligman: We haven't the original of that. Here is a copy.

Paper offered in evidence and marked Exhibit D9.

Mr. Hardin (reading):

"JOHNSON & HIGGINS,
49 & 51 Wall Street.

New York, December 24, 1918.

Mr. Thos. J. Prindiville,
Ritz-Carlton Hotel,
New York, N. Y.

My dear Tom:

In view of your urgency that you be informed regarding your status in the corporation and firm upon your return to active duty, I felt it desirable to bring the matter before the Board of Directors at the special meeting held yesterday.

I am instructed to advise you that all of the directors agree that your salary percentage for 1919 from the corporation will be exactly the same as it was at the time you left (and since continued during your absence), and the salary committee have been instructed accordingly.

In respect to the firm, your interest was last year increased (notwithstanding your inactivity) by the pro rata of certain retiring interests. Your partners have agreed that this also will continue unchanged.

Hoping we may soon have you back in active work with us, and wishing you a very Merry Christmas, I am,

Sincerely yours,
(Sgd.) W. H. LABOYTEAUX."

You make no objection to the statement that Mr. LaBoyteaux was the president at that time?

Mr. Wollman: Yes; he was the president.

Mr. Hardin: I call for letter of December 26, 1918 from Mr. LaBoyteaux to Mr. Prindiville.

Mr. Seligman: The original of that is also missing, but here is a copy.

Mr. Hardin: I offer the copy.

Paper marked Exhibit D10.

Mr. Hardin (reading):

"JOHNSON & HIGGINS,

49 & 51 Wall Street.

New York, December 26, 1918.

Mr. Thos. J. Prindiville,
Ritz-Carlton Hotel,
New York, N. Y.

My Dear Tom:

At a special meeting of the Board of Directors held this afternoon, formal action was taken on your request for a reconsideration of your salary for the year beginning January 1, 1918, and ending December 31, 1918, and a resolution was adopted fixing your salary for the current year at 6%, which is in accordance with what I wrote you in my letter of the 24th would be done.

I am sending you this note so that you may be fully advised at the earliest possible moment.

Sincerely yours,
(Sgd.) W. H. LABOYTEAUX."

I will also have marked this schedule of dividends for 1917, 1918 and 1919 to which I referred a while ago.

Paper marked Exhibit D11.

"Common Stock Dividends 1917-8-9.

1917		Common capital, $372,900	
June 20	20%	$ 74,580	
Dec. 19	80%	298,320	
1918			
Mar. 29	100%	372,900	$745,800.00
Preferred stock dividends 8%			36,000.00
			$781,800.00
1918		Common capital,	$372,900
June 19	20%	$ 74,580	
Dec. 18	25%	93,225	
1919			
Mar. 6	105%	391,545	
Mar. 19	50%	186,450	
Aug. 20	50%	186,450	
Nov. 19)			
Dec. 4)	44%	164,076	$1,096,326.00
Preferred stock dividends 8%			36,000.00
			$1,132,326.00

1919				
June 18	20%	$ 74,580		
Dec. 17	25%	93,225		
1920				
Feb. 18	55%	205,095	$372,900.00	
Preferred stock dividends,			36,000.00	
			$408,900.00"	

I have also had tabulated and which perhaps can be taken subject to correction a statement of the corporation salary and dividends of Mr. Prindiville during the period of his activity in the corporation from 1911 to 1918.

Mr. McCarter: What has that got to do with it?

The Court: He continued in the service until 1918?

Mr. Hardin: We regarded him—although he was absent in the war he was treated just exactly as though he were present. We do not dispute his right to these dividends. We simply say he is not entitled to have them paid to him until he turns in the stock as required in the Certificate of Incorporation.

Mr. McCarter: I do not quite see the materiality of this schedule of dividends and salaries he has received in the early years. Subject to correction.

Paper marked Exhibit D12.

"JOHNSON & HIGGINS,

Distribution of Salary and Common and Preferred Dividends—T. J. P.

1911	Dividends	$ 9,575.00	
	Salary	10,955.34	$ 20,530.34
1912	Dividends	11,560.00	
	Salary	16,328.51	27,888.51
1913	Dividends	11,425.00	
	Salary	17,509.60	28,934.60
1914	Dividends	11,800.00	
	Salary	21,956.76	33,756.76
1915	Dividends	16,425.00	
	Salary	32,269.38	48,694.38
1916	Dividends	25,800.00	
	Salary	56,451.83	82,251.83
1917	Dividends	25,800.00	
	Salary	93,833.34	119,633.34
1918	Dividends	19,550.00	
	Salary	67,676.09	87,226.09
			448,915.85"

Mr. Hardin: Here is another tabulation which I think will be convenient. It is a matter that is already in evidence.

Mr. McCarter: Subject to correction.

The Court: It is of no probative force?

Mr. Hardin: No. I have been putting in the minutes today the resolutions relating to the stock that has been released and this shows the stock that has been surrendered from May, 1911, when Mr. Prindiville became identified with the company and the distribution of the stock.

Paper marked Exhibit D13.

Case

"From May 17, 1911.

Barrett, Dickson, Loines, Lowe retirement.

200 Shares distributed in 1913—Dividend from1922.

		If distributed pro rata
W. H. Davidge	5	24
S. C. Hunter	5	24
W. H. LaBoyteaux	36	19
Geo. V. Coe	16	23
J. A. H. Hopkins	38	17
W. H. Botsford	25	11
W. N. Davey	25	9
H. W. Lowe	25	6
T. J. Prindiville	25	7
	200	

Curtin retirement

200 shares distributed in 1916—Dividend from 1923.

W. H. LaBoyteaux	80	52
Geo. V. Coe	40	57
J. A. H. Hopkins	29	46
W. H. Botsford	51	20
	200	

50 shares distributed in 1916—Dividend from 1924.

W. H. Botsford	5	2
T. J. Prindiville	15	4
H. W. Lowe	15	3
W. N. Davey	15	5
	50	

50 shares distributed in 1916—Dividend from 1925.

T. J. Prindiville	17	5
H. W. Lowe	17	4
W. N. Davey	16	5
	50	

100 shares distributed in 1916—Dividend from 1926.

T. J. Prindiville	33	10
H. W. Lowe	33	8
E. N. Davey	34	12
	100	

Shriver retirement

25 shares distributed in 1916—Dividend from 1916.

J. S. Keegan	25	(Goodwill)

4 shares distributed in 1916—Dividend from 1918.

W. H. Botsford	4	1 1/2

4 shares distributed in 1916—Dividend from 1919.

W. H. Botsford	4	1 1/2

Davidge retirement

200 shares distributed in 1917—Dividend from 1927.

W. H. Botsford	25	15
W. N. Davey	25	13
H. W. Lowe	25	11
T. J. Prindiville	25	12
J. S. Keegan	100	3
	200	

200 shares surrendered in 1918—Dividend from 1928.

Held by treasurer of Johnson & Higgins as trustee.

Hunter retirement

400 shares surrendered in 1918—Dividend from 1928.

Held by treasurer of Johnson & Higgins as trustee."

Mr. Hardin: In the shareholders Minute Book, already offered in evidence, I call attention to page 65, being minutes of the annual meeting of the corporation held in Jersey City, Wednesday, May 1, 1912, it appears:

"The Chairman stated that the minutes of the Board of Directors and of the Finance Committee were available for inspection of any stockholder who desired to see the same.

"The secretary read the report of the Treasurer showing the condition of the company and upon motion of Mr. W. E. Lowe duly seconded it was

"Resolved that the Treasurers report be accepted and placed on file. Carried."

Then there was an election held and it was reported that 3,143 votes cast of a total of 3,493 entitled to vote, and Mr. Prindiville was present at the meeting by proxy.

Mr. McCarter: Who was his proxy?

Mr. Hardin: His proxy was Mr. Davey. This proxy is for that meeting. (Reading):

"Know all men by these presents, That I, do hereby consitute and appoint W. N. Davey, Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the first day of May, 1912 according to the number of votes that I should be entitled to vote, if then personally present.

"In Witness Whereof, I have hereunto set my hand and seal this 29th day of April, one thousand nine hundred and twelve.

"Sealed and delivered in the presence of

H. R. HOWARD THOMAS J. PRINDIVILLE."

At that meeting Mr. Prindiville was elected a director of the corporation. This resolution was passed on motion of Mr. Lowe:

"Resolved that all contracts, acts, by-laws, proceedings, elections and appointments made by the Board of Directors and the Finance Committee since the twelfth annual meeting of the Corporation on May 3rd, 1911 and all acts of the Executive Officers be and they hereby are ratified confirmed and approved. Carried."

I next direct attention to the annual meeting of 1913, beginning on page 68 of the minute book. The minutes show that there were 3,504 votes cast out of a total of 3,504 entitled to vote at that meeting. Mr. Prindiville was present by proxy, his proxy being Mr. W. R. Coe. It is conceded that Mr. Prindiville was present at this meeting by proxy.

Mr. McCarter: Not that he was present at the meeting, that he gave a proxy. It is a question as to what happened afterwards.

Mr. Hardin: I do not see how that concession amounts to anything. I am producing these proxies from the files.

The Court: Offer them as a whole.

Mr. Hardin: For the year 1912, in favor of W. N. Davey, 1913, W. R. Coe, 1914, W. R. Coe, 1915, blank, 1916, blank, 1917, S. C. Hunter, 1918, blank.

Proxies marked Exhibit D14.

Mr. Hardin: In 1913 a resolution was passed as follows:

"Resolved that all contracts, acts, by-laws, proceedings, elections and appointments made by the Board of Directors and the Finance Committee since the thirteenth annual meeting of the Corporation on May 1st, 1912, and all acts of the Executive Officers be and they hereby are ratified, confirmed and approved. Carried."

At the annual meeting in 1914 all the stock having power to vote, 3,454, was present in person or by proxy and a resolution was passed as follows:

"Resolved that all contracts, acts, by-laws, proceedings, elections and appointments made by the Board of Directors and the Finance Committee since the

fourteenth annual meeting of the Corporation on May 7th, 1913, and all acts of the Executive Officers be and they are hereby ratified, confirmed and approved. Carried." (Page 78.)

Annual meeting in 1915, minutes beginning on page 79 of this book, contains a similar resolution, and there were at that meeting 3,404 votes cast out of 3,404 entitled to vote, all the stock being present in person or by proxy—similar resolution of ratification of the past years work.

Annual meeting of May, 1916, minutes beginning page 82, it appears by the minutes that there were 3,329 votes cast out of 3,729 entitled to vote, and a similar resolution was passed.

At the annual meeting of 1917, at which Mr. Prindiville was elected director, there were 3,529 votes cast out of a total of 3,529 entitled to vote.

The Court: 3,729 were entitled to vote the year before. Some retired?

Mr. Hardin: Yes. The stock varies, and stock owned by the corporation for the time being is disfranchised.

The Court: Do those shares or computations that you gave that are entitled to vote include preferred stock?

Mr. Hardin: No; I have been talking about common stock only.

The Court: The preferred stock is only deprived of voting for directors?

Mr. Hardin: I know that, and each time it appears what proportion of the preferred stock was present at the meeting, and like resolution of ratification of the preceding years work was passed.

At the annual meeting of 1918, all the stock was again present, common stock, 3,729, in person or by proxy, a similar resolution of ratification was passed at the stockholders' meeting. Minutes beginning on page 88 of the minute book.

Adjourned till tomorrow morning at 10 a. m.

Appearances as before.

Mr. Hardin: I call for original letters of October 31, 1917, and November 7, 1917.

Letters produced.

Mr. Hardin: Pursuant to notice to produce counsel for complainant has handed me original letters dated October 31, 1917, from W. H. LaBoyteaux to T. J. Prindiville and letter of November 7, 1917, from LaBoyteaux to Prindiville and in association with Exhibit D8 relating to the distribution of 200 shares of

stock I desire to offer these letters, to show the consent of Mr. Prindiville thereto, his signature not appearing to the exhibit.

Letter of October 31, 1917, marked Exhibit D15.

Mr. Hardin (reading):

"October 31, 1917.

Mr. T. J. Prindiville,
Nantucket, Mass.

My dear Tom:

There are at the present time in the hands of the Treasurer of the Corporation 200 shares of the common stock, surrendered by Mr. Davidge last year. Some of the directors are anxious that this stock should be distributed at the present time and after discussion it has been agreed here that the following distribution be made:

J. S. Keegan	100	shares
H. W. Lowe	25	"
W. N. Davey	25	"
W. H. Botsford	25	"
T. J. Prindiville	25	"

It will of course be necessary to carry out the legal procedure that this stock be distributed on the basis of *pro rata* against the holdings, but in order to avoid this a waiver will probably be necessary from all of the stock-holders and an agreement to distribute as above.

Will you kindly write me the above is satisfactory to you when the formal waiver will be prepared and signed up by all.

I am leaving tonight for several days' absence and will leave on Friday the 9th on a trip to the Pacific coast. I should like to have your advice so that this matter may be closed before I go away on the 9th.

Sincerely yours
(Signed) W. H. LABOYTEAUX."

I now offer in evidence letter of November 5, 1917, in reply to that.

Letter marked Exhibit D16.

Mr. Hardin (reading):

"HEADQUARTERS, NANTUCKET SECTION.

Nantucket, Mass.

November 5, 1917.

Mr. W. H. LaBoyteaux
c/o Johnson & Higgins
51 Wall street
New York City.

My dear LaBoyteaux:

Yours of the 31st received and note schedule on distribution of the 200 shares of the common stock surrendered by Mr. Davidge last year. I join the other directors in approving of same.

I note you expect to leave the end of this week for the Pacific Coast and hope some day to be able to go out there with you.

With kindest regards to all, I am,

Yours very truly,
THOMAS J. PRINDIVILLE."

Case

I now offer in evidence the second letter produced by counsel for complainant under notice:

"November 7th, 1917.

My Dear Tom:

I have to acknowledge receipt of your favor of the 5th. To carry out the distribution of the 200 shares of common stock on the terms named it would be necessary to have the waiver of *pro rata* distribution signed by all of the stockholders of record as of November 20th, and I am handing you herewith a form for this purpose which please sign in the space shown, returning same to me by following mail.

Sincerely Yours,
(Signed) W. H. LaBOYTEAUX.

Lieut. Com. Thomas J. Prindiville, headquarters Nantucket Section, Nantucket, Mass."

Marked Exhibit D17.

Mr. Hardin: I now offer in evidence by way of copy not having been able to find the original, the acknowledgement of Mr. Prindiville in reply to l[illegible] of November 8th.

"Headquarters Nantucket Section,
Nantucket Mass.
November 8, 1917.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall St.,
New York City.

Dear LaBoyteaux:

Yours of the 7th received with waiver of *pro rata* distribution of the common stock which I have executed as you requested.

Yours very truly,
THOMAS J. PRINDIVILLE."

Letter marked Exhibit D18.

Mr. Hardin: I want to offer this stock book. It should have been put in yesterday. Stock certificate book covering Certificates 501 to 750 common stock of Johnson & Higgins.

Book marked Exhibit D19.

Mr. Hardin: I refer to the stub of certificate No. 531, showing the issue of the certificate Thomas J. Prindiville for 25 shares under date of November 22, 1917.

The Court: The original is already in.

Mr. Hardin: Yes; I was going to call attention to the fact that the original stock certificate is already in evidence and Mr. Prindiville's signature appears on the stub, and it also appears by the stub and surrendered certificate that that 25 shares is part of Certificate 527 for 200 shares referred to in the waiver of Davidge stock.

Now yesterday I offered in evidence, or the other side offered in evidence the resolutions for dividends and percentages of salaries from the time that Mr. Prindiville became associated with the corporation in 1911 forward. I also offer some earlier resolutions, at the beginning of the corporation in 1899, but it seems to me useless to take the time of the Court by taking them up in detail. There is a string of resolutions from 1899 forward to the time when Mr. Prindiville became associated with the corporation, each year, for the ascertainment and apportionment of half of the net earnings to salaries and apportionment of salaries year by year. The minute books are in. I will give the other side a reference to the pages. This paper that I have contains many things that are not pertinent to this matter, so I will make a list.

Going back now to the matter we were immediately on last night, I desire to offer in evidence letter of December 23, 1918, from Mr. Prindiville to Mr. LaBoyteaux.

Letter marked Exhibit D20.

"New York, N. Y.,
December 23rd, 1918.

W. H. LaBoyteaux, Esq.,
49 Wall Street,
New York, N. Y.

My Dear LaBoyteaux:

Thus far our talks commencing on December 2nd have gone forward in an informal way and you will understand, of course, that in writing you now I am not undertaking in any way to cover my views of the situation as I have expressed them in detail orally, this letter being designed purely to give you a statement over my signature, as you request, of the minimum adjustment which I would be willing to make in the interests of securing a prompt arrangement of our differences.

My ideas are as follows:

In January, 1917, the Salary Committee saw fit to grant me such increases as would bring my total income for the year 1917 equal to that received by my running mates, Messrs. Lowe and Davey; and while I feel that for 1918 my interests should be increased to correspond with theirs, I am willing to accept (in order to try to secure a prompt adjustment) the 1917 interest of six per cent for 1918, less the salary I received from the Government, say $5,000. And

also less the salaries of any clerks or other employees who were detailed to my work during my absence, approximately $5,000.

Now, for the year 1919, I feel I am clearly entitled to my relative position and that my interest for that year be put at such a figure that my total income from the business for 1919 would approximately equal that of the above-named running mates, Messrs. Lowe and Davey. I have not before me the total results of the business for 1917, nor have I any means of approximating what the results for 1918 will be, so cannot give the exact interest which would make my total equivalent to those partners above mentioned. I will gladly leave the details to be worked out later by the Salary Committee, but before I could consistently accept the situation I feel that assurances of such action as above outlined should be given.

Yours truly,
THOMAS J. PRINDIVILLE."

Mr. Hardin: Yesterday afternoon I offered in evidence a letter from Mr. LaBoyteaux to Mr. Prindiville, dated December 24, 1918. Your Honor may perhaps recall, Exhibit D9.

The Court: This is the start of the break I suppose?

Mr. Hardin: No; this was a letter of advice from Mr. LaBoyteaux to Mr. Prindiville that the directors had agreed that his salary percentage for 1919 should be the same as it was at the time he left and continued during his absence.

The Court: He had returned in 1918?

Mr. Hardin: He returned at the end of 1918. They were then determining the apportionment of the salaries for the year 1919, and this was a letter of advice to Mr. Prindiville. He had returned from the war but was not yet in active service.

The Court: A lengthy letter?

Mr. Hardin: No. It was offered yesterday afternoon, but it is relating to this matter, and I want to call your Honor's attention to it.

"December 24, 1918.

My dear Tom:

In view of your urgency that you be informed regarding your status in the corporation and firm upon your return to active duty, I felt it desirable to bring the matter before the board of directors at the special meeting held yesterday.

I am instructed to advise you that all of the directors agree that your salary percentage for 1919 from the corporation will be exactly the same as it was at the time you left (and still continued during your absence), and the salary committee have been instructed accordingly."

That is the pertinent part of the letter.

The Court: That letter was evidently written before the other letter was received.

Mr. McCarter: Counsel is not bringing out the real situation.

The Court: He is doing it in his own way.

Mr. Hardin: I now desire to offer in evidence letter dated December 24, 1918, from Mr. LaBoyteaux to Mr. Prindiville. My friends have the original.

Case

"JOHNSON & HIGGINS,

49 & 51 Wall St.,

New York, December 24, 1918.

Mr. Thos. J. Prindiville,
Ritz-Carlton Hotel,
New York, N. Y.

My dear Tom:

At a meeting of the Board of Directors held yesterday a full discussion was had on the situation as concerns yourself, and I have been instructed to write you as follows:

After a very careful consideration of all that you have said to us on the subject of your salary and interest in the business for 1918, it is the unanimous opinion of all those present (Mr. Hopkins, Mr. Curtin and Mr. Loines being absent) that your contention is not well grounded, but, on the contrary, the treatment accorded you by your partners and fellow-directors has been extremely liberal. I desire to call your attention to the following facts:

1. Notwithstanding at the time it was well-known to you that all of your partners were working under tremendous pressure and strain and needed all of the assistance that could possibly be had, you decided it was your duty to enter the Naval Reserve, without consultation or any notice to them, and did so, leaving our Lake business, of which you had been particularly in charge, either to be added to the duties of your already overburdened partners or absolutely abandoned to its fate.

2. Under our plan of organization salaries are paid to directors for active service. The resolution voting salaries is made subject to the following clause:

'If the services of any of the above-named directors shall be for a shorter time than the full year, then his compensation shall be at the rate of one-twelfth of the stated yearly compensation for each full month of service.'

At the time you appeared before the Board in April, 1917, and announced that you had joined the Naval Reserve and expected at any moment to be called for military service, the above resolution was referred to by our Chairman, who made the statement that he felt consideration by the Board was necessary on account of your probable inactivity in the affairs of the corporation.

You stated at that time you were willing to leave your interests in the hands of your co-directors. The Board granted you leave of absence, and notwithstanding the resolution above mentioned, voted to continue your salary in full force for the current fiscal year.

As a result of this voluntary action of the Board you received for 1917 a salary of $89,700, notwithstanding your absence for practically the entire year.

3. At the beginning of 1918 your interest in the firm was increased (albeit your absence) by the pro rata of certain retiring interests.

Your stock interest in the corporation was not disturbed, although, under its terms, a surrender could have been demanded.

From these interests you will receive for 1918 approximately $40,000 to $50,000, which certainly does not indicate any desire to penalize you.

You have in your discussions repeatedly urged as a reason for continuing your salary for the year 1918, our duty to our country. Naturally different ideas exist as to what constitutes patriotism, but that you may know we have not been entirely lacking in this respect, you may be interested to learn:

That the corporation and firm has subscribed for Liberty Bonds in an aggreggate amount of $4,250,000.

That they have contributed to war work (Red Cross, Y. M. C. A. and similar organizations) about $90,000.

And they have paid the salaries of employees who entered the service and who really needed the financial assistance, an aggregate of approximately $100,000.

And are continuing to pay the salary of such employees until the war terminates.

The views of our directors in respect of yourself have not been influenced by any question of the money cost or by any desire to deprive you of anything to which you are either morally or equably entitled. The entire question has been considered entirely from our viewpoint of the principle involved. We have felt and continue to feel that we have been most liberal with you. We voluntarily paid you in 1917 the very handsome sum of $134,500. And in 1918 will pay you a further amount of $40,000 to $50,000. Had we felt so inclined, we need not have paid you anything after you had become inactive.

Notwithstanding all of the above and the very strong views held by all of us that your demands are quite unjustifiable and cannot be sustained, it is nevertheless the most earnest desire of all that any such feeling as you have expressed be dissipated.

It has therefore been decided, in an effort to promote harmony and to dispel from your mind any idea that you have been badly treated, to meet your demand, and, for the year 1918, it has been agreed that your salary would be fixed at the rate which you were receiving when you left, less only the deduction of $5,000.00—pay received by you from the Government—which you have suggested be deducted.

The above gives you identically what you would have received had you continued actively in the business.

It is my sincere hope that this action on the part of your co-directors will accomplish the purpose intended.

Sincerely yours,

(Sgd.) W. H. LABOYTEAUX

PRESIDENT."

Letter offered and marked Exhibit D21.

Mr. Hardin: The resolution is already in by which they did perfect by corporate action the application to Mr. Prindiville of the same salary percentage in 1918 that he had theretofore enjoyed, six per cent, as in 1917.

I call your Honor's attention to the letter put in yesterday afternoon, which is Exhibit D10. December 26, 1918, which advised Mr. Prindiville of the corporate action:

"At a special meeting of the Board of Directors held this afternoon, formal action was taken on your request for a reconsideration of your salary for the year beginning January 1, 1918, and ending December 31, 1918, and a resolution was adopted fixing your salary for the current year at 6%, which is in accord-

ance with what I wrote you in my letter of the 24th would be done. I am sending you this note so that you may be fully advised at the earliest possible moment.

W. H. LABOYTEAUX."

Now, I have another letter of December 30—

The Court: That last letter refers to 1918?

Mr. Hardin: Yes. There was put in another letter which apprized Mr. Prindiville that they had fixed the salary for 1919 at the same percentage—that they had agreed to fix it. We have the original but it is not here. In this letter, Exhibit D9 it was stated, "I am instructed to advise you that all of the directors agree that your salary percentage for 1919 from the corporation will be exactly the same as it was at the time you left." December 24, 1918.

I now have the letter of December 30, 1918, from Mr. Prindiville to Mr. LaBoyteaux, which I will offer.

Letter marked Exhibit D22.

Mr. Hardin (reading):

"December 30, 1918.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall St., New York.

My dear LaBoyteaux:

Your favors of December 24th and 26th received, and regret to note that the Directors did not see fit to accept the suggestions contained in my memorandum of the 23rd. My letters of December 27th, 1917, January 14th and 29th, 1918, outlined quite

clearly my perspective whereby I do not consider it right nor just for a firm or corporation that benefited largely owing to war conditions to tax or penalize a member or director that entered active service to help the Government out during the present great crisis.

Your refusal to give me back my relative position in the corporation violates the above principle, as it is deliberately penalizing me for being in Government service. For in January, 1917, the Directors saw fit to give me a small increase in corporation salary to establish my position with Messrs. Lowe, Davey, etc., who entered the corporation about the same time. A couple of months later, having joined the Naval Reserves, I was called into active service and from that date until I reported to you on December 2nd last I was doing an honorable service in assisting the Government in this crisis.

Early in 1918, the corporation interests of some of our retiring partners were distributed among the remaining active partners. The salary increase received by my running mates, Messrs. Lowe, Davey, etc., figures about 40%, and of the more recent partner, Mr. Keegan, considerably more than this. So I feel it is quite fair to assume that had I not gone into the service of the Government and my entire time had been given to the business of the corporation, I would have had the same proportionate increase in salary for 1918 as my running mates.

Now, in asking me to accept the 1917 basis for my 1919 salary you are penalizing me for entering the Government service, when the financial results of the corporation do not warrant any such action. So your intention creates a situation which I cannot

accept, so I have asked my counsel, Mr. Royall Victor, to confer with you on a fair value for my J. & H. holdings and, in consideration of a prompt and satisfactory settlement of same, I will agree not to engage in the insurance brokerage business for one year from January 1, 1919.

I feel this whole matter deeply and regret exceedingly that you could not adopt the principle involved in this situation. The war was a period of sacrifice and suffering for practically every one. The strain and responsibilities were very great on both the man at home and the man that went into active service. To penalize the latter unnecessarily is in my opinion morally wrong, and I was in hopes you would all see it in this light.

Yours very truly,
THOMAS J. PRINDIVILLE."

I now call your attention to minute book No. 3, page 198, minutes of the meeting of January 16, 1919:

"On motion of Mr. Davey duly seconded by Mr. Dickson it was

RESOLVED that for the year beginning January 1st, 1919, the compensation of the Directors including the Executive or General Officers (but excluding the Secretary and Treasurer), be and is hereby fixed in the aggregate at one-half the profits of the corporation, after payment of all losses and charges and expenses, and after deduction of such reserves as the Finance Committee may deem it wise or necessary to make, being, therefore equal to the net profits of the corporation as defined in the Certificate of

Incorporation, such compensation shall thereafter continue until modified by the action of the Board, and such aggregate shall be subject to apportionment by the Board and the Board may also make regulations respecting time and manner of payment."

The second resolution in 1919 is found on page 204, and the percentages were fixed and our standpoint is that Mr. Prindiville is omitted in the distribution of salaries for 1919.

The Court: Does his name appear?

Mr. Hardin: His name does not appear.

Now, there is another matter of proof, which would take some time, if I am called upon to go into detail. I think it should appear some way that Mr. Prindiville has received during the period of his connection with the corporation—actually received the various amounts of salary and dividends that came to him either by his membership—

The Court: Up to and including 1918, and in 1918, 45 per cent?

Mr. Hardin: Yes.

Mr. Wollman: But after that he got no dividends after that 45 per cent in 1918, and no salary.

Mr. Hardin: It is easy enough to prove it.

Mr. Wollman: Why do you want to prove it?

The Court: He got his salary for 1918?

Mr. Hardin: Certainly.

The Court: That is admitted, gentlemen, isn't it?

Mr. Wollman: I guess that is admitted.

The Court: That answer is "yes."

Mr. Hardin: Now, I should like to put in evidence the stock transfer book.

Book marked Exhibit D23.

Mr. Hardin: These books are necessary to show that at the time of the waiver agreement with reference to the distribution of 408 shares of the common stock from the treasury made as of January 18, 1916, it was signed by all of the common stock. These books are necessary to show that the signatures here cover the entire common stock. They are also necessary for the same purpose in association with the waiver agreement of 1917.

WILLIAM H. LABOYTEAUX, sworn for defendant.

Direct-examination by Mr. Hardin:

Q. Where do you reside? A. New York City.

Q. What is your occupation? A. I am president of Johnson & Higgins.

Q. A New Jersey corporation? A. Yes, sir.

Q. The defendant in this case? A. The defendant in this case.

Q. How long have you been connected with that corporation? A. Well, I have been connected with Johnson & Higgins since 1894; I have been connected with the corporation since 1905.

Q. Just explain that answer, please? A. Well, I was connected originally with Johnson and Higgins before they were organized into a corporation, in Philadelphia, in 1894. I then went from Philadelphia to the Coast and was connected with Johnson & Higgins out there until—well, I was connected with them from that time on. Johnson & Higgins on the coast operated as a firm.

Q. On the coast, you mean San Francisco? A. Pacific Coast; yes, sir.

By the Court:

Q. You entered the service of the corporation in 1905? A. 1905; yes, sir.

By Mr. Hardin:

Q. Are you familiar with the history of the corporation of Johnson & Higgins? A. I am.

Q. Do you remember when it was organized? A. I do.

Q. What year? A. 1899.

Q. It succeeded the partnership of Johnson & Higgins? A. It did.

Q. And did it entirely succeed the business of the partnership, or partially? A. It succeeded to the business of the co-partnership as conducted in certain parts of the country.

Q. And did the firm of Johnson & Higgins continue—

The Court: All the business except the business in certain parts of the country.

Mr. Hardin: The bill of sale reserves certain parts of the country.

The Court: Yes.

Q. And did the firm of Johnson & Higgins continue in those parts of the country which were excepted in the transfer to the corporation? A. It did.

Q. And still continues in some parts of the country? A. Yes, sir.

Q. Will you tell the Court, please, the nature of the business of Johnson & Higgins? A. Johnson & Hig-

gins are insurance experts, brokers and average adjusters; they represent the assured in the handling of insurance of various classes, and in the placing of the insurance in the markets where they can get the best rate conditions and securities; they are all men that have been brought up in the business, have a high technical knowledge of the business, and have such knowledge that their personal—that their professional training—they have established a reputation with their clients, so it is a question largely of personality. For instance a large—we handle mostly large corporate business—they entrust that business to us to place for them and to see that they get the proper security and see that they are properly protected. That requires expert knowledge as average adjusters. It is a profession which requires a great many years study. It is the application of marine insurance law and shipping law to the settlement of marine losses. That necessitates very hard study and very long—well, very great application. There are very few people that have that knowledge and application in the country. But the particular business of Johnson & Higgins is the insurance adviser and insurance expert and insurance negotiator for people who have large amounts of insurance to place and they trust it to us.

By the Court:

Q. All classes? A. All classes except life. We do not handle any life insurance

Q. You say "averagers." You mean adjusters? A Yes, sir; average adjusters.

By Mr. Hardin:

Q. Is the business a large business at the present time? A. Very large business.

Q. How many employees have you at the home office? A. We have about 470 today.

Q. And in your other agencies and subsidiaries throughout the country of the corporation how many? A. We have a total so far as—of course the number of employees changes—average about 700 employees in the various offices, including the New York office.

By the Court:

Q. You have branches throughout the country? A. Yes, sir; we have branches in the principal cities of the country, Chicago, Philadelphia, Boston and—

By Mr. Hardin:

Q. And can you give us any idea of the annual turnover in dollars and cents in the transaction of the business? A. I haven't an accurate knowledge of that, but it is somewhere in the neighborhood of between seventy-five and a hundred million.

By the Court:

Q. Of what? A. Money going through our hands.

By Mr. Hardin:

Q. Premiums? A. Premiums.

Q. Adjustment moneys? A. Yes, sir.

Q. Is the business larger now than it was in 1899? A. Oh, yes, very much.

Q. Has there been any part of the territory originally excluded from the organization of Johnson & Higgins brought into the corporation since the original

organization of 1900? A. I think the Philadelphia office was originally left out of the organization, and that was subsequently incorporated and the incorporation became the owner of the stock of the Philadelphia corporation, if I remember correctly.

Q. How about Boston? A. Boston was part of the corporation for a while, but on account of the business not being very profitable it was dropped in Boston.

Q. You told us I think that you came into the corporation in 1905? A. I became a director of the corporation and stockholder of the corporation in 1905.

Q. I find in Minute Book No. 1, page 319, at a meeting held on March 15, 1905, a letter set forth addressed by you to the corporation. Is that the time that you became connected with the corporation? A. Yes, sir.

Mr. Hardin: I would like to read to your Honor that letter.

The Court: Why take up the time?

Mr. Hardin: It is very short, and your Honor asked yesterday how they got new men in. This goes to illustrate that.

The Court: All right.

Mr. Hardin: The minute is as follows:

"Mr. Barrett on behalf of the 'Committee on purchase of the remainder of Johnson & Higgins agencies,' reported that his committee felt the time is not opportune for absorbing the San Francisco business of the firm of Johnson & Higgins, but it recommended the acquirement by this corporation of the interest of Mr. W. H. LaBoyteaux in certain accounts such

as the Pacific Mail hulls, Great Northern hulls, &c., which are handled by this corporation, but on which certain allowances of profits are now made to Mr. LaBoyteaux. The latter is willing to sell his interest and good will in such accounts in a way approved by this committee, as shown by the following letter received from him.

'To the Corporation of Johnson & Higgins

Gentlemen:

I propose to sell and deliver to you all my interest in the various Adjusting & Insurance accounts, secured, influenced and/or controlled by me, on which your Corporation through the firm of Johnson & Higgins has heretofore been allowing me a participation in the profits accruing therefrom, and to sell you all my goodwill in such accounts.

This I agree to do in exchange for the sum of $5000 in cash or at my option $5000 par value of your Common Capital Stock.

Yours very truly,

(Signed) W. H. LABOYTEAUX.'"

That is the same as with reference to Keegan and this is back in 1905 and typical of what was done before.

And in the same minutes appears the transfer of these accounts. It also appears, page 321, that the question of LaBoyteaux's compensation was referred to the proper committee for report later.

I find also, if your Honor please, in the minute book, page 325, that Mr. LaBoyteaux

was elected director of the corporation, in the annual meeting of May, 1905.

Q. Have you been a director of the corporation continuously, Mr. LaBoyteaux, since your original admission to it? A. I have.

Q. Have other new men come into the management since—into the corporation as directors since your association with it in 1905? A. Quite a number.

Q. And by substantially like methods? A. All, practically—well, the identical method. In fact the entire ownership in the corporation today is held by men that came in just as I came in.

Q. Is that so as to Mr. Prindiville? A. No; Mr. Prindiville's situation was a little different. Mr. Prindiville was operating in Chicago. In 1903, I think it was, a corporation was formed in Chicago in which to carry on the operations in the Lake district. Mr. Prindiville had a half interest in that Chicago corporation and Johnson & Higgins held the other half stock in that corporation. In that respect Mr. Prindiville was different from the rest of us.

By the Court:

Q. Only in consideration? A. Only in consideration.

By Mr. Hardin:

Q. What was the nature of the Prindiville & Company insurance business? You spoke of Lake business. What do you mean by that? A. I meant that the larger marine business on the Great Lakes was handled from Chicago as a brokerage business the

same as our business in New York is handled, but another feature was that Prindiville & Co. acted as agents for some of the other companies, which Johnson & Higgins do not do.

Q. And did Johnson & Higgins do any business in Chicago after the organization of Prindiville & Co. in the same lines of insurance? A. In the fire insurance business but not in the marine.

Q. And how long did that continue, that transaction of business by Johnson & Higgins side by side with Prindiville & Company, in the same line? A. It continues to today.

Q. Johnson & Higgins now own all the stock of Prindiville & Company? A. They do. Johnson & Higgins that is operating in Chicago is the firm of Johnson & Higgins, not the corporation.

Q. Can you give us an idea of the extent of the business of Prindiville & Company?

The Court: What interest is that in this case?

Mr. Hardin: I do not know as it has any special interest.

The Court: The real thing we want to try now is whether the man was retired or fired. That really seems to be the meat of the climax that you are coming to. I don't know. You go on and try your case.

Mr. Hardin: This is a very complicated matter and I am trying to inform the Court. It seems to me the matter is of great importance and I want to get everything before the Court.

Mr. McCarter: In view of what your Honor has just said, it is only fair to counsel that we

should say, owing to our form of pleading there being no special replication—we ought to call the attention of the Court and counsel to the fact that our contention is one of law as well as of fact, and that this system or plan evolved in this certificate of incorporation and by-laws, even assuming that our client, Mr. Prindiville, retired out of his own accord, that the claim that they make is entirely illegal. In other words it is incompetent and against public policy to have any such provision with reference to its stock. I want your Honor to have that in mind and counsel, too.

Mr. Hardin: We wondered why the real charge was omitted in the bill of complaint, but we guessed it out.

Q. Now, do you recall, Mr. LaBoyteaux when you became president of the corporation? A. In 1916.

Q. And you were the president of the corporation then during 1917 and 1918? A. I was.

By the Court:

Q. Who did you succeed? A. Mr. W. R. Coe, our present chairman.

By Mr. Hardin:

Q. Did he step out? A. He stepped out.

By the Court:

Q. Stock retired? A. No; he hasn't stepped out of the active business; simply stepped out of the presidency.

The Court: Stepped out of a salary of $118,000?

Mr. Hardin: He just said he didn't step out.

The Court: I want to know whether any of the men actively engaged in the business have stepped out and their stock retired?

The Witness: Yes.

The Court: How many?

The Witness: Mr. Hunter and Mr. Hopkins have both stepped out.

The Court: How about Curtin?

The Witness: Curtin? I think Mr. Curtin retired prior to my—or started to retire prior to the time I came in.

The Court: Hasn't he been a director?

The Witness: He was a director.

By Mr. Hardin:

Q. Was the retirement sometimes gradual? A. Sometimes gradual, if they wanted to become practically inactive, in other words not devote all their time to the business they might make a partial retirement.

Q. Is that practical inactivity taken into consideration in the award of percentages in salaries? A. Oh, absolutely.

Q. Do you remember the spring of 1917 when the war began and Mr. Prindiville brought to your attention the fact that he was in the Naval Reserves? A. Yes, sir.

Q. What action was taken, if you recall, by the corporation with reference to Mr. Prindiville's absence? A. Special resolution was—by special resolution Mr. Prindiville was granted leave of absence

during the period of the war and his salary was continued for the current year.

Q. How long did Mr. Prindiville continue in the service? A. He advised me in early December or very late November, 1918, that he was free from—that he had been released from his activities.

Q. And did you meet him or take up with him the question of his compensation upon his return to work? A. He asked for discussion. I told him it was—I arranged the meeting with all the directors at which we discussed that matter.

Q. In the actual arrangement—in the actual adjustment of the percentages of 1918, what was done with reference to Mr. Prindiville?

Mr. McCarter: That all appears.

Q. You took up also with Mr. Prindiville the discussion of his allowance of salary during his absence, 1918? A. Yes, sir.

Q. Which finally resulted in the corporate action giving him his allowance? A. Yes, sir.

The Court: Did Mr. Prindiville come back to work?

The Witness: Never.

The Court: Why?

The Witness: I don't know.

Q. Now, you said you had conversations with Mr. Prindiville about his return to activity in the affairs of the corporation. When about were these conversations? A. There was the first conference with Mr. Prindiville early in December following, I think, —yes, it was very early in December, at which time Mr. Prindiville came before the board of directors and stated what he considered the board of directors should do in respect to himself.

Q. What did he say the board should do with respect to himself? A. He stated that he felt that he should be put on a parity with what he called his running mates.

Q. Who were they? A. He mentioned Mr. Henry Lowe and Mr. Davey. The "running mates" is some expression out of the navy.

Q. Now tell us, please, what Mr. Prindiville said as to how the corporation should treat him? A. Mr. Prindiville demanded that the corporation should place him—give him the same income that Mr. Lowe and Mr. Davey were receiving. During the time Mr. Prindiville was away there had been certain amounts of certificate retirements or semi-retirements in which some salary items were available for distribution among the remaining directors. That salary had been allotted to certain men whom it was felt were deserving of it by reason of their value to the corporation and the work they were doing for the corporation. Mr. Prindiville said, "I must have the same as they get."

The Court: Lowe and Davey?

The Witness: Lowe and Davey; the board were unable to agree upon that principle, because our salaries are not fixed on the basis of running mates or any other method of running advancement; it is fixed on the basis of the value of the man to the business; that is what the business is, the personal business and we cannot possibly have scales of increase or regulations as they do in some other businesses, or such as they have in the navy, or wherever they have it.

Q. Well, did he say anything as to what his attitude would be if his suggestions were not conceded? A. At the meeting in which he made his demand he said that he was not satisfied; he said he had to some extent lost confidence in his co-directors and that he was not satisfied to go back to Johnson & Higgins until this matter had been straightened out to his satisfaction, and we ask him—at least I asked him, "What do you mean by that, Tom? What do you mean that you won't come back?" He says "Well, I have made—I won't come back to work with the corporation. I feel that we have got to settle this thing first." And after some pressure as to exactly what he did mean he finally said, "I am going to leave unless the corporation recognizes my demand."

Q. And did these negotiations continue after this date you have now referred to? A. The negotiations continued up around until just before Christmas, I think the 23rd of December, and the 23rd of December we had a final meeting. Mr. Prindiville was down talking with Mr.—I think Coe, George Coe, and William Coe and myself, on this general subject, and he represented at that conference that unless we gave him what—he says, "Our perspective is different. Unless you can recognize my perspective I am going to get out." And finally the thing finally terminated in the meeting of the board, at which time we decided to pay him for the year 1918 exactly the same as he had for—that is exactly on the same basis that he had for 1917, and had prior to the time he left for the war, although, of course, the figures would be different because of the different net earnings of the corporation, and we also decided—

The Court: You mean the sums would be different?

The Witness: The sums would be different, but the percentages were identically the same, exactly. And we also decided that when Mr. Prindiville came back, although the matter was one which should properly be left to the salary committee to be determined in the regular course, we decided, the general concensus was expressed—

> Mr. McCarter: I do not suppose that the general consensus expressed in the absence of Mr. Prindiville is competent.
>
> Mr. Hardin: There is a letter.
>
> Mr. McCarter: Then the letter speaks for itself.

Q. Mr. Prindiville was advised by you, as appears, by letter, that for 1919, he should have the same percentage as 1918 and 1917? A. Exactly.

By the Court:

Q. What were Lowe and Davey getting? What was their percentage, do you remember? A. I think they were around eight and nine or ten per cent. I do not remember the exact percentage.

Q. Has Mr. Prindiville ever come back to work? A. No, sir.

Q. What is he doing? A. Immediately after or now?

Q. Immediately after? A. Immediately after he went down to Florida and then came back and organized a new company to go into competition.

Q. When? A. I think he got back sometime in March—February or March.

Q. And then? A. He is still in that business.

Q. Did what? A. Organized another concern, same line of business as Johnson & Higgins, in competition.

Q. What name? A. Prindiville, Croxson & Co.

Q. And has continued in that business? A. He has continued in business. He has made, apparently, an association with another concern, but it is identically the same business.

Q. Where? A. They have an office in Chicago, and, I think, have an office in New York.

Q. Where in New York? A. I don't know what the location of their office is.

By Mr. Hardin:

Q. Do you know whether any of the former employees of Johnson & Higgins have been connected with this new business that you have just mentioned?

Mr. McCarter: I object.

The Court: Objection overruled.

A. Mr. Croxson, who was our marine man in Chicago, was taken by Mr. Prindiville away from the corporation and made a partner of his.

Q. Do you know whether any other employees of the company— A. I know that he has been after a number of employees, but he hasn't—

Mr. McCarter: You don't know that of your own knowledge?

The Witness: I don't know what you consider my knowledge. A man told me that he had been after him.

Mr. McCarter: I object to what has been told him and move to strike it out.

The Court: It will be stricken out.

Q. Have you had any conversation with Mr. Prindiville as to the dividends on his 125 shares of stock? A. I called up Mr. Prindiville some time in March, 1919, I think it was, and suggested to him that he send in his common stock to be exchanged for dividend certificates so that we could pay the dividends that had been declared and would be shortly declared on the common stock.

Q. Has he complied with that suggestion? A. He has not.

Q. Is there money necessary to pay the dividends if Mr. Prindiville turned in his stock in compliance with the certificate of incorporation ready for him? A. Absolutely.

The Court: Did he draw his salary for 1918?

The Witness: Fully, yes, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. LaBoyteaux, may I ask your age, please? A. I am 48.

Q. And in 1894, as I understood you, you became associated with the then partnership of Johnson & Higgins? A. As an employee, yes, sir.

Q. As an employee. At that time Johnson & Higgins was a well established and well known insurance brokerage business, was it not? A. Yes, sir.

Q. Does your connection with the corporation enable you to tell us generally about when that firm had been organized? A. The firm? The original starting, of course, I have no knowledge of. I haven't my own knowledge of that thing, only what has come to me, that the original firm was started in 1845.

Q. 1845. And the Higgins of that firm was the late A. Foster Higgins? A. Yes, sir.

Q. And he died a year or two ago? A. Yes, sir.

Q. And his connection and skill and value in the enterprise was of such a character that you directors deemed it worth while to pay him a pension down to the time of his death, wasn't it? A. No; we did not pay the pension to the time of his death.

Q. For several years? A. For several years after he got out of active business he was given a small—

Q. Who was Johnson? A. Mr. Johnson was an average adjuster in the early days.

Q. He died? A. He died, yes, sir.

Q. Well, the partnership enterprise before the formation of the corporation, retained the name of Johnson & Higgins, didn't they? A. Yes, sir.

Q. Because of its value? A. Yes, sir.

Q. It had a well fixed value in the trade, did it not? A. It had a value. Whether it was a well fixed, I don't know.

Q. Well, a decided value? A. I should say so.

Q. And that was long after both the death of Mr. Johnson and the practical active retirement of Mr. Higgins? A. Yes, sir.

Q. Well, now, the partnership's main office was in New York? A. Yes, sir.

Q. City? A. Yes, sir.

Q. And the business of the partnership previous to the formation of the corporation was—one thing —the placing of insurance. If I had a vessel or had a house that I wanted insured, I could come to the office of Johnson & Higgins or they could come to me and place my insurance. A. They could take the order and go in the market and place the insurance.

Q. The ordinary insurance broker? A. Yes, sir.

Q. Then you call yourselves, "general average adjusters." What does that mean? A. We call ourselves "average adjusters."

Q. Scratch out the "general." A. Average adjuster is the profession of the application of marine law and insurance law to losses which occur at sea.

Q. Yes. Well, the settlement of a marine loss. A. The statement—the proportion of loss—the statement of the loss, yes, sir.

Q. Now, do I understand that you, for instance, in the case of a loss of a steamship, and the occasion arises to ascertain how much the insurance company and how much the owners share in that loss, that you personally do that figuring? A. That I personally do the figuring?

Q. Yes. A. No.

Q. You have clerks to do that? A. Yes, sir. But I tell them what to do.

Q. He is to adjust the loss by the law of general average, isn't he? A. No, sir. We have clerks to do the work. We have men of high profession—high training, that we bring up—which we gradually educate to do part of the work, but the general handling of the business is in the hands of the directors and owners of the business.

Q. Oh, certainly. I understand that. A. And the very men that we are bringing up are men that follow along in our footsteps.

Q. Now, there are in New York City gentlemen who are average adjusters who are not connected with Johnson & Higgins, aren't there? A. Certainly.

Q. Just as there are Custom House brokers? A. Yes, sir.

Q. Who have this wonderful skill enabling them to make the proper proportion of loss between owner and insurance company in the event of a marine loss? A. There aren't very many.

Q. There are some? A. There are two or three.

Q. Now, you have in your office, and have had so long as you have known anything about it, gentlemen who have had training to do that thing? A. Yes, sir.

Q. And not one of them is a director, is he? A. Yes, there is.

Q. Who? A. Mr. Davey.

Q. He came in in nineteen hundred and what? A. I do not remember the exact year he came in. I think it was around 1911 or 1912.

Q. As a director? A. Yes, I think so.

Q. 1911? A. 1911 or 1912. I do not remember the exact date. It will show.

Q. About the time that Mr. Prindiville came in? A. I don't remember whether it was before or the year after. Somewhere in that neighborhood.

Q. Now, coming to the development of this business. The old firm of Johnson & Higgins gradually outgrew New York and commenced to have agencies in different cities of the country, is that right? A. They established agencies in various places.

Q. Cincinnati, Philadelphia, San Francisco, Boston? A. Yes, sir.

Q. Would there be a member of the firm in all those places or simply an agent? A. There was a member of the firm in San Francisco, member of the firm in Philadelphia and a member of the firm in Chicago.

Q. Now, the member of the firm in Philadelphia is Mr. Curtin? A. Yes, sir.

Q. And the member of the firm in San Francisco is who? A. Mr. LaBoyteaux.

Q. Yourself? A. Yes, sir.

Q. And you became a member of the firm—

Mr. Hardin: What firm are you now referring to?

Mr. McCarter: Johnson & Higgins.

Mr. Hardin: When?

The Court: Do not interrupt counsel.

Mr. Hardin: I apologize if I am put in the attitude of interrupting counsel improperly. What I wanted to know was whether my friend is referring to Johnson & Higgins prior to 1899 or since, because the matters concerned in this suit relate to the corporation of Johnson & Higgins from 1899 forward.

The Court: Do you object?

Mr. Hardin: I object to before 1899.

Q. When did you become a member of the firm of Johnson & Higgins? A. 1905.

Q. Then previous to 1905 did the firm of Johnson & Higgins have a member in San Francisco? A. No.

Q. You were their agent there? A. I was their agent. I participated in the business.

Q. I understand that, yes. And they had agents where members of the firm were not located generally in the large cities of the country, didn't they? A. They had agencies in each of the large cities, not generally.

Q. And that agent in charge developed the business there? A. Not exactly.

Q. Well, if a man wanted to insure a ship on the Great Lakes, would he come to the New York office or

go to the Chicago office, or would the New York office get him or would the Chicago office get him? A The business isn't handled that way.

Q. Answer that question. Can't you answer it? A. What was the question.

Q. Suppose there was a ship to be insured on the Great Lakes would that be insured from New York or from Chicago? A. Sometimes in New York and sometimes in Chicago.

Q. All right. Now the corporation was formed in what year? A. 1899.

Q. And it chose the name of Johnson & Higgins, didn't it? A. Yes, sir.

Q. And the counsel of the firm were the counsel of the corporation? A. Yes, sir.

Q. The firm, however, has still continued? A. Not in New York.

Q. The firm has still continued? A. The firm has continued in places other than New York.

Q. Is that because in those places where it still continues it is inconvenient, injudicious or illegal to have a corporate action? A. Yes, sir.

Q. And the firm is engaged in doing the same business that the corporation of the same name is engaged in performing in those localities where, for reasons that I won't inquire about—it is not involved here at all—it is injudicious or inconvenient to act as a corporation; is that right? A. The firm is operated in places outside of New York.

The Court: Do you understand the question?

The Witness: I thought I did. He is asking—

Mr. McCarter: I want you to understand me. No catch in it.

The Witness: Will you read the question to me?

(Question read as follows):

"Q. Is that because in those places where it still continues it is inconvenient, injudicious or illegal to have a corporate action?" A. No; it isn't illegal. It is a question I cannot answer yes or no to.

The Court: You did answer?

The Witness: Well, I am very sorry. I further said I could not answer the question directly yes or no.

Q. It isn't involved in this suit at all so I do not care. I did not mean any offense to anybody by using the word illegal. There are some cities, I take it, where it is inconvenient, if you will, to have a corporation, whether Johnson & Higgins or any other corporation, engage in business. In those localities the firm does business; isn't that the situation? A. The firm does business where the conditions are such that it is more convenient for the firm to do the business.

Q. Does the firm belong to the corporation? A. No, sir.

Q. Now, are all the members of the board, members of the firm? A. No.

Q. Who isn't? A. Mr. Barrett isn't a member of the firm.

Q. How long has he been a director?

Mr. Hardin: I think I would like to renew my objection made a minute ago, and in so doing I want to bring to your Honor's attention the fact that there is a suit pending in another jurisdiction with reference to the firm of Johnson & Higgins which is in no way concerned

in this suit. This suit has been restricted by the bill of complaint to the corporation, and it seems to me to be incompetent and irrelevant to inquire into the operations of the firm any more than to develop the fact that the firm has no relation to the corporation and does not do business where the corporation does.

Mr. McCarter: I simply wanted to know when this Mr. Barrett became a director.

The Court: I will overrule the objection. You may renew it.

Q. When did Mr. Barrett become a director? A. Mr. Barrett was one of the original directors of the corporation.

Q. He has never been a member of the firm? A. Yes, sir; he has been a member of the firm in the past. He is not a member of the firm now.

Q. When did he withdraw? A. I really cannot tell you.

The Court: Do I understand that, with the exception of the gentleman you have named, the members of the firm are directors of the corporation; is that what you mean?

The Witness: Generally. Let me see—

The Court: Generally speaking.

The Witness: Generally; yes, sir.

Q. It is so not only generally but specifically, isn't it? A. There are instances where a man has been a director of the corporation and he has not been a member of the firm. There are instances where men have been members of the firm and they have not been directors of the corporation.

Q. But generally speaking the identity has been the same? A. Generally speaking the identity—yes, sir.

Q. When you were agent out in California had the corporation been formed? A. Yes, sir.

Q. And you were their agent both of the firm and of the corporation? A. No.

Q. Only of the corporation? A. Only of the firm.

Q. Of the firm. And you had acquired a certain personal interest in the accounts that your agency there had established? A. Yes, sir.

Q. And it was then that you transferred to the company under the transfer that Mr. Hardin referred you to in the minutes? A. Yes, sir.

Q. And you then, in what year, became— A. 1905.

Q. —became a stockholder of the corporation? A. Yes, sir.

Q. And what position did you take in the board at that time, immediately a member? A. Director.

Q. Pardon me. A. As a director. I was elected director.

Q. And at that time how old were you? A. When was this, 1905? I was thirty-three then, I think—thirty-four.

Q. And did you continue to remain in California? A. For a period.

Q. How long? A. Until 1916.

Q. Did your duties continue about the same in California until you came to New York? A. Well, about the same. There was an extension of the duties, of course. I had some duties as director of the corporation that I did not have before and I wasn't in the corporation.

Q. You were head of the California— A. I was head of the Pacific Coast business.

Q. As you had been before? A. Yes, sir.

Q. And how much increase in salary occurred immediately upon your coming to New York—your salary? A. How much increase in salary? Well, I can't tell you. Your records will show that. I can't possibly tell you. I don't remember exactly what it was.

The Court: Increase in salary over that which he got from the firm?

Mr. McCarter: No, sir. He became an officer and director and remained in California, as I understand.

The Court: No.

The Witness: Yes.

Mr. McCarter: Until 1916.

The Court: He became president in 1916.

Mr. McCarter: He came to New York then.

Q. I am right, Mr. LaBoyteaux? A. Yes, sir.

Q. Now, between 1905 and 1916, which, if my mathematics are correct, was about eleven years, you were, as you say, in charge of the business on the Pacific Coast as you had been before? A. Yes, sir.

Q. Now, how much increase in your salary did you receive when you came to New York? A. If you will let me see the record I will tell you, but I cannot—

The Court: You mean in percentage?

Mr. McCarter: Either way.

The Court: That is all in.

Mr. McCarter: I would like to know myself. I cannot keep all those things in mind. I want to know from my own curiosity what increase in salary he received at once.

Mr. Hardin: When did he come?

Mr. McCarter: 1916.

Mr. Hardin: He received in 1915, 13.35, 1916, 15.25 and 1917, 15 per cent.

Mr. McCarter: Now, Mr. Hardin, will you read from the same document the percentages for the previous years from 1905 to 1915?

Mr. Hardin: 5.73, 1905; 6.30, 1906; 7, 1907; 7, 1908; 8 1/2, 1909; 10.875 in 1910; 10.54 in 1911; 13.70 in 1912; 12.20 in 1913; 13.25 in 1914. 1917, 15 per cent; 1918, 16.50; 1919, 17 per cent.

Q. Now, as I understand it during that period between 1905 and 1916, when you came to New York, you were receiving the percentage named by Mr. Hardin as salary from this corporation? A. Yes, sir.

Q. The corporation wasn't doing business in California, was it? A. May I answer that question my own way?

Q. The corporation was not doing business in California, was it? A. The corporation was not represented in California, no.

Q. It wasn't doing business in California, was it? A. I can't answer that question yes or no in that way. If you let me explain what I mean or just what the situation is I will be glad to do it.

Q. Mr. LaBoyteaux, you know what a "corporation" means, don't you? A. Yes.

Q. You know what "doing business" means, don't you? A. Yes, sir.

Q. And you are familiar with the limits of California? A. Yes, sir.

Q. During the years 1905 to 1916, when you came to New York, was the corporation from which you

were getting these percentages of salary doing business in California? A. The corporation was doing some business in California; yes, sir.

Q. What? A. Some insurance business.

Q. Didn't you tell us a little while ago that California was one of the places where it was not convenient for the company to do business and therefore the firm did business there? A. They were doing business from New York in California.

Q. Doing business from New York in California? A. Yes, sir.

Q. As you were in California you were not doing that business, were you, personally? A. I was in the company, too, to some extent.

Q. What? A. I was in the company to some extent, although I didn't actually handle the business.

Q. No. Your ostensible business there during these years from 1905 to 1916 was as a representative of the firm of Johnson & Higgins, wasn't it? A. Yes, sir.

Q. Notwithstanding which the corporation paid you a salary of the percentages that have been named by Mr. Hardin? A. Yes, sir.

Q. Now, when you came to New York in 1916 you found Mr. Coe as president? A. He was president then.

Q. Mr. W. R., or George? A. W. R. Coe.

Q. And what particular place did you fill other than director immediately upon your coming to New York? A. No other position, immediately upon coming to New York.

Q. No; you remained director? A. Yes, sir.

Q. And in particular charge of any branch of the work? A. It was understood I was in New York to become president.

Q. I didn't ask you what was understood, I asked you what you did? A. I came to New York to become the president and I immediately took charge of the business that properly belongs to the president. Of course, I was not elected president until a little later—until after I had arrived.

Q. How long a time elapsed? A. Several months; I do not remember the exact date.

Q. Sometime then during the year 1916? A. I do not recall whether it was in January or February. I think it was very early in the year.

Q. You came the latter part of 1916? A. I came —no. I came in—I think I came in 1915, December, 1915, but I started in the first of January.

Q. Mr. W. R. Coe continued in the enterprise? A. Mr. W. R. Coe became chairman of the board.

Q. Chairman of the board? A. Yes, sir.

Q. He is in the room, is he not? A. He is.

Q. He wasn't what we lawyers call very ancient and infirm, was he? A. No.

Q. What is Mr. W. R. Coe's age, which became chairman of the board, when you became president? A. You will have to ask Mr. Coe that.

Q. He is active in the business? A. Exactly.

Q. His share of the proceeds—his salary for the year 1919 was 12 1/2 per cent? A. Yes, sir.

Q. And the only one whose salary in the year 1919 exceeded his was his brother, Mr. George Coe, and your own? A. I believe that is true.

Q. Now, what did Mr. George Coe—William R. Coe—surrender to you and what new duties did he assume when you came to New York and assumed the presidency? A. Mr. W. H. Coe's salary prior to the time I came to New York was considerably in

excess of what he is getting now or what he was getting then.

Q. You have not answered the question. (Question read.) What duties, I mean? A. The duties of the president.

Q. That is what he surrendered to you. What did he take up? What new duties did he assume? A. Mr. Coe devoted himself more particularly to seeing people in connection with the business—people with whom he had influence.

Q. To give them the glad hand? A. If you want to call it that.

Q. That is Mr. Coe that sits behind Mr. Larkin, there? A. That is Mr. Coe; yes, sir.

Q. His idea was to take them out to lunch? A. Oh, no.

Q. I misunderstood you. What did you mean? A. I mean talking to people about the business, handling the business and keeping—just exactly the same as anybody else does that gets business. I can't tell you exactly how you get business. You go to see people you are doing business with, they tell you what they want, you either show them that they want that or they want something else, and you are in touch with them, and through that touch the confidence they have in you and confidence they have in our business and our integrity we handle their business. Now, that is our part. That is what Mr. Coe is doing. He has very wide associations and he knows a great many people. He has influence with those people and they are satisfied.

Q. His office, so far as the physical surroundings are concerned, is just the same as it was before, isn't it? A. What do you mean?

Q. He is in the same place, has a desk in the same suite of rooms he had when president? A. No, not in the same suite of rooms. He has a desk in a different suite of rooms.

Q. Different suite of rooms? A. Yes, sir.

Q. Now, are you able to any more definitely describe his duties since he became chairman of the board than you have? A. He presides at the meetings of the board and does those things that I have mentioned.

Q. How often does the board meet? A. Once a month. Sometimes a meeting may be called *ad interim.*

Q. Now, do you recall that your 17 per cent in the year 1919 resulted in your receiving a salary of $161,543? A. I do not recall the exact figures; I should think that that would be about right.

Q. And that Mr. W. R. Coe's percentage of 12 1/2 per cent for doing the duties of presiding once a month, as you described with a wave of the hand, that that aggregated $118,781.79; do you remember that? A. I remember that Mr. Coe's salary amounted to somewhere in that neighborhood; yes, sir.

Q. In the meantime there is Mr. G. V. Coe, isn't there? A. George V. Coe.

Q. And he is what—what position does he hold in the company? A. He is first vice president and the head of the fire brokerage department.

Q. Fire brokerage department? A. Senior director in charge, I should say.

Q. In charge of the fire brokerage department? A. Yes, sir.

Q. And his office is in the same place? A. In the same building.

Q. Same building? A. Yes, sir.

Q. And he has 17 per cent? A. Yes, sir.

Q. And the aggregate amount, of course, if figured correctly, for the year 1919, was a hundred and sixty-one thousand dollars and odd? A. Yes, sir.

Q. Now, what did Mr. Botsford do?

The Court: What did George V. Coe do?

Q. What does George do. I say George, he is a neighbor of mine and friend. I do not want to be too familiar. What does Mr. George do? A. Mr. George Coe is probably the brightest fire insurance man in the country. He has supervision of all of our —he is the senior director, I should say, in charge of the fire insurance, liability insurance and that type of insurance.

Q. (By the Court.) Devote all his time? A. Absolutely; every minute of his time.

Q. (By the Court.) And the chairman of the committee as well—the board? A. The chairman of the committee does not devote his entire time, but by far the major part of his time. He takes off a—in the summer time of a couple of months. The balance of the time he is practically at the office every day.

Q. Those two months do not make him inactive? A. No.

Q. Now we will take Mr. Botsford; what does he do? A. Mr. Botsford is a director. The major part of his time is devoted to handling the marine insurance business—part of the marine insurance business. We have several directors that are handling marine insurance business, and several directors that are handling fire insurance business. One man couldn't possibly do it all.

Q. Well, for instance, a large part of the marine insurance business or a substantial part of it is transacted from the Chicago office, isn't it? A. A substantial part?

Q. A substantial part? A. No, sir.

Q. What? A. Relatively not.

Q. Well, what proportion? A. Well, I should think the Chicago office runs probably five per cent of the New York office.

Q. How much San Francisco or Pacific Coast? A. Pacific Coast will run about ten—between ten and twelve.

Q. How about Boston? A. Boston does very little. None at all to speak of. It is practically a loss.

Q. So that possibly from 17 to 20 per cent of the marine business is done outside of the New York office? A. Well, I should say that the various offices outside would probably cover 20 per cent of the total.

Q. By the way, who succeeded you as head of the Pacific Coast business? A. Three men.

Q. Three men? A. Three men.

Q. You observe you haven't answered my question. A. Mr. E. A. Hanson, Mr. Alexander Field and John A. Bishop.

Q. All in the San Francisco office? A. All in the San Francisco office.

Q. There was very large increase in the business of the corporation during the war, was there not? A. There was.

Q. Three hundred per cent? A. Three hundred per cent? Yes, I think it was three hundred per cent.

Q. And of course the Pacific Coast end bore its part of that increase? A. There wasn't—just what do you mean that it bore. Explain.

Q. There was increase out there as well as all over? A. Not as great an increase.

Q. But proportionately? A. No.

Q. Still a decided increase? A. There was some increase.

Q. Some increase. Now, Mr. Botsford, of course, was a partner as well as— A. Yes, sir.

Q. As well as Messrs. Coe? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. Now, we come next to Mr. Davey? A. Yes, sir.

Q. And Mr. Lowe, the so-called running mates. Where are they located, New York? A. Yes, sir.

Q. And what are their functions? A. Mr. Davey is the director who has charge of—the direct charge of the average adjusting department. He is the one that has the supervision of that particular branch of the business. Mr. Coe—Mr. W. R. Coe—of course is an average adjuster and I was an average adjuster. We all had some supervision over it. Mr. Henry Lowe is a director in the fire insurance department —fire brokerage department and he is the same as Mr. Coe and his duties are just about the same as Mr. Coe's.

Q. They, as the Presbyterian catechism says, equal in effect and everywhere in that department or is one above the other? A. Mr. Coe is the senior of the two.

Q. By that you mean senior in age or senior in authority? A. Senior in age and senior in authority.

Q. Now, we come to Mr. Keegan. He is in New York? A. He is in New York.

Q. He is a director? A. Director.

Q. And partner? A. And partner.

Q. He got eight per cent in 1919? A. Yes, sir.

Q. Mr. Davey, I think got ten? A. I think the proportion is about correct; I don't remember.

Q. What does Mr. Keegan do? A. He is another director in the marine department.

Q. The marine department? A. Yes, sir.

Q. What does he do? A. He has general supervision of the business, he sees the client, he keeps everything running, his particular—the particular people that he comes in contact with; he works for them—he is their personal insurance adviser.

Q. (By the Court.) Has his own clients? A. Well, the clients of the business are so large that no one man can have all the clients and we divide them up as it seems best in the handling of the business. That is all I can tell you.

Q. (By the Court.) Divided up the work of the clients? A. Yes, sir; the work of the clients, not the clients.

Q. Now, Mr. Hopkins, we come to him? A. Yes, sir.

Q. He is a six per cent man? A. Mr. Hopkins is no longer connected with us at the present time.

Q. He was during 1919? A. He was during 1919, but he had very little to do with the business.

Q. He got six per cent, didn't he? A. Yes, sir.

Q. For doing very little? A. Yes, sir; for doing very little.

Q. How long did that situation continue? A. Two years.

Q. Two years? A. Yes, sir.

Q. Why did the corporation pay a man who did nothing or very little two years six per cent?

Mr. Hardin: I desire to object again. I do not think it is worth while to go into the differences between the corporation and the company.

The Court: What is your position, Mr. McCarter?

Mr. McCarter: We attack the salaries and claim they are illegal. This gentleman has undertaken to say they are perfectly proper.

The Court: And a prayer that they be returned?

Mr. McCarter: No; they haven't yet been paid; they only have a drawing account.

The Court: They have been paid for all these years.

Mr. McCarter: For the year 1919 I am talking about.

The Court: Your effort is to restrain the present, not the past. You do not seek recovery for the past?

Mr. McCarter: No, to restrain future payments.

Mr. Hardin: No attack on the past and strictly speaking there is no attack on any particular—

The Court: I understood your opening to be that you were seeking your dividends?

Mr. McCarter: We are. We are also seeking to enjoin the payment of the 1919 salaries, which are now the subject of my discussion with this gentleman which have been paid since the bill has been filed. We ask for no preliminary injunction.

The Court: What is the last question?

(Question read.)

Mr. Hardin: I submit the foundation has not been laid here—there has been no evidence offered by the complainant to show extravagance of salaries. I submit it is not necessary to go into the differences between Mr. Hopkins and the corporation in this trial.

The Court: Objection overruled.

Q. (Question read.) A. The corporation paid Mr. Hopkins 6 per cent rather than have a fight with him.

Q. Six per cent was $56,865 in the year 1919, didn't it? A. Yes, sir.

Q. Was he active? A. He wasn't very active.

Q. Was he in the war? A. No.

Q. Did you pass a resolution that his salary should cease? A. No.

Q. Did you ask him to forfeit his stock? A. Yes.

Q. When? A. Several times.

Q. You still paid him the salary? A. Yes, sir.

Q. And he still got his dividends, didn't he? A. During the period he was active. Understand, Mr. Hopkins—I haven't said Mr. Hopkins was not active. I have said he did not perform a great deal of work.

Q. Will you kindly define for my poor country brain the distinction between being active and not performing a great deal of work? A. Mr. Hopkins came to the office; he attended to a certain amount of work in the office; he had certain accounts that he did look out for. He did not devote his entire time and attention to the business during the year 1917 or 1918, but he was there for a major portion of his time. His salary in the previous year—

Q. Do you mean daily—greater portion of the time daily? A. Daily. He might be away for a week sometimes, the same as anyone else. His salary prior to the time that he became not so active was 12 per cent, not 6 per cent, and on account of his inactivity his salary was reduced.

Q. Your familiarity with the enterprise enables you to say that 6 per cent, that was paid him in 1919 and in 1918, in 1919 amounted to about $56,000, doesn't it? A. I cannot tell you. The record shows that. If 12 per cent amounts to 112,000, 6 per cent would amount to 56,000.

Q. You have no idea at all what he got, whether it is 56 or 156?

The Court: Amounted to sixty.

Mr. McCarter: I am interested to know whether the president of this concern has any idea what his officers were drawing.

Q. Have you any idea what Mr. Hopkins got during the year 1919? A. I have, but I do not carry the figures in my mind.

Q. You don't know whether he got a hundred thousand, a hundred and fifty thousand or fifty thousand, do you? A. Oh, yes.

Q. What did he get? A. He got 6 per cent of whatever the salary item was.

Q. Well, now, we have disposed of him, I guess. Now, we come to Mr. Davidge, who got 3 1/2 per cent. What were his duties? A. He was one of the senior directors in the fire department; he does a great deal of work. He is there practically all the time. He looks a good deal after the financial end in connection with the fire accounts, and looks after certain accounts the same as Mr. Coe and Mr. Lowe.

Q. In the fire department? A. In the fire department.

Q. We have Mr. S. C. Hunter; he is in New York? A. Yes, sir.

Q. He is a director? A. Yes, sir. He is no longer a director. He was a director in 1919.

Q. And member of the firm? A. Member of the firm.

Q. And what were his duties? A. Mr. Hunter was more or less in the same situation as Mr. Davidge. He was practically semi-retired, but looked after certain accounts and devoted a considerable portion of his time.

Q. Both Davidge and Hunter have been in the concern a long time? A. Yes, sir.

Q. Davidge is the man who is still a director? A. Yes, sir; he is still a director.

Q. Still a director; well is he active or incapacitated? A. Mr. Davidge? He is active enough to be at the office about 360 days a year.

Q. Then when he withdrew or surrendered his stock and the resolutions that have been offered in evidence reciting his inactivity, that wasn't exactly accurate, was it? A. Well, he was—

Mr. Hardin: What resolution do you refer to? I do not remember any resolution reciting Mr. Davidge's inactivity.

Q. Mr. Davidge did surrender some of his stock, didn't he? A. He did.

Q. And it was put in the name of Mr. Larkin? A. Temporarily.

Q. On the same day it was put in the name of Mr. Larkin. Mr. Larkin assigned it back to Mr.

Davidge, didn't he? A. I think you will find the dividend certificate—

Q. Dividend certificate back. Was that on the theory that Davidge had become inactive? A. It was on the theory that Mr. Davidge wished to be relieved of a certain amount of care and responsibility and therefore he was ready to surrender his stock in order to do that. He didn't want to do the same amount of work he had done before or assume the same responsibilities.

Q. Who made that proposition, he or you; he did, didn't he? A. I do not recall.

Q. It was his request, wasn't it, wanted to be relieved from certain responsibilities and he would like to be relieved of some of his stock? A. I think so.

Q. And still his quota was 3 1/2 per cent in 1919? A. Yes, but his quota before that was considerably more.

Q. We come to Mr. Dickson. I think we have dealt with Mr. Hunter. Mr. Dickson is a 2 per cent man? A. Yes, sir.

Q. How old a man is he? A. He is somewhere between sixty and seventy.

Q. Now, he has been with the concern a long time? A. Mr. Dickson was one of the original members of the concern.

Q. And what does he do—what did he do in 1919? A. Well, he devoted a certain amount of supervision in the office.

Q. Now, tell us what he did? A. I don't know exactly what he did, Dickson. He was in the finance committee; he watched the credits to some extent. He was always there available. He came down and gave his attendance in the office from September until

May, from ten o'clock until four o'clock and he was there available to us about any question that came up. If I wanted something done I would ask Mr. Dickson, if I didn't have time to do it, if he would do it.

Q. Was he your errand boy? A. Decidedly not my errand boy, but he was always willing to do anything he could to help out.

Q. His salary for that year was $19,000? A. It was 2 per cent.

Q. Nineteen thousand? A. Yes, sir.

Q. He was there ready to do anything that might be asked for? A. Yes, sir.

Q. And he got $19,000 for the job? A. Yes, sir.

Q. Now, Mr. Barrett I think was another director? A. Yes, sir.

Q. Was he an old director or a young one? A. He is one of the older directors.

Q. These gentlemen at the foot of the list are veterans? A. Mr. Barrett, Mr. Dickson—

Q. Yes. A. Mr. Hunter.

Q. The seniors? A. Yes, sir.

Q. Mr. Davidge— A. We refer to them as seniors.

Q. If you prefer that. As they get older their shares get smaller and beautifully less? A. Yes, sir.

Q. And poor Barrett is down to $2,500 a year. What does he do? A. He doesn't do very much. He doesn't do anything but attend the directors' meetings.

Q. Once a month? A. Yes, sir.

Q. For which he got $2,500, two hundred and some dollars every time he attended a directors' meeting. Where does he live? A. Greenwich, I believe.

Q. He got his director fee as well as a salary of $2,500, for attending the directors' meeting, didn't he? A. Yes, sir.

Q. $20? A. Yes, sir.

Q. Now, there was one more director, I think, Mr. Curtin? A. Yes, sir.

Q. He lives over in Philadelphia? A. Yes, sir.

Q. He is still a director? A. Yes, sir.

Q. Or was in 1919? A. Yes, sir.

Q. Active? A. Yes, sir.

Q. Any salary? A. Yes, sir.

Q. 1919? A. Not from Johnson & Higgins, New York.

Q. I am talking about the corporation? A. Corporation of Johnson & Higgins, New York, he received no salary.

Q. He received no salary but he was a director? A. He was a director; yes, sir.

By the Court:

Q. Why? A. Why didn't he receive a salary?

Q. Yes. A. He received a salary from the subsidiary corporation in Philadelphia, Curtin & Brockie.

By Mr. McCarter:

Q. Johnson & Higgins owns Curtin & Brockie just as they own Prindiville? A. Yes, sir.

Q. And Curtin's salary is taken care of by Curtin & Brockie before they account to Johnson & Higgins, which is the holding company? A. Yes.

Q. How much does Curtin get? A. $7,500.

Q. Has he reached the infirm age of between sixty and seventy? A. He has reached the age of between sixty and seventy; yes, sir.

Q. Is he in charge of the Philadelphia branch? A. Not entirely—he is in charge of the Philadelphia branch but he doesn't devote all of his time to the business. We have more active men that look after the details there.

Q. What particular thing does he do, I would be glad to hear? A. He does just about the same as all the rest of us do, gets all the business he can and keeps everybody satisfied that he can and inspires all the confidence he can. He doesn't go into the detail of whether this, that or the other thing is on the books; just as we do; always working for Johnson & Higgins.

Q. Now, Mr. LaBoyteaux, I would be very glad to give you the opportunity, because I think you are entitled to it, to describe any other thing that any one of these gentlemen does other than you have described?

The Court: The answer would be they are the men who make the money for the concern by their activities.

The Witness: That is the absolute fact.

The Court: Is that your answer?

The Witness: Absolutely.

Q. Now, have you ever added up the salaries for the year 1919 paid to these gentlemen? A. No; I haven't added them up.

Q. Have you any idea what they amount to? A. Yes, sir.

Q. How much? A. Somewhere in the neighberhood of $950,000.

Q. $952,000 to be accurate, I think.

The Court: $952,000 dividends.

Mr. Hardin: Approximately.

The Court: Profits of the year 1919?

The Witness: Yes, sir.

The Court: What was the amount in 1918?

The Witness: Is this 1919 now, you are talking about? 1918 I think they were about the same. Just a little—

The Court: About four and a half million?

The Witness: No; it wasn't four and a half million. I don't really remember the exact figures. The biggest year we had was in 1917.

Q. Haven't you any idea what you made in 1918 within a million or two? A. Oh, yes, within a million or two I have.

Q. Just try to remember within a million or two what you made in 1918? A. 1918? Let me see. I think the figures in 1919 was a million and fifty thousand, or a million and one hundred thousand.

Mr. Hardin: Dividends were declared to the extent of $1,132,126, including preferred stock.

Q. Now, Mr. LaBoyteaux, I heard you say during your direct evidence something to this effect. See if I have it right. Some of the elder gentlemen had reason to retire some of their holdings and that that left more money to be divided as salary and that, therefore, the two running mates, Lowe and Davey, had been able to find more salary and their salary was increased. Am I right? A. There were certain give-ups by some of the men in those years; yes, sir.

Q. You have always estimated salaries on percentages, haven't you? A. Always.

Q. You have never fixed a man's salary at $50,000 a year or $20,000 a year or $12,000 a year or $13,000 a year or $14,000 a year, but it is a certain per cent of profits? A. All except, as you have noticed in the records there, Mr. Barrett, one period—Mr. Barrett and Mr. Lowe and Mr. Loines I think were to receive a salary of $2,500; however, ever since the institution of the corporation salaries have been divided on the basis of percentage.

Q. And the scheme roughly speaking and generally has been to take half of the net profits and fractionally divide that among the officers? A. The scheme has been to apply half the net profits to active service and the balance of it for dividends; yes, sir.

Q. So, without regard to anything else, if the profits in one year were four times the profits in the previous year with the same effort on everybody's part, the same men would get four times the salary that they got the previous year? A. It wouldn't be possible for the profits to be four times as great with the same effort.

Q. Well, did the war have anything to do with the increase in salaries—with the increase of profits during the past year, or was that all effort—past three or four years, or was that all effort? Did the war with all its accompaniments have anything to do with the increase of the profits of this concern during the war period. There was increased business due to war activities unquestionably.

Q. I beg pardon? A. There was increased business.

Q. Decided? A. Surely.

Q. Your business didn't jump 300 per cent simply from the intelligence and skill displayed by its offi-

cers, the war had a good deal to do with that, didn't it? A. The war produced the business, certainly.

Q. How much of that 300 per cent did the war have to do with? A. I couldn't answer that question.

Q. Practically all of it, didn't it? A. No; I wouldn't say practically all of it.

Q. Large bulk of it? A. Why the business was running on an increase of somewhere between fifty and twenty per cent per annum prior to the war.

Q. And during the war it jumped 300 per cent? A. During 1917 I think it jumped about 300 per cent.

Q. And the largest jump was in marine insurance? A. Yes; I think it was.

Q. Owing to the exigencies of the war? A. Owing to the war's business.

Q. Yes, exactly. During the war all shipping was anxious to get insurance, wasn't it? A. Surely.

Q. Sure. They didn't need very much urging to come in and get insurance, did they; what they were anxious about was to be insured? A. They wanted to be insured correctly, certainly.

Q. Now, without regard to this abnormal and unusual increase in the business the fractional percentage basis permitted the salary to grow proportionately, without regard to effort, skill or anything else, didn't it? A. No, certainly not.

Q. It didn't? A. No.

Q. Well, if the business grew 300 per cent during the war of which we will say 250 per cent was due to the war— A. Yes, sir.

Q. —and the salaries were and the fraction of the profits remained practically the same as they were the year before, didn't the salaries jump up propor-

tionately? A. You said without effort and without attention.

Q. I said extra? A. Extra, but there was extra effort.

Q. Well, how much increase in hours of service was rendered by you in 1917, '18 and '19, that had not been rendered before? A. I don't know how much extra hours, but I know I was on the job from nine in the morning until six or seven at night.

Q. You have always been that way? A. Yes, but you can work sometimes under some conditions and other times you are under a strain and you have to —you get through more work.

Q. Well, as a matter of fact, automatically, under this scheme of percentage, the salaries went up under those conditions, didn't they? A. Certainly; increase the business and certainly the salaries increase.

Q. You do not mean to say that these thirteen or fourteen gentlemen that were directors of this company were not doing their best efforts for the concern before the war, do you? A. No; I do not.

Q. They were not loafing on the job? A. I haven't said that.

Q. They were all pretty zealous of the company before then? A. We were always zealous.

Q. Now, I have forgotten—the record shows—but I would like for my own information to know what period of the year the salaries are fixed? A. The salaries are ordinarily fixed by a resolution in January.

Q. Of each year? A. Of each year for the coming year.

Q. So that without regard to the effort or the skill or the time or anything else that will be displayed

during that year the fractional sum is fixed in January for that year? A. Certainly; yes, that is right.

Q. And, if in the meantime, next year, or before next year comes around Mr. Curtin should get out or Mr. Barrett, or Mr. Dickson, these venerable sirs, should retire from the concern, and that would leave a certain—shall I say profit to be distributed by way of salaries, the salaries would automatically be increased to that extent to the others? A. If there was a give-up, if I may express it that way—if there is a give-up of that salary by anyone retiring—

Q. The other fellow would get it. A. It naturally must be divided among the other people.

Q. In other words half the profits are there to be distributed in the way of salaries to the directors, and the only question is how to divide that up fractionally among the given thirteen, is that right? A. That is quite right.

The Court: Increased burdens however?

The Witness: Why, certainly, that naturally follows.

Q. What is the greatest number of directors you have ever had? A. Greatest number of directors? Fifteen.

Q. How many did you have in 1919? A. I think we had—during 1919 there were most of the time—there were—let me see—there were thirteen men, I believe, that were active.

Q. Beside Mr. Curtin; Mr. Curtin made fourteen? A. No; there were about eleven.

Q. I am not asking about active directors, I am asking how many directors you had? A. All right, then Mr. Curtin was amongst them.

Q. Now, when these fellows retired didn't you generally elect a successor? A. Not necessarily immediately upon retirement.

Q. You kept the board about the neighborhood of thirteen or fourteen always, haven't you? A. The board was fifteen and I tell you now the board is only twelve.

Q. I am talking about 1919. I am not talking about what transpired since the suit commenced. What was the board during 1919? A. There were, I think—I will have to look at the list—I think there were thirteen men that were directors that were actively engaged in the business.

Q. Were there two that were not active? A. Yes; Mr. Barrett, as I told you and—I think Mr. Barrett was the only one.

Q. Mr. Prindiville was a director during 1919, wasn't he; wasn't that the other one? A. He retired at the beginning of 1919—no, of 1918—we understood.

Q. Well, that, of course, is a matter to come up later, but isn't he the other one, whether he was or wasn't director—the other one you had in mind? I am not trying to catch you on that at all. Isn't it the other one, whether or not he was a director, Mr. Prindiville? Doesn't that account for the discrepancy? A. Let me see. In 1918 Mr. Prindiville was on the board of directors.

Q. That made how many? A. That made fifteen.

Q. And in 1919? A. 1919, there were thirteen on the board of directors.

Q. And Prindiville you do not count? A. Mr. Prindiville was not among the thirteen.

Q. Who was the other, Barrett? A. Barrett.

Q. Barrett went out. Now, as a matter of fact, the practice was when an elderly, venerable sir retired a youthful, brawny substitute came in, didn't he, so that the labors were about distributed among the same number; isn't that the fact? A. Ordinarily when there is a retirement, at that time, or shortly after we take in another director.

Q. Yes. When was the successor to Mr. Prindiville elected? A. There was no successor elected to Mr. Prindiville.

Q. Has Mr. Sexton been elected? A. Mr. Sexton has been elected to the board.

Q. When? A. He was elected, I think, in the January meeting, 1920.

Q. Is he in this Chicago business? A. No, Mr. Sexton is in New York.

By the Court:

Q. How long do you elect your directors for? A. The Board of Directors are elected every year for a period of three years in groups. We have a group elected in 1914, three men, whose term expired in 1917; then 1915 three men. We work in groups.

Q. How long had Mr. Prindiville served when you had this trouble? A. Mr. Prindiville was originally elected director in 1911 for the period of—

Q. He had another year to run? A. His term expired as director in May, 1917. He went away in May, 1917, at which time he was elected for a period of three years.

By Mr. McCarter:

Q. His term, supposing he stayed there, and there had been no trouble and everything had gone along

smoothly—when would his term have expired? A. May, 1920.

Q. Yes. Now, in January, 1920, Mr. Sexton was elected, wasn't he? A. Yes, sir.

Q. And Mr. Sexton theretofore had been in Chicago in the office of Prindiville & Co.? A. He had; yes, sir, previous. He hadn't been immediately preceding in the office.

Q. How long previous? A. Mr. Sexton came to New York in 1917, I think it was, and was here a couple of years, and then when Mr. Prindiville retired or said he was out, we sent Mr. Sexton to Chicago to look after the business there temporarily until we could reorganize that office.

Q. How much salary did Sexton get? A. When?

Q. Before he became a director? A. $18,000 a year.

Q. $18,000 a year? A. Yes, sir.

Q. What percentage was he put on when he became a director? A. My recollection is 2 1/2 per cent.

Q. Of course, at the time these fractions are arranged in January of each year, not knowing what the business for the year will be, you have no idea what the aggregate salary will amount to? A. No, necessarily not.

Q. Now, assuming that your salary in 1919 amounted to $161,543.14, and don't forget the fourteen cents? A. Yes, sir.

Q. Do you know of anybody in this country getting as high a salary as that?

The Court: What?

Q. Do you know anybody in this country that gets as high a salary as that? A. I do not know the

highest salaries paid in the country, but it is generally admitted that in some business that salaries are paid as high as a million dollars. It depends on the result of the man's effort that is getting the salary.

Q. I am asking you—answer my question—do you know a single individual in this country that gets as high a salary, regardless now of anything else, from a corporation as $161,000? Do you know of any such man?

The Court: Mr. Schwab.

A. Mr. Schwab, the president of the Bethlehem Steel Company, is supposed to get (interrupted)—

Recess.

Q. Mr. LaBoyteaux, when we separated for luncheon, we were on this question of salaries and something was said either by you or the Court with reference to the salary of Mr. Schwab. I suppose you are aware of the fact that the profits of the Bethlehem Steel Corporation for the year 1917 were something like $53,000,000? A. I was not aware exactly of what the profits of the Steel Company were.

Q. Very largely in excess of the profits of your concern, weren't they? A. Yes, sir; but not any more so in relation to the efforts of the individual.

Q. Do you know whether or not a dozen other men get salaries, several of them over a hundred thousand dollars, in the Steel Corporation—Bethlehem Steel Corporation, besides Mr. Schwab, if he does get any such salary; do you know anything about

that? A. If you ask me about the salaries paid by the Steel Corporation, I have no personal knowledge.

Q. I am speaking of the Bethlehem Steel? A. I have no knowledge of the individual salaries of Bethlehem Steel. That was only used as an illustration. There must be hundreds of men through their individual effort making over a hundred thousand dollars a year.

Q. Salary? A. Either salary or by lawyer's fees, other things; exactly the same thing—personal effort.

Q. Lawyer's fees? A. I suppose there are lawyers making more than a hundred thousand.

Q. Do you know that Behtlehem Steel for the year 1918 made $57,000,000 profit? A. The Bethlehem Steel Corporation—

Q. Won't you answer my question. A. I told you I don't know.

Q. You don't know? A. No.

Q. You have some idea. Upon your theory of the value of services that value depends something upon the extent of profit, don't it? You referred to Mr. Schwab. You didn't— A. If I am not mistaken the Court referred to him.

Q. You took it up—you were quick to avail yourself of it? A. I had Mr. Grace in mind particularly

Q. You said Schwab. Do you feel that the extent of the profit has anything to do, upon your theory, with the amount of the salary? A. I don't quite catch the trend of your question.

Q. Do you think there is any relation between the profits that a corporation makes and the salaries to which its management is entitled? A. I think I have understood that that is a fact in connection with the Bethlehem Steel Corporation.

Q. Then if it be true that the Bethlehem Steel Corporation profits were for the year 1918, $57,000,000, that might have something to do with the size of the salary? A. Well, there might—

Q. Will you answer the question? A. I can't answer it.

Q. Are you aware of the fact that the Bethlehem Steel Corporation profits for the year 1917 were something $37,000,000? A. No; I don't know what their profits were.

Q. Don't know anything about that, no. Now, during the time of your going to and from California you have probably gone over the Atcheson, Topeka & Santa Fe route? A. Yes, sir; I went over the route.

Q. Mr. Ripley Burke to his death was the president? A. Yes, sir.

Q. About twelve or fifteen or sixteen thousand miles of railroad, haven't they? A. Yes, sir.

Q. How many employees? A. I haven't the slightest idea.

Q. Are you aware of the fact that his salary at the time of his death was $70,000? A. I don't know what his salary was.

Q. Are you aware of the fact that Mr. Chauncey M. Depew's salary as chairman of the Board of the New York Central was $25,000? A. I have no knowledge of his salary.

Q. Have you any knowledge of the salary of Mr. Samuel Rea, president of the Pennsylvania Railroad, is $75,000? A. I have no knowledge of his salary.

Q. Have you any knowledge of the salary of Mr. Smith, president of the New York Central, is $69,000? A. I have no knowledge.

Q. Have you any knowledge of the fact that the salary of Mr. Underwood, president of the Erie, is $77,000? A. I have no knowledge of the fact.

Q. Have you any knowledge of the fact that Mr. Britt, president of the Chicago & Alton Railroad, was $36,000? A. No, sir; no knowledge of his salary.

Q. Have you any knowledge of the fact that Mr. Farrell, president of the Union Pacific, had a salary of $60,000? A. No, sir.

Q. Now, can you point to a corporation where, whose profits were $3,000,000 in a given year, or thereabouts, four of its directors got combined salaries of more than half a million dollars? A. I don't know of any other corporation such as Johnson & Higgins, sir.

Q. Your answer to my question, I suppose, is no; you don't know of any such affair? A. I don't know of any such corporation.

Q. You had a secretary and treasurer of the corporation? A. Yes, sir.

Q. And they performed the usual functions of those offices? A. Yes, sir.

Q. What were their salaries respectively in the year 1919? A. I think the treasurer was getting $10,000 if I am not mistaken.

Q. In 1919? A. In 1919; and the secretary was—had some participation. I don't know what his figures were.

Q. Neither one of them was a director? A. No.

Q. Before the directors divided the half profits among themselves they each voted what they would pay the secretary and treasurer, didn't they? A. Yes, sir.

Q. You can't remember what it is that you paid one of the officers I have named? A. The secretary of the corporation has a participation in some way —small participation in the salary item of the corporation and just exactly what his figures were I don't know.

Q. When you speak of the participation you mean the salary? A. I mean his salary item; yes, sir.

Q. In other words, is the officer to whom you last referred put among those who fractionally share in half of the profits, is that what you mean? A. Yes; I think that is so, but I think his participation does not appear in the hundred per cent, if I make that clear. Before the hundred per cent that is for salaries is divided amongst those who are entitled to receive it his is deducted from the fifty per cent of the net earnings that goes to salary.

Q. See if I understand that practice, then. In the first place it is January of 1919, for instance, and the board is meeting to settle this question of salary, and with reference to the—secretary, was it we were just referring to, or treasurer? A. Secretary.

Q. Secretary. You say that he will have first a certain part of the profits which shall be deducted from half the profits attributable to salaries? A. I believe that is it.

Q. That is correct. Then after that remainder is ascertained, you then apportion to him and to the treasurer a certain salary? A. No, no.

Q. What? A. The salary of the treasurer is charged as an ordinary expense of conducting the business. There is also a certain amount, as I recall it, of the salary to the secretary which is likewise charged as a specific charge in the ordinary op-

eration of the business. When the net profits of the business is shown, and the amount that is allotted to the salary item, the secretary gets a small percentage of that before it is then divided amongst the directors who have salary participation.

The Court: Not small percentage, small fixed sum.

The Witness: Small fixed percentage. I have forgotten exactly what it was. It is something that has been going on since the corporation was organized.

Q. Well, now, assuming that our figures here are correct and that the aggregate salaries to directors for the year 1919 was $952,000 plus, was that charged up as an expense of the business on your income tax statement? A. How do you mean "charged to the expense of the business"? Yes, charged as salary item.

Q. Net? A. Before the net result available for dividends are ascertained.

Q. You obtained, I think, at the time you entered the company, 50 shares? A. 50 shares of common stock.

Q. May I ask how many shares you now own? A. I own shares of record 400, in addition to which I have another hundred of which I am the real owner, but which have been used by me to qualify some of the other directors; some of the retiring directors.

The Court: Qualify some of the retiring directors?

The Witness: For instance, Mr. Davidge is one of these gentlemen. Mr. Davidge has retired and surrendered all of his active stock but he is still a director of the corporation.

Q. Of record? A. Of record. Fifty shares of my stock have been transferred to Mr. Davidge for fifty

shares of stock which is not dividend bearing at the present time and stands in his name. Although I am the actual owner of the stock I have loaned the stock to him.

The Court: He is not participating in the dividends?

The Witness: He is not participating in the—

Q. Davidge is getting 3 1/2 per cent—3 1/10th? A. Mr. Davidge is getting 3 1/2 per cent, and is still a director, but he has nevertheless surrendered all his active stock and has taken dividend certificates for the active stock.

Q. But he is a 3 1/2 per cent man in your apportionment of 1919, isn't he? A. Yes, sir.

Q. Did he get that or did you get it? A. He got it.

Q. Who are these other men? A. Mr. Hunter had fifty shares of my stock last year but he has retired now and the stock has been put back in my name, so today I have 450 shares—no; I have still 400 shares of stock. Fifty shares was used to qualify another director.

Q. You say he has retired, what do you mean? A. I mean he has surrendered his active stock and taken dividend certificates and surrendered all salary. No longer actively or inactively connected with the corporation.

Q. In 1919 he was active enough to get 3 per cent? A. Yes, has all happened since first of January, 1920.

Q. During 1919 how was it? A. During 1919 Mr. Hunter was active but had surrendered. I don't remember whether it was surrendered in 1919 or not. He had surrendered some of his shares, I think. The record will show it.

Q. Who is the next man? A. Who do you mean, the next man?

Q. The next man who your stock qualified? A. Mr. Larkin.

Q. That is the current year? A. Yes, sir.

Q. I am speaking of 1919. I don't care anything about the present time? A. 1919, Mr. Davidge and Mr. Hopkins, those two alone.

Q. So that as a matter of fact when you went into this enterprise in 1905 your ownership was 50 shares and now you are owner legally or equitably of 500? A. Yes, sir.

Q. The 50 shares that you originally owned were the consideration for the transfer you made to the concern? A. Yes, sir.

Q. Is the balance of 450 shares, other than the original fifty all active or is some of it participating dividend stock? A. Originally the entire 450 shares was non-dividend paying stock at the time that I received it. At the present time there has, through the lapse of years since I have had this stock—the ten years has expired so that today I have about 382, I think it is, active dividend bearing certificates. The remainder of my stock will not become entitled to dividends until 1923, at which time, my recollection is, the entire lot is dividend bearing stock.

Q. Then the large bulk of your stock has grown from or been converted into or converted from non-dividend to participating dividend stock? A. The non-paying dividend stock, just exactly the same as—

Q. I didn't ask you about the same; I am asking you if that isn't the fact? A. Yes; the stock was inactive, non-dividend bearing when I received it and by lapse of time it becomes dividend bearing.

Q. It was stock that had been surrendered? A. Yes, sir; surrendered and reissued.

By the Court:

Q. Your share? A. It was my participation in the stock that had been surrendered and was being reissued.

Q. What did you do for the company prior to 1915 to earn these large sums of money? A. Why, I developed business, I handled business. The money that we—the large sums of money is simply by reason of the great volume of business that we are handling.

Q. Yes, but prior to 1915, you were in San Francisco and not carrying on the business of the corporation, I understood; is that right? A. That is correct, but the corporation—

Q. What did you do to participate in these items of salary? A. Exactly. There is a certain amount of business that was controlled, by reason of the financial conditions in New York, in New York that was located on the Pacific Coast. That business required a certain amount of local effort and handling to watch it and take care of it without being directly handled through the San Francisco office. All of the business that was controlled on the Pacific Coast by the firm of Johnson & Higgins had come through—that was not placed directly in the local market—and a comparatively small amount was placed in the local market because the market couldn't absorb it—had come to New York and through New York to London, I suppose—all the business that was developed on the Pacific Coast in point of fact in New York the corporation of Johnson & Higgins participate in the earn-

ings of that business; in other words they took half the commission or percentage that was earned for their direct use because of the fact that it passed through them; the firm in California got the other half. And it was the general development of that business—and in addition to that there were people on the coast—for instance, reference has been made to Great Northern & Pacific Mail hull. That business happened to be controlled by Mr. Farrell, who at the inception—he is now connected with the Union Pacific; at that time he was connected with the Great Northern Steamship Company—Mr. Farrell had been doing business with me for years, knew me personally and consulted with me before this business came up at all and I was asked to come to New York when this business was being discussed. The boats were worth $3,000,000 apiece and the premium on them amounted to practically $100,000 apiece. Mr. Farrell telegraphed me to come to New York to see him about those boats and I came to New York and got the business. And Pacific Mail hulls was more or less the same way. The ramifications of handling and controlling business in this organization you can only explain by referring to one or two cases, as you understand. Another situation is the Pan American Petroleum Transport Company on the coast. They own some forty steamers. That is controlled in California but handled from New York. That business is business which the officers and directors of the corporation hold me personally responsible for. They say, "If anything happens to these, LaBoyteaux gets in trouble."

Mr. McCarter: Is this an answer to the question of what you did in California?

The Witness: Yes. I am trying to answer the Court.

Mr. McCarter: I understood the question was what you did in California.

The Court: I asked him what labor he performed for this corporation to earn the salaries that he got prior to coming to New York.

Mr. McCarter: When he was in California. He is telling what he is doing now.

The Witness: No. I told you not what I did in New York, but in California.

The Court: Have you finished?

The Witness: I have finished.

Mr. McCarter: May I see the minutes book of the last annual meeting, Wednesday, May 5, 1920.

(Minute book produced.)

Q. You were present at the meeting of stockholders that was held on the 5th of May, recently? A. Yes, sir.

Q. I have in my hand the minutes of that meeting, and I find that it there appears that the following resolution was passed, and I want some information with reference to it, "Whereas it appears that on and before December 31st, 1918, Thomas J. Prindiville had ceased to be actively engaged in the service of the corporation, either as an officer or a director, or an employee, and had expressly and voluntarily abandoned the position, as well as the duties of his office, as director, and had resigned as such director, and has engaged in business in direct competition with this company, therefore it is on motion duly made and sec-

onded and carried, Resolved that the action of the board of directors of this company in accepting and treating (a) the refusal of Thomas J. Prindiville, who was until the latter part of December, 1918, one of the directors of this company, longer to serve this corporation, (b) his statement of intention thereupon to end his connection therewith and (c) his action immediately thereafter in wholly abandoning the work and service of the corporation and in establishing a business actively competing therewith, as a resignation of his office as a director of the corporation and in treating the office of director formerly held by him as vacant, be and it is hereby in all things expressly approved, confirmed and adopted as the action of the stockholders of the corporation." Do you remember that resolution being introduced and passed? A. Yes, sir.

Q. You voted for it, didn't you? A. I did.

Q. Had Mr. Prindiville resigned? A. I think so; he had refused to go on with the business.

Q. Did he not continue a director until the end of December, 1918? A. Until the end of December, 1918?

Q. Yes. A. Yes; I presume he did.

Q. And until the end of December, 1919? A. No.

Q. What? A. I don't think so.

Q. When did his office as director terminate? A. When he notified us of his intention not to longer remain with the corporation.

Q. Was it noted? Was his name taken off the roll of directors? A. His name was omitted from the salary list.

Q. Was his name taken off the roll of directors? A. We never take names off the roll of directors.

Q. Was a successor elected? A. No.

Q. If he was no longer a director there was a vacancy in the board, was there not? A. Yes, sir.

Q. Yes. He never did, in fact, unless his acts amounted to a resignation, he never wrote or tendered a resignation, did he? A. You are asking me—we considered it a resignation. I don't know. That is a question.

The Court: Answer the question, whether he actually ever wrote out and tendered a resignation as director?

The Witness: He wrote no formal resignation in that sense, no.

Q. What you speak of as his resignation in that resolution was his conduct? A. And the fact that he notified us that he had placed the matter in the hands of his lawyers and they would send me a letter.

Q. You mean the letter that has been referred to? A. Yes, sir.

Q. Now, you felt that inasmuch as he was no longer active unless he came to your terms with reference to his compensation, that he had to suffer the provision of the charter, didn't you? A. We had no such feeling.

Q. You hadn't? A. No. We had nothing to say about what Mr. Prindiville did. We fixed what—he asked us to state what salary would be allowed him for 1919. We—I got an expression from the board of directors as to what salary he should receive; I notified him of that; he says, "All right, I will get out."

Q. Did he say, "I will get out"? A. Practically, in so many words.

Q. What did he say? A. Well, there is a letter.

Q. The letter speaks for itself? A. Yes. He told me he was going to get out.

Q. Did you present any other alternative to him beyond accepting the terms of your proposition, namely, as specified in the letter? A. Present any terms to him?

Q. Nothing other than that? A. No.

Q. In other words you declined his idea that he should be equal to what he called his running mates—you declined that? A. We refused to recognize that Mr. Prindiville was worth more to the corporation than the salary we offered him.

Q. You declined his proposition that he should be equal to his running mates, didn't you? A. We didn't recognize his running mates at all; that is not in our organization.

Q. You declined that he should stand in the same position as Mr. Lowe and Mr. Davey as he stood before, didn't you?

The Court: Your answer is yes?

Mr. McCarter: Why, of course.

Q. Why don't you say so?

The Court: It already appears.

Mr. McCarter: If the witness won't admit what already appears I think it bears on his testimony. I think I have a right to find out what already appears.

Q. Is that the fact or isn't it? A. What do you want to know?

Q. I have already asked it twice. See if you can understand the English language. (Question read as

follows): "You declined his proposition that he should be equal to his running mates, didn't you?" "You declined that he should stand in the same position of Mr. Lowe and Mr. Davey, as he stood before, didn't you?" A. He never stood in the same position as Mr. Lowe and Mr. Davey.

The Court: Do not quibble. The question is a very plain one.

Mr. Hardin: "As he stood before" changes absolutely the nature of the question.

The Court: Strike out "as he did before."

A. Yes, sir.

Q. With the result that your position ever since has been in view of the fact that he insisted on that, that you should stand on the charter rights and that he shouldn't get a cent of the dividends or any salary until he acquiesces in the provisions of the charter and surrenders his stock, because he is inactive, isn't that your position?

Mr. Hardin: I object as not being a correct interpretation of what the witness has said, and as combining two elements, one relating to dividend and the other relating to salary.

The Court: Objection overruled.

Q. Isn't that the fact? A. I can't answer that question. We haven't done anything—

The Court: Do you understand the question?

The Witness: I do not understand the question the way it is put to me.

(Question read.)

A. I will have to answer that question no.

Q. It is not your position? A. No.

Mr. McCarter: We have a copy of a letter from Mr. LaBoyteaux to Mr. Prindiville, dated August 21, 1918. The original should be with us, but we haven't got it.

Mr. Hardin: No objections.

Letter marked Exhibit C6a.

Q. I have in my hand what is conceded to be a copy of a letter you wrote to Mr. Prindiville under date of August 21, 1918, as to which I will refresh your recollection by reading it to you. "Dear Tom: I have to acknowledge receipt of your favor of the 18th inst., and will, as you suggest, send to you a copy of the partnership agreement for 1918, for your signature. Referring to the matter of the action of the Board of Directors in connection with salary percentages for 1918, I thought I had made perfectly clear to you that the Board as a whole were unable to see the justice of allotting to you a salary for services to the Corporation in 1918, when you are not giving any of your time or service to the Corporation, but are actively engaged in the service of the Government. While I think the entire country has unquestionably become more deeply impressed as to the greatness of the work we have undertaken I must say I do not see that this in any way affects the principle involved as to whether or not this corporation should pay to one of its directors who is not engaged directly in its service a salary. I think when the Corporation gave you a leave of absence and continued to you the dividends on your stock in the Corporation, and when the firm not only continued your interest without any reduction but further gave you your proportionate

participation in the interest of certain retired members or associates, they were quite as liberal to you as you could reasonably expect and have really gone beyond what you were strictly entitled to by law or equity. What I have written is, I know, simply a repetition of what I have said to you before. There is however, nothing more that can be said. I know you hold different ideas from the rest of us. Your views and the entire subject have been most carefully considered, with the result that the conclusion has been reached that we cannot properly pay to you a salary from the Corporation while you are engaged in other services, and I really do not see what further can be done in the matter." Do you remember writing that letter? A. Yes, sir.

Q. Now, what were the views that you know Mr. Prindiville enjoyed? A. Mr. Prindiville expressed himself that while he was in the service of the government he should receive just exactly the same compensation as he would if he was in the service of Johnson & Higgins from Johnson & Higgins as he would if he was doing active service for Johnson & Higgins. We did not agree with him.

Q. You didn't agree with him, no. A. But we accepted his views in the end of 1918, and paid him just exactly what he asked for.

Q. However, did you get together then? A. We got together sufficiently to do that.

Q. Didn't you have a difference at the end of 1919? A. 1919?

Q. 1918? A. We had a difference?

Q. Yes. What was the difference that you and he had in 1918; what were you willing to do and what were you unwilling to do? A. Mr. Prindiville

asked to be reinstated in exactly the same position for 1918 that he was in 1917, on this theory of his of running mates. Now, that we did not concede because we do not concede that provision—that situation. We did pay him exactly the same as he got in 1917 and as he got before he went away.

Q. But you were unwilling to put him up where in the meantime Davey and Lowe, who, at the time that he left to go to war were his subordinates or running mates, had now gotten ahead of him, that you were unwilling to do? A. You ask me to say something about getting ahead of him. I am not saying anything about getting ahead of him. We refused to pay him—to give him the same percentage of salary that Mr. Lowe and Mr. Davey got.

Q. That is very good. When he left what were they getting? A. When he left?

Q. Yes. A. Why, I do not remember the exact figures. I can show you.

Q. Were they getting something he was not? A. They were getting somewhat more than he was getting, yes, in salary.

Q. At the time he left? A. Yes, sir, at the time he left.

Q. Their fees had relatively increased in the meantime? A. They had received an increase and he hadn't.

Q. His desire was to be put, relatively to them, the same as he had been at the time he went to war? A. That was his demand.

Q. And that you separated on? A. That we disagreed to.

Q. Therefore the alternative, according to you, was if he wouldn't accept that, he should surrender

his stock or couldn't get the dividends? A. I made no mention of any alternative.

Q. Hasn't that been the alternative? A. We haven't had any discussion about what we were going to do.

Q. Have you paid the dividend? A. We paid him everything except—

Q. Have you paid him the dividends in 1919? A. We paid the dividends in 1918—no, not since he left the employ.

Q. Isn't that your position, that his stock should be retired? A. Our position is that he is working for himself.

Q. Isn't that the position? A. Yes, sir.

Q. Did you see your answer before it was filed in this case? A. Yes, sir.

Q. Did you sign it? A. I presume so.

Q. Don't you say that in your answer? A. I presume so.

Q. Why don't you say it now? A. I am doing the very best I can.

Q. Have you always taken that position with the gentlemen who wanted to retire or did retire from the company, that they must surrender their stock and take a non-dividend or dividend participation certificate? A. We never had this question come up before.

Q. Have you always taken the position when a gentleman withdrew from the company and no longer was active that he should occupy the position that your answer says Mr. Prindiville should occupy? A. To the best of my knowledge, yes, yes.

Q. Do you remember a Mr. McCumber? A. No, I don't remember.

Q. Don't remember him? A. I remember of him. I can't remember anything about the circumstances.

Q. Wasn't he once a director? A. Yes, sir.

Q. Didn't he sell out? A. Yes, sir.

Q. Did they require him to surrender his stock? A. Yes, sir.

Q. What? A. He did surrender his stock.

Q. Didn't the company buy his stock? A. Yes, sir.

Q. They didn't require surrender did they, this way? A. You are getting beyond my depth, I don't know the exact conditions.

Q. When was this McCumber business? A. About 1902.

Q. You know, as a matter of fact, that the company or some of its directors actually bought his stock, don't you, rather than to require him to transmute his stock into dividend participating certificates; you know that, don't you? A. There was some settlement made with Mr. McCumber. I don't know what the settlement was. I know his business was turned back to him and I think a small cash consideration was paid to Mr. McCumber.

Q. And he has not been since that time the owner of any dividend participating certificates, has he? A. No.

Q. Now, do you know why they made fish of him and flesh of Prindiville? A. I don't think they have.

Q. You don't. Do you know why they didn't agree to buy Mr. Prindiville's stock? A. Why?

Q. Yes. A. I don't know why.

Q. You don't know why. Do you know why you insist—did you have any negotiations with Mr. Prin-

diville's counsel? A. We had a meeting with Mr. Prindiville's counsel once, up in our board room.

Q. Only once? A. Yes, sir.

Q. Now, was Mr. Prindiville the only one of your associates that was patriotic enough to go to war? A. Mr. Prindiville is the only one of the directors of Johnson & Higgins that went into the army or navy.

Q. Do you recall Mr. Keegan? A. Yes, sir.

Q. Didn't he go down to the Border? A. He went to the Border in the Mexican War.

Q. How long was he down there? A. Five or six months.

Q. Did you call that inactive? A. No.

Q. Well, why was Mr. Keegan's absence at the preliminary fracas with Mexico that required him to go to the Border and stay there six months, although he was one of your directors, why was that activity and Mr. Prindiville's mere statement that he was going to war without regard to the length of time he would be there, immediately characterized as inactivity? What was the distinction? A. Well, Mr. Keegan was a member of the National Guard and was ordered there by the government. Naturally there was nothing for him to do but to go. We are not in any way criticizing Mr. Prindiville's going to war—we were very glad to have him go to war—but we think he ought to have done us the courtesy to have at least consulted with us in what he was going to do about the business before he went. We have not deprived Mr. Prindiville on account of the time he stayed in the war—we have not deprived him of anything on account of his service in the war.

Q. Sure about that? A. Absolutely.

Q. Didn't you first pass a resolution in 1918 declining to pay him and then subsequently, a year later—you were mistaken when you said you had never done it, aren't you? You had a resolution in effect for a year by which you absolutely declined to let him have a cent, didn't you? A. He got his money.

Q. Now, I can stay here just as long as you, Mr. LaBoyteaux. I want an answer to the question. You had a resolution declining to pay him a cent in operation for a year, didn't you? A. Yes, sir.

Q. Yes; so you were mistaken a moment ago when you said to the contrary? A. I was talking about the result.

Q. I see. Now, then, the real thing behind the woodpile was the fact that before he determined to go to war he did not appear before the board of directors and obtain their consent, is that it? Is that what you meant as to the difference between him and somebody else; that he determined to go to war without consulting his board of directors; is that it? A. We felt he should have consulted us: yes, there is a distinction between the two.

Q. If he had come to you from Chicago and said, "Gentlemen, I feel the call of the war and I feel it is my duty to go. I am already a member of the Naval Reserve just as Mr. Keegan is a member of the Militia, may I, your Honors, go?" You would have said, "Go, and God bless you, and keep your salary as long as you are there," but not having done that, you wouldn't let him have his salary, is that it? A. We voted him a salary right then.

Q. Is that the reason you make the distinction

because he did not forsooth ask your permission, is that it? A. We felt he should have asked our permission.

Q. You practically said that in one of your letters, didn't you? A. Yes, sir.

Q. If you had come to us and asked our permission it might have been different? A. Yes, sir.

Q. Your dignity was hurt? A. No.

Q. What was hurt? A. We are engaged—all partners—married in business, as it were. We have to work as a unit. We haven't got the same liberty of individual action if we are partners as when working for ourselves. We have to co-operate and arrange our affairs so that when one goes there will be somebody to take his place. Now, it seems to me very reasonable that Mr. Prindiville should have let us know before he took this final step of what he had in mind. Now, that is all there was to it.

Q. Prindiville at that time was in Chicago? A. Yes, sir.

Q. Taking care of the Chicago office? A. Taking care of the Lake—Chicago office.

Q. Who else was there? A. Mr. Croxson, the gentleman he took with him.

Q. One of your directors? A. No, there wasn't any other director there; he was the sole director in charge of the lake business.

Q. Now, what occurred was this, wasn't it, Mr. LaBoyteaux, before the 7th of April, which I think was the date that we went into the war—Mr. Prindiville told you that he had attached himself to the naval militia and that the time might come when he would have to go. That was the situation, wasn't it? A. I don't think—that is not my recollection.

My recollection is that the very first intimation that I had from Mr. Prindiville was a letter in which he advised me that he had bought a boat and joined the naval militia and he expected to be called within a few weeks and he would naturally have to go when he was called.

Q. I would like to see that letter, if you have it. War hadn't been declared, had it? A. I don't recall whether it had or not.

Q. At our request counsel of the other side produces a letter, or copy of letter from Mr. Prindiville to yourself, dated April 3, 1917. Look at it and see if that is the letter to which you have just referred? A. This is the letter to which I referred.

Q. Do you remember the date we went into the war, was it April 5th or 7th? A. I do not remember.

Q. "April 3, 1917: Dear LaBoyteaux: As you probably know, I have been in touch with naval affairs here for the past year, helping on committees in furthering the enlistment of men. All members of our committees who own yachts have enrolled same in the Naval Coast Defense Reserve, and having purchased the 'Suzanne,' I enrolled her with her crew (including myself as master). For the present (in case of war) the Government will need these boats as coast defense patrol units and no doubt *if* war is declared we will be ordered to report at some coast station as soon as possible. Owing to heavy ice still in the lakes, it looks as if no boat will be able to reach Buffalo before the 20th of April, so that all our lake business will be practically on our books before I will have to leave. I am going over everything very carefully with Herbert and will have mat-

ters all straightened out for him to handle in case I have to leave, so do not think my departure will effect our lake results in any material way. Of course, they may not call our boats out, but from what I have learned today, they will need every good boat they can get for patrol duty and I naturally am glad to be of some service to the Government in this emergency." Who was Herbert? A. That was Mr. Sexton.

Letter marked Exhibit C7.

Q. Mr. Sexton is the same man that we referred to this morning who subsequently became a director? A. Exactly.

Q. He was the man at Chicago immediately under Mr. Prindiville, wasn't he? A. Yes, sir.

Q. And when you finally broke with Mr. Prindiville—it was Sexton who had had charge of the business in Chicago during Mr. Prindiville's absence? A. Mr. Sexton came to New York before December, 1918.

Q. So that the man who was in charge of the business, the Herbert whom Mr. Prindiville in that letter referred to, was taken away from Chicago by Johnson & Higgins about a year before you even broke with Mr. Prindiville? A. Taken away before?

Q. Yes. How long a time was he in New York? A. I think he came to New York in December—latter part of December, 1917, I think it was.

Q. 1917? A. Yes, sir.

Q. And was there all 1918? A. Yes, sir.

Q. Who was in charge of Chicago? A. Mr. Croxson in charge.

Q. Now, the fact therefore is that Herbert Sexton, whom Mr. Prindiville is giving the finishing touches to, to enable him to remain in charge of

that business during his absence, you took away from that job and brought to New York? A. We did.

Q. Did you send him back to Chicago? A. We did when Mr. Prindiville organized the Prindiville-Croxson Company.

Q. Now one thing I think is apparent, but one of my associates suggests I ask it of you, when Hopkins and Hunter retired their share of the—whatever you want to call it, swag I was going to say—it was divided up and these two running mates got their share, but Mr. Prindiville did not, that was the situation, wasn't it? A. Mr. Prindiville was not actively associated with us then.

Q. I don't care whether he was active or inactive, that was the fact? A. He was not associated with us?

Q. Is that the fact? A. No, he did not get a share.

Q. Yes? A. No, he did not get a share.

Q. You, of course, read the answer in this case? A. I haven't read it very carefully, Mr. McCarter.

Q. You are aware of the fact that considerable accent is placed in the answer and a great deal of testimony yesterday was directed to the fact that Mr. Prindiville is at the present time the owner of stock in this concern that has been the product of surrender by other gentlemen? A. Yes, sir.

Q. And you know the significance or attempted significance of that contention, don't you, that he has recognized this scheme? A. I really must confess I do not see the significance.

Q. Now, it appears that Mr. Davidge voluntarily surrendered the stock which he got, you remember that, don't you? A. Yes, sir.

Q. The same thing was true of Mr. Curtin, wasn't it? A. Yes, sir.

Q. And the same thing is true of Messrs. Barrett, Dickson, Loines and Lowe, a portion of whose stock upon their retirement he got? A. Yes, sir.

Q. That they voluntarily withdrew? A. Yes, sir.

Q. Can you tell me of a single share of stock that Mr. Prindiville owns that was taken from a man involuntarily pursuant to the provisions of this charter against his will? A. We have never taken any stock from anybody involuntarily.

Q. There has never been before an issue on this question? A. There never has been a refusal to surrender stock.

Q. No. And at the time Barrett, Dickson, Loines and Lowe did surrender some of their stock they were active and still continued active until some time after the surrender took place? A. To a lesser degree, yes.

Q. They were active? A. Active.

Q. Active enough to get salaries? A. Yes, sir.

Q. The same thing is true of Curtin? A. Yes, sir.

Q. And also the same thing is true of Davidge—I mean they were active enough to get salaries? A. Yes, sir.

DEFENDANT RESTS.

New Jersey State Library

THOMAS J. PRINDIVILLE sworn.

Direct-examination by Mr. McCarter:

Q. Your age, please? A. Forty-six.

Q. And you live where? A. Chicago.

Q. You are the complainant here? A. Yes, sir.

Q. I want to go back a little bit and ask you about the business that was carried on previous to the purchase by Johnson & Higgins of a part interest in Prindiville & Company in Chicago. What was the character of their business? A. Prindiville & Company?

Q. Yes. A. It was general marine and insurance brokerage, and underwriting agency.

Q. Was the business established by you personally? A. Well, it was a partnership, or rather agreement between Johnson & Higgins and myself.

Q. I am speaking of Prindiville & Co., before Johnson & Higgins— A. You mean John Prindiville & Son? I went first into business with my father under the name of John Prindiville, and later "Son" was attached to it, general shipping and insurance business in Chicago.

Q. When did the enterprise known as Johnson & Higgins first acquire an interest in the Prindiville business of Chicago, under whatever name? A. In 1903 the corporation of Prindiville & Co., was formed and Johnson and Higgins had half the stock and I had half.

Q. Now, of course, therefore—you have been in the insurance business for how many years about, roughly speaking? A. Roughly speaking, thirty years.

Q. This concern of Johnson & Higgins, what about the name Johnson & Higgins? A. It is a pretty big name—what do you mean?

Q. I mean to say has it a name in the trade? A. Yes, sir.

Q. Valuable name? A. Very, in my opinion.

Q. How long to your knowledge has it had a value, that name, to your knowledge? A. Well, prior to 1903, our business was more or less localized on the lakes, still I had heard of Johnson & Higgins as a very large and prosperous institution at that time.

Q. At the time the company was organized Johnson & Higgins purchased half the interest? A. Yes, sir.

Q. And you owned the other half in Prindiville & Co.? A. Yes, sir.

Q. And after your acquisition—after your sale, what particular function did you continue to perform in the business that is now wholly owned by Johnson & Higgins? A. Well, I did the best I could to develop it; traveling from one end of the lake to the other, soliciting accounts.

Q. Where were you located? A. Headquarters in Chicago.

Q. Were you a director of Johnson & Higgins? A. I became a director in 1911, I think.

Q. After you became a director in 1911, did you continue your headquarters in Chicago? A. Yes, sir.

Q. How much of the time did you spend in New York after that? A. Oh, comparatively little, although a large amount of our business is marketed in New York and it was essential that frequent visits should be made there.

Q. Your headquarters though continued in Chicago? A. Yes, sir.

Q. Now, how much of a plant did you have out there? A. Well, we started small, but grew very much.

Q. I mean to say at the time the war broke out what did the plant in Chicago consist of? A. Well, at the time war broke out we had taken over the Chicago Fire Department of Johnson & Higgins, the firm. I mean they moved into our office. The accounts were kept separate. We had an office of probably, I guess, all told, probably around thirty.

Q. Who was your chief understudy? A. Sexton.

Q. Besides him who else was high up in it? A. Well, there were directors of our local corporation, I think Sexton, Hall, Croxson and Mr. Green were directors, I think, when I left.

The Court: What local corporation?

The Witness: Prindiville & Company, Illinois corporation.

By the Court:

Q. That was not absorbed when you went with Johnson & Higgins? A. No; that still remained alive.

Mr. McCarter: The operating company out there yet, your Honor, as I understand it.

Q. Is that right? A. Yes, sir.

Q. They simply bought the stock? A. Yes.

The Court: Didn't Johnson & Higgins operate out there independent of Prindiville?

The Witness: They do their marine business under the name of Prindiville & Company. Their firm business was mostly fire and that was operated in the name of Johnson & Higgins.

The Court: You had charge of that?

The Witness: Yes; I was the resident partner.

The Court: You had two capacities.

The Witness: Yes, sir.

By Mr. McCarter:

Q. At the time that you sold out your half interest in Prindiville & Company to Johnson & Higgins did you also become a member of the firm of Johnson & Higgins? A. Yes, sir.

Q. Now, did your experience and training in marine insurance give you or add to a natural taste for things maritime? A. Oh, yes; I naturally inherited that.

Q. I do not care to have you, Mr. Prindiville, glory over the war or your patriotism, or anything of that kind. Those things speak for themselves. Did you feel the call of the war? A. I felt so very deeply.

Q. What activities did you undertake previous to the correspondence which we will bring up in a moment—previous to your expectation to be called out. What activities did you enter into? A. In 1916 I took my vacation as a naval cruise, civilians naval cruise and went on a battleship for several months to get in touch with the conditions of the navy. After I returned I was on certain duties in Chicago, stimulating recruiting and helping in every way the naval representatives at the Great Lakes Naval Station, and so forth; established nautical schools and did everything we learned during our naval cruise that was necessary to properly shape up for trouble which looked very threatening.

Q. Did those duties that you have been referring to in any way, in your judgment, interfere with the prosecution of your regular duties as resident manager, if you will, of J. & H. in Chicago? A. I don't think so, no.

Q. Now, what was the first overt act of personal participation besides this monthly cruise that you took,

was it referred to in the letter which has just been read?

The Court: He bought a boat.

The Witness: I bought a boat sometime before, and she was a type that was very well adapted for what at that time we thought would be an important branch of the service, but we found the boats were not adequate at all, but a number of us joined the Naval Reserve.

Q. When did you join the Naval Reserve? A. April 3, 1917.

Q. And that is the same date that this letter was written, I think. The same day you enlisted or joined the Naval Reserve you wrote this letter of April 3rd, which has already been offered in evidence, did you, to Mr. LaBoyteaux? A. Yes, sir.

Q. Did you get an answer to that letter? A. I did. It might have been wire or telephone—asking me to come to New York, if I remember correctly.

Q. I show you a letter from Mr. LaBoyteaux to you dated April 5th. Is that the letter you refer to? A. Yes, sir.

Letter marked Exhibit C8.

"April 5, 1917.

Mr. Thomas J. Prindiville,
c/o Prindiville & Co.,
Insurance Exchange Bldg.,
Chicago, Ill.

My dear Tom:

Your letter of April 3rd advising me of your plans was received this morning.

It is the feeling of all of us that this move which you have in contemplation is of such importance to our general interests that before you do anything further we should have an opportunity of conferring with you.

It has been our intention to ask you to come to New York early next week, to talk the matter over, but owing to the fact that Herbert Sexton will be here and the lake situation requires your presence in Chicago, we have decided to ask you to come on, being here on Monday, April 16th, for a talk."

Q. Did you go on, or what was the next thing? A. I think I did.

Q. Went on. Whom did you see and what was the subject of conversation? A. Well, I think—I remember seeing Mr. LaBoyteaux—I think Mr. Will Coe, possibly other directors; I do not remember. I think there was quite a meeting of the directors.

Q. What was the subject of discussion? A. Well, the subject of discussion was the chance of my being—first of all my joining the naval reserve, and how, in case I was called—how the business would be left, and so forth; and they seemed to think that I shouldn't have joined the Naval Reserve without asking their

permission. I felt that in case of war—why—I saw Johnson & Higgins would have to be represented anyway in active service, I was the logical one to go. I thought possibly my action might save them some embarrassment even, and after talking it all over apparently they seemed to feel that it was all right, and that resolution was afterwards adopted giving me leave of absence, etc.

Mr. McCarter: May I read the resolution?

"Resolved that the corporation pay the salaries of the members of the staff who have been in the employ of the corporation for six months or more and who are called to the colors or who join the armed forces of the United States or who go to military training camp for the period of their service during the war. That such allowance be based on the difference between their salaries and the amount received from the Government.

Be it further resolved that a committee of the Directors shall be appointed with power to carry out the desire of the Board as expressed in the foregoing resolution.

The chairman announced that Mr. Prindiville had advised him that he was a member of the naval reserve and expected to be called out for military service at any time. The chairman stated that in view of the resolution passed by this Board at its meeting of January 19th dealing with Directors' salaries it appeared to him that consideration by the Board was necessary on account of Mr. Prindiville's probable inactivity in the affairs of the corporation, and on motion made by Mr. LaBoyteaux and duly seconded it was

Resolved, that during the period of Mr. Prindiville's military service he be given leave of absence and that his salary continue in full force during his military service in the current fiscal year. Carried."

Q. That was on the 18th of April. How soon were you called out? A. June 10.

Q. Between the 18th of April and June 10 where were you? A. I was in Chicago mostly.

Q. From June 10 what did you do? A. I was ordered to report to the Second Naval District.

Q. Where? A. In Rhode Island, Newport.

Q. After that what were you doing? A. I was on duty off Newport. In August—first of September put in command of the Nantucket section, outside patrol—in command of the boats there—naval equipment.

Q. And continued there actively how long, Mr. Prindiville? A. Until the end—November, 1918.

Q. What was your rank? A. Lieutenant.

Q. You have said that you remained from June until November or December; June, 1917, until November or December, 1918, in the service? A. Yes, sir.

Q. Did you receive from Mr. LaBoyteaux a letter of which that (handing witness paper) seems to be a copy? A. Yes, sir; December 20.

Paper offered in evidence and marked Exhibit C9.

Mr. McCarter (reading):

"December 20, 1917.

Mr. Thomas J. Prindiville,
Headquarters, Nantucket Section,
Nantucket, Mass.

My dear Tom:

At the December meeting of the Board of Directors the usual Committee was appointed to deal with Directors' salaries for the ensuing year. The Committee appointed by me comprised of Mr. W. R. Coe, Mr. G. V. Coe, Mr. W. N. Davey and Mr. J. S. Keegan. I am as president, ex officio member of the Committee. This Committee will report to the Board at the January meeting, fixing the salaries for the Directors for the year 1918.

You will remember that the resolution adopted at the April, 1917, meeting only continued your salary percentage for that current year. The question will undoubtedly come up before the Salary Committee as to what is to be done in respect to your percentage for 1918 and I want to suggest that you should if possible arrange to appear before the Committee sometime between January 3rd and 12th, to give them the benefit of your views.

I hope you will be able to come down.

Sincerely yours."

Paper offered in evidence and marked Exhibit C10.

Mr. McCarter (reading):

"December 27, 1917.

W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

Dear LaBoyteaux:

Your favor received and note your suggestion that I appear before the Directors' Committee between the 3rd and 12th of January. In reply will state that I get liberty (48 hours) about every month or six weeks, and I obtained permission last week to spend Saturday shopping in New York, returning Sunday. I am sorry I did not receive your letter in time, as I could have called and had a short talk with you on this subject.

If I knew I was to return to business life within the next few months, I naturally would be glad to discuss plans for the future, but one cannot forecast how long this war is going to last or tell whether I will be here at the end of it. I may be transferred anywhere at any time. So under the circumstances I would not feel like making any suggestions to the Committee. If they ask for my ideas as to what action I would vote for in regard to the position of a partner that is in the service, I would be glad to give same. We are all making sacrifices, some in one line and some in another, and we may all have to make much greater ones before this conflict is over. I realize the burden placed upon the shoulders of my fellow Directors by my being in the service and on the other hand they must realize the work I am doing for the cause is theirs as well as mine and the strain and responsibility in this service is at least, as great

as what they are undergoing. So as above stated I cannot see what I can voluntarily say to this Committee other than what they already know themselves. If they wish light on a situation of this kind I presume they could ascertain from our friends Messrs. Willis, Faber & Co. what action they are taking in regard to their Directors who are in the service.

I would suggest that you talk this subject over with the members of the Committee and let me know what their views are, or if they prefer to have me appear before them in person, advise promptly and I will make application to the Commandant for this permission.

Yours truly,
THOMAS J. PRINDIVILLE."

Q. Who are Willis, Faber & Co.? A. They are the London correspondents of Johnson & Higgins.

Q. In the same business over in England? A. Yes, sir.

Paper offered in evidence and marked Exhibit C11.

Mr. McCarter (reading):

"January 2, 1918.

Mr. Thomas J. Prindiville,
Headquarters, Nantucket Station,
Nantucket, Mass.

My dear Tom:

I have received your letter of the 27th. I really think you should make every effort to appear before the Committee and I hope you will be able to do so. I suggest, if possible, you be down on the 7th, but

if you cannot be here on that date please let me know the earliest time you can come down.

The very strong feeling which existed at the time you joined the service without consulting us before you took such a step has in nowise abated. I feel —and I think these are the views generally held by the partners—that each of us, in being a partner and director, have certain duties and obligations to the others which do not allow the same freedom of individual action as one not a partner would have. I do not mean to say that the right of individual action is absolutely taken away from any of us or that when we have a call to duty greater than our duty to the business we must ignore it because of our obligations to the business, but I do feel that when such a duty arises and any of us feel it is necessary to answer the call, they should do so at their own expense and not expect the others, who might not agree with us as to the necessity of such action, to help carry the burden. There are a great many men who have felt as you did that it was their duty to the country to go into the service. Many of these men, to my knowledge, have resigned from the firms in which they were partners, or have sacrificed the other business interests which they had in order to do this. This, I can appreciate, is any man's right. You are, however, not in that position, and, as this entire question will have to be passed upon by the Committee on salaries in connection with your case, I want you to have the opportunity of presenting your side before the decision is reached.

Yours very truly,"

Q. Do you remember whether you replied by telegram to that letter? A. If I remember rightly I was iced in at that time and couldn't reply in any other way; no mail service or anything else.

Mr. McCarter: I have a copy of telegram:

"January 8, 1918.

W. J. LaBoyteaux, Cr Johnson & Higgins, 51 Wall St New York. Hemmed in by ice No mail for ten days Have you replied my letter December twenty-seventh No telling yet when could leave here.

THOMAS J. PRINDIVILLE."

Telegram offered in evidence and marked Exhibit C12.

Mr. McCarter: We offer the telegram in reply, dated January 8, 1918.

Telegram marked Exhibit C13.

"Thomas J. Prindiville,
Headquarters, Nantucket Station,
Nantucket, Mass.

Wrote you January second urging you appear before committee at earliest possible date.

W. H. LABOYTEAUX."

Mr. McCarter: I next offer letter of January 8th, 1918, from LaBoyteaux to Prindiville.

Paper marked Exhibit C14.

"January 8, 1918.

Mr. Thomas J. Prindiville,
Headquarters, Nantucket Station,
Nantucket, Mass.

My dear Tom:

I received your telegram advising me that you are hemmed in by ice and that you have not had any mail for ten days. I have replied to your inquiry, advising that I wrote you on January 2nd urging that you appear before the Committee.

Yours truly,"

Mr. McCarter: Then a letter from LaBoyteaux to Prindiville, dated January 9, which I offer in evidence.

Paper marked Exhibit C15.

Mr. McCarter (reading):

"January 9, 1918.

Mr. Thomas J. Prindiville,
Headquarters, Nantucket Station,
Nantucket, Mass.

My dear Tom:

I have your telegram of the 9th as follows:

'Your letter second just received When on naval cruise August nineteen sixteen was requested sign agreeing respond to any call Navy Department. This I refused but agreed to volunteer in case of war with great power. Was Chairman Naval Association Chicago and before war was declared went into Naval Reserves with other members of this Association start-

ing nautical schools and promoting welfare Navy in general. Was called to active duty June first my action aside from patriotic motive was in accordance with agreement made in nineteen sixteen Southeast rain and gale enabled boat get through late yesterday present northwest storm warnings may close channels again expect Navy cutter today if channels remain open can probably get liberty end this week otherwise must remain at post will advise later.'

If you can come down the end of this week to appear before the Committee on Directors' salaries, I think it would be advisable. The Board meeting, as you know, is on the 16th, at which time the Committee must make its report. If you are not able to get down, I will submit my correspondence with you to the Committee for consideration.

Yours truly,
JOHNSON & HIGGINS.
W. H. LaBoyteaux,
President."

Mr. McCarter: Another letter of the same date, January 9, 1918, offered in evidence.

Paper marked Exhibit C16.

Mr. McCarter (reading):

"January 9, 1918.

Mr. Thomas J. Prindiville,
Headquarters, Nantucket Station,
Nantucket, Mass.

Dear Sir:

Referring to your letter of December 26th, in which you advise me of your salary as Lieutenant in the

Government employ, I brought this matter to the attention of the Board in a special meeting held on Monday, at which time it was the view of the Board that it would not be necessary to take the salary received by you from the Government in consideration when paying you your participation in the corporation and firm earnings this year.

Yours truly,"

Q. What salary did you get at that time? A. Naval salary? $2,500.

Mr. McCarter: I offer letter dated January 14, 1918, from Prindiville to LaBoyteaux.

Letter marked Exhibit C17.

Mr. McCarter (reading):

"SECOND NAVAL DISTRICT.

Office of Commander, Nantucket Section.

January 14, 1918.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall Street, New York.

Dear LaBoyteaux:

Your letters and wires received and note that the Salary Committee is again taking up its disagreeable task of apportioning salary percentages, etc., for 1918.

I suppose that each Director has outlined what they have done for the firm and corporation during the past year and I enclose schedule showing service I rendered to the Government, which in my opinion is for Johnson & Higgins as well. I also note that apparently some of the Directors feel that I should be

penalized or fined for entering the service without first obtaining the approval of my partners. I thought this matter was all settled last spring when I explained my action. If this matter is again to be brought up as an excuse to curtail, even temporarily, my income from firm and corporation, I certainly wish to protest against such action. As described in my wire of January 9th, when on the Naval cruise in August, 1916, I was requested to sign articles agreeing to respond to any call from the Navy Department, this I refused, but did verbally agree to volunteer in case of war with any great power. The chance of such a thing occurring seemed very remote at that time. Sometime after I returned to Chicago I was elected Chairman of the Civilian Naval Association of that district and was in a position to obtain knowledge of Naval conditions, showing serious unpreparedness in certain branches of the service. We immediately organized nautical schools and recruiting committees and took other action promoting the welfare of the Navy in general. We experienced considerable difficulty in arousing proper interest and appreciation of the seriousness of the situation and in order to set an example and to give force to our work I joined the Naval Reserves with other members of our association and promptly advised you of my action. This I considered my right to do and certainly did not look for any criticism on the part of my partners, as I considered it was the duty of all of us to do anything in our power to help the Government out during this crisis.

Johnson & Higgins has been a material gainer by this World's war, its profits have increased many fold owing to same. Personally I think our Directors

should be proud to have as many members as possible in active service and those that cannot go should cheerfully and willingly assume the burden of those who do, and see that their interest and relative position in the firm and corporation be held and preserved for them, just as many other corporations are doing, for example, the Association of Lawyers of New York are assuming the practice of those in the profession who went into active service, handle their cases for them free of charge and turn over entire fees. I cannot for the life of me see how any of our Directors could contemplate taxing or penalizing a partner for patriotic action at a time like this, which would mean his loss and their financial gain. I don't think for one moment that Willis, Faber & Company are doing it. The Naval service is a serious one entailing no little personal risk. I entered it because I thought it was my duty and the patriotic decent thing to do and I certainly expect my partners to do the patriotic decent thing by me. Of course it may be human for each one to think that they are carrying a little too much of the burden and to feel that the other fellow's game is easier than his own, I have thought so myself, I have envied you all your liberty, your home comforts, etc. You on the other hand seeing men of the service on Liberty have doubtless envied their free of care air, etc. Of course there is another side to it all and each must realize and appreciate the position of the other. If I can be of greater service to the Government by returning to Johnson & Higgins, or if any Director of Johnson & Higgins can be of greater service to the Government than I, and cannot be spared by the corporation, why not apply to have me detailed to business and let him go. The Department

at Washington would be quite agreeable to such a trade if it was to the interest of the Government to make it, and on my part I only want to give the best service I can to the cause and if I would be doing so by returning to business I would be glad to do it.

I would like to appear before the Committee and hear their views on this subject. Up to this writing the Commandant has refused me permission to leave, owing to conditions affecting the patrols of this section. They are improved somewhat and I may be able to get away the end of this week, but thought it best to outline my ideas for your consideration and that of the Committee.

Yours truly,"

Mr. Hardin: There was an enclosure in that letter.

Mr. McCarter: That is all we have.

Mr. Hardin: Here it is.

Mr. McCarter: I offer the enclosure.

Paper marked Exhibit C18.

Mr. McCarter (reading):

"Was appointed Chairman of Chicago Committee on Naval Affairs to further enlistment and to organize nautical schools for the development of young men for officers in Navy and Naval Reserves.

Joined Naval Reserves with other members of this Association to set example and to give force to our work.

Called to active duty June 1st, assigned Command U. S. S. "Susanne" S. P. 411, ordered June 12th to report with boat to Commandant, Newport. Arrived there June 30th, was detailed on Dispatch and

Inspection Duty between different ports of the District.

August 28th was detailed as Commander, Nantucket Section, embracing territory from Chatam, Mass., on the north, Martha's Vineyard on the west and the sea on the east and south, including six Light Ships, five Coast Guard Stations and a fleet of Patrol Boats and Cruisers, conducting inside and outside patrols and equiping this port as base with machine shops, ship repair yards with marine ways, etc.

The following is a copy from my service record made out by my Commander which is on file at Washington:

Bearing and Conduct? Excellent.

Military appearance and manner? Excellent.

Manner of giving commands? Excellent.

Aptitude for service? Excellent.

Temperamental qualities. Excellent, calm, even temperament forceful.

Professional ability (is he above the average, average, or below the average)? Above.

Initiative, intelligence, judgment, thoroughness, etc., in the general performance of duties? Excellent.

Do you consider him fit to be intrusted with important independent duties? Yes.

To what degree does he maintain discipline, contentment, and interest in their duty among his subordinates? Excellent.

Efficiency of personnel? Excellent.

Health noting any physical defects interfering with his duty. Health record clear. No sick days.

Give any information which might be of value to the Department in making assignments to duty or

selections for special duty, also any special or exceptional duty performed.

Answer. An excellent all around officer especially qualified for independent duty required initiative and good judgment.

Question. For what duty has officer a preference?

Answer. Would prefer duty on Destroyer.

Question. Name localities in which duty is desired?

Answer. Anywhere.

Feb. 10. Recommended by Commandant 2nd Naval District to Bureau of Navigation at Washington for promotion to rank of Lieutenant Commander."

Adjourned until tomorrow morning at 10 A. M.

Third day.

Appearances as before.

THOMAS J. PRINDIVILLE resumed.

Further Direct-examination by Mr. McCarter:

Q. I think, Mr. Prindiville, when we adjourned yesterday afternoon we had gotten to the stage of events where you were asked to appear before the committee on salaries with reference to your then status. Did you attend before the committee finally? A. Yes, sir.

Q. Do you recall about when that was? A. Well, it was the end of January, if I remember, or first of February; first of February probably. Around there.

Q. 1918? A. Yes, sir.

Q. And who were that committee? A. Well, I think Mr. W. R. Coe, G. V. Coe, LaBoyteaux and Mr. Keegan. I don't know whether that comprises it all or not.

Q. Now, I would be glad if you would recall, without too much detail, as much as you can, and tell us of what occurred at that conference? A. Well, the subject was discussed about cutting off my salary for 1918, and that I was not active; that I was in the service, they said I wasn't active, and a few remarks on either side, but I simply held the position that the corporation was very prosperous and I saw no reason why I should be reduced any more than any other member of the directors. That was the gist of it all as I understand. I do not remember anything in particular.

Q. Did you repeat the arguments that you had already written to them? A. Yes, sir.

Q. And was any conclusion reached by the committee or was the matter left, so far as the hearing was concerned, undetermined? A. There was no conclusion reached. I think after the meeting Mr. LaBoyteaux came to me and inferred or suggested that if I would accept the reduction of one-half my salary why he thought he could get that approved by the committee.

By the Court:

Q. What was your actual stand before the committee at that time? A. My stand was, considering the prosperous condition of the corporation, I saw no reason why the only member in active service should be penalized or taxed for going into the service.

Q. To what extent? A. To any extent.

Q. Below what you had been receiving, or what your so-called running mates were receiving? A. My position was that my relative position should be maintained.

Q. Meaning therefore, the same position that you had hitherto maintained? A. Yes, sir.

Q. Or that which your associates had attained? A. That which had prevailed prior to my entering the service.

Q. In other words six per cent? A. Yes, sir. I meant to say our relative positions. For instance if my running mates were advanced I was entitled to the same percentage. No fixed percentage at all.

Q. At that time—at this meeting now, which, as you recall, preceded Mr. Prindiville, the passage of the resolution in which they gave you no salary—at that time did this running mate question come up, at this particular interview? A. I don't remember mentioning that, but I think I mentioned our relative positions.

Mr. McCarter: I think your Honor is a little ahead of the game. I think the running mate question came up after that.

The Court: I may be a little ahead of the testimony.

Mr. McCarter: We are coming to that, your Honor. As long as the question has been raised, I will bring the whole running mate question out.

Mr. Hardin: You are talking about the meeting in January, 1918.

The Court: That is what he is talking about, about the 11th or 12th, after he was icebound.

Mr. McCarter: This was his first meeting before the committee, as I understand it. As

I understand it at that time he had the salary that had been allotted him up to the end of the then previous year, that by its terms expired and the question arose of whether he was to be paid anything and he was directed to appear before the committee; he appeared and stated his case and after the interview ended Mr. LaBoyteaux called him aside and suggested the promise of a half.

The Court: I understand.

Q. But you subsequently sent Mr. LaBoyteaux a letter January 29, 1918.

The Court: Is it your recollection of the testimony that he drew for the first time anything on account of his salary for 1918?

Mr. McCarter: My understanding is that he had had his salary up to the end—

The Court: Of 1917, under the resolution.

Mr. Hardin: Yes.

The Court: Do you claim that he received his salary for 1918 or any part of it in January, 1919?

Mr. McCarter: I may be confused for the moment of the year, because they seem to be a year behind time always, but I understand that when he asked permission to go they passed a resolution to pay his salary to the end of that current year. Now that salary he drew.

The Court: That is 1917. Did he draw any part of the 1918 salary?

Mr. McCarter: In a moment we are going to prove that resolution declining to pay him anything, after this meeting.

The Court: I am asking you what your recollection is?

Mr. McCarter: Later on they revoked that action and he did get a salary which he enjoyed. There is no doubt about that. But the dispute came later about the running mate question.

The Court: I wondered whether he had drawn anything on account of his salary prior to this meeting.

Mr. McCarter: I don't know how that is. I will find out.

The Witness: I think not, to the best of my recollection.

Mr. McCarter: This meeting we are talking about, as your Honor recalls, was in January, 1918.

The Court: 1919.

Mr. McCarter: No, 1918; this is in 1918, January.

The Court: He came back in November, 1918.

Mr. McCarter: Your Honor is a little ahead of the game. I am now trying to develop the thing chronologically and historically, and we are now at the early part of January, 1918. You will recall the fact that the resolution which was passed when the issue was first raised continued his salary to the end of that year. That comes down to December 31, 1917. Now this is January, 1918; he is asked to appear before the committee; he appears; he has his talk.

The Court: I am one year out of the way.

Mr. McCarter: That is it, yes.

I offer in evidence letter dated January 29, 1918, from Prindiville to LaBoyteaux.

Paper marked Exhibit C19.

Mr. McCarter (reading):

"SECOND NAVAL DISTRICT

Office of Commander, Nantucket Section

January 29, 1918.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

Dear LaBoyteaux:

Have given a great deal of thought to the subject discussed with the Salary Committee on the 21st, and will say that the arguments presented by the members of the Committee failed to impress me or cause me to change my own point of view. At the meeting of the Board on April 18th, two resolutions were passed. One giving me leave of absence during the period of my military service and that my salary continue in full force during my military service in the current fiscal year. The other resolution stated that the corporation would pay the salaries to the members of the staff for the period of their service during the war, less the amount received from the Government. Why should any exception to this latter resolution be made in my case? Why do they ask me to accept reduced compensation now? Is it because some partner is in financial straits, or is it to promote some war or other worthy charity? To this I would cheerfully contribute at least

my share, but to be taxed or levied on by my own partners for being in Government services at this crisis, is something I cannot understand. If Morgan & Co. can give the services of such men as Davidson and Stettinius, and the Guggenheims the services of Billy Potter. It seems strange that Johnson & Higgins with fifteen partners, cannot assume the burden of having one of them in active service without asking him to assume a financial loss that the others do not share. I know that Charley Pfister (who is a German) of the Pfister & Vogel Leather Co. of Milwaukee, gave their London representative, who is an English Captain, a leave of absence with full pay for the duration of the war. The partners of my friend Nat Ayers, of Boston, did the same thing.

What do you think our friends, Willis, Faber & Co., are doing in regard to their partners in the service. In speaking about the Hopkins case, you or George Coe mentioned the fact that some of the Underwriters had criticized his lack of patriotism. I wonder what Bird of Chubb would say if they knew of the action your committee was contemplating. Jack's argument about leaving the Service last Spring out of consideration for his partners, carries no weight with me, for that was a matter for him to decide. My own idea of his action is that he left the service because he was bored to death with its routine and was mighty glad for personal reasons to get out, just as I will be when this thing is over.

My present position is just this, I feel that I am entitled to the same relative position in the firm and corporation that I held when I went into the service. Last year the Committee partially corrected, by increasing my salary, an injustice that was done me

three years ago and I was placed up with Lowe and Davy and I understood that this year increases would be granted to Lowe, Davy, Jack and myself, and while my services for practically all of 1917 were in the interests of the Government, they were well performed and such that any partner of Johnson & Higgins might well be proud, and I certainly expect my relative position with the above named partners maintained. If there are any retired interests in the Johnson & Higgins corporation, like the Brockie Estate, etc., that object to such action, I will guarantee to obtain their approval or pay them the difference myself. As stated in my previous letters on this subject, I am perfectly willing to be detailed back to business if other directors of Johnson & Higgins can give the Government greater service, but under the conditions as they are, I must ask the committee to give careful consideration to the claim I make of being entitled to the same relative position in the firm and corporation of Johnson & Higgins, as I held before I entered the service, and if the committee are disinclined to adopt this view, I must be allowed to put the entire matter up to each Director individually so that he will have time to carefully consider and vote intelligently on the Committee's recommendations.

Some members of your Committee might take the position that if I don't like the action they take, why don't I resign. My answer to this would be the same as on the question of yearly compensation, why should I resign when such action would probably cause me financial loss, for I have an interest in the good will of Johnson & Higgins and unless I receive a fair price for my holdings I would be sacrificing same, and as I feel absolutely sure in my mind of the equity and

soundness of my position, I see no reason why I should be asked to make such a sacrifice.

Yours truly,
THOMAS J. PRINDIVILLE."

Now the next is the reply by Mr. LaBoyteaux under date of February 9, 1919, which I offer in evidence.

Letter marked Exhibit C20.

Mr. McCarter (reading):

"February 9, 1918.

Mr. Thomas J. Prindiville,
Office of Commander
Nantucket Station, Nantucket, Mass.

My dear Tom:

Your letter of January 29th was received this morning and has been brought before the Committee on Directors Salaries for action.

I am sorry you have written such a letter, which has impressed all of us most unfavorably, as indicating not only a very biased state of mind, but is most unfriendly and unfair in its tone, containing inferences for which, as you well know, not the slightest foundation exists.

After full consideration, it is the unanimous decision of the Committee that, as salaries to our Directors are paid for time and services given each year to the business of the corporation, the Committee do not feel that they would be justified in recommending to the Board of Directors any salary allotment to you for the year 1918, unless and until such time as you may again become engaged in active work for the corporation.

I am advising you immediately of this Committee conclusion, so that you may take such action as you wish in laying your arguments before the individual directors, as you suggest you desire to do.

The matter will come up for action at the Board meeting on Wednesday, February 20th.

Sincerely yours."

Mr. McCarter: Now, gentlemen, there is a letter here from Mr. LaBoyteaux of February 18, 1918, that refers to Mr. Prindiville's letter of February 15, 1918, which we have not got.

Q. Did you write to the directors severally, Mr. Prindiville? A. Yes, sir. I might have left out the salary committee, but I wrote to all the others.

Q. All the other directors? A. Yes, sir; I am positive of that.

Q. Practically to the same effect as contained in your previous correspondence. A. I sent a copy, if I remember correctly, of the correspondence with Mr. LaBoyteaux, calling the attention of the directors to the fact that in my opinion such action by our Board was not to the best interests of Johnson & Higgins.

Q. I notice that in Exhibit C19, you referred to Chubb. Who was Chubb? A. Chubb? I referred to Mr. Chubb, underwriters.

Q. Were they in the same line of business? A. They are marine underwriters. They are not brokers.

Mr. McCarter: I offer in evidence letter from Mr. LaBoyteaux to Mr. Prindiville, dated February 18, 1918.

Letter marked Exhibit C21.

Mr. McCarter (reading):

"February 18, 1918.

Mr. Thomas J. Prindiville,
Office of Commander,
Nantucket Section, Nantucket, Mass.

Dear Tom:

Your favor of February 15th is received and I note you have placed your viewpoint, as outlined in your letters to me, before the Directors, which is quite in order.

Referring to the last paragraph of your letter regarding distribution of 1917 earnings, it is my understanding that, under the law and the rulings of the Treasury Department, we are only to declare for 1917, out of corporation earnings (whether salary or dividend) the amount of money received in 1917. In respect to firm earnings it is my understanding that we are to declare in 1917 our respective proportion of these earnings irrespective of when received. A settlement of the firm's Profit and Loss account for 1917 has not yet been completed. As soon as it is you will be furnished with the figures.

It is my understanding that the Treasury Department has, in view of the delay in getting out forms for the Income Tax Reports, given a general extension of time within which these can be filed to March 31st instead of March 1st.

Yours very truly."

Now, for the sake of sequence, although it has been read before, I call the Court's attention to the resolution of May 15, 1918, page 168, Book 3 (page 93 of this record). As your Honor observes, on the 15th of May, subse-

quent to the letter and the meeting, a resolution was passed in which he was given no salary.

Q. Had you seen any of the directors between the time of your interview or your correspondence with each of them about the passage of that resolution in May, that you recall? A. No, sir.

Q. You were still in the service? A. Yes, sir.

Mr. McCarter: I think I ought to call your Honor's attention to the fact that in this allotment which is incorporated both in this report and the resolution to which I have just referred, the fractional share of Messrs. Davey and Lowe had been increased from six and something to ten per cent in each case.

Now Mr. Larkin produces the letter of February 15, 1918, which was referred to in Mr. LaBoyteaux's letter, and I think, while I have never seen it, we will offer it.

Paper marked Exhibit C22.

Mr. McCarter (reading):

"SECOND NAVAL DISTRICT

Office of Commander Nantucket Section.

February 15, 1918.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

Dear LaBoyteaux:

Your favor of February 9th was received by me the evening of February 13th. Apparently there is a

very wide difference between your perspective and mine, in regard to this matter. I feel that if the Committee takes such action as outlined by you, that same would not be for the best interests of Johnson & Higgins, and therefore, consider it my duty to put my viewpoint, as outlined in my various letters to you, up to my fellow Directors, so that they may be posted in the premises when the Committee's report is acted upon by the Directors. I am not able to leave here to attend the meeting next Wednesday. If I was I certainly would go on record as voting against the recommendations of the Committee as outlined by you."

The part referring to the income tax is not material and no use of reading it.

The Court: Mr. LaBoyteaux's letter is really in reply to the part you haven't read.

Mr. McCarter: I will read it.

The Court: No.

Mr. McCarter: Now we offer letter of August 18, 1918, from Prindiville to LaBoyteaux.

Letter marked Exhibit C23.

Mr. McCarter (reading):

"August 18, 1918.

Mr. W. H. LaBoyteaux,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

Dear LaBoyteaux:

Yours of recent date received, enclosing schedule of firm's percentages for 1918, and note that you would like me to stop in and sign same when next in New

York. I have not been in New York since early in June and it is hard to tell when I will be there again, for you can well understand, owing to certain activities in this vicinity, I would not want to leave my station at present and in fact it is a question whether I could obtain permission to do so. I am not keen for travelling at this time as I am still lame from an accident that occurred on one of my new boats. So all things considered, if you desire my signature promptly, would suggest that you forward to me firm schedule by registered mail.

The half-year has gone by and up to this writing have not received any salary check for 1918, so infer the Directors approved the recommendations of the Salary Committee in not granting me a salary for 1918."

Q. Right in that connection I will ask you, did you receive any notice of the passage of the resolution, that I have just read, in May? A. No, sir.

Q. No notice whatever? A. Not to my knowledge.

Q. So that you had to infer, as your letter says? A. Yes, sir.

Mr. McCarter (reading continued):

"I hope that the Directors will reconsider this action for the situation has developed, showing clearly that this war is yours, as well as mine, and that in volunteering for service I was acting to the best interest of Johnson & Higgins, and if a greater number of business men all over this Country had come to an earlier realization that this was their own struggle, we might now be settling down to normal business prosperity, and the early sacrifices would have been a thousand

fold repaid. At present and until this war is won the Government will need and will take practically the entire earnings of firms, corporations and individuals, and it behooves us all, (the Directors of Johnson & Higgins included) to put forth our best efforts to bring the war to a successful conclusion at the earliest possible moment.

"I cannot believe that it is to the best interest of Johnson & Higgins to have the salary of one of its Directors cancelled on account of his entering the service or his relative position in the firm or corporation disturbed. The attitude of representative firms and corporations on this subject is well known. The attitude of the Navy Department on unnecessary discrimination against men in its Service is quite clear. The few close friends that I have discussed this subject are unanimous in endorsing my perspective, and I certainly look to my partners to reconsider their action apparently taken last February without full realization of their obligations and responsibilities in this great war.

Yours very truly,
THOMAS J. PRINDIVILLE."

Now I will, if I may, take a moment and reread to your Honor Exhibit C6, which was introduced earlier, but I think it would be well to have it in sequence (reading Exhibit C6 appearing on page 192 of this record).

Then if I may be permitted I will again read, so that we may have the sequence, Exhibit D20, page 116 of this record.

Q. Mr. Prindiville, in that letter and in the course of our progress here the words "running mates" have

come up. Why do you call them running mates and what was the significance of that? A. Well, it is simply a term to describe men that received practically or have received practically for a period of years the same basis of compensation.

Q. The same basis of what? A. As another.

Q. Now, what had been the fact? A. For instance I would term LaBoyteaux and George Coe running mates. They might not like the term—might not think it means anything—at the same time they have for a number of years been going along about the same basis of compensation.

Q. That had been the fact prior to the time of your going into the fight with reference to you and these two gentlemen, Lowe and Davey? A. Yes, sir; some years the firm might make a little more than the corporation and vice versa, but the practical result was our compensation would figure about the same, as probably the figures will show.

By the Court:

Q. Do the same character of work relatively? A. Oh, different work entirely.

Q. Same quality of work? A. Well, apparently. The directors put it on the same basis of compensation. It is hard to say.

Mr. McCarter: I direct your Honor's attention to the resolution of December 23, the same date as the letter last read:

"The secretary was then asked to retire and Mr. Hunter was requested to act as secretary.

"The president referred to the resolution adopted by the board at its meeting on April

18th, 1917, giving to our director Mr. T. J. Prindiville leave of absence during the period of his military service, and stated that Mr. Prindiville had reported as having now been released from active duty and had asked that the board reinstate his salary percentage for the year 1918 less a deduction of $5,000, the pay received by him from the U. S. Government. After an informal discussion it was agreed that Mr. Prindiville's request be granted.

"On motion duly seconded and carried the meeting adjourned until 4 P. M. of Tuesday, December 26th, 1918."

In regular sequence would appear Exhibits D9 and D21, which are already in and which we do not care to read unless your Honor desires it. They come next, because they are letters, both from Mr. LaBoyteaux. We do not want to read them unless your Honor or counsel on the other side desire it.

The Court: It will be instructive to read them.

Mr. McCarter: Letter of December 24, 1918 (reading, page 100 of this record).

Letter of December 24, 1918, D21 (reading, page 119 of this record).

Mr. Hardin: That is after the Board of Directors had allowed him the 1918 salary.

The Court: In the meantime Mr. Prindiville had written a letter suggesting a compromise of six per cent and this evidently followed. In order to come to a settlement he offered to take the old rating, and that rating was six per cent.

The Witness: For 1918.

The Court: Then they followed it up by accepting your compromise for 1918?

The Witness: Yes.

Mr. Wollman: For 1919 he wanted an increase.

The Court: Yes; but this is 1918, which was followed up by a resolution of the board giving him six per cent.

Mr. McCarter: Now, on December 26, 1918, the resolution of that date, already in evidence, recites the fact of the previous resolution in which they gave him no salary and proceeds, "Resolved, that supplementing and amending the resolution passed at the meeting held on May 15th, 1918, fixing the compensation of the directors for the period in said resolution stated, beginning January 1st, 1918, and ending December 31st, 1918, the compensation of the directors, including the executive or general officers (but excluding the secretary and treasurer) be and is fixed as follows, subject to modification at any duly convened meeting of the Board of Directors, by the unanimous vote of the directors present at such meeting."

Then it provides with reference to Barrett and Loines and then naming the other gentlemen giving the percentages and fixing Davey and Lowe at 9.3 and 9 respectively, where previously Davey had been 7.8 and Lowe 7.5 and fixing Keegan at 7 whereas before he had been 3.

The Court: What was Prindiville?

Mr. McCarter: Prindiville is 6.

Next is the letter of December 26, D10, already in evidence in which the formal announcement is made to Mr. Prindiville of the passage of the resolution as just referred to, and then that is followed by the letter of December 30, already in evidence, D22, in which Mr. Prindiville—perhaps I might read this again—says (reading, page 123 of this record).

By Mr. McCarter:

Q. Now, did you have some talks with Mr. LaBoyteaux upon your return and report to duty, which I understand was about the end of November or first of December?

Mr. Hardin: I object to the assumption in the question "report to duty." There has been no question asked the witness about that.

The Court: Reframe your question.

Q. The armistice occurred I think on November 11th, when did you come back to New York? A. Approximately the 28th or 29th of November; Saturday, I think.

Q. What then occurred? A. Well, on Monday or Tuesday I reported to Johnson & Higgins.

By the Court:

Q. Following the armistice? A. No, not following the armistice. I think I arrived in New York on some Saturday, might have been the 28th or 30th of November, and on the 2nd of December, it might

have been Monday or Tuesday, I called on Mr. La-Boyteaux and told him that I was detailed from active duty and ready to resume work, but before doing so that I would like to have a talk with the directors, and he said, "Are you going to bring up that subject of salaries? Why there is nothing doing." I said, "I would like to talk to the directors." He said, "That is your right. I will call a meeting tomorrow or next day and let you know." I think I heard by telephone or called him up, and within a day or two we had this meeting.

Q. Now, what occurred there? A. Well, I stood up and gave my talk.

Q. What did you say, that is the point? A. Well, I said that in the navy we took pride in our ship, we had pride and confidence in our officers, if we didn't have that we couldn't do our best work, and could not develop our highest efficiency; I was ready to go to work, but that the action taken by the board in the previous February caused me to lose all pride in the institution, unless some action was taken in regard to that matter why I couldn't see where I could go on with them.

Q. Go right on. A. Well, that is about the gist of what I said. Now, they began to tell me where they thought I was wrong.

The Court: What did they say in substance?

The Witness: Well, I don't think it makes much difference what they said.

The Court: It does, very much, to me. It is the crux of the case.

Q. Tell the conversation as far as you recall it. A. Well, they took the position that they saw no reason

why, my being away from the office, why I should receive a salary. They felt—I think someone made the remark, "Why should they pay for my patriotism," or something of that kind. A few pleasant things like that.

Q. Was anything said at that conversation with reference to your having enlisted, as they called it, without their permission? A. Oh, yes, they seemed to put upon that as an excuse for taxing or penalizing.

Q. The fact that you had enlisted in the naval reserve without telling them about it? A. Yes, sir.

Q. Now, was the matter left? What finally was the upshot of the interview? A. Well, they thanked me for appearing before them and told me they would talk it over and let me know their decision.

Q. I beg pardon? A. They told me they would talk it over, and asked me to leave the room, and I think that letter of LaBoyteaux's is—

Q. The next thing you heard? A. Practically, I think—well, no. Wait a minute. I think it took some time—some deliberation—and I think there were several meetings, but the same talk on both sides, and the difference in perspective, apparently, could not be breached. They seemed to be absolutely fixed in their minds, and I happened to feel the same way.

Mr. Hardin: Can't we have the conversation?

The Court: You were perfectly candid in your views?

The Witness: Yes, sir.

The Court: They were candid in theirs?

The Witness: Yes, sir.

Q. Come to what the French call an empasse? A. Yes, sir.

Q. Well, now, your letter that is already in evidence, recites the fact that you had placed the matter in the hands of Mr. Royall Victor. That is Mr. Victor, sitting here, of the firm of Sullivan & Cromwell? A. Yes, sir.

Q. That, I think, was after the last of these interviews? A. Yes, sir. I, in the meantime, conferred with some friends and tried to get their perspective of the situation to see if they could tell me where I was wrong, and apparently they couldn't, and one of them suggested my calling on Mr. Victor for his advice from a legal standpoint and common sense advice and Mr. Victor—

Q. Never mind your talk with Mr. Victor. That would not be competent. You met Mr. Victor and placed the matter in his hands, did you? A. Yes, sir.

Q. Now, did you then go to Florida? A. Yes, sir; afterward. I was pretty well disgusted with the whole situation and I wanted a new scene and I went down on a houseboat to Florida, leaving the matter in Victor's hands to see if he could negotiate a fair settlement of my interests in Johnson & Higgins.

Q. Is Mr. Sykes also connected with the firm of Sullivan & Cromwell? A. Yes, sir.

Mr. McCarter: We have a letter from Mr. Sykes to Johnson & Higgins which we would like to introduce.

Letter marked Exhibit C24.

Mr. McCarter (reading):

"New York, December 31, 1918.

Messrs. Johnson & Higgins,
49 Wall Street,
New York, N. Y.

Gentlemen:

Enclosed is a letter from Mr. Prindiville to Mr. LaBoyteaux, which was left with Mr. Victor of this firm for delivery. While Mr. Victor is engaged in matters which demand his immediate attention, he has requested me to take this matter up with you.

On behalf of Mr. Prindiville, I beg hereby definitely to notify you that he will not continue or renew the partnership of Johnson & Higgins, which by its terms, expires today. On his behalf, I shall be glad to consider with you, at your convenience, what adjustment of the partnership affairs and interests should be made in view of this situation and will ask you to be kind enough to give the matter your prompt attention.

Very truly yours,
E. H. SYKES."

Q. Did you shortly afterward, and on the 2nd of January, while you were at Jacksonville, Florida, receive this telegram from Mr. Coe (showing witness papers)? A. Yes, sir.

Mr. McCarter: I offer the telegram in evidence.

Telegram marked Exhibit C25.

Mr. McCarter (reading):

"January 2, 1919.

Mr. Thomas J. Prindiville,
Hotel Mason,
Jacksonville, Florida.

Your letter of thirtieth also letter from Sullivan and Cromwell in which they notify us on your behalf that you wont continue or renew copartnership agreement has been received by your partners with much regret. Stop. While your letter of the thirtieth is apparently intended to cover withdrawal from corporation and copartnership lawyer's letter does not mention corporation. Stop. I have discussed matter with your lawyers who understand as we do that you desire to withdraw from corporation and copartnership. Stop. As there will be meeting of directors of corporation Friday January third if it is your intention to withdraw from corporation that fact should be made clear by your resigning as director. Stop. If we correctly understand your intention I suggest you telegraph me today your resignation as director so that it can be acted on at tomorrows meeting. Stop. I am telegraphing you with your lawyers knowledge.

W. R. COE."

Now, I offer in evidence the reply.

The Court: What is the meaning of "partnership"? I don't know whether it has been developed to me.

Mr. McCarter: This gentleman was both, member of the partnership and he had his interest in the corporation. Now, the retirement that the lawyers are talking about in their letter—

The Court: Which partnership, Chicago?

Mr. McCarter: No. J. & H., Johnson & Higgins.

The Court: General partnership?

Mr. McCarter: General partnership. It will develop in the correspondence, the dispute that arose. January 6, 1919, Mr. Prindiville's letter to Mr. Coe in reply to that telegram. I offer it in evidence.

Said paper marked Exhibit C26.

Mr. McCarter (reading):

"HOTEL PONCE DE LEON

St. Augustine, Fla., Jan. 6, 1919.

Mr. W. R. Coe,
Johnson & Higgins,
51 Wall Street,
New York.

Dear Will:

Your wire of the 2nd received the evening of the 3rd.

Inasmuch as I have placed my interests in the hands of Royall Victor, who instructed me to forward to him any communication dealing with my case, I thought best to advise Victor to communicate with you direct, which I understand he has done.

Yours very truly,
THOMAS J. PRINDIVILLE.

I thought best to leave New York as I did not want to see Appleton, Chubb, etc., until I had effected understanding or settlement with you.

T. J. P."

Now we have a letter from Johnson & Higgins to Sullivan & Cromwell, and I think we have reached the end of the correspondence. I offer the letter in evidence.

Letter marked Exhibit C27.

Mr. McCarter (reading):

"January 4, 1919.

Messrs. Sullivan & Cromwell,
49 Wall Street,
New York, N. Y.

Dear Sirs:

Attention of Mr. E. H. Sykes.

We acknowledge receipt of your favor of December 31st.

We accept the letter as the notice of Mr. Prindiville's withdrawal from the firm as provided in the 5th paragraph of the articles of co-partnership. This notice is so accepted as effective December 31st, 1918.

We will promptly take steps to carry out the provisions of the articles of co-partnership in adjusting Mr. Prindiville's interest.

Yours truly,
JOHNSON & HIGGINS."

The Court: That has not been developed in this case.

Mr. McCarter: No. It has been spoken of. This is confined to the partnership.

The Court: Should there not be some explanation of the co-partnership and its connection with the firm?

Mr. McCarter: I haven't felt it very im-

portant and Mr. Hardin said yesterday the co-partnership was not involved. We developed the fact that the original concern of Johnson & Higgins was a co-partnership; then they incorporated and in certain states and localities they could not do business as a corporation so they continued the firm.

The Court: Evidently there is a written agreement of the co-partnership which came to an end?

Mr. McCarter: Yes. That is the subject of controversy in New York. We are not proposing to introduce that here unless it is desired. The significance of these inquiries is that the facts that occurred at the end of the year 1918 were with respect to the partnership and not with the corporation. We are here concerned with the corporation.

Mr. Wollman: The Court asked the distinction between the word firm and co-partnership?

Mr. McCarter: They are one and the same thing.

The Court: I meant corporation.

Mr. McCarter: I offer in evidence letter of January 6, 1919, from Sullivan & Cromwell to Johnson & Higgins.

Paper marked Exhibit C28.

Mr. McCarter (reading):

"New York, January 6, 1919.

Messrs. Johnson & Higgins,
49 Wall Street,
New York, N. Y.

Dear Sirs:

We are today in receipt of your letter of the 4th instant, apparently by mistake dated January 4, 1918. There must be no misunderstanding as to Mr. Prindiville's position, as set forth in the letter of our Mr. Sykes to you under date of December 31, 1918. This letter does not bear the construction that you seem to place upon it and was not a withdrawal of Mr. Prindiville from your firm under the fifth paragraph of the articles of co-partnership or otherwise. The letter on its face states very definitely that Mr. Prindiville would not continue or renew the partnership of Johnson & Higgins which by its terms expires today. Mr. Prindiville's interest in the firm and its assets still continues, and it is for the purpose of adjusting this interest and other related matters that we have requested an early conference.

Very truly yours,
SULLIVAN & CROMWELL."

The Court: What does he mean by "firm"?

Mr. McCarter: Now, what I think you should know, in order to clarify the situation, is that it was the view of Sullivan & Cromwell, which they still entertain, that it was the purpose of Johnson & Higgins under the terms of co-partnership, which we are not here concerned with, to construe his letter as giving one effect of his retirement from the firm,

where as they wished, as they said here, to have it distinctly understood as referring altogether to the partnership. What they say they meant. Your Honor has no interest in that matter.

The Court: You mean the firm—corporation?

Mr. McCarter: No, the firm. There were two possible constructions as to what his position was in the firm, arising from the correspondence, and this is designed to make clear that their contention was that with regard to the firm. You see the whole discussion is in regard to the firm, not the corporation. It isn't worth while, unless you desire to say what that contention is, because it affects the other controversy. We think they were trying to slip something over on us in the firm business, which isn't involved. The controversy was concerning the firm and not the corporation. Does your Honor see the point?

The Court: Yes.

Mr. McCarter: I now offer letter of January 7, 1919, from Johnson & Higgins to Sullivan & Cromwell.

Letter marked Exhibit C29.

Mr. McCarter (reading):

"January 7, 1919.

Messrs. Sullivan & Cromwell,
49 Wall Street,
New York, N. Y.

Dear Sirs:

Your favor of January 6th is received. The articles of co-partnership provide for the method of withdrawal of a partner and we see no construction that could be placed upon Mr. Prindiville's action than that he has withdrawn from the firm under the articles of co-partnership.

Should there be any other questions regarding Mr. Prindiville's withdrawal, we feel the same had best be taken up with Mr. A. H. Larkin, of Larkin & Perry.

Yours truly,
JOHNSON & HIGGINS."

Q. Did you have any later conference on the subject at all with any of the gentlemen? A. Yes, sir. I think about the middle of February or first part of February in conference between Mr. Victor, Mr. Larkin, Messrs. Coe and LaBoyteaux, in the office of Johnson & Higgins, in regard to—discussed settlement.

Mr. McCarter: I do not suppose that is competent.

Mr. Hardin: Was Mr. Prindiville there?

Mr. McCarter: He says he was.

The Court: He did not say.

Mr. McCarter: I asked him if he had any further conference with these gentlemen and he said yes.

The Court: I presumed he was there.

Q. Do you recall any other different statement by you in your previous talk with Mr. LaBoytaeux, prior to the correspondence between the lawyers, than you have stated. In other words, Mr. LaBoyteaux testified yesterday that his recollection was that you stated, "I am going to leave unless the corporation satisfy my demands," and that you repeated that direct averment, "I am going to leave unless the corporation satisfies my demand." Have you any recollection of making any such statement as that? A. Not of making any such statement as that. I think I did say, "I will have to leave," on account of the position they put me in. It was a case of accepting a position which would cause me to lose my self-respect and pride, and the alternative was of getting out; that is all.

Q. Did you get any notice of any directors' meetings thereafter? A. No, sir.

Q. How often did the board meet, or do they regularly meet? A. Every month.

Q. Did you in fact resign? A. No, sir; never resigned.

Q. Reference has been made to the fact that you were at present engaged in some competing business. When was that business first organized? A. Well, when I came back to town about the 1st of February and found out that, after this meeting, there was no chance to make a settlement with J. & H., I had to go to work—I had to live—I conferred with my attorney and he told me—

Q. Never mind about that. That wouldn't be competent. I may ask you, as a matter of fact, when your present business of Prindiville & Croxson was organized? A. I think the very end of March or first of April—about the first of April.

Q. 1919? A. 1919.

Q. You received from Mr. Coe this letter of April 14, 1913, which refers to a letter of April 12, 1913, which we do not seem to have.

Mr. McCarter: I offer the letter in evidence.
Paper marked Exhibit C30.
Mr. McCarter (reading):

"April 14th, 1913.

Thomas J. Prindiville, Esq.,
Chicago, Illinois.

Dear Tom:

I am in receipt of your favor of the 12th inst., and also the fourteen copies of the temporary agreement which you have signed. I am interested in what you say concerning the increased percentages. I do not think you have any reason for complaint. Here is the position: Last February when the new percentages were agreed upon, six per cent was allotted to Mr. Loines and rather than take it he resigned from the firm. This left us at the end of the year with six per cent belonging to all of the partners who had signed up, and it was necessarily distributed pro rata. I note your reasons for desiring a larger interest in the firm's business. This could only be arranged by cutting down your interest in the corporation, which, I take it, you would not desire.

It is not correct to judge the fairness of a partner's interest by what he gets in the firm as distinct from what he gets in the corporation. We base our calculations on his total income. In considering the interests of the various partners of the firm and corporation for this year it was the general idea that

they should remain the same as last year, and if it had not been that I gave up about $16,000 of my corporation income, the corporation percentages would have been exactly the same.

I have appreciated the fact that you left your interests in my hands and it has been my desire to deal fairly with you. I do not think you have suffered. For instance, your last year's income as a partner was over $32,000, whereas if the situation had remained as it was two years ago, your income from Prindiville & Company, would only have been $28,750. In addition to the increased revenue you are in a much safer position as your interest is in a much larger business and you have the protection of the common stock in case of death or disablement. Also owing to the unsatisfactory condition of the Lake business, you would probably have to face a material reduction in your income this year if your interest had remained solely in Prindiville & Company. If you want me to take up the matter of your interest with the other partners on the lines mentioned earlier in the letter, I will of course be very glad to do so, but I think it would be a foolish move on your part. With kindest regards,

Sincerely yours,

W. R. COE."

Now, the letter of April 12, 1913, which is referred to in that letter that I have just read, I offer in evidence.

Paper marked Exhibit C31.

Mr. McCarter (reading):

"Chicago, April 12, 1913.

Mr. William R. Coe,
c/o Johnson & Higgins,
New York.

Dear Will:

Yours of the 8th received and noted. The copy of the firm's temporary agreement arrived, and I am returning you the fourteen copies signed as you requested.

I am sorry to see I am so far down on this list I note that there has been an average advance of about five points and I received but two. I would like to have a larger interest in the firm's business, inasmuch as I am going to devote a good portion of my time in promoting its welfare in this vicinity.

I have always left these matters in your hands and know you will do the best you can for me.

With kindest regards I am,

Yours very truly,
THOMAS J. PRINDIVILLE."

Mr. Cutcheon: We have Mr. Prindiville's reply to Mr. Coe's letter.

Mr. McCarter: We have no objection to putting it in and will offer it.

Paper marked Exhibit C32.

Mr. McCarter (reading):

"Chicago, April 16, 1913.

Mr. W. R. Coe,
c/o Johnson & Higgins,
New York.

Dear Will:

Your favor of the 14th received and noted. As advised in my letter of the 12th, I have left my interest in your hands and will continue to look to your good will and judgment as far as my personal interests are concerned. However, it was quite a shock to see my percentage of the firm's business.

In reply to your remarks in regard to my income, will state that you probably overlook the fact that when I withdrew from Prindiville & Sons, my share was bringing me in a revenue of Seventy-five hundred per year, which I had to give up to Chamberlain and my brother when I ceased to devote my time to that firm.

In regard to the unsatisfactory conditions of the Lake Business, will state that of course we cannot help actual conditions, although I think when you are fully posted you will find that we have used the very best judgment in handling the situation this year and we have secured a volume of business for our underwriting facilities that will more than offset any loss in commission on hulls secured as brokers. Of course, the rates on Lake grain insurance have been badly cut, but this will not effect us nearly as much as would have been the case had I not rearranged our entire basis of reporting this business to Appleton.

There are a number of things that I have in mind in regard to this Lake situation and within a few days I will write you fully on this subject.

With kindest regards I am

Yours very truly,
THOMAS J. PRINDIVILLE."

Mr. McCarter: Now, we offer in evidence letter from Mr. Coe to Mr. Prindiville, under date of January 6, 1916. The only object is to accentuate what already appears, that the stock Mr. Prindiville received from Curtin had been voluntarily surrendered by Curtin.

Paper marked Exhibit C33.

Mr. McCarter (reading):

"January 6th, 1916.

Thomas J. Prindiville, Esq.,
Chicago, Ill.

Dear Tom:

Private.

At our meeting on January 19th we should distribute the four hundred (400) shares of stock surrendered by Mr. Curtin and probably eight (8) shares surrendered by Shriver. This stock will draw dividends as follows:

W. W. Curtin	200 shs.	1923
" " "	50 "	1924
" " "	50 "	1925
" " "	100 "	1926
E. J. Shriver	4 "	1918
" " "	4 "	1919

In the first instance this stock must be distributed by Board resolution pro rata to common stockholders and then by mutual arrangement, it is alloted to active directors. Under the arrangement by which LaBoyteaux comes here as President, he received eighty (80) shares of the earlier stock, and George forty (40) shares, which brings them up to five hun-

dred (500) which is the limit on which I worked. Deducting this hundred and twenty (120) shares it leaves two hundred and eighty-eight (288) shares. Hopkins now has three hundred and seventy-one (371), of which only fifty-three (53) are dividend paying. It is my idea, with which the others acquiesce, to give him twenty-nine (29) shares of the first retired stock. This leaves a balance of two hundred and fifty-nine shares.

Although strictly speaking the rest of us are entitled to our pro rata we have agreed to a mutual distribution of the two hundred and fifty-nine (259) shares between Botsford, Davey, Henry Lowe and yourself, being practically sixty-five (65) shares apiece.

The division of stock and the question of directors' salaries is, as you know, one that is accompanied with many difficulties and my experience has been that it is a decidedly unpleasant job for the president. I have talked it over with Botsford, Davey and Henry Lowe, and they agree to this two hundred and fifty-nine shares being equally divided among the four of you. One of you, of course, will have to take one share less as we cannot have fractions.

Bostford is now 59 years old and came to this concern in 1877. He went away for four years. As you know, he has been working very hard since the war started. Stock commencing to pay dividends in 1926 will not be of much benefit to him if we follow the actuary tables of longevity. The rest of them have agreed that after LaBoyteaux, George and Hopkins have been taken care of, that Botsford should get his sixty-five shares out of the stock remaining that is nearest to paying dividends.

It has required a considerable amount of diplomacy to bring about this arrangement in regard to this 259 shares and the rest of the older men who do not participate and who legally should, and we are foregoing their rights think it is a fair division, and I sincerely trust you will write me by return mail that you agree to it. Do not delay your answer as there are many formalities to go through with before the meeting. While you told me you would write me a letter in regard to the corporation salaries I am working on the assumption that it is agreeable to you to let your corporation interest remain as it is until 1917. That certainly is the view of the Committee and the other directors with whom I have spoken and I hope you will confirm this.

Your firm interest will be increased 1.1%. Now please cheerfully acquiesce in this and relieve me from any addition to my burdens in dealing with this matter.

Sincerely yours,

W. R. COE."

Q. At the time this letter was written, Mr. Prindiville, which was on the 6th of January, 1916, were Curtin and Shriver actively connected with the business? A. Curtin certainly was. I think—

Q. Who was Shriver? A. He was treasurer.

CROSS-EXAMINATION by Mr. Hardin:

Q. Mr. Prindiville, can you tell us what was your income from Prindiville & Co. just prior—the year prior to your coming with Johnson & Higgins? A. I think it was about twenty-one or twenty-two thousand dollars.

Q. You spoke to us yesterday about the organization of the firm of John Prindiville & Sons? A. Yes, sir.

Q. And you recall when a half interest in that business was sold to Johnson & Higgins and the corporation of Prindiville & Co. was formed? A. Well, a half interest in that business was never sold. When the corporation—do you wish me to tell you?

Q. Yes. A. When the corporation of Prindiville & Company was formed and in payment of my fifty per cent of that stock I turned over, and had the permission from my father to turn over, the hull business of John Prindiville & Sons, and the cargo business, providing I did not affect the local agency revenue that John Prindiville & Sons were getting on that cargo business.

Q. What was the income of that business that you took to the new corporation of Prindiville & Co. A. I can't say. I do not remember.

Mr. McCarter: That was back in 1903.

The Witness: 1903. The fact is Prindiville & Co. lost $200 the first year they were in business so it couldn't have been very great.

Q. In making your arrangements at the time that the corporation of Prindiville and Co. was organized you had an arrangement by which you were assured a minimum salary or compensation, did you not? A. I was guaranteed a salary.

Q. Do you remember the amount? A. $4,000.

Q. Now, can you give us the earnings of Prindiville & Co. the second year. You say they lost money the first year? A. They made some money the second year.

Q. Do you remember how much? A. Well, I really don't know. Isn't there a record here?

Q. Was it about $35,000? A. Oh, no; we didn't go so fast as that.

Mr. McCarter: We can furnish those figures if they are of the slightest moment.

Q. How much the third year? A. We made a pretty stiff gradual increase up until 1916. I think we netted about $160,000 that year.

Q. Do you recall the earnings of Prindiville & Co. in 1905? A. No, sir.

Q. 1906? Have no definite recollection of that? A. No, sir; I have not.

Q. Of the progress of business at all? A. After our first loss we went ahead very well indeed, and I think increased almost every year up until 1916. That is a long while ago. I do not remember the details.

Q. Do you know what figure you had reached in the year 1910, just prior to the time that you went to Johnson & Higgins? A. Well, I think it was around $20,000, that is $40,000. The dividends declared that year—

Q. That would be the total, and half of it was yours? A. Mine, yes, sir.

Q. Do you recall whether, in fixing your percentages upon your entry into the firm or into the corporation of Johnson & Higgins there was any relationship between what the business of Prindiville & Co. had been in the year 1910? A. Oh, yes—well, yes, the year just closed. My total compensation from J. & H. was, based on percentage on the preceding year, would bring about a result approximately the same as I had from Prindiville & Co.

Q. Now, when you came into the firm of Johnson & Higgins, or into the co-partnership of Johnson & Higgins—

The Court: Which is the firm, the co-partnership?

Mr. Hardin: Firm and co-partnership is the same thing.

Q. When you came into the corporation of Johnson & Higgins, you also contemporaneously went into the firm of Johnson & Higgins? A. It was all one deal.

Q. And do you recall what your percentage was in the co-partnership at the time you first came in? A. No. It was all based on a certain percentage of firm interest, profit sharing interest and corporation interest, the earning power on that based on the preceding years result. It was a small interest, I think, in the firm.

Q. Do you recall whether your interest in the co-partnership was larger than your percentage in the corporation, or the other way? A. Well, I don't know. I think they were pretty near alike, if I remember rightly.

Q. Do you recall whether your interest in the firm increased afterwards, and if so in what relation to your interest in the corporation? A. Well, I think they went along pretty near the same percentage, the results from that percentage were different though.

Q. One being figured, of course, on the earnings of the co-partnership and one being figured on the earnings of the corporation? A. Yes, sir.

Q. That is what you mean by the difference between the two? A. The result. It is pretty hard to tell the difference between the two.

Q. I say that is what you mean by the difference between the two in the result, the percentages were figured on different principal sums? A. Yes, sir.

Q. When did Mr. Lowe come into the firm of Johnson & Higgins, if you remember? A. I think the year before I did.

Q. Did he come into the corporation also the year before you did? A. Apparently.

Q. When Mr. Davey came in? A. I think with Mr. Lowe.

Q. It is your recollection that your percentage when you came into the corporation in 1911 was fixed with any reference to the ones that Messrs. Lowe and Davey were receiving? A. No; not when I came in.

Q. It was fixed entirely from the relationship of what you have been accomplishing in the Prindiville & Co. business, was it not? A. Yes, sir.

Q. Do you know whether Messrs. Lowe and Davey were receiving more or less percentage than you in the year 1911 in which you entered the firm? A. I think they were receiving less.

Q. In which you entered the corporation also? A. The results of that year, yes, sir.

Q. When did this equality that you have referred to between Messrs. Lowe & Davey, whom you term your running mates, and yourself arise? A. Well, it seems for two or three years I was never asked to appear before the salary committee and Mr. Coe would write me each year what was done—as to what was done for me. I never knew what was done for the others until after two or three years. I found that where in 1911, I was getting a larger compensation than Lowe and Davey, and in nineteen hundred and

say thirteen or fourteen I was getting less, so I went to New York and asked for an explanation and I was told that apparently something had been overlooked, but at the same time they said, "Now, there is practically no difference between you and as soon as possible we will correct your percentage so that you will be with Lowe and Davey."

Q. Did I understand you to suggest that you didn't know about the percentages to the various directors until the end of the year— A. I didn't know what my partners were getting for two years—two or three years. I never asked for a list of it. It was from obtaining that list that I discovered I was apparently a little bit overlooked.

Q. Do you recall the meeting at which you were elected a director of the corporation? A. Yes, sir.

Q. In June, 1911, I think? A. No.

Q. Were you present at the meeting? A. I was asked in after the meeting, I think.

Q. After you were elected a director? A. Yes, sir.

Q. And do you recall that your compensation was fixed at that meeting by a resolution of the directors? A. It was fixed before the meeting, agreed to.

Q. It might have been agreed upon, but you recall there was corporate action with reference to it? A. Yes, sir.

Q. After you entered the meeting. And do you also recall that contemporaneously there was a revision of the entire salary list for the year occasioned by the change that resulted from your coming in? A. I don't remember hearing of it.

Q. The minutes I think will show that there was a resolution of that kind passed? A. I wasn't there at the meeting.

Mr. McCarter: He was there in May and this meeting was in June.

Mr. Cutcheon: He was there also.

Mr. Hardin: I am not mistaken, Mr. McCarter.

Q. Do you remember that immediately after you entered the meeting, May 11, 1911, action was taken fixing your drawing account at $700 per month? A. Well, I know that I wrote a letter asking for that and agreeing to it. I do not remember the ratification of it by the board.

Q. I find on page 249 of the minute book where the chairman referred to the election of a director, "Mr. Prindiville thereupon took his seat as a director. On motion of Mr. Hunter duly seconded it was resolved that the treasurer of the corporation be and is hereby authorized to pay Thomas J. Prindiville the sum of $700 each month on account of his compensation, subject, however, to an agreement by the said Thomas J. Prindiville to refund any portion thereof which may prove excessive." Do you recall that action being taken at that meeting? A. Yes, sir; that was a letter I sent. That is a matter of—

Q. I am reading from a resolution that appears to be passed at the meeting after you came in. I ask you if you remember it? A. I have no recollection.

Q. You are sure there was action assuring you $700? A. Oh, yes.

Q. Now, I ask you if you recall being present at the meeting of the directors on June 21, 1911. The minutes show you to have been present? A. Apparently I was there, then.

Q. Now, the minutes also say that at that meeting there was a resolution passed reciting the facts as follows:

"Resolved, that T. J. Prindiville, having been elected a Director of the Corporation, his percentage of salary be fixed at 3.10% of the entire amount heretofore allotted by the Board to Directors salaries, and for the full period beginning January 1st, 1911, and ending December 31st, 1911, also

"Resolved that inasmuch as this allottment of 3.10% will necessitate a rearrangement of the salary percentages of all Directors for the year 1911, the percentages agreed upon at the meeting held January 18th, 1911, be revised: Such revised percentages being as below mentioned."

Then follows a list in which every director's percentage is set forth from J. D. Barrett down to yourself? A. That was my first meeting.

Q. Yes. You were present at that meeting? A. Yes, sir.

Q. For the year 1911 you did know immediately upon your entry into the corporation just what the percentages were of yourself and the other directors also. A. Yes, sir. At that time I had no knowledge of what the corporation salary was.

Q. I am reading about the corporation salaries at this meeting at which you were present? A. Corporation salaries? I don't remember it. I don't know whether it was done before I was in there or not.

Q. As a matter of fact each year wasn't the question of the percentages given to the directors a matter of reference to committees and discussion? A. Yes, sir.

Q. And didn't you know about it each year? A. I was never—never went before that committee and was never called upon by that committee for two years.

Q. You reached the committee by correspondence, however? A. No; I did not. Mr. Coe would write me each year as to what was done with me, that is for two years; then I finally asked for a list.

Q. Which two years are you referring to? A. Well, I think probably 1912 and 1913.

Q. In 1911, apparently, you were immediately advised of everybody's percentage? A. Yes, sir.

Mr. McCarter: Would there be any objection to withdrawing this witness for the purpose of examining Mr. Victor, who is desirous of getting away.

Mr. Hardin: No objection.

ROYALL VICTOR, sworn for complainant.

Direct-examination by Mr. McCarter:

Q. Mr. Victor, you are the Royall Victor to whom reference has already been made in the testimony as being a member of the law firm of Sullivan & Cromwell, New York? A. Yes, sir.

Q. And do you recall meeting Mr. Prindiville and having his matters in connection with Johnson & Higgins put in your hands? A. I do; yes, sir.

Q. Did you make an investigation of the situation? A. I did.

Q. And what did you ascertain? What knowledge came to your hands?

Mr. Hardin: I object.

The Court: What did he do?

Q. Did you ascertain the status of both the partnership and the corporation? A. I did to the best of my ability; yes, sir.

Q. What did you ascertain that to be? A. I ascertained that "Johnson & Higgins" was the name applied to two separate legal entities. There was a corporation organized under the laws of New Jersey by the name of Johnson & Higgins, and there was a co-partnership which had regular co-partnership articles by the same name. I ascertained that the co-partnership and the corporation did business more or less indiscriminately throughout the United States. That the corporation—

Mr. Hardin: I object to his general description of the results of his investigation.

The Court: Objection overruled.

A. (Continuing.) I ascertained that the corporation had a license to do business in certain states and that the co-partnership did business in other states in which the corporation has no license to do business. The sum and substance of it all came down—

Mr. Hardin: I object.

Q. Do you recall Mr. Prindiville going to Florida? A. Yes, sir.

Q. He laid before you the situation? A. He did, yes, sir.

Q. And did you suggest that Mr. Sykes, one of your associates, communicate with these gentlemen on the other side? A. I did.

Q. You were unable to give it personal attention at that time? A. Yes, sir.

Q. You received word from Mr. Prindiville of the receipt by him of the telegram from Mr. Coe to Jacksonville? A. Yes, sir; I was advised of that at once.

Q. You were aware of the terms of the letter that has been put in evidence and that had been sent on behalf of Mr. Prindiville to the firm of Johnson & Higgins with reference to the retirement? A. I was, yes, sir.

Q. Did you later have a conference with Mr. Larkin? A. I did; yes, sir.

Q. Was that the first active step that you personally took in the matter, except as you conferred with Mr. Sykes? A. Well, I had been in conference with Mr. Prindiville before he went to Florida.

Q. I mean after his going to Florida. What was the conference you had with Mr. Larkin?

The Witness: May I, your Honor, explain that letter of December 31st as to the difference between "firm" and "corporation," in order to—

The Court: Mr. McCarter does not seem to take advantage of my ruling. I think the history that he was about to explain might be of some interest to me.

Mr. McCarter: I would be very glad to. Counsel objected again.

The Court: I know, but I did not change.

The Witness: I have got to, very briefly, to explain my course of action.

The Court: Simply a description of things then present in order to explain the witness's action.

The Witness: This firm—partnership—had partnership articles, a copy of which were furnished to me. Those partnership articles by their terms expired on December 31st, 1918.

Q. (Handing witness paper.) Are they the articles? A. This is a copy of the partnership articles.

Mr. Hardin: They speak for themselves.

Mr. McCarter: We offer that in evidence.

Mr. Hardin: I object.

The Court: Objection overruled.

Mr. Hardin: Your Honor understands that question is in litigation in the courts of New York. His interpretation of those articles—

The Court: We are not going into that.

Mr. McCarter: It seems to me the articles are necessary to explain the correspondence that has been offered in evidence.

Paper marked Exhibit C33a.

The Witness: These articles of co-partnership provided that the firm of Johnson & Higgins should continue until the 1st day of January, 1919. Because of that provision in the articles I had to take a position on behalf of Mr. Prindiville on December 31st. Either he was going ahead with the firm or he was not going ahead with the firm. The letter of December 31st related solely to that situation. It was formal notice that he would not renew those partnership articles. He was at all times—at that time a director of the corporation, elected as a director to

serve until May, 1920. I was trying to make it perfectly clear that, although my friend seemed to misunderstand our letter, that our letter was perfectly clear and it had nothing whatever to do with his directorship in the corporation, although they seemed not to be able to understand that. When Mr. Coe telegraphed to Mr. Prindiville in Florida to ask whether the letter carried with it an implication of his resigning as director from the corporation and I first became informed of that telegram, I told Mr. Sykes at once to clear up any doubt about that question, that our letter had been merely a notice that we would not renew the partnership, that it had nothing whatever to do with his directorship in the corporation, which he held, according to the terms of his election, until May, 1920, which was a year and a quarter or a year and a half further on. Now, when I next saw Mr. Larkin, which was about—I have refreshed my recollection from my officer blotter—January 14, I think it was, I told Mr. Larkin that Prindiville had received this telegram and that Prindiville would not resign as a director of the corporation except as a part of a settlement of the whole situation; that his letter had been merely a notice that he would not renew the partnership.

Q. Had you—had Sullivan & Cromwell, as far as you know, been shown a copy of the telegram from Mr. Coe to Mr. Prindiville at Jacksonville? A. No, sir; we had not until after it was sent and we felt the telegram did not—(interrupting).

Q. Yes. Had you had any discussion with Mr. Coe in which you stated that you understood that Mr. Prindiville desired to withdraw from the corporation? A. I had not; no, sir; nobody else in my firm had.

Mr. Hardin: I would like to ask that the last part of the answer be stricken out.

The Court: It will go out.

THOMAS J. PRINDIVILLE resumed.

Further cross-examination by Mr. Hardin:

Q. Now, Mr. Prindiville, coming to 1912. Do I understand you were not advised as to the percentages that were applicable to 1912? A. There was a period of two years there that I apparently have no record of it. In fact my letter to Coe, you will note where I mention it was a shock to see the percentages. Now, if I had been familiar with them it would have been no shock, and that was very clear in my mind that I had never been given the percentages for a period of two years.

Q. Granting that you were shocked when you received the knowledge, wasn't the knowledge conveyed to you promptly after the percentages were fixed, so that your shock was not postponed until the end of the year? A. No; I had no knowledge of all of them.

Q. You knew the method of the corporation as to the appointment of the committee each year for the consideration of that question? A. Yes, sir.

Q. You recall that you were present at the meeting of the corporation held in the month of December, 1912, at which the committee was appointed to fix the—I mean in December, 1911—at which the committee was appointed to fix the salaries for the year 1912? A. I do not remember being there; probably I was.

Q. The minutes show you to be present? A. Then probably I was.

Q. And the minutes also show that there was passed at that meeting a resolution appointing that committee on the 1912 salary? A. Yes, sir.

Q. You attended the meeting of the directors from time to time? A. From time to time.

Q. You do not mean to suggest you were kept in the dark about the doings of the corporation? A. No. I mean to say I was busy in the west and did not attend every meeting.

Q. No, but you attended from time to time? A. Yes, sir.

Q. And you knew about this method of ascertaining these percentages, apparently were present when it was appointed for 1912? A. Yes, when the committee was appointed, but I never appeared before the committee.

Q. How did you represent or bring before the committee, or before your fellow directors, your ideas as to compensation? A. They were given to the salary committee by Mr. Coe. I never appeared before them.

Q. Indicated by you to Mr. Coe for that purpose? A. I never paid any attention to it for two years or three years after I had been—

The Court: Strike out the answer. Won't you answer?

Q. Communicated by you to Mr. Coe for that purpose? A. Not to my knowledge I didn't.

Q. Didn't you have at different times during your relationship with this corporation differences with the salary committee as to the compensation which you would receive? A. Yes; later on.

Q. Your percentage and salary? A. Yes, sir.

Q. Both in the corporation and in the firm? A. Yes, sir.

Q. Didn't you have extended correspondence with Mr. Coe or others on the subject? A. Yes, but not in 1912.

Q. When? A. Probably about 1914 or 1915.

Q. To what year did these letters that have been put in evidence this morning refer? In April, 1913, there were two letters put in evidence back and forth between you. Two of them, I think, written by you and one of them by Mr. Coe with reference to your percentages. That was for the year 1913, I assume? A. That was for the year 1913, yes, sir.

Q. And you were advised some time as early as April, 13, what the percentages were? A. What my percentage was not the percentage of my partners.

Q. What was the basis of your objection if you didn't know about the percentages that were going to others?

Mr. McCarter: I haven't heard he did object. I think he said he didn't have the information.

A. Well, that letter—I said—I think that was the —that was a firm—I think I had the information on the firm. I think the firm partnership was sent to me single or something of that kind.

Q. You knew that the corporation kept minutes? A. Oh, yes.

Q. You saw the minute book when you were at the meeting? A. I saw it.

Q. Did you ever examine the minutes? A. No.

Q. You heard resolutions offered—you assumed, did you, the corporation had proper records? A. Yes, sir.

Q. Did you ever take any pains to find out anything about the doings of the corporation? A. No, I really never did.

Q. You think the 1913 matter referred entirely to your percentage in the firm? A. I think so.

Q. Had nothing and you were not in anyway advised as to your percentage in the corporation? A. Yes, I was advised as to my percentage, but not as to those of my partners.

Q. As a matter of fact, you very, or quite early in your relationship to the corporation began to develop from your end to Mr. Coe, for the purpose of influence on your fellow directors, a larger idea of compensation than they were apparently ready to accede to you? A. No; when I discovered—

Q. What is this "shock" then that you are talking about? A. Well, it was, as I say, when I discovered that other partners were being increased and I was not, and when I felt that I was pulling my oar and should have had my proportionate increase I did write to inquire about it.

Q. What is the first occasion of shock of that kind that you remember? A. Well, as I say, it was, as I remember, about two years after I joined the organization.

Q. And that shock was the result, was it not, of a difference of opinion on your part as to the compensation that you were to receive from the opinion entertained by your fellow directors in the apportionment of the salaries? A. No; apparently it

was the result of their meetings which I had not attended.

Q. And out of which came an allotment of compensation to you less in amount than you thought you should receive? A. Yes, sir.

Q. This whole matter ran in percentages, did it not? A. Always.

Q. Weren't you fully advised and informed about the scheme under which this corporation was run before you joined it? A. In a general way.

Q. You knew about this method of the allotment of half of the net earnings to the compensation of directors and executive officers—the charter scheme? A. Yes, in a general way, I never read it.

Q. And the other half went to dividends? A. Yes, sir.

Q. How early did you have a copy of the certificate of incorporation and by-laws? A. I think it was about two years after I joined I asked for one.

Q. Was that before or after you had participated in the allotment of stock that had been turned in by the retiring members? A. I am not sure. It was probably before.

Q. Yes; so that you understood that when it happened. Now, you received your stock certificate, did you not, for 125 shares promptly after you came into the corporation? A. Yes, sir; I think so.

Q. You read it, didn't you? A. No.

Q. You didn't read it? A. No.

Q. You received later other stock certificates when these various distributions in which you participated were made? A. Yes, sir.

Q. You didn't read those certificates either? A. No.

Q. You never read any stock certificate that you got? A. No. I read the by-laws, no stock certificate.

Q. You never have read the stock certificate? A. Yes; I read one in Mr. Victor's office, I think, when I brought them down.

Q. Up to that time you never had bothered to read them? A. No; never bothered.

Q. Although you had one in your possession since 1911, and others at various dates intervening? A. Yes, sir.

Q. Is that your habit with reference to investments, to pay no attention to the terms of the certificates? A. Well, I felt I was one of an organization, and the retirement provisions, etc., did not seem to interest me because I intended to stick.

Q. Was that your habit with reference to investments of your money, to pay no attention to the terms of the certificate? A. I am not in the habit of reading every stock certificate, I guess. I have read very few of them.

Q. It is your habit then not to pay any attention to the terms of the securities which you get? A. I don't pay any attention.

Q. You look at the number of certificates and number of shares and what the par is and let it go at that? A. Practically that is all.

Q. You yourself at times have served on the distribution committee, haven't you? A. Only once. thank God.

The Court: Strike out the "Thank God."

Q. That year, of course, you were advised about everybody's percentage? A. Yes, sir.

Q. And was there any debate in that committee about the distribution? A. Oh, yes; we discussed the claims of several partners.

Q. Was it the custom to have the different directors bring to the salary committee their claims with reference to increases in their compensation? A. Yes, sir.

Q. And that committee that you acted on was no exception to that rule? A. No.

Q. And the directors—that committee, I assume, gave diligent attention to the various suggestions that came to them and took everybody's views into consideration and through their knowledge of the business made the final apportionment that they thought was fair? A. Yes, sir.

Q. And the judgment reached in the year you were on the committee, you, of course, thought was perfectly fair, and so far as you know, that was reached by no other method than the usual method? A. No.

Q. Now, in that particular instance, do you recall whether or not your own compensation was advanced? A. I think so.

Q. You made your statement to the committee as to what you thought was fair? A. Yes, sir.

Q. And the committee reported accordingly. Do you remember what your percentage was for that year? A. In 1917, I think it was. Mc? Six per cent.

Q. And was that the year in which you were on the committee? A. I think so.

Q. I show you Exhibit D7, which is the report signed by you. What is your percentage in that report? A. Six per cent.

Q. That confirms your recollection in that respect. What had it been the year previous? A. I think 5.6, or something like that.

Q. Do you recall any particular discussion in the committee of any reasons for advancing your percentage? A. Yes, the committee acknowledged that I was right in calling their attention to the fact that I was overlooked a year or two or three years previous, which in the meantime there hadn't been any way of balancing or straightening out.

Q. Your percentage had been advanced, had it not, earlier than 1917? You originally came in as I recall it at 3.10 per cent. Was it jumped for the first time in 1917? A. No, I think not.

Q. You had been raised in the meantime? A. Yes, sir.

Q. What were the conditions which expressly entitled you to special consideration—just the fact that you had been overlooked a year before? A. No, the committee considered I was entitled to be put on a plane with Davey and Lowe and they corrected my percentage, which, with the firm and stock returns, would approximately give the same total compensation.

Q. You had begun even as early as that to discuss your comparative compensation in the light of Davey and Lowe? A. Oh, yes; three years before. The point was that they advanced those men more rapidly than they did me, and they couldn't point out any reason for it.

Q. Then as early as 1914 those men were going along more rapidly than you and you were complaining? A. Well, they were advanced and it was not corrected until 1917, owing to the fact that there was nothing to distribute, I think you will find in —either in the corporation salary or in the firm percentage up until 1917, when the matter was adjusted.

Q. Do you remember any particular discussion the year you were on the committee concerning Mr. Botsford? A. Yes, sir.

Q. And there were special conditions existing which led to some special recognition of Mr. Botsford? A. Yes, sir, I think the committee was impressed by Mr. Botsford's situation and he was increased.

Q. Now, looking at this report, and of course, you are familiar—this report which was finally approved by the board for the year 1917, was it not? A. I think so.

Q. Was the basis of distribution for 1917? A. I think so.

Q. I call your attention to this report as to the percentages of Mr. Davey and Mr. Lowe. What are they ? A. Mr. Davey 7.8 and Lowe 7.5.

Q. And yours is six per cent? A. Yes, sir.

Q. Then that does not seem to have been an equality. A. You do not understand that all sources of revenue are taken into consideration in estimating a man's total compensation. I had more stock interest—larger stock dividends than Lowe and Davey to make up the difference, so that our total compensation from Johnson & Higgins was practically the same. I refer you to Mr. Coe's letter on that, where they take the compensation from both firm and corporation and estimate a man's worth.

Q. Your idea is that it was desired to get equitable relationship between all by the inclusion of every element of income that could come to the associates within the business? A. That was the common practice of the corporation and firm.

Q. And was that taken into consideration in the distribution of stock? A. Yes, sir.

Q. And was that another reason why others stood aside on one occasion and allowed you and others to take stock? A. I presume so.

Q. And it was the reason, I suppose, for the directors instead of distributing stock pro rata to agree among themselves about how it should be done? A. Yes, to adjust differences and claims for compensation.

Q. Now, as a matter of fact, was there ever a time in the corporation when there was an equality of distribution of the salaries, corporation salaries, as far as Lowe and Davey were concerned, and yourself on the basis of equality? A. Not corporate salaries; but total compensation from Johnson & Higgins, yes.

Q. You have to bring in other figures when you sustain that claim of— A. All come from the same office, from the same auditor.

Q. You are entirely aware, are you not, that never was there a time after 1911, when the proportion of salary received by Lowe and Davey were not larger respectively than yours? A. Salary?

Q. Corporate salary? A. They were always larger.

The Court: But income?

The Witness: Income was practically the same.

Q. Income from corporation or income from corporation and firm combined? A. Well, income from the combined organization.

Q. I would like to know whether you include in your comparison income from the firm as well as income from the corporation? A. Yes, sir.

Q. There was not always complete identity of

membership among the board of directors and the firm? A. Very often—

Q. (Interrupting.) Answer the question, please? A. Not always.

Q. And the percentages in the firm participation were frequently quite different from the percentages in the participation in the co-partnership? A. Yes; it was all used for adjustment purposes.

Q. Please answer the question.

(Question read.)

A. Yes, sir.

Q. Now, do you recall the compensation for the year 1914? A. No, sir. Total compensation?

Q. You were continued, were you not, at the figure of six per cent that year? A. You mean corporation?

Q. 1914 corporation percentage. I am not talking about anything else, just the corporation? A. 1914, I didn't have six per cent to the best of my knowledge.

Q. What did you have? A. Well, I don't remember.

Q. No, you did not have six per cent, I did not mean to mislead you. Do you recall what it was? No, not exactly, something under that.

Q. Do you remember whether you were present at the meeting at which the compensations were fixed for that year? A. 1914?

Q. Yes. A. I don't think I was.

Q. If the minutes show you were present at the meeting of January 21, 1914, at which the resolution was passed, you probably were, weren't you? A. Yes, sir.

Q. Apparently the minutes do show, Minute Book 2, page 340, meeting held January 21, 1914, Mr. Prindiville was present and a resolution was adopted and Mr. Prindiville was given an appropriation of 5.60? A. Yes, sir.

Q. You knew about that? A. Yes; I knew about that. I knew after the first two years. I kept pretty good track of it. The first two or three years—

Q. You recall having had any communication or talk with anybody about your 1914 figures of 5.60, before it was fixed? A. I don't remember.

Q. You remember talking to Mr. LaBoyteaux about the matter at all? A. I remember taking it up with him one year. I don't know whether it was 1914 or not.

Q. Do you remember receiving a telegram from Mr. Coe of which I show you what purports to be a copy? A. Yes, sir, I remember receiving that.

Q. And do you recall now that you had been talking to Mr. LaBoyteaux about your dissatisfaction with the committee's views? A. Yes, sir, I do.

Q. This telegram was an invitation to appear before the committee to present your views? A. Yes, sir.

Q. You came on to the meeting which was held— this telegram is dated January 15, 1914. It refers to the meeting of the following Wednesday, and you were present at the meeting of January 21, which I assume was the date referred to in the telegram. In the interval did you present your views to the committee or have an opportunity to? A. I presume I did.

Q. And you acquiesced in the final action? A. I did, but if I remember rightly, at that meeting, when

I explained the situation, they concurred or seemed to feel that I was correct in what I stated, but there was nothing to adjust at that time and—it was either in 1914 or 1915—and they could not straighten the thing out.

Q. Do you recall anything particular about 1915 salaries? A. I do. There was—whether it started in 1914, when I put the situation up to Coe and LaBoyteaux and they admitted that I had been overlooked and they would try to adjust it and then for one or two years there was either nothing to adjust or they could not arrange to get the thing on a parity with my running mates until 1917, at which it was adjusted. Now, there was considerable correspondence and talk, I think, prior to every annual meeting from 1914 up until 1917, and it was in process of being adjusted.

Q. And it is the fact that every year you brought to the committee your idea that you should have a larger share of the corporation earnings? A. That the adjustment which they acknowledged was correct be made as per promise.

Q. And year by year from the beginning almost there was a debate between you and the committee as to the question of amount? A. There was a debate from almost every member of the corporation year by year.

Q. Yes, and you? A. I started in—

Q. You debated annually that proposition? A. —about two years after I joined the same debate with the rest of them.

Q. All wanting more? A. All feeling that they ought to have more and that they were not appreciated or something.

Q. And all finally acquiescing in it? A. All finally threshing it out just as I did in 1917.

Q. You seem to have been present at the meeting which fixed the compensation for 1916? A. I was I guess I was present pretty near every year after that, 1914.

Q. The meeting at which these resolutions were passed usually followed pretty closely the salary committee's meeting at which the directors were present to give their views? A. I think so.

Q. So that customarily you were present at the resolution meeting? A. I tried to be. I do not say I was all the time.

Q. You were generally there. I do not find you voting anywhere in the negative. You acquiesced in the result? A. Oh, yes, I acquiesced.

Q. You knew about the provision in the charter about the matter being in the control of the board of directors? A. Yes, sir.

Q. You were present at a meeting held June 21, 1911? That I think was the first meeting that you attended? A. Yes, sir.

Q. And at that meeting there was a distribution of the Brockie estate stock of 175 shares. There is nothing in the minutes to indicate any dissent on your part from that action. Do you remember to have made any objection? A. Oh, none whatsoever.

Q. You had before that time become informed as to this method of distribution of the stock that was turned in by retiring directors? A. Yes, sir.

Q. Mr. Brockie, as a matter of fact, had deceased, had he not? A. Yes, sir.

Q. And the stock turned in by his estate?

Mr. McCarter: You do not mean he got some of it?

Mr. Hardin: No. He was not a stockholder at the time that distribution was made. He, however, was present when the report was made about it.

Q. Are you able to tell us the effect on your annual compensations of these various increases that you have been describing? I do not mind if you take into consideration all the elements that you have referred to? A. What do you mean?

Q. You have the figures, have you not, showing the annual results to you from the time you became associated with Johnson & Higgins in 1911 down to the end of 1918, compensations that came to you by way of salary from that firm? A. No, sir; not on hand, I haven't; I have them on file somewhere.

Q. You have a general recollection of about what they were? A. Why they increased gradually just about—I don't know whether the percentage was the same with the increase each year, but in 1917, I think my drawings were around, total compensation, firm and corporation, stock and salary, was something like $180,000.

Q. In the one year? A. 1917? $140,000, something like that; around $140,000, approximately, from all sources of income from the Johnson & Higgins organization.

Q. Including now what? A. Including stock dividends, preferred and common—dividends on stock, corporation salary and firm percentage.

Q. Can you tell us what the salary item was from the corporation? A. Approximately it was three-quarters of the entire income.

Q. You know these figures have been furnished specifically to your counsel, do you not? Perhaps they can give you some memorandum that will enlighten you as to the figures.

Mr. McCarter: It is in evidence, isn't it, Exhibit D12?

Mr. Hardin: D12 has not the firm on.

Mr. McCarter: You asked about salary.

The Court: He is also asking about the by-product?

Mr. McCarter: The per cent question is salary.

Q. For the basis of my present question, Mr. Prindiville, I am inquiring about the salary that is on Exhibit D12? A. The salary for what year?

Q. You picked out 1917? A. $93,833.34.

Q. What was your salary in 1911? A. $10,955.

Q. And what dividends did you draw during that year? A. 1911, $9,575.

Q. Do you remember what you drew from the firm that year? A. No; I do not.

Q. How did the total result to you in 1911 compare with 1910 compensation that you had received from Prindiville & Co.? A. Well, it must have been a little more than I received from Prindiville & Co. Prindiville & Co., I think, was something like $21,500. Now the dividends and salary of 1911 were $20,530, and possibly the firm interest then was around five or six thousand dollars; might have been a little more or less; I don't know.

The Court: I think you said $28,000 earlier in your testimony.

The Witness: I think that was in some letter.

Q. The half of Prindiville & Co., you are speaking about when you are making comparisons in 1910? A. My half. I think, if I remember correctly it was $21,500—something like that.

Q. So that the result in 1911 with Johnson & Higgins was a trifle better? A. Yes; and I think Prindiville & Co. results were improved, too.

Q. Prindiville in the meantime had been incorporated and absorbed by Johnson & Higgins? A. Yes, sir.

Q. Now, do you remember what your salary was in 1912? A. No; I do not remember. The corporation salary?

Q. Yes. A. $16,328.51.

Q. What dividends did you draw that year? A. $11,560.

The Court: What from the firm?

The Witness: I do not remember. I haven't a memorandum of that.

The Court: Haven't you the statement of that?

Mr. Hardin: Yes; I have.

The Court: Why don't you just add the amount if you have it there.

Mr. Hardin: The firm amount as I have it on this sheet, $3,130.19.

The Court: Do you recall that?

The Witness: Yes, sir; I will accept it.

Mr. Hardin: The total for 1911 was $23,660.50. You have already given us your salary from the corporation and dividends from the corporation for 1912. Your firm percent-

age apparently was $4,470.22; total $32,358.73.

Mr. McCarter: These are figures the other side are giving us. I suppose they are correct.

The Court: They are subject to correction.

Recess.

Q. I think I had just stated at adjournment about 1912. You have the memorandum that you had before you? A. No. I think I gave that to Mr. McCarter (witness produces paper).

Q. What were your receipts in 1913 from salary and dividend from the corporation? A. Dividends $11,425, salary $17,509.60.

Q. The firm $5,397.91.

The Court: The latter amount and other income from the firm, figures stated by Mr. Hardin, are accepted by the witness subject to correction.

Mr. Hardin: Making a total for the year from the three sources $34,332.51.

Q. What were your receipts from dividend and salary from the corporation in 1914? A. Dividend $11,800, salary $21,956.76.

Q. And from the firm $5,442.04, making a total of $39,198.80. What were your receipts from dividend and salary in the corporation in 1915? A. Dividends, $16,425, salary $32,269.38.

Q. And from the firm $7,188.42, making a total for the year from the three sources of $55,882.80. And what were your receipts from dividends and

salary from the corporation for 1916? A. Dividends $25,800, salary $56,451.83.

Q. And from the firm $10,186.92, making a total for the year 1916 from the three sources of $92,438.75. What were your receipts from dividends and salary from the corporation for the year of 1917? A. Dividends $25,800; salary $93,833.34.

Q. And from the firm, $19,080.30, making a total from the three sources of $138,713.64. And what were your receipts from salary and dividends for 1918? A. Dividends $19,550, salary $67,676.09.

Q. What does that memorandum show as to dividends? A. 1918 dividends, $19,550.

Mr. Hardin: There was an additional dividend declared in December which Mr. Prindiville received. I think he will remember it.

Mr. McCarter: Something wrong with the figures?

Mr. Hardin: Yes.

Mr. McCarter: We are accepting this exhibit as absolutely right.

Mr. Hardin: Surely, subject to correction.

Mr. McCarter: The point I am making is it seems useless for Mr. Prindiville to read from their exhibit—whether right or wrong it is in—now it turns out that one of the figures is incorrect. It seems rather unnecessary and perhaps improper to bind Mr. Prindiville's testimony upon figures when they are wrong.

The Court: Not binding him. He may correct it at any time.

Mr. McCarter: What correction do you want to make?

Mr. Hardin: I do not think I have the figures at hand to make the correction. There were two dividends during 1918.

The Court: Forty-five per cent and—

Mr. Hardin: Yes, Mr. Prindiville received 45 per cent on the 1918 dividends.

Mr. Wollman: That would be about $11,250. Our information was that he got 45 per cent; the statement shows $19,550.

Mr. Hardin: I am informed the paper is right and I am wrong, but the dividends that have been declared—it does not represent so far as the dividend item is concerned the money actually received by Mr. Prindiville.

Mr. Wollman: On this paper you show $19,550 received, as a matter of fact, it was $5,625 of the 1918 dividend.

Mr. Hardin: The sum named on the exhibit represents the 295 per cent or whatever the total percentage of 1918 was, received or unreceived.

The Court: The total is?

Mr. Hardin: $37,550 and salary is $67,676.09.

Q. That you have entirely received? A. I don't know. I presume my attorneys have.

Q. Something has been said in the case about $5,000 representing the amount of your salary from the Government.

The Court: How much from the firm have you, making the total.

Mr. Hardin: From the firm $35,514.72, making a total for the year 1918 from the three sources of $140,740.81.

Mr. Wollman: You have added to that the figure that he did not receive. He received $14,000 less than that?

The Court: That is the total amount that he should have received.

Mr. Hardin: Yes.

Q. Now, with reference to the salary of $67,676.09 for 1918, which you have admittedly received, do you know whether there was deducted from that your salary of $5,000 as officer in the navy? A. No.

Q. There was no such deduction made? A. I don't know.

Q. What do you say about that? A. I simply say again I don't know. Those statements were left with my attorney. I haven't got them at all.

Q. You have not been informed? A. I have not been informed, no.

The Court: It appears in the evidence that it was not deducted.

Mr. Hardin: It does as to 1917.

The Court: 1918.

Mr. Hardin: It has not been put in evidence.

Mr. McCarter: I was going to state my understanding of the fact is that the first resolution that they passed called for a deduction. The so-called modifying or amending resolution where they reinstated the whole thing did not call for the deduction.

Mr. Hardin: It calls for the deduction, but as a matter of fact the deduction was not made.

The Court: Mr. LaBoyteaux testified as to that.

Mr. Hardin: He did as to 1917.

The Court: I think you will find in the testimony of Mr. LaBoyteaux that he said it was not deducted.

Q. Now, Mr. Prindiville, are you able to tell us what your half of the earnings of Prindiville & Co., for the year 1912 would have been if you had not connected yourself with Johnson & Higgins? A. I do not remember it.

Q. Do you know what the actual earnings were?

The Court: What do you want to show?

Mr. Hardin: I want to show the earnings of Prindiville & Company as one of the elements of the Johnson & Higgins outfit during each year. The effect of his percentage. That is what I am trying to get at. He was in charge in Chicago for Johnson & Higgins of the Prindiville & Co. business which belonged to Johnson & Higgins. I want to show what the result of that business was.

The Court: Rather remote.

Mr. Hardin: If your Honor does not think it is too remote I would like to have it go in

The Court: All right.

Q. Do you know what the earnings of Prindiville & Co. were in the year 1912? A. I do not remember.

Q. Subject to correction if you like. Will you accept my figures that they were $57,000? A. Yes, sir.

Mr. McCarter: I do not think that is the way to prove the case. I object.

The Court: Objection sustained.

Q. During the years from 1911 until your absence in the service in 1917 you were in active charge of Prindiville & Company as I understand? A. Yes, sir.

Q. And were familiar with its operation? A. Yes, sir.

Q. And its accounts were kept to some extent under your supervision? A. Yes, sir.

Q. There was a constant increase year by year in the business up until the year 1915? A. I think so.

Q. And do you recall any year when there was a very sudden jump in the earnings of Prindiville & Co.? A. 1916 was a good year. I think it was our big year, at the time I left.

Q. Do you recall the jump in 1915 from $64,000 to $110,000? A. Yes, sir.

Q. In 1915, and from $110,000 to, in 1916, $125,000? A. Yes, sir.

Q. Now, did the fact of the increased earnings by Prindiville & Co. have any effect when you made your appeals to the salary committee in relation to your percentages? A. I don't know.

Q. You presented that phase, did you not? A. Oh, yes.

Q. As an element for increased compensation? A. Yes, sir.

Q. And you received an increased compensation? A. Yes, sir.

Q. You told us this morning that you didn't bother to read the stock certificates that you received from this corporation. Did you not note on the six certificates that you received by way of distribution of stock that had been turned in by retiring directors a note

as to the dividend bearing qualities of the stock? A. On the stock received subsequent to the first issue?

Q. Yes. A. I think I saw that clause.

The Court: Are you trying to charge him with notice?

Mr. Hardin: Yes.

The Court: He took the certificates and he is charged with notice of the contents. If he has not read them he should have.

Mr. Hardin: I wanted to bring actual knowledge if I could, and he has now said that he had actual knowledge, whether he read them or not.

The Court: I think he knew all about the scheme.

Mr. McCarter: He has not pretended that he did not.

The Court: I think he knew all about the scheme generally. There may have been some details he did not know about. He is charged with them. He had notice.

Q. And you did note the times at which the stock that you received in the distributions would begin to bear dividends in your ownership? A. Yes, sir.

Q. You told us this morning I think that you never had objected actively, after your argument with the committee was over, to the method or the result of the various fixing of the percentages in the corporation? A. Well, I think—I don't think I did. I might have called attention to the matter of comparison or something. I made no formal protest.

Q. You had your argument with the committee and the board finally acted and you made no objection to

the method of the consideration of the suggestion? A. No.

Q. Or the method of action on them? A. No.

Q. And the same is true, is it not, of the stock distribution? A. I never objected.

Q. You assented to the proportions and the distributions to the different persons interested therein? A. Yes, sir.

Q. And you never made any complaint to anybody based on any objection on your part to the corporate scheme?

The Court: What was it based on?

Mr. Hardin: Based on the consideration of the work of the directors.

The Court: He did in a general way. You were a member of this committee at one time yourself. On what did you base the percentage?

The Witness: Based on the opinion of the committee as to the relative merits of the different ones.

The Court: The worth of the members to the corporation?

The Witness: Yes, sir.

Q. You never have made any suggestion, have you, to the corporation of returning to the corporation any of the stock that has been distributed to you? A. No, sir.

Q. You still have the certificates? A. Yes, sir.

Q. You haven't any idea of returning them? A. No, sir.

Q. You never made any suggestion about returning to the corporation any part of the salaries that have been contributed to you under the working of this percentage plan from 1911 to 1918? A. No.

Q. You haven't had any thought of doing anything of the kind? A. No.

Q. You knew, I assume, that if you surrendered your stock, your 125 shares, that you would receive dividend bearing certificates for ten years under the terms of the charter?

Mr. McCarter: I object. He has not surrendered it.

The Court: Objection overruled.

A. I had that understanding.

Q. And your attention was actually directed, was it not, to the fact that your dividends for 1918, the balance of them, would be paid to you if you did turn in your stock and take your dividend certificate? A. No; I haven't any recollection of being told that.

Q You knew it anyhow? A. I assumed they would be.

Q. And you never made any tender of your stock? A. No.

Q. For the purpose of receiving dividend certificates? A. No.

Q. Never give any notice of your willingness so to do? A. No.

The Court: Under the scheme what becomes of the other stock?

Mr. Hardin: That dividend goes out for the balance of the ten-year period.

Q. When you came back from the service at the beginning or at the end of November, 1918, had you been discharged? A. I was just detailed to inactive duty at the time.

Q. When were you actually mustered out? A. I haven't been mustered out.

Q. You are still in active duty? A. Waiting for peace.

Q. When was the first meeting that you had with Mr. LaBoyteaux about this matter? A. I think it was in—second of December.

Q. And was that with Mr. LaBoyteaux alone or with— A. I think that was with Mr. LaBoyteaux alone, in his office.

Q. Most of your debate or discussion of this matter was with him, wasn't it? A. Most of the correspondence was and he was present at all talks. Often I met others besides LaBoyteaux.

Q. And you finally attended the board meeting? A. Yes, sir.

Q. Now, when you first began to discuss this matter with Mr. LaBoyteaux on the 2nd of December, were you discussing only the 1918 matter or both 1918 and 1919 matter? A. I think both. The resuming of my duties and on what basis, etc. I was asking for my relative position to be maintained and given back to me.

Q. And was there at any time conveyed to you on the part of—was there any doubt in your mind about your right to return to the corporation as an active director as of 1919? A. No; there was no doubt in my mind.

Q. The whole trouble in the early part of December, 1918, was over the adjustment of your claim that you should have your salary during 1918 notwithstanding your absence? A. That was not the whole trouble. It was just the situation, I wanted to know what my position would be. There was intense feel-

ing developed and I wanted to know just what the basis would be on which I would return to active duty in the office.

Q. Well, was it at that first meeting that you told him you had lost all pride in the institution? A. No, that was at the directors' meeting.

Q. How long after this first interview of December 2nd was the directors' meeting? A. I think a day or two afterwards.

Q. And was it at that meeting that you stated that you had lost all your pride in the institution and that you were unwilling to come back until your claims were adjusted? A. I think I made the statement I couldn't come back until—couldn't in justice to myself.

The Court: Come back to what?

The Witness: To come back into the organization and take up my duties.

Q. And as a matter of fact you never did resume your duties? A. No. No, I never—

Q. Now, you did finally reach an agreement with your associates as to the 1919 settlement? A. No, sir.

Q. 1918 settlement? A. Well, I accepted apparently the adjustment made for 1918.

Q. Well, didn't you express yourself in writing as being willing to accept six per cent? A. That was one part of the thing I was willing to accept.

Q. And that was adjusted without relation to 1919? A. There was another part as well. My proposition —they asked me what I wanted and I outlined, which embraced 1919 as well as 1918. That is all a matter of record.

Q. I would like you to refer me to the record? A. There is a letter of December something; December 23, 1918.

Q. Is this the letter to which you refer, your letter to Mr. LaBoyteaux of December 23, 1918? A. I think so.

Q. And this part of the letter: "In January, 1917, the salary committee saw fit to grant me such increases as would bring my total income for the year 1917 equal to that received by my running mates, Messrs. Lowe and Davey, and while I feel that for 1918 my interests should be increased to correspond with theirs, I am willing to accept (in order to try to secure a prompt adjustment) the 1917 interest of six per cent for 1918, less the salary I received from the Government, say $5,000 and also less the salaries of any clerks or other employees who were detailed to my work during my absence, approximately $5,000." Is that the letter to which you refer? A. That is in that letter, yes, sir.

Q. I am talking now with reference to 1918. Is that the part of the letter? A. Yes; it goes on and mentions 1919. That is what I said, it embraces both years.

Q. Will you point out to me anything which makes the 1918 settlement in any way conditional as related to 1919? A. I can point out the feeling that prevailed, that nothing was settled at all.

Q. I ask you to point out to me in that letter anything which made the contents of that letter with reference to your willingness to adjust the 1918 salary question that is conditional in any way on the settlement of 1919? A. This clause, "but before I could consistently accept the situation I feel that assurances of such action as above outlined should be given."

Q. Will you read the whole reference to 1919 in that letter of yours referred to in your last answer? A. "Now, for the year 1919, I feel I am clearly entitled to my relative position and that my interests for that year be put at such a figure that my total income from the business for 1919 would approximately equal that of the above named running mates, Messrs. Lowe and Davey. I have not before me the total results of the business for 1917 nor have I any means of approximating what the results for 1918 will be, so cannot give the exact interest which would make my total equivalent to those partners above mentioned. I will gladly leave the details to be worked out later by the salary committee, but before I could consistently accept the situation I feel that assurances of such action as above outlined should be given."

Q. Don't you find that sentence, in the body of it, you refer to 1919 entirely? A. Not in my opinion. The situation was—

The Court: Is "position" and "situation" the same?

The Witness: No. I mean the situation was this, that in my opinion, from my perspective, they were taxing or penalizing me for going in the service, and that applies both to 1918 and 1919, and this letter was written at the request of Mr. LaBoyteaux to demand what I would want and what would make me prolong the thing along and forget it all.

Q. Where is your information to Johnson & Higgins that in meeting your suggestion of settlement on the 1917 basis for 1918 they would be doing something that was conditional on another thing to be done in the future with reference to 1919? A. That was the gist of all our talk. I can see it in the letter. Probably you might not.

Q. As a matter of fact the 1918 settlement was made, except now as to the dispute over the dividends which remain unpaid—the 1918 settlement was carried out on the basis of this letter so far as the corporation is concerned, with the exception there was no deduction made from your salary in the United States Navy? A. I think so.

Q. Now, in your discussions with Mr. LaBoyteaux and the others concerning this 1918 matter had your discussions been limited to the corporation? A. I think so.

Q. Entirely? A. I think so.

Q. And in your discussions as to 1919, referred to in this letter of yours that I just called to your attention, Exhibit D20, of December 23, 1918, where you refer to 1919, you were referring exclusively to the corporation? A. My relative position had not been disturbed in the firm, so my statement simply applied to the corporation.

Q. And there wasn't any matter of the firm or question of the firm brought into the discussion at all? A. Not that I remember.

Q. This reference to 1919 that I just asked you to read in Exhibit D20 in your evidence related only to the corporation? A. I think it did. My term "relative position" means relative position with J. & H. organization, including both firm and corporation, but according to my best recollection my firm position had not been disturbed.

Q. What was the figure you had in mind with reference to the firm when you wrote this letter? A. I did not have reference to the firm especially. It was, as I say, in figuring out the compensation you figure out the revenue from the firm and corporation.

It made no difference to me whether I got more from one and less from the other.

Q. You were satisfied with the firm? A. I was satisfied with the total results, aggregate results; that is what I wanted.

Q. The thing you wanted changed was the corporate percentage? A. I just wanted the total result figured out so that it would be equal to my running mates.

Q. And to meet that view of yours which was suggested, to change the percentage in the corporation? A. I didn't care how it was figured out. Yes, it would have. I answer yes to that.

Q. Now, you say here that for the year 1919 you feel that you are clearly entitled to your relative position and your interest for that year should be put at such a figure that your total income from the business for 1919 would approximately equal that of Lowe and Davey. What was the figure you named that you wanted, what percentage? A. As I told you I didn't know the result and I couldn't figure percentages till I did. If you read the letter that is brought out pretty clearly.

Q. Did you later find out? A. No.

Q. Did you ever ask for a particular percentage of the corporation? A. I just asked to be placed on an equal plane of compensation, leaving it up to the committee, as I said in the letter, to work it out. I couldn't. I didn't have any figures.

Q. Without any reference to anything at all except Messrs. Lowe and Davey? A. Well, they were the ones that I mentioned; yes, sir.

Q. And so far as the corporation was concerned there never had been equality as between Lowe and Davey and yourself? A. I always went under the sup-

position it was the net result of both firm and corporation just as explained in Mr. Coe's letter.

Q. You are not able to say that you ever fixed any —gave anybody your definite idea—your own definite idea of the percentage that would accomplish what you here refer to as equality between yourself and running mates? A. No; I mentioned in my letter I couldn't.

Q. Well, you knew about 1917—not as to the total, but you knew about the percentages for 1917? A. Not the final figures.

Q. But you did know the percentages? A. Yes, sir.

Q. To accomplish this theory of equality that you had reference to, membership on your part and membership on the part of Messrs. Lowe and Davey in the firm was essential as well as in the directorate of the corporation, was it not? A. They were members of the firm and corporation. Yes; based on net income from all sources.

Q. And when you notified your partners, as I understand you did, at the end of December, that you would not renew the partnership of Johnson & Higgins, you destroyed the chance for that particular kind of equality that you have been talking to us about, didn't you? A. Yes, sir.

Q. What was your idea of doing that if you intended to stay with the corporation? A. Well, as I already said, I felt that I couldn't stay.

Q. And that applied as well to the corporation as to the firm? A. Well, I—

The Court: Answer the question.

The Witness: Eventually, yes.

Q. What do you mean by eventually? A. Well, I felt that I would have to eventually sell my interest

in Johnson & Higgins, my stock. I thought there was a value—I thought in a short time I would get a value —cash consideration for that stock.

Q. Have you ever communicated your willingness to continue with the corporation of Johnson & Higgins as one of the directors of that corporation and return to duty, as you put it a minute ago, on any other basis except the ultimatum that you delivered at this meeting? A. No; I have not.

Q. You had no intention, unless that ultimatum was met, of resuming your activities with the corporation? A. I certainly had no intention to lose my self-respect and go back unless those conditions were changed.

Q. Whatever your motives, you had no intention of returning unless your terms were met? A. No, sir.

The Court: He really means yes, sir, instead of no, sir.

Q. You said you had received no notice of directors' meeting since January 1st, 1919. Have you ever brought to the attention of the corporation or any officer of the corporation your claim that you were entitled to such notice? A. No; I have not.

Q. Have you ever sought to attend a directors' meeting since January 1st, 1919? A. No.

Q. You were acquainted with the regular meeting days, monthly meeting days of the corporation? A. Yes, sir; and I expected my notices, but I didn't get them.

Q. You never made any attempt to attend? A. No, sir.

Q. And your whole attitude towards this matter,

in your discussion of your percentages of salaries that you ought to receive for 1919, was on the assumption that you were to continue in both the firm and the corporation? A. Yes, sir; on that assumption.

Q. You carried your debate to your associates on that theory? A. Yes, sir.

Q. And when you resigned from the—or when you gave notice that you wouldn't continue the firm and wrote them later, December 30, when you said you desired to dispose of your Johnson & Higgins holdings, you had in mind both the firm and the corporation? A. I had in mind selling all interest in Johnson & Higgins.

Q. And not the firm only? A. No.

Q. In this letter of December 30, 1918, Exhibit D22, you said, "Now, in asking me to accept the 1917 basis for my 1919 salary you are penalizing me for entering the Government service, when the financial results of the corporation do not warrant any such action. So your intention creates a situation which I cannot accept so I have asked my counsel, Mr. Royall Victor, to confer with you on a fair value for my J. & H. holdings, and, in consideration of a prompt and satisfactory settlement of same, I will agree not to engage in the insurance brokerage business for one year from January, 1919." You meant when you wrote that and had it forwarded to Mr. W. H. LaBoyteaux, president of Johnson & Higgins, to convey to him the impression that what you wanted to do in disposing—getting fair value for your Johnson & Higgins holdings—you wanted to dispose of both the firm and corporation holdings? A. Yes, sir.

Q. Had you up to January 1, 1919, ever taken the

position with any of your associates that this corporation of Johnson & Higgins, or the scheme on which it was based, and the by-laws under which it was working, was in any way illegal? A. No; I never gave it any thought.

Q. You heard about its illegality since January 1, 1919? A. Yes, sir.

Q. And, of course, from counsel? A. From counsel.

Q. Can you give any good reason for the present increase in the business of Prindiville & Co. in Chicago? Was there anything in the local conditions that led to that advance in business in 1916-17? A. Why the business in Chicago was largely—the profits were largely derived from insurance of grain on the Great Lakes, and I think the movement of grain in 1916 was large and our profits were very large in that branch of our business.

Q. There wasn't any change, was there, in the percentage on premiums that were received by way of compensation in the transaction of business in 1916-17? A. Any what?

Q. Any change in the percentage of compensation due Prindiville & Co., percentage on premiums of business—commissions, I mean; brokers' commission. A. Well, yes; we had worked out a scheme of general agencies and overwriting commissions that were more favorable than the year before, if I remember rightly.

Q. "We had worked out." How do you mean "we had worked out"? A. I think probably I worked out.

Q. Isn't the commission which is received by the insurance broker substantially the same, whether you

be the broker or somebody else be the broker? A. Not in lake grain. The lake grain business is handled under a very queer custom—old-time custom, where there are deductions for vessel agents' commissions to pool managers and overwriting commissions from an underwriting standpoint, and we worked out the contract—

The Court: Everybody got a dip?

The Witness: We got most of it, I guess.

Q. Pool commissions, you mean commissions involving companies that are placing insurance—by which the insurance is placed? A. Yes, sir.

Q. Not a combination among brokers? A. No—oh, well, there was a combination I think on hulls which we got a little more out of but it didn't amount to a great deal in my opinion.

Q. Generally speaking the commissions were about the same in those years as before? A. Generally speaking, yes, sir; probably a little better.

Q. The same as other brokers got? A. Not the same; I think we had better basis on grain.

Q. Well, take the hulls, for instance? A. Just the same on hulls.

Q. Generally in the insurance business it is true that the commissions are fixed by the custom of the trade or by the rules of the trade? A. Yes, sir; generally speaking.

Q. And that is true in other lines of business, other than the marine business, in the insurance line? A. Yes, sir.

Q. Now, then, the sudden growth of business in Chicago was due then to the increase of volume in business? A. I think so.

Q. And not to increase of the rate of compensation? A. I think so.

Q. And was that so later, as the war went on? A. No; as the war went on, for instance, the Government took charge of all wheat shipments and carried all that insurance which made a very heavy shrinkage in our grain commissions.

Q. And how about hulls? A. Oh, hulls remained about the same. Some came down to the coast.

Q. Was there any addition, more risk insurance on hulls? A. Not lake hulls, very few risks placed on lake hulls.

Q. The large increase of Johnson & Higgins as a whole was due mostly to increased volume of business resulting from the war as I understand it? A. Yes, sir.

Q. Isn't it also true, generally, of the business of Johnson & Higgins, that that was due to volume, and not rate of compensation? A. It is all due to volume of premium.

Q. And the application of the usual broker's commission to that volume of premium? A. Yes, sir.

Q. Now, there is a branch of the business where regular professional fees are charged, such as adjustments; that is so? A. Yes, sir.

Q. Outside of that the whole matter of compensation of insurance brokers is regulated by commissions fixed generally, prevalent throughout the country? A. Very largely.

Q. And volume makes this enormous quantity of business? A. Yes, sir.

Q. Now, in getting that large volume of business the individual element comes in, doesn't it, of soliciting the business? A. Of large volume of business

you have got to have—before soliciting it you have got to have a large plant to take care of it.

Q. You have got to inspire confidence in the men who need the insurance? A. Yes, sir.

Q. Owners of vessels? A. Yes, sir.

Q. And you have got to keep that confidence? A. Yes, sir.

Q. And it is a personal proposition? A. No; it is a matter of reputation of your organization.

Q. And the accounts—you could control the accounts for the organization because of the efficiency of the organization? A. Yes, sir.

Q. And the personnel of the organization is what holds the business and the influence of the personnel of the organization is what gets the business? A. It is service that gets the business.

Q. Reputation for service that gets it? A. Yes, sir.

Q. What have you been doing, Mr. Prindiville, since your retirement from Johnson & Higgins? I understand you went down to Florida and stayed there for a time? A. I came back and under advice of counsel entered the insurance business.

Q. And when did you open that business? A. About April 1st.

Q. And under what name? A. 1919 Well, under the name of Prindiville & Croxson, later formed association with Rollins, Burdick, Hunter Company.

Q. In the same business as Johnson & Higgins? A. Yes, sir.

Q. Where are your headquarters with relation to that business, Chicago or New York? A. Main office in Chicago. We have a New York office.

Q. The Mr. Croxson you refer to was the Mr. Croxson who was in Chicago with Johnson & Higgins or Prindiville & Co.? A. Prindiville & Co.

Q. When did he leave Prindiville & Co.? A. Just about the time I started in business he came with me.

Q. He was with Johnson & Higgins in Chicago until that time? A. He was with Prindiville & Co.

Q. Prindiville & Co. belongs to Johnson & Higgins? A. Yes, sir.

Q. Have you anybody else connected with you that was formerly with Johnson & Higgins?

Mr. McCarter: I object as immaterial.

The Court: Objection sustained.

Q. Why have you declined to turn in your stock certificates in accordance with your charter requirements and take your dividend certificates? A. Because I think they are worth more than what the dividends would give me.

Q. Ten years dividends does not bring you what you have made up your mind you want to get? A. Yes.

Q. Pure question of price? A. Yes, sir.

Q. When you got this 1918 settlement fixed up with your partners in December and had received the salary percentages for that year, this feeling of pride that you refer to had been to some extent assuaged? A. It had what?

Q. Been assuaged? A. No; it had not. There was nothing settled.

Q. You still felt as badly as you did before? A. Why, certainly.

Q. And you felt that you were being denied a larger percentage in 1919, just what? A. I felt that

I continued to be taxed and penalized for entering the service. The 1918 settlement didn't clear that situation at all.

Q. And although you had had all that you could have had had you been present throughout the year 1918, you felt that the same motives that your partners had that first led them to deny you that money and then later had led them to give you that money was keeping you back from advancement in 1919? A. I didn't get what I should have received had I been in the business in 1918.

Q. It all got down to a question of dollars and cents? A. No, it hadn't. It was a matter where my relative position was not maintained and I was told it wouldn't be maintained.

Q. If in 1919 you had been conceded by the corporation the percentage that would have produced equality with the gentlemen you refer to as running mates you would still have declined to go with Johnson & Higgins? A. No.

Q. Then isn't it all a question of dollars and cents? A. No. It is a matter of principle. If a wrong is corrected why it is eliminated, isn't it?

Q. If your price is met the principle is corrected? A. Price? Yes; it was a matter of principle.

Q. Principle depends on price? A. No; not at all. If it was a matter of price I would have accepted. Why should I accept the financial disadvantage of leaving Johnson & Higgins? You must credit me with a lot of good judgment.

Q. Did you ever know, during the period you were connected with the corporation, any retiring director to object in any way to turning in his stock and taking his dividend certificate? A. I understand Hopkins did.

Complainant's Witness, Thomas J. Prindiville, Re-direct

Q. Did Mr. Hopkins retire prior to January 1st, 1919? A. I am not sure whether it was December 31, 1918, or December 31, 1919; probably not until 1919.

Q. Now, go back to the time from 1911 to January 1, 1919, while you were connected with this corporation. There were directors who became inactive and passed out, were there not? A. Yes, sir.

Q. Did you ever know of any of them to object to turning in their stock in accordance with the charter plan?

Mr. McCarter: I object.

The Court: Objection overruled.

A. I heard no open objection. I don't know what went on in the committee room.

Q. And it was undoubtedly the object, as the men retired, to turn in their stock and take the dividend certificates? A. The results show that.

RE-DIRECT EXAMINATION by Mr. McCarter:

Q. I understood you to say, Mr. Prindiville, that after the war got under way a large part if not practically all the grain business on the Great Lakes which I understand was the theatre for the business of Prindiville & Co. largely was done by the Government. Did the Government insure that grain? A. Yes—no; they assumed insurance; they carried the risk themselves.

Q. I mean they did not insure it through Prindiville & Co., as had been done before? A. No, sir; they took the ownership away from the individuals.

We had our contracts with our clients who had individual insurance.

Q. The Government carried the risk? A. Yes, sir.

Q. What effect did that have upon the business that Prindiville & Co. did during the next three years? A. It must have had a very material effect.

Q. Assuming that the receipts decreased for the next three years how do you account for it—that way? A. Very largely; yes, sir.

Q. Now, was Mr. Sexton, who you left in charge of the office of Prindiville & Co. in Chicago, a valuable man? A. Yes, sir; he was getting a good salary.

Q. Now, how much salary was he getting? A. I think about $12,000 a year, possibly fifteen; I don't know.

Q. How soon after you left the office of Prindiville & Co., and went into the war did Mr. Sexton go to New York, do you know? A. I don't know. I think Mr. LaBoyteaux has mentioned. Very shortly after, I think.

Q. And he was there, I think, for over a year. Where was the most activity during the war for marine insurance, on the part of the people who wanted the insurance for the boats, or on the part of the insurance companies who wanted to get the job? A. Well, I would say offhand the ship owners and cargo owners.

By the Court:

Q. The war made it more important to get insurance? A. Very important to get proper insurance.

Complainant's Witness, Thomas J. Prindiville, Redirect

By Mr. McCarter:

Q. Now, did you have any feeling of pride, or what we French call "amour propre" in the idea of being outranked, as it were, by your running mates? A. Naturally.

Q. Pardon me. A. Naturally, without cause. If there was cause I wouldn't have had any feeling at all.

Q. Had it been customary for the concern to give notice of the directors' meetings? A. Yes, sir.

The Court: They were stated meetings, however?

The Witness: Yes, sir; monthly meetings; I think the third Wednesday in every month.

Q. Always preceded by notice? A. Yes, sir.

Q. Now, how many times did you serve as a member of this committee on salaries? A. Once.

Q. And won't you explain the checkerboard, or whatever game it was, of how these relative fractional amounts were fixed? Was it simply the service in the corporation that fixed the amount or how was the thing reached? What was the plan? A. Well, it was supposed to be based on the value of the man to the organization. That included the corporation and firm.

Q. You did not know, of course, at the time that you were acting as a member of the committee that year what the profits for that year would be, did you? A. Oh, no.

Q. And the fractional sums or amounts which you reached were how determined, as far as your experience that year was concerned? A. Well, they were determined on what was available and what would be

given up by someone to satisfy a grievance or claim by one of the partners.

The Court: Those things were mere details?

The Witness: Yes.

The Court: The fundamental was the merit or value of the director to the corporation?

The Witness: Yes.

Q. Did the amount of the dividend that the man would receive have anything to do with it? A. Oh, yes; that was counted in his total income from the association.

By the Court:

Q. Was the percentage the same in the firm? A. No, sir; not always.

Q. Why the distinction? A. I don't know.

Q. Why the difference? A. Well, often there was some firm percentage that had been given up and that was distributed.

Q. You said that the basis—the fundamental—was the value of the man to the corporation and firm? A. Yes, sir.

Q. Why then distinguish between percentage in the firm and the percentage in the corporation? A. There is no distinction, except sometimes there was firm percentage given up and other times there were corporation salary interest available. If a man deserved an increase he would get it from whatever source it was available.

Q. By subsequent allotment? A. Yes, sir.

Q. By afterwards adjustment or— A. No; adjusted at the meeting.

Q. Or in determining the percentage? A. In determining the percentage.

By Mr. McCarter:

Q. Would this question of the distribution of retired stock come up at the same time? Sometimes would that enter into it? A. No; that would not give a man increased earning power at the present time.

Q. If a premium or dividend would be earned on the returned stock and received by the director that would be taken into consideration? A. Yes, sir.

Q. Now, see if I got this right. The only year you acted as a member of this committee was 1917. As I understand it it became necessary to settle the fractional interests of the several members or partners or directors or stockholders in this enterprise, didn't it? A. Yes, sir.

Q. And the committee undertook to ascertain the percentages based on the comparative worth of each member? A. Yes, sir; that is the basis they tried to work it out on.

Q. You anticipated, or you knew the fractional interest that they would get from the partnership receipts? A. Oh, absolutely; that was all before us.

Q. Did that knowledge enter into the determination of what the fractional share of each partner would be in the corporation earnings? A. Yes, sir.

Q. What relation did that have to the other? A. It was all figured in as income from all sources and the man's worth was determined accordingly.

Q. Now, when you say then, "A man's worth," you are speaking of his fractional worth, his relative worth? A. His worth to the association of Johnson

& Higgins—worth to the firm as well as to the corporation.

Q. And you determined the fractional interest on the worth to both forms of the enterprise? A. No; just one; that is, it was taken as a whole, as one institution.

Q. That is both the firm and the corporation? A. Yes, sir.

The Court: Will you state a concrete example and let him say yes to it?

Q. Suppose in any given year a man would have no dividends, would that enter into this computation of fractional relation? Have any effect on his fractional worth, as you call it, in the corporation? A. No dividends? His worth to the corporation would be estimated and given in such percentages as were available. If he had no income from dividends and he was of great value to the association he certainly would get a pretty good stout interest in the salary and in the firm percentage.

Q. Suppose a man got no—he left the partnership the year before—would that have had any effect on his fractional interest in the corporation salary the next succeeding year, as you understood it? A. There is only one case I know of, and it did not.

The Court: Could he leave the partnership without leaving the corporation—your conception of it?

Mr. McCarter: I don't see why he couldn't.

The Witness: That has been done.

Mr. McCarter: I did not ask you whether it occurred or not.

Complainant's Witness, Thomas J. Prindiville, Redirect

Q. I ask you if, in the plan that they had—please listen—I understand you to say that they considered this was all one enterprise, he was stockholder, he was partner and he was a director, and there was a certain amount that he was to get out of the gross receipts— A. Yes, sir.

Q. —and if he got less of one he would get more of the other to equalize it. Now, I say suppose in any event that the man had ceased to be a partner what effect would that have on his fractional interest in the salary, if any? A. His compensation would have to be paid out from the corporation then.

Q. Would it increase his salary or decrease it? A. He would be given his worth, whatever it was.

Q. I asked you whether it would be increased or decreased. Suppose he had been getting, for instance, $50,000? A. Yes, sir.

Q. Part as a member of the firm, part in dividends and part in salary. Now, the same man is to continue in the corporation and he is to get the same dividends, but he is to get nothing from the business of the partnership, what effect, if any, would that have upon his fractional interest in the salary? A. If he was of the same value to the organization he would get an increase.

The Court: If he was of the same value he would get $50,000?

The Witness: Yes, sir.

Q. If the man remained the same? A. Yes, sir.

Q. And that was true in every case, wasn't it? A. To the best of my knowledge.

Q. Did the extent of the dividends or stock interest

that one of the gentlemen had, and therefore the dividends that he would receive, have any bearing upon the amount of salary that he would be awarded? A. Yes, sir.

Q. What effect did it have? A. Well, his returns or income from his dividends were taken into consideration as part of his compensation that he received from all interests.

The Court: I think that must naturally be so. They get their dividends from the returned stock for which they never gave anything, and still kept it in the business. A closed corporation. A man was paid what he was worth by the concern out of the moneys that the concern made, whether they made it as a corporation or firm, whether it counted in dividends or in salary.

Q. Well, when you acted in that year or from your experience in other years, when you received your share did you look upon it as salary or what did you look upon it as? A. Just part of the compensation I was getting from Johnson & Higgins.

Q. Dividing up what? What were you dividing up? A. Dividing up the profits. My share of the profits.

By the Court:

Q. In other words if the profits were large or small did you regard yourself as having earned your share? A. I can't say that I felt that I earned—any of us earned part of our share in these big years.

Q. You didn't earn it? Why not? A. I felt I

did, as well as the others, but I felt that the old organization itself was rolling up a big earning power. People would come in and ask for Messrs. Johnson & Higgins that had been retired and dead for twenty years.

Q. You were ready to take what you didn't earn? A. I certainly was ready to take it with the rest of them.

Q. If you didn't earn it where do you think it should have gone? A. Well, I would say it was easy money.

Q. Still, nevertheless, yours? A. Yes, sir; I did not refuse it.

By Mr. McCarter:

Q. What difference was there in computation, or in results, between what was called directors salary and what was paid by way of compensation to employees? A. Repeat that?

(Question read.)

A. I do not quite get that.

The Court: I do not get your meaning and I don't think the witness does.

Mr. McCarter: I had in mind that the salaries of the employees was one thing, that they were fixed purely according to the merits. If a man was in charge, like Mr. Sexton of the Prindiville & Co. office under salary, that that had some relation to the value of the service. That in the case of the directors there was half of the profits of that concern which were divided up fractionally among the people,

whether they were large or small, without regard to the relation between the particular director and the amount that he would get, whether that amount be large or small. That is the idea I think exists.

The Court: I understand what you have in mind. I do not think your question covers it.

(Question read.)

A. The directors' salaries was based on half the profits after the employees were paid, and were distributed in the form of percentages.

The Court: Out of one-half of the net profit?

The Witness: Yes, sir.

RE-CROSS EXAMINATION:

Q. Do you know of any case where a partner retired from the firm and did not sever his connection with the corporation? A. I was told so.

Q. Never mind what you were told. During your connection with the corporation?

The Court: He may tell us what he was told from certain sources.

The Witness: I was told Mr. Hopkins retired from the firm and was still interested in the corporation.

Q. That is since January 1, 1919?

The Court: Since Hopkins retired he told you that?

The Witness: Yes, sir.

The Court: It will be stricken out.
(Question read.)

A. You are asking me that to date or prior to this date.

Q. You can answer it prior to January 1, 1919, if you want to? A. No; I don't know of any.

Mr. Hardin: Mr. LaBoyteaux made a statement in regard to the secretary of the company, which on reflection and investigation he finds to be inaccurate and he desires to correct his testimony in that regard.

Mr. McCarter: No objection.

WILLIAM H. LABOYTEAUX recalled.

The Witness: In my testimony yesterday regarding the salary of the secretary I think I stated that the salary of the secretary was based on a percentage of the fifty per cent applied to salary item. I now find instead of that it is based on the percentage of the net earnings of the corporation after deducting from the gross earnings the ordinary expenses of the corporation exclusive of directors' salaries, and after that—after the secretary's salary is ascertained it is deducted as a part of the ordinary expenses of the business prior to the division between dividends and salary items.

Mr. Wollman: How about the treasurer?

The Witness: The treasurer is paid a flat salary.

Mr. Wollman: That is taken out before?

The Witness: That is part of the ordinary expenses of the business.

Mr. Wollman: And you do not include that when you say that half the earnings go for salary. You do not include the amount that you paid the treasurer?

The Witness: No; that is charged to ordinary expenses of the business before the division is made.

Mr. Hardin: Their appropriation resolution excludes the salary of the secretary and treasurer.

Adjourned until tomorrow morning at ten o'clock.

IN CHANCERY OF NEW JERSEY.

Fourth Day.

May 22, 1920.

Appearances as before.

WILLIAM H. LABOYTEAUX recalled.

Further Cross-examination by Mr. McCarter:

Q. Recalling the statement you made the other day with reference to your successors in California, you said you were succeeded by three men, or something of that kind? A. Yes, sir.

Q. What were their names? A. E. A. Hanson, Alexander Field and John A. Bishop.

Q. They were all there with you? A. They were all chief lieutenants when I was there.

Q. And they remained there after you left? A. Certainly.

Q. And how many are still there? A. Still there, all of them.

Q. Now, do you recall what their salaries were when you left? A. I don't recall exactly, but my impression is that at the time I left it was $6,000 apiece.

Q. And when you left was that increased? A. Certainly.

Q. How much? A. I think the first year it was $7,500.

The Court: That is the gross, or $7,500 apiece?

A. $7,500 each.

Q. How long had they been what you call your chief lieutenants before you left? A. Well, I think Mr. Hanson joined us about in 1903 or '04, somewheres in there, and Mr. Field came with us in 1907. Mr. Bishop I think had been there—I think it was 1907 or 1908.

By the Court:

Q. Is the business of the corporation and of the firm identical? A. The character of the business?

Q. Yes. A. Engaged in identically the same character of business.

Q. Which is the parent, the firm or the corporation? A. There isn't any parent; they are entirely separate institutions.

Q. The corporation grew out of the firm, didn't it? A. The corporation grew out of the firm. The firm was the first established. It had offices in San Francisco and in other parts of the country. The corporation took over only the business in New York and certain other places, leaving the business outside of New York which was continued as a firm.

Mr. Hardin: Outside of New York? You mean outside of New York and the places named in the exception in the bill of sale?

The Witness: Outside of the places that were not taken into the corporation, were continued as firm.

Mr. Wollman: Subsequently the corporation took over other places, didn't it?

The Witness: Subsequently, I think within a year or two after the corporation was organized, it took over the business in Philadelphia.

Mr. Wollman: And then afterwards other places?

The Witness: No; it did not. I do not think it took over any other business—my recollection is that it did not take any additional place where the firm was operating, but it may have established offices in other places where the firm had not been operating.

Q. Can you tell me offhand whether the aggregate income of the complainant in this case during 1917-1918, was greater or less than those of his running mates? A. During 1917 or 1918?

Q. And 1918? A. I think that Mr. Prindiville's salary in 1917 was approximately the same. Within a few thousand dollars of Mr. Lowe's and Mr. Davey's. I think in 1918 Mr. Prindiville's salary was not quite as much as—income. I do not mean salary—I mean the total income was not quite as much as Mr. Davey or Mr. Lowe.

Q. And in 1919, had he remained and had continued his salary at the amount you stated, six per cent—if he continued would it have been greater or less? A. I think it would have been less.

Q. Substantially less? A. Well, of course, it de-

pends somewhat on the business. I think the percentages would have—

Q. I am speaking now of the aggregate income, the result, as it has been put, of his labor? A. I don't know how much less, your Honor, but it would have been less.

Q. I understood from Mr. Prindiville that the apportionment of stock was sometimes used by way of boosting the low man's salary. That is the reason I am asking. A. That is not correct. At least it never has been done.

Q. He gave me the impression, or I gathered from what he said, that aside from the apportionment in percentage of salary from the corporation, sometimes, in order to do justice to the various directors, it was readjusted, not in corporation salary as fixed by percentage, but by way of allotment of returned certificates, and possibly in the adjustment of the percentage from the firm. What is there as to that? A. That is not correct.

Q. Substantially correct? A. No; that is not even substantially correct.

Mr. Wollman: He did not say that.

The Court: Wait.

A. (Continuing.) In the first place the allotment of stock certificates, reissued returned certificates: does not become earning for ten years after it is done, therefore it would not be done in that way. The firm percentages, where there is a give-up in the firm, naturally each partner is entitled to a pro rata share of the firm. If there is any inequalities that are apparent, of course, we try to rectify them because we must retain the spirit of the organization.

Q. What give-up? A. Why, the give-up of someone who has a larger salary to satisfy one who has a small salary, if the value is there, but that must be apparent before it is done, and ordinarily each man in the organization receives his pro rata except the big men. The men of larger participation generally give up a portion of theirs in order to build up younger men when they come along.

Q. You speak of give-up, you do not mean necessarily when a man leaves, but voluntarily surrender of some portion of his salary? A. If I have, for instance, 12 1/2 per cent interest in the firm and some other man has 3 per cent interest in the firm and there is a give-up of 10 per cent by one of the remaining partners, my portion of that would be one-quarter of 10 per cent, or an eighth, which is 1 1/4 per cent. Instead of taking 1 1/4 per cent, in order that the younger men can be built up, I will say I will be entirely satisfied with a half or three-quarters per cent, and the younger men will be built up in that proportion.

Q. But you never give up any part of your original? A. Not until I retired.

Q. You never give up any part of your salary as fixed? A. We never have.

Q. There have been surrenders of stock practically from the time—ever since the company has been organized, hasn't there? A. Of the stock of the corporation?

Q. Yes. A. Certainly.

Q. So that ten years are expiring every year? A. No; not—there is new stock coming in all the time, certainly.

Q. Yes. Now, I call your attention to Exhibit C33, which is Mr. Coe's letter of January 6, 1916, to Mr. Prindiville, wherein he, speaking of his salary question, says; after referring to the fact that Mr. Curtin has surrendered 400 shares and Mr. Shriver 8, you say, "In the first instance this stock must be distributed by board resolution pro rata to common stockholders, and then by mutual arrangement it is allotted to active directors," and then he says, further on, on the second page of the letter, "the division of stock and the question of directors' services is, as you know, one that is accompanied with many difficulties and my experience has been that it is a decidedly unpleasant job for the president"—isn't that contrary to what you have just stated to the Vice Chancellor? A. No, sir.

Q. Do you mean to tell the Vice Chancellor that in fixing these relative fractional shares of salary the then present status of the individual with reference to his stock and his interest in the firm were not considered? A. I mean to say—

Q. Answer that question.

(Question read.)

A. No; I didn't tell the Vice Chancellor that.

Q. They were both in fact considered, were they not? A. Everything was considered.

Q. Yes; your answer is yes to my question? A. My answer is everything was considered.

THOMAS J. PRINDIVILLE, recalled

Direct-examination by Mr. McCarter:

Q. Mr. Prindiville, you stated almost at the close of your testimony yesterday, in reply to a question that the Judge put to you, that you did not think that you had earned your salary in 1917. Now, just what did you mean by that statement, will you explain?

Mr. Larkin: I do not remember any such statement as that.

The Court: He said that the income was far in excess of the actual mental and physical labor. That is the impression I got.

A. As a salary I thought it was excessive, but naturally being part owner of the business, why, I felt that I was entitled to it.

The Court: I understood that.

Q. You also had said previously to that you believed, in your opinion, that the salaries, the 50 per cent, divided up into salaries, was distributed to the directors in accordance with their worth to the corporation. I want to ask you just what you meant by that statement.

The Court: I think it is perfectly plain. I do not think I want an explanation. The fifteen men were carrying on that business and they appointed a committee to fix the salaries, the report of the committee was approved by the judgment of the fifteen men, and if they acted honestly, why, that distribution will stand, unless some other question arises in the case.

Mr. McCarter: The question I would like to ask the witness is to bring out whether the directors ever used their judgment in any way to determine that the services of the directors in a lump were worth this 50 per cent of the earnings which were distributed or whether the 50 per cent was not taken purely arbitrarily, and then the division made.

The Court: I do not think that makes very much difference in this case, as I view it. I think this combination of men is nothing but a partnership in the guise of a corporation, and if they may divide half their profits for a certain purpose, as partners, they may do so under our statute, unless it exceeds the power of the statute, in that it is against public policy.

Mr. McCarter: What we would like to bring out is this, that this 50 per cent was taken arbitrarily.

The Court: Suppose they took 90 per cent or 100 per cent, the money belonged to these men, every penny of it.

Mr. McCarter: Not as salary.

The Court: I don't care what it is, the fifteen men owned the concern.

Mr. McCarter: No, there were some dividend certificates outstanding that were entitled to dividends, and if they are entitled to dividends, they are entitled to all the profits of the business over and above fair salary.

The Court: With the exception of the men who had an equity by way of these certificates the fifteen men owned all of that corporation, and could they not actually appropriate to them-

selves the entire profits and give them to a charity?

Mr. McCarter: How about these men who have dividend certificates?

The Court: I say excepting their equity.

Mr. McCarter: Didn't they have the right to have dividends declared?

The Court: They will be looked after. In case they come to the court, their equity would have to be preserved. Outside of that, doesn't all the property belong to the fifteen men, whether you call them a corporation or a partnership?

Mr. McCarter: They were not true salaries. They were simply a distribution of the profits.

The Court: I do not care what badge you put on it, the question is whether this was honestly done between the parties.

Mr. McCarter: If the fact is clear on the record that this fifty per cent which was distributed in salaries bore no relation to the services—

The Court: How could it? It was fixed before the services were rendered and before they knew that the services could be rendered.

Mr. McCarter: I had feared Mr. Prindiville had said something which gave a contrary meaning.

The Court: Do not waste time on that.

Q. Mr. Prindiville, in your opinion, was the salary paid Mr. LaBoyteaux in 1919, of $161,000 excessive as a salary?

Mr. Hardin: I object.

The Court: Objection sustained.

Q. Do you believe, Mr. Prindiville, that the salaries which were distributed to the directors for the year 1918 were excessive as salaries? A. Yes, sir.

Mr. Hardin: I object.

The Court: Objection sustained. He is not qualified. It might be that you can ask him his judgment as to the year in which he sat as judge, appointed by the fifteen. That might be pertinent.

Q. Mr. Prindiville, in the year 1917, were the amounts which were distributed at the end of the year as the so-called salaries in fact excessive and more than the reasonable, fair value of the services which the directors had rendered during that year?

Mr. Hardin: I object.

The Court: Objection sustained.

Mr. McCarter: Well, your Honor just suggested—

The Court: How can he say what Mr. La-Boyteaux's services were worth during that year, or whether the sum total that he got was in excess of the value of his services?

Mr. McCarter: He sat on the salary committee.

The Court: Not in the sense you put it. He sat on the percentage, not on the result of the business of the company resulting to Mr. La-Boyteaux because of the percentage.

Mr. McCarter: All right, your Honor.

Q. Mr. Prindiville, could the corporation have hired for the year 1919, an individual to act as president for a sum less than $161,000?

Mr. Hardin: I object.

The Court: Objection sustained.

Mr. McCarter: I would like to bring out what presidents of other corporations greater than this one received.

The Court: You are not asking that.

Q. Mr. Prindiville, does, to your knowledge, presidents of other corporations, which are larger than Johnson & Higgins and which do a bigger business than Johnson & Higgins, receive a smaller salary than $161,000 a year?

Mr. Hardin: I object on the ground that it is immaterial and because the witness has shown no knowledge of the purpose of the comparison.

The Court: The latter ground is well taken. You may qualify him.

Q. Are you particularly familiar with the salaries received by the presidents of any large corporations? A. Yes, sir.

Q. Do you know some of the presidents of large corporations? A. Yes, sir.

Q. What corporations do you have particularly in mind, Mr. Prindiville? A. I know Mr. Swift of the Swift Packing Company.

Q. Do you know what Mr. Swift's salary is?

Mr. Hardin: I object.

The Court: Does he know what it is?

Q. Do you know? A. $40,000.

Q. I just asked you whether you knew what it was. A. Yes, sir.

Q. You do know what his salary is? A. I was told. I never saw his salary check.

Q. You were told by him, were you? A. By his son.

Q. Are there any other presidents of large corporations, Mr. Prindiville, that you are particularly acquainted with? A. Quite a number, but I don't know what salaries they get.

Q. Are there any vice presidents or active executives of large corporations you are acquainted with whose salaries you know? I do not ask the amount. A. There are.

Mr. McCarter: Is that sufficient qualification, your Honor?

The Court: In order to qualify him, you have got to show the character of work the other men do, the responsibility, and a thousand and one things essential to compare what they do and what they render to their company with the things that Mr. LaBoyteaux rendered to this company. That is what you have got to do.

Mr. McCarter: I am afraid to go into that detail. It would take too long.

The Court: We know that some presidents are not worth powder to blow them up, and others are worth a great deal. Probably the worthless one gets the biggest price because of other influences.

Q. Mr. Prindiville, in any given year the profits of Johnson & Higgins might have increased without any increase in the effort of the directors, or any increase due to the services of the directors, might it not? A. Yes.

Mr. McCarter: I would like to ask Mr. Prindiville what he meant by the answer to the last question and in what way, particularly in the insurance business, the profits might increase, irrespective of the services of the directors.

Mr. Hardin: I object.

The Court: This is not in the way of correction.

Mr. McCarter: It is in the way of explanation.

The Court: I will hear it.

A. Well, during the last five or ten years there has been a tremendous development of industries, automobiles and everything of that kind, and the insurance premiums of the country have increased three hundred fold, and on account of increase of business there is an increase of profit.

Q. The business of all other insurance brokers, competitors of Johnson & Higgins, engaged in similar business has increased in about the same proportion? A. Tremendously.

Complainant's Witness, Emery H. Sykes, Direct

EMERY H. SYKES, sworn for complainant.

Direct-examination by Mr. McCarter:

Q. You are a lawyer of New York? A. Yes, sir.

Q. You are connected with the firm of Sullivan & Cromwell?? A. I am.

Q. And are the Mr. Sykes that has been referred to in the evidence? A. Yes, sir.

Q. And are the gentleman to whom Mr. Victor turned over the performance of some duty in connection with this Prindiville matter? A. Yes, sir.

Q. Did you have a communication either by 'phone or otherwise with any gentleman connected with the Johnson & Higgins enterprise? A. Yes, sir; I had two telephone conversations with Mr. Coe, W. R. Coe.

Q. Do you recall about the date of the first conversation? A. The first conversation was on the 2nd of January.

Q. What was the purport of that? A. Mr. Coe, whose voice I recognized over the telephone, as I had heard him before, called me on the telephone and said that he had received our letter of December 30 or December 31, and that he wanted to know whether or not from that letter they should infer that Mr. Prindiville had resigned as a director of the corporation, and I said that the letter referred solely to the partnership matter and that so far as I knew, Mr. Prindiville had no intention of resigning. He then asked me—in the course of the conversation it came out that Mr. Prindiville was away, that he had left for Florida, and he asked me if there was any objection to writing him directly. I said none at all.

Q. Did you see, before it was sent, or hear read, or were you familiar with the contents of the telegram that Mr. Coe did send to Mr. Prindiville which is in evidence in this case as Exhibit C25? A. It was never shown me nor did I hear from Mr. Coe or anyone about it, and I knew nothing of its contents.

Q. Did you, quoting the language of the telegram, understand that Mr. Prindiville desired to withdraw from the corporation and the partnership? A. I did not.

Q. Did you so state to Mr. Coe? A. I did not so state, either in substance or otherwise.

Q. Did you have another conversation with Mr. Coe? A. I received a telegram from Mr. Prindiville and on the 4th of January called Mr. Coe up at his house and told him that Mr. Prindiville had received the telegram that they had sent him and that he would not resign as a director of the company. Some further conversation, but that was substantially what was said, that he would not resign as director of the company. He asked me then to call up Mr. LaBoyteaux and ask Mr. LaBoyteaux to not send off a telegram which had been prepared, and I called up somebody—

Q. Somebody in Mr. LaBoyteaux's office and gave the message? A. Yes, sir.

CROSS-EXAMINATION by Mr. Hardin:

Q. You referred to a telegram from Prindiville. What is that telegram?

Mr. Wollman: We have it here (producing telegram).

Q. Is this the telegram, Mr. Sykes, that you received from Mr. Prindiville prior to your interview of January 4, with Mr. Coe? A. Yes, sir.

Mr. Hardin: I offer the telegram in evidence.

Telegram marked Exhibit D24.

Mr. Hardin (reading):

"St. Augustine, Florida, January 3, 1919. Royall Victor, cr. Sullivan & Cromwell, 51 Wall Street, N. Y. C.

"Just rec'd long message from Will Coe, dated second, asking if I would wire resignation as director corporation so that same could be taken up at today's meeting; stated he had conferred with you stop In order to avoid possible complications suggest all communications come through you so see Coe, find out what he wants and take such action as will best serve my interests. Send me night letter giving situation to date. Thomas J. Prindiville."

Q. Mr. Sykes do you recall in the first interview with Mr. Coe, that Mr. Coe asked you for Mr. Prindiville's address and you gave it to him? A. That is my recollection; yes, sir. I think I so stated.

Mr. McCarter: In view of the fact that Mr. Hardin has seen fit to introduce the telegram from Mr. Prindiville to Mr. Victor, I think the other telegram should go along with it. We do not want half the story.

Mr. Hardin: We have no objection.

Mr. McCarter: I offer in evidence further telegram to Royall Victor.

Telegram marked Exhibit C34.

Mr. McCarter (reading):

"St. Augustine, January 6, 1919.

"Mailing Coe's wire which states my attorneys approved his wiring asking my resignation corporation directorship. Stop. Think Sykes knowing Coe was wiring me, should have asked to see telegram or wired me himself to take no action without conferring with you serious mistake might have occurred stop understood you would handle my case. Conferences with LaBoyteaux and Coe extremely important and need your personality to get results."

We offer in evidence list that has been furnished us of owners of dividend certificates as of May 22, 1920, and as of December 31, 1918, showing that there are several who are not directors sharing in salaries.

Paper marked Exhibit C35.

The Court: You have established in the case, I think, that there was identity as to membership in the firm and in the directorate, except that Mr. Prindiville stated that it was substantially the same, which implied an exception. The record will disclose it.

Mr. Hardin: Yes.

WILLIAM H. LABOYTEAUX, recalled.

Further Direct-examination by Mr. Hardin:

Q. Was there at all times a complete identity in membership of the firm and directorate? A. No; there has been several instances in which it has not been the same.

Q. What was the occasion? A. In the case of—the occasions have been of different reasons—Mr. Loines at one time resigned from the partnership at a time that he was director because he felt that the responsibilities and liabilities of the partnership was more than initial share of the earnings of the partnership, so he sent in his resignation and for a period of a few years he was not a partner, while he remained as director.

Q. Did he derive any interest out of the partnership by reason of retaining his directorship? A. No.

Q. The other cases were about the same—not the reason for them? A. The facts are the same. When they resign from the partnership they do not participate in the profits—

Q. That is all.

Mr. Seligman: We offer in evidence dividends certificate No. 73 for fifty shares standing in the name of Wilfrid H. Robertson, dated March 21, 1914.

Certificate marked Exhibit C35A.

Mr. Seligman: I also offer dividends certificate No. 75.

Certificate marked Exhibit C36.

Mr. Seligman: We also offer certificate No. 82, dividends certificate, and the stock powers attached to each.

Certificate marked Exhibit C37.

Mr. Seligman: I would like to read from the minutes of January 5, 1920, of directors' minutes, page 233, minute book 3:

"The secretary stated that there had been filed with him a consent in writing to the amendment of Article IV and Article II of the By-laws duly signed by stockholders owning two-thirds of the outstanding common stock and submitted such consent for the inspection of the meeting.

"The chairman announced that the amendment to the By-laws having become effective that in accordance with Article II as amended, it was necessary to reduce the number of directors in the class expiring 1921, from five to four." * * *

Then I omit some of the minutes and read the following:

"The secretary then stated that the present Board of Directors consists of Class expiring in May, 1919, Mr. J. D. Barrett, W. H. Botsford, J. S. Keegan. Class expiring in 1920, Mr. G. V. Coe, W. W. Curtin, W. R. Coe, J. A. H. Hopkins. Class expiring in 1921, Mr. W. H. LaBoyteaux, W. H. Davidge, W. N. Davey, H. W. Lowe."

I would like your Honor to note that Mr. Prindiville's name does not appear.

The Court: He had not expired.

Mr. Seligman: No, sir.

The Court: It does not give his name as having expired.

Mr. Seligman: No. This purports to give the name of the directors.

Then I would like to read an extract from the stockholders' minutes of May 5, 1920, second meeting held on that day at 11:55 A. M.:

"Mr. Seligman, holding a proxy on behalf of Mr. Prindiville, objected to the approval of the minutes."

And then another extract:

"Mr. Lowe again nominated the following for directors, duly seconded by Mr. Botsford: Mr. G. V. Coe, W. W. Curtin, W. R. Coe, A. H. Larkin.

"Mr. Seligman nominated Mr. T. J. Prindiville, but the nomination was not seconded."

The Court: I understand Mr. Prindiville's time would have expired in May?

Mr. Seligman: We contend that it did in fact expire in May, 1920.

"Mr. Lowe stated that Mr. Prindiville is not a stockholder under the certificate of incorporation and By-laws entitled to vote for directors, and in view of the fact that he has resigned and otherwise disqualified himself, protests against the acceptance of the ballot.

"Mr. Seligman asks what provision of the certificate of incorporation or By-laws Mr. Lowe refers to.

"Mr. Lowe states that Mr. Prindiville having resigned and otherwise disqualified himself as a director and so having disqualified himself as a common stockholder was not eligible for nomination as a director under the certificate of incorporation and the By-laws.

"The chair ruled that under the certificate of incorporation and By-laws, Mr. Prindiville is not eligible for a director of the corporation."

The Court: All that is argumentative.

Mr. Seligman: It goes to show that their position was that we could not even vote on the stock we held.

The Court: Attitude of mind, which they maintain now.

Mr. Seligman: There is no provision of that kind in the certificate.

The Court: That is not before me now. The issue before me is whether, in his present status, he is entitled to 249 per cent of the dividends of 1918, the per cent status that he maintained; and, further, whether that status, namely, as a holder of common stock continues and as such holder of common stock the Court will restrain this corporation from carrying out its plan and policy that has prevailed since its creation and compel them hereafter to adjudge the value of services on another basis than what they have in the past. If your client was badly dealt with, was it his position to withdraw or his position to come into court and say the implied contract was that I was to share with my running mates, and enforce the contract? I don't know.

Mr. Wollman: Our position is that those clauses that these gentlemen are relying upon are entirely unenforceable.

Mr. Hardin: I offer stock book number 1 to 250.

Book marked Exhibit D24.

Mr. Hardin: I also offer stock book No. 251 to 500.

Book marked Exhibit D25.

Mr. Hardin: I offer dividends certificate book No. 1.

Complainant's Exhibit 2

Book marked Exhibit D26.

Mr. Hardin: I offer dividends certificate book No 2.

Marked Exhibit D27.

The Court: All the official minutes that are not already in will be admitted.

Mr. Hardin: The table they object to.

The Court: You may use it on your argument.

TESTIMONY CLOSED.

Complainant's Exhibit 1.

Printed on page 30.

Complainant's Exhibit 2.

Number 413 Shares 125

JOHNSON & HIGGINS

Incorporated Under The Laws of the State of New Jersey.

CAPITAL STOCK $1,000,000.

Preferred Stock $500,000 Common Stock $500,000

THIS IS TO CERTIFY that Thomas J. Prindiville is entitled to One hundred and twenty-five shares

New Jersey State Library

of the Common Capital Stock of JOHNSON & HIGGINS, transferrable only on the books of the Company by the holder thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

The Common stock is subject to the prior rights of the holders of $500,000 of the Preferred Stock of the Company as declared in the Certificate of Incorporation. In the event that any share or shares of the Common Stock of the corporation becomes the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation, actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them and with or without specific consideration (any consideration, however, to be the property of the corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as afore-

said, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends.

Dated, Jersey City, N. J., May 17th, 1911.

W. R. COE,
President.

E. B. Schriver,
Treasurer.

(Corporate Seal)

Complainant's Exhibit 3.

Printed on page 33.

Complainant's Exhibit 4.

Printed on page 33.

Complainant's Exhibit 5.

JOHNSON & HIGGINS (a Corporation)

ASSETS & LIABILITIES—December 31st, 1918.

ASSETS

Cash (footnote A)		$4,839,115.46
Accounts Receivable (footnote B)		3,072,724.80
INVESTMENTS:		
Stock in		
Curtin & Brockie, Phila. (497 shares, par value $49,700)	54,700.00	
Prindiville & Co., Chicago (100 shares, par value $10,000)	17,500.00	
Texas Transport & Terminal Co. 20 shares, par value	1,000.00	
Pierce Oil Corporation (1,000 shares, par value $25,000)	17,112.50	
Overseas Underwriting Agency (250 shares, par value)	25,000.00	
BONDS:		
U. S. Liberty Loan 3rd Par value	618,000.00	
Old Dominion S. S. Co. Par value	10,000.00	
Canada Victory War Loan	49,893.50	

Complainant's Exhibit 5

Par value ($50,000) Atlantic Mutual Scrip Par value	177,434.52	970,640.52
FURNITURE & FIXTURES:		34,424.95
GOOD WILL:		366,764.00
		$9,283,669.73

LIABILITIES

CAPITAL STOCK:		
Common	372,900	
Preferred	450,000	822,900.00
RESERVES AGAINST VARIOUS OBLIGATIONS:		89,060.19
SURPLUS & UNDIVIDED PROFITS:		
Surplus	451,286.44	
Undivided profits (footnote C)	1,547,101.02	1,998,387.46
ACCOUNTS PAYABLE (footnote D)		6,373,322.08
		$9,283,669.73

(A) Cash represents mostly funds in bank collected by us as Brokers for account of underwriters and clients and in process of distribution to them and funds deposited in trust in uncompleted General

Average cases for ultimate distribution to those concerned.

(B) Accounts Receivable as stated herein are mostly premiums in course of collection by us for the benefit and account of various underwriters.

(C) This amount has since been reduced by payment of dividends aggregating $928,521.00. The balance, $618,580.02, is being held for reserves and taxes.

(D) Accounts Payable as stated herein are mostly premiums due and payable to underwriters when and if same are collected by us.

Complainant's Exhibit 6.

JOHNSON & HIGGINS (a Corporation)

BALANCE SHEET—December 31, 1919.

ASSETS

CASH	$3,800,801.55
ACCOUNTS RECEIVABLE	2,230,946.00
INVESTMENTS:	
U. S. Bonds & Obligations	
3rd Liberty Loan 4 1/4	618,000.00
5th " " 3 3/4	830,000.00
Stock of Companies (Domestic)	
Curtin & Brockie, Philadelphia	54,700.00
Prindiville & Co., Chicago	17,500.00

Complainant's Exhibit 6

Texas & Transport Terminal Co.	1,000.00	
Overseas Underwriting Agency, New York	25,000.00	
Bonds		
Old Dominion Steamship Co.	10,000.00	
Canada Victory War Loan	74,893.50	
Atlantic Mutual Insurance Co. Scrip	240,860.96	
Allied Packers	47,739.20	
FURNITURE & FIXTURES	51,649.96	
GOOD WILL (Paid for in stock)	366,764.00	
	$8,369,855.17	

LIABILITIES

ACCOUNTS PAYABLE	$5,639,079.16	
RESERVES	89,060.19	
CAPITAL STOCK Common	372,900.00	
Preferred	450,000.00	
SURPLUS & UNDIVIDED PROFITS (subject to reserves and taxes)	1,818,815.82	
	$8,369,855.17	

Complainant's Exhibit 6a.

Printed on page 192.

Complainant's Exhibit 7.

Printed on page 201.

Complainant's Exhibit 8.

Printed on page 209.

Complainant's Exhibit 9.

Printed on page 212.

Complainant's Exhibit 10.

Printed on page 213.

Complainant's Exhibit 11.

Printed on page 214.

Complainant's Exhibit 12.

Printed on page 216.

Complainant's Exhibit 13.

Printed on page 216.

Complainant's Exhibit 14.

Printed on page 217.

Complainant's Exhibit 15.

Printed on page 217.

Complainant's Exhibit 16.

Printed on page 218.

Complainant's Exhibit 17.

Printed on page 219.

Complainant's Exhibit 18.

Printed on page 222.

Complainant's Exhibit 19.

Printed on page 229.

Complainant's Exhibit 20.

Printed on page 232.

Complainant's Exhibit 21.

Printed on page 234.

Complainant's Exhibit 22.

Printed on page 235.

Complainant's Exhibit 23.

Printed on page 236.

Complainant's Exhibit 24.

Printed on page 246.

Complainant's Exhibit 25.

Printed on page 246.

Complainant's Exhibit 26.

Printed on page 248.

Complainant's Exhibit 27.

Printed on page 249.

Complainant's Exhibit 28.

Printed on page 251.

Complainant's Exhibit 29.

Printed on page 253.

Complainant's Exhibit 30.

Printed on page 255.

Complainant's Exhibit 31.

Printed on page 257.

Complainant's Exhibit 32.

Printed on page 258.

Complainant's Exhibit 33.

Printed on page 259.

Complainant's Exhibit 33a.

AGREEMENT, made this 27th day of June, 1918, by and between James B. Dickson, William E. Lowe, William W. Curtin, William H. Davidge, Stephen C. Hunter, William R. Coe, W. Harvell LaBoyteaux, George V. Coe, John Appleton Haven Hopkins, Willis H. Botsford, William N. Davey, Henry W. Lowe, Thomas J. Prindiville and John S. Keegan.

WHEREAS, under written articles of co-partnership bearing date of January 1st, 1908, certain persons therein mentioned entered into a co-partnership agreement, a copy whereof is hereto annexed, marked "A"; and

WHEREAS, under sundry agreements, informal and otherwise, said co-partnership agreement has from time to time been extended; and

WHEREAS, the last extension of said co-partnership agreement continued effective and in force after January 1st, 1918, unless and until same shall have been superseded by a new agreement between the parties; and

WHEREAS, the parties to said last-mentioned agreement are desirous of entering into a new co-partnership agreement, but until the same can be drafted and the conditions thereof determined, have been and are desirous of continuing as co-partners under the terms and conditions of the agreement hereinbefore mentioned until the said new articles of co-partnership can be made and entered into.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, That as and from January 1st, 1918, the co-partnership of Johnson & Higgins shall consist of the following members: James B. Dickson, William E.

Lowe, William W. Curtin, William H. Davidge, Stephen C. Hunter, William R. Coe, W. Harvell La-Boyteaux, George V. Coe, John Appleton Haven Hopkins, Willis H. Botsford, William H. Davey, Henry W. Lowe, Thomas J. Prindiville and John S. Keegan.

Second. That in every respect except as hereinbelow contained the articles of co-partnership bearing date of January 1st, 1908, as amended by agreements hereinbefore referred to, are ratified, approved and confirmed, and are the articles of co-partnership of the firm of Johnson & Higgins, until the first day of January, 1919, unless prior to said date the parties hereto enter into written articles of co-partnership, in which event this agreement shall only apply or pertain to the period of time existing between the first day of January, 1918, and the date prior to January 1st, 1919, under which such new articles of co-partnership shall have been entered into by the parties hereto.

The period during which it is permitted under the articles of co-partnership for any person to be an inactive partner having in the case of James B. Dickson expired by effluxion of time, and having been requested by three-fourths of the remaining partners that he continue as an inactive partner for the ensuing year and it being his desire to so continue, such right is hereby accorded to him. It is, however, understood and agreed that having received all of the payments provided in the articles of copartnership to cover his entire interest of every kind and nature in the assets and profits of the co-partnership, including the firm name and good will, any further participation by him in the assets and profits of the co-partnership is hereby expressly limited to his participation

in the current earnings for each year or part thereof during which he may continue as an inactive partner and at the rate fixed by the co-partners. He or his representatives shall be entitled to no further participations of any kind or nature in the assets, good will or profits of the co-partnership.

Third. That for the fiscal year beginning January 1st, 1918, and ending December 31st, 1918, unless prior to said last-mentioned date new articles of co-partnership shall have been made and entered into by the parties hereto, the interests of the parties in the said co-partnership shall be divided in the following proportions, that is to say:

James B. Dickson	2.	per	cent
William E. Lowe	4.2	"	"
William W. Curtin	4.2	"	"
William H. Davidge	4.5	"	"
Stephen C. Hunter	4.5	"	"
William R. Coe	14.6	"	"
W. Harvell LaBoyteaux	13.3	"	"
George V. Coe	13.3	"	"
John Appleton Haven Hopkins	8.3	"	"
Willis H. Botsford	6.5	"	"
William N. Davey	6.5	"	"
Henry W. Lowe	6.5	"	"
Thomas J. Prindiville	6.5	"	"
John Sloane Keegan	5.1	"	"

Fourth. That if new articles of co-partnership shall not have been made or entered into on or before January 1st, 1919, this agreement shall continue effective and in force after January 1st, 1919, unless and until same shall have been superseded by a new agreement between the parties.

Complainant's Exhibit 34

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals as of the day and year first above written.

J. B. DICKSON	(L. S.)
WILLIAM E. LOWE	(L. S.)
W. W. CURTIN	(L. S.)
WM. H. DAVIDGE	(L. S.)
S. C. HUNTER	(L. S.)
W. R. COE	(L. S.)
W. H. LABOYTEAUX	(L. S.)
GEO. N. COE	(L. S.)
J. A. H. HOPKINS	(L. S.)
W. H. BOTSFORD	(L. S.)
W. N. DAVEY	(L. S.)
HENRY W. LOWE	(L. S.)
THOMAS J. PRINDIVILLE	(L. S.)
JNO. S. KEEGAN	(L. S.)

Complainant's Exhibit 34.

Printed on page 342.

Complainant's Exhibit 35.

SHARES UNDER DIVIDENDS CERTIFICATES

As of May 22nd, 1920.

J. D. Barrett	50
W. W. Curtin	400
W. H. Davidge	395
Harriet L. Dickson	50
S. C. Hunter	395
Stephen Loines	50
W. E. Lowe	50
J. A. H. Hopkins	400

As of December 31st, 1918.

J. D. Barrett	50
Estate of Wm. Brockie	500
W. W. Curtin	394
W. H. Davidge	333
J. B. Dickson	50
S. C. Hunter	333
Stephen Loines	50
W. E. Lowe	394

Complainant's Exhibit 35a.

No. *149 73* 50 Shares

JOHNSON & HIGGINS

Incorporated under the Laws of the State of New Jersey

DIVIDENDS CERTIFICATE

THIS IS TO CERTIFY that Wilfred H. Robinson, owner of Fifty shares of the Common Capital Stock of this Corporation, of the par value of One Hundred Dollars per share, and not being an officer, director or employee of the Corporation, has on this date surrendered or caused to be surrendered the said stock and the certificate or certificates representing the same to the Corporation pursuant to the provisions of the Certificate of Incorporation and the By-Laws of the Corporation, and has thereby become entitled to receive all dividends that may be declared payable in respect of said stock within the period of ten years next succeeding the date hereof, and to that end has been registered as the owner of this Certificate upon the books of the Corporation.

Dividends shall be payable as and when declared, but to such person as may be registered as the owner of this Certificate upon the books of the Corporation.

No transfer of this Certificate shall be effective to entitle the transferee to be registered as the owner, until the instrument of transfer shall be filed with the Corporation at its office in the City of New York and until this Certificate shall be presented at the said office of the Corporation, and the fact of such transfer be attested by endorsement hereon by the President or

Vice President and by the Secretary or Treasurer of the Corporation.

In Witness Whereof, the Corporation has caused this Certificate to be signed by its President or Vice President, and its Corporate Seal duly attested to be affixed in the City of New York, this 21st day of March, 1914.

JOHNSON & HIGGINS,
By W. R. Coe,
President.

Attest
H. R. Howard
Secretary

Dividends Certificate No. *149* 73

Covering 50 Shares under Stock Certificate No. 492

Issued to

Wilfred H. Robinson March 21st 1914

Received the above described Dividends Certificates
.....
.....

(On back) : March 24th 1914 Transferred to W. W. Curtin #74

Complainant's Exhibit 36.

No. *147* 75 50 Shares

JOHNSON & HIGGINS

Incorporated under the Laws of the State of New Jersey

DIVIDENDS CERTIFICATE

THIS IS TO CERTIFY that Wilfred H. Robinson, owner of Fifty shares of the Common Capital Stock of this Corporation, of the par value of One Hundred Dollars per share, and not being an officer, director or employee of the Corporation, has on this date surrendered or caused to be surrendered the said stock and the certificate or certificates representing the same to the Corporation pursuant to the provisions of the Certificate of Incorporation and the By-Laws of the Corporation, and has thereby become entitled to receive all dividends that may be declared payable in respect of said stock within the period of ten years next succeeding the date hereof, and to that end has been registered as the owner of this Certificate upon the books of the Corporation.

Dividends shall be payable as and when declared, but only to such person as may be registered as the owner of this Certificate upon the books of the Corporation.

No transfer of this Certificate shall be effective to entitle the transferee to be registered as the owner, until the instrument of transfer shall be filed with the Corporation at its office in the City of New York and until this Certificate shall be presented at the said office of the Corporation, and the fact of such

transfer be attested by endorsement hereon by the President or Vice President and by the Secretary or Treasurer of the Corporation.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by its President or Vice President, and its Corporate Seal duly attested to be affixed in the City of New York, this 21st day of January, 1915.

JOHNSON & HIGGINS,
By
President.

Attest

Secretary

Dividends Certificate No. *147* 75

Covering 50 Shares under Stock Certificate No. 30—41 shares
Covering 50 Shares under Stock Certificate No. 71—9 shares

Issued to

Wilfred H. Robinson January 21st 1915

Received the above described Dividends Certificates
.....
.....

(On back) : January 25th, 1915, transferred to W. W. Curtin #76

Complainant's Exhibit 37.

No. *148* 82 200 Shares

JOHNSON & HIGGINS

Incorporated under the Laws of the State of New Jersey

DIVIDENDS CERTIFICATE

THIS IS TO CERTIFY, that Adrian H. Larkin, owner of two hundred shares of the Common Capital Stock of this Corporation, of the par value of One Hundred Dollars per share, and not being an officer, director or employee of the Corporation, has on this date surrendered or caused to be surrendered the said stock and the certificate or certificates representing the same to the Corporation pursuant to the provisions of the Certificate of Incorporation and the By-Laws of the Corporation, and has thereby become entitled to receive all dividends that may be declared payable in respect of said stock within the period of ten years next succeeding the date hereof, and to that end has been registered as the owner of this Certificate upon the books of the Corporation.

Dividends shall be payable as and when declared, but only to such person as may be registered as the owner of this Certificate upon the books of the Corporation.

No transfer of this Certificate shall be effective to entitle the transferee to be registered as the owner, until the instrument of transfer shall be filed with the Corporation at its office in the City of New York and until this Certificate shall be presented at the said office of the Corporation, and the fact of such transfer be

attested by endorsement hereon by the President or Vice President and by the Secretary or Treasurer of the Corporation.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by its President or Vice President, and its Corporate Seal duly attested to be affixed in the City of New York, this 17th day of January, 1917.

JOHNSON & HIGGINS,
By
President.

Attest

Secretary

Dividends Certificate No. *148* 82

Covering 200 Shares under Stock Certificates Nos. 20, 34, 44, 62, 75, 85, 200, 211.

Issued to

Adrian H. Larkin, January 17th, 1917

Received the above described Dividends Certificates Received certificate with transfer registered Jan. 23rd, 1917.

WM. H. DAVIDGE.

.....
.....

(On back): January 23rd, 1917. Transferred to Wm. H. Davidge.

Complainant's Exhibit 37

Irrevocable Stock Power.

KNOW ALL MEN BY THESE PRESENTS,

That Adrian H. Larkin
For Value Received have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto W. H. Davidge Dividend certificate under two hundred shares of the common stock of Johnson & Higgins, standing in my name on the books of said Johnson & Higgins, represented by Certificate No. 82 herewith.

And I do hereby constitute and appoint W. H. Davidge my true and lawful Attorney, Irrevocable, for me and in my name and stead, but to my use, to sell, assign, transfer, and make over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that my said Attorney or his substitute or substitutes shall lawfully *due* by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal at New York City the 23rd day of January, 1917.

Signed, sealed and delivered in the presence of

ADRIAN H. LARKIN (L. S.)

C. W. Martegue

Defendant's Exhibit 1.

AMENDED CERTIFICATE OF INCORPORATION

of

JOHNSON & HIGGINS

and

BY-LAWS

as

AMENDED

January, 1916

AMENDED CERTIFICATE OF INCORPORATION

of

JOHNSON & HIGGINS.

Johnson & Higgins was incorporated under the laws of the State of New Jersey by certificate filed in the office of the Secretary of State on June 13, 1899, with a capital of $500,000 consisting of $250,000 of preferred stock and $250,000 of common stock.

On December 23, 1899, a certificate was filed in the office of the Secretary of State increasing the capital stock from Five hundred thousand dollars to Seven hundred thousand dollars, of which increase $100,000 was preferred stock and $100,000 was common stock.

On December 23, 1902, an Amended Certificate of Incorporation was filed in the office of the Secretary of State amending Article Seventh of the Certificate

of Incorporation by increasing the number of Directors from eight to twelve.

On February 4, 1903, a further Amended Certificate of Incorporation was filed in the office of the Secretary of State further amending Article Fourth of the original Certificate of Incorporation by increasing the capital stock from $700,000 to $850,000, which increase consisted of $150,000 common stock.

On May 6, 1911, a further Amended Certificate of Incorporation was filed in the office of the Secretary of State further amending Article Fourth of the Certificate of Incorporation as amended by increasing the capital stock from $850,000 to $1,000,000, which increase consisted of $150,000 preferred stock.

On May 5, 1914, a further Amended Certificate of Incorporation was filed in the office of the Secretary of State amending Paragraph Sixth of Article Fourth of the Certificate of Incorporation as amended, by providing that losses sustained during any year may be paid out of any surplus reserve fund, or failing the establishment of such a fund, out of surplus, and that the losses so paid shall not go to diminish the net profits of the year so far as fixing the amount of dividends or the amount of salaries of Executive Officers and Directors is concerned, and also amending Article Seventh of the Certificate of Incorporation, as amended, by adding a provision authorizing the Corporation to pay losses from any surplus reserve fund, or failing the establishment of such fund, from accumulated surplus, and providing that losses so paid shall not go to diminish the net profits for the year so far as the fixing the amount of dividends or the amount of salaries of Executive Officers or Directors is concerned.

Defendant's Exhibit 1

The Certificate of Incorporation of Johnson & Higgins as amended is as follows:

AMENDED CERTIFICATE OF INCORPORATION

of

JOHNSON & HIGGINS.

This is to Certify, That we, the undersigned, all being persons of full age, and all being citizens of the United States, do hereby associate ourselves under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act concerning Corporations" (Revision of 1896), and the several Acts supplemental thereto and amendatory thereof, and do severally subscribe for and agree to take the number of shares of the capital stock of the Corporation set opposite our respective names.

FIRST: The name of the Corporation is Johnson & Higgins.

SECOND: The location of its principal office in the State of New Jersey is No. 243 Washington Street, in the City of Jersey City, and County of Hudson. The name of the agent therein, and in charge thereof, and upon whom process against the Corporation may be served, is Charles N. King. The location of the office and the name of the agent may be from time to time changed by the Board of Directors, and such change may be indicated by certificate, report or statement, published, filed or recorded, as may be required by law.

THIRD: The objects for which and for any of which the Corporation is formed are:

Defendant's Exhibit 1

(A) To purchase, acquire and take over the business of the co-partnership of Johnson & Higgins, as insurance brokers, insurance agents, agents of underwriters and of insurance companies, adjusters of averages and their kindred business, all as conducted by them in New York and in other places (excepting their business as now conducted in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco), together with the accounts, good will and other assets of such business, subject to such current liabilities of the business as may be deemed incidental thereto, and further to purchase, acquire and take over such other similar business or branches thereof as may be carried on by said co-partnership in said excepted place or places as may be advantageously acquired.

(B) To continue and conduct any and all the business or businesses so acquired.

(C) To act as agents *del credere* or otherwise, or as managers, for any corporation, association or individual in connection with its or his business of the following classes, or any branch thereof, wherever the same may be carried on, to wit:

(a) The business of marine insurance in all its branches.

(b) The business of fire insurance in all its branches.

(c) The business of life insurance in all its branches.

(d) The business of accident insurance in all its branches.

(e) The business of guaranteeing the fidelity of persons in situations of trust and guaranteeing the due performance of any duty, contract or obligation of any person or persons or corporation or corporations.

(f) The business of guaranteeing the payments of money under and in respect of bonds, mortgages, stocks or other securities, or of any person or persons, or corporation or corporations.

(g) The business of giving protection to principals and employers, and indemnifying them against liability, injury, damage or loss, by reason of negligence, fraud, theft, robbery, or other misconduct of persons in their employ.

(h) The business of furnishing any species or measure of guaranty or indemnity in respect of any kind of loss, damage, diminution or injury to person, estate or property, or in respect of legal liability or responsibility.

(D) To carry on the business of brokers for and in all classes and species of insurance, indemnity and guaranty hereinbefore referred to, and as agents *del credere* or otherwise, to procure or to place on behalf of principals such insurance, indemnity or guaranty.

(E) To state adjustments of general average and of partial or total losses, and of salvage losses, and any other kind of adjustment or statement in respect of any marine disaster or in respect of any class of marine, or fire or other insurance.

(F) To act as agents or representatives of owners, mortgagees and other persons and corporations hav-

ing, or claiming to have, any interest in buildings, merchandise, vessels, cargoes, freights, bullion, specie, bonds, bottomries and other subjects of insurance, and to prosecute their claims and to defend their rights, and to execute in such connection any bail bond or stipulation, as the same may be required, and otherwise to take such action as may be deemed beneficial to the interests of such principals.

(G) To carry on the business of a salvage corporation or association in all its branches, and operations of every nature in any way connected with salvage, and to act as agents or managers of any salvage corporation or association, or of any branch thereof.

(H) To acquire the whole or any part of the business, good-will and assets of any person, firm or corporation carrying on or proposing to carry on any class of the business which this Corporation is authorized to carry on, or to acquire and hold any part of the capital stock of any such corporation.

(I) To hold, purchase, mortgage and convey real and personal property in any State or Territory or colony of the United States of America, and in any foreign country or place.

(J) To carry on any other lawful business which may seem to the company to be of a character which may be judiciously carried on in connection with one or more branches of the company's business, excepting a Savings Bank, a Building and Loan Association, an Insurance Company, a Surety Company, a Railroad Company, a Telegraph Company, a Telephone Company, a Canal Company, a Turnpike Company or other company which shall need to possess the right

of taking and condemning lands in this State, or a corporation provided for by "An Act concerning Banks and Banking" (Revision of 1899), or by "An Act concerning Trust Companies" (Revision of 1899), or by "An Act concerning Safe Deposit Companies" (Revision of 1899), it being hereby declared that no such business is to be undertaken by the Corporation as principals, and the Corporation expressly disclaims any banking powers.

(K) To have one or more offices out of the State of New Jersey, and to conduct its business or any part thereof outside of that State, and in any State, Territory or Colony of the United States of America and in any foreign country or place.

FOURTH: The total authorized capital stock of the Corporation is to be one million dollars ($1,000,000) which is to be divided into ten thousand shares (10,000) of the par value of One hundred dollars each. Of such total authorized capital stock of the Corporation Five thousand (5,000) shares of the par value of five hundred thousand dollars ($500,000) shall be preferred stock, and Five thousand (5,000) shares of the par value of Five hundred thousand dollars ($500,000) shall be common stock.

The preferred stock shall be entitled to non-cumulative dividends at the rate of not to exceed eight per cent per annum for each fiscal year ending on the 31st day of December, payable to the limit of eight per cent out of any and all net profits or out of any accumulated surplus and before any dividends are set apart or paid upon the common stock. The preferred stock shall not be entitled to any other dividends. The holders of preferred stock shall not have the right to

vote for Directors or officers of the Corporation, but shall have the right to vote upon all other matters properly coming before the stockholders.

In the event of the dissolution of the Corporation the holders of preferred stock shall be entitled to receive the par value of their preferred shares out of the funds and assets of the Corporation before any payment shall be made therefrom to the holders of common stock.

The common stock shall be subject to the prior rights of the holders of preferred stock as is herein declared. If, after providing for the payment of full dividends for any fiscal year on the preferred stock, there shall remain any net profits of such year, or any accumulated surplus, any and all such surplus or net profits shall be applicable to such dividends upon the common stock as from time to time may be declared by the Board of Directors, and out of any such surplus or net profits the Board of Directors, after providing for any reservations for working capital or other purposes, may pay dividends upon the common stock, but not until the dividends upon the preferred stock for such fiscal year shall have been actually paid or provided for and set aside.

In the event that any share or shares of the common stock of the Corporation become the property of any person who is not an officer, Director or employee of the Corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the Corporation ceases to be an officer, director or employee of the Corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and un-

til he shall surrender or cause to be surrendered the said stock and the certificate therefor to the Corporation, upon which surrender he shall receive from the Corporation in exchange for such stock a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the Corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the Corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends.

The net profits of any year, so far as dividends are concerned, shall be deemed to be the amount of profits remaining after payment of all losses and of all charges and expenses of the year, including the salaries of the Executive Officers and Directors. Any loss sustained in any year may be paid out of (1) any surplus reserve fund that may be then established; or (2) failing the establishment of such a surplus reserve fund, out of the accumulated surplus, and if so paid the amount thereof so paid shall not go to diminish the net profits of the year, either so far as the determination of dividends is concerned, or so far as the fixing of the salaries of Executive Officers and Directors is concerned. Such salaries are to be

fixed from time to time by the Board of Directors and shall not exceed, in the aggregate the amount of the net profits in the year ascertained as herein provided.

FIFTH: The names of the Incorporators, the Post Office address of each and the number of shares subscribed for by each, the aggregate of such subscriptions being $1,000, and being the amount of the capital stock with which the Corporation will commence business are as follows, the subscriptions being made to the common stock:

Name	Post Office Address	Number of Shares
Adrian H. Larkin	243 Washington Street Jersey City, New Jersey	8
Francis L. Patton, Jr.	243 Washington Street Jersey City, New Jersey	1
Lewis H. Freedman	243 Washington Street Jersey City, New Jersey	1

SIXTH: The duration of the Corporation is unlimited.

SEVENTH: The Corporation may use and apply its net profits or its accumulated surplus authorized by law to be reserved to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock, from time to time, to such extent and in such manner, and upon such terms, as its Board of Directors shall determine, and neither the property nor the capital stock so purchased or acquired, nor

any of its capital stock taken in payment or satisfaction of any debt due to the Corporation, shall be regarded as profits for the purpose of declaration or payment of dividends, unless otherwise determined by a vote of three-fourths of the Directors.

The Corporation may pay from any surplus reserve fund that may be then established; or, failing the establishment of such a surplus reserve fund, out of the accumulated surplus, any losses that may be sustained in any year, and if so paid the amount thereof so paid shall not go to diminish the net profits of the year, either so far as the determination of dividends is concerned or so far as the fixing of the amount of the salaries of Executive Officers and Directors is concerned.

The number of Directors of the Corporation is to be twelve (12) each of whom shall be the holder of not less than fifty shares of the common capital stock of the Corporation (but the qualifying amount may be increased by the By-Laws to the amount of one hundred shares), and the members of the Board of Directors, commencing from the date of the filing of this Certificate, shall be divided into four classes, each class to consist of three Directors. The first class shall hold office until the annual meeting in the year 1906; the second class shall hold office until the annual meeting in the year 1905; the third class shall hold office until the annual meeting in the year 1904; the fourth class shall hold office until the annual meeting in 1903; so that the term of office of one class of Directors shall expire in each year.

The said Directors shall be elected by the holders of the common stock at a meeting of the stockholders, to be held after the filing of this Certificate.

Defendant's Exhibit 1

At each annual meeting Directors shall be elected by the holders of the common stock of the Corporation to fill any vacancy in any class hereby created and then existing, and at such annual meeting three Directors shall be elected by ballot by the holders of the common stock of the Corporation, to replace the outgoing class, and the term of office of the class so elected shall be four years.

The number of Directors may be increased or decreased in accordance with such By-Laws as may from time to time be adopted relating to the subject, and the classification of Directors may, in like manner, be varied.

The Board of Directors shall have power to alter, amend, add to or rescind the By-laws of the Corporation, or any of them, in accordance with the provisions of said By-laws therefor; to fix any amount to be reserved as working capital; to authorize, and to cause to be executed, mortgages, and liens upon the real and personal property of the Corporation and from time to time to sell, assign, transfer or otherwise dispose of any and all of the property of the Corporation; but no such sale of all of the property shall be made except pursuant to the vote of at least three-fourths of the Board of Directors.

The Board of Directors shall, from time to time, determine (in the event that there shall not be an existing by-law on the subject), whether, to what extent and at what times and places, and under what conditions and regulations, the account books of the Corporation, or any of them, shall be open for the inspection of stockholders, and no stockholder shall have any right of inspecting an account or book of document of the Corporation except as conferred by

statute or authorized by the Board of Directors or by resolution of the stockholders.

The Board of Directors shall have power to hold its meetings, to have one or more offices, to keep the books of the Corporation (excepting the stock and transfer books) outside of this State, at such places as may be, from time to time, designated by them.

The Corporation, in its By-laws, may prescribe the number necessary to constitute a quorum of the Board of Directors, which number may be less than a majority of the whole number.

The preferred stock and its holders shall be entitled to the privileges and shall be subject to the limitations hereinbefore set forth in respect of such stock, and the common stock and its holders shall likewise be entitled to the privileges and subject to the limitations hereinbefore set forth in respect of the common stock.

IN WITNESS WHEREOF we do hereby make, record and file this Certificate, and have set our hands and seals, in the City of Jersey City, this 12th day of June, One thousand eight hundred and ninety-nine.

ADRIAN H. LARKIN (Seal)
FRANCIS L. PATTON, JR. (Seal)
LEWIS H. FREEDMAN, (Seal)

State of New York,
County of New York, ss:

Be It Remembered, that on this 12th day of June, one thousand eight hundred and ninety-nine, before me personally appeared Adrian H. Larkin, Francis L. Patton, Jr., and Lewis H. Freedman, who I am satis-

fied are the persons named in and who executed the foregoing Certificate, and, I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

WM. H. FAIN,
A Commissioner of Deeds for the
State of New Jersey,
(Seal) Residing in New York

BY-LAWS OF JOHNSON & HIGGINS.

Article I.

The annual meeting of the stockholders shall be held on the first Wednesday of May in each year at the office of the Corporation in the State of New Jersey at eleven o'clock in the forenoon, when the holders of the common stock shall elect by plurality vote, Directors as provided in Article II hereof. The Chairman of the Board of Directors (if one shall have been elected), or in the absence of the Chairman of the Board of Directors, the President, or in the absence of the President, a Vice President in the order provided in Article VIII hereof, shall preside at the meeting, and shall appoint two Inspectors of Election. Each of the holders of stock shall be entitled, either in person or by proxy, to as many votes as he owns shares of stock in the Corporation upon all matters that come properly before the meeting, except that the holders of preferred stock shall not have the right to vote for Directors or other officers of the Corpora-

tion. The polls for the election of Directors shall be opened as soon after eleven o'clock as may be convenient, and certainly before five o'clock in the afternoon, and shall remain open at least one hour, unless all the holders of common stock are present in person or by proxy, and have sooner voted; and the voting shall be by ballot.

A notice of the annual meeting shall be mailed by the Secretary, postage prepaid, to each stockholder whose name shall appear upon the books of the Corporation, at least ten days before the date fixed for such meeting, addressed to such address as he may have registered with the Secretary, or, in default thereof, to his last known place of residence or business.

Special meetings of stockholders may be called by the Chairman of the Board of Directors or by the President whenever either shall deem it proper to do so, or on the request to the Chairman of the Board of Directors, or the President, as the case may be, in writing of a majority of the Directors or the holders of two-fifths in amount of the capital stock issued and outstanding. Such call shall be made by a notice mailed, postage prepaid, to each of the stockholders whose names shall appear upon the books of the Corporation at least ten days before the date fixed for such meeting, addressed as hereinbefore provided, and shall state the time and place of the meeting and the general nature of the business proposed to be transacted thereat, and no other business shall be transacted at such meeting.

At all meetings of stockholders a majority in interest of all stockholders shall be present in person or by proxy to constitute a quorum.

Defendant's Exhibit 1

ARTICLE II.

The Directors shall be classified in respect of the time for which they shall severally hold office, by dividing them into three classes, each class consisting of one-third of the whole number of the Board of Directors, and the term of office of one of said classes shall expire each year. The number of Directors shall be twelve (12), at least one of whom shall reside in the State of New Jersey. At each annual election the successors to the Directors of the class whose term shall expire in that year, shall be elected to hold office for the term of three years.

ARTICLE III.

A Director to fill any vacancy which may occur prior to the next annual meeting, through death, resignation or inelgibility, or by the number of Directors being increased, or which may so occur thereafter in any class in the interim between any two regular or duly called special elections, shall be chosen by the remaining members of the Board by ballot by a majority vote. He shall hold office until the next election of Directors by the holders of the common stock, at which time the vacancy shall be filled by electing by ballot by the holders of the common stock a Director to serve during the remaining term of the class in which the vacancy has occurred.

ARTICLE IV.

The Directors shall meet annually on the first Wednesday of May in each year. Notice of such meeting

shall be mailed to each Director by the Secretary at least five days prior to the said meeting. Six Directors in office shall be necessary to constitute a quorum for the transaction of such business as may be brought before any meeting of the Board. Special meetings of the Board of Directors may be called by the Chairman of the Board of Directors or by the President or by a Vice President on three days' notice to each Director. The meetings of the Directors may be held outside the State of New Jersey and in the City of New York, State of New York.

ARTICLE V.

The Executive officers of the Corporation shall be a Chairman of the Board (who may or may not be elected each year as the Directors see fit), a President, one or more Vice Presidents, a Secretary and a Treasurer. The Chairman of the Board of Directors, the President and Vice Presidents shall be chosen from among the Directors. The offices of Secretary and Treasurer may be held by the same person and one of the Vice Presidents may be chosen to either or both offices.

ARTICLE VI.

No person shall be eligible as a Director unless he shall be a stockholder owning not less than 50 shares of the common stock of the Corporation. If a Director shall cease to be such a stockholder, his office shall thereby become vacant.

Defendant's Exhibit 1

ARTICLE VII.

It shall be the duty of the Chairman of the Board of Directors, if one shall have been elected to preside at the meetings of the Board of Directors and of the stockholders and to do and perform such other duties as shall from time to time be delegated or assigned to him by the Board of Directors.

It shall be the duty of the President to preside at meetings of the Board of Directors and of the stockholders in the event that a Chairman of the Board of Directors shall not have been then elected, or in the event of the absence of the Chairman of the Board of Directors. He shall sign such conveyances and such contracts as require to be recorded, and shall have power to acknowledge the same as the acts of the Corporation, and to affix the seal of the Corporation. He shall also sign the certificates of stock. He shall have general control, direction and supervision of the affairs of the Corporation, subject nevertheless to the authority of the Board of Directors, and shall do and perform all acts ordinarily appertaining to the office of President.

ARTICLE VIII.

Each of the Vice Presidents is authorized, in the absence of the President or in case of his disability or inability to perform the duties of President, to perform and exercise all of the powers and duties of the President. The Vice Presidents shall act in the order of their election. The Vice President who shall be first elected shall perform and exercise all of the powers and duties of the President in case of his disability or inability to perform and exercise all of the powers and duties of the President. In the event of

the absence or disability of the Vice President first elected, the Vice President next elected, and so on. In order to determine the order of the election of the Vice Presidents, the Secretary shall immediately after the annual meeting of the Board and at the meeting of the Board at which the officers of the Corporation shall be elected, certify to the Board the order of the election of the Vice-Presidents and a certified copy of such certification shall be full warrant and authority for all acts of any such Vice President.

ARTICLE IX.

The Secretary of the Corporation shall be *ex officio* the Secretary of the Board of Directors. He shall attend all sessions of the Board, shall act as Secretary thereof, and record all votes and the minutes of all proceedings in a book to be kept for that purpose. He shall see that proper notices of all meetings of stockholders of the Corporation and of the Board of Directors are given. He shall preserve and keep all letters, contracts and instruments of writing not properly belonging to the office of Treasurer, and shall perform all duties lawfully required of him by the Board of Directors.

He shall keep a register of the address which any stockholder may designate as the address to which any notice intended for such stockholder shall be sent. He shall make out in advance of every meeting of the stockholders a full, true and complete list of the holders of preferred stock and of the holders of common stock, with the number of shares held by each, and shall supply a copy thereof for the use of the Inspectors of Election at such stockholders' meeting. He

shall have the custody of the records of the Corporation and the corporate seal, and shall attest such seal when required.

The Board of Directors may appoint an Assistant Secretary with such powers and duties and compensation as shall be conferred upon him by such Board of Directors, but he shall not be deemed an executive officer of the Corporation.

Article X.

The Treasurer shall keep full and accurate accounts of the receipts and disbursements of the Corporation in books belonging to the Corporation, and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such Trust Companies or Banks as may be designated by the Board of Directors. He shall have the custody of the stock registers and transfer books of the Corporation. He shall give a bond to the Corporation in the sum of $1,000 conditioned for the faithful performance of his duties.

All certificates of stock when signed by the President of the Corporation shall be countersigned by the Treasurer, and he shall keep the accounts of the stock register and transfer book in such form and manner and under such regulations as the Board of Directors may prescribe.

In the event that the Board of Directors create the office of Assistant Treasurer or Second Assistant Treasurer or Second Assistant Treasurer shall have such powers and duties and compensation as shall be conferred upon them by the Board of Directors, but they shall not be deemed to be executive officers of the Corporation.

Defendant's Exhibit 1

ARTICLE XI.

All moneys received by the Corporation shall be deposited to its credit in such Trust Companies or Banks as the Board of Directors may designate, and checks drawn thereon shall be signed by the President, or by one of the Vice Presidents, and shall be countersigned by the Treasurer, or, in the event of his absence or disability, by a Director. In the event that the offices of Assistant Treasurer and Second Assistant Treasurer are created, then the Assistant Treasurer and Second Assistant Treasurer shall have such powers as to countersignature of checks as shall be delegated by the Board of Directors.

ARTICLE XII.

Each holder of stock shall be entitled to a Certificate signed by the President or Vice President and Treasurer stating the capital stock of the Corporation, and the number of shares into which it is divided, and certifying the number of shares to which the said holder is entitled, and whether such shares are of preferred stock or of common stock, and stating the manner in which said Certificate is transferable. Said shares may be transferred upon the books of the Corporation by the holder or owner, either personally or by power of attorney, upon surrender of the certificate of such shares.

Each certificate for shares of preferred stock shall bear the statement:

"The preferred stock shall be entitled to non-cumulative dividends at the rate of not to exceed eight per

cent per annum for each fiscal year, ending on the thirty-first day of December, payable to the limit of eight per cent out of any and all net profits or out of any accumulated surplus, and before any dividends are set apart or paid upon the common stock. The preferred stock shall not be entitled to any other dividends. The holders of preferred stock shall not have the right to vote for Directors or officers of the Corporation, but shall have the right to vote upon all other matters properly coming before the stockholders.

"In the event of the dissolution of the Corporation the holders of preferred stock shall be entitled to receive the par value of their preferred shares out of the funds and assets of the Corporation before any payment shall be made therefrom to the holders of common stock."

Each certificate for shares of common stock shall bear the statement:

"The common stock shall be subject to the prior rights of the holders of preferred stock, as declared in the Certificate of Incorporation.

"In the event that any share or shares of the common stock of the Corporation becomes the property of any person who is not an officer, Director or employee of the Corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the Corporation ceases to be an officer, Director or employee of the Corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock, unless and until he shall surrender, or cause to be surrendered, the said stock and the certificate therefor to the Corporation

upon which surrender he shall receive from the Corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall, from the time of surrender, be subject to reissue under the direction of the Board of Directors, and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the Corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the Corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends."

ARTICLE XIII.

No transfer of stock shall be made within twenty days preceding the date appointed for paying a dividend or for holding a meeting of stockholders.

All certificates of stock surrendered for transfer shall be cancelled by the President or Treasurer at the time of transfer. The shares of common stock surrendered under the provisions of the Certificate of Incorporation in exchange for certificates entitling the holder to dividends for a period of ten years, may be transferred to the Treasurer of the Corporation as such, or to any other Trustee appointed by the Directors, for the benefit of the Corporation, and subject to reissue under the direction of the Board of

Directors; and upon such transfer being made the certificate shall be cancelled.

No stockholder shall have the right to inspect the books, accounts, records, vouchers or documents of the Corporation unless he shall have been a stockholder of record on the books of the Corporation for at least six months prior to the making of the demand, and unless he shall have been a holder of at least fifty shares of stock during that period.

ARTICLE XIV.

The corporate seal of the Corporation shall be in the following form:

A circular face with the words and figures "Johnson & Higgins, 1899," arranged in a circle inside the outer edge of the seal, and bordered with an inner ring and an outer ring, and with the word "Seal" within the inner ring.

ARTICLE XV.

The compensation of the Directors and of the executive officers of the Corporation shall be fixed by the Directors. Such compensation may be specific in amount, or it may be measured by a share of the profits of the Corporation, but in neither case shall the aggregate compensation of the Directors and executive officers for any year exceed the amount of the net profits of the Corporation as defined in the Certificate of Incorporation.

Defendant's Exhibit 1

ARTICLE XVI.

These By-laws or any of them may be altered or amended or repealed, or further By-laws may be adopted at any time and from time to time by a vote of three-fourths of the entire Board of Directors at any meeting, provided, that notice of the character of the proposed alteration or amendment or repeal or addition shall have been mailed or sent to each Director with the regular notice of meeting; but no such alteration, amendment or repeal shall be effective, nor shall any new By-law be operative, until such alteration or amendment or repeal of such new By-laws shall have received the approval of the stockholders owning two-thirds of the outstanding common stock, which approval shall be in writing and filed with the Secretary of the Corporation.

ARTICLE XVII.

The Directors of the Corporation after reserving over and above its capital stock paid in as a working capital, or as a surplus reserve fund such sums, if any, from the surplus net earnings as shall have been fixed by the Directors, shall at the regular monthly meetings in September, December, March and June, in each year, or at such other times as the Board of Directors shall see fit and determine, declare quarterly dividends on the preferred stock of the Corporation of two per cent each. But no portion of any sums set aside by the Directors as a surplus reserve fund shall be used for the purpose of dividends upon either preferred or common stock. No portion of any sum set aside by the Directors as a surplus reserve fund

shall be used for the purpose of paying losses, except upon the affirmative vote of two-thirds of the Board of Directors. Such action may be taken at any regular meeting of the Board.

INDEX.

	Page
Accident insurance, right to conduct business of	4
Agent in New Jersey	3
Agent, right to act as	4, 6
Annual meeting	15
" " notice of	16
Averages, right to adjust	5
By-laws	15-27
" amendment of	25-26
Capital stock, authorized	7
" " original issue $500,000	1
" " increased to $750,000	1
" " increased to $850,000	1-2
" " increased to $1,000,000	2
Certificate of Incorporation, filed June 13, 1899	1
Certificate of Incorporation amended Dec. 23, 1899	1
Certificate of Incorporation, amended Dec. 23, 1902	1
Certificate of Incorporation, amended Feb. 4, 1903	1-2
Certificate of Incorporation, amended May 6, 1911	2
Certificate of Incorporation, amended May 5, 1914	2
Certificate of Incorporation, as amended	3-14

Defendant's Exhibit 1

Chairman of the Board of Directors. Powers and duties of 18-19
Checks, who shall sign 21-22
Common stock, original issue $250,000 1
" " increased to $350,000 1
" " increased to $500,000 2
Common stock, becoming property of person other than officer, director or employee 8-9
Common stock, dividends, declaration of 7-8
Common stock, exchange of for dividend certificates 8-9
Common stock, holder of exchanged stock not entitled to dividends for 10 years 9
Common stock, reissue of, received in exchange for dividend certificates 9
Common stock, rights of holder of stock exchanged for dividend certificates 9
Common stock, statement contained in certificate 23-24
Common stock, subject to rights of preferred stock 8
Common stock, surrendered for 10-year dividend certificates may be transferred to Treasurer of corporation 24
Compensation of directors and executive officers shall not in the aggregate exceed net profits of corporation 25
Convey, right to 6
Corporate money, deposit of 21-22
Deposit of corporate funds 21-22
Directors, Annual meeting of 17-18
" Classes of 11, 16-17
" Compensation fixed by Board 25
" Elected by common stockholders .. 12

" Increase of number of 12
" Meetings and offices outside New Jersey 13
" notice of meetings of 17-18
" one must be resident of New Jersey 17
" power to alter, rescind or add to by-laws 12
" power to cause execution of mortgages, etc 12
" power to fix working capital 12
" power to regulate books of corporation 12-13
" power to sell, transfer or dispose of property 12
" Quorum. By-laws may provide for 13
" Quorum. Seven directors in office constitute 17
" Special meetings of, how called 17-18
Dividends, Declaration of 26

Employers' liability, right to conduct business of 5
Executive officers 18
" " Compensation of, fixed by board of directors 25

Fidelity insurance, right to conduct business of 5
Fire insurance, right to conduct business of .. 5
Guarantee insurance, Right to conduct business of 5
Incorporators 10
Insurance brokers, Right to conduct business of 5

Lawful business, Right to carry on 6
Life insurance, Right to conduct business of . 4
Lien on corporate property, Right to create .. 12

Defendant's Exhibit 1

Losses. Effect of payment from surplus fund or accumulated profits 11

Marine insurance. Right to conduct business of 4
Mortgage. Right to 6, 12

Name of corporation 3
Net profits. What constitute 9-10

Objects of corporation 4-7
Office, Principal, in New Jersey 3
Offices, right to have outside New Jersey 7, 13

Plurality vote. Directors elected by 15
Polls. When open at annual meeting 15
Preferred stock, original issue $250,000 1
" " increased to $350,000 1
" " increased to $500,000 2
" " no right to vote for directors 8
" " rights on dissolution 8
" " right to non-cumulative dividends 8
" " statement contained in certificate 22-23
President. Powers and duties of 19
Principal office, where situated 3
Purchase of business of Johnson & Higgins, a co-partnership 4
Purchase of real estate, Right to 6
Quorum, majority in interest of stockholders shall constitute 16
Quorum, seven directors in office shall constitute 17
Real estate, right to purchase, mortgage or convey 6

Defendant's Exhibit 1

Sale of all property of corporation, must be authorized by three-quarters of directors 12
Salvage. Right to conduct business of 6
Secretary. Powers and duties of 20
Seal of corporation 25
Special meetings of stockholders 16
" " " directors 18
Stock. Transfer of 24
Stock certificates. Transfer of 24
Stockholders, Annual meetings of 15
Stockholders, majority in interest constitute a quorum 16
Stockholders, right to inspect books of corporation 12-13
Stockholders, right to vote at annual meeting . 15
Stockholders, special meetings 16
Surplus. Use of 10-11
Surplus reserve. Payment of losses from 11, 26
Treasurer. Powers and duties of 21
Vice Presidents. Powers and duties of 19

Defendant's Exhibit 1a.

This exhibit is a copy of the certificate of amendment of the charter of Johnson & Higgins, filed May 5, 1914, amending the charter as described in Defendant's Exhibit 1, Record p. 369. The consents of stockholders, part of the certificate of amendment, include the consent of Thomas J. Prindiville as holder of 150 shares of common stock and 100 shares of preferred stock.

This statement as to Exhibit D1A, is printed by consent in lieu of the exhibit itself, with full reservation of the right of either party to refer to the exhibit in the argument.

Defendant's Exhibit 2.

Printed on page 55.

Defendant's Exhibit 3.

(Copy of Stub.)

Transfer of Part of No. 16

Certificate No. 491

200 Shares

Issued to W. W. Curtin from issue March 17th, 1913

Received the above described Certificate
(Signed) W. W. CURTIN

(On back): March 19th, 1913 Transferred to Treasurer of Johnson and Higgins as Trustee No. 493.

Number 491 Shares 200

JOHNSON & HIGGINS

Incorporated under the Laws of the State of New Jersey

CAPITAL STOCK $1,000,000.

Preferred Stock $500,000 Common Stock $500,000

This is to Certify That W. W. Curtin is entitled to Two hundred shares of the Common Capital Stock of Johnson & Higgins, transferable only on the books of the Company by the holder thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

Defendant's Exhibit 3

The Common stock is subject to the prior rights of the holders of $500,000 of the Preferred Stock of the Company as declared in the Certificate of Incorporation. In the event that any share or shares of the Common Stock of the corporation becomes the property of any person who is not an officer, director or employee of the corporation, actively engaged in its service, or in the event that any owner or a share or shares of the Common Stock of the corporation ceases to be an officer, director or employee of the corporation, actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them and with or without specific consideration (any consideration, however, to be the property of the corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time

Defendant's Exhibit 3

the holder of the stock shall be entitled to receive dividends.

Dated, Jersey City, N. J., March 17, 1913.

(Seal.)

(Signed) W. R. COE
President.

(Signed) E. J. Shriver
Treasurer.

(On back):

For value received I hereby sell, assign and transfer unto Wilfred H. Robertson

Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint

Attorney to transfer the said stock on the Books of the within named Company with full power of substitution in the premises.

Dated, March 18, 1913

(Signed) W. W. CURTIN

In the presence of
(Signed) C. T. Westerman

(Four U. S. Revenue Stamps, $1.00 each, affixed.)

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

Defendant's Exhibit 4.

(Copy of Stub.)

Dividends Certificate No. 71 covering 200 Shares under Stock Certificate No. 491.

Issued to Wilfred H. Robertson March 19th, 1913
Received the above described Dividends Certificate.
Received from Johnson & Higgins Retirement Certificate No. 71 for 200 shares.
(Signed) WILFRED H. ROBERTSON
(On back): March 21st, 1921 Transferred to W. W. Curtin No. 72

Number 71 Shares 200

JOHNSON & HIGGINS

Incorporated under the Laws of the State of New Jersey

Dividends Certificate

This Is to Certify, that Wilfred H. Robertson owner of Two hundred shares of the Common Stock of this Corporation, of the par value of One hundred dollars per share, and not being an officer, director or employee of the Corporation, has on this date surrendered or caused to be surrendered the said stock and the certificate or certificates representing the same to the Corporation pursuant to the provisions of the Certificate of Incorporation and the By-Laws of the Corporation, and has thereby become entitled to receive all dividends that may be declared payable in respect of said stock within the period of ten years next succeeding the date hereof, and to that end has

been registered as the owner of this Certificate upon the books of the Corporation.

Dividends shall be payable as and when declared; but only to such person as may be registered as the owner of this Certificate upon the books of the Corporation.

No transfer of this Certificate shall be effective to entitle the transferee to be registered as the owner, until the instrument of transfer shall be filed with the Corporation at its office in the City of New York and until this Certificate shall be presented at the said office of the Corporation, and the fact of such transfer be attested by endorsement hereon by the President or Vice President and by the Secretary or Treasurer of the Corporation.

In Witness Whereof, the Corporation has caused this Certificate to be signed by its President or Vice President, and its Corporate Seal duly attested to be affixed in the City of New York, this 19th day of March, 1913.

JOHNSON & HIGGINS
By W. R. Coe
President

(Seal)

Attest
(Signed) H. R. Howard
Secretary

(On back):

Registered owner (Signed) W. W. Curtin
From March 21st, 1913
To Registry attested by (Signed) W. R. Coe President.

Defendant's Exhibit 5.

Printed on page 79.

Defendant's Exhibit 6.

Printed on page 82.

Defendant's Exhibit 7.

REPORT OF COMMITTEE ON DIRECTORS SALARIES FOR 1917.

Your Committee desires to report that after a hearing of the views of the Directors who were given an opportunity to appear before it, and after careful consideration of all the arguments advanced, they are unanimously agreed that no substantial grounds exist for making any changes in the salary percentages of Directors for the year 1917, except as hereinafter mentioned.

It has been felt that in the cases of Thomas J. Prindiville and Willis H. Botsford, certain conditions exist entitling them to special consideration and to the accomplishment of which voluntary relinquishment has been made by certain of the other Directors.

Your Committee therefore recommends that beginning January 1st, 1917, the compensation of the General or Executive Officers of the Corporation excluding the Treasurer and Secretary be fixed as follows, subject to modification at any duly convened meeting of the Board of Directors by the unanimous vote of the Directors present at such meeting:

Defendant's Exhibit 7

J. D. Barrett	$2,500
Stephen Loines	2,500

After deducting the foregoing amounts the balance of the profits of the Corporation available as Directors Salaries as above provided shall be distributed as follows:

James B. Dickson	2%
W. W. Curtin	none
W. H. Davidge	6.4
S. C. Hunter	6.3
W. R. Coe	10.5
W. H. LaBoyteaux	15.
G. V. Coe	15.
J. A. H. Hopkins	12.
W. H. Botsford	8.5
W. N. Davey	7.8
H. W. Lowe	7.5
T. J. Prindiville	6.
J. S. Keegan	3.

Respectfully submitted
W. H. LABOYTEAUX,
W. R. COE,
GEO. V. COE,
J. A. H. HOPKINS,
THOMAS J. PRINDIVILLE.

(On back.)

(58)
Report of Committee
on Directors Percentages
1917

Defendant's Exhibit 8.

For and in consideration of value received, we, the undersigned stockholders of record as of November 20th, 1917, of the Corporation of JOHNSON & HIGGINS, and entitled to prorata participation in 200 shares of Common Stock to be distributed as authorized by the Board of Directors at a meeting of the Corporation on November 21st, 1917, hereby waive all our right to a pro rata distribution of said stock and hereby authorize and direct that said distribution be made among the certain below mentioned stockholders and on the basis below appearing, viz.

W. H. Botsford	25	shares	dividend	bearing	1927
W. N. Davey	25	"	"	"	1927
Henry W. Lowe	25	"	"	"	1927
Thos. J. Prindiville	25	"	"	"	1927
John S. Keegan	100	"	"	"	1927

and the Executive Officers are hereby authorized, empowered and directed to make such distribution accordingly. It is agreed that a copy of this waiver be filed with the records of the Corporation.

In Witness Whereof, we have hereunto set our hands and seals this 22nd day of November, 1917.

W. R. COE,
GEO. V. COE,
HENRY W. LOWE,
S. C. HUNTER,
W. H. BOTSFORD,
J. A. H. HOPKINS,
JOHN S. KEEGAN,
J. B. DICKSON,
W. H. DAVIDGE,
JOHN W. BARRETT,
H. R. HOWARD,
W. N. DAVEY,
W. W. CURTIN,
STEPHEN LOINES,
W. E. LOWE.

Defendant's Exhibit 9.

Printed on page 100.

Defendant's Exhibit 10.

Printed on page 101.

Defendant's Exhibit 11.

Printed on page 102.

Defendant's Exhibit 12.

Printed on page 104.

Defendant's Exhibit 13.

Printed on page 105.

Defendant's Exhibit 14.

KNOW ALL MEN BY THESE PRESENTS, That I, do hereby constitute and appoint W. N. Davey, Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the first day of May, 1912, according to the number of votes that I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of April one thousand nine hundred and twelve.

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
H. R. Howard.

KNOW ALL MEN BY THESE PRESENTS, That I, do hereby constitute and appoint W. R. Coe, Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the seventh day of May, 1913, according to the number of votes that I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of April one thousand nine hundred and thirteen.

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
Arthur Croxson.

Defendant's Exhibit 14

KNOW ALL MEN BY THESE PRESENTS, That I, Thomas J. Prindiville, do hereby constitute and appoint W. R. Coe, Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington, Street, Jersey City, N. J., on the sixth day of May, 1914, according to the number of votes that I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23rd day of April one thousand nine hundred and

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
Herbert B. Sexton.

———

WESTERN UNION Form 168

TELEGRAM

Theo. N. Vail, President

RECEIVED AT 16 Broad St. (Stock Exchange Bldg.), N. Y. Always Open

68 EX BX 19

EX CHICAGO ILLS MAY 5 1914

W R COE

CARE JOHNSON AND HIGGINS NEWYORK
YOU ARE HEREBY AUTHORIZED TO TRANSFER MY PROXY NOW IN YOUR NAME TO SUCH OTHER DIRECTORS AS YOU DESIRE
THOMAS J. PRINDIVILLE
143P

(On back): Con 150 P. 100 W. R. Coe.

Defendant's Exhibit 14

($.10 documentary stamp attached, cancelled Apr 30 15 New York)

KNOW ALL MEN BY THESE PRESENTS, That I, T. J. Prindiville, do hereby constitute and appoint , Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the fifth day of May, 1915, acording to the number of votes that I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of one thousand nine hundred and .

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
Mildred Wormwood.

($.10 Documentary Stamp Attached, Cancelled Apr 27 16 New York)

KNOW ALL MEN BY THESE PRESENTS, That I, Thos. J. Prindiville, do hereby constitute and appoint , Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the third day of

May, 1916, according to the number of votes that I should be entitled to vote if then personally present.

In Witness Whereof, I have hereunto set my hand and seal this 27th day of April one thousand nine hundred and sixteen.

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
H. R. Howard.

Know All Men by These Presents, That I, Thos. J. Prindiville, do hereby constitute and appoint S. C. Hunter, Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the second day of May, 1917, according to the number of votes that I should be entitled to vote if then personally present.

In Witness Whereof, I have hereunto set my hand and seal this 18 day of April one thousand nine hundred and seven.

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
H. R. Howard.

Defendant's Exhibit 14

KNOW ALL MEN BY THESE PRESENTS, That I, Thos. J. Prindiville, do hereby constitute and appoint , Attorney and Agent for me, and in my name, place and stead, to vote as my proxy at Annual Shareholders Meeting of Johnson & Higgins, held at the office of the Corporation, 243 Washington Street, Jersey City, N. J., on the first day of May, 1918, according to the number of votes that I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29 day of April one thousand nine hundred and eighteen.

THOMAS J. PRINDIVILLE.

Sealed and Delivered in the
Presence of
H. R. Howard.

($.10 I. R. Cancelled Stamp.)

Defendant's Exhibit 15.

Printed on page 112.

Defendant's Exhibit 16.

Printed on page 113.

Defendant's Exhibit 17.

Printed on page 114.

Defendant's Exhibit 18.

Printed on page 115.

Defendant's Exhibit 19.

Printed on page 115.

Defendant's Exhibit 20.

Printed on page 116.

Defendant's Exhibit 21.

Printed on page 119.

Defendant's Exhibit 22.

Printed on page 123.

Defendant's Exhibit 23.

Printed on page 126.

Defendant's Exhibit 24.

Printed on page 341.

Defendant's Exhibit 24a.

Printed on page 346.

Defendant's Exhibit 25.

Printed on page 346.

Defendant's Exhibit 26.

Printed on page 347.

Defendant's Exhibit 27.

Printed on page 347.

Opinion.

IN CHANCERY OF NEW JERSEY.

Submitted—Decided May 2, 1921.

Between

THOMAS J. PRINDIVILLE,
Complainant,
and
JOHNSON & HIGGINS,
Defendant.

On Final Hearing.

For complainant, Messrs. McCarter & English (Mr. Henry Wollman, Mr. Royal Victor and Mr. Eustace Seligman, of the New York bar).

For defendant, Messrs. Pitney, Hardin & Skinner (Mr. A. H. Larkin and Mr. F. W. M. Cutcheon, of the New York bar).

BACKES, V. C.:

This is a stockholders bill, alleging two causes of action; to compel the defendant corporation to declare and pay dividends, and to restrain the directors from paying themselves excessive salaries.

Johnson & Higgins was incorporated in 1899, under "An Act Concerning Corporations," Revision of 1896, with an authorized capital stock of $500,000—half preferred and half common. The preferred stock is 8% non-cumulative, dividend bearing, with priority over the common, in dividends, and in the capital upon

dissolution. The authorized capital stock has been increased to $1,000,000, similarly divided. The preferred stock is not entitled to vote for directors or officers. The principal object for which the company was formed, as stated in the charter, was "To purchase, acquire and take over the business of the copartnership of Johnson & Higgins, as insurance brokers, insurance agents, agents of underwriters and of insurance companies, adjusters of averages and their kindred business, all as conducted by them in New York and in other places (excepting their business as now conducted in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco)."

In 1845 Messrs. Johnson and Higgins formed a copartnership to engage in the insurance business as brokers, agents and adjusters, and prospered, extending their business throughout the nation, and earning for themselves, besides riches, an enviable goodwill. In 1899 the members of the firm, then eight in number (there are now twelve), concluded to incorporate part of their business, and to that end caused the corporation of Johnson & Higgins to be formed, and conveyed to it the partnership business described in the charter, for all the common stock and $50,000 of the preferred. The partners thereupon divided the stock among themselves in proportion to their interest in the firm's business, electing themselves directors, and assumed the management of the company's affairs, which they and their successors have since carried on with marked success. The copartnership business not incorporated continued, and also has been conducted profitably, the members and the board of directors being, as a rule, identical. The corporation was designed to be a strictly personal service con-

cern, a copartnership, as nearly as ingenuity could achieve, and to embody all of the advantages of both, without incurring, in full the obligations of either. The scheme was simple. The common stock was to be held only by the officers, directors and employees of the company actively promoting its affairs, and among them was to be divided the net annual profits, in part according to the appraised or real value of their services, and in part according to their stock holdings, and when any of them became inactive, the right to dividends was to cease after the expiration of ten years. To that end it was provided in the charter that:

"In the event that any share or shares of the common stock of the corporation become the property of any person who is not an officer, director or employee of the corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the corporation ceases to be an officer, director or employee of the corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the corporation, upon which surrender he shall receive from the corporation in exchange for such stock a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them, and with or without specific consideration (any considera-

tion, however, to be the property of the corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends."

For twenty years there was perfect harmony and cohesion. The directors held the common stock during their period of service, and when they ceased to be active they turned in their stock for the ten year dividend paying certificates, and their places were taken by others. The stock so turned in was reissued to the remaining members, usually in proportion to their holdings. The uniform practice of the directors was to set aside at the beginning of each year one-half of the net profits in prospect, for their compensation; the other half for dividends. Then the amount set aside for salaries was apportioned among the members on a percentage basis, presumably, according to the value of their service.

In 1911, the complainant, Prindiville, was selected a director. He had been engaged in the insurance business in Chicago under the name of Prindiville & Co., a corporation, of which he was half owner, the other half belonging to Johnson & Higgins. His interest was taken over at an appraised value of $12,500 for which he was given 125 shares in the defendant company of the par value of $100 each. Mr. Prindiville was taken into the corporation, not for his assets in Prindiville & Co., but for his singular excellence

in the insurance line, which was calculated to add to the prestige, advancement and success of Johnson & Higgins. That, he and his associates fully understood, and he took his position and his stock well knowing the plan of operation and the limitation of his status. He continued with Johnson & Higgins, with headquarters at Chicago, until December 31, 1918, subscribing at all times to its scheme, taking his share of the yearly profits by way of compensation and dividends upon his stock, and also from time to time accepted his allotment of the common capital stock surrendered by his fellow members of the directorate who ceased to be active—in all 115 shares. His annual compensation and dividends during his connection with the company were enormous. The profits of the company were fabulous.

His retirement came about in this manner: When America entered the war in April, 1917, he went into the service, without consulting his co-workers and obtaining their leave. They protested, not against his ideals and zeal, but against his arbitrary and abrupt manner of putting country above company. All was smoothed over, however, and throughout his service in the navy, until the end of 1918, he drew his annual compensation as before—and it was princely—and also dividends on his stock for the year 1917, which was no paltry sum. Upon his release by the Government, and when he was due to resume his duties as an active director on January 1, 1919, he demanded an increase in compensation for the year 1919, equal in percentage to that of Lowe and Davey, his so-called "running mates," who had come into the concern with him, but who worked while he was absent. During the period of his absence he drew pay at the rate of

6% of the net profit set aside annually for directors' compensation, and the company proposed continuing him at that rate. Lowe and Davey had in the meantime been raised to 9% plus. After considerable controversy, sometimes acrimonious, the directors refused to accede to his demands, and he quit. He then brought this suit to recover dividends aggregating 205% on the common stock declared out of the profits of 1918. The company stands ready and offers to pay them upon surrender by him of his certificates of shares in exchange for dividend certificates in accordance with the requirments of the charter. This he declines to do, maintaining that the condition is *ultra vires* the corporation, and that it is an unlawful restraint upon the alienation of his capital stock. His contention is, that the Corporation Act does not authorize a charter, with limitations upon shares perpetuating the control of the company in the organizers and their chosen successors; that capital stock in a corporation is personal property, so declared by Sec. 20 of the Corporation Act; and that inasmuch as the free and untrammeled right of disposition is an essential and inalienable incident to ownership of personal property, the requirement of the charter, that he surrender his stock to entitle him to dividends, is in restraint of trade, and void as against public policy. However sound in principle the argument may be, it is weak in appeal and application.

(1) It may well be doubted that a partnership may be perpetuated in the garb of a corporation, with its corporate rights and powers, and immunity to personal liability, without complete submission to its cardinal ordinances, of which a conspicuous one is that "the

shares of stock in every corporation shall be personal property" (Sec. 20 C. S. 1610), and I seriously question that the provisions of Sec. 8 of the Corporation Act countenance corporate existence with copartnership privileges of chosing ones associates. Sub-division 4, requires that the certificate of incorporation contain, "if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created," and sub-division 7 provides that "The certificate of incorporation may also contain any provision which the incorporators may choose to insert, for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act." These broad grants of power were intended, in my opinion, to be exercised consistently with the declared policy that "The shares of stock in every corporation shall be personal property," and in entire subordination to this declaration. The point is not, however, up for decision. If the defendant corporation has arrogated to itself powers that are not conferred, or that are obnoxious in the eyes of the law as against its policy, it is guilty of an invasion of the public right, and direct redress lies with the State through its duly appointed agency—the Attorney General. Strangers may resist their imposition, but the complainant is not in a position to assail them. The charter restriction, of which he complains, forms the very keystone of the corporate scheme and structure he helped build, and under which he holds, and he cannot be heard to oblit-

erate it. He has supped sumptuously at the table of plenty for eight years, and he cannot bring the feast to an end simply because he is indisposed.

(2) The principal point to which counsel have addressed their arguments, orally and in voluminous briefs, is, whether the charter provision above quoted, terminating the right to dividends, is in conflict with the policy of the law against restraint of trade, and therefore void; and much that has been said and written, supported by long lines of authority pro and con the subject, though exceedingly helpful in interpreting the clause, is, it seems to me, beside the question. As I view the clause it limits the quality of the shares, not their alienability. That is to say, the limitation is upon the property in the shares, their normal dividend bearing capacity is curtailed, but there is no restraint upon their transferability. The shares came into being with this condition as a part of their essence; it was one of their original incidents, and the complainant contracted with the corporation and his fellow stockholders for them with this inherent characteristic attached. He and his associates are not deprived of the rights or privileges of stockholders, save as to dividends, and those he agreed to forego in a certain contingency, which has come to pass. He got all he bargained for, and what he has he is at liberty to sell and transfer. As to that there is no restriction. He may transfer his shares, such as they are, at will, and to whom he pleases. That he will not be able to find as ready a market or as smart a price as could be secured for shares otherwise unlimited, may be embarrassing and disappointing, but that does not impair the vendibility of the article he bought and has for sale. I can perceive no infraction of public policy.

Where shares are unqualified, full fledged, so to speak, restraints upon their transfer, whether by charter or by law, secured except for convenience of corporate regulations, are in contravention of public policy and void. The authorities are unanimous in enunciating this principle, but a call for its application in the present circumstances is inopportune. The cases cited by complainant are illustrative and conclusive of the doctrine. Morris v. Hussong Dyeing Machine Co., 81 N. J. Eq. 256; Chouteau Spring Co. v. Harris, 20 Mo. 382; Kretzer v. Cole Bros. Lightning Rod Co., 193 Mo. App. 99; Fisher v. Bush, 35 Hun 641; *In re* Petition of Klaus, 67 Wis. 401, 29 N. W. 582; Miller v. Farmers Milling & El. Co., 78 Neb. 441, 110 N. W. 995, and McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954. Longyear v. Hardman, 219 Mass. 405, 106 N. E. 1012, cited by the defendant, is not an exception. There the Court upheld a charter provision that none of the shares should be sold, hypothecated or transferred without the consent of three-fourths of the capital stock of the corporation. It was held to be valid upon the authority of Sec. 8 (e) of the Massachusetts statute, which provides that the articles of association shall state "the number of shares into which the capital stock is to be divided, and the restrictions, if any, imposed upon their transfer." Other cases cited by the defendant as recognizing, in a measure, the right of a corporation to control the transfer of shares, will be found to deal with pre-emption rights, or options, reserved to the corporation or to the stockholders, to acquire the shares of a retiring stockholder at a price fixed by a legal standard, as, for instance, the sum he offers to take from another, par, their book value, or what they are reasonably worth, to be determined by

appraisers and the like. Charter provisions of this character, obviously, are not restrictions on the transfer, but conditional contracts of sale, and specifically enforceable as contracts, and were sustained in the cases upon that theory. New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432; Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N. E. 991; Farmers M. & S. Co. v. Laun, 146 Wis. 252; Weiland v. Hogan, 177 Mich. 626, 143 N. W. 599; Garrett v. Phila. Lawn Mower Co., 39 Penn. Supr. 78; Bloomingdale v. Bloomingdale, 107 Misc. (N. Y.) 646; Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Borland's Trustee v. Steel Bros. & Co. Ltd., 1 Ch. (1901) 279. See also Barrett v. King, 181 Mass. 476, 63 N. E. 934; Scruggs v. Cotterill, 73 N. Y. Supp. 882 and Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57. Authority for the English cases cited by defendant as sustaining liens on shares for debts due the company from stockholders, and upholding refusal to transfer shares while the stockholder is indebted to the corporation, may be found in the Companies Act of 1862, 25 & 26 Victoria, 798, Section 14 of which provides that the companies may in their Articles of Association "adopt all or any of the Provisions contained in the Table marked A in the First Schedule hereto." Paragraph 10 of the Schedule reads "The Company may decline to register any Transfer of Shares made by a Member who is indebted to them." Banking companies are subject to the company legislation of 1862. 1 Hals. L. Eng. 582; see New London & Brazilian Banking Co. v. Brocklebank, 21 Ch. Div. 302; Brandford Banking Co. v. Henry Briggs Son & Co. Ltd., 12 App. Cas. 29.

(3) Furthermore, to exscind from the charter the limitation upon the right to dividends, or to ignore it altogether—and that is really the complainant's aim—would evolve property by judicial decree that had never been acquired by complainant, nor created by the parties, incorporators and their successors, nor had ever been within the contemplation of either. By the new order of things thus to come into being, the complainant's shares—not only those which he acquired by his initial purchase from the company, but also those that were allotted to him through the corporate scheme he now denounces—would take on qualities and characteristics for which no warrant can be found in his engagement. By the magic stroke of the judicial pen, so to speak, that which was a conditional fee would be metamorphosed into an absolute estate, if I may indulge in those terms; the shares would become perpetually dividend bearing, translated from choses in action to things in possession, as it were, and this, not by virtue, but in spite, of the complainant's undertaking. Equity determines, protects and enforces property rights, it never creates them.

(4) Now, if we were to accept the complainant's contention and argument at face value and as sound (a) that the Corporation Act does not grant charter privileges of conditional shares such as the defendant's articles of incorporation presume to appropriate, and (b) that the conditions imposed on the shares are unlawful restrictions upon their transfer, and void as against public policy, it would not be to his advantage or helpful to him in the least in maintaining this suit. In setting up the first proposition he is met by an equit-

able estoppel, or an estoppel in the nature thereof, and the doctrine finds excellent expression in the opinion of Justice Willard Bartlett in Wormser v. Met. St. Ry. Co., 184 N. Y. 83, as follows: "Where the objection to the acts of a corporation is that they are *ultra vires,* without being either *mala prohibita* or *mala in se,* a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the act, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel, 4th Edition, Chapter 19), or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here. The point is, that the seeking and acceptance of a substantial benefit which would be unavailable to the stockholders except as a result of the acts which he would attack as *ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract." See also Treadwell v. United Verde Copper Co., 134 App. Div. 394; Bonta v. Gridley, 77 App Div. 33 and cases cited. As to the second, the complainant was a party to the wrongful imposition upon the statute, and an active participant in the violation of the law, and he stands before the Court guilty, by his own confession, of transgressing the law by the

acts which he himself now condemns as vicious and injurious to the public weal. He comes not in a penitent mood to restore what he gained by the unlawful means, and to retrace his steps to virgin soil—*locus penitentiae*—but as an unregenerated sinner praying the Court to help him to more. Where the parties to the litigation are equally guilty in the execution of an unlawful venture, equity will help neither. Its strong arm becomes limp, as of paralysis, and it pronounces upon them its invariable sentence, *in pari delicto potior est conditio defendentis.* In St. Louis R. R. Co. v. Terre Haute R. R. Co., 145 U. S. 393, Mr. Justice Gray, in applying the doctrine, said: "The general rule, in equity, as at law, is *in pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the Court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant." See Harriman v. Northern Securities Co., 197 U. S. 244; Arnot v. Pittston & E. Coal Co., 68 N. Y. 558; Leonard v. Poole, 114 N. Y. 371; Unckles v. Colgate, 148 N. Y 529; Knowlton v. Congress, etc. Spring Co., 57 N. Y. 518, 103 U. S. 49, cited in 197 U. S. 244; Gould v. Head, 41 Fed. 240; Continental Securities Co. v. Northern Securities Co., 66 N. J. Eq. 274.

(5) The complainant's second cause of action—to restrain the corporation from paying the directors ex-

cessive salaries in the future—is, in view of the foregoing conclusion, not ripe for decision. Excessive salaries are in diminution of the dividends, and only those who are entitled to them may complain of their deprivation. The complainant sues only in right of the 125 shares originally purchased by him, and as to these he has lost his claim to dividends, only to be restored upon the surrender of his shares, and to be vouched to him by a ten years certificate. When he shall have complied with his contract and assumes the status of a dividend certificate holder he will then, and not until then, be in a position to complain that he is deprived of his just share of the company's profits.

The bill will be dismissed with costs.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between THOMAS J. PRINDIVILLE, Complainant, and JOHNSON & HIGGINS, Defendant.	On Bill, etc. Final Decree

This cause coming on to be heard in the presence of Robert H. McCarter, of counsel with the complainant, and John R. Hardin, of counsel with the defendant, and the pleadings and proofs having been heard and the arguments of the respective counsel considered, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by him in his bill of complaint;

It is, on this 24th day of May, 1921, on motion of Pitney, Hardin & Skinner, solicitors for the defendant, by the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this Court, does hereby order, adjudge and decree, that the bill of complaint in the above entitled cause be and the same is hereby dismissed.

And it is further ordered and decreed that the complainant pay to the defendant its costs of this suit to be taxed, and that execution issue therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
John H. Backes,
V. C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

THOMAS J. PRINDIVILLE, Complainant, against JOHNSON & HIGGINS, Defendant.	On Bill, etc. Notice of Appeal.

The complainant hereby appeals from the decree entered herein on the 24th day of May, 1921, dismissing the bill of complaint filed by the complainant against the defendant, and to the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

McCARTER & ENGLISH,
Solicitors of Complainant.

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

ROBERT H. McCARTER,
Of Counsel with Complainant.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THOMAS J. PRINDIVILLE, Appellant, and JOHNSON & HIGGINS, Respondent.	On Bill, etc. Petition of Appeal

To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of Thomas J. Prindiville, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 24th day of May, 1921, wherein your petitioner was the complainant and the said Johnson & Higgins were defendants, in this respect, to wit: That the said decree dismisses the bill of complaint filed in the said cause, and your petitioner humbly appeals from the said decree of dismissal upon the ground that the same is erroneous, for that, the bill ought not to have been dismissed but that the Court of Chancery should have accorded to the complainant therein the relief he praved for.

Your petitioner therefore prays that the said decree 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.

McCARTER & ENGLISH,
Solicitors for and of counsel
with Appellant.

Answer to Petition of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THOMAS J. PRINDIVILLE,
Complainant-Appellant,

and

JOHNSON & HIGGINS,
Defendant-Respondent.

On Appeal.
Answer to Petition of Appeal.

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters, which in the said petition of appeal are contended to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 24th day of May, 1921, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated.

And this respondent is advised and believed that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this respondent.

PITNEY, HARDIN & SKINNER,
Solicitors for and of counsel with respondent.

DIRECTORS — PERCENTAGE OF SALARY DISTRIBUTION — JOHNSON & HIGGINS

	1899	1900	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916	1917	1918
John D. Barrett	16.75	15.60	18.48	2.70	2.70	2.70	3.06	3.40	4.	4.	4.	3.	2.90							
John H.Gourlie	16.75	15.60	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Stephen Baines	15.75	15.60	18.48	18.48	14.82	14.82	9.43	10.	4.	4.	4.	2.	1.94	-	-	-	-	-	-	-
Wm. W.Curtin	10.	9.72	11.04	11.51	10.74	10.74	9.66	10.	10.	10.	10.	8.	7.75	5.75	5.75	5.	3.80	-	-	-
William B. Lowe	10.	9.72	11.04	11.51	10.74	10.74	9.66	10.	0.	10.	4.	2.	1.94	-	-	-	-	-	-	-
William Brockie	8.	7.46	8.84	11.51	13.19	13.19	11.02	17.05	4.	14.	15.50	-	-	-	-	-	-	-	-	-
William Krebs	5.	4.66	5.53	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Jas.F.Dickson	16.75	15.60	18.48	18.48	14.82	14.82	11.55	12.	7.	4.	4.	4.	3.87	3.	3.	3.	3.	2.	2.	2.
Robt.T.Lethbridge	-	7.73	4.42	5.46	5.39	5.39	5.66	7.40	7.50	7.50	10.	-	-	-	-	-	-	-	-	-
Wm. H.Davidge	-	3.11	7.69	4.80	5.79	5.79	5.56	7.40	7.50	7.50	-	12½	12.11	9.50	9.50	8.	7.	6.6	6.4	8.
F. G. Macomber	-	-	-	11.57	10.79	10.79	9.66	-	-	-	-	-	-	-	-	-	-	-	-	-
Stephen C. Hunter	-	-	-	7.98	5.18	5.18	5.66	7.40	8.	8.	9.	10 3/6	10.54	9.	9.	8.50	7.50	6.8	6.3	8.
William R. Coe	-	-	-	-	7.24	7.24	13.25	13.05	14.	14.	15.50	18.	17.48	18.25	14.25	12.20	11.70	11.40	10.5	11.6
J.S.LaBoyteaux	-	-	-	-	-	-	5.73	6.30	7.	7.	8.50	10.7/6	10.54	12.20	12.20	13.25	13.25	15.25	15.	16.5
George V. Coe	-	-	-	-	-	-	-	-	7.	7.	10.	12½	12.11	13.70	13.70	14.75	14.75	15.25	15.	16.5
J.A.W.Hopkins	-	-	-	-	-	-	-	-	-	7.	5.50	9.	8.72	9.50	10.25	10.60	12.	12.	12.	6.
J. H. Davey	-	-	-	-	-	-	-	-	-	-	-	2.7/8	2.30	5.	6.	6.50	7.80	7.8	7.8	9.7
Henry W. Lowe	-	-	-	-	-	-	-	-	-	-	-	2.1/8	2.06	5.	6.	6.50	7.50	7.5	7.5	9.
J.H.Botsford	-	-	-	-	-	-	-	-	-	-	-	2¾	2.67	5.	5.75	6.10	7.10	7.1	8.5	10.1
Thos.J.Prindiville	-	-	-	-	-	-	-	-	-	-	-	-	3.10	4.10	4.00	5.00	5.00	5.6	6.	6.
John S.Keegan	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5.	7.	7.

End of	Dividend Bearing shares	Shares ex-dividend	Total shares outstanding	Dividend Certificates
1899	2500		2500	
1900	2266.25	418.75 (a)	2685	418.75
1901	2509.48	543.75 (b)	3053.23	543.75
1902	2190.83	912.50	3103.33	912.50
1903	2792.73	932.50 (c)	3725.23	932.50
1904	2765.73	1009.50 (d)	3775.23	1009.50
1905	2765.73	1059.50 (e)	3825.23	1059.50
1906	2320.50	1059.50 (f)	3380.	1059.50
1907	1952.75	1477.25	3430	1477.25
1908	1535.	1945.	3480	1945
1909	1195	2325 (g)	3520	2325
1910	1155.75	2454.24 (h)	3610	2454.25
1911	1300.75	2416.25 (i)	3717	2416.25
1912	2416.25	2290.50 (j)	3704	2290.50
1913	1238.50	2465.50 (k)	3704	2465.50
1914	1189.50	2514.50 (l)	3704	2514.50
1915	1179.50	2524.50 (m)	3704	2524.50
1916	1110.50	2618.50	3729	2618.50
1917	1319.25	2409.75	3729	2409.75
1918	1625	2104 (n)	3729	2104

Held by Johnson & Higgins (a) 1900-418.75; (b) 1901-543.75; (c) 1903-20; (d) 1904-97; (e) 1905-147; (f) 1906-147; (g) 1909-745; (h) 1910-531; (i) 1911-13; (j) 1912-211; (k) 1913-200; (l) 1914-250; (m) 1915-300; (n) 1918-600;

New Jersey Court of Errors and Appeals.

Between—

THOMAS J. PRINDIVILLE,
Complainant-Appellant,

AND

JOHNSON & HIGGINS,
Defendant-Respondent.

On Bill, &c.
On Appeal from Decree in Chancery

APPELLANT'S BRIEF.

This is an appeal from an order of the Court of Chancery advised by Vice-Chancellor Backes, dismissing the bill of complaint.

The Issues.

Defendant is a New Jersey corporation with an oustanding issue of $450,000 preferred stock and $372,900 common stock, all of the par value of $100 per share.

Complainant-appellant, Thomas J. Prindiville, in his bill of complaint (pp. 1-6) states that in 1911 he was and ever since has been the owner of 125 shares of the common capital stock of defendant, and that defendant, out of its net earnings for the year 1918, which amounted to more than 205% of its common stock, declared and paid dividends of 205% on some of the outstanding stock, but failed to declare or pay a dividend upon his 125 shares, and refused and still refuses to declare or pay any dividend on his stock. He states that unless defendant is compelled by a mandatory injunction of the Chancery Court, it will continue to refuse to declare or pay any dividend on complainant's stock.

For a separate cause of action, complainant

states that defendant's directors are about to and will, unless restrained by the court, pay to James B. Dickson, Henry W. Lowe, William W. Curtin, William H. Davidge, Stephen C. Hunter, William R. Coe, W. Harvell La Boyteaux, George V. Coe, John Appleton Haven Hopkins, William H. Botsford, William N. Davey and John S. Keegan, who are a large majority of defendant's directors, as alleged salaries since January 1st, 1919, an amount equal to one-half of its net earnings for 1919, which said one-half greatly exceeds $1,000,000, and that the amount which it is proposed to pay to its directors for alleged salaries is about $1,000,000 above fair, legitimate or proper salaries or compensation for all services which they have performed for defendant, and that defendant will, unless restrained by the court, from year to year hereafter, pay to its directors, as alleged salaries, a very large proportion of defendant's earnings, which alleged salaries so to be paid will amount to many hundreds of thousands of dollars each year, above the legitimate salaries and compensation of such directors for any and all services performed or to be performed by them for defendant. Complainant then states that the effect of such payments will be to largely decrease the value of complainant's said 125 shares of stock and largely decrease the amount of money which will be available for the payment of dividends upon such stock. Complainant then prays that defendant be enjoined from paying to said directors, or any director, officer or employee of said corporation, or any persons, any amount as salary over and above the fair value of services rendered, &c. Then there is a prayer for general relief.

Defendant in its answer (pp. 7-27) as a defense to complainant's cause of action based on defendant's failure to declare and pay dividends on complainant's 125 shares of stock, pleads a clause of

its Certificate of Incorporation to the effect that if any of its common stock becomes the property of any person not an officer, director or employee of defendant, actively engaged in its service, or if any owner of its common stock ceases to be an officer, director or employee actively engaged in its service, such owner shall thereby and thereupon be disentitled to dividends on such stock until he shall surrender such stock, and receive in exchange a certificate entitling him to such dividends as may be declared upon such stock for the next succeeding ten years.

Complainant contends that this provision is in restraint of trade contrary to public policy, illegal and unenforceable.

Defendant then alleges that complainant from 1911 to 1917 was an active officer of defendant corporation, but that in 1917 he became an officer in the United States Navy, and about the end of 1918, after certain conferences between complainant and defendant's officers, in which complainant expressed great dissatisfaction with the way he had been treated by defendant (p. 23) complainant * * * "absented himself from the service of this defendant, and by his own definite choice abandoned any and all association with the business of this defendant and then and from thenceforth ceased to be an officer, director or employee of this defendant actively engaged in its service", and then states (p. 24) that when complainant ceased to be an officer, &c., of defendant, actively engaged in its service, as and from January 1st, 1919, he thereby and thereupon became disentitled to dividends thereafter declared upon his common stock, unless and until he should surrender said stock. It then states that complainant has not complied with its charter and by-laws relative thereto, and that he has not surrendered his common stock to defendant, and

(p. 26) that defendant is advised and alleges that complainant cannot successfully assert any right to dividends upon the common stock held by him unless and until he shall surrender said common stock and the certificates therefor to defendant and accept in exchange therefor a certificate entitling him to such dividends as may be declared upon such stock for the next succeeding period of ten years.

Defendant then alleges that certain common stock which was held by other persons who had been actively engaged in defendant's service, *and had ceased to be such,* had been surrendered by such persons and that they accepted dividend certificates, and that new certificates of stock equivalent in amount to the stock so surrendered, bearing no dividends for ten years, had been issued, and that part of same had been given to complainant.

As its defense to complainant's allegations with reference to salaries, defendant in its answer sets up a provision of its by-laws that the *compensation* of its directors and executive officers could be fixed by the directors, and that such compensation might be specific in amount or measured by the profits of the corporation, but that in neither case should the aggregate compensation of the directors and executive officers for any year *exceed the net profits* for that year. It then alleges that while complainant was connected with defendant, and before that time, it was the practice to pay one-half of all of defendant's net profits to the directors, to be divided up between them, and that complainant while he was connected with the Company took such share of the same as was allotted to him, and (p. 26) that therefore complainant is under such circumstances equitably estopped from now questioning the determination of salaries and the payment of dividends pursuant to defendant's charter and by-laws, in accordance with the methods and practices of de-

fendant from the time of its incorporation and during the entire period he was a stockholder therein.

The Trial.

ON THE TRIAL, complainant proved that he held and holds 125 shares of the common stock which he had received for a one-half interest in a successful insurance business in Chicago called Prindiville & Co., and that the net earnings of the defendant for 1919, after paying dividends on the outstanding preferred stock, exceeded 205% of the outstanding common stock, and that 205% dividend had in 1919 been declared on the other common stock of the defendant, out of defendant's net earnings of the year 1918, but that defendant had failed and refused to declare and pay the 205% dividend or any dividend on his 125 shares of stock. Complainant then rested as to this branch of the case.

Defendant, to sustain the defense pleaded by it, then offered in evidence the article of its certificate of incorporation to which it referred in its answer, which it asked the Court to enforce against complainant, and then introduced evidence to prove that after the beginning of 1919 complainant was no longer actively engaged in its service.

A sharp issue was raised as to whether complainant voluntarily quit defendant's service or was in effect forced to quit. The position taken by defendant, as we understand it, is that by the provision which it invokes against complainant, in this case, defendant can in effect compel the surrender of a man's common stock if he dies, becomes disabled while in its service, or if defendant's directors, with or without reason, conclude to terminate his active relations to defendant.

Defendant then endeavored to prove the alleged

estoppel which it pleaded. The evidence, however, showed that certain persons had *voluntarily* asked the corporation to accept their stock and issue dividend certificates for ten years, in exchange therefor. Every share of such stock, at the time such request was made, was owned by a person then actively engaged in the service of the defendant and who remained in its service after his request to exchange the stock for dividend certificates was granted. Quite some time after such requests were acceded to, common stock, equivalent in amount to the surrendered stock, bearing no dividends for ten years, was issued, and a part of it was delivered to complainant, who now holds it, but, as already stated, that is no part of the 125 shares involved in this case.

Defendant never *enforced* this provision against any person. No stock was ever surrendered by any person *involuntarily.*

The Vice-Chancellor, as we view his opinion, held to a considerable extent with complainant on the main legal question involved, but said that complainant was estopped, etc. A man has no lawful right to agree to violate the public policy of the State, and he cannot even, by way of estoppel, by doing or failing to do something, remove the legal barrier to the enforcement of an agreement or anything else that is contrary to public policy. It is as much beyond his power to waive, by his acts or deeds, the public policy of the State, as it is for him to agree in advance to violate it. If, however, the law were to the contrary, we will show that the facts in this case form no basis of any kind for an estoppel.

Much evidence was introduced upon the issues raised by the complaint and answer, with reference to what complainant claims are grossly excessive salaries about to be paid by defendant to its di-

rectors, etc. The Vice-Chancellor in effect held that complainant had no interest or right of any kind that would justify a court of equity in protecting him against the payment of excessive salaries; that complainant was not entitled to dividends unless and until he surrendered his stock, and that therefore he could not at this time raise the question as to the excessiveness of the amounts about to be paid to defendant's directors.

We hope to demonstrate, in this brief, that the Vice-Chancellor erred in his decision with reference to both branches of this case.

The Facts.

Although the final decision of the branch of this case dealing with the refusal to declare or pay dividends on complainant's 125 shares of common stock, turns largely, if not entirely, on questions of law, we believe that this court will desire to get a full view of the entire situation.

In 1899, Johnson & Higgins, a copartnership, was carrying on an insurance business in New York City, with branches in many of the principal cities of the United States. Johnson and Higgins, the founders of the business, had, before that time, retired from the co-partnership. The business was then being carried on by a number of other persons, as partners, who, for the purpose of escaping the personal liability of partners, and getting the protection and advantages conferred on corporations and the owners thereof, by the laws of New Jersey, concluded to and did in 1899 incorporate under the laws of New Jersey, using the name of Johnson & Higgins as the name of the corporation. The co-partnership continued in business under the same name. Wherever the corporation could lawfully, or conveniently do business, it did business. Wherever it could not, the copartnership continued to function. Except in the case of men who did not

wish to incur the partnership liability, the same men were directors in the corporation and members of the copartnership. In this brief, wherever we say "Johnson & Higgins", unless we specifically refer to the copartnership of Johnson & Higgins, we will refer to the corporation.

For many years, Prindiville & Son, a copartnership composed of complainant, his father and brother, conducted an insurance agency and brokerage, etc., business in Chicago. Sometime before 1911, Prindiville & Co., a corporation, was started in Chicago. That corporation took over quite an important part of the assets and business of Prindiville & Son. One-half of the stock of that corporation belonged to defendant Johnson & Higgins, and one-half to complainant, Thomas J. Prindiville. In 1911 the defendant bought complainant's half of the capital stock of Prindiville & Co., and thus became the absolute owner of that corporation. For his half of the stock, complainant received the 125 shares of defendant's common stock involved in this suit. Mr. Prindiville became a director of Johnson & Higgins, the corporation, and also a member of the copartnership. He had charge in Chicago of the business of Prindiville & Co., and of the corporation and copartnership of Johnson & Higgins, and also assisted in the management of their general business. Johnson & Higgins—both the corporation and the copartnership—grew steadily, and during the period of the World War the earnings of the corporation were almost fabulous. The net earnings of the corporation alone before deduction of so-called salaries were $3,137,788.02 in 1917, $2,275,869.55 in 1918, and $1,903,508.70 in 1919.

Mr. Prindiville's work, to quite a large extent, was in connection with marine insurance. When it looked as though the United States might be

involved in the war, he having previously spent his thirty days' vacation in a naval cruise on a battleship, and having assisted the naval representatives at the Great Lakes Naval Station, felt it his duty to join the Naval Reserves and put himself in a position where he might be called into the Government Naval service. When the United States entered the war, Mr. Prindiville was called into the Naval service. None of the other Johnson & Higgins directors or partners, although fourteen in number, entered the government service. Some of the directors apparently were annoyed that Mr. Prindiville had done so. Whether they were annoyed because they were to lose his services during a time when the insurance business would be very large, or whether they were annoyed that he, without consulting them, had put himself in a position where he could be called into active naval service, is an open question. That was the beginning of the breach between them.

Mr. Prindiville came to New York. Some of the directors expressed their dissatisfaction with the course he had pursued. They nevertheless voted to give him a leave of absence with full salary for the remainder of 1917. At the same meeting, the directors granted a leave of absence, with full pay during the period of the war, to all employees, who had or should enter the Government service. In 1918 Mr. Prindiville was in command of the Nantucket Section of the Navy. The directors passed a resolution declining to pay him any salary at all for 1918. This aroused his feelings. He felt that a corporation and copartnership that had made such tremendous sums out of the war, ought to feel proud that at least one of their very large number had gone into the service of the country. He expressed to them his great indignation at the treatment he had received, insisting that he ought to get his full salary, less the amount he received from the Government. Later in the year,

after Mr. Prindiville again protested feelingly and vigorously, Mr. La Boyteaux, defendant's president, suggested to him that the corporation might pay him one-half of his salary for 1918. Later on, the board of directors yielded to Mr. Prindiville's insistence, reconsidered the matter and agreed to give him, as salary, the same percentage of the net profits that he had received at the time he entered the Naval service. While Mr. Prindiville was away, two of what he called his running mates, Messrs. Lowe and Davey, who became connected with the corporation and copartnership practically at the same time that he did, and also all the other managing directors, had been advanced and given a larger percentage of the profits.

The following were the percentages of salaries paid by the corporation to the following directors, for 1917: W. R. Coe, 10.5; Laboyteaux, 15.; G. V. Coe, 15.; Botsford, 8.5; Davey, 7.8; Lowe, 7.5; Prindiville, 6.; Keegan, 3. (p. 88).

The difference between Prindiville's salary and that of Davey and Lowe respectively was equalized by the fact that Prindiville had more stock and therefore got a larger amount in dividends. The next year, the salaries of Davey and Lowe were increased, so as to make the aggregate which they received from salaries and dividends greater than the aggregate that Prindiville received from salaries and dividends.

The following were the percentages for the same directors, as first fixed for 1918: W. R. Coe, 12½%; LaBoyteaux, 17%; George V. Coe, 17%; Botsford, 11%; Davey, 10%; Lowe, 10%; Prindiville, none; Keegan, 8% (p. 93).

The following were the percentages for the same directors, for 1918, as modified after the directors agreed to give Mr. Prindiville a salary for 1918: W. R. Coe, 11.6; LaBoyteaux, 16.5; George V. Coe, 16.5; Botsford, 10.1; Davey, 9.3; Lowe, 9.; Prindiville, 6.; Keegan, 7. (pp. 95-96).

Mr. Prindiville, in the latter part of December, 1918, insisted that for 1919 he should be put on an equality with his running mates, and besides that, he should not be put behind Keegan, who had been his junior ever since he came into the corporation. This the directors refused to do. Prindiville felt that not treating him as well as his associates had been treated was taxing or penalizing him for having gone into the Government service. He put the matter before the president, Mr. La Boyteaux, and the other directors, but they were obdurate. Mr. Prindiville felt that he was being very badly treated by them and was practically being forced out of the Company. He felt that his dignity and self-respect would not permit him to submit to what he considered a penalization, and he in effect stated that he could not return to the Company unless the wrong that he felt had been done him, was righted. That had no effect. The complainant therefore brought this suit to obtain his legal and equitable rights.

The history of the contest between complainant and defendant's directors will very fully appear from the following letters and short excerpts from the testimony:

(pp. 219-222):

"SECOND NAVAL DISTRICT
Office of Commander, Nantucket Section.

JANUARY 14, 1918.

MR. W. H. LABOYTEAUX,
c/o Johnson & Higgins,
51 Wall Street, New York.

DEAR LABOYTEAUX:

Your letters and wires received and note that the Salary Committee is again taking up its disagreeable task of apportioning salary percentages, etc., for 1918.

I suppose that each Director has outlined what they have done for the firm and corpo-

ration during the past year and I enclose schedule showing service I rendered to the Government which in my opinion is for Johnson & Higgins as well. I also note that apparently some of the Directors feel that I should be penalized or fined for entering the service without first obtaining the approval of my partners. I thought this matter was all settled last spring when I explained my action. If this matter is again to be brought up as an excuse to curtail, even temporarily, my income from firm and corporation, I certainly wish to protest against such action. As described in my wire of January 9th, when on the Naval cruise in August, 1916, I was requested to sign articles agreeing to respond to any call from the Navy Department, this I refused, but did verbally agree to volunteer in case of war with any great power. The chance of such a thing occurring seemed very remote at that time. Sometime after I returned to Chicago I was elected Chairman of the Civilian Naval Association of that district and was in a position to obtain knowledge of Naval conditions, showing serious unpreparedness in certain branches of the service. We immediately organized nautical schools and recruiting committees and took other action promoting the welfare of the Navy in general. We experienced considerable difficulty in arousing proper interest and appreciation of the seriousness of the situation and in order to set an example and to give force to our work I joined the Naval Reserves with other members of our association and promptly advised you of my action. This I considered my right to do and certainly did not look for any criticism on the part of my partners, as I considered it was the duty of all of us to do anything in our power to help the Government out during this crisis.

Johnson & Higgins has been a material gainer by this World's war, its profits have increased many fold owing to same. Personally I think our Directors should be proud to have as many members as possible in active service and those that cannot go should cheerfully and willingly assume the burden of those

who do, and see that their interest and relative position in the firm and corporation be held and preserved for them, just as many other corporations are doing, for example, the Association of Lawyers of New York are assuming the practice of those in the profession who went into active service, handle their cases for them free of charge and turn over entire fees. I cannot for the life of me see how any of our Directors could contemplate taxing or penalizing a partner for patriotic action at a time like this, which would mean his loss and their financial gain. I don't think for one moment that Willis, Faber & Company are doing it. The Naval service is a serious one entailing no little personal risk. I entered it because I thought it was my duty and the patriotic decent thing to do and I certainly expect my partners to do the patriotic decent thing by me. Of course it may be human for each one to think that they are carrying a little too much of the burden and to feel that the other fellow's game is easier than his own, I have thought so myself, I have envied you all your liberty, your home comforts, etc. You on the other hand seeing men of the service on Liberty have doubtless envied their free of care air, etc. Of course there is another side to it all and each must realize and appreciate the position of the other. If I can be of greater service to the Government by returning to Johnson & Higgins, or if any Director of Johnson & Higgins can be of greater service to the Government than I, and cannot be spared by the corporation, why not apply to have me detailed to business and let him go. The Department at Washington would be quite agreeable to such a trade if it was to the interest of the Government to make it, and on my part I only want to give the best service I can to the cause and if I would be doing so by returning to business I would be glad to do it.

I would like to appear before the Committee and hear their views on this subject. Up to this writing the Commandant has refused me permission to leave, owing to conditions affecting the patrols of this section. They are im-

proved somewhat and I may be able to get away the end of this week, but thought it best to outline my ideas for your consideration and that of the Committee.

Yours truly,

THOS. J. PRINDIVILLE."

Mr. Prindiville then appeared before the Salary Committee. After the meeting of that Committee he met President LaBoyteaux. Complainant testified:

(p. 225): "Q. And was any conclusion reached by the committee or was the matter left, so far as the hearing was concerned, undetermined? A. There was no conclusion reached. I think after the meeting Mr. LaBoyteaux came to me and inferred or suggested that if I would accept the reduction of one-half my salary why he thought he could get that approved by the committee."

Then Mr. Prindiville wrote the following letter to Mr. LaBoyteaux:

(pp. 229-232):

"SECOND NAVAL DISTRICT
Office of Commander, Nantucket Section
JANUARY 29, 1918.

MR. W. H. LABOYTEAUX,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

DEAR LABOYTEAUX:

Have given a great deal of thought to the subject discussed with the Salary Committee on the 21st, and will say that the arguments presented by the members of the Committee failed to impress me or cause me to change my own point of view. At the meeting of the Board on April 18th, two resolutions were passed. One giving me leave of absence during the period of my military service and that my salary continue in full force during my military service in the current fiscal year. The

other resolution stated that the corporation would pay the salaries to the members of the staff for the period of their service during the war, less the amount received from the Government. Why should any exception to this latter resolution be made in my case? Why do they ask me to accept reduced compensation now? Is it because some partner is in financial straits, or is it to promote some war or other worthy charity? To this I would cheerfully contribute at least my share, but to be taxed or levied on by my own partners for being in Government services at this crisis, is something I cannot understand. If Morgan & Co. can give the services of such men as Davidson and Stettinius, and the Guggenheims the services of Billy Potter. It seems strange that Johnson & Higgins with fifteen partners, cannot assume the burden of having one of them in active service without asking him to assume a financial loss that the others do not share. I know that Charley Pfister (who is a German) of the Pfister & Vogel Leather Co. of Milwaukee, gave their London representative, who is an English Captain, a leave of absence with full pay for the duration of the war. The partners of my friend Nat Ayers, of Boston, did the same thing.

What do you think our friends, Willis, Faber & Co. are doing in regard to their partners in the service. In speaking about the Hopkins case, you or George Coe mentioned the fact that some of the Underwriters had criticized his lack of patriotism. I wonder what Bird of Chubb would say if they knew of the action your committee was contemplating. Jack's argument about leaving the Service last Spring out of consideration for his partners, carries no weight with me, for that was a matter for him to decide. My own idea of his action is that he left the service because he was bored to death with its routine and was mighty glad for personal reasons to get out, just as I will be when this thing is over.

My present position is just this, I feel that I am entitled to the same relative position in

the firm and corporation that I held when I went into the service. Last year the Committee partially corrected, by increasing my salary, an injustice that was done me three years ago and I was placed up with Lowe and Davy and I understood that this year increases would be granted to Lowe, Davy, Jack and myself, and while my services for practically all of 1917 were in the interests of the Government, they were well performed and such that any partner of Johnson & Higgins might well be proud, and I certainly expect my relative position with the above named partners maintained. If there are any retired interests in the Johnson & Higgins corporation, like the Brockie Estate, etc. that object to such action, I will guarantee to obtain their approval or pay them the difference myself. As stated in my previous letters on this subject, I am perfectly willing to be detailed back to business if other directors of Johnson & Higgins can give the Government greater service, but under the conditions as they are, I must ask the committee to give careful consideration to the claim I make of being entitled to the same relative position in the firm and corporation of Johnson & Higgins. as I held before I entered the service, and if the committee are disinclined to adopt this view, I must be allowed to put the entire matter up to each Director individually so that he will have time to carefully consider and vote intelligently on the Committee's recommendations.

Some members of your Committee might take the position that if I don't like the action they take, why don't I resign. My answer to this would be the same as on the question of yearly compensation, why should I resign when such action would probably cause me financial loss, for I have an interest in the good will of Johnson & Higgins and unless I receive a fair price for my holdings I would be sacrificing same, and as I feel absolutely sure in my mind of the equity and soundness of my position, I see no reason why I should be asked to make such a sacrifice.

Yours truly,

THOMAS J. PRINDIVILLE"

To this Mr. LaBoyteaux replied as follows: (pp. 232-233):

"NEW YORK, February 9, 1918.

Mr. THOMAS J. PRINDIVILLE,
Office of Commander,
Nantucket Station, Nantucket, Mass.

MY DEAR TOM:

Your letter of January 29th was received this morning and has been brought before the Committee on Directors Salaries for action.

I am sorry you have written such a letter, which has impressed all of us most unfavorably, as indicating not only a very biased state of mind, but is most unfriendly and unfair in its tone, containing inferences for which, as you well know, not the slightest foundation exists.

After full consideration, it is the unanimous decision of the Committee that, as salaries to our Directors are paid for time and services given each year to the business of the corporation, the Committee do not feel that they would be justified in recommending to the Board of Directors any salary allotment to you for the year 1918, unless and until such time as you may again become engaged in active work for the corporation.

I am advising you immediately of this Committee conclusion, so that you may take such action as you wish in laying your arguments before the individual directors, as you suggest you desire to do.

The matter will come up for action at the Board meeting on Wednesday, February 20th.

Sincerely yours,

WM. B. LABOYTEAUX."

On August 18th, 1918, Mr. Prindiville, not having heard anything further about his 1918 salary, wrote President LaBoyteaux the following letter: (pp. 236-238):

"AUGUST 18, 1918.

MR. W. H. LABOYTEAUX,
c/o Johnson & Higgins,
51 Wall Street,
New York City.

DEAR LABOYTEAUX:

Yours of recent date received, enclosing schedule of firm's percentages for 1918, and note that you would like me to stop in and sign same when next in New York. I have not been in New York since early in June and it is hard to tell when I will be there again, for you can well understand, owing to certain activities in this vicinity, I would not want to leave my station at present and in fact it is a question whether I could obtain permission to do so. I am not keen for traveling at this time as I am still lame from an accident that occurred on one of my new boats. So all things considered, if you desire my signature promptly, would suggest that you forward to me firm schedule by registered mail.

The half-year has gone by and up to this writing have not received any salary check for 1918, so infer the Directors approved the recommendations of the Salary Committee in not granting me a salary for 1918.

I hope that the Directors will reconsider this action for the situation has developed, showing clearly that this war is yours, as well as mine, and that in volunteering for service I was acting to the best interest of Johnson & Higgins, and if a greater number of business men all over this Country had come to an earler realization that this was their own struggle, we might now be settling down to normal business prosperity and the early sacrifices would have been a thousand fold repaid. At present and until this war is won the Government will need and will take practically the entire earnings of firms, corporations and in-

dividuals, and it behooves us all, (the Directors of Johnson & Higgins included) to put forth our best efforts to bring the war to a successful conclusion at the earliest possible moment.

I cannot believe that it is to the best interest of Johnson & Higgins to have the salary of one of its Directors cancelled on account of his entering the service or his relative position in the firm or corporation disturbed. The attitude of representative firms and corporations on this subject is well known. The attitude of the Navy Department on unnecessary discrimination against men in its Service is quite clear. The few close friends that I have discussed this subject are unanimous in endorsing my perspective and I certainly look to my partners to reconsider their action apparently taken last February without full realization of their obligations and responsibilities in this great war.

Yours very truly,

THOMAS J. PRINDIVILLE."

On December 23rd, 1918 (pp. 239-40), defendant's board reconsidered its refusal to give Mr. Prindiville his salary for 1918, and voted it to him. As already stated, Mr. Prindiville then found that for the next year, 1919, it was proposed not to give him the same increase in salary percentage that had been granted to his "running mates" who did not enter the Government service. He then wrote to President LaBoyteaux as follows:

(p. 116-117):

"NEW YORK, N. Y.,
December 23rd, 1918.

MY DEAR LABOYTEAUX:

Thus far our talks commencing on December 2nd have gone forward in an informal way and you will understand of course, that in writing you now I am not undertaking in any way to cover my views of the situation as I have expressed them in detail orally, this letter being designed purely to give you a statement

over my signature, as you request, of the minimum adjustment which I would be willing to make in the interests of securing a prompt arrangement of our differences.

My ideas are as follows:

In January, 1917, the Salary Committee saw fit to grant me such increases as would bring my total income for the year 1917 equal to that received by my running mates, Messrs. Lowe and Davey; and while I feel that for 1918 my interests should be increased to correspond with theirs, I am willing to accept (in order to try to secure a prompt adjustment) the 1917 interest of six per cent. for 1918, less the salary I received from the Government, say $5,000. And also less the salaries of any clerks or other employees who were detailed to my work during my absence, approximately $5,000.

Now, for the year 1919, I feel I am clearly entitled to my relative position and that my interest for that year be put at such a figure that my total income from the business for 1919 would approximately equal that of the above-named running mates, Messrs. Lowe and Davey. I have not before me the total results of the business for 1917, nor have I any means of approximating what the results for 1918 will be, so cannot give the exact interest which would make my total equivalent to those partners above-mentioned. I will gladly leave the details to be worked out later by the Salary Committee, but before I could consistently accept the situation I feel that assurances of such action as above outlined should be given.

Yours truly,

THOMAS J. PRINDIVILLE."

In fixing "salaries" and the relative amounts to be received by the directors as "salaries", dividends on stock and from the copartnership were taken into consideration.

On December 24th, Mr. LaBoyteaux replied as follows:

(pp. 119-122):

"JOHNSON & HIGGINS,
49 & 51 Wall St.,

NEW YORK, December 24, 1918.

MR. THOS. J. PRINDIVILLE,
Ritz-Carlton Hotel,
New York, N. Y.

MY DEAR TOM:

At a meeting of the Board of Directors held yesterday a full discussion was had on the situation as concerns yourself, and I have been instructed to write you as follows:

After a very careful consideration of all that you have said to us on the subject of your salary and interest in the business for 1918, it is the unanimous opinion of all those present (Mr. Hopkins, Mr. Curtin and Mr. Loines being absent) that your contention is not well grounded, but, on the contrary, the treatment accorded you by your partners and fellow-directors has been extremely liberal. I desire to call your attention to the following facts:

1. Notwithstanding at the time it was well-known to you that all of your partners were working under tremendous pressure and strain and needed all of the assistance that could possibly be had, you decided it was your duty to enter the Naval Reserve, without consultation or any notice to them, and did so, leaving our Lake business, of which you had been particularly in charge, either to be added to the duties of your already overburdened partners or absolutely abandoned to its fate.

2. Under our plan of organization salaries are paid to directors for active service. The resolution voting salaries is made subject to the following clause:

'If the services of any of the above-named directors shall be for a shorter time than the full year, then his compensation shall be at the rate of one-twelfth of the stated yearly compensation for each full month of service.'

At the time you appeared before the Board in April, 1917, and announced that you had joined the Naval Reserve and expected at any moment to be called for military service, the above resolution was referred to by our Chairman, who made the statement that he felt consideration by the Board was necessary on account of your probable inactivity in the affairs of the corporation.

You stated at that time you were willing to leave your interests in the hands of your co-directors. The Board granted you leave of absence, and notwithstanding the resolution above mentioned, voted to continue your salary in full force for the current fiscal year.

As a result of this voluntary action of the Board you received for 1917 a salary of $89,700, notwithstanding your absence for practically the entire year.

3. At the beginning of 1918 your interest in the firm was increased (albeit your absence) by the pro rata of certain retiring interests.

Your stock interest in the corporation was not disturbed, although, under its terms, a surrender could have been demanded.

From these interests you will receive for 1918 approximately $40,000 to $50,000, which certainly does not indicate any desire to penalize you.

You have in your discussions repeatedly urged as a reason for continuing your salary for the year 1918, our duty to our country. Naturally different ideas exist as to what constitutes patriotism, but that you may know we have not been entirely lacking in this respect, you may be interested to learn:

That the corporation and firm has subscribed for Liberty Bonds in an aggregate amount of $4,250,000.

That they have contributed to war work (Red Cross, Y. M. C. A. and similar organizations) about $90,000.

And they have paid the salaries of employees who entered the service and who really needed the financial assistance, an aggregate of approximately $100,000.

And are continuing to pay the salary of such employees until the war terminates.

The views of our directors in respect of yourself have not been influenced by any question of the money cost or by any desire to deprive you of anything to which you are either morally or equably entitled. The entire question has been considered entirely from our viewpoint of the principle involved. We have felt and continue to feel that we have been most liberal with you. We voluntarily paid you in 1917 the very handsome sum of $134,500. And in 1918 will pay you a further amount of $40,000 to $50,000. Had we felt so inclined, we need not have paid you anything after you had become inactive.

Notwithstanding all of the above and the very strong views held by all of us that your demands are quite unjustifiable and cannot be sustained, it is nevertheless the most earnest desire of all that any such feeling as you have expressed be dissipated.

It has therefore been decided, in an effort to promote harmony and to dispel from your mind any idea that you have been badly treated, to meet your demand, and, for the year 1918, it has been agreed that your salary would be fixed at the rate which you were receiving when you left, less only the deduction of $5,000.00—pay received by you from the Government—which you have suggested be deducted.

The above gives you identically what you would have received had you continued actively in the business.

It is my sincere hope that this action on the part of your co-directors will accomplish the purpose intended.

Sincerely yours,

(sgd) W. H. LaBoyteaux

President."

On December 30th, Mr. Prindiville wrote Mr. LaBoyteaux as follows:

(pp. 123-125):

"DECEMBER 30, 1918.

MY DEAR LABOYTEAUX:

Your favors of December 24th and 26th received, and regret to note that the Directors did not see fit to accept the suggestions contained in my memorandum of the 23rd. My letters of December 27th, 1917, January 14th and 29th, 1918, outlined quite clearly my perspective whereby I do not consider it right nor just for a firm or corporation that benefited largely owing to war conditions to tax or penalize a member or director that entered active service to help the Government out during the present great crisis.

Your refusal to give me back my relative position in the corporation violates the above principle, as it is deliberately penalizing me for being in Government service. For in January, 1917, the Directors saw fit to give me a small increase in corporation salary to establish my position with Messrs. Lowe, Davey, etc. who entered the corporation about the same time. A couple of months later, having joined the Naval Reserves, I was called into active service and from that date until I reported to you on December 2nd last I was doing an honorable service in assisting the Government in this crisis.

Early in 1918, the corporation interests of some of our retiring partners were distributed among the remaining active partners. The salary increase received by my running mates, Messrs. Lowey, Davey, etc., figures about 40%, and of the more recent partner, Mr. Keegan, considerably more than this. So I feel it is quite fair to assume that had I not gone into the service of the Government and my entire time had been given to the business of the corporation, I would have had the same proportionate increase in salary for 1918 as my running mates.

Now, in asking me to accept the 1917 basis

for my 1919 salary, you are penalizing me for entering the Government service, when the financial results of the corporation do not warrant any such action. So your intention creates a situation which I cannot accept, so I have asked my counsel, Mr. Royall Victor, to confer with you on a fair value for my J. & H. holdings and, in consideration of a prompt and satisfactory settlement of same, I will agree not to engage in the insurance brokerage business for one year from January 1, 1919.

I feel this whole matter deeply and regret exceedingly that you could not adopt the principle involved in this situation. The war was a period of sacrifice and suffering for practically every one. The strain and responsibilities were very great on both the man at home and the man that went into active service. To penalize the latter unnecessarily is in my opinion morally wrong, and I was in hopes you would all see it in this light.

Yours very truly,

THOMAS J. PRINDIVILLE."

Mr. LaBoyteaux, referring to Mr. Prindiville, testified:

(p. 139): "Q. Well, did he say anything as to what his attitude would be if his suggestions were not conceded? A. At the meeting in which he made his demand he said that he was not satisfied; he said he had to some extent lost confidence in his co-directors and that he was not satisfied to go back to Johnson & Higgins until this matter had been straightened out to his satisfaction, and we asked him—at least I asked him, 'What do you mean by that, Tom? What do you mean that you won't come back?' He says, 'Well, I have made—I won't come back to work with the corporation. I feel that we have got to settle this thing first.' And after some pressure as to exactly what he did mean he finally said, 'I am going to leave unless the corporation recognizes my demand.'

Q. And did these negotiations continue after this date you have now referred to? A. The negotiations continued up around until just before Christmas, I think the 23rd of December, and the 23rd of December we had a final meeting. Mr. Prindiville was down talking with Mr.—I think Coe, George Coe, and William Coe and myself, on this general subject, and he represented at that conference that unless we gave him what—he says, 'Our perspective is different. Unless you can recognize my perspective I am going to get out.' And finally the thing finally terminated in the meeting of the board, at which time we decided to pay him for the year 1918 exactly the same as he had for—that is exactly on the same basis that he had for 1917, and had prior to the time he left for the war, although, of course, the figures would be different because of the different net earnings of the corporation, and we also decided——"

Mr. Prindiville testified:

(p. 254): "Q. Do you recall any other different statement by you in your previous talk with Mr. LaBoyteaux, prior to the correspondence between the lawyers, than you have stated. In other words, Mr. LaBoyteaux testified yesterday that his recollection was that you stated, 'I am going to leave unless the corporation satisfy my demands,' and that you repeated that direct averment, 'I am going to leave unless the corporation satisfies my demand.' Have you any recollection of making any such statement as that? A. Not of making any such statement as that. I think I did say, 'I will have to leave,' on account of the position they put me in. It was a case of accepting a position which would cause me to lose my self-respect and pride, and the alternative was of getting out; that is all."

On cross-examination, Mr. Prindiville, in answer to Mr. Hardin's questions, testified:

(p. 314): "Q. If in 1919 you had been conceded by the corporation the percentage that would have produced equality with the gentlemen you refer to as running mates you would still have declined to go with Johnson & Higgins? A. No.

Q. Then isn't it all a question of dollars and cents? A. No. It is a matter of principle. If a wrong is corrected why it is eliminated, isn't it?

Q. If your price is met the principle is corrected? A. Price? Yes; it was a matter of principle.

Q. Principle depends on price? A. No; not at all. If it was a matter of price I would have accepted. Why should I accept the financial disadvantage of leaving Johnson & Higgins? You must credit me with a lot of good judgment."

I.

The provision which defendant's incorporators inserted in its Certificate of Incorporation, and which defendant invokes and asks the Court to enforce in this case, absolutely prevents the holder of its common stock from ever selling or transferring it. If it fails to do that, then it fails of its sole and only purpose. Such a provision as that is contrary to the statutes of New Jersey, and contrary to law, even in the absence of statutory enactment. It is in "restraint of trade". It is violative of public policy, illegal, and therefore is void and unenforceable.

Defendant's Certificate of Incorporation (pp. 372-383) sets forth that it is incorporated under an Act of the Legislature of New Jersey entitled "'An Act concerning Corporations' (Revision of 1896), and the several Acts supplemental thereto and amendatory thereof." The Corporation has power, among other things, to take over and operate the business of the copartnership of Johnson & Higgins; to act as agents, etc., or managers for any marine, fire, life or accident insurance business; to guarantee the fidelity of persons in situations of trust; to guarantee the due performance of any contract or obligation of any person or corporation, etc.; to guarantee the payment of money in respect of bonds, mortgages, stocks or other securities, of any person or corporation; to indemnify employers against liability, injury, damage or loss by reason of the negligence, fraud, theft or robbery, etc., of

their employees; to guarantee in respect of loss, damage, diminution or injury to person, estate or property, or in respect of legal liability or responsibility; to act as insurance brokers, and adjusters; to state adjustments of general average of losses; to carry on the business of a salvage corporation, to acquire the whole or any part of the business of any persons or corporations carrying on or proposing to carry on any class of business which the Corporation is authorized to carry on; to hold, purchase, mortgage and convey real and personal property in any State, and in any foreign country; to carry on any other lawful business which may be judiciously carried on in connection with one or more branches of the Company's business, excepting Savings Banks, etc.

Complainant showed on the trial of this case that he owned and owns the 125 shares of defendant's common stock to which we have already referred; that defendant, out of its 1918 earnings, in 1919 declared 249% dividends upon all outstanding common stock, except complainant's, and in 1919 and 1920 out of the earnings of 1919, 100%, on all the outstanding common stock except complainant's, and has refused to declare or pay such, or any, dividends on complainant's stock. That, in and of itself, made out complainant's case.

Complainant then rested, and defendant, as its defense, introduced in evidence the following provision which its incorporators inserted in its Certificate of Incorporation which, they filed with the Secretary of State, and which provision it set up as an affirmative defense to complainant's cause of action:

> (pp. 377-8) : "In the event that any share or shares of the common stock of the Corporation become the property of any person who is not

an officer, Director or employee of the Corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the Corporation ceases to be an officer, director or employee of the Corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the Corporation, upon which surrender he shall receive from the Corporation in exchange for such stock a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the Corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the Corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends."

Defendant then assumed, as it was bound to do, the burden of proving the allegations of its answer that complainant "ceased to be an officer, director or employee of the defendant actively engaged in its service", and then it asked the Court to enforce the foregoing provision of its Certificate of Incorporation, including all the penalties therein prescribed, resulting from the fact which it claimed it established, that complainant had ceased to be an officer, director or employee actively engaged in its service, and had failed to surrender his stock to defendant and accept a certificate entitling the

holder to dividends, if they should be declared, for the next ten years, on a similar quantity of stock.

The effect of the provision of defendant's Charter, which it asks the Court to affirmatively enforce against complainant, is that it absolutely prevents the holder of any of its common stock from ever selling or transferring his stock, *except possibly that he may, while still actively engaged in the service of the Corporation, sell it to a director, etc., who is then actively engaged in the service of defendant, but to no one else.*

The fact, however, that he might possibly have the right to sell to another director, who is under no obligation to purchase it, but could not sell to any one else, is a restriction that is just as illegal as one that absolutely prevents him from selling or transferring his stock to any one.

The Statutes of New Jersey specifically make stock in a corporation, personal property, and transferable.

Section 20 of the General Corporation Act, Revision of 1896, reads as follows:

> "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; * * *"

Shares of stock, being personal property, it is absolutely beyond the power of anybody either by placing any provision in the Certificate of Incorporation of the Corporation, or in a contract or will or anywhere else, to deprive them of the attributes of alienability, or deprive the owner of the power to sell them, and consequently any provision which produced such result, is in restraint of trade, is illegal and unenforceable. If there had been no Statute in this State bearing directly or indirectly

on the subject, the authorities are practically unanimous that a restriction against the alienability of corporate stock is contrary to public policy and void.

Not only does Section 20 make corporate stock personal property, from which its alienability inevitably follows, but in addition expressly declares that shares of stock shall be *transferable* on the books of the corporation in such manner and under such restrictions as the by-laws provide.

Vice-Chancellor Backes, in his opinion in this case, referring to the provision of the defendant's Charter above quoted, said:

> (p. 424): "* * * As I view the clause it limits the quality of the shares, not their alienability. That is to say, the limitation is upon the property in the shares, their normal dividend bearing capacity is curtailed, but there is no restraint upon their transferability. * * * He and his associates are not deprived of the rights or privileges of stockholders, save as to dividends, and those he agreed to forego in a certain contingency, which has come to pass. He got all he bargained for, and what he has he is at liberty to sell and transfer. As to that there is no restriction. He may transfer his shares, such as they are, at will, and to whom he pleases. That he will not be able to find as ready a market or as smart a price as could be secured for shares otherwise unlimited, may be embarrassing and disappointing, but that does not impair the vendibility of the article he bought and has for sale. * * *."

It must strike one that it would be fantastic to say that one can sell a piece of real estate but that the purchaser cannot occupy it or that he cannot receive the rents from it except for a period of ten years.

The Certificate of Stock issued by defendant to complainant for the 125

shares involved in this suit, reads as follows:

> (pp. 347-8): "THIS IS TO CERTIFY that Thomas J. Prindiville is entitled to One hundred and twenty-five shares of the Common Capital Stock of JOHNSON & HIGGINS, transferable only on the books of the Company by the holder thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed."

Subsequently, in the same certificate of stock, there is a statement (p. 348) that "In the event that any share or shares of the Common Stock of the corporation becomes the property of any person who is not an officer, director", etc., practically following the provision of its Charter quoted above.

This certificate shows that the complainant is the owner of 125 shares of the common stock of the Company, which includes the right to dividends for all time to come.

Eisner v. *Macomber,* 252 U. S. 189:

PITNEY, *J.*

> (p. 208): "Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole,—entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects,—entitled to vote at stockholders' meetings, *to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors.*"

Jackson's Administrators v. *Newark Plankroad Co.*, 31 N. J. Law, 277, 279:

> "It is one of the obligations of a corporation, inherent in its essential nature, to permit, at the request of the holder, a transfer of its stock, and as this is an obligation not due to the members at large, but exclusively owing to the individual stockholder, it was properly held that the law, upon its ordinary principles, implied an agreement on the part of the company to discharge such specific obligation. But the right to transfer stock is no more an incident to its ownership than is the right to dividends upon it; and the duty of the company, in making a distribution of profits, to appropriate a quota to each share of stock, is, in all respects, as definite and specific as is the duty to allow a transfer of stock on a sale. In neither case does the act to be done rest in the discretion of the company, and in both of them the duty is due, not to the members in general, but to each separate stockholder. It is not perceived how these two classes of cases are to be discriminated."

The Vice-Chancellor in his opinion said that this provision of the defendant's Charter "limits the quality of the shares, not their alienability. That is to say, the limitation is upon the property in the shares, their normal dividend bearing capacity is curtailed, **but there is no restraint upon their transferability.** He may transfer his shares such as they are, at will and to whom he pleases".

Jackson's Adm'rs. v. *Newark Plankroad Co.*, 31 N. J. Law, 277, 279 (Supreme Court), BEASLEY, *C. J.*:

> "It is one of the obligations of a corporation, inherent in its essential nature, to permit, at the request of the holder, a transfer of its stock. * * *"

Flint v. *Stone Tracy Co.,* 220 U. S. 107:

> (p. 162): "* * * the tax laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, *the transfer of property interests by the disposition of shares of stock,* the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things *inhere* in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships."

"Transferring" stock means that the stock is delivered to the corporation which in turn delivers a certificate for exactly the same amount and kind of stock to the new owner, showing him and not his "vendor" to be the owner of the stock.

10 *Cyc,* pp. 594-595.

14 *Corpus Juris,* p. 677, §§ 1047-8.

If the Corporation permitted a real transfer of the stock, then the provision on which the defendant relies would become nugatory and of no force and effect whatsoever.

If this provision of defendant's Charter is to be enforced, it would be impossible for complainant or his vendee to obtain a transfer of these shares. The shares could not be transferred simply because the defendant would not make the transfer and no transfer could be made by any one but the defendant.

Upon delivering the stock to defendant for transfer, defendant would not issue new stock to him;

it would deny the alienability of the stock delivered to it for transfer; it would treat the stock as having been "surrendered" to it under its Charter provision, and cancel it, and then insist on its right to issue to the "vendee" not a certificate of stock, but an agreement on its part that if its directors declared any dividends for the next ten years he should have them, and at the end of that time he would be done.

In the course of the trial, the following occurred:

(pp. 87-88): "Mr. Hardin: Of course, that is not the case. I don't know exactly what is in your Honor's mind, but what happens is, as a director retires, the stock itself, subject to the dividends certificate for ten years, goes back to the corporation and lays in the corporate treasury, and presently it is reissued to somebody else.

The Court: Not somebody else, but members of the concern that are stockholders.

Mr. Hardin: The then members, that was the practice. The articles merely gave authority for its reissue. Every time it went out, it went out pro rata to all the existing common stockholders, or if they departed from the pro rata arrangement, it was by agreement between themselves and the new directors that had come in participated in that distribution.

The Court: They only got in by having new stock issued to them.

Mr. Hardin: In consideration of their worth to the concern.

The Court: New stock, but none of the old retired stock.

Mr. Hardin: Not necessarily. I haven't made the analysis. I think it may be found that it was not always new stock. It didn't make any difference. The stock, when it got back, minus the dividend privilege, could be issued by the corporation under any conditions that it wanted. They could sell it if they wanted to. It was an asset of the corporation.

The Court: Sell it to an outsider.

> Mr. Hardin: *Couldn't sell it to an outsider, because it would immediately be subject to the dividends certificate and have to be turned right back* * * *."

At another time, during the trial the following occurred:

> (Record, pp. 98-99): "Mr. Hardin: The corporation does not deny Mr. Prindiville's right to dividends, but we say he has got to turn in his stock before he gets the right to collect the additional dividends."
>
> * * * * *
>
> "Mr. Hardin: I say, whatever happened to him, it is our contention under this charter he retired and ceased to be active.
>
> The Court: Had the Board of Directors a right to retire him?
>
> Mr. Hardin: It is our contention, having become inactive, he has ceased to have the right to dividends until he turns his stock in and takes his dividends' certificate * * *."

The Vice-Chancellor, referring to complainant, says: "he is at liberty to sell and transfer. He may transfer his shares, such as they are, at will, and to whom he pleases".

He cannot sell and transfer his shares, because shares of stock imply and mean the right to earnings on those shares for all time. The shares, without those rights, are practically nothing.

Wynehamer vs. *The People,* 13 N. Y. 378:

COMSTOCK, *J.*

> (pp. 396-7): "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. * * * Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them

exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says, (1 Com. 138): 'The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says, (2 Com., 320): 'The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.'

32 *Cyc.* 677.

"* * * Indeed property is often defined as the right to possess, use, enjoy, and dispose of a thing, or the power of one to do with it as he pleases so long as he does not violate the law."

"*Chicago, etc., R. Co.* v. *Englewood Connecting R. Co.,* 115 Ill. 375, 385; *Grand Rapids Booming Co.* v. *Jarvis,* 30 Mich. 308, 321; *Jaynes* v. *Omaha St. R. Co.,* 53 Nebr. 631, 653; *Wynehamer* v. *People,* 13 N. Y. 378, 396; *Sherman* v. *Elder,* 24 N. Y. 381, 384; Ex. p. Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 295; 1 Blackstone Comm. 138.

* * * * *

Stevens v. *State,* 2 Ark. 291, 299; *Crow* v. *State,* 14 Mo. 237, 262.

* * * * *

'Property in its legal sense is not the thing itself, but certain rights in and over the thing, those rights being: 1, user; 2, exclusion; 3, disposition.' *Dixon* v. *People,* 168 Ill. 179, 190 affirming 63 Ill. App. 585."

If the supposed owner of the stock has the right to sell or transfer it, as the Vice Chancellor says he has, he must necessarily have the right that every stockholder has to sell and transfer all that his shares may earn during the entire life of the corporation.

The Charter of this Corporation is perpetual. If this Corporation remains in existence perpetually, then there is practically nothing to the stock except the right to dividends during the entire life of the Corporation.

The right to sell and transfer the stock, means the right to sell not the shell, but the stock, including the perpetual right to dividends if the Corporation is never dissolved and the right to an interest in the property in case the Corporation is dissolved.

Complainant could not sell his stock, for if the defendant's Charter provision is enforced, there is absolutely nothing in the way of stock to sell. What would the purchaser get? He certainly would not get 125 shares of stock. All he would get would be the right to dividends for ten years if declared. If the directors failed to declare a dividend during the ten years, he would not get even one cent out of his stock. If the Corporation is dissolved before the expiration of ten years, he would lose even the possibility of getting dividends for the ten years.

The complainant owns the stock. If there is no restraint on his alienation of it, he has a right to sell it, and thus in effect convey his *pro rata* interest in the assets of the Corporation, and his *pro rata* share of its earnings not merely for ten years, but for all time to come, for under its Charter the life of defendant is perpetual. The whole plan and purpose of this provision of the Charter, if it is to be enforced at all, is to prevent just that thing. If there is anything that is

prevented by the actual and practical enforcement of this provision of defendant's Charter, it is the possibility of selling the stock. We might just as easily say that if a man has a contract to purchase a house and lot, and when the title is offered to him it is found that the alleged vendor only has an estate for ten years, or else, having had a fee simple estate, he had made an agreement that after ten years the use of the property should go to somebody else, that the purchaser is compelled to take the property, because he has agreed to buy it, and the seller, notwithstanding the holes in his title, is willing to make him an absolute fee simple deed to it. He agreed to buy the house and lot, which necessarily included a right to use it forever and to get all the emoluments out of it forever, and unless he can get that, it is no sale.

The Vice-Chancellor says:

> "That he will not be able to find as ready a market or as smart a price as could be secured for shares otherwise unlimited, may be embarrassing and disappointing *but that does not impair the vendibility of the article he bought and has for sale.*"

It certainly does. He bought the stock, and if defendant's position is correct that is not vendible.

Would an article be considered vendible if it was beyond the power of the alleged vendor to make a delivery of the whole of it and everything appertaining to it? He might go through the form of saying that he sells, but it would not be considered a sale. It would not be vendible unless he could make a full and perfect delivery. In this case, if defendant's Charter provision is to be enforced it is absolutely impossible to do that.

The Vice-Chancellor, referring to Mr. Prindiville, says (p. 424): **"He got all he bargained for, and what he has he is at liberty to sell and transfer."** *He got* the stock. He cannot sell and transfer that, can he?

It does not require any great astuteness to see that the sole purpose of this provision, which defendant is asking this Court to enforce, was to prevent complainant or any of defendant's stockholders from "selling", "vending" or "transferring" their stock, and if this Court enforces that provision, that purpose will be carried out, and that result will be obtained.

Straus v. *Victor Talking Mach. Co.*, 243 U. S. 490, 501:

> "Courts would be perversely blind if they failed to look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

This provision of Defendant's Certificate of Incorporation which was inserted without right or warrant of law, is in "restraint of trade", is contrary to public policy, illegal and unenforceable.

Breslin v. *Fries-Breslin Co.*, 70 N. J. Law, 274:

At page 282, PITNEY, *J.*, said that

> "a stock corporation is in essence an aggregation of individuals, a statutory partnership with *assignable membership* and limited liability of the members."

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373, 404:

> " 'The right of alienation is one of the essential incidents of a right of general property in

> movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void * * *'."

Morgan v. *Struthers,* 131 U. S. 246:

LAMAR, *J.*

> (p. 252): "One essential feature of an incorporated joint stock company is the right of each stockholder, without restraint, to sell or transfer his shares at pleasure. Thompson, Liability of Stockholders, § 210, and cases there cited. So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraint of trade. *Moore* v. *Bank of Commerce,* 52 Missouri, 377. Even where the charter gives the corporation the power to regulate transfer of stocks, it has been held that this power does not include the authority to restrain transfers. *Choteau Spring Co.* v. *Harris,* 20 Missouri, 382, citing 10 Mass. 476, and numerous other authorities."

In *Choteau Spring Co.* v. *Harris,* 20 Mo. 382, cited by the Supreme Court of the United States, the Supreme Court of Missouri expressly says that the power to restrain the transferability of stock never exists unless it is expressly given by the Legislature.

The Court said:

> (pp. 387-8): "Stock in incorporated joint stock companies like the present, is always treated as property, * * * The legislature may grant corporate power to restrain this transferability, but unless it is expressly given, it does not exist; * * *
>
> * * * * *

"* * * This power, however, of regulating transfers of stock, confers no corporate authority to control its transferability by prescribing to whom the owner may sell, and to whom not, or upon what terms. * * *"

In the following case, the power of the Legislature to take away the alienability of stock is even somewhat doubted:

Moore v. *The Bank of Commerce,* 52 Mo. Rep. 377:

(p. 379): "The right of alienation is an incident of property, and a by-law prohibiting this right or imposing any restrictions on its exercise would be in restraint of trade and against public policy and therefore void. Whether the Legislature could authorize such restraint, is not involved in this record, and need not be passed on."

Morris v. *Hussong Dyeing Machine Co.,* 81 N. J. Eq. 256:

EMERY, V. C.

(p. 260): "The second and main ground of demurrer relied on is, that under this by-law all transfers of stock to any transferee are subject to the approval of directors, and that until such approval is given by the board of directors no transfer can be compelled. The bill alleges that this by-law is invalid, and prays that it be declared void. It is claimed by defendants that under this by-law the board of directors has the right in its discretion to refuse to admit a transferee of shares as a stockholder.

Shares of stock in a corporation are, by the Corporation act, section 20, declared to be personal property, and are made transferable on the books in such manner and under such regulations as the by-laws prescribe. But the certificates of stock, regulation for the transfer of which may be made by the by-laws, are only the evidence of the shareholders' rights in the company, and are not themselves the property of the company in which the shareholder

has rights. *Bijur* v. *Standard Distilling and Distributing Co.* (1905), 74 N. J. Eq. (4 Buch. 546); affirmed on appeal for reasons stated, 78 N. J. Eq. (8 Buch.) 582.

This section of the act must therefore be considered as giving to the directors only power to regulate or approve the formalities of transfer of the certificate or evidence of ownership, and not as giving power to restrict *the absolute right of transfer.* In the absence of clear express provisions either in the articles or by-laws lawfully restricting or qualifying this absolute right of property and transfer, he has the same absolute right to transfer his shares as to transfer any other personal property. If, however, this by-law should be construed as not confined merely to approval of the formalities of transfer, but as giving the directors the right to refuse, in their discretion, a transfer by one stockholder to another, then the by-law is illegal. It is clearly in *restraint of trade and violates the general laws* relating to the right of transfer of personal property, and is void as unreasonable. 5 Am. & Eng. Encyl. L. (2d ed.) 93. Some authorities are cited sustaining provisions in charters or by-laws, expressly providing for a prior offer of sale to the company, or submitting to directors the name of the transferee for approval. But the weight of authority and—in my judgment—the better rule, seems to be against the *validity of such provisions* as being an unreasonable restraint of alienation. * * *"

The following case, by the Supreme Court of Wisconsin, decides many of the questions raised in this case:

In Re Petition of Klaus, 29 North Western, 582 (Wis.):

(p. 583): "* * * But Chapter 144, Laws 1872, under which this company was organized, in many of its sections would seem to imply the free and independent right of the assignees of stock, duly transferred, to have

such transfers entered upon the books of the company in all cases. * * * These provisions are inconsistent with the exercise of a prohibitory power of the corporation, by by-laws *or the articles of incorporation,* to prevent the entry of transfers of stock in the books actually made, and which are valid between the parties." * * *

(p. 584) : "It is again very plausibly argued by the learned counsel of the appellant that what might be against public policy in a public or quasi public corporation, would not be in a strictly private corporation, and that the latter corporation was in substance only an incorporated partnership. We cannot give countenance to any such distinction. * * * But when a private business or a partnership has become incorporated under the general law, and greatly favored by privileges and franchises and by restricted liability, there is no reason for making any distinction between such a corporation and others, and our statutes make none. The corporators have secured the advantages of a corporation, they should be governed by all the other incidents of a corporation. Why not? They cannot be a corporation, and still remain, in respect to the same business, a copartnership. The one must completely displace the other. We cannot, therefore, be governed by any authorities which make such a distinction. * * * The corporators, if formerly partners in the same business, and the partnership, are merged in the corporation,—not partially, but fully and completely. * * * As a partner, a person may sell his interest in the partnership property, but he does not sell his interest in the partnership as such, and he may bind himself to his copartners by his agreement; but, as a stockholder, he is in no sense the owner or part owner of the partnership property. His stock represents his interest in the corporation, and that is made property by the statute. *Button* v. *Hoffman, supra.* His individuality is merged in that of a stockholder. His stock is not only property, but private property, and he may do with it as he pleases. * * *

Enough, and perhaps too much, has been said on general principles, and once for all we hold that a by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all of the stockholders is void as against public policy. It is an unwarrantable and unlawful restriction upon the sale of personal property, the sale and interchange of which the law favors, and in restraint of trade. I have already said that the transfer is valid to all intents and purposes, as between the parties, without the entry thereof in the books of the company. So the statute provides. Section 1751, Rev. St. But, as to third persons and the public, it is void unless so entered in the books. Its sale, full and complete, may thus be prevented by the will and at the option of another who has no interest in it. The claim is against all reason and justice. *When the law makes stock personal property, it clothes it with all the incidents of personal property, and the owner has full dominion over it, and may dispose of it at will. That such a by-law as that under consideration is void as against public policy nearly all of the authorities seem to hold.* Ang. & A. Corp. Sec. 567; Low, Transf. Stock, Sec. 48; *Bank of Attica* v. *Manufacturers' & Traders' Bank,* 20 N. Y. 501; *Sargent* v. *Insurance Co.,* 8 Pick. 90; *Chouteau S. Co.* v. *Harris,* 20 Mo. 382; *Quiner* v. *Insurance Co.,* 10 Mass. 476; *Bond* v. *Mt. Hope Co.,* 99 Mass. 505; *Case* v. *Bank,* 100 U. S. 446; and many cases cited in brief of respondent's counsel, and many more that might be cited.

It is claimed that this case ought to be made an exception, because the original stockholders were the former copartners, and they three ought to have the right to choose their associates in the business, as it took all of them to be directors and officers. That might be so in this case, but the principle would not apply to other cases of private corporations where the stockholders were more numerous, and hence there would be an exception to a general rule

> for personal reasons. But it is not proper to say that stockholders, as such, are associates in the management of the business. They have nothing to say about the business, any further than to protect their interests. The directors and officers manage the business. As stockholders, they are in no sense partners." * * *

McNulta v. *Corn Belt Bank* (Supreme Court of Illinois), 45 North Eastern, 954. A by-law provided that all stock transferred shall be with the express condition that it would be voted in favor of increasing the capital.

> (p. 959): "This by-law is illegal and void, not only because it seeks to keep the future action of the stockholders in reference to the increase of the stock in subjection to the will of the original directors who passed the by-law, but also because it attempts to limit the right to sell or transfer stock, by imposing unreasonable conditions. Shares of stock in a corporation are as transferable as any other kind of personal property, and all unreasonable attempts to restrain the right to transfer such shares are void, as being against public policy."

Douglas v. *Aurora Daily News Co.*, 160 Ill. App. 506:

The headnote correctly states the holding of the case.

> "A clause in a certificate of stock to the effect that it is transferable only to some person first approved by the board of directors of the corporation issuing it, is an illegal restriction upon the right of a stockholder to transfer his stock and one which a corporation has no right to make."

Steele v. *Telephone Association*, 95 Kansas 580:

> "Stock in a corporation is personal property (§ 1743) which may be seized and sold on execution, may be devised by will, passes to executors and administrators, and may be dis-

> tributed to heirs * * *. The power to adopt by-laws regulating transfers is intended to promote convenience and certainty as to membership. It cannot be employed to embarrass transfers or curtail property rights, and the provisions of the defendant's constitution making election to membership or acceptance of a member by the board of directors a condition of transfer are void."

and again:

> *"It is argued that by-laws affixing restraints upon the disposal of shares of stock by their owners ought to be permitted to insure harmonious membership and to prevent corporate turmoil. Harmony secured in this way may be as vicious as corporate turmoil. But the fatal defect in the argument is that it ignores the fundamental principle of corporate composition."*

Herring v. *Ruskin Co-op. Ass'n*, 52 S. W. 327 (Tenn.).

The following by-law was before the Court:

> "The stock certificates are not transferable, except to the association, and this shall be expressed on the face of the stock certificates. The stock of this association can be held only by qualified members of this association, and no member shall hold more than one share of stock."

The Court said:

> "It is the law, pretty well settled, we believe, that a corporation such as this, and organized under statutes similar to our own, has no power to forbid its members from selling their stock on the market to any one willing to buy it. * * * And a by-law prohibiting the transfer, except to a definite party, although it is indorsed on the certificate of stock, is void. Authorities *supra*. If these propositions be sound law, the rule, regulation, or by-law of the defendant inhibiting the transfer of

his stock by a member, except to it, is absolutely void, and does not stand in the way of complainants selling their shares to any one willing to buy them."

Tomson v. *Iowa State Traveling Men's Assn.*, 110 N. W. Rep. 995 (Neb.).

The Court said at page 996:

"*The question presented by the appeal is whether a corporation, organized under the laws of this state, can, by its by-laws, limit the number of shares of its stock a person may hold at one time, and prevent a transfer of stock, by a stockholder to a nonstockholder, without the consent of the directors of the corporation?* If it can, the decree of the district court is wrong and should be reversed, otherwise it should be affirmed. The power to make by-laws, not inconsistent with the law of the land, is one of the common law incidents to a corporate existence (Angell & Ames on Corporations, Sec. 325), and is expressly conferred by statute (section 124, c. 16, Comp. St. 1903). The transfer of stock has been uniformly regarded as a legitimate subject of corporate legislation, to enable the company to know who are stockholders, to whom dividends are to be paid, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights. But such legislation will not be enforced beyond what is necessary to serve those purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the disposition of property in the stock of the corporation.

* * * * *

We see no escape from the conclusion that the by-laws in question are void, as an unreasonable restraint on the transfer of property in the stock of the corporation.

It is therefore recommended that the decree of the district court be affirmed."

Miller v. *Farmers Milling & Elevator Co.*, 78 Neb. 441. The opinion of the Court states the question before it succinctly as follows:

> "The question presented by the appeal is whether a corporation organized under the laws of this state can, by its by-laws, limit the number of shares of its stock a person may hold at one time, and prevent a transfer of stock by a stockholder to a nonstockholder without the consent of the directors of the corporation?"

After a review of all the authorities, the Court concluded:

> "The by-laws under consideration, tested by the authorities cited, operate as an unreasonable restriction upon the transfer of stock and are void as an unlawful restraint upon the transfer of property."

On the trial before the Vice Chancellor it was contended that because the obnoxious provision appeared in defendant's Certificate of Incorporation, it would be legal and enforcible, although it might not be if it merely appeared in a By-Law or in a stock certificate. The reason such a provision is not enforcible when it appears in a By-Law or a stock certificate is because it is against public policy. It is just as much against public policy when it appears in a Certificate of Incorporation, which is merely the act of the incorporators. The fact of it being filed in the office of the Secretary of State could not possibly render anything otherwise illegal or contrary to public policy, legal and in accordance with public policy. If persons prepared a Certificate of Incorporation and stated therein that the corporation had power to conduct a gambling house or, at this time, a liquor saloon, and the clerk in the office of the Secretary of State, through inadvertence or otherwise

permitted it to be filed, the Corporation certainly would not have the right to exercise those illegal powers, because they happened to appear in its Certificate of Incorporation.

Ellerman v. *Chicago Junction Railways & Union Ry. Co.*, 49 N. J. Eq. 217, 241:

Vice-Chancellor Green said:

> "As amended, the corporation act permits incorporations not only for objects specified therein, but for 'any lawful business or purpose whatsoever'; which general clause is not, however, to be construed as embracing powers to do those things which would deprive the corporation of its ability to carry out the objects for which it was formed, *or discharge any duties which it might under its charter owe to the public*, or which are contrary to the policy of the law. *Oregon Ry. & Nav. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1."

Vice-Chancellor Green bases his decision on the following decision of the U. S. Supreme Court:

The Oregon Railway and Navigation Company v. *The Oregonian Railway Company*, 130 U. S. 1:

MILLER, *J.*:

> "It may also be conceded, at the outset of the argument, that the memorandum made under the Companies' Act of 1862 by the plaintiff, and the articles of association made under the Laws of Oregon by the defendant, both contain declarations of the powers of these companies and of each of them to buy or sell or lease railroads. The only question, therefore, to be considered is whether this declaration of power is authorized by the laws of Oregon.
>
> It is argued that the articles of association, under the Oregon Law, and the memorandum of association under the Companies' Act of Great Britain, are themselves the equivalent of an Act of incorporation by the Legislature, and that whatever is found as a grant of power,

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or description of the purpose of the company, set forth in such articles or memorandum is tantamount to a legislative Act. A phrase in the opinion of the court in *Thomas* v. *West Jersey Railroad Co., supra,* is cited as supporting this proposition, namely: 'The memorandum of association, as Lord Cairns said, stands in place of a legislative charter'. But what was meant, both by Lord Cairns and by this court, was that anything not claimed, granted or described in such instrument in relation to the powers and business of the corporation could not be held to be a part of them by construction; in other words, that its powers could not exceed those enumerated therein. It was necessarily implied in such a remark that anything in such articles or memorandum not warranted by the statutes in question, authorizing the formation of corporate bodies, was void for want of authority. * * *

We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte;* their formation and execution—what shall be put into them as well as what shall be left out, do not take place under the supervision of any official authority whatever. They are the production of private citizens gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good. * * *

These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the state upon that subject, and the rule stated above."

What defendant's incorporators did when they inserted the provision in question in defendant's Certificate of Incorporation which they filed with the Secretary of State, is what Mr. Justice Bergen, when he was Vice-Chancellor, said was exercising legislative authority, and he held that the Legislature nowhere in the corporation laws undertook to confer "on individuals an indefinite power of legislation", and held that when the persons, in their articles of incorporation, undertook to legislate, by inserting provisions that were not authorized by law, those provisions were void and unenforceable.

Audenried v. *East Coast Milling Co.*, 68 N. J. Eq. 450:

BERGEN, *Vice-Chancellor:*

(p. 465): "The complainant not denying that such official action was obtained in this manner, attempts to justify it under the authority conferred by the certificate of incorporation contained in the following clause:

'Any resolution, in writing, signed by all the members of the board of directors or executive committee, shall be and constitute action by such board or executive committee, as the case may be, to the effect therein expressed, with the same force and effect as if the same had been duly passed by the same vote at a duly called meeting of such bodies, respectively, and it shall be the duty of the secretary of the company to place such resolution, as signed, in the minute book of the company under its proper date.'

As the complainant rests his right upon a resolution adopted in that manner, it becomes important to ascertain whether the power attempted to be conferred by this clause is supported by the laws under which the articles of association were filed. When authority to manage the affairs of a corporation is vested in a board of directors it is conferred upon

them as a board and not as individuals. If they act or give their consent separately, and not as a board, their conclusion is not the action of the corporation, although all may consent, and the corporation is not bound, in the absence of ratification. Clark & Marsh. Corp. 2074, Section 677; *First National Bank of Fort Scott* v. *Drake,* 35 Kan. 564; 57 Am. Rep. 193.

This eminently wise and just rule, the complainant claims, may be abrogated by persons incorporating themselves under the General Corporation act of this state, and relies upon subdivision 7 of section 8 of the act, which permits any provision which the incorporators may choose to insert,

> 'for the regulation of the business, and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act.'

If the power to legislate as these incorporators have legislated exists, it must be found in the expression, 'any provision creating, defining, limiting and regulating the powers' of directors.

Under this clause, it is insisted that the legislature has granted the right, not only of creating, defining, limiting and regulating the powers of the corporation, but also the right to authorize the directors to exercise the powers thus established according to any method the incorporators may see fit to adopt, although the power to do this is not granted in express terms. I do not so interpret these words. The right 'to create' is limited to the establishing of or regulating a power to be exercised by the corporation through its directors, which power shall not be inconsistent with the terms of the general act. The method of exercising the power created must conform to settled legal principles unless it be otherwise distinctly authorized by the legislative

act. No such express authority is conferred by this act and it ought not to be inferred from ambiguous expressions.

To hold that the legislature of our state, by the adoption of our General Corporation act, intended to confer upon individuals an indefinite power of legislation, would require the adoption of a liberality of construction which the act does not warrant, and which upon every known principle is contrary to public policy."

Courts disregard illegal restrictions, conditions or provisions of any kind, even though contained in the instrument in which title is created, conveyed or vested.

The Vice-Chancellor, in his decision in the case at bar, said:

(p. 427): "Furthermore, to exscind from the charter the limitation upon the right to dividends, or to ignore it altogether—and that is really the complainant's aim—would evolve property by judicial decree that had never been acquired by complainant, nor created by the parties, incorporators and their successors, nor had ever been within the contemplation of either. * * * **Equity determines, protects and enforces property rights, it never creates them.**"

Equity is not called upon to create property rights in this case. They were created when the complainant became a part owner of the corporation and of everything belonging to it and of everything that his interest in the corporation created in the way of profits. His property rights are evidenced by the stock certificate that defendant issued to him (p. 347) stating that "Thomas J.

Prindiville is entitled to One hundred and twenty-five shares of the Common Capital Stock of Johnson & Higgins."

The question here is not whether equity should "create" property, as stated by the Vice-Chancellor, but whether equity should aid in taking from it its most valuable constituent, its use, viz., its right to have for all time what it earns.

The clause in defendant's Charter and in complainant's stock certificate involved in this case, does not rise even to the dignity of a condition subsequent, which, in plain and unequivocal words, takes the title out of the grantee, in whom it then is, and puts it back in the grantor. Even a condition subsequent that is illegal or contrary to public policy is absolutely nugatory and will not have the effect of divesting the title of the grantee. In such a case, equity, when it refuses to enforce an illegal condition subsequent, does not create property in the grantee. That was created by the grantor.

The Courts have never yet enforced, as against the estate created by an instrument, an illegal condition or provision, because the illegal provision appeared in the same instrument in which the estate was granted. The Courts never, in such cases, thought that they were "creating property rights". They simply allowed a man to hold the property freed of the unlawful provisions, refusing to enforce the provision which attempted to put unlawful restraints on the disposition of the property.

Cornelius v. *Ivins,* 26 N. J. Law 377:

GREEN, *Chief Justice:*

> (p. 385): "* * * A condition, that the grantee shall not alien or take the profits of the estate granted, is repugnant to the nature of the estate, and void because it is of the es-

sence of a fee simple estate that it shall be alienable, and that it shall enure to the benefit of the grantee."

In *Bradley* v. *Peixoto,* 3 Vesey, Jr. 324, the Court said:

"This cause arose upon the following disposition by the will of Thomas Bradley:

'I give and bequeath to my son Henry Bradley, the dividends arising from 1,620£ of my Bank stock, for his support during the term of his life; but at his decease the said 1,620£ Bank stock, principal and interest, to devolve to his heirs, executors, administrators, and assigns. Having observed, during the term of my life, so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank stock, the dividends from which is bequeathed to them in this will and testament for their support, during their lives, such an attempt, by my wife or any of my children, *shall exclude them,* him, or her so attempting, from any benefit in this will and testament, and shall forfeit *the whole of their share, principal and interest;* which shall go and be divided unto and among my other children, in equal shares, that will observe the tenor of this will and testament.'"

The Master of the Rolls said at page 325:

"I have looked into the cases that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition is wholly void. * * * *In all these cases the gift stands, and the condition or exception is rejected.* In this case then I am under the necessity of declaring that this is a gift with a qualification inconsistent with the gift; *and the*

qualification must therefore be rejected. * * * Upon the whole, I am obliged to hold this condition repugnant to the gift, and therefore void; * * * and upon payment of the costs of this suit by the plaintiff, let the stock be transferred to him."

In *Trumbull* v. *Gibbons,* 22 New Jersey Law, 117, the Court, by CARPENTER, *J.,* said, at page 154:

"It has, however, been urged by the defendant's counsel, that the condition is one simply in restraint of alienation to a particular person and to his heirs, and that such condition is good. It is not necessary for the present purpose to settle whether the condition be good or bad. The present case, perhaps, goes much further than any case cited on the argument, being an attempt, not merely to restrain alienation by grant or devise to Trumbull or his heirs, but to shut out one branch of the testator's descendants from the possibility of receiving aid from the devisee, whatever might be their necessity or the urgency of their distress. The testator makes it a condition, that if the devisee should give any property of any kind, or money arising from any source, to Trumbull or any of his descendants, then the estates should go over. Such condition might well be held bad without infringing the generally received rule as to partial restraint or alienation; but, as I have already said, it is not necessary to consider or to settle the question. Suppose the conditions to be declared bad as *contra bonos mores,* as an attempt to impose an uncharitable unchristian restraint upon the devisee, still the primary devise would not fail; it would be simply discharged of the condition, and rendered absolute. The authorities are clear, and further discussion on this point seems unnecessary."

In *Feit* v. *Richard,* 64 New Jersey Chancery, 16, 19, the Court, by Magie, Chancellor, said:

"The only other portion of the will which suggests a question as to the quantity of the

estate devised to complainant is that contained in the ninth section of the will, which reads as follows: 'It is my will that none of the real estate shall be sold by any of my children that I have herein devised to them, without first obtaining a full written consent of all the children or the remainder of them.' This clause is evidently intended to impose a restraint upon the alienation by sale of any of the lands devised by the will to any of his children, and it consequently affects the lands in question, if it is a valid restraint. Since the power of alienation is a necessary and inseparable incident to an estate in fee simple, a condition annexed to a devise of such an estate, that the devisee shall not alien the lands devised, has always been held to be void, as repugnant to the nature of the estate. 2 Jarm. Wills (R. & T. Ed.) 528; *Trumbull* v. *Gibbons*, 22 N. J. Law, 117; *Cornelius* v. *Ivins*, 26 N. J. Law, 376; Bac. Abr. tit. 'Conditions' (L.) 13 Am. & Eng. Enc. Law (1st Ed.) 794.

If therefore, the clause now under consideration is properly construed as forbidding any alienation by complainant not consented to by his sisters or by those who represent them, it is a condition wholly void, and of no effect upon the estate devised to complainant."

If the Vice-Chancellor is correct, then every decision that we have quoted from or cited, in which similar provisions to the one now before this Court was held to be illegal and unenforceable, was erroneous.

If the Vice-Chancellor is correct, then the decisions of all the Courts, in cases where a man buys goods and in the contract of sale or bill of sale, there is a provision that he can only resell at a price fixed by the vendor, holding that such a condition as that was void and unenforceable because it was contrary to public policy—are erroneous.

In such cases as that of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 227 U. S. 373, and *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and in

many cases along that line, the Courts have refused to enforce the provisions which appeared in the bill of sale, restraining or interfering with the free sale and disposal of the property covered by the bill of sale. The purchaser has been allowed to hold the property which he got under the bill or contract of sale containing these restrictive conditions, and to dispose of it free of the restraints which were attempted to be imposed, although the vendee thus obtained greater rights than he originally bargained for.

The statutes of this State provide for the formation of "Partnership Associations". The provision which defendants' incorporators unwarrantably inserted in its Certificate of Incorporation was an attempt to get the benefit of the provisions of those statutes without complying with them. Defendant is a corporation. A corporation differs from a partnership in that it cannot refuse to recognize as a stockholder, a person to whom stock is sold by a stockholder.

In the course of the trial, the Vice-Chancellor, in speaking of defendant, said:

> **(p. 333): "* * * I think this combination of men is nothing but a partnership in the guise of a corporation."**

In his opinion, the Vice-Chancellor, basing the following statements entirely on the provision of defendant's Charter which it is invoking against this complainant, said:

> (pp. 418-19): "* * * *The corporation was designed* to be a strictly personal service concern, *a copartnership, as nearly as ingenuity could achieve, and to embody all of the ad-*

> *vantages of both, without incurring, in full the obligations of either.* The scheme was simple. The common stock was to be held only by the officers, directors and employees of the company actively promoting its affairs, * * *."

In *Jackson* v. *Hooper,* 76 N. J. Eq. 592, the question presented to this Court was whether the Encyclopædia Britannica Co. was a corporation or a copartnership. It belonged to two persons.

Vice-Chancellor Howell, in 76 N. J. Eq. 185, held that it was a joint adventure and was not a corporation. This Court reversed the Vice-Chancellor, and in its unanimous opinion said:

> (p. 599): "The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus-like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require. The policy of the law is to the contrary. If the parties have the rights of partners, they have the duties and liabilities imposed by law, and are responsible *in solido* to all creditors. If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners, and have only the rights, duties, and obligations of stockholders."

A provision inserted by incorporators in any corporation charter that was designed to and did bring about the result that the corporation should be a copartnership "as nearly as ingenuity could achieve, and to embody all of the advantages of both, without incurring, in full the obligations of either", must necessarily be such an attempt at evasion of the Laws of this State that if nothing else could be said against it, it would clearly be against public policy and no corporation could rightfully ask a court to enforce it.

Undoubtedly the persons who framed this provision of defendant's Charter, had before them the Act of the Legislature of this State, passed in 1888, entitled "An Act authorizing the formation of Private Partnership Associations", and took out of it whatever suited their purpose and put it into the corporation charter, just as if it appeared in the Statutes with reference to corporations, except this, they were not even willing to assume the burdens which the Partnership Association Act put upon those who wished to take the benefits of it, viz.: that they could not put a partner out without paying him the appraised value of his interest.

The "Partnership Associations" Act, P. L. 1880, p. 304, 3 Comp. Stats. p. 3921, provides (Sec. 1) that when any three or more persons desire to form a partnership association for the purpose of conducting any lawful business or occupation, etc., by subscribing and contributing capital, "* * * which capital shall alone be liable for the debts of such association", they may sign, &c., a statement, etc., setting forth the amount of capital subscribed by each, etc., the character and location of the business, etc., "the name of the association with the word 'limited' added thereto * * *, the contemplated duration of said association, *which shall not, in any case, exceed twenty years*", etc., which statement shall be recorded in the office of the clerk or recorder of deeds, &c., &c.

Sec. 4 provides that interests in said association shall be personal estate, "and may be transferred under such rules and regulations as the association may prescribe, but no transferee of any interest, or the representative of any decedent, or of any insolvent, shall be entitled thereafter to any participation in the subsequent business of said association, unless he or she be elected thereto by a vote of the majority of the members" etc., "and any

change of ownership, whether by sale, death, bankruptcy or otherwise, which shall not be followed by election to the association, *shall entitle the owner only to his interest in the association at a price and upon terms to be mutually agreed upon,* and in default of such agreement the price and terms shall be fixed by an appraiser appointed by the Court of Common Pleas of the proper county, subject to the approval of said court."

Why did not the creators of defendant corporation create a partnership Association under that Act? The reason is that if they did so, they would not have the power, even though a partner became "inactive" or under any circumstances, to put him out and take away his interests in the assets of the association by giving him therefor a possibility of his getting ten years' dividends, and besides, the association would not have the right to exist forever, as is the case with defendant.

The question arises, whether they could take out of this Partnership Association Act what they wished, and put it, as it were, into the Statute with reference to corporations, without any legislative authority giving them such power.

If the power existed to put into a corporation charter the provisions that defendant is relying upon here, it was not necessary to pass this law providing for Partnership Associations, the important purpose of which was to obtain the same exemption from liability for debts as is given to stockholders in a corporation. The Legislature undoubtedly felt that if partners wanted exemption from liability for debts, they could not get it, unless the interests of all partners were safeguarded, so that each partner when he went out, voluntarily or involuntarily, or died, should get the full value of his share in the assets.

The New Jersey Act with reference to private Partnership Associations was undoubtedly taken from a Statute of Pennsylvania, almost identical with it.

We find no decisions in this State with reference to this Act, but we do find decisions in Pennsylvania and of the United States Supreme Court, with reference to the Pennsylvania Statute, **and these clearly show, among other things, that a corporation cannot refuse to transfer stock or admit new stockholders.**

McGeorge v. *Manufacturing Co.*, 141 Pa. 575, referring to Partnership Associations under the Pennsylvania Act, the Court said at page 578:

> *"The chief point of difference between them is that while a corporation cannot refuse to permit a transfer on its books of its shares to any purchaser thereof,* a partnership association limited can, except according to its rules."

Carter v. *Producers Oil Co.* (Supreme Court of Pennsylvania), 182 Pa. 551, 38 Atl. 570:

The Supreme Court affirmed the decision of the trial Court, whose opinion is copied in the report of the case in the Supreme Court, in which the trial Court said:

> (p. 574): "A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. *It differs from the common type of corporation in that the members have a right to admit or refuse membership in the company to the transferee of the interest,* as well as in some other particulars . * * * Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in

> any business enterprise to do so without incurring, on the one hand, the general liability of partners, *or, on the other, the risk of having the business taken out of the control of those in whom it was originally placed without their consent, which exists in ordinary corporations.*"

In *Great Southern Fireproof Hotel Co.* v. *Jones,* 177 U. S. 449; 44 L. Ed. 842, the United States Supreme Court decided that a Partnership Association under the Pennsylvania statute could not sue in the Federal courts as a corporation. In the course of its decision, it said:

* * * * *

> (p. 845): "In *Carter* v. *Producers' Oil Co.,* 182 Pa. 551, 573, 574, 38 Atl. 571, 576, which involved the validity of a rule adopted by a limited partnership association organized under the Pennsylvania statute of June 2, 1874, and its supplements, and which rule prohibited any person who acquired the capital stock of a member from exercising the privileges of a member, unless he was elected as such, the court said: 'We cannot assent to the plaintiff's claim that the defendant company is a corporation and restricted, in the adoption of by-laws, rules, and regulations for its government, to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association. * * *"

"Estoppel."

There is no basis either in the law or on the facts for the application of the doctrine of estoppel.

The Vice-Chancellor said:

> (pp. 427-8): "Now, if we were to accept the complainant's contention and argument at face

> value and as sound (*a*) that the Corporation Act does not grant charter privileges of conditional shares such as the defendant's articles of incorporation presume to appropriate, and (*b*) that the conditions imposed on the shares are unlawful restrictions upon their transfer, and void as against public policy, it would not be to his advantage or helpful to him in the least in maintaining this suit. In setting up the first proposition he is met by an equitable estoppel, or an estoppel in the nature thereof * * *".

The Vice-Chancellor does not state exactly on what facts he bases what he says is an "equitable estoppel" against the complainant. He states that "the doctrine finds excellent expression in the opinion of Justice Willard Bartlett in *Wormser* v. *Met. St. Ry. Co.,* 184 N. Y. 83, and quotes from that, the following:

> (Record, p. 428): "'A litigant is not at liberty to deny the validity of a contract, *which is neither prohibited by law nor evil in itself,* after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract.'"

and in another place, the Vice-Chancellor, referring to the complainant, says:

> (p. 424): "He has supped sumptuously at the table of plenty for eight years, and he cannot bring the feast to an end simply because he is indisposed."

We will assume that the Vice-Chancellor bases his estoppel on the contention made by defendant in its answer, to which we have already referred, and which it so vigorously pressed upon the trial and in its briefs, that because certain stock had been surrendered by certain persons and dividend certificates for ten years issued in lieu thereof, and the stock so surrendered, stripped of the dividends for ten years, was subsequently re-issued to certain of

the stockholders and a part of the same was received by Mr. Prindiville, that that is the estoppel. At any rate, whether that is what the Court meant or not as the basis for estoppel, in view of the fact that this point has been so vigorously pressed by defendant, we deem it best to meet it here.

The 125 shares of stock involved in this suit are not part of the stock, the receipt of which furnished the basis for defendant's claim of estoppel.

The corporation never even attempted to enforce the provision in question. The complainant never received any stock that had been surrendered by anybody who had ceased to be an active director. He never received any stock that had not been voluntarily turned over by the holder thereof to the corporation, asking to have it exchanged for a ten year dividend certificate.

The Corporation never exercised its right or power, if any it had, to enforce the provision of its Certificate of Incorporation so as to bring about the surrender of any stock. Every share of stock that complainant received was issued against stock voluntarily delivered by the holder thereof who requested that the company should accept it and give him in place thereof dividend participating certificates.

Moreover, complainant never received one share of stock that grew in any way out of any stock that was surrendered by anybody who was not at the time of surrender an active director of the corporation and who did not thereafter remain such active director, and the holder of other common stock.

Mr. LaBoyteaux, president of defendant, referring to every person whose stock was "surrendered", testified as follows:

(pp. 202-203): "Q. Now it appears that Mr. Davidge voluntarily surrendered the stock which he got, you remember that, don't you? A. Yes, sir.

Q. The same thing was true of Mr. Curtin, wasn't it? A. Yes, sir.

Q. And the same thing is true of Messrs. Barrett, Dickson, Loines and Lowe, a portion of whose stock upon their retirement he got? A. Yes, sir.

Q. That they voluntarily withdrew? A. Yes, sir.

Q. Can you tell me of a single share of stock that Mr. Prindiville owns that was taken from a man involuntarily pursuant to the provisions of this Charter against his will? A. We have never taken any stock from anybody involuntarily.

Q. There has never been before an issue on this question? A. There never has been a refusal to surrender stock.

Q. No. And at the time Barrett, Dickson, Loines and Lowe did surrender some of their stock they were active and still continued active until some time after the surrender took place? A. To a lesser degree, yes.

Q. They were active? A. Active.

Q. Active enough to get salaries? A. Yes, sir.

Q. The same thing is true of Curtin? A. Yes, sir.

Q. And also the same thing is true of Davidge—I mean they were active enough to get salaries? A. Yes, sir."

(pp. 195-196): "Q. Have you always taken that position with the gentlemen who wanted to retire or did retire from the company, that they must surrender their stock and take a non-dividend or dividend participation certificate? A. We never had this question come up before.

Q. Have you always taken the position when

a gentleman withdrew from the company and no longer was active that he should occupy the position that your answer says Mr. Prindiville should occupy? A. To the best of my knowledge, yes, yes.

Q. Do you remember a Mr. McCumber? A. No; I don't remember.

Q. Don't remember him? A. I remember of him. I can't remember anything about the circumstances.

Q. Wasn't he once a director? Yes, sir.

Q. Didn't he sell out? A. Yes, sir.

Q. Did they require him to surrender his stock? A. Yes, sir.

Q. What? A. He did surrender his stock.

Q. Didn't the company buy his stock? A. Yes, sir.

Q. They didn't require surrender, did they, this way? A. You are getting beyond my depth. I don't know the exact conditions.

Q. When was this McCumber business? A. About 1902.

Q. You know as a matter of fact that the company or some of its directors actually bought his stock, don't you, rather than to require him to transmute his stock into dividend participating certificates; you know that, don't you? A. There was some settlement made with Mr. McCumber. I don't know what the settlement was. I know his business was turned back to him and I think a small cash consideration was paid to Mr. McCumber.

Q. And he has not been since that time the owner of any dividend participating certificates, has he? A. No.

Q. Now, do you know why they made fish of him and flesh of Prindiville? A. I don't think they have."

Certain stockholders who were in the active service of the defendant and who thereafter remained in its active service, asked for the privilege of exchanging a part of their stock for dividend certificates. This request was granted and the stock

which was so delivered was then distributed among the remaining stockholders, in certain proportions agreed upon between them, in the nature of a dividend. Mr. Prindiville got a part. He never got any other stock, except the 125 shares involved in this case which he bought and paid for.

Mr. Prindiville in all received 115 shares of stock issued against stock so delivered. The first distribution to him was 25 shares,—certificates 469 and 485, dated February, 1913. These certificates show on their face that they were re-issued pursuant to a resolution of the Board, December 18th, 1912, and from those resolutions it appears that the shares thus distributed were 211 shares that had been received from John D. Barrett, J. B. Dickson, Stephen Loines and William E. Lowe (p. 71). Each of these gentlemen was at the time of the exchange of the shares for dividend certificates, *and for a considerable time thereafter* was, still a holder of other common stock (p. 72). Furthermore, all of these men were, during all of 1912 and all of the next year, 1913, directors actively engaged in the service of and in receipt of salaries from the corporation (pp. 68, 74).

The surrender to the Corporation of these shares, to be exchanged for dividend certificates, was not made by directors or officers *ceasing* to be actively engaged in its service, but on the contrary, by directors who still remained actively engaged in its service and who still remained owners of other shares of common stock on which they received dividends. This surrender, instead of being an exercise of the forfeiture provision, was merely a voluntary exchange by some of the directors of a portion of their interest in the Corporation for ten-year dividend certificates.

The second distribution of stock to Mr. Prindiville consisted of 65 shares. They were part

of 400 shares that had been received from W. W. Curtin, and 8 shares from E. J. Shriver (Ex. C-33, p. 259; pp. 80, 81). Mr. Shriver at that time was and still is treasurer of defendant corporation. W. W. Curtin was at that time and still is a holder of other shares of common stock of the corporation, the 400 shares which he had surrendered constituting only a portion of his common stock holdings (Deft.'s Ex. 6, printed in part only on p. 83, omitting Curtin's signature). Furthermore, during the whole of 1913, 1914 and 1915, in which years Mr. Curtin had surrendered these shares, he was at all times a director actively in the services of defendant by, and in receipt of, a salary from defendant (Directors' Minutes, Jan. 21, 1914, p. 77; Feb. 25, 1915, p. 80).

It is thus clear that as to the shares surrendered by Mr. Curtin, there was no exercise of the forfeiture clause and that in each case these shares were voluntarily surrendered by persons during the time that he was actively engaged in the company's service and that he retained other shares of common stock, which he still holds, and receives dividends thereon.

The three resolutions (pp. 74, 79, 79), which deal with the "surrender" of this Curtin stock state that the shares standing in the name of W. H. Curtin had been transferred into the possession of W. H. Robertson, who is not an officer, &c., of the Corporation, and who is desirous of obtaining a retirement certificate for the same as provided for in Article 4 of the Certificate of Incorporation; it was resolved to transfer said shares to the treasurer of the Corporation as trustee and issue a retirement certificate to W. H. Robertson. Mr. Curtin's stock was put into Mr. Robertson's name upon the same day as the transfer by him to the corporation, and as soon as the dividend certificate was issued

to Mr. Robertson he at once endorsed it over to Mr. Curtin (Exs. D4, p. 404; C, 35*a*, 36, pp. 365-368), who still holds it.

These proceedings were purely a device, and even the corporation itself forgot the fiction when it came to distribute these shares. It stated in its minutes that the 400 shares being distributed had been received from Mr. Curtin (p. 81).

The last distribution of stock in which Mr. Prindiville shared took place under resolutions of November 21st, 1917 (p. 90). These resolutions state that 200 shares of stock received from W. H. Davidge should be distributed to stockholders. Mr. Davidge was at that date a holder of other common stock of the corporation, which he still holds. Mr. Davidge at that time was a director in the service of the company in receipt of a salary (p. 88), and Mr. Davidge still is an active director receiving a salary (p. 45).

Just as in all the other cases, this stock was "surrendered" by an officer, who at the time was actively engaged in the service of the corporation, and who, at the time, retained other common stock of the company upon which he was entitled to receive dividends, and that he is still in active service of defendant, and still holds his other common stock.

As to this stock Mr. Davidge went through the form of transferring it into the name of someone not an active employee of the company. In this case, the name of Mr. Larkin, counsel for the company, was used. This stock was put by Mr. Davidge into Mr. Larkin's name the same day that he transferred it to the Company, and the dividend certificate issued to Mr. Larkin was immediately endorsed by him to Mr. Davidge, the owner of the stock against which it was issued (Complainant's Ex. 37, p. 368). The resolutions of November 21,

1917, state that the stock which was being distributed has been received from Mr. W. H. Davidge (p. 90).

Only once in the history of defendant, did the question ever come up as to the disposition of the stock interest of one who left the corporation's service, and in that case the corporation did not even attempt to use the charter provision. The stock of Mr. McCumber, the man who had left the defendant, was bought by it. In that case, Mr. McCumber's stock was bought from him by the corporation at a valuation agreed upon, viz: he received back his own business which he had brought into Johnson & Higgins, and for which the stock was issued to him, and also a cash consideration (p. 203).

The defendant is pleading estoppel. Even if there were any facts on which to base a claim of estoppel, still under no circumstances can there be any basis for the application of the doctrine of estoppel except in favor of somebody who has changed his position or acquired rights or failed to do something in reliance on the complainant's acts upon which the claimed estoppel is based. Nothing of that kind was attempted to be shown by defendant in this case. Neither the defendant corporation nor any one did or refrained from doing anything to form the basis for an estoppel.

Central Railroad Co. v. *MacCartney* (1902) 68 N. J. Law (39 Vroom) 165, Mr. Justice Pitney:

> (pp. 175-6): "The essential elements which must unite in order to create an equitable estoppel by conduct may be stated with approximate accuracy, as follows:
>
> * * * * *
>
> "* * * That the latter party, in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation.
>
> In short, an equitable estoppel prevents one from rectifying his own grossly negligent mistake at the expense of another who has, without negligence, been misled thereby."

Mutual Life Insurance Co. v. *Norris* (1879), 31 N. J. Eq. (6 Stew.) 583, Vice-Chancellor Van Fleet, at pages 585-6:

> "They rest their right to recover on an equitable estoppel. To constitute such an estoppel, the defendant must have done an act or made an admission, the natural effect of which was to influence the conduct of the complainants, and which has induced them to change their position or condition, so that, if he is now permitted to deny the truth of his words or conduct, the complainants must suffer harm. Justice Elmer, in *Phillipsburg Bank* v. *Fulmer,* 2 Vr. 55, said: 'To constitute an estoppel *in pais* there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him if the party making it is allowed to retract it.' In the case under consideration, both parties seem to have acted in ignorance of what the actual state of the law was. Where both parties have equal opportunities of knowledge, and they both act in ignorance of the real state of the case, and the complainant's act, which he says was induced by the defendant, appears to be

rather the result of his own will or judgment than the consequence of the defendant's act or representation, there can be no estoppel. *Baldwin* v. *Richman,* 1 Stock. 399; *Richman* v. *Baldwin,* 1 Zab. 403. The main purpose of the doctrine is to prevent fraud; there can, therefore, be no estoppel without fraud, either actual or legal. * * *"

Even if the corporation had exercised the right which it in this case claims to have, to compel stockholders to surrender their stock, and Mr. Prindiville had gotten a part of such stock which the corporation compelled the retiring stockholders to surrender, that would not estop Mr. Prindiville from taking the position that he does in this case, or form the basis for the corporation pleading estoppel. A person cannot render an illegal thing legal, by previous agreement or subsequent estoppel.

The provision which defendant is now asking this Court to enforce, being in restraint of trade, contrary to public policy, and illegal, cannot be rendered legal or enforceable by the act of any person. It is beyond the power of any person to make a thing legal and enforceable that is contrary to public policy, either by agreeing to it in advance or by way of estoppel.

As was stated by United States Circuit Judge BAKER, in *Quinby* v. *Consumers Gas Co.,* 140 Fed. 362, 366:

"* * * If this were not so, the result would be that parties could by their conduct or their contracts reciprocally give each other the right to violate the law or make the law for themselves. The law can only be upheld

(and that is the highest good of the whole body of citizens) by declaring all such contracts unenforceable irrespective of the equities between the parties."

Perkins v. *Trinity Realty Company,* 69 N. J. Eq. 723, 731:

"And in a case in which no question of public policy is concerned and therefore the rights of the state or of the public are not involved and where no creditors exist and all of the stockholders have assented to the action, I do not see upon what basis the plea of *ultra vires* can be rested."

This court in the famous and leading case of *Camden & Atlantic R. R. Co.* v. *Mays Landing, &c., R. R. Co.,* 48 N. J. Law, 530, said, at page 564:

"The propositions maintained by the court were that acts of a corporation, which are not, *per se,* illegal, or *malum prohibitum,* or *contrary to public policy,* but which are *ultra vires,* affecting only the interests of stockholders, may be made good by the assent of shareholders, so that strangers to them, dealing in good faith with the corporation, will be protected in reliance on those acts."

and was careful to add, at page 568:

"No reason is perceived why the rules of fair dealing, which are so rigorously applied to natural persons, shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf, and for his own advantage, his want of authority to do an act for which he has received the consideration from the other party. *Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion; they cannot furnish the basis for a legal cause of action."*

Kilbourn City v. *Southern Wis. Power Co.,* 149 Wis. 168, 183:

"Appellant contends that the contract has been executed on its part and that defendant has received the benefit thereof and that it is estopped from asserting its invalidity, even though it was *ultra vires* when made. In support of this proposition the following cases are cited. * * *

The rule invoked has no application to a contract made in violation of a statute and that is therefore in contravention of the lawfully declared public policy of the state. In such a case the party who has not performed and who is sued for the breach of his contract can avail himself of its illegality. *Clark* v. *Lincoln L. Co.,* 59 Wis. 655, * * *; *Cohn* v. *Heimbauch,* 86 Wis. 176, 180, * * *; *Pearson* v. *Kelly,* 122 Wis. 660, * * *; *Sentinel Co.* v. *A. D. Meiselbach M. W. Co.,* 124 Wis. 224; *Menominee River B. Co.* v. *Augustus Spies L. & C. Co.,* 147 Wis. 559."

West Penn Chemical & Mfg. Co. v. *Prentice,* 236 Fed. 891, 895:

"(7) Against this conclusion the plaintiff's chief objection is that the company is estopped from setting up such a defense, and his brief cites many cases on the general subject. We need not review them, nor discuss the doctrine of estoppel in connection with *ultra vires* acts. Assuming the general rule to be that, where an *ultra vires* agreement has been executed by the other party in good faith, and where the corporation has derived from the transaction the benefit it desired, the corporate party may be estopped to deny its authority to contract, nevertheless we are of opinion that the particular situation before us falls within a recognized qualification to the rule, namely, that the corporation is not estopped to set up the defense if the agreement has been prohibited by statute, or is immoral, or is otherwise contrary to public policy."

State ex rel. Hadley v. *Bankers Trust Co.,* 157 Mo. App. 557, 566:

> "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void but only voidable; not wrong *per se* or against public policy and good morals but wrong merely because the act is not within the scope of the powers conferred by law on corporations. We know of no case in this state where the rules under consideration have been applied where the corporation has become a party to the contract void for the reason that it was wrong in itself and a violation of sound public policy and good morals."

If an act is simply *ultra vires,* that is the exercise of a power that a corporation could legally have inserted in its charter, but did not, a stockholder may find himself estopped by his acts,—exactly as a principal can ratify the unauthorized lawful acts of his agent.

Estoppel can bind a stockholder merely when the acts are not prohibited by any express or implied provision of law, and are acts which would have been valid under a proper amendment to the charter. In the case at bar, however, the matter could not have been cured by charter amendment, or by an act of anybody. It is a violation of the corporation statutes of New Jersey, and of a fundamental rule of public policy.

In its brief in the Chancery Court, defendant in support of its claim of estoppel cited *Trimble* v. *American Sugar Refining Co.,* 61 N. J. Eq. 340.

The charter of this corporation only authorized buying and selling sugar, but the corporation also engaged in buying and selling coffee. A stockholder objected to this, and also other matters of the business management of the corporation. None of the corporation's actions objected to were in violation

of any express or implied statutory provision or of any rule of public policy. The company simply did lawful things which it could have taken the power in its Certificate of Incorporation, but did not take. The question came up whether the corporation could continue in the coffee business, and it was held that it could. The decision of the Court is based on *Rabe & Cross* v. *Dunlap,* 51 N. J. Eq. 40. The headnote in this case clearly brings out the distinction which we are making.

> "A stockholder who applies to a court of equity for its summary interference to protect his stock against the consequences of an act not prohibited by law, but in excess of the power of the corporation, to be entitled to what he asks, must apply promptly; he cannot wait to speculate upon the chances. * * *"

The decision is carefully limited at page 46, as follows:

> "But stockholders, to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely *in excess of the power* of the corporation, and are *not prohibited* by law, must be diligent; * * *"

Breslin v. *Fries-Breslin Co.,* 70 N. J. Law, 274:

It was held that acquiescence of all the stockholders might create an estoppel and prevent the setting up thereafter of "legal informalities in matters of internal concern that affect only the interests of the stockholders" (281).

At page 282, this Court carefully limited its decision as follows:

> *"Saving so far as public policy* and the interests of creditors and other third parties are concerned (none of which is involved in the present case), the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements, and what

> will bind all the stockholders, with respect to an obligation from the company to one of its members, will bind the company as such."

The head note of this case also emphasizes that the decision is not applicable to any acts or agreements in violation of public policy.

The Vice-Chancellor in the case at bar said:

> (p. 423): "If the defendant corporation has arrogated to itself powers that are not conferred, or that are obnoxious in the eyes of the law as against its policy, it is guilty of an invasion of the public right, **and direct redress lies with the State through its duly appointed agency—the Attorney General."**

No authority was cited by the Vice-Chancellor for this ruling.

If this ruling is correct, the courts in the many cases which we have cited and many others that we could have cited, should have enforced the unlawful provisions, against the alienation of corporate stock, because no one but the Attorneys-General of the various States or the United States could have called the court's attention to the fact that these provisions were against public policy, but they did not do so. If no one called a court's attention to the fact that a provision in a charter or contract was against public policy, it would be the duty of the court itself, of its own motion, to refuse to enforce it or to aid in any way, directly or indirectly, in its enforcement.

If complainant were asking the Court to enjoin certain person from pretending to be operating a corporation, when they were not incorporated, he would be told that that was a case for the Attorney-General, and not for a private citizen. That is

not this case. Both complainant and defendant insist that defendant is a New Jersey corporation. Complainant insists that defendant must therefore be governed by the laws of New Jersey governing corporations. Complainant simply resists the efforts to enforce an unwarranted, illegal and void provision, improperly inserted in defendant's Certificate of Incorporation.

An objection to a particular provision in a charter in no way affects the validity of the incorporation.

The Eastern Plank Road Company v. *Vaughan,* 14 N. Y. 546:

The Court said, per SELDEN, *J.:*

> (p. 551): "Several objections are made to the proceedings by which the plaintiffs claim to have become incorporated. * * *
>
> * * * * *
>
> A second objection is, that the articles of association contain a provision not authorized by the act, viz: that the capital stock may be increased by the directors alone, without consulting the stockholders. The want of authority for this provision cannot affect the validity of the incorporation. The articles must contain the statements affirmatively required by the 1st section of the act, because those statements constitute conditions precedent to the right of the company to become incorporated. *If unauthorized provisions are added, all acts done pursuant to such provisions will be void;* but until the company is proceeded against for an abuse of its franchises, its rights as a corporation will not be affected by such unauthorized provisions."

In the highest Court of practically every State in the Union, and in all the Federal Courts, contracts of sale of businesses, containing provisions against the vendor's doing business in a wider territory than the law permitted, have been held unenforce-

able, because they were in restraint of trade and against public policy. A conspicuous example is *Wydder* v. *Milhomme*, decided November 14th, 1921, by this Court. The courts have never said to the vendor when he said, "this is unenforceable because it is against public policy" that the Attorney-General could say that, but that the vendor could not be heard to say it.

If the Vice-Chancellor is correct in this case, the Vice-Chancellor VanFleet in *Albright* v. *Teas*, 37 N. J. Eq. 171, where a party asked the court not to enforce against him a covenant that he made in a contract in which he sold his rights to a patent, on the ground that the covenant was against public policy, should have said to this party: "The Attorney-General has not asked us not to enforce this covenant, and you cannot." Vice-Chancellor Van Fleet did not do that, but, at the request of the man who made the covenant, refused to enforce it.

Vice-Chancellor Van Fleet said:

> (p. 173): "Moreover, if the covenant would bear the construction which the complainants put upon it, I think it is quite obvious, unless the parties stand to each other in the relation of copartners, that its violation cannot be made the basis of judicial restraint. If they are right, the defendant has restrained himself, generally and absolutely, without limitation as to time or place, from exercising his talents and skill in making gig-saddles and coach-pads. According to the uniform course of decision, such a contract is void, on account of its repugnancy to public policy. * * *
>
> * * * * *
>
> The complainants' application must be denied, with costs."

In *Brewer* v. *Marshall and Cheeseman*, 19 N. J. Eq. Reports, 537, this Court, when it found a covenant in a deed to be in restraint of trade, and therefore against public policy and unenforceable, re-

fused to enforce the covenant notwithstanding that the Attorney-General did not ask it to refuse to do so.

BEASLEY, *Ch. J.:*

(p. 546) : "But, in the second place, it seems to me that this covenant, on which this suit rests, is illegal in itself, and absolutely void. The substance of this covenant is, that neither the former owner of these premises, nor his assigns, shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug up and used upon the land; but the restriction is on the sale of the marl after it shall have been dug up. Marl of course is an article of merchandise, and the covenant restrains traffic in that article. * * * Now it seems to me that this is a plain contract 'against trade and traffic, and bargaining and contracting between man and man.' * * * I cannot say that this covenant is legal, any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm, would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed, and is so well adapted, to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property."

II.

"Salaries".

Complainant is entitled to the relief prayed for by him, against the payment of excessive "salaries" to defendant's directors.

Complainant's second cause of action is that the Corporation unless restrained by the Court would, for the year 1919 and subsequent years, pay its directors grossly excessive salaries.

At the meeting of defendant's directors January 16th, 1919, *the salaries of the directors for 1919 were fixed at an amount equal to half the net profits of the Corporation* for the coming year (p. 41), no distribution of this lump sum being made as between the various directors. At the meeting March 6th, 1919, this aggregate sum was divided among the directors for 1919 in certain fixed proportions (p. 42). After the filing of the Bill, the directors authorized the distribution among the directors of $750,000, on account of 1919 "salaries" (p. 43). Later on, the directors authorized an additional distribution to the directors for "salaries" for 1919, making a total of $952,754.35 (p. 44) as follows:

W. H. LaBoyteaux	17%	$161,543.14
G. V. Coe	17%	161,543.14
W. R. Coe	12½%	118,781.79
W. H. Botsford	11%	104,527.97
W. N. Davey	10%	95,025.43
H. W. Lowe	10%	95,025.43
J. S. Keegan	8%	75,820.34
J. A. H. Hopkins	6%	56,865.26
W. H. Davidge	3½%	33,258.90
S. C. Hunter	3%	28,507.63
Jas. Dickson	2%	19,005.08
J. D. Barrett		2,500.00
		$952,754.35

The appropriation of one-half the net profits of the then coming year to be distributed among the directors as salaries, bore no relation whatsoever to the total value of the services of the directors. The method of determining these "salaries" shows that they were in no sense "salaries".

President LaBoyteaux testified as follows:

> (pp. 172-173): "A. The salaries are ordinarily fixed by a resolution in January.
>
> Q. Of each year?
>
> A. Of each year for the coming year.
>
> Q. So that without regard to the effort or the skill or the time or anything else that will be displayed during that year the fractional sum is fixed in January for that year?
>
> A. Certainly; yes, that is right."

The Vice-Chancellor summed up the situation as follows:

> (p. 334): "Mr. McCarter: If the fact is clear on the record that this fifty per cent. which was distributed in salaries bore no relation to the services——
>
> "The Court: How could it. It was fixed before the services were rendered and before they knew that the services could be rendered.
>
> "Mr. McCarter: I had feared Mr. Prindiville had said something which gave a contrary meaning.
>
> "The Court: Do not waste time on that."

The testimony shows that adjustments were made in the so-called salary percentages, not for the purpose of making the salary received by a particular director represent the value of the services rendered by him, but for the purpose of arranging the distribution of the entire earnings of the corporation and partnership in the desired proportion. In other words, the so-called "salary" included two wholly distinct things—(1) compensation for services rendered by the particular

director; and (2) an additional element consisting of return to that director upon his investment in the business.

Carr v. *Kimball,* 153 App. Div. 825:829:

> "These salaries were in substantial proportion to their stock holdings, were distributions of profits in the guise of salaries, and were not designed to be, and were not, the fair and reasonable compensation for their services."

This was just another method of paying a dividend, and as long as the stockholders agreed to it, it is quite unimportant how the directors did it or what they called it.

Fitchett v. *Murphy,* 46 App. Div., p. 181, at page 184:

> 'So long as all the parties in interest, incorporators, stockholders, directors and officers, assented to the scheme for the distribution of assets by the payment of salaries, the plan was unobjectionable; and that state of affairs continued until the original plan for the personnel of the directors was changed in April, 1897, and a change was made in the officers and the salary of Fitchett was suspended. From that time the actions of the defendants must be regarded as hostile to the interests of Fitchett."

These men could distribute the earnings of the Corporation in any way and under any name they saw fit, as long as there was no objection, but as soon as any one stockholder who had been getting his share, under the name of salary, would no longer get such share, he had a right to insist upon the law being enforced from that time on, so that the people who did the work should be paid such salaries as were fair and reasonable and that noth-

ing should be paid under the name of salaries that really should be paid out in dividends on the stock.

The Vice-Chancellor, in his opinion, refused to pass upon the issue involved in this branch of the case. His reason for such refusal is stated in the following, which is the sole reference, in his opinion, to complainant's second cause of action:

> (pp. 429-430): "The complainant's second cause of action—to restrain the corporation from paying the directors excessive salaries in the future—is, in view of the foregoing conclusion, not ripe for decision. Excessive salaries are in diminution of the dividends, and only those who are entitled to them may complain of their deprivation. The complainant sues only in right of the 125 shares originally purchased by him, and as to these he has lost his claim to dividends, only to be restored upon the surrender of his shares, and to be vouched to him by a ten years' certificate. When he shall have complied with his contract and assumes the status of a dividend certificate holder he will then, and not until then, be in a position to complain that he is deprived of his just share of the company's profits."

This holding of the Vice-Chancellor, to support which he cites no authority, is opposed to the fundamental principles on which courts of equity grant injunctions to protect rights, the invasion of which is threatened. Complainant either has the right to continue to hold his stock in defendant as dividend bearing stock, or to receive a ten years' dividend certificate. No matter what happens, he has the one or the other of these rights. Under any and all circumstances, he has at least a present equitable interest in the dividends of defendant. The fact that if this Court finds against him on his first cause of action, he must then go through the formality of surrendering his stock

and receiving a dividend certificate, is no ground for a court of equity refusing to recognize and protect his interest, which in one shape or another is there.

Equity will by injunction and in every way protect any equitable interest.

4 Pomeroy Equity Jurisprudence, Sec. 1345:

> "As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce *any equitable estate, interest, or primary right,* or to secure and render efficient and purely equitable remedy."

The Courts of this State have frequently stated that they regard equitable interests as though they were legal rights and will protect them to the same extent.

Skellenger's Executors, 32 N. J. Equity 659:

> (p. 662): "This interest is an equitable estate, and, as such, is entitled, in equity, to be considered, to all intents and purposes, as a legal estate. Such estates, in equity, are subject to the same incidents, properties and consequences that similar legal estates are at law, and are transmissible in the same manner."

Kip v. *Kip,* 33 N. J. Equity 213, at page 215:

> "The rights in dispute are purely equitable, but here they must be treated as though they were legal rights. Courts of equity treat trust estates as though they were legal estates, and deal with them as having the same incidents, properties and consequences that belong to like estates at law."

Beideman v. *Sparks,* 61 N. J. Equity, 226, at page 231:

> "In this court equitable estates are dealt with as legal estates, and are subject to the

same incidents and consequences as, under like circumstances, attend upon similar estates at law."

Courts of equity will even protect claimed rights in property although the title is unsettled, undetermined and in dispute.

The New Jersey Zinc and Iron Company v. *Charles W. Trotter, et al.,* 38 N. J. Eq. Reps., page 3.

CHANCELLOR RUNYON, at page 7:

"The court will, in many cases, interfere to preserve property in *statu quo* during the pendency of a suit in which the rights to it are to be decided, and that, without expressing, and often without having the means of forming, any opinion as to such rights * * *; and in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the complainant."

Johnson v. *Hughes, et al.,* 43 Atl. Rep. 901.

GREY, *V. C.,* at page 902:

"* * * In the *Flamang* case, cited in *Hanson* v. *Gardiner,* 7 Ves. 307, Lord Thurlow, in order to prevent irreparable mischief, allowed an injunction, though the right of the complainant was not established; and in the *Hanson* Case Lord Eldon followed that authority."

In *Bowman* v. *Blackman,* 60 Oregon, 304, it was held that an equity court will protect unpatented rights in public lands even though all steps necessary to acquire the patent from the Government and legal title have not yet been fully complied with.

Another form in which this same doctrine of equity courts is stated is in the maxim that equity

regards as done that which ought to have been done. As stated in 21 *Corpus Juris,* at page 203:

> "The maxim has also been applied in a variety of other cases where some act necessary to the rights of the parties has been omitted."

A familiar application of this maxim is in connection with contracts for the sale of property. See 21 *Corpus Juris,* page 201, Section 194:

> "Contracts to Convey. The maxim finds a most important application in respect to contracts for the conveyance of real property.
>
> Chancery viewing such agreements as though the obligation imposed by them had been met, treats the purchaser or contractee as the owner of the land from the time of making the contract and as trustee of the purchase money for the vendor, while the vendor is regarded as holding the land in trust for the purchaser until the time when the conveyance is finally and formally made, and as security for the purchase money."

This principle is clearly recognized in this State, *Burrell* v. *Middleton,* 72 N. J. Equity 774. The headnote correctly states the case.

> "2. If A, for a valuable consideration, agrees to bestow upon B a right of passage over land of A, such agreement operates to vest in B an equitable estate in the land of A co-extensive with the terms of the agreement, and it is within the exclusive jurisdiction of a court of equity to enforce the execution of the agreement by decree of specific performance, and to protect B against the violation of the agreement until the agreement shall have been executed by the delivery of the necessary assurances of legal title."

President LaBoyteaux testified that after the dividend had been declared on March 11, 1919, he

had the following conversation with Mr. Prindiville (p. 142):

> "Q. Have you had any conversation with Mr. Prindiville as to the dividends on his 125 shares of stock? A. I called up Mr. Prindiville some time in March, 1919, I think it was and suggested to him that he send in his common stock to be exchanged for dividend certificates so that we could pay the dividends that *had been declared* and would be shortly declared on the common stock.
>
> Q. Has he complied with that suggestion? A. He has not."

Mr. LaBoyteaux was then asked whether the corporation was still holding those dividends and the dividends which had subsequently been declared in order to pay them over to Mr. Prindiville whenever he should surrender his stock. He testified (p. 142) as follows:

> "Q. Is there money necessary to pay the dividends if Mr. Prindiville turned in his stock in compliance with the certificate of incorporation ready for him?
>
> A. Absolutely."

At another time during the trial the following occurred (p. 98):

> "Mr. Seligman: The explanation of that is that the 249 per cent. which your Honor is referring to consists of dividends declared during 1919 out of 1918 earnings, and the dividends which Mr. Hardin is referring to are dividends paid during 1918 out of the 1918 earnings and declared in 1918 and as to that there is, as Mr. Hardin says, no dispute.
>
> The Court: Declared in 1918, 45 per cent., and declared in 1919 as of 1918, 249 per cent.
>
> Mr. Seligman: Which he did not get."
>
> Mr. Hardin: "The corporation does not deny Mr. Prindiville's right to dividends, but we say he has got to turn in his stock before he gets the right to collect the additional dividends."

Whatever complainant's rights are, they are certainly greater than those of a person who holds only an option to buy property which he may never exercise. Equity courts will by injunction protect the possible rights of the holder of an option that may ripen into actual ownership.

Williston on Contracts, § 936, p. 1776:

> "The interest of one who has contracted to purchase can be assigned, but so can that of the holder of an option. The purchaser has a right to require husband-like conduct of the vendor in possession, but the same may be said not only of the vendor's right against a purchaser in possession, but also of the right of the holder of an option. Surely one who has given an option for valuable consideration, cannot thereafter be allowed to misuse the property."

Williston on Contracts, § 61, p. 108, Footnote 89:

> "Though such an option to buy land is a contract, it should be observed it is a contract to buy only if the buyer chooses to do so. Accordingly it will not make the buyer in any sense the equitable owner of the property until he exercises his right to buy. Equity will, however, specifically enforce his right to become owner on acceptance of the option, * * * will also enjoin a proposed sale by the offeror during the time when he had contracted to hold the offer open."

Even if defendant's contention on the first branch of this case were sustained and complainant never surrendered his stock in exchange for a dividend certificate, he would always be a stockholder, and a stockholder is entitled to an injunction to stop waste of the corporation's assets, a pro rata share of which would be his in case of the dissolution of the corporation. Paying grossly excessive salaries to directors is waste.

On the evidence introduced in this case complainant has made a *prima facie* case entitling him to an injunction on this branch of the case. The authorities in this State are well settled that whenever salaries paid to directors are attacked as being excessive and unreasonable, the burden of proof is at once thrown upon the corporation to prove that the salaries are reasonable. The Corporation has not attempted to meet this burden, and the method employed by defendant of distributing half the net earnings, regardless of what they may be, as directors' salaries, shows that defendant could not meet that burden.

Lillard v. *Oil Paint and Drug Co.*, 70 N. J. Eq. 197, the Court, by EMERY, *V. C.*, said at page 204:

> "It is settled in this state beyond question that where the salary of the president or of any other member of the board of directors, for his personal services in the general management of the business of a company of this character, is fixed by the directors, the amount of compensation fixed by the board is not final as against any dissentient stockholder promptly applying for relief The mere employment of a director to perform the services is not reviewable to any greater extent than any other act of the board in managing the business of the corporation under the statute, but the agreement for employment is in such cases considered as distinct and separable from the agreement for compensation, and the compensation, when properly called in question, is determined by the court, at its fair value, *and the burden of establishing the value of their services is upon the directors.*" (Italics ours.)

Gardner v. *Butler*, 30 N. J. Eq. 702, the Court, by VAN SYCKEL, *J.*, said at page 725:

> "The case resolves itself, then, into this question: Have the directors, whose action is the subject of controversy, retained for their services more than they are justly and reasonably

> entitled to? *The burden is on them* to show what they reasonably deserve to have, and no unjust exaction will be permitted." (Italics ours.)

See also

> *Raynolds* v. *Diamond Mills Paper Co.*, 69 N. J. Eq. 299, STEVENSON, *V. C.*
>
> *Fougeray* v. *Cord*, 50 N. J. Eq. 185, 195, PITNEY, *V. C.*

This case was reversed in 50 N. J. Eq. 756 (*Laurel Springs Land Co.* vs. *Fougray*), in so far as the decree below appointed a receiver, but the decision was affirmed in so far as it held the directors' salaries unreasonable. At page 759 Garrison, *J.*, said:

> "1. As to salaries and commissions. The decree below setting aside the resolution and putting the defendants to their election between a salary of $3,000 or commissions, is affirmed."
>
> *Davis* v. *Thomas A. Davis Company*, 63 N. J. Eq. 572, 574, REED, *V. C.*

The defendant contends that it was justified in voting the payments which it did, to its directors, and the payment of which complainant asks this court to enjoin, by the following provision in its certificate of incorporation:

> (pp. 378-9): "Such salaries (*i. e.* of execuitve officers and directors) are to be fixed from time to time by the Board of Directors, *and shall not exceed in the aggregate* the amount of the net profits in the year ascertained as herein provided."

This provision furnishes no authority whatsoever for the payment by the defendant of unreasonably high salaries. This clause, instead of justify-

ing the arbitrary payment of one-half of the net earnings to the directors, as "salaries", has just the contrary effect. It contains a maximum limit beyond which in no event can the salaries go. It was inserted for the protection of defendant against its directors, and not as a license to let them take one-half of the net earnings as salaries, whether they have earned them or not. The statement that salaries "shall not exceed" the net profits cannot be construed as being equivalent to a provision that salaries may equal the net profits,—just the reverse.

The provision in question is one by way of limitation and is inserted as a safeguard for the rights of the stockholders. The effect of it is that even though reasonable salaries for a given year, under ordinary rules of law, might exceed one-half net profits, nevertheless the directors would not be authorized to pay such salaries to themselves. It is a restriction upon the rights of the directors, and is not an extension of their powers.

Defendant sought to meet complainant's second cause of action by urging that complainant is estopped from objecting to the salaries for 1919 and thereafter. Defendant's basis for such claim is that complainant himself has shared in excessive salaries for preceding years, and should therefore be estopped from objecting to them in the future.

Complainant is asking the Court to protect him against the future payment of excessive salaries. This action looks only to salaries which defendant is threatening to pay for 1919 and thereafter. As to those years, complainant has in no way acquiesced or consented to the payment of unreasonable salaries. The fact that the complainant may have consented in the past, does not bar him from preventing the payment of excessive salaries in the future.

The salaries for each year stand by themselves. The resolutions of the directors under which the salaries, the payment of which complainant is seeking to enjoin, were passed by the directors in 1919 at a meeting at which complainant was not present and at a time when the defendant contends that complainant was no longer a director.

Acquiescence in the salaries for preceding years does not estop the complainant from attacking the payment of excessive salaries in subsequent years, to which he did not consent.

This very question was passed upon and squarely decided in *Lillard* v. *Oil, Paint & Drug Co.*, 70 N. J. Eq. 197.

EMERY, *V. C.*, said, at page 201:

> "* * * Where the contract or act complained of is one which relates to separable annual payments, but is continuous in its operation, and the illegality or oppression will be permanent, unless it is set aside or restrained by the court, delay may not be a bar to relief against the continuance of the salaries, although it may bar a recovery of the excess paid previous to the time of filing the bill. Delay is made effective as a bar to relief mainly upon the ground of acquiescence, but acquiescence in one illegal act, or invalid act, should not be held to bind the stockholder to submit to a continuance of similar illegal or invalid acts. The office of president of these companies is an annual office, and the salaries are payable yearly, and the minority stockholder's substantial grievance here is that the salary claimed to be excessive is attached permanently to the office by means of by-laws and stockholders' resolutions, and that this annual salary to the presidents cannot be terminated at all, except by the consent of the majority stockholder, who holds the office at his will. So far as relates to the salary paid each year, the stockholder may be barred from relief, if he delays beyond the year, and allows the com-

> pany to pay the salaries, and the delay is not satisfactorily explained. But if the by-laws or resolution is invalid, he is entitled to relief against its continuous operation, as fixing permanently the salaries of the presidents for the future. In the present case, I do not think the delay to take proceedings for relief against this salary has been satisfactorily accounted for."

Mr. Prindiville, as he stated on the stand, shared in excessive "salaries" which were greater than what he conceived to be the true value of his own services and those of his then fellow-directors, but it made no difference as long as he received a salary and dividends upon his stock, whether he received his income by way of dividends or under the name of salary. As long as he was receiving his share of the earnings of the business, it was immaterial to him whether he was paid under one name or the other.

Mr. Prindiville's status changed; he ceased to receive a "salary" and merely became entitled to dividends. It then became important to him whether the amount paid out as so-called salaries was really salary, or whether it included what was really a dividend distribution to certain of the stockholders. It being the latter, he would not receive the full amount of dividends to which he was entitled, and his right as a stockholder or a dividend certificate holder would be very greatly injured. As soon as the change in Mr. Prindiville's situation came about, the reasons why he had acquiesced in the past to the distribution of part of the company's profits under the guise of salary, ceased, and instead of it being immaterial to him in what form payments were made, the question became vital. As he was, as a stockholder, entitled to share in the one form of distribution of the net earnings of the corporation, and not in the

other form of distributing the corporation's net earnings, he became entitled to an injunction to stop the distribution among the directors of moneys which should be paid to all stockholders.

The situation in the present case is in this and other respects closely analogous to that in *Godley* v. *Crandall & Godley Co.*, 153 App. Div., First Department, 697. The language of that case at page 706 applies precisely to this case.

> "The basic reason of the corporate disputes which have produced the crop of representative actions, similar to the case at bar, is this: the original members of a joint enterprise or partnership engaged in trade, business or manufacturing, seeing certain real advantages in incorporation—the two most important being (1) a limitation of personal liability for the debts of the business to the amount invested therein, and (2) freedom from dissolution by reason of the death of a partner—transform the trading partnership into a business corporation, the partners receiving stock in proportion to their interests. So long as they all live, and agree, they treat it as a partnership, and, whether they distribute the surplus profits among themselves as dividends or by way of salaries, the financial result is precisely the same and there is no one to complain. But when a partner (that is, such a stockholder) dies, or by reason of disagreement with the majority is ousted from the management, the majority refuse to regard the stock of that deceased or ousted partner as entitled to the treatment that he was when alive or in agreement. They think that as they do the work and have the responsibility, they are entitled to keep to themselves and divide among themselves all, or the substantial part, of the profits or gains of the business, thus losing sight of the fact that the very form of the enterprise which they have created, to wit, a corporation, which has conferred upon them the benefits of a limitation of liability and a survival notwithstanding the death of

a member, couples with those advantages the equality of all the stock, irrespective of ownership, whether original or recent, and irrespective of the participation in the affairs of the company or of the work or labor for it. All the stock is on the same basis of partnership *inter sese* and the right of the majority, or the surviving original partners, to still treat the enterprise as their own and as they will, has ceased. That is the penalty or payment which they have to make for the original advantage which they have received by incorporating. It is for this reason that, chafing under the legal necessity of treating all the stock alike and of dividing the profits *pro rata* to the holders thereof, they became ingenious in devising methods to evade and avoid their corporate responsibilities. The only safeguard lies in strict adherence to the equitable principle that the directors are fiduciaries, and may not, therefore, deal with themselves. The court is still the refuge and the support of the minority. Whenever a minority stockholder can show that the directors, his fiduciaries, have deviated from the path of square and honorable dealing for their own benefit, the court will exercise its power to right the wrong."

It is respectfully submitted that the claim of the complainant in both causes of action is correct, and should be sustained; and that the decree below should be reversed.

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Filed after the Oral Argum
by leave of Court.

New Jersey Court of Errors and Appeals.

Between

THOMAS J. PRINDIVILLE,
Complainant-Appellant,

and

JOHNSON & HIGGINS,
Defendant-Respondent.

APPELLANT'S REPLY BRIEF.

I.

Defendant's argument that complainant's position in this case is weakened by the fact that he received what defendant erroneously claims is a large amount out of the entire situation, during eight years, is untenable.

On the argument before this Court, the claim was substantially made by defendant's counsel that because Mr. Prindiville had, in the eight years that he was associated with the Corporation, received $557,410.72 (less the $31,125 dividends for 1918 involved in this suit) out of his interest in the copartnership, dividends on his 125 shares of common stock in the Corporation, salary, and dividends on 100 shares of preferred stock for which he paid $100 a share in money, that therefore he ought not to prevail in this suit. Much more than half of

this was received in the last three years. In the first four years, he received in dividends on preferred and common stock, salary and interest in partnership, an average of $32,387.64 per year. The total amount that he received from all sources in 1911—the first year, being $23,660.53 (see Deft.'s brief, pp. 32-33).

Stress was laid, in the argument, on the fact that Mr. Prindiville got only 125 shares of defendant's common stock for his business in Chicago. It was a valuable business, built up by complainant's father and brother and then by himself, in conjunction with defendant. Defendant knew its value, as it then owned a half of it.

When Mr. LaBoyteaux, the present President of the defendant, came into the defendant corporation, six years before Mr. Prindiville, he got 50 shares of the Corporation for his business. Defendant's capitalization was very small, and 125 shares was four or five per cent. or more of the defendant's common stock. They could have done what many corporations do, increased the capital and given Mr. Prindiville 1,250 shares. One hundred and twenty-five shares of stock in a corporation with a small nominal capitalization—far below its real value—was worth much more than $12,500., the nominal value of the stock.

The very great increase in the volume of the business and wealth of the Corporation came after 1911, when Prindiville became a director. Naturally, Chicago being the second largest City in the Union, the business of the Corporation there would be the second in importance to that done in New York. Mr. Prindiville had charge of all the business in Chicago of defendant corporation and of Johnson & Higgins, the copartnership, which were simultaneously doing business in that territory, besides helping in the general administration of the entire corporation and copartnership.

It does not impress one that it is a very sound argument to say that because a man started in business we will say in 1911 with limited capital or without any capital at all, and in 1919 had built up a business worth a tremendous sum of money, that the courts should not protect him.

The plea that Mr. Prindiville should not receive the protection of this Court because he put, as they claim it, comparatively little into the Company and has taken out a good deal, is made on behalf of men who put in very much less and got very much more out of the Corporation than he did.

We will take the case of Mr. LaBoyteaux, who had charge of the matters that led to Mr. Prindiville's elimination from the Corporation. He came into the Corporation in 1905. He was then living in San Francisco, and remained there until 1916, when he came to New York. Mr. LaBoyteaux had no business of his own, but while working for Johnson & Higgins, as an employee, he "secured" and "influenced" certain persons to do business with them, and "controlled" a certain amount of business (p. 132). In consideration of that, the Corporation gave him 50 shares of common stock. He now has 382 shares of dividend paying stock, for none of which he paid, against Mr. Prindiville's 125 shares. He also has much more non-dividend bearing stock than Mr. Prindiville.

Mr. LaBoyteaux testified:

> (p. 133): "All, practically—well, the identical method. In fact the entire ownership in the corporation today is held by men that came in just as I came in.
>
> Q. Is that so as to Mr. Prindiville? A. No; Mr. Prindiville's situation was a little different. Mr. Prindiville was operating in Chicago. In 1903, I think it was, a corporation was formed in Chicago, in which to carry on the operations in the Lake district. Mr. Prindi-

ville had a half interest in that Chicago corporation and Johnson & Higgins held the other half stock in that corporation. In that respect Mr. Prindiville was different from the rest of us.

Q. (By the Court): Only in consideration? A. Only in consideration."

In 1919, after Mr. Prindiville was eliminated, Mr. LaBoyteaux, as "salary", got 17% of the half of the net profits of the Corporation. The highest that Mr. Prindiville ever got was 6%. Mr. LaBoyteaux's 17% in that year alone amounted to $161,543.14. The same amount was paid to George V. Coe. W. R. Coe got $118,781. Mr. LaBoyteaux in 1918 got 13.3% of the copartnership profits (record, p. 360), whereas Mr. Prindiville got 6½%, and Mr. LaBoyteaux probably got more after Mr. Prindiville was eliminated. In 1918 the common stock of defendant paid 294% dividends, and it probably paid more in 1919. Therefore, Mr. LaBoyteaux, who never put a dollar of money into the Corporation or copartnership, probably got nearly two-thirds as much of the situation in the one year of 1919, as Mr. Prindiville got out of the corporation and copartnership in any way, shape or form from 1911 to date.

The chances are that if Mr. Prindiville had gone into any other corporation, with his ability, and had put as much as he did into this Corporation, that he would have gotten very much more out of it in that identical period of eight years.

After the signing of the Armistice, and when Mr. Prindiville was ready to return to private life, those then in charge of the defendant corporation refused to reinstate him in his former relative position, but proposed to have him rank below his former running mates, Messrs. Davey and Lowe, and also below Mr. Keegan, who was very much his

junior in every way in the corporation, and who had entered the corporation years after he had. Upon his refusal, Mr. Prindiville, realizing that a withdrawal from his active services in the Company would involve him in a very large financial loss, the loss of his salary as an officer, nevertheless, as there was a matter of principle involved (p. 314) and as he was being humiliated to an extent that he could not submit to, announced to his fellow directors that his pride and self-respect would not permit him to remain with them any longer, unless they altered their course.

Mr. Prindiville's position was exactly the same as that of numerous members of the bar who left their practice to enter military service during the World War. What would the feeling of such a lawyer be if on his return to civil life, he had found that juniors in his firm had been promoted ahead of him and that he would only be offered a secondary position in his own firm? Any such man would have been indignant, and properly so, and would have taken the position that his partners were acting in an inequitable and unfair manner towards him, and were, in effect, seeking to force him out of the firm.

II.

The doctrine of *pari delicto* does not, in any court of law or equity, apply to provisions in restraint of trade or alienation. All courts will treat the illegal part as void and enforce the legal parts. Complainant is not estopped from asserting his right to dividends nor from asking this Court to treat the illegal provision as void.

Fishell v. *Gray, Receiver,* 60 N. J. Law, 5.

This is the leading authority on this point in this State.

Fishell contracted to sell his business to a corporation represented in the action by Gray as Receiver. As one of the terms of the contract of sale, Fishell agreed thereafter not to enter into competition with the corporation. The agreement further provided that should Fishell violate his promise not to compete, the unpaid installments of the purchase price then owing to him by the corporation should *"thereupon cease and be forfeited forever thereafter"*.

Before all the installments of the purchase price had been paid Fishell violated his agreement and entered into competition with the corporation. Thereafter he sued for the remaining installments of the purchase price. The Supreme Court held in an opinion delivered by Chief Justice Beasley that Fishell was entitled to recover upon the ground that the promise not to compete was an agreement in restraint of trade and therefore illegal and void.

This case, in the principle involved, is exactly like the case at bar. Fishell entered into a con-

tract which contained an illegal provision. At a subsequent date Fishell came into Court and sought to enforce a promise of the defendant contained in the contract. In that case, defendant then set up the failure of the plaintiff to comply with a condition in the contract. The condition in the Fishell case was that if Fishell violated his agreement not to compete, his right to future payments should be forfeited. In the *Fishell* case the Court held that the condition being unlawful was void and that Fishell could recover. It necessarily follows that in this case the provision in defendant's charter being equally illegal and void, Prindiville can recover.

Fishell v. *Gray* was followed in *Rosenbloom* v. *United States Credit System Co.,* 64 N. J. Law, 34, in which case identically the same decision was made as in *Fishell* v. *Gray.*

The *Rosenbloom* case was appealed to this Court, which in 65 N. J. Law, 255, affirmed the lower court.

Rosenbloom v. *United States Credit System,* 65 N. J. Law, 255.

COLLINS, *J.,* speaking for this Court, said at page 259:

> "* * * Contracts in undue restraint of trade are loosely spoken of in the books as 'illegal contracts'. It is more accurate to style them 'unenforceable contracts'. It is not against the law to make such a contract, or illegal to perform it. As was said by Pollock, *C. B.,* in *Green* v. *Price,* 13 Mees. & W. 695: 'It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform it if he choose'. In the case cited there was a covenant to pay £1,500 liquidated damages if the vendor of a London business should engage in like business in the cities of London and West-

minster, or within 600 miles from them, respectively. The restriction as to the cities was held good, and the stipulated damages were awarded the plaintiff, although the other restriction was held void as unreasonable. On affirmance in the exchequer chamber in *Price* v. *Green,* 16 Mees. & W. 346, Petterson, *J.,* said: 'The restriction as to six hundred miles from London and Westminster is only void, not illegal, and therefore the rest of the restriction formed a sufficient consideration for the agreement to pay £1,500.' The same distinction underlies this court's decision in *Potteries Co.* v. *Olyphant, ubi supra,* where a covenant by vendors not to engage in a like business to that sold in any state or territory except Nevada and Arizona was held disjunctive and separable as to place. Being good as to New Jersey, where the vendors had their factory, this court compelled by injunction its performance here, and refused to inquire into the validity of the restraint elsewhere. It is evident that, if the invalidity in any part of the covenant would avoid it utterly, the court would have been obliged to pass on that question.

The case in hand stands thus: The defendant, desiring the service of the plaintiff as its agent, agreed, in consideration of his covenant to serve it for five years, to employ him for that period; exacting from him, also, a covenant not to engage in like business for three years after his service should end. It was not wrong or illegal for the plaintiff to perform this covenant. If he could not be compelled to perform it, the defendant must be presumed to have known that this was so, and to have taken the chance that he would act honorably. To deprive the plaintiff of his contract of employment because of the possibility that he might repudiate his collateral engagement would be neither sound law nor good morals. *In Fishell* v. *Gray, ubi supra, the supreme court held that the receiver of the present defendant must perform its agreement to purchase a business, although the contract con-*

> *tained an agreement that the vendor would not engage in a like business. We approve that decision, and the reasoning of Beasley, C. J., on which it is based.* In most of the cases in which it has been held that if a promise forming part of the consideration of a contract is illegal the whole consideration is void, it will be found that to do the thing promised was illegal or immoral. A failure to perceive the distinction between such cases and those where the promise is merely void has led text writers and some judges to include contracts in undue restraint of trade as within the doctrine stated, but, as pointed out in *Fishell* v. *Gray, ubi supra,* this view is untenable. The only case directly asserting it to which we have been referred by counsel for the defendant is *Bank* v. *King,* 44 N. Y. 87, the reasoning of which, in the light of what has been said, is its own refutation. * * *"

Cone v. *Russell & Mason,* 48 N. J. Equity, 208.

This is a decision which is decisive in Complainants' favor, of the issues involved in this case.

Defendants purchased stock of a corporation at the request of complainants "and upon an understanding and agreement" (p. 210) with complainants that the stock in the corporation owned by complainants should be delivered to defendants to be voted by them as Voting Trustees for a period of five years. Defendants agreed to vote complainants' stock and also their stock during this period for the election of directors who would appoint one of complainants as the manager of the Company at a certain salary throughout the period of five years.

After this contract had been carried out and after it had been in operation for a period of years and one of the complainants had been appointed manager and had received his salary, complainants de cided to withdraw their stock from the Voting

Trust and brought a bill in equity asking that the defendants be enjoined from voting their stock.

In *Cone* v. *Russell* (PITNEY, *V. C.*) held that the Voting Trust was illegal and therefore void. It then took up the objection "that the complainants have no standing in this Court because they stand in *pari delicto* with defendants".

The Court held that there were two answers to this argument. First, that complainants were not asking to enforce the illegal provision but were seeking to be relieved "from its apparent obligations". The Court further stated that "a second and complete answer is that the maxim in *pari delicto potior est conditio defendentis, does not apply to a case like this, resting upon the ground of public policy*" (217). It therefore held that complainants were entitled to the equitable relief asked for.

The facts in that case were stronger against the complainant than anything that could possibly be claimed in this case.

The defendants had bought stock relying upon complainants' agreement to allow them to vote the stock and they had gone ahead and operated under this agreement and one of the complainants had obtained benefit thereunder by being made manager of the corporation. The complainants then change their mind, seek to be relieved from their obligations and a Court of Chancery listens to their prayer and decrees that since the Voting Trust provision is unlawful and against public policy that it is void and that, notwithstanding that this agreement was a substantial part of the contract under which the complainants acquired their stock, they were entitled to relief from a court of equity in order to free them from the illegal obligation, and permitted them to enjoy their rights as stockholders of the corporation free from and untrammeled by the illegal agreement.

The decision in the *Cone* case has been repeatedly affirmed by the Courts of New Jersey. Perhaps the best known decision is *Warren* v. *Pim,* 66 N. J. Equity, 353, in which this Court discussed the question of *pari delicto* at length and in numerous portions of its decisions expressly reaffirmed the principles and the decision of the *Cone* case.

See especially the concurring opinion of GREEN, *J.,* at page 425 which referring to the second of the answers given in the *Cone* case to the *pari delicto* argument states:

> "That decision (see *3 Dick Ch. Rep. 216, 217*) was placed upon two grounds, of which I prefer the second. This ground is thus expressed in *1 Story Eq. Jur.* (13th ed.), Sec. 298:
>
> 'In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se,* courts of equity, following the rule of law, as to participators in a common crime, will not at present interpose to grant any relief. But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis,* is not in equity material. The reason is that the public interest requires that the relief should be given, and it is given to the public through the party.' "

This decision clearly brings out the distinction between the case where a party to an illegal contract seeks the aid of a Court to have the illegal provision enforced and the case where he seeks the aid of a Court to have the illegal provision rendered void. In the latter case no doctrine either of *pari delicto* or of equitable estoppel can prevent his being given the relief to which he is entitled.

The United States Supreme Court, basing one of its earlier decisions on a New Jersey case, has con-

sistently held that a contract or enactment of any kind containing an illegal provision in restraint of trade, or any other provision that is illegal but not necessarily immoral, will be enforced minus the illegal provision.

Chicago, St. L. & N. O. R. Co. v. *Pullman Southern Car Co.,* 139 U. S. 79; 35 L. Ed. 97.

HARLAN, *J.*:

(p. 103): "Besides, it is not clear that the agreement is so far indivisible that the stipulation giving the plaintiff the exclusive rights in question, and binding the defendant not to make similar contracts with other parties for drawing room and sleeping cars to be used on its lines, cannot be separated from the other provisions. If that stipulation were held to be void, upon the ground suggested, we should be inclined to hold that, as between the parties, the provision making the Railroad Company liable for loss or damage, arising from casualty or accident, to the plaintiff's cars, while in the possession of and subject to use by the defendant, remained in force. *Erie R. Co.* v. *Union Locomotive & Exp. Co.,* 35 N. J. L. 246."

Oregon Steam Nav. Co. v. *Winsor,* 20 Wall. 64; 22 L. Ed. 315.

BRADLEY, *J.*:

(p. 319): "* * * It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void, altogether.' The cases cited in support of this

proposition are *Chesman* v. *Nainby,* 2 Str. 739; *Wood* v. *Benson,* 2 Cromp. & J., 94; *Mallan* v. *May,* 11 Mees. & W., 653; *Price* v. *Green,* 16 Mees. & W., 346; *Nicholls* v. *Stretton,* 10 Q. B., 346. * * *"

McCullough v. *Commonwealth of Virginia,* 173 U. S. 103; 43 L. Ed. 382.

BREWER, *J.:*

(p. 387): "That bonds and other deeds may, in many cases, be good in part and void for the residue, where the residue is founded in illegality but not *malum in se,* is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in Pigot's Case, 11 Coke, 27*b,* it was said 'that it was unanimously agreed in 14 Hen. VIII., 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio* and the others stand good.'

So in *Gelpcke* v. *City of Dubuque,* 1 Wall. 221 (17: 531), this court said, in reference to a similar contention in a suit on a contract made by the officials of the city of Dubuque (p. 222 (17: 520)):

> 'We have not, therefore, considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se,* is that the bad parts do not affect the good. The valid may be enforced.'

We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in 135 U. S. 668 (34: 306), 'this question, therefore, must be considered as foreclosed and no longer open for consideration'."

Fleckenstein v. *Fleckenstein,* 76 N. J. Law, 613; 71 Atl. 265.

GUMMERE, *C. J.:*

(p. 267): "* * * Reading it thus, the description of the area within which the contract restrains the defendant is a divisible one, embracing not one whole area, but two areas disjunctively described. Assuming that the restraint contracted for, so far as it embraces territory outside of Jersey City, is unreasonable, and that the contract is to that extent invalid, nevertheless, in respect to Jersey City, it was clearly necessary for the protection of the business as it existed at the time of the sale, and to that extent is not in opposition to public policy, and may be enforced. *Trenton Potteries Co.* v. *Oliphant, supra.*"

See also

Smith's Appeal, 113 Pa. 585.

Murphy v. *Wheatley,* 100 Md. 365.

The doctrine for which complainant contends is in accord with the decisions of practically all the courts that have had the question before them. See 6 Ruling Case Law, 829:

"Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy. Hence, even between parties in *pari delicto,* relief will sometimes be granted if public policy demands it. The general rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in contracts *contra bonos mores,* or violating the policy of the law. If it is necessary, in order to discountenance such transactions,

to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are *in pari delicto.* The party is not allowed to allege his own turpitude, in such cases, when defendant at law, nor is he prevented from alleging it when plaintiff in equity, if the refusal to execute the contract at law, or refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaging in such transactions. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom the relief is granted being only the instrument by which the public is served. This principle is no doubt the basis of the statutes which have been enacted in many jurisdictions allowing money lost in gaming or betting to be recovered back. Even in the absence of such statutes, the equity courts of some jurisdictions give relief from gambling contracts, these courts having concluded that the public interest is subserved thereby. There is even a declaration to the effect that contracts against the policy of a public statute will be set aside in equity at the instance of a *particeps criminis,* and that in such case the court does not interfere for the sake of the party, but for the public good. However, according to some authorities, it seems that the granting of relief to parties *in pari delicto* should be limited to cases in which the contract is not immoral or criminal. But in view of the principle on which the exception to the rule is founded, there does not seem to be any good reason for such a limitation."

13 *Corpus Juris,* 506:

Estoppel.

"An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel."

> (p. 487): *"Exceptions to the General Rule —a. Where Public Policy Requires Intervention of Court.* Although the parties are in *pari delicto,* yet the court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with defendant. But here the guilt of the parties is not considered as equal to the higher right of the public, and the guilty party to whom the relief is granted is simply the instrument by which the public is served."

Defendant in its brief under Points Second and Third urges in various forms that Mr. Prindiville has had the benefit of the contract containing the illegal provision and is therefore equitably estopped from now asserting that such provision is invalid. This same argument was accepted by the Vice-Chancellor below in his opinion in a slightly different form, when he held that complainant was in *pari delicto* with defendant and therefore not entitled to equitable relief.

In every case where a party asks a Court to relieve him from an illegal provision in a contract which he has agreed to, the other party to the contract invariably raises the same argument of equitable estoppel. It is of course true that whenever a Court strikes out an illegal provision from a contract that it is thereby in effect giving one party to the contract something better than his bargain provided for. This, however, is a necessary result of the rules of law governing in all cases like the one at bar.

Defendant in its brief at page 85 says:

> "It would be entirely inequitable to give complainant what he did not pay for and what it was expressly agreed by him he should not get."

If this contention is sound, every one of the cases cited by us and recognized by the Vice-Chancellor as being the law which held that restraints on alienations of stock are invalid would necessarily have been decided the other way. For in every one of those cases the stockholder bargained for stock which was subject to a restriction on its vendibility and yet the Courts held that he could hold his stock freed from that portion of his bargain and get a more valuable stock than he appeared to be purchasing!

In the recent line of decisions of the Supreme Court of the United States referred to in our brief, holding invalid all attempts to restrict the price at which chattels may be resold by the original purchaser, every one of the purchasers was relieved from one of the burdens of his contract and got more than he bargained for.

Defendant at pages 83 and 84 of its brief cites cases to support its contention that although the provision in its charter is illegal complainant cannot be heard to attack it. It neither quotes from any of these decisions nor attempts to summarize their holdings. An examination of the decisions will show that none of them are in point.

The New Jersey cases which are among those discussed by us in our main brief hold that where an *ultra vires* contract is involved which *is not in violation of any statute or any rule of public policy,* a party who has agreed to the contract is estopped from attacking it thereafter. This doctrine has no application to the present case.

The decision in *Wormser* v. *Metropolitan Street Railway Company,* 184 N. Y. 83, which was quoted from by the Vice-Chancellor in his opinion (Record, 428) is equally inapplicable. That opinion expressly states that the doctrine of quasi

estoppel applies only "where the objection to the acts of a corporation is that they are *ultra vires* without being either *mala prohibita* or *mala in se*".

Another case cited by defendant which is quoted from by the Vice-Chancellor in his opinion (p. 429) is *St. Louis Railroad Company* v. *Terre Haute Railroad Company,* 145 U. S. 393. That case is not at all in point. We have cited the decisions of the United States Supreme Court applicable to the question involved in this case.

There is not a single one of the decisions cited by defendant which in the slightest supports defendant's contention.

III.

No man who surrendered any stock to the Corporation during the time Mr. Prindiville was connected with it, testified or could have testified that anything that Mr. Prindiville said or did, led him to believe that he was compelled to surrender his stock either under the provisions of the defendant's Charter or for any other reason. No man testified, or could have testified, that he surrendered his stock, a part of which was subsequently given to Mr. Prindiville, because he believed that he was compelled to surrender it. The fact is that every share of stock that was surrendered came from men who after such surrender remained in the active service of defendant and held and still hold other common stock which, if the provision had been operative and they believed it to be operative, they would have had no right to continue to hold.

Whatever the motives were of the men who surrendered stock, none of them did it because they

were compelled to under the provision above mentioned, but all did it voluntarily, as they had a right to do, the same as a promoter has a right to give back to a corporation any quantity of stock because he believes it to be to the interest of the corporation to return the stock to the treasury so that it can be sold to outside interests.

A letter which defendant's counsel read on the argument in this Court, but which is not printed in the State of Case, told the story. As we recollect it, it was from a stockholder who stated that he believed it to the interests of the Corporation to surrender some of his stock so that it could be given to younger men, and therefore he asked the Corporation to accept his stock, and give him a dividend certificate in place of it. There wasn't the slightest suggestion in that letter that the stockholder was surrendering the stock because he believed he was compelled to do so under the provision above referred to. He surrendered it simply because he thought it was for his interests as a stockholder who would still hold common stock, for the corporation to be in a position to make a present of the stock which he was going to surrender, to some of the younger men in the corporation.

If the provision was valid, there was no possible opportunity, during Mr. Prindiville's connection with the corporation, to put it into effect, because never was a share of stock surrendered during Mr. Prindiville's time by any man who came within such provision.

Even if the illegal provision had been enforced, and Mr. Prindiville had benefited from such enforcement, there is no doctrine of equitable estoppel or *pari delicto* which prevents his asking a court of equity to grant him the relief he prays for in this case. The facts, however, are that Mr. Prindiville has *not* obtained any benefits of any kind from the illegal provision.

Counsel for defendant in his brief and on oral argument asserted in general language that Mr. Prindiville joined in the general plan and participated in the corporate scheme and benefited thereunder. We must ascertain just what Mr. Prindiville did receive.

The following analysis of the benefits which Mr. Prindiville received from the Corporation will show that none of them resulted from the operation of the illegal provision.

FIRST: Mr. Prindiville received his original 125 shares of stock in the Corporation for which he paid.

SECOND: He received by way of stock dividend, stock which had been surrendered by other directors who were still active at the time of their surrender.

Defendant at page 6 of its brief makes a statement that the 115 shares of common stock received by Mr. Prindiville as stock dividends had been "surrendered by stockholders who had become inactive". Again, at page 33 of its brief, it states that Mr. Prindiville has shared in the distribution of stock reissued "after surrender by directors or officers ceasing to be active". We have no hesitancy in stating that these two assertions in defendant's brief are contrary to the facts and contradicted by the record.

In our brief at pages 68 to 73 we have set forth the facts with reference to all the stock surrendered during Mr. Prindiville's connection with the Company and in the redistribution of which he shared, and we have shown that during that time no director died or became inactive, and that the clause requiring surrender of stock never became operative during Mr. Prindiville's connection with the Company.

Counsel for defendant on oral argument admitted that these statements were not correct and said that the 115 shares in question had been surrendered to the Corporation by directors who were gradually becoming less active.

These surrenders did not constitute a benefit to Mr. Prindiville resulting from the operation of the illegal provision, for the simple reason that the surrenders were not made under the operation of the illegal provision.

In its brief at page 82 defendant states that the surrender of stock by other directors while still active was "induced by complainant's conduct" and that therefore complainant is estopped.

There is not a particle of evidence in the record to substantiate this statement.

Defendant in its brief has gone at length into the entire history of the Corporation from its original incorporation, and argues that Mr. Prindiville became a party to the corporate contract, after "defendant's entire corporate plan had been fully established and executed" (p. 79).

If the past history of the Corporation is considered, as we have pointed out in our main brief at page 68, there was only one case in which the Corporation could have enforced this provision—that was the case of Mr. McCumber, who ceased to be an active director. In that case, defendant agreed to buy back from him the shares of its stock which he owned, and returned to him his business, which was the original consideration which he had given for his stock, and in addition paid him a sum of money for his stock.

THIRD: Mr. Prindiville received as a benefit from the Corporation the dividends on his stock.

These dividends in no sense came as a result of the operation of the illegal clause. The surrender by other directors of their stock did not affect the

amount of dividends received by Mr. Prindiville on his stock, because the dividends on their stock were paid to the men who surrendered the stock, *i. e.,* the full amount was paid on all stock whether outstanding or surrendered, and the dividends on the surrendered stock were paid to the parties who surrendered the stock just the same. There is no relation whatsoever between the dividends received by Mr. Prindiville and the void charter provision.

FOURTH: The final benefit received by Mr. Prindiville from the Corporation was his salary.

Here, again, there is no relation between the salary paid to Mr. Prindiville and the illegal charter provision.

Defendant in its brief and on the oral argument treated the illegal charter provision and the excessive salaries paid as part and parcel of one general plan which it was implied was being attacked by complainant. Nothing could be farther from the fact. The paying of excessive salaries has nothing to do with the illegal charter provision. That provision was designed to enable the members of the partnership to limit the stockholders of the corporation to their number. That plan of retaining the choice of their associates in no way required the payment of excessive salaries nor is there any relation between the two separate and distinct features. It happened that they adopted the procedure of paying out half their profits as salaries. There is nothing in the Charter giving them the right to pay half the net earnings as salaries; it only provided that they could not pay out more than half the net earnings as salaries. This bore no relation to the fundamental purpose of the provision designed to prevent the alienation of stock to outsiders, and is in no way tainted with the illegality of the provision restricting alienation.

The only provision in defendant's Charter, with reference to the salaries, is as follows:

> (pp. 378-9): "The net profits of any year, so far as dividends are concerned, shall be deemed to be the amount of profits remaining after payment of all losses and of all charges and expenses of the year, including the salaries of the Executive Officers and Directors. * * * Such salaries are to be fixed from time to time by the Board of Directors and shall not exceed, in the aggregate the amount of the net profits in the year ascertained as herein provided."

Mr. Prindiville's objection to the payment of excessive salaries is based solely on the ground that if any stockholder objects, the Corporation cannot pay any man as salary any more than he actually earns.

Mr. Prindiville never received a cent of dividend on any "surrendered" stock.

It was suggested on oral argument, by a member of the Court, that complainant might be estopped because he had not made his objection to the illegal provision earlier. While we believe that the cases cited above establish that the doctrine of estoppel will never be imposed to violate public policy and to give effect to an unlawful provision, there is also the further answer that no wrong was done until the defendant endeavored to enforce the illegal provision and that complainant could not have taken any steps to attack the illegal provision until that time.

The situation is just as though the charter purposes of a corporation included the unlawful purpose of selling liquor. Until the corporation would commence to sell liquor there would be no violation of the law. Until that time no action

could be taken by any stockholder to register his objection to the unlawful provision in the charter. If he were to come to an Equity Court and ask for an injunction the answer he would receive would be "Wait until the corporation threatens to commit the illegal act and then come to us and ask for relief. We will not presume in advance that the corporation will do an unlawful thing." If Mr. Prindiville had come into Court and sought to have the charter provision clause declared unlawful he would have been met with the answer that the question was a moot one and that until a case arose where its enforcement was attempted that there was no relief which a court would grant him.

Not only, therefore, was there no reason why Mr. Prindiville *should* have attacked the charter provision until its enforcement was attempted, but even further, there was no way in which he *could* have attacked it in advance if he had so desired, and there was no reason in law or morals why he should do so.

IV.

If this Court affirms the decision of the Vice-Chancellor, the illegal provision in defendant's charter is in effect being enforced by this Court.

That provision has been lying dead, but an affirmance of the Vice-Chancellor's decision will vitalize it.

We can call it what we may, but an affirmance of the Vice-Chancellor's decision makes this illegal provision a legal provision. It has all the force and effect of one. The defendant pleads that pro-

vision as a defense to complainant's right to his dividends. If that defense is accepted under any name or in any aspect, and that provision is allowed to act as a barrier to complainant prevailing in this case, that provision gets all the destructive power and gets all the active life that the most legal and valid provision could.

The complainant made his case when he showed that dividends had been declared on the common stock but that no dividends had been declared or paid on his stock.

If defendant had not pleaded this provision of the charter, or had not introduced it in evidence, then there would be nothing for the Court to pass upon. The defendant has pleaded and invoked this provision and introduced evidence to found the basis for asking the Chancery Court to enforce it.

Suppose neither the complainant nor his estate, if he dies, ever surrenders his certificate of stock. His stock is earning money, year after year. To whom does that money belong? It belongs to him or his estate. But who keeps it? The Company will keep it. Can it divide it up among the other stockholders? If so, where do they get any right to it? If the Company keeps it, where does it have any fair or just right to keep it and use it?

A court of equity always looks beyond the form and into the substance of things, and in this case it will do so, and see that what the defendant is asking the court to do here is to enforce a forfeiture of complainant's dividends for failure of what it calls his contract to surrender his stock.

In *Morris* v. *Kettle,* 56 N. J. Eq. 826, this Court adopted the opinion of Vice-Chancellor Emery, in the same case, in the lower Court, in which he said:

> *"He is defendant in the action at law, it is true, but he is a defendant setting up a defence*

which is, under the circumstances of this case, practically the enforcement of a forfeiture, and in applying to this court for its aid in reforming the lease, the substantial rather than the formal situation of the complainant should be regarded."

Worthington v. *Moon,* 53 N. J. Eq. 46.

BIRD, *V. C.*

(p. 48): "* * * In this case the defendants expended their labor in the excavation of five hundred or six hundred tons of clay, which, according to the complainant's bill and the testimony, are worth from $300. to $400. According to the complainant's insistment, this has all been forfeited. So much of the consideration which he was to give and which the defendants were entitled to he claims the right to retain.

There seems, therefore, to be two well-settled principles governing courts of equity, which stand in the way of the complainant obtaining relief in this court, namely, the fact that the trespass complained of does not work irreparable injury to the inheritance, and that a penalty or forfeiture would be the result of a decree in his favor, which courts of equity are always disinclined to pronounce."

Morris v. *Kettle,* 56 N. J. Eq. 826, 830.

The New Jersey Courts, in their abhorrence of a forfeiture, have gone so far as to hold that unless express statutory authority is given to a corporation to forfeit stock for the failure of a stockholder to pay a call on account of the unpaid installments of his subscription for stock, the corporation cannot forfeit the same.

New York & East. Tel. & Tel. Co. v. *Great East. Tel. Co.*, 74 N. J. Eq. 221; affd. 75 N. J. Eq. 297.

GARRISON, *V. C.*, said at page 230, after referring to the statutory provisions setting forth the method of forfeiting stock:

> "And with respect thereto it is not useful to refer to other authorities than the one in our state which clearly holds that where stock has been rightfully issued, even though nothing has been paid on it by the subscriber, it can *only* be forfeited in the mode prescribed by the statute, and the procedure therein prescribed must be strictly followed. *Downing* v. *Potts*, 23 N. J. Law (3 Zab.), 66 (Supreme Court, 1851)."

Let us see what the situation will be if complainant is compelled to take a ten year dividend certificate.

This arrangement, if it be deemed an agreement, is inequitable, and equity will never lend its aid to enforce in any shape or form any arrangement that is not entirely fair and equitable.

The Company does not agree to pay him any dividends, but only such as may be declared, and does not agree to declare any of its earnings in the shape of dividends.

Under the provisions of defendant's charter, it can, out of the money which would ordinarily be applicable to the payment of dividends, purchase, without limit as to amount, any property that it deems fit, and purchase its own capital stock, and it is specifically provided that any such property so bought or any capital stock so purchased shall not be regarded as profits, for the purpose of declaration of dividends (pp. 379, 380). The testimony shows that at the time of the trial, the defendant, out of the funds which might be available for dividends, was buying $450,000. par value of its preferred stock at $115. per share.

None of these provisions, however, affect the "salaries" that are to be paid to the Directors. They must, under any and all circumstances, get their so-called "salaries", but whatever is done in the way of piling up a surplus or buying the Company's stock or buying outside property may be used to decrease the fund that goes to the payment of dividends.

Moreover, the next ten years may show a large decrease of profits. It may be that the many years of great prosperity have left behind them unforeseen obligations that may result in losses. Many a business has turned from ten years of great profit to ten years of losses. Assuming, however, that the business of the Company is profitable, the Directors might, in good faith, use the profits of the Company to enter into new enterprises and purchase valuable properties, which the Charter permits, and therefore decide in good faith that during the next ten years the Corporation should pay no dividends whatsoever. Besides all this, there is no way, except in case of rank fraud, to compel the directors of a Corporation to declare dividends.

The Corporation, in addition to its good will, which is worth millions of dollars, all of which it "charged off" as an asset in 1916, had its entire capital in money or its equivalent, and in addition had a surplus fund at the end of the year 1919 of $1,818,815.52.

V.

The charter provision is a restraint upon alienation.

Restraints upon alienation of stock are invalid. Cases cited by defendant do not sustain contention

Defendant in its brief, advances the argument that the charter provision is not really a restraint upon alienation, and that Mr. Prindiville is always free if he desired not to surrender his stock to the Corporation, but to sell it denuded of its right to dividends, to a purchaser if he can find one. This contention is so unsound as not to require lengthy reply.

The corporation of Johnson & Higgins was formed to carry on the business of the partnership of that name in all portions of the United States where feasible. The sole object of this charter provision is the obtaining for the Corporation the same choice of associates or *delectus personorum* which exists in the partnership.

The purpose of the provision being to restrict the ownership of stock to directors of the Company and to prevent its sale to anyone outside of that narrow group, the precise legal machinery for effecting that purpose is immaterial as long as it is effective. The sale of the stock is restricted; it cannot be sold outside of the small group of directors. This is as much a restraint on alienation as if it were stated in so many words that the stock of the corporation can never be sold to anyone.

Defendant at page 41 of its brief urges that the clause in question is not a restraint on alienation of stock, but that it is one of the original incidents of the creation of the stock, and that the stock came into being with this condition as a part of its essential nature.

This argument is unsound, for it would apply to all cases where restraints on alienation existed in the original charter or the original by-laws. The prohibition against restraints on alienation necessarily applies to the original creation of property rights and interests, whether stock or otherwise. A restraint upon alienation contained in a grant of a fee or of personalty is recognized as invalid. Equally so is a restraint contained in any instrument which creates a life estate. A restraint upon alienation in the latter case would not be valid. A deed creating a life estate is creating a new right just as much as the original issuance of stock to the subscriber is creating a new right. If the instrument creating the life estate cannot provide for a restraint upon alienation of the life estate, how can the instrument creating the stock do so? The distinction suggested by defendant is not only unsound if analyzed from a point of view of logic, but, even further, it has no basis when considered as a matter of substance. There is no real difference between tying up stock in the original charter or tying it up by agreement entered into at some time after the stock had been issued. The substance in each case is identical, and no rule of law can be laid down which would justify a distinction between the two classes of cases.

The Vice-Chancellor in his opinion below recognizes that restraints on the transfer of stock "are in contravention of public policy and void. The authorities are unanimous in enunciating this principle" (Record, p. 425, line 8). An examination of the cases cited by defendant will show that they are in no way inconsistent with the cases cited by us.

Defendant at page 61 cites *Young* v. *Vough,* 23 N. J. Eq. 325, in which a by-law of a national bank declaring that the debts of a stockholder shall be a lien on his stock and that he shall not transfer it until such debt is paid was held valid. This deci-

sion was appealed to this Court and was affirmed upon other points in the case in

Mattison v. *Young,* 24 N. J. Eq. 535.

With reference to the question of the validity of the by-law this court expressly said, at page 537:

> "The complainant also sought to be subrogated to any right the bank had by virtue of a by-law that no transfer should be made of any stock, without the consent of the board of directors, while the stockholder was liable to the bank as a principal debtor or otherwise. Whether such by-law was legal under the act of congress of 1864, or, if so, whether the complainant had any right of subrogation, it is not intended now to determine, and the same must be considered as unsettled in this court."

The question which was thus left unsettled was definitely settled in *Delaware, Lackawanna & Western Railroad Company* v. *Oxford Company,* 38 N. J. Eq. 340. In this case a similar by-law was involved. In the meantime, however, and since the decision in *Young* v. *Vough,* the Supreme Court of the United States had held that such by-laws were invalid.

The Vice-Chancellor held:

> "By force of the authoritative decision just cited, the articles of association and the by-laws were powerless to create any lien upon the stock in question.
>
> It will be decreed that the bank is not bound to credit anything on the claim against the Oxford Iron Company by reason of any lien on the stock."

The decision of the Supreme Court in question is *Bullard* v. *Bank,* 18 Wall. 589, which was reaffirmed in *Third National Bank* v. *Buffalo German Insurance Company,* 193 U. S. 581. An examination of these decisions will show that they support the proposition contended for by complainant that restraints on alienations of stock are unlawful.

It appears, therefore, that the decision in *Young* v. *Vough,* instead of supporting defendant is, if its subsequent history is examined, in fact authority for complainant.

The defendant also cites *Drexel* v. *The Long Branch Gas Light Co.,* 3 N. J. Law Journal, 250. In this case a provision of a very different nature was involved, namely, one which did not forbid the transfer of stock but which gave the corporation a lien on its stock for a debt from the stockholder, which lien followed the stock into the hands of any purchaser.

This decision has no application whatsoever to the question of the invalidity of restraints on alienation. Such a provision does not attempt to restrain the alienation of stock but merely holds that the purchaser will take subject to the lien of the corporation. The owner can sell the stock subject to this debt, just as a man can sell mortgaged property subject to the mortgage debt.

Tomson v. *Iowa State Traveling Men's Association,* 110 N. W. 995 (Nebraska).

The Court said, at page 997:

> "The defendants cite authorities to the effect that a charter provision, or a by-law, giving the corporation a lien on the shares of a stockholder for any indebtedness due from him to the corporation, and making a transfer of stock contingent upon the satisfaction of such debt, is valid. Without going into those authorities at length, or expressing approval or disapproval of the doctrine there announced, it will suffice to say that we do not consider them in point. The nominal interest of a stockholder in a corporation is evidenced by his certificates of shares. His actual interest is the difference between his nominal interest and his indebtedness to the corporation. A charter provision,

> or by-law, which restricts his right to transfer to a transfer of his actual, instead of his nominal, interest in the corporation, is radically different in principle from a provision limiting the number of shares a person may hold or which forbids a transfer without the consent of the corporation."

Defendant at page 60 cites the Statute of 1891 amending the Corporation Act of 1875. This act provides that when the transfer of stock is restricted by giving the corporation a pre-emption upon or the first right to purchase stock of stockholders desiring to transfer or of employes desiring to transfer, then the corporation may amend its charter by following the statutory procedure, etc., etc. This act was repealed in the year 1896, before the defendant was incorporated. A statute which has been repealed for twenty-five years cannot accomplish an implied repeal of section 20 which makes stock "personal property". Repeals or amendments by implication are always avoided by the courts.

But what is more important, the repealed statute cited by defendant does not support the conclusion which defendant urges because it does not deal with restraints on alienation but only with options to purchase giving the optioner the right to sell to any one if the optionee does not avail himself of the option.

The language of the statute is carefully drawn; it does not state that if any corporation has by its charter restricted the transfer of its stock in any manner, then it may amend by following statutory procedure, but very carefully states that when the transfer of stock is restricted by giving the corporation a right to purchase stock of stockholders or employes desiring to sell, then in such case the corporation may amend its charter. In so far as this repealed statute impliedly recognized the

legality of any charter provisions it expressly limited the same to options to purchase stock.

Whether, since the repeal of this statute, even an option contract in a corporate charter would be valid, raises a serious question, as the only New Jersey decision is *Morris* v. *Hussong Dyeing Machine Co.,* 81 N. J. Eq. 256, quoted from at length in our main brief, in which Vice-Chancellor Emery stated that he considered such an agreement void and against public policy. However, whether an option provision in a charter is valid or not is a question which has no materiality in the present case. The situation where a stockholder gives an option to the corporation or other stockholders if he desires to sell, but where he is free to sell to anyone if the option is not seasonably exercised, is entirely dissimilar to the case where a charter contains in effect an absolute prohibition upon the alienation of stock.

It is unquestioned, even by defendant, that restraints upon alienation of realty and personalty in general are invalid. It is equally unquestioned by defendant that options for the purchase of realty or personalty in general are valid. Authorities holding that option contracts for stock are valid in no way justify a conclusion that restraints on alienation of stock are valid.

This distinction is stated by Vice-Chancellor Backes in his opinion in this case.

> "Other cases cited by the defendant as recognizing, in a measure, the right of a corporation to control the transfer of shares, will be found to deal with pre-emption rights, or options, reserved to the corporation or to the stockholders, to acquire the shares of a retiring stockholder at a price fixed by a legal standard, as, for instance, the sum he offers to take from another, par, their book value, or what they are reasonably worth, to be determined by appraisers and the like. Charter

> provisions of this character, obviously, are not restrictions on the transfer, but conditional contracts of sale, and specifically enforceable as contracts, and were sustained in the cases upon that theory." (Record, pages 425-426.)

Under no possibility could the provision in defendant's charter be construed as an option agreement. It provides: 1st, that while a stockholder remains in defendant's active service he is allowed to transfer only to other common stockholders who are also in its active service; 2nd, but as soon as a stockholder ceases to be in active service, or dies, his right to transfer to any person, common stockholder or no common stockholder, immediately ceases. Under the first part of the provision while the stockholder remains in active service he can sell to the narrow class of fellow stockholders. There is no possibility that if he or his estate wishes to sell to anyone else he or his estate may do so after first giving his fellow stockholders a chance to buy. Neither the corporation nor anyone else can give him such power. Again, under the second part of the clause, when he ceases to be active he must give up his stock, and he cannot sell even to other common stockholders.

It is illogical to suggest, as defendant does in its brief at page 79, that in effect the charter provides for a sale of the stock to the corporation, and that "ten years' dividends of the defendant would represent a reasonable consideration for a present sale of a holding of the size of the complainant of entirely unrestricted stock by an owner to any vendee".

The consideration the complainant would receive for this so-called sale, namely, dividends for ten years, is something to which he is already entitled as a stockholder. Nothing additional is being given to him. It is as though he were to hand to the cor-

poration One hundred Dollars and receive Five Dollars in exchange. This transaction is not and never was intended to be a sale.

Defendant (p. 61) cites section 15 of the Uniform Stock Transfer Act. This section reads:

> "There shall be no lien in favor of a corporation upon shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

This act deals only with lawful restrictions and not with those that are unlawful and contrary to public policy.

The Uniform Stock Transfer Act was adopted by a number of States prior to its enactment in New Jersey. It deals only with the manner of negotiating and transferring stock and was intended by its framers to render stock negotiable in a manner similar to the negotiable instruments law. The act does not purport to authorize the corporation to insert either in its charter or by-laws any provisions not previously authorized and certainly none that are unlawful. No power is given to a corporation to in any way prevent the alienation of its stock. The act is carefully phrased in a negative form so that its entire effect merely is that if, under the laws of any particular state a lawful restriction, such as a lien on the stock to secure the indebtedness of a stockholder to a corporation, is inserted in charter or by-law, even such a restriction shall not be valid against a *bona fide* purchaser, unless it appear upon the face of the certificate.

Neither the original framers of the Uniform Stock Transfer Law nor the legislators of New Jersey intended by section 15 to permit a corporation to take away the transferability of stock.

The cases cited by defendant to support its contention that restraints on alienation of stock are valid do not do so. The chief emphasis is laid on the case of *Borland's Trustee* v. *Steel Bros. Co.*, 1 Chan. 79 (Defendant's Brief, p. 53).

Articles of Association of a corporation gave an option to the corporation to purchase stock at its fair value from any stockholder who wished to transfer his stock to a person not a manager or an assistant of the corporation. It was, however, expressly provided in Article 55:

> "* * * that if the company should not within the space of fourteen clear days after being served with the transfer notice find a manager or assistant willing to purchase the share and give notice in manner aforesaid, the intending transferor should, at any time within three calendar months afterwards, be at liberty, subject as therein specified, to sell and transfer the shares, or those not placed, to any person, and at any price, provided that such price should not be, without the consent of the directors, lower than the price fixed by the transferor in the transfer notice as the fair value."

If the company did not buy the stock, the stockholder could sell it to anyone he saw fit.

It was held that the above quoted provision in the Articles of Association was valid. There was absolutely no restriction upon alienation.

It should also be noted, however, that even if there had been a provision restricting alienation, it would have been valid in that case. It appears at page 280 that the Corporation in that case was what is called in England a "Private Company". Under

the English law a Private Company is a particular kind of corporation, very much in effect like the Partnership Association provided for by the Statutes of New Jersey. Section 121 of the Companies Act of 1908 reads as follows:

> "(1) For the purpose of this Act the expression 'Private Company' means a company which by its articles—
>
> (*a*) restricts the right to transfer its shares; and
>
> (*b*) limits the number of its members (exclusive of persons who are in the employement of the company) to fifty; and
>
> (*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company."

This type of corporation is peculiar to the English law and is unknown in American jurisprudence.

Defendant cites certain additional cases supporting option contracts.

Nicholson v. *Franklin Brewing Co.*, 91 N. E. 991 (Ohio) (Defendant's Brief, p. 47), is in reality a decision in favor of complainant because of the distinction which it makes between option contracts and restraints on alienation.

The Court held a by-law which merely required the stockholder to offer his stock at market price to the corporation before he offered it to the public, valid.

It supported the by-law, upon the ground that it did not restrain alienation, saying:

> "The by-law here called in question contains no suggestion of a purpose to prevent the alienation of stock nor to restrict it beyond reasons suggested by a consideration of the

> welfare of the corporation and the express provisions of the statute. It interposes no permanent impediment to the transfer, providing only for an option in the directors for 30 days as a reasonable opportunity to them to dispose of stock to persons deemed desirable as holders."

Farmers Mercantile & Supply Co. v. *Laun,* 146 Wis. 252 (Defendant's Brief, 69).

The court held an option clause valid. The court distinguished between an option clause, of the nature before it, and a provision in effect prohibiting the transfer of stock. This distinction was made clear in the following language:

> p. 254. "A distinction must be observed between an agreement absolutely restrictive of sale or transfer and one merely imposing conditions, such as first giving a refusal to the other shareholders."

The Court made clear in its decision that it was in no way overruling the case of *In re Klaus,* 67 Wis. 401, quoted from by us in our brief. On the contrary, the court reaffirmed that decision upon the ground that it "involved the validity of a by-law creating an absolute prohibition upon the transfer of shares."

Weiland v. *Hogan,* 143 N. W. 599 (Mich.) (Defendant's Brief, p. 69), was a case in which the by-laws compelled the stockholder to give the corporation the right to buy his stock before he offered it to the public.

Garrett v. *Phila. Lawn Mower Co.,* 39 Pa. Sup. Ct. 78 (Defendant's Brief, p. 70).

An option by-law was held valid. The court was careful to point out that it in no way intended to

approve of any restraint on alienation by saying, at page 83:

> "The regulation they adopted did not prohibit the alienation of his stock by any incorporator. On the contrary, it recognized and anticipated that such sale might happen."

Bloomingdale v. *Bloomingdale,* 107 Misc. 646 (Defendant's Brief, p. 70).

The Court states the provision under consideration to be as follows:

> "In the certificates of all three of the corporations it was provided that no stock should be transferred until it was first offered for sale to the other stockholders on terms and conditions to be fixed by the by-laws or by an agreement between the stockholders, but in case the offer to sell were refused, the stock would be no longer subject to the conditions."

An agreement was entered into, carrying out these provisions of the certificates of incorporation. The court held them valid, but expressly pointed out in its decision that the reason it so held was because such an option contract did not prohibit alienation of the stock:

> "As to the legality of such restrictions, doubtless an absolute prohibition unlimited in point of time against the transfer of the stock would be invalid as against public policy. *Brown* v. *Britton,* 41 App. Div. 57. Both the certificate of incorporation and the agreement embodying the restrictions expressly permit the free sale of the stock after its purchase has been refused by the other stockholders. The limitations imposed are in my opinion binding and legal in all respects. Gen. Corp. Law, § 10" (p. 656).

That restraints on alienation of stock are invalid in New York has been ruled by the Attorney General of that state (See printed Opinions of Attorney General of New York, 1910, p. 404).

The only case cited by defendant which goes further than to support an option contract is *Longyear* v. *Hardman* (Mass.), 106 N. E. 1012, cited in defendant's brief, page 46. Vice-Chancellor Backes in his opinion (p. 425) said of this case:

> "Where shares are unqualified, full fledged, so to speak, restraints upon their transfer, whether by charter or by law, secured except for convenience of corporate regulations, are in contravention of public policy and void. * * * *Longyear* v. *Hardman,* 219 Mass. 405, 106 N. E. 1012, cited by the defendant, is not an exception. There the Court upheld a charter provision that none of the shares of the capital stock could be sold, hypothecated or transferred without the consent of three-fourths of the capital stock of the corporation. It was held valid upon the authority of Section 8(*e*) of the Massachusetts Corporation Act which provides that the articles of association shall state 'the number of shares into which the corporate stock is to be divided and the restrictions if any imposed upon their transfer'."

There is no such provision in the New Jersey Corporation Act. There is nowhere in the New Jersey Statutes explicit authority, as there is in this Massachusetts Statute, authorizing the imposition of restraints on the alienation of stock.

Moreover, this decision could not be regarded as a precedent even in Massachusetts, let alone any other State. The Chief Justice, towards the end of the opinion, says:

> "This decision, however, is confined strictly to the facts here presented and does not undertake to lay down principles governing other circumstances."

The opinion itself expressly states that, although "it finds support in the reasoning and result" of the decisions which it cites, none are "direct authorities" to support it.

In so far as this decision attempts to lay down a general doctrine that a corporation is no different from a partnership in the right of its members to choose its associates and restrict the alienation of stock to those persons to whom they desire, it is contrary not only to the decisions and policy of the State of New Jersey but also of every other state of the United States.

VI.

Restraints on alienations of stock are in violation of the express provisions of the New Jersey Corporation Act.

Defendant in its brief, at page 70, seeks to find authority for its unlawful charter provision in Subdivision VII of Section 8 of the New Jersey Corporation Act.

This specific section was considered in *Audenried* v. *East Coast Milling Co.*, 68 N. J. Equity, 450 (quoted from at length at p. 53 of our brief), and Vice-Chancellor Bergen held that the language of that section did not authorize anything inconsistent with the other provisions of the General Corporation Act, and said:

> "The method of exercising the power created must conform to settled legal principles unless it be otherwise distinctly authorized by the legislative act. No such express authority is conferred by this act and it ought not to be inferred from ambiguous expressions.
>
> To hold that the legislature of our state, by the adoption of our General Corporation act, intended to confer upon individuals an indefinite power of legislation, would require the adoption of a liberality of construction which the act does not warrant, and which upon every known principle is contrary to public policy" (p. 465).

Defendant also seeks to obtain support from the provisions of Section 18 of the General Corporation act which gives authority "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 in the charter. This section does not avail defendant. The use of the word "thereof" shows that the Legislature definitely limited the right to create restrictions to restrictions of *voting power* of stock, and no other restrictions on stock are authorized by this section.

Not only are restraints on alienations of stock in violation of the general rule of law with relation to property of all nature but they are in violation of the express provisions of the General Corporation Act of New Jersey which provides in Section 20 that "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". This statute by its terms forbids the preventing of the transfer of stock.

See *Morris* v. *Hussong Dyeing Co.*, 81 N. J. Equity, 256. EMERY, *V. C.*, said, at page 260, referring to this very section:

> "This section of the Act must therefore be construed as giving to the directors only power to regulate or approve the formalities of transfer of the certificate or evidence of ownership, and *not as giving power to restrict the absolute right of transfer.*"

See also *Nicholson* v. *Franklin Brewing Co.*, 91 N. E. 991, *supra*, where, in discussing an identical section of the Delaware Corporation Law, the Court said, at page 994:

> "Certainly power to regulate transfers of stock could not properly be regarded as power to prohibit the transfer."

VII.

Complainant is entitled to have the payment of unreasonable salaries for the future enjoined.

Defendant at page 86 argues that Mr. Prindiville is estopped from objecting to excessive salaries for the future.

There is no basis for any plea of estoppel with reference to excessive salaries for the future. This point is expressly decided in *Lillard* v. *Oil, Paint and Drug Co.,* 170 N. J. Equity 197, quoted from at length at page 96 of our brief.

While Mr. Prindiville was both a stockholder and a director receiving a salary it made no difference to him in what form payment was made to him, and therefore there was no reason for his objecting to the payment of excessive salaries. Such payment was not unlawful, and since it was consented to by all the stockholders it was perfectly proper. Acquiescence in such payments during the time when he was a director and participation by him in his own proper share thereof cannot in any way affect or bind Mr. Prindiville as to the future. Now he is no longer a director and is only entitled to dividends, and there is nothing which he has ever done in the past which prevents him from now asserting the unreasonableness of the amount of alleged salaries being paid by the directors. Defendant is a corporation and is governed by the doctrines of law with reference to salaries. Defendant argues that Mr. Prindiville has agreed in advance to the payment of excessive salaries, throughout the entire period that he would remain either a stockholder or a dividend certificate holder.

Now, has Mr. Prindiville agreed to this?

Certainly, the provision in the Certificate of the

Corporation, dealing with salaries, does not constitute such an agreement.

As we have pointed out in our original brief, this provision is in negative form, and is a prohibition upon the payment of salaries of more than half the net profits, and in no way an authorization permitting the payment annually for all time, of half the net profits as salaries, irrespective of how large these might be.

It cannot be seriously contended that the Charter provision is sufficient to constitute such an agreement upon the part of Mr. Prindiville, so as to bind him for the future.

Defendant rests its position upon the ground that Mr. Prindiville has assented to the "plan" of distributing half the net earnings as salaries.

In its brief, the defendant states that when Mr. Prindiville voted in 1912 for the distribution of half the net earnings as salaries, he did not merely thereby approve such action for that year, but did so for all time. The salaries of each year, including the giving of one-half of the net profits to the directors as "salaries", are fixed by a new and independent resolution each year.

This suggestion is untenable. The salaries approved by Mr. Prindiville were voted upon each year, and did not purport to be for more than one year. There is nothing in Mr. Prindiville's conduct which in any way estops him from objecting to unreasonable salaries for the future.

Defendant cites at length, in this connection, *New Jersey Car Spring Co.* v. *Fields,* 85 N. J. Law 217.

Instead of supporting defendant's position, this case is clear authority for complainant, in that it squarely holds that unless *all* of the stockholders consent to the payment of excessive salaries the payment can be attacked.

The decision expressly distinguishes the facts

before it from the case of *Gardner* v. *Butler,* cited by complainant, on the ground that in the *Car Spring* case "the contract was assented to by *all* the stockholders who were also all the directors". The Court in the *New Jersey Car Spring* case said:

> "In the absence of any claim of creditors, we see no legal objection to their accomplishing the object as they did, *as long as every one acquiesces* * * * and there is *no minority* of the stockholders *to suffer* thereby."

That case also rests upon the ground that the salaries had been paid and that the objecting stockholder stood by while the payments were being made, and had delayed for a long time before objecting thereto, and no question of objecting to future salaries was involved.

No case is cited by defendant where a stockholder is prevented from objecting to proposed excessive salaries to be paid in the future.

Defendant also urges that inasmuch as the salaries for 1919 which are being attacked by Mr. Prindiville were approved by all the stockholders excepting himself, they being the directors themselves, that therefore the ordinary rule of law that the burden of proof was upon the directors to sustain the reasonableness of the salaries voted by them does not apply.

Defendant quotes from *Lillard* v. *Oil, Paint & Drug Co.,* 70 N. J. Eq. 197, a statement that "in some cases the status of a stockholder objecting to salaries may be different when the majority of the stockholders and not merely the Board of Directors approve of the salaries". There is no suggestion in the Lillard decision as to when such a case may arise and upon the facts before the court in that case the burden of proof was not put upon the dissenting stockholder, although it

appears that the salaries in that case had been approved by a majority of the stockholders, and that complainant Lillard was a minority stockholder. This fact in no way influenced the court, as appears from its statement at page 207:

> "The fixing of his salary by the sole vote of the majority stockholder in his own favor is, in effect, an appropriation of the assets to his own use, and under this necessary qualification or limitation of the power of the stockholders it is subject to the review of a court, when properly questioned, and if fraudulent or oppressive should not be allowed to stand."

It appears, therefore, that what the court meant by its suggestion that in some cases the burden of proof may shift and be on the dissenting stockholder was that when the majority stockholders *who were themselves not the recipients of the salaries complained of* ratified the salaries, then the burden of proof might no longer be on the directors.

That this is New Jersey law appears from an examination of the various cases cited in our main brief, which held that the burden of proof is upon the directors to sustain their salaries. The record in each of those cases shows that the directors were also a majority of the stockholders and that the complaining stockholder was a minority stockholder.

In each of the following cases, the court set aside the salaries which the directors had voted to themselves:

Gardner v. *Butler,* 30 N. J. Eq. 702. The record shows that Butler, to whom the excessive salary was paid, owned a majority of the stock. Complainant claimed his right under Taylor, who was a minority

Fougeray v. *Cord,* 50 N. J. Eq. 185. The record in that case shows that the complaining stockholder stockholder.

owned one-third of the stock and the officers to whom excessive salaries had been paid owned two-thirds.

Davis v. *Thomas Davis & Co.*, 63 N. J. Eq. 572. Thomas was the majority stockholder and Davis a minority stockholder. The excessive salary was paid to Thomas, and objection thereto raised by Davis.

Reynolds v. *Diamond Mills Paper Co.*, 69 N. J. Eq. 299. In this case complainant owned one-fifth of the stock and the directors to whom the excessive salaries had been paid owned four-fifths.

Under the New Jersey authorities as well as in all states, the burden of the proof in the present case is upon the directors to sustain the salaries paid to themselves. And they have not met it.

We again most respectfully submit that the decree against this complainant should be reversed, and a decree advised in his favor on both causes of action set forth in his bill of complaint.

Robert H. McCarter,
Henry Wollman,
Royall Victor,
Eustace Seligman,
Counsel for Appellant.

New Jersey Court of Errors and Appeals.

BETWEEN THOMAS J. PRINDIVILLE, Complainant-Appellant, and JOHNSON & HIGGINS, Defendant-Respondent.	**On Bill, etc.** **On Appeal from Chancery.**

BRIEF FOR JOHNSON & HIGGINS, DEFENDANT-RESPONDENT.

Introductory.

The bill of complaint in this case includes two causes of action: (1) in the individual right of the complainant-appellant, a stockholder of the defendant-respondent, to compel the declaration and payment of dividends, and (2) in the corporate right to restrain the directors from paying themselves salaries which are alleged to be excessive. The complainant asserts that the provisions of the defendant's charter, which have been contained therein from the beginning of *its* corporate life-contract, in which he acquiesced and from which he accepted his full share of benefits during the entire period of his active connection with the corporation (about eight years), are illegal and void. The bill of complaint does not disclose the real character of the attack, nor did it appear in the course of the presentation of the complainant's case. After the defense had begun to present its case (Record, pp. 134-135), counsel for complainant for the first time developed the theory that the entire plan involved in the certificate of incorporation, by-laws and uniform practice of the defendant is illegal. This plan, if legal, admittedly justifies the action complained of, both with respect to dividends and to salaries.

The bill of complaint is printed in the Record (pp. 1 to 6); the answer follows (pp. 7 to 27); annexed to the answer is a copy of

the certificate of incorporation as amended and of the by-laws of the defendant, which will be found printed as defendant's Exhibit 1 (Record, pp. 370 to 395).

Vice Chancellor Backes, in an opinion printed in the Record (pp. 417 to 430), reached the conclusion that the bill should be dismissed and advised decree accordingly. From that decree this appeal is taken.

As the facts involved, which are substantially undisputed, have been proved in great detail and a full statement of them can best be made chronologically, it seems desirable, in order that the Court in reading the formal statement of facts may be able to appreciate the bearing of each statement, that the detailed statement of facts shall be prefaced by a summary introductory statement.

The business which it was intended that the corporation of Johnson & Higgins should transact and which in fact that corporation did transact from the beginning of its life to the present time, is that of insurance brokers and agents, underwriters' agents and adjusters of averages. The business consists largely in the placing of entire lines of insurance for clients and in the giving of highly technical opinions and advice. In a high degree it involves securing and retaining the confidence of clients and also of insurance companies and underwriters, and as a primary necessity requires that those who are active managers of the business shall be experts of standing and character, who shall work industriously and competently in the harmony and mutual confidence essential to a business so peculiarly partaking of the character of personal service.

Accordingly, we find that the charter of Johnson & Higgins, disregarding its formal provisions and the provisions authorizing preferred stock, contains as the very essence of the charter (the contract of the shareholders *inter sese*) certain definitions of the rights of common shareholders which are intended to assure the continued existence of the character, competency, service, confidence and harmony referred to. It is upon these provisions that this litigation turns. They are as follows:

From paragraph Fourth of the charter (Record, p. 377, line 13, to p. 379, line 4):

> "The common stock shall be subject to the prior rights of the holders of preferred stock as is herein declared. If, after providing for the payment of full dividends for any fiscal year on the preferred stock, there shall remain any net profits of such year, or any accumulated surplus, any

and all such surplus or net profits shall be applicable to such dividends upon the common stock as from time to time may be declared by the Board of Directors, and out of any such surplus or net profits the Board of Directors, after providing for any reservations for working capital or other purposes, may pay dividends upon the common stock, but not until the dividends upon the preferred stock for such fiscal year shall have been actually paid or provided for and set aside.

"In the event that any share or shares of the common stock of the Corporation become the property of any person who is not an officer, Director or employee of the Corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the Corporation ceases to be an officer, director or employee of the Corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock unless and until he shall surrender or cause to be surrendered the said stock and the certificate therefor to the Corporation, upon which surrender he shall receive from the Corporation in exchange for such stock a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall from the time of surrender be subject to reissue under the direction of the Board of Directors and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the Corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock to the Corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends.

"The net profits of any year, so far as dividends are concerned, shall be deemed to be the amount of profits remaining after payment of all losses and of all charges and expenses of the year, including the salaries of the Executive Officers and Directors. Any loss sustained in any year may be paid out of (1) any surplus reserve fund that may be then established; or (2) failing the establishment of such a surplus reserve fund, out of the accumulated surplus, and if so paid the amount thereof so paid shall not go to diminish the net profits of the year, either so far as the determination of dividends is concerned, or so far as the fixing of the salaries of Executive Officers and Directors is concerned. Such salaries are to be fixed from time to time by the Board of Directors and shall not exceed, in the aggregate, the amount of the net profits in the year ascertained as herein provided."

Also in paragraph 7 of the charter (Record, p. 379, line 32, to p. 380, line 19):

> "*Seventh*: The Corporation may use and apply its net profits or its accumulated surplus authorized by law to be reserved to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock, from time to time, to such extent and in such manner, and upon such terms, as its Board of Directors shall determine, and neither the property nor the capital stock so purchased or acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the Corporation, shall be regarded as profits for the purpose of declaration or payment of dividends, unless otherwise determined by a vote of three-fourths of the Directors.
>
> "The Corporation may pay from any surplus reserve fund that may then be established; or, failing the establishment of such a surplus reserve fund, out of the accumulated surplus, any losses that may be sustained in any year, and if so paid the amount thereof so paid shall not go to diminish the net profits of the year, either so far as the determination of dividends is concerned or so far as the fixing of the amount of the salaries of Executive Officers and Directors is concerned."

And page 382, line 15 to line 22:

> "The preferred stock and its holders shall be entitled to the privileges and shall be subject to the limitations hereinbefore set forth in respect to such stock, and the common stock and its holders shall likewise be entitled to the privileges and subject to the limitations hereinbefore set forth in respect of the common stock."

In practice the foregoing provisions were intended to work and have worked as follows:

A given individual became or was at the beginning a common stockholder. Accordingly, he was also a director and an active manager of the business (the directors and the active common stockholders have always been identical). Fifty per cent. of the net profits of the corporation in the aggregate were distributed among the directors as salaries; the balance of the corporation's profits save necessary reserves was distributed in dividends. As a given director became especially valuable, his share of the salary fund was largely increased; as a director ceased to be valuable, his share of that fund was diminished. When the time came that a given director felt that he was no longer adequate to the work expected of him, a feeling which in cases may conceivably have been aroused by a diminution of salary, he surrendered his shares

of common stock to the corporation or subjected himself to the rule of the charter by indirectly effecting a surrender of his shares. These surrendered shares thereupon ceased to be dividend-bearing, but the former stockholder received a so-called "dividend certificate" which was a contract of the corporation entitling him to receive an amount equivalent to the dividends upon an equal number of shares to be paid during the succeeding ten years. This was the purchase price paid him for his stock by the corporation. Thereupon or at a later date the corporation re-issued the shares thus surrendered to active directors, but upon the condition that the stock so re-issued should bear no dividends for the period of ten years, thus providing itself with the means wherewith to pay the consideration due to its former stockholder. Such shares were re-issued (as a rule, without consideration) to the remaining common stockholders, either in proportion to their existing holdings or in proportions agreed upon by all of them.

The result of all this has been that the corporation has had a body of common stockholders all workers and all actively engaged in its business as long as their abilities and energies were adequate to the work, all having the confidence of one another and of the public and working efficiently and harmoniously one with another; that those who became incapacitated for active service dropped out and thereby enabled the injection of fresh blood into the working forces of the management. The plan worked automatically and successfully—in part because everyone interested loyally observed his contract and as loyally promoted the purpose of the corporate plan; in part because of the inducement to effort and the incentive to retirement, alike afforded by the charter plan. The complainant furnishes the solitary exception to this broad statement.

Complainant became an active stockholder through the purchase from him by the corporation of a half interest in a business similar to its own, conducted in Chicago. He remained one of the active directors of the corporation until the spring of 1917 (about six years). At that time he entered the Naval service of the United States and remained an officer of the Navy until just prior to the close of 1918. So far as salary and dividends and the distribution of surrendered shares are concerned, he was treated during this period, by special agreement upon the part of the other directors, as if he had remained an active director. At the end of the period, he insisted upon being placed upon an equality as to salary with two of the directors who had been, generally speaking, upon an equality with him during the earlier years of his service in the

corporation, but later had been given larger salaries than were assigned to him. The other directors of the corporation refused to yield to his demands and, in accordance with a threat previously made, he abandoned the service of the corporation without returning to work and established a competitive business. During the period of his active service, complainant not only received the benefits of the corporate plan as agreed to and practiced, but uniformly acquiesced in and upon occasion actively participated in the administration of the charter provisions in question. The evidence with respect to these matters will be examined in detail a little later on. It suffices for this moment to say that it is conceded that he knew from the beginning the terms of the contract under which his stock was issued, that he knew the practice of the corporation in all of the particulars above-mentioned, that he received, without consideration other than his adhesion to the corporate plan, 115 shares of common stock surrendered by stockholders who had become inactive, and that during the eight years during which he was an active shareholder in the corporation he received, as a result of the execution of the corporate plan, in dividends paid or tendered and in salaries paid an aggregate of $466,915.85 in addition to a distributive share of profits in a collateral partnership amounting to $90,410.72, and that, of the foregoing, $279,454.45 were on account of the years 1917 and 1918 during which he was absent from the business excepting only for five months' service during the earlier part of 1917.

He admits that he first conceived the idea of repudiating the charter contract when advised by his counsel that the corporate plan might be attacked upon the ground that it was illegal, and that his failure to surrender his stock was solely a matter of price. His salary for the year 1918 has been paid to him, and the dividends for the year 1918, so far as they have not been paid to him, were tendered to him upon condition that he surrender his stock and accept dividend certificates in exchange therefor. This he refused to do and sued to compel the payment of these and subsequent dividends and to restrain the execution of the corporate plan with respect to salaries.

The issues of law involved in the case fundamentally are but three:

(1) Are the provisions of the Johnson & Higgins charter, which define the rights of common stockholders, legally binding upon the complainant?

(2) Has the complainant, who voluntarily engaged in, assisted to execute and participate in the benefits of the corporate plan, any standing in a court of equity to claim that the provisions of the charter do not bind him? In other words, will a court of equity listen at all to this man in repudiation of his agreement for the sole purpose of exacting more than he has agreed to accept and more than any of his fellows or their predecessors have received in like circumstances?

(3) Is the complainant equitably estopped to attack the corporate plan as illegal?

The Facts.

Johnson & Higgins, the defendant, was incorporated under the laws of the State of New Jersey in 1899, under the general corporation act of 1896, with an authorized capital stock of $500,000., one-half preferred and one-half common.

The preferred stock is entitled to a non-cumulative dividend of 8%, payable out of net profits or accumulated surplus before any dividends are set apart or paid on the common stock. The holders of preferred stock have no right to vote for directors or officers of the corporation. In the event of the dissolution of the corporation the holders of the preferred stock are entitled to receive the par value of their preferred shares before any payment shall be made to the holders of common stock.

The common stock is subject to the prior rights of the holders of the preferred stock, and no dividends may be paid thereon until the dividends on the preferred stock for the fiscal year shall have been actually paid or provided for and set aside. We have already quoted the provisions of the charter with reference to the common stock.

The present authorized capital, preferred and common, is double the amount originally authorized, sundry increases having been authorized by statutory amendments of the charter, the dates of which will appear in the preliminary historical statement part of Exhibit D-1 (Record, pp. 370-1).

The amount of the preferred stock now outstanding is $450,000.

The amount of the common stock now outstanding is $372,900.

The par of the shares is $100.

The objects for which the defendant corporation is formed are

set forth in the third paragraph of the charter (Record, pp. 372, line 39, to 376, line 18), and specifically include this provision:

> "(A) To purchase, acquire and take over the business of the co-partnership of Johnson & Higgins, as insurance brokers, insurance agents, agents of underwriters and of insurance companies, adjusters of averages and their kindred business, all as conducted by them in New York and in other places (excepting their business as now conducted in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco), together with the accounts, good will and other assets of such business, subject to such current liabilities of the business as may be deemed incidental thereto, and further to purchase, acquire and take over such other similar business or branches thereof as may be carried on by said co-partnership in said excepted place or places as may be advantageously acquired."

The co-partnership of Johnson & Higgins referred to in the foregoing quotation from the charter had been organized in 1845 to engage in the insurance business as brokers, agents and adjusters, and had been continued with great prosperity to the date of incorporation.

The business in certain localities was excepted from the transfer to the corporation and has been continued by a partnership of the same name, the partners as a rule being active common stockholders and directors of the corporation, but independently participating in the co-partnership under written agreement. The partnership affairs are not involved in this litigation but will be found from time to time referred to, and complainant put in evidence (Exhibit C33-A, Record, pp. 358-361) the written partnership agreement in effect when the differences involved in this litigation developed. Mr. Barrett, although a director of the corporation, was not a member of the firm in 1918, as appears from the partnership agreement (complainant's Exhibit C33-A), and the testimony of Mr. LaBoyteaux, president of the corporation. (Record, p. 149; also p. 343 as to Mr. Loines.)

The character of the business conducted by the co-partnership of Johnson & Higgins as insurance brokers, underwriters, adjusters, etc., prior to incorporation has been developed by the evidence, and also the fact that the corporation, as soon as organized, executed the purpose of the charter relative to the acquisition of the co-partnership of Johnson & Higgins and took over (except in certain localities) and has continued to the present time the business theretofore conducted by the partnership.

A corporation engaged in such business is of the type of personal service corporation. The nature of the business differentiates it from an ordinary merchandising or trading enterprise and brings it within the class of enterprises dependent for their success upon the character, industry and attention of the individuals engaged in it rather than upon returns from the turnover of invested capital. (See quotations from the corporate minutes set forth in the Record, beginning at p. 55; testimony of President LeBoyteaux, pp. 128-129.)

The other objects set forth in the certificate of incorporation on examination will disclose provisions appropriate to the conduct of a business similar to that taken over from the partnership of Johnson & Higgins and dependent on the same elements for success, thereby emphasizing the personal service character of the entire enterprise.

The provisions of the charter of the defendant corporation pertinent to the subject of this litigation, in addition to the objects and the general reference to the preferred and common stocks, from paragraph "Fourth" of the charter (Record, p. 377, line 13, to p. 379, line 4), paragraph 7 of the charter (Record, p. 379, line 32, to p. 380, line 19), and page 382, line 15 to line 22, have already been quoted in full on pages 2 to 4 of this brief.

Also by paragraph 7 of the charter (Record, p. 380, line 19, to p. 381, line 15) the directors are to be elected by the holders of the common stock and are to be classified in groups, with power, however, to vary the number and classification by by-law. The number of directors was originally eight, and has been varied from time to time, the number during the year 1918 being fifteen. Each director is required to be the holder of not less than fifty shares of the common capital stock of the corporation.

By the same paragraph of the charter (p. 381, line 21) the directors are given authority to fix any amount to be reserved as working capital.

By the first paragraph of Section 7 (Record, p. 379, beginning at line 31) the corporation may use and apply its net profits and accumulated surplus authorized by law to be reserved, to the purchase or acquisition of property and to the purchase or acquisition of its own capital stock from time to time to such extent and in such manner and upon such terms as its board of directors shall determine, and neither the property nor the capital stock so purchased or acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation shall

be regarded as profits for the purpose of declaration or payment of dividends, unless otherwise determined by the vote of three-fourths of the directors.

The provisions of Article 4 of the charter, already cited with reference to preferred and common stocks, are renewed in the by-laws by provisions requiring the charter definitions of both kinds of stock to be endorsed on the respective certificates. (See Article 12 of the by-laws, Record, p. 390, beginning at line 20.)

The endorsement required on certificates of shares of preferred stock, as taken from the by-laws, is as follows:

> "The preferred stock shall be entitled to non-cumulative dividends at the rate of not to exceed eight per cent. per annum for each fiscal year, ending on the thirty-first day of December, payable to the limit of eight per cent. out of any and all net profits or out of any accumulated surplus, and before any dividends are set apart or paid upon the common stock. The preferred stock shall not be entitled to any other dividends. The holders of preferred stock shall not have the right to vote for Directors or officers of the Corporation, but shall have the right to vote upon all other matters properly coming before the stockholders.
>
> "In the event of the dissolution of the Corporation the holders of preferred stock shall be entitled to receive the par value of their preferred shares out of the funds and assets of the Corporation before any payment shall be made therefrom to the holders of common stock.

The endorsement required on the certificates of common stock, as taken from the by-laws, is as follows:

> "The common stock shall be subject to the prior rights of the holders of preferred stock, as declared in the Certificate of Incorporation.
>
> "In the event that any share or shares of the common stock of the Corporation becomes the property of any person who is not an officer, Director or employee of the Corporation actively engaged in its service, or in the event that any owner of a share or shares of the common stock of the Corporation ceases to be an officer, Director or employee of the Corporation actively engaged in its service, the owner of such share or shares of stock shall thereby and thereupon be disentitled to dividends upon such stock, unless and until he shall surrender, or cause to be surrendered, the said stock and the certificate therefor to the Corporation, upon which surrender he shall receive from the Corporation, in exchange for such stock, a certificate entitling him to such dividends as may be declared upon said stock for the next succeeding period of ten years, and such stock shall, from the time of surrender, be subject

> to reissue under the direction of the Board of Directors, and upon any terms approved by them, and with or without specific consideration (any consideration, however, to be the property of the Corporation); but the new holder or holders of such stock so reissued shall not be entitled to dividends thereon until ten years from the time of the surrender of the stock of the Corporation as aforesaid, and prior to the reissue of such stock there shall be written or stamped upon the face of the new certificate or certificates therefor a statement indicating at and after what time the holder of the stock shall be entitled to receive dividends."

Article XIII of the by-laws (Record, p. 392, beginning at line 24) deals with the transfer of stock and contains the following:

> "* * * The shares of common stock surrendered under the provisions of the Certificate of Incorporation in exchange for certificates entitling the holder to dividends for a period of ten years, may be transferred to the Treasurer of the Corporation as such, or to any other Trustee appointed by the Directors, for the benefit of the Corporation, and subject to reissue under the direction of the Board of Directors; and upon such transfer being made the certificate shall be cancelled."

Article XV of the by-laws (Record, p. 393, beginning at line 25) is as follows:

> "The compensation of the Directors and of the executive officers of the Corporation shall be fixed by the Directors. Such compensation may be specific in amount, or it may be measured by a share of the profits of the Corporation; but in neither case shall the aggregate compensation of the Directors and executive officers for any year exceed the amount of the net profits of the Corporation as defined in the Certificate of Incorporation."

The provisions of the charter and by-laws to which attention has been thus far specifically directed have been in effect since the time of original organization, except as to the authorized amount of the capital stock and also except as to the provision adopted by amendment on May 5, 1914, included in the provision heretofore quoted defining the net profits of any years so far as the dividends are concerned, the amendment of 1914 providing that losses sustained during any year may be paid out of any surplus reserve fund, or, failing the establishment of such a fund, out of surplus, and that the losses so paid shall not go to diminish

the net profits of the year so far as fixing the amount of dividends or the amount of salaries of executive officers and directors is concerned. Contemporaneously, and in the same amendment, there was added a provision in paragraph 7 authorizing the directors to pay from any surplus reserve fund established, or, failing the establishment of such a surplus reserve fund, out of accumulated surplus, any losses that may be sustained in any year and providing that the amount so paid shall not go to diminish the net profits of the year either so far as the determination of dividends is concerned or so far as fixing the amount of salaries of executive officers and directors is concerned. This amendment was specifically assented to by complainant. (Exhibit D-1*a*, Record, p. 400.)

The complainant Prindiville became a common stockholder of the corporation in May, 1911, and was at once elected a director (Record, p. 30, line 20, to foot of page 32), and so continued until December 31, 1918, when his activities terminated under circumstances which will be hereafter more particularly referred to. He became a common stockholder to the number of 125 shares in consideration of the transfer by him to the defendant corporation of his one-half interest in Prindiville & Company, a corporation of Illinois, engaged in the marine brokerage business in Chicago, the other one-half interest in which was already owned by the defendant corporation. His original stock certificate, No. 413, for 125 shares of common stock, is in evidence as Exhibit C-2 (Record, p. 347), and carries on its face the charter provisions with reference to the privileges and limitations of the common stock.

The complainant has since acquired by distribution from the treasury of the defendant corporation, as hereinafter detailed, 115 shares of the common stock of the corporation not mentioned in the bill of complaint, the certificates of which bear on their face not only the provisions of the charter, as in his certificate for 125 shares, but also the statement that the holder is not entitled to dividends until after a date named in such endorsement. The certificates of stock of the complainant for said 115 shares—certificate No. 469 for 7 shares entitled to dividends from February 9, 1922, certificate No. 485 for 18 shares entitled to dividends from January 1, 1922, certificate No. 518 for 15 shares entitled to dividends from March 21, 1924, certificate No. 519 for 17 shares entitled to dividends from January 21, 1925, certificate No. 520 for 33 shares entitled to dividends from January 14, 1926, and certificate No. 531 for 25 shares entitled

to dividends from January 17, 1927—were produced in court but were not marked because original certificates, but copies thereof were made by counsel for the complainant and handed to counsel for the defendant and such copies are available for examination by the court. They are described with sample copies of certificates and endorsements in the Record (p. 48, line 36 to p. 54, line 20).

The complainant also holds 100 shares of the preferred stock of the corporation, certificate No. 66 for 50 shares dated July 10, 1911, certificate No. 80 for 20 shares dated January 23, 1912, and certificate No. 122 for 30 shares dated January 14, 1913. All of these certificates bear upon their face the provisions relating to the preferred stock of the defendant corporation found in the certificate of incorporation and in the by-laws, and for all of these certificates the complainant paid to the defendant, at the time of their issue, the par value thereof in cash.

From the character of the business and the methods pursued in its conduct from the beginning, applicable to the retirement of its active members and the introduction of new blood, it is apparent that the prosperity and permanence of the business depended upon the mutual confidence and trust in each other of its active owners, and upon their hearty and diligent co-operation in the prosecution of its affairs.

The corporate plan sought to secure for the benefit of the corporation and the business conducted by it, as well as for its members, the active participation at all times of the actual owners of the business, and to that end provided in the fundamental corporate contract, in a most specific manner, for the continuous control of the corporation by its active common stockholders, and the elimination from its management of stockholders who ceased to be active in its affairs.

The preferred stock was restricted in its returns, and without power to vote for directors or officers. Its holders were without voice in the actual management and were intended to be and were incapable of interference with the charter plan for the government and continuation of the corporation by its active common stockholders.

The directors were to be elected by the common stockholders. The record shows that the by-laws originally adopted on the formation of the corporation provided for a number of directors equal to the number of persons in the old firm of Johnson & Higgins, and that as a matter of fact the persons of that concern who executed the bill of sale to the corporation became the holders

of all of the common stock originally issued by the corporation and became its only directors.

The defendant corporation has been from the beginning a close corporation. Every holder of common stock ceasing to be an officer, director or employee of the corporation actively engaged in its service (excepting only Mr. Prindiville) has turned in his stock to the corporation and received dividend certificates, pursuant to the provisions of the fourth paragraph of the charter. Sometimes retirement from active service as officer, director or employee has been gradually accomplished, the surrender of stock being at first partial and not being finally completed until complete retirement from active service. In the event of death of an officer, director or employee, holding common stock, while still actively engaged in the service of the corporation, the estate of the deceased stockholder has turned in the stock to the corporation and received dividend certificates pursuant to the provisions of paragraph 4 of the charter. After the surrender of the stock from time to time there has been re-distribution of the shares, ex-dividend until the expiration of the corresponding outstanding dividend certificates, to those actively engaged in the service of the corporation, *pro rata* to the common stockholdings of the common stockholders so actively engaged, or, if not *pro rata,* in such proportions as such active stockholders may have agreed upon in writing between themselves. The result has been that the common stock of the corporation has from the beginning, in 1899, been held by the group of men who were officers, directors or employees of the corporation actively engaged in its service.

The record shows that from time to time new members have been introduced into the corporation, sometimes in addition to the existing number and sometimes in place of the members retiring by resignation or death, but in every case they were brought in as common stockholders and the directors have been at all times those who were actively engaged in the business and were the owners of its common stock. (For illustration see Record, p. 83, line 37, and page 88 as to the coming in of Mr. Keegan, and generally as to the practice of the corporation; pp. 131 to 133 as to the coming in of Mr. LaBoyteaux and of the complainant Prindiville.)

There has been no instance of any deviation from the charter plan until the dispute with the complainant in this case. Mr. LaBoyteaux, the President of the corporation, testified (p. 195, line 30), "we never had this question come up before", and again (Record, p. 203, line 14), "there never has been a refusal to

surrender stock". The present complainant has not only refused to surrender his stock in accordance with the charter plan, but, by the present bill of complaint, challenges the validity of the plan, not only so far as it relates to the common stock but also as to its operation in the matter of the salaries of the executive officers and directors.

It has been suggested that a possible exception to this uniform practice during the life of the corporation is with reference to the McComber stock. Mr. McComber was the proprietor of an insurance brokerage business in Boston which he turned into the corporation for a consideration, including certain shares of the common stock of the corporation, and became an active member of the directorate and so continued for some time. After the transfer of the McComber Boston business to Johnson & Higgins McComber continued in charge thereof as a director of Johnson & Higgins, and disputes developed relative to the conduct of that business, which were finally solved by the undoing of the arrangement,(whereby McComber's Boston business was transferred to the defendant corporation)and his business was returned to him, his common stock handed back and ultimately cancelled.

The matter is referred to in the testimony of Mr. LaBoyteaux on page 196, and the details of it are found in the minute books of the corporation—as to the acquisition of McComber's business, Minute Book No. 1, 141-143; as to the retirement of McComber, Minute Book No. 2, pages 2 to 5; as to cancellation of stock, Minute Book No. 2, page 274. These minutes are not printed in the record, but the books themselves are in evidence and these minutes were read on the argument below. This McComber incident is entirely without parallel to the Prindiville case, and constitutes no real exception to the uniform operation of the charter provision and its application to common stockholders ceasing to be active in its affairs. But if it be treated as an exception, it was by unanimous consent of the common stockholders, including the complainant Prindiville, who at the date of the cancellation, on January 17, 1912, was a director of the defendant corporation.

We have already seen that, to accommodate the plan to the presence in the board of directors of all of the active common stockholders, the charter provided for the increase or decrease of the number of directors by by-law, and the number of directors has not been constant, being always equal in number to the active common stockholders.

Reference has already been made to the acquisition of the

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major part of the business of the co-partnership of Johnson & Higgins by the corporation on its organization in 1899. At that time the firm of Johnson & Higgins consisted of William Krebs, John D. Barrett, John H. Gourlie, James B. Dickson, Stephen Loines, William W. Curtain, W. E. Lowe and William Brockie, as appears from the organization minutes read into the record beginning at page 55.

The first meeting was held on June 13, 1899, with all the incorporators present. By-laws were adopted containing the provisions already cited with reference to common and preferred stock and for the fixing of the compensation of the directors and executive officers by the directors, such compensation to be specific in amount or to be measured by a share of the profits of the corporation, but in either case not to exceed in the aggregate for any year the amount of the net profits of the corporation as defined in the certificate of incorporation.

The first directors' meeting was held on the 14th day of June, 1899, and a resolution was adopted that the proposition submitted by the co-partnership firm of Johnson & Higgins be accepted, that the officers of the company be authorized, empowered and directed to do any and all acts necessary to carry the same into effect, and to issue the stock of the company in payment for the property in said proposition mentioned.

The offer was of all of the accounts, good-will and other assets of the business (other than as specifically excepted), subject to current liabilities, in exchange for 2,490 shares of the common capital stock of the par value of $249,000, and 500 shares of the preferred capital stock of the par value of $50,000.

At the time this action was taken the board still consisted of the directors chosen by the incorporators and no member of the firm of Johnson & Higgins had as yet been inducted.

On June 27th there was a special stockholders' meeting ratifying the action of the directors as to the purchase of the Johnson & Higgins co-partnership business.

On June 30, 1899, there was a special meeting of the board of directors, at which the following resolution was adopted (Record, p. 58, line 15):

> "Resolved that for the six months from July 1st, 1899 to January 1st 1900, the compensation of the Directors, including that of the executive or general officers, be and it hereby is fixed in the aggregate at one-half the profits of the corporation after payment of all losses and of all charges and expenses of the year, being therefore equal

to the net profits of the Corporation as defined in the Certificate of Incorporation, and such compensation shall thereafter continue until modified by action of this Board, and such aggregate shall be subject to apportionment by the Board, and the Board may also make regulations respecting the time and manner of the payment."

To this meeting the president reported that the copartnership of Johnson & Higgins had delivered to the corporation an assignment of its assets and good-will as contemplated, and the bill of sale is set forth in accordance with the proposition already quoted, signed by the eight members of the partnership of Johnson & Higgins, and that in consideration for this bill of sale stock had been issued as authorized.

After the acceptance of the bill of sale and the issue of the stock to Johnson & Higgins, we find the proceedings whereby the original directors were gradually retired and the members of the firm of Johnson & Higgins introduced as directors, so that when the process was completed the board of directors of the corporation consisted of the eight members of the firm of Johnson & Higgins.

The common stock issued to the copartnership of Johnson & Higgins was distributed among the members of the firm to the total amount of $250,000, in the proportions shown by the stock records in evidence:

John D. Barrett	418¾	shares
William Brockie	200	"
W. W. Curtin	250	"
James B. Dickson	418¾	"
John H. Gourlie	418¾	"
William Krebs	125	"
Stephen Loines	418¾	"
W. E. Lowe	250	"

We have quoted above the compensation resolution passed by the directors on June 30, 1899, and as the members of the firm of Johnson & Higgins were introduced into the board of directors, and in every case before they took their seats, the percentage of compensation was established for six months, as was also the monthly drawing account of each director, with the following result:

	Compensation Percentage.	Monthly Drawing Account.
John D. Barrett.....	16.75	$1,250.00
John H. Gourlie.....	16.75	1,250.00
Stephen Loines.....	16.75	1,250.00
W. W. Curtin.....	10.	1,000.00
W. E. Lowe.....	10.	1,000.00
William Brockie.....	8.	1,000.00
William Krebs.....	5.	833.33
James B. Dickson.....	16.75	1,250.00

In this first distribution of stock and compensation the percentages of the participants were alike as to the stock and to the compensation, but as the years went on this identity ceased.

After the directorate had been reorganized by the introduction of the members of the firm of Johnson & Higgins they proceeded to the election of a president, and seven vice-presidents, Mr. William Krebs being elected president and the others vice-presidents. Mr. Dickson was elected treasurer and Mr. Loines secretary.

The corporate organization was thus completed with all of the common stockholders as directors and officers of the corporation, and the charter plan in this behalf and in the allocation of one-half of the profits of the corporation to compensation of the directors in definite percentages was carried out.

We also find that at this very early meeting of the corporation a resolution was adopted with reference to the form of the dividend or retirement certificate (for full text see Record, p. 62), and the form of endorsement to be stamped upon a certificate of common stock after surrender under the fourth article of the certificate of incorporation, to show that the stock was in the hands of the holder entitled only to such dividends as might be declared by the corporation after a particular date (for full text see Record, p. 63). These forms are still in use.

We have already developed the salary resolution and the fixing of percentages for the six months in 1899.

The minutes show a continuous practice from 1900 to date in the annual allotment in the aggregate to the salary or compensation of the directors, of one-half of the profits of the corporation as defined in the certificate of incorporation, and apportionment of the aggregate among the directors by percentages, fixed on the report of a committee, and based on the comparative value of each director to the business. In the working of this arrange-

ment, as the contributions of the directors became less important, their percentages were lessened to the advantage of others, and new men were brought in on a small participation, increasing with experience, so that over a series of years the percentages are constantly changing. Contemporaneously with the apportionment of the percentages drawing accounts were fixed for each director.

On January 23, 1900, we find a resolution of the directors as to salaries for 1900, and fixing percentages and drawing accounts. (Minute book 1, p. 69.)

On January 16, 1901, we find the resolution as to salaries and percentages and drawing accounts for the year 1901. (Minute book 1, p. 117.)

On January 15, 1902, there was a like resolution for 1902. (Minute book 1, p. 167.)

On January 21, 1903, a like resolution was passed for the year 1903. (Minute book 1, pp. 223, 4, 5.)

On February 17, 1904, the directors took similar action for the year 1904. (Minute book 1, p. 273.)

On January 18, 1905, a salary appropriation was made in gross for 1905, the apportionment of percentages being postponed and made on February 15, 1905, it appearing that the delay was due to the partial retirement of Mr. Loines, who, by reason thereof, turned in 50 shares of his common stock. (Minute book 1, pp. 309, 311, 315, 316.)

On January 17, 1906, we find the salary resolution for 1906 as to aggregate, with resolution fixing the salary percentages on February 2nd. (Minute book 2, p. 10.)

On January 16, 1907, was passed the salary resolution for 1907 in the aggregate, and as to salary percentages. (Minute Book 2, pp. 43-45.)

On January 15, 1908, there was a salary resolution in the aggregate (Book 2, p. 92), the percentages being fixed on January 18th, 1909.

On January 20, 1909, the directors passed the usual resolution as to 1909 salaries. (Minute Book 2, p. 149.)

On January 19, 1910, there was the customary resolution as to 1910 salaries. (Minute Book 2, p. 197.)

And on January 18, 1911, was enacted the resolution as to 1911 salaries. (Minute Book 2, p. 232.)

In introducing the evidence it was not considered necessary to read the foregoing resolutions (except as to 1911) as they are in form exactly similar to 1911 and subsequent years which were

spread upon the record. The minute books are in evidence, and this series of resolutions has specific mention (Record, p. 115, line 22 to bottom).

As we have before seen Mr. Prindiville became a stockholder and a director in May, 1911.

The resolution appropriating salaries and fixing percentages and drawing accounts for 1911 had been passed on January 18th, and when Mr. Prindiville came in, in order that he might participate in the appropriation of salaries, it was necessary to revise that resolution.

A resolution was first passed as follows (Record, at top of page 65):

> "Resolved that T. J. Prindiville, having been elected a Director of the corporation, his percentage of salary be fixed at 3.10% of the entire amount heretofore allotted by the Board to Directors salaries, and for the full period beginning January 1st, 1911 and ending December 31st, 1911, also
>
> "Resolved that inasmuch as this allotment of 3.10% will necessitate a re-arrangement of the salary percentages of all Directors for the year 1911, the percentage agreed upon at the meeting held January 18th, 1911 be revised; such revised percentages being as below mentioned," etc.

The revised percentages were then set forth and Mr. Prindiville's appears as 3.10%. He was present at the meeting. It will be noted that the resolution took him back to the beginning of the year and gave him the percentage for the full year and re-adjusted the other percentages, requiring a surrender on the part of some of the rest to fit the plan.

On December 28, 1911, with Mr. Prindiville present (Record, top of page 67), a committee of four was appointed by the directors to take under advisement the matter of apportionment among the directors and officers of the allotment to be voted by the board out of the net earnings for the year 1912 to cover salaries of directors and officers, and report its views at the regular monthly meeting of the board in January, 1912.

This committee reported on January 17, 1912, and the usual resolution was passed in the form in use from 1899 forward, the compensation of the directors being fixed in the aggregate at one-half of the profits of the corporation as defined in the certificate of incorporation, and the aggregate compensation being distributed among the directors by percentages, the percentage assigned to Mr. Prindiville being 4.10% and his drawing account

$800 per month. The full text will be found in the Record, pages 67 to 69.

At the annual meeting in May, 1912, Mr. Prindiville was elected a director for the term of three years, the board having been now increased to 15, divided into five classes serving three years each. The minutes are in evidence and the details of the change can be cited if desired, but they do not seem to be involved in this controversy. (Record, p. 70.)

At a meeting of the directors held on January 15, 1913, the usual salary resolution, making the appropriation in the aggregate and fixing the percentages and drawing accounts for the year 1913, was passed, Mr. Prindiville being awarded 4.60% and a drawing account of $1,200 a month. (Record, pp. 73 and 74.)

On January 21, 1914, the directors passed the usual resolution for salaries in the aggregate and fixing percentages and drawing accounts, Mr. Prindiville being awarded 5.60% and a drawing account of $1,250 a month. (Record, pp. 76 and 78.)

On February 25, 1915, the usual resolution with reference to salaries, percentages and drawing accounts was passed by the directors, Mr. Prindiville's percentage being 5.66% and his drawing account $1,250 per month. (Record, p. 80.)

On January 19, 1916, the usual resolution was passed with reference to salaries, percentages and drawing accounts for 1916, Mr. Prindiville's percentage being 5.6% and his drawing account $1,500 per month. (Record, pp. 81 bottom and 82 top.)

On December 20, 1916, a committee was appointed as to the apportionment of the directors' salaries for the year beginning January 1, 1917, of which committee Mr. Prindiville was a member. This committee reported at a meeting of the directors held January 17, 1917. The original report is in evidence (Exhibit D-7, printed Record, pp. 406-7), and the report was approved and the usual resolution passed, Mr. Prindiville's percentage being 6% and his drawing account $1,500 per month. (Record, p. 88, line 30, to p. 89, line 20.)

Leaving aside for the minute the action of the directors as to salaries for 1918, we will bring to the attention of the court the practice of the corporation with reference to shares surrendered by officers and directors ceasing to be active, and the disposition thereof in accordance with the provisions of the charter.

Mr. Prindiville came in the corporation as we have seen in 1911. Before that time there had been many surrenders by retiring stockholders. As it is necessary for the purposes of this case to trace the surrenders and distributions after Mr. Prindi-

ville came into the corporation we need not go into detail as to the earlier ones, the practice being uniform from the beginning and the form of the dividends certificates and the form of the endorsements on re-issued stock ex-dividend having been adopted, as we have seen, at the very first stage of the corporate life.

The first meeting at which the minutes show the presence of Mr. Prindiville was held in May, 1911. The second meeting he attended was held on June 21, 1911 (Record, p. 64, line 18), and at this meeting Mr. Barrett, on behalf of the Advisory Committee, reported that 175 shares of the common stock of the corporation received from the Estate of William Brockie had been distributed *pro rata* to the common stockholders of record as of May 16th, naming them and the shares received by them.

On December 18, 1912, we find a report of the Advisory Committee (Record, p. 70, line 30) recommending that 446 of the 946 preferred shares of the corporation still unissued be sold, and the Committee also recommended the distribution of 211 shares of common stock now standing in the name of the Treasurer of Johnson & Higgins, Trustee, which stock was turned in by J. D. Barrett and others, said distribution to be on a *pro rata* basis to the holders of common stock as of record January 14, 1913, then actively engaged in the service of the corporation as officers, directors or employees; at the same meeting a resolution was passed approving the recommendation and directing the distribution of the 211 shares which had been turned in by common stockholders under the charter plan, as follows:

J. D. Barrett	61 shares
J. B. Dickson	50 "
Stephen Loines	50 "
W. E. Lowe	50 "

At the next meeting of the board, held on January 15, 1913 (Record, pp. 71-2), we find the details of the distribution of these 211 shares, from which it appears that T. J. Prindiville received 7 shares out of the 211. He still has them. Certificate 469, entitled to dividends from February 9, 1922.

At the same meeting a resolution was passed (Record, pp. 74, line 30, to 75, line 14), reciting that W. W. Curtin had transferred 200 shares to one Wilfrid H. Robertson, who was not an officer, director or employee of the corporation, and authorizing the issue to Robertson of a retirement certificate as provided for in Article 4 of the certificate of incorporation.

On the record (Record, p. 76) will appear the fact of the turn-

ing in of certificate No. 491 in the name of W. W. Curtin for 200 shares, the issue of retirement or dividends certificate No. 71 in the name of Wilfrid H. Robertson covering the same 200 shares of stock. Both were offered in evidence (Ex. D-3 and Ex. D-4, printed Record, pp. 401-405).

Fifty shares of common stock standing in the name of W. W. Curtin, transferred in a similar manner to Robertson, were surrendered and retirement certificate, as provided in Article 4 of the certificate of incorporation, issued thereon. (Record, p. 79 top.)

On January 20, 1915, 50 more shares of common stock of Curtin were surrendered under like circumstances and retirement certificate authorized. (Record, p. 79 bottom.)

On January 19, 1916 (Record, foot of page 80 to line 32, p. 81), it appears that the Advisory Committee reported to the directors that 408 shares of common stock, then standing in the name of the Treasurer of Johnson & Higgins as Trustee, which had been received, 400 shares from W. W. Curtin and 8 shares from E. J. Schriver, should be distributed *pro rata* to the holders of common stock as of record January 18, 1916, then actively engaged in the service of the corporation as officers, directors or employees. A resolution was then passed providing for such distribution, and at the meeting on February 16th (Record, pp. 82-3) the Advisory Committee reported that the distribution had been made "in accordance with the understanding and agreement of the Common Stockholders". By this distribution Prindiville received 15 shares dividend bearing in 1924, 17 shares dividend bearing in 1925 and 33 shares dividend bearing in 1926, all of which he still has.

The distribution varied from *pro rata* was so varied in accordance with the written agreement signed by all the common stockholders including Prindiville, such agreement being in evidence, Exhibit D-6, and printed in the Record (Record, line 30, p. 82, to line 30, p. 83).

On January 17, 1917 (Record, p. 89, lines 20 to 32), the treasurer was authorized to issue retirement certificate on 200 shares of common stock turned in by W. H. Davidge under Article IV of the charter, and on November 21, 1917 (Record, p. 90, line 20), the directors resolved to distribute said 200 shares on a *pro rata* basis to the holders of common stock as of record November 20, 1917, and the evidence shows a similar stockholders' agreement with reference to the distribution of these 200 shares (Ex. D-8, Record, p. 408). In this distribution Mr. Prindiville received 25 shares becoming dividend bearing in 1927, and,

while he did not sign the formal paper, a letter is in evidence in which he assented to the distribution (Ex. D-15 and Ex. D-16, printed Record, pp. 112-3) and the stock certificate was produced by his counsel at the trial and is in his possession. (Record, p. 48, line 36, to p. 49, line 20.)

A table, Exhibit D-13 (printed Record, pp. 105 to 107), shows all retirements of common stock from May, 1911, through 1918.

The dividend certificates outstanding on December 31, 1918, are shown by Exhibit C-35 (printed Record, p. 362).

It appears from the minutes of the stockholders in evidence that Mr. Prindiville was re-elected a director in 1917 for three years. (Record, p. 90, line 16.)

It was the custom at each annual meeting of stockholders to ratify, confirm and approve all the contracts, acts, by-laws, proceedings, elections and appointments, made by the directors and the Finance Committee since the preceding annual meeting. A form of this resolution is set forth at foot of page 108 of the Record. The minutes show no dissenting votes at any meeting. Mr. Prindiville was present by proxy at every annual meeting from 1912 to 1918 inclusive. The proxies are in evidence (Ex. D-14, Record, pp. 410 to 414). The proxy was not limited to common stock and included the right to vote on Prindiville's preferred stock. (See reference to annual meetings 1912 to 1918 inclusive, Record, pp. 107, line 23, to 111, line 10.) It is indicative of the character of this corporation that at every annual meeting from 1913 to 1918 inclusive every share of common stock was present in person or by proxy.

Turning now to the action of the directors in the matter of salaries for the year 1918, we find that at a meeting of the directors on February 20, 1918 (Record, p. 92, line 23), there is a resolution fixing the drawing accounts of the directors pending the report of the Committee on Directors' Percentages, and further action by the board, and on May 15, 1918, there is a report from the Committee and the usual resolution (Record, p. 93, line 9) as to the compensation of the directors in the aggregate and approving their percentages, such percentages appearing in the record, page 93, beginning at line 16.

Mr. Prindiville does not appear either in the resolution with reference to the drawing account or in the resolution with reference to the percentage of salaries, the reason being that he was absent in the Government service as a lieutenant commander in the navy and was not expected to be active in the business during 1918.

At a meeting of the board of directors held April 18, 1917 (Record, p. 89, beginning at line 35), at which Mr. Prindiville was present, the chairman announced that Mr. Prindiville had advised him that he was a member of the Naval Reserve and expected to be called out for military service at any time and that, in view of the resolution passed by the board at its meeting of January 19th dealing with directors' salaries for the year 1917, it appeared to him that consideration by the board was necessary on account of Mr. Prindiville's probable inactivity in the affairs of the corporation. The following resolution was passed:

> "Resolved, that during the period of Mr. Prindiville's military service he be given leave of absence and that his salary continue in full force during his military service in the current fiscal year."

Shortly thereafter Mr. Prindiville was called to duty in the navy and was thereafter, during the balance of the year, entirely absent from the company's business. He received his salary in accordance with the resolution pursuant to the terms of his leave of absence and pursuant to the resolution passed as to salaries for the year, not deducting therefrom his salary as a lieutenant in the United States Navy in the amount of $2,500, his offer to make such deduction being declined, as appears in the minutes of the board of directors of January 7th, 1918.

In December, 1918, Mr. Prindiville, being relieved from active service and contemplating return to the business, represented to President LaBoyteaux his feeling that he should be entitled, notwithstanding his absence in the war, to enjoy the salary privileges for the year, and after a good deal of debate between Mr. Prindiville and the president and other directors (Record, LaBoyteaux, pp. 137-9; pp. 193-4; Prindiville, p. 243; pp. 300-1) it was finally determined to accede to Prindiville's request and accord him the same salary percentage as he had enjoyed in 1917. Prindiville wanted a larger percentage, but his associates did not see it his way. There is in the record a long letter from President LaBoyteaux to Prindiville, dated December 24, 1918 (Record, p. 119, Ex. D-21), in which the objections to Mr. Prindiville's request as to participation in salaries for 1918 are set forth at length, after which the President said (Record, p. 121, line 35, to p. 122, line 20):

> "Notwithstanding all of the above and the very strong views held by all of us that your demands are quite unjustifiable and cannot be sustained, it is nevertheless the most

earnest desire of all that any such feeling as you have expressed be dissipated.

It has therefore been decided, in an effort to promote harmony and to dispel from your mind any idea that you have been badly treated, to meet your demand, and, for the year 1918, it has been agreed that your salary would be fixed at the rate which you were receiving when you left, less only the deduction of $5000.00—pay received by you from the Government—which you have suggested be deducted.

The above gives you identically what you would have received had you continued actively in the business.

It is my sincere hope that this action on the part of your co-directors will accomplish the purpose intended."

The conclusion of the board of directors was communicated to Mr. Prindiville by a letter by the President, dated December 26, 1918 (Ex. D-10, Record, p. 101), as follows:

> "At a special meeting of the board of directors held this afternoon, formal action was taken on your request for a reconsideration of your salary for the year beginning January 1, 1918, and ending December 31, 1918, and a resolution was adopted fixing your salary for the current year at 6%, which is in accordance with what I wrote you in my letter of the 24th would be done."

The formal action of the board at the meeting held December 23, 1918, is in evidence (Record, p. 95).

Preceding this meeting, by letter of December 23, 1918 (Ex. D-20, Record, pp. 116-7), Mr. Prindiville had communicated to Mr. LaBoyteaux his willingness to accept for 1918 the same percentage he had received in 1917, less the salary received from the Government. (It was stipulated in the case that no deduction was made on account of the Government salary from the payments afterward made to Mr. Prindiville.)

At a meeting of the directors held on Thursday, December 26, 1918 (Record, p. 95), a resolution was passed reciting the absence of Mr. Prindiville pursuant to leave granted by the board on April 18, 1917, and his request for reconsideration as to his salary compensation for the year 1918, and resolving that supplementing and amending the salary resolution passed on May 15, 1918, fixing the compensation of the directors for that year, the percentages should be revised, and they were so revised giving Mr. Prindiville 6%. There was, of course, a reduction in other percentages. The revised list of percentages for the year is set forth at the bottom of page 95 and top of page 96 of the Record.

In Mr. Prindiville's letter of December 23rd, already referred to, to President LaBoyteaux, in which he assented to the suggestion of the same percentage of salary to him for 1918 that he had enjoyed in 1917, he also presented his claim as to the year 1919, as follows (Record, p. 117):

> "Now, for the year 1919, I feel I am clearly entitled to my relative position and that my interest for that year be put at such a figure that my total income from the business for 1919 would approximately equal that of the above named running mates, Messrs. Lowe and Davey. I have not before me the total results of the business for 1917 nor have I any means of approximating what the results for 1918 will be, so cannot give the exact interest which would make my total equivalent to those partners above mentioned. I will gladly leave the details to be worked out later by the Salary Committee, but before I could consistently accept the situation I feel that assurances of such action as above outlined should be given."

Mr. Prindiville was advised by the President of the action of the directors in a letter dated December 24, 1918, as follows (Record, p. 118):

> "In view of your urgency that you be informed regarding your status in the corporation and firm upon your return to active duty, I felt it desirable to bring the matter before the board of directors at the special meeting held yesterday.
>
> "I am instructed to advise you that all of the directors agree that your salary percentage for 1919 from the corporation will be exactly the same as it was at the time you left (and still continued during your absence), and the salary committee have been instructed accordingly."

Mr. Prindiville replied to Mr. LaBoyteaux under date of December 30, 1918 (Ex. D-22, Record, pp. 123-5), regretting the action of the directors as to 1919 and expressing his dissatisfaction and repeating the arguments theretofore advanced by him both orally and in writing, and summing up as follows:

> "Now in asking me to accept the 1917 basis for my 1919 salary you are penalizing me for entering the Government service, when the financial results of the corporation do not warrant any such action. So your intention creates a situation which I cannot accept so I have asked my counsel, Mr. Royall Victor, to confer with you on a fair value for my J. & H. holdingsand, in consideration of a prompt and satisfactory settlement of same, I will agree not to engage in the insurance brokerage business for one year from January 1, 1919."

Mr. Prindiville himself tells us in his examination (Record, p. 301 *et seq.*) that he never did resume his duties; never did finally reach an agreement with his associates as to 1919. He affirmatively said, in response to direct questions on cross-examination, that when he was talking about the sale of his interest in Johnson & Higgins he included his interest in the partnership and that he felt he could not stay unless his terms were accepted by his associates. The finality of his position at this time is illustrated by questions and answers in the record (Record, p. 307):

> "Q. Have you ever communicated your willingness to continue with the corporation of Johnson & Higgins as one of the directors of that corporation and return to duty, as you put it a minute ago, on any other basis except the ultimatum that you delivered at this meeting? A. No; I have not.
>
> Q. You had no intention, unless that ultimatum was met, of resuming your activities with the corporation? A. I certainly had no intention to lose my self-respect and go back unless those conditions were changed.
>
> Q. Whatever your motives, you had no intention of returning unless your terms were met? A. No, sir.
>
> The Court: He really means yes, sir, instead of no, sir.
>
> Q. You said you had received no notice of director's meeting since January 1st, 1919. Have you ever brought to the attention of the corporation or any officer of the corporation your claim that you were entitled to such notice? A. No; I have not.
>
> Q. Have you ever sought to attend a directors meeting since January 1st, 1919? A. No.
>
> Q. You were acquainted with the regular meeting days, monthly meeting days of the corporation? A. Yes, sir; and I expected my notices, but I didn't get them.
>
> Q. You never made any attempt to attend? A. No, sir.
>
> Q. And your whole attitude towards this matter, in your discussion of your percentages of salaries that you ought to receive for 1919, was on the assumption that you were to continue in both the firm and the corporation? A. Yes, sir, on that assumption.
>
> Q. You carried your debate to your associates on that theory? A. Yes, sir.
>
> Q. And when you resigned from the—or when you gave notice that you wouldn't continue the firm and wrote them later, December 30, when you said you desired to dispose of your Johnson & Higgins holdings, you had in mind both the firm and the corporation? A. I had in mind selling all interest in Johnson & Higgins.
>
> Q. And not the firm only? A. No.

Q. In this letter of December 30, 1918, Exhibit D-22, you said, 'Now in asking me to accept the 1917 basis for my 1919 salary you are penalizing me for entering the Government service, when the financial results of the corporation do not warrant any such action. So your intention creates a situation which I cannot accept so I have asked my counsel, Mr. Royall Victor, to confer with you on a fair value for my J. & H. holdings, and, in consideration of a prompt and satisfactory settlement of same, I will agree not to engage in the insurance brokerage business for one year from January 1919.' You meant when you wrote that and had it forwarded to Mr. W. H. LaBoyteaux, president of Johnson & Higgins, to convey to him the impression that what you wanted to do in disposing—getting fair value for your Johnson & Higgins holdings—you wanted to dispose of both the firm and corporation holdings? A. Yes, sir.

Q. Had you up to January 1, 1919, ever taken the position with any of your associates that this corporation of Johnson & Higgins, or the scheme on which it was based, and the by-laws under which it was working, was in any way illegal? A. No; I never gave it any thought.

Q. You heard about its illegality since January 1, 1919? A. Yes, sir.

Q. And, of course, from counsel? A. From counsel."

We are thus affirmatively informed out of Mr. Prindiville's own mouth of his intention with reference to a refusal of further active service unless his terms were met. We know from him that he definitely intended to and did actually refrain from any further service as director or employee.

We further know from the testimony that Mr. Prindiville left for Florida on December 31, 1918 (Record, p. 245; Ex. C-24, p. 246), leaving the letter of December 30th, already referred to, to Mr. LaBoyteaux, to be delivered by his counsel, Mr. Victor of the firm of Sullivan & Cromwell, and that he remained in Florida for several weeks and upon his return at once engaged in business competitive with Johnson & Higgins. (Record, p. 312, line 20, to 313, line 14.)

There has been reference in the correspondence and quotations from the testimony of Mr. Prindiville to the firm of Johnson & Higgins. It will be remembered that there was retained, on the transfer in 1899 of the business of Johnson & Higgins to the corporation Johnson & Higgins, certain excepted territory, and the firm of Johnson & Higgins continued with variate membership, usually corresponding with the members of the board of directors of the corporation (but not always) (Record, p. 343).

The bill of complaint does not mention the firm of Johnson & Higgins and this case is not concerned with any difference of opinion as to the rights or interests of the partners in the firm. The Vice Chancellor admitted in evidence some figures as to receipts of Mr. Prindiville from the firm (Record, p. 290, line 21, to p. 294).

The attempt was made by counsel for the complainant to limit the desire, expressed by Mr. Prindiville in his letter of December 30, 1918, to dispose of his Johnson & Higgins holdings, to his interest in the firm, because of the letter in evidence (Exhibit C-24, Record, p. 246), written by Mr. Sykes, of Sullivan & Cromwell, to Johnson & Higgins under date of December 31, 1918, enclosing the letter of December 30th from Mr. Prindiville to Mr. LaBoyteaux, Mr. Sykes' letter containing a notification on behalf of Mr. Prindiville that he would not continue or renew the partnership of Johnson & Higgins which by its terms expired December 31, 1918. Mr. Prindiville's quarrel with his associates was not primarily about the firm, but about his corporation salary percentages, and the correspondence over Mr. Prindiville's own signature (several of the letters are set forth at length in complainant's brief) leaves no doubt about this. The issue cannot be evaded by an appeal to the Sykes letter, of December 31, itself enclosing Mr. Prindiville's own letter of December 30, concerning the meaning of which he himself testified. It has been made apparent out of the mouth of Mr. Prindiville himself in the quotations above made from his testimony, that his letter, expressing his desire to sell his holdings in Johnson & Higgins, did cover his holdings in the corporation, and that he, at the time of writing that letter, did not intend to return to the corporation unless his terms were met, and that he had at no time since that letter was written been actively engaged as officer, director or employee in the service of the corporation. The telegram sent by Mr. Coe to Mr. Prindiville in Florida (Ex. C-25, Record, p. 247), asking him to definitely resign as a director of the corporation, was not answered except through counsel and can have no bearing on Mr. Prindiville's actual status with reference to the corporation. *In view of Mr. Prindiville's own declarations there can be no doubt as a question of fact that he ceased to be actively engaged in the service of the corporation as officer, employee or director after the end of the year 1918.*

During complainant's active connection with the corporation he annually participated in the distribution of one-half of the yearly profits by the percentage each year awarded to him by the

annual salary or compensation resolution, and also in the other half of the yearly profits as distributed in dividends on preferred and common stock holdings, in proportion to his dividend bearing shares. Contemporaneously he received his agreed percentage of the co-partnership of Johnson & Higgins.

The assets and liabilities of the corporation as of December 31, 1918, appear in complainant's Exhibit 5 (printed Record, pp. 350-1). The total assets are $9,283,669.73, inclusive of a good will item of $366,764.00. The liabilities included $6,373,322.08 accounts payable, chiefly consisting, as appears by a foot note, of premiums due and payable to underwriters when and if collected by the corporation. The capital stock consisted of preferred $450,000. and common $372,900. with a surplus of $451,286.44 and undivided profits of $1,547,101.02, out of which last item dividends were later paid of $928,521. Large sums were held in reserve for taxes.

The annual business involves cash passing through the corporation of between $75,000,000. and $100,000,000. (Record, p. 130, line 23).

The Company employed at the time of the hearing 470 persons at the New York office, and on the average about 700 persons in the various offices including New York (Record, p. 130, top).

This enormous business owes its great profit to its volume. The business is transacted on the usual broker's commission. The volume of course depends on the reputation of the concern and the personal attention of the proprietors (Record, pp. 311-2).

The common stock dividends paid in the years 1917 and 1918 are shown in Exhibit D-11 (Record, p. 102). In addition to preferred dividends of $36,000., dividends on the common stock were, out of the earnings of 1917, 20% declared June 20, 1917, 80% declared December 19, 1917, and 100% declared March 29, 1918, *in all 200% or in dollars $745,800.* on 3,729 shares of common stock. In addition to preferred dividends of $36,000., dividends on the common stock were, out of the earnings of 1918, 20% declared June 19, 1918, 25% declared December 18, 1918, 105% declared March 6, 1919, 50% declared March 19, 1919, 50% declared August 20, 1919, and 44% declared December 4, 1919, *in all 294%, or in dollars $1,096,326.* on 3,729 shares of common stock.

These tremendous results are in the war years. The salaries, of course, were similarly magnified in these years. But both salaries and dividends, in their ultimate destination, were allocated and declared by the same methods and pursuant to the same cor-

porate plan as from the organization of the corporation in 1899 to 1911, when Mr. Prindiville came in, and from 1911 to 1918, when Mr. Prindiville took himself out. And even his counsel concedes that he knew all about the plan before he came in (Record, p. 297, lines 7 to 25).

In addition to compensation, the directors who were also members of the firm, shared in its profits, and they were not negligible.

Exhibit D-12 (printed Record, p. 104) shows compensation and dividends received by complainant in the operation of this corporate plan from 1911 to 1918 inclusive. He had 100 shares of 8% preferred stock (acquired 50 shares July 10, 1911, 20 shares January 23, 1912, and 30 shares January 14, 1913), so that the amount derived from preferred stock is easily ascertainable, being in 1911, on 50 shares, $200., in 1912, on 70 shares, $560., and thereafter on 100 shares $800. He held at all times 125 shares of dividend bearing common stock. The figures taken from the exhibit are, as to Mr. Prindiville, incorporating dividend rate and percentage of salary participation, and including full dividends for 1918 as declared:

1911.	Dividends, Preferred 8% (6 mos.)	$200.00	
	Common 75%	9,375.00	
	Salary (3.10%)	10,955.34	$20,530.34
1912.	Dividends, Preferred 8%	$560.00	
	Common 88%	11,000.00	
	Salary (4.10%)	16,328.51	$27,888.51
1913.	Dividends, Preferred 8%	$800.00	
	Common 85%	10,625.00	
	Salary (4.60%)	17,509.60	$28,934.60
1914.	Dividends, Preferred 8%	$800.00	
	Common 88%	11,000.00	
	Salary (5.60%)	21,956.76	$33,756.76
1915.	Dividends, Preferred 8%	$800.00	
	Common 125%	15,625.00	
	Salary (5.66%)	32,269.38	$48,694.38
1916.	Dividends, Preferred 8%	$800.00	
	Common 200%	25,000.00	
	Salary (5.6%)	56,451.83	$82,251.83
1917.	Dividends, Preferred 8%	$800.00	
	Common 200%	25,000.00	
	Salary (6%)	93,833.34	$119,633.34

1918.	Dividends, Preferred 8%	$800.00	
	Common 294%	36,750.00	
	Salary (6%)	67,676.09	$105,226.09
	Total, 8 years		$466,915.85

In addition to the foregoing Mr. Prindiville received from the firm (Record, pp. 290 to 295):

1911	$3,130.19	
1912	4,470.22	
1913	5,397.91	
1914	5,442.04	
1915	7,188.42	
1916	10,186.92	
1917	19,080.30	
1918	35,514.72	90,410.72
		$557,326.57

The complainant Prindiville has therefore become entitled during the eight years, 1911 to 1918, inclusive, to $466,915.85 from the corporation and $90,410.72 from the firm, or from both $557,326.57, all of which he has had except balance of dividends of 1918 declared but unpaid to him of $31,125. and which have been tendered to him upon the condition that he turn in his stock and accept dividend certificates as required by the corporate plan, and as all other common stockholders have done from 1899 to date.

And of this princely amount Mr. Prindiville received about $76,000. from the corporation and about $13,000. from the firm for the period of eight months in 1917, when actually away from the business; and $105,226.09 from the corporation and $35,514.72 from the firm in 1918, although actually away from the business during the whole of that year. And yet he tells us that he refused to accept the allocation of 6% of the salary distribution determined for him in the usual way for the year 1919, because he felt that he was being "penalized" for his patriotism in absenting himself from the business in war service, and his counsel in their brief emphasize this claim!

But these figures do not measure the entire opportunity which he has received. He has participated in distributions of stock reissued after surrender by directors or officers ceasing to be active, and at the present time holds certificates as follows: No. 469 for 7 shares, dated February 19, 1913, and No. 485 for 18 shares dated February 27, 1913, part of the Barrett-Dickson-Loines-Lowe retirement redistribution in 1913, and becoming

dividend bearing in 1923; No. 518 for 15 shares, dated February 28, 1916, part of the Curtin retirement distributed in 1916, and becoming dividend bearing in 1924; No. 519 for 17 shares, dated February 28, 1916, also part of the Curtin retirement distributed in 1916, and becoming dividend bearing in 1925; No. 520 for 33 shares, dated February 28, 1916, also part of the Curtin retirement distributed in 1916, becoming dividend bearing in 1926; and No. 531 for 25 shares, dated November 22, 1917, part of the Davidge retirement distributed in 1917, becoming dividend bearing in 1927.

For none of these 115 shares has Mr. Prindiville paid a cent. He has received them as a beneficiary of the corporate plan inaugurated in 1899, into which he was admitted in 1911 with full notice of the rights and duties of stockholding. He has received these shares from men who have surrendered them in good faith observance of the corporate plan, and have accepted the 10-year dividend certificates thereby provided. For twenty years this has been going on, and the dividend certificates first issued long ago expired. Mr. Prindiville still has these certificates and has no intention of returning them. (Record, p. 298, lines 29 to 40.)

He paid value for 125 shares of stock issued to him for his one-half interest in Prindiville & Co., but he has known from the beginning what was expected of him if he became inactive. If he had complied with the corporate plan, he would have enjoyed for the full ten years dividends on 125 shares, for six years on 25 shares, for five years on 15 shares, for four years on 17 shares, for three years on 33 shares, and for two years on 25 shares. Judging by past history these dividends would have represented a very handsome sum, and adequate consideration for the surrender of the stock.

Complainant offered evidence as to the history of Prindiville & Co. to show, as was claimed in his behalf, that he is differently situated as to the 125 shares of stock, issued to him in 1911 for his interest in the Chicago business, from his associates, who, in his view, have contributed no actual capital under the usual method of admission to the corporation. That he paid valuable consideration is not denied, but so did every incoming member, and so did the eight men who in 1899 organized the corporation of Johnson & Higgins and turned over to it, for stock consideration, a wide spread business in many states, which had been fifty-five years in the building. As they and their successors passed from activity to inactivity they turned in

their stockholdings, to the current advantage of their successors including Mr. Prindiville, and he retains in his possession the fruits of their plan and its operation, even while for the first time in the corporation's history, offering challenge to the legality of the corporate plan.

Of the shares of common stock outstanding December 31, 1918, 3,729 in total number, dividend certificates with varying expirations were in the hands of directors and officers (or of their personal representatives, if deceased) who had retired from active service, with relation to 2,104 shares, surrendered by the holders on retirement from activity in the working of the corporate plan (See Ex. C-35, Record, p. 362). The complainant's challenge to the legality of this plan, if successful, will immediately destroy the validity of these dividend certificates, and restore the dividend privilege to the shares, now held *ex*-dividend, in the hands of present holders who have received them on distribution after surrender in accordance with the corporate plan. The complainant himself holds 115 such non-dividend paying shares, and makes no suggestion of restoration or correction (Record, p. 298, line 29 to p. 299, line 20). He proposes to keep all the benefit he has received by reason of the operation of the plan, and to still further enhance the value of the common stock he has received, by the indefinite continuation of the dividend right on his original 125 shares and the immediate restoration of the dividend privilege to the shares distributed to him after surrender by earlier holders no longer actively engaged in the corporate business. His own words are unusually frank. We quote question and answer (Cross-examination Prindiville, Record, p. 313, beginning at line 18):

> "Q. Why have you declined to turn in your stock certificates in accordance with the charter requirements and take your dividend certificates? A. Because I think they are worth more than what the dividends would give me.
>
> "Q. Ten years dividends does not bring you what you have made up your mind you want to get? A. Yes.
>
> "Q. Pure question of price? A. Yes sir."

The facts summarized show that Prindiville voluntarily ceased to be actively engaged in the service of Johnson & Higgins and with full knowledge of the consequences on his revenues from the corporation. There was no combination or conspiracy on the part of his associates to oust him from corporate activity. Although absent from the business during the entire year of 1918 and most of 1917 he was accorded the continuation of par-

ticipation in the salaries in both years. His percentage in 1917 was determined by the directors in the usual manner and after full opportunity to him to present his claims for consideration, and was fixed at 6%. To this he assented. At first denied salary participation in 1918 because of absence on leave, although without suggestion of stock retirement and in the expectation of his return to actual activity after the war, his plea for recognition was heard by his associates and the directors unanimously finally awarded him in December, 1918, treating him as active though absent, the same percentage for that year that he had enjoyed in 1917, other directors surrendering in part the awards previously made them in order that he might participate. And in December, 1918, after his return from war duty, in the belief that he would be "actively engaged" in the business during 1919, the Salary Committee, after full consideration of his claims as presented by himself, recommended, and the directors concurred in the recommendation, that he should have in 1919 the same percentage as in 1917 and 1918. This determination as to his 1919 participation was reached in the usual way and according to the custom of the corporation from the beginning and during his entire association with it. He notified the President of his dissatisfaction and refusal and his wish to retire and dispose of his Johnson & Higgins holdings. He gave no notice of any claim of illegality or of his objection to the payment of salaries as excessive in the aggregate. His objection was that he himself was not to get as much as somebody else. He had not then given any thought of illegality, and heard of it from counsel after January 1, 1919. He left matters in the hands of his lawyers, and took himself away to Florida, where he remained until about March 1, 1919. On his return he formed other associations in competitive antagonism to Johnson & Higgins, taking with him some of their employees. He never in any way resumed or offered to resume active service with Johnson & Higgins in any capacity, not even attending or attempting to attend the meetings of directors, although the three year term of office as director, for which he had been elected, did not expire until May, 1920. He absolutely ceased to be "actively engaged" as officer, employee or director from December 29, 1918, and completely fixed his own status to be such as disentitled him to dividends on his common stock, until his surrender of the certificates therefor and the acceptance of dividend or retirement certificates as prescribed by the company's charter.

The facts of complainant's relationship to the corporation, from its inception, are established from the company's records,

from his own writings and out of his own mouth, and the case, at the conclusion of the testimony, was free from any substantial or influential dispute of fact.

Not only did complainant have a general knowledge of the corporate plan before he became a stockholder and accepted his original certificate of common stock with all the charter terms applicable thereto included therein, but after his entrance into the corporation, by his acquiescence, conduct and participation in and with respect to every phase of the corporate plan, in its application to others and to himself, ratified and confirmed it, deriving from it every benefit accruing to himself as an active common stockholder against associates retiring or deceasing, and making no protest of any kind until called upon, under conditions created by himself, to submit himself to the personal consequences incident to his own changed relationship.

During his active association with the company he had participated actively in the administration of every feature of the plan, both with reference to stock and to salaries, and had continuously enjoyed every benefit resulting therefrom. He participated as a director, affirmatively at many meetings and without protest as to any, and as a stockholder annually voted in corporate meeting for ratification of all actions of the directorate during the preceding year. When it was necessary to more fully serve the corporate purpose by making more certain the annual salary distribution undiminuted by current losses, he joined with his associates in giving unanimous consent to the amendment of the charter on May 4, 1914 (Exhibit DX), as appears by his assent to the amendment under authority of proxy personally signed. His retirement from active service at the end of 1918 was the result of the operation of the plan to himself in the same manner and under the same conditions which he had for years applied to others. He does not even claim that his associates, in rejecting his ultimatum, were influenced by other than fair and honest motives or by considerations differing in any way from those he had himself exercised as a member of the salary committee in 1917. He stands confessedly on no individual equity arising out of circumstances and plants his case squarely on the invalidity of the charter contract.

The bill alleges refusal to declare such dividends upon common stock of complainant out of the 1918 profits, as had been declared to other common stockholders.

This was denied by the answer, and the proofs show no discrimination in the declaration of dividends on complainant's

common stock. And the statement on page 5 of Complainant's Brief, to the contrary, is erroneous. It is not denied that the dividends payable since December 31, 1918, have been withheld, and it affirmatively appears that they were ready for complainant if he complied with the corporate charter as all other stockholders in like circumstances are bound to do, and as all others so circumstanced have heretofore done.

The bill alleges illegal and excessive salaries in 1919. The answer denies the charge and the proofs show aggregate salaries in 1919 measured by the same standard, viz., one-half of the corporate profits, as in all former years of the corporate life, and distributed by like method among officers and directors actively engaged in the company's business. The proofs show nothing from which to adjudicate the amount of a reasonable salary, and any presumption that the large sums payable or paid, in pursuit of the corporate plan, are *per se* excessive and illegal because of mere size, is rebutted by a like standard in continuous use by the defendant corporation during the twenty years from its birth in 1899, and also, as against the complainant by his own adhesion to that standard from 1911 to 1918 inclusive without protest or objection.

POINT FIRST.

The provisions of the Johnson & Higgins charter in reference to its common stock are valid and lawful, being directly authorized by Sections 8 and 18 of the New Jersey Corporation Act, and constitute a statutory classification of corporate stock, defining the interest, right or estate, thereby created and vested in the shareholder, and are not in violation of any statute or rule of public policy, and are enforceable against complainant as his proper contract as originally made and as continuously confirmed by him.

At the outset of the argument it is of compelling importance to have a proper appreciation of the essential nature of the contract made by the complainant with the defendant and with his then associate stockholders and their successors. That agreement as made by him and them is simply and briefly to the following effect:

(1) It provides that an inactive shareholder shall not be entitled to dividends upon his stock.

The stockholder may retain, sell, and receive his distributive share of capital with respect of his shares. His right to dividends is lost. That right can be recovered by his again becoming active or may be reclaimed by an active transferee.

There can be no doubt that both by contract at common law and by virtue of the express provisions of Sections 8 and 18 of the Corporation Act, the right of stockholders of a class defined in the corporate articles to receive dividends may be limited, qualified or suspended upon condition or absolutely.

(2) Then the charter confers a *right* upon every inactive stockholder, *i. e.,* the right to turn back his shares to the corporation, to require it to purchase them and to receive its certificate—that is its contract—to pay him for ten years thereafter amounts equal to the dividends which would have been payable upon the surrendered shares had he retained them and remained an active shareholder.

These payments are not and cannot be dividends upon stock owned by him. The stock has been surrendered and may be

reissued. Ordinarily it will belong to some one else. If the payments can be described as dividends at all, it is merely because the corporation has, by agreement, withheld the dividends of active shareholders who are the new owners of the stock and paid over like amounts to satisfy its contract obligations to the old.

There is no doubt of the power of a solvent corporation to purchase or to contract to purchase, if required to do so, shares of its own stock. The contract, once executed by the surrender of the shares and their acceptance by the corporation, is susceptible of enforcement, whether by the original certificate holder or any transferee.

(3) Finally, the charter authorizes the reissue of the shares *ex*-dividend for ten years, *i. e.,* the corporation is to recoup the consideration paid to its late stockholder by exacting from his successor an agreement disentitling him to receive an equivalent amount of dividends to which ordinarily he would be entitled. This again is merely a classification of stock rights but it is a matter with which the inactive shareholder has no concern. The shares cannot be reissued as long as he retains them and after he surrenders them he is no longer interested in them. He has ceased to be a stockholder altogether and has become a creditor of the corporation or the obligee of its contract obligation.

There is here no separation of different interests in or attributes of property. When stock has been surrendered and a dividend certificate issued, the obligation under the latter is a new and independent corporate obligation, measured merely by what in the first instance was a dividend obligation. The surrendered stock may or may not be reissued. If not reissued it carries no dividends. If reissued, *ex*-dividends, neither the person who has voluntarily disposed of it nor the person who has accepted it upon condition that he shall forego dividends for a certain period can complain.

(A)

The provisions of the Johnson & Higgins charter in reference to its common stock are, properly construed, definitive of the property interest therein of the original issuees and subsequent holders, and are not limitations on alienability of the shares or against public policy.

The complainant condemns the provisions of the charter of Johnson & Higgins relative to its common stock (quoted in full on pp. 2-4 of this brief) as obnoxious to law and public policy

because they deprive the common shares of freedom of transfer claimed to be a necessary attribute of corporate shares.

Without now considering the specific authority believed to be found in the general corporation act for the creation of shares with limited interests or rights, it seems clear that the provisions of the Johnson & Higgins charter transgress no general rule applicable to the transferability of personal property.

Corporate shares are, of course, personal property. Section 20 of the Corporation Act expressly so says, and affirms their transferability on the books of the corporation. This section is not of recent origin. It has been a feature of the New Jersey statute law since 1849, and antedates the period of development of the corporation as a customary means of association of the activities and capital of individuals for the conduct of business enterprises.

This section, so far as we have been able to discover, has never been regarded as preventing provisions in corporate charters giving characteristics to stock suitable to the operation under corporate form of the lawful purposes of the corporators, even if definitive of the quality of the property interest in the holder of the shares.

(1) *The provisions of the charter define the property rights, inherent in the shares from their original creation, in the hands of original issuees and transferees, and constitute no restraint on alienability of the property rights as defined.*

The Vice-Chancellor in his opinion said (Record, p. 424, line 16 to end):

> "As I view the clause it limits the quality of the shares, not their alienability. That is to say, the limitation is upon the property in the shares, their normal dividend bearing capacity is curtailed, but there is no restraint upon their transferability. The shares came into being with this condition as a part of their essence; it was one of their original incidents, and the complainant contracted with the corporation and his fellow stockholders for them with this inherent characteristic attached. He and his associates are not deprived of the rights or privileges of stockholders, save as to dividends, and those he agreed to forego in a certain contingency, which has come to pass. He got all he bargained for, and what he has he is at liberty to sell and transfer. As to that there is no restriction. He may transfer his shares, such as they are, at will, and to whom he pleases. That he will not be able to find as ready a market or as smart a price as could be

> secured for shares otherwise unlimited, may be embarrassing and disappointing, but that does not impair the vendibility of the article he bought and has for sale. I can perceive no infraction of public policy."

Properly construed, the provisions of the Johnson & Higgins charter are designed to meet the peculiar requirements essential to the present conduct and continued success, under corporate form, of a business dependent on the personal representation, ability and service of those immediately active in the conduct of its affairs.

These charter provisions are legitimate means of securing a proper and necessary end, *i. e.,* the maintenance of confidence and harmony among business associates in a corporation fundamentally based upon the co-operation in personal service to, and satisfaction of, the public.

To meet these peculiar requirements of a business, certainly lawful in its purposes and capable of corporate embodiment, certain characteristics were made inherent in its common capital stock to insure the success and permanence of the corporate enterprise. The original issuees of the common stock included *all* of the active participants in the business the corporation was organized to conduct, and the corporate plan contemplated and the corporate purpose legitimately required, that the control of the corporation should be always entrusted to those actively engaged in the conduct of its affairs. To this end it was provided that when any common stockholder saw fit to transfer his stock to a stranger, or to cease his active participation, certain consequences, potential in the stock at its creation, should automatically result. Certainly such a plan suggests no illegal purpose, and, indeed none has been asserted.

Clearly we are dealing with an instrument, in the Johnson & Higgins charter, marking out the right created in the origination of the common stock. There is involved no attempt to dictate to, restrain or constrain any stockholder, but there has been by the fundamental contract, assented to by the original issuee, repeated in the by-laws to which he also assented, and in the certificate of stock which he accepted, a definition of what the original stockholder and every transferee was entitled to and of what he received.

Power is conferred (Corporation Act, Sec. 8, para. IV, and Sec. 18) upon the incorporators to set forth in their certificate of incorporation, among other things, the amount of the total authorized capital stock of the corporation, the amount of capital

stock with which it will commence business, and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes and the terms on which the respective classes of stock are created—and the Johnson & Higgins charter is in exact compliance with the statutory permission. The operation of this provision is not limited by the statement in Section 20 that the stock, *after creation,* shall be personal property.

Section 20 of the Corporation Act does not undertake to define or delimit shares of stock.

Nothing in the charter, in the provisions under examination or elsewhere, confers any right or undertakes to confer any right upon the board of directors to interfere in any way with the transfer of stock, and it may be conceded for present purposes that Section 20 of the Corporation Act, in providing that shares of stock shall be personal property and transferable on the books of the corporation in such manner and under such regulations as the by-laws provide, recognizes no right in the corporation through its by-laws beyond a mere regulatory right to approve transfers so far as necessary to protect the company.

There is no declaration in Section 20 of the Corporation Act that personal property is at all times one and indivisible, or that every element of property right in a share of stock shall be permanent or at all times reside in the same person. There is nothing in that section to interfere in any way with any dealing, by individual stockholders with reference to a share of stock, that would not be permissible with reference to any other kind of personal property, except only that reasonable regulations may be made by by-law as to the registration of transfers on the books of the corporation necessary for the protection of the corporation in its responsibilities to its stockholders.

There is no inference to be drawn to the contrary from the reference in the final part of the section to the transfer of shares for collateral security. That part of the clause makes it impossible for the corporation to refuse to note on the entry of the transfer the fact that it is made for collateral security. No limitation can be implied from this on the right of the shareholder to make other contracts relative to his stock.

A chief reason for the transfer of the shares on the books of the corporation is to assure the stockholder the recognition of his right to participate in the management of the corporation, as a stockholder not so registered is not entitled to vote, and even a stockholder of record whose stock has been transferred on the

books within twenty days preceding the election is not permitted to vote under Section 36. Under Section 40 the books of the corporation are controlling as to the right to vote. Section 37 authorizes executors, administrators, guardians and trustees, or persons in any other representative or fiduciary capacity, to represent stock held by them at all meetings of the corporation and to vote thereon as a stockholder (even though the stock may not have been actually transferred into the name of the executor, administrator, guardian or trustee), and also provides that a pledgor may vote on his stock under pledge as collateral security, unless in the transfer of 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.

We are not in the present case concerned with the voting right, and the provision of the Johnson & Higgins charter relative to dividend certificates does not affect the voting right.

In the Johnson & Higgins charter there is nothing more than a definition of *property right* in the common share, whether in the hands of an original issuee or of a transferee. The provisions set forth in the charter may operate to bring about a surrender of stock, under specified conditions, for a consideration equivalent to ten years dividends. Such provisions are not destructive of the share or of any of its elements. The property right of the common stockholder originates and continues as defined in the charter.

Assuredly the complainant, by arbitrary decision of his own, cannot enlarge the interest which he received and diminish that of his fellow stockholders. He cannot substitute a new common stock of a different quality.

To quote the thought of Chief Justice Holmes (now Mr. Justice Holmes of the United States Supreme Court) in *Barrett v. King,* 63 N. E. Rep. 934 (Mass.), looking at the Johnson & Higgins stock merely as property, it was called *into existence, with the terms relating to the future effect of the conditions set forth in the charter and inherent in it, by the consent of all concerned in taking out the charter.*

Complainant's argument apparently makes some distinction in character between the 125 shares of stock of Johnson & Higgins originally issued to the complainant and other shares of stock held by him *ex*-dividend, coming to him in the operation of the charter plan and not specifically mentioned in the bill of complaint.

There is no real distinction. The 115 shares of stock now held by the complainant *ex-dividend* went to original issuees, subject to being surrendered under the charter conditions and were so surrendered by original holders or their successors as they became inactive in the corporate service; they were also after surrender subject to the corporate right to re-issue *ex*-dividend pending the expiration of the outstanding dividend certificates.

Exactly the same possibility attached immediately upon its issue to the 125 shares of common stock still held by the complainant *as original issuee.* There is no difference in quality. Every share of common stock has identical-characteristics.

The charter defines the quality of the property right.

Complainant erroneously argues that the operation of the charter is to *cut down property rights already acquired* without consent of the complainant as owner, there being no objection to the operation of the plan so long as the holder is consenting. This argument might be appropriate if the property right of the issuee in the stock had not been defined as to its quality by the charter itself. If, for instance, a by-law had undertaken to lessen an unqualified interest theretofore acquired by the stockholder, it might be said that an enforced diminution of rights already acquired was in contravention of the stockholder's right of unrestricted ownership. That is not this case. The validity of such a by-law in its application might turn on equities sounding in notice.

There is a distinction taken in many cases between provisions in charters and provisions in by-laws as affecting the right to transfer stock, some courts upholding the first while rejecting the second. Reference to some of these cases will appear in another part of this brief.

The dividend right under the Johnson & Higgins charter, pending surrender by a stockholder of his stock upon retirement from active service is suspended so far as that stockholder is concerned, but this is not by action or inaction of the directors but because of the voluntary inaction of the stockholder. The dividend certificate issuing, the holder becomes at once entitled to the dividends for the period of ten years from date of surrender, and this dividend certificate is assignable. After the expiration of ten years from the time of surrender, or perhaps from the time when the surrender should have been made, the interest of the retired stockholder or his assignee to have the dividends will cease. Again such interest will cease without action on the part of the directors and will immediately

re-attach to the stock with which it was originally associated. Every element of value in every share of stock of Johnson & Higgins is at all times in present legal or equitable ownership of either an active stockholder or of the corporation or its re-issuee, or of a stockholder retired from active service or his assign holding dividends certificate. The ownership of no right inherent in the stock is at any time in the air, or at any time withheld from alienation. The act of a stockholder retiring from active service, who neglects or refuses to surrender, may suspend the distribution of dividends, but such dividend right is at all times existent.

This charter provision is made for the evident benefit of the company and not for the individual advancement of any stockholder at the expense of another as between the stockholder and the company. The considerations for this fundamental contract (which is expressed in full in each certificate of common stock), as between the company and its stockholders and as between the stockholders *inter sese,* are entirely sufficient and are executed by the issuance by the corporation of the stock and its acceptance by the stockholder. It is not conceivable that the company would have issued the stock to the complainant except upon the terms of the charter contract, and in accepting those conditions of the contract he took upon himself whatever consequences might thereafter result upon the termination of his active service with the corporation, and such consequences were at all times inherent in the stock itself and affected the quality of the property right therein.

If the value of the property right in the stock was, by the inherence therein of such conditions, affected adversely, the effect is the result of the quality of the stock and not because of any supposed inalienability.

The Supreme Court of Massachusetts, speaking by Chief Justice Rugg, in *Longyear* v. *Hardman,* 106 N. E. Rep. 1012, followed *Barrett* v. *King* in upholding a provision in a charter providing that none of the shares of stock should be sold, hypothecated or transferred without the consent of three-fourths of the capital stock of the corporation, the certificate of stock issued being in usual form but with the statement that the transfer was "subject to the restrictions set forth in aricle XIV of the by-laws". This provision was, of course, not at all analogous to the Johnson & Higgins charter, but we may none the less appropriately quote the reasoning of the court. The Chief Justice said that each stockholder took his stock subject to this restriction and that it was an innate characteristic of the stock ante-

cedent to any transfer and following it into the hands of every purchaser.

The same court further developed the thought of Chief Justice Holmes in *Barrett* v. *King,* that stock in a corporation created a personal relationship, analogous otherwise than technically, to a partnership (for analogy of a corporation to a partnership see *Breslin* v. *Fries Breslin Co.,* 70 N. J. L. 274, 282), and that there was no greater objection to the right of choosing one's associates in a corporation than in a firm, Chief Justice Rugg saying:—

> "The motives for the retention of such right in a small business corporation, where substantial changes in ownership of stock well might be accompanied by a change of managing officers, are obvious. Subscriptions of stock sufficient to organize the corporation with adequate capital might be difficult to obtain unless permanency of management were secured in some way against possible changes arising from mutations in the ownership of a bare majority of the stock. Elements of importance both to the subscribers of capital stock and to the executive officers might render some such restriction a valuable security to the investment of money and to the personal devotion of individuals in building up the business. The characteristics of associated stockholders may be important. Harmony of purpose and of business methods and ideals among stockholders may be a significant element in success. The insertion of the restriction upon the right of transfer of the shares of stock in the agreement of association, the initial act in the organization of the company upon which depends all that comes after, is a limitation upon the corporation. It becomes a part of its being and enters into each share of stock as a part of its essence. The corporation comes into existence with this inherent qualifying restraint. It is agreed to by all the original incorporators who in respect of determining the nature of the corporation speak for future stockholders. * * * The owners of stock in a corporation thus organized cannot complain of such a congenital characteristic. Each stockholder takes his stock subject to this restriction."

Similar views will be found in *Nicholson* v. *Franklin Brewing Company,* 91 N. E. 991 (Ohio). The charter in that case was a Delaware charter, and under analogous statutes.

(2) *The shares of common stock of Johnson & Higgins are personal property, but there is nothing in the charter violative of any rule applicable to the transferability of personal property as such.*

Section 20 of the New Jersey Corporation Act declares that shares are personal property. Of course the shares, so denominated, are the shares as created with all their qualities and incidents, and not shares stripped of the essential characteristics impressed upon them by the act of their creation. Upon creation the shares become personal property.

We are not now concerned with the right of the incorporators to impose these characteristics. The staute law might forbid certain characteristics for reasons not at all related to the classification of shares as between real and personal. The present inquiry is whether the mere fact that shares are personal property makes the provisions of the Johnson & Higgins charter illegal.

Complainant concedes knowledge of the plan and the corporate provisions for its support and continuance, and his acceptance of stock certificates, which he still retains, plainly exhibiting the qualities inherent in the stock the certificates represent. He would retain the shares, but would repudiate the qualifications and conditions of the agreement under which he got them, because personal property, as such, cannot be subjected in ownership to a qualified interest such as is potential in the provisions of the Johnson & Higgins charter. He admits the acceptance by himself of the personal property represented by the shares, with full understanding of the possibilities inherent therein in possible future effect upon himself as their owner, but would enlarge the limited interest which he originally took therein to an absolute estate. As the Vice Chancellor well said, if the complainant's view be accepted, his shares—not only those he himself acquired by original purchase, but those of like original origin allotted to him through the operation of the corporate plan—"would take on qualities and characteristics for which no warrant can be found in his engagement".

Clearly he is endeavoring to set up a different species of personal property, and one incapable of recognition as the personal property actually represented by the Johnson & Higgins common shares.

But, is there any warrant in the nature of personal property for the contention that shares of stock may not be made the subject of contract provisions such as are found in the Johnson & Higgins charter?

Although it is not a case of qualified property rights,—merely of the nature of the property itself—it will be useful to recall that qualified property rights in personal property are constantly

created without the thought of thereby denying the right of alienation. Every form of bailment recognizes qualified property in different persons in the same item of personal property. Hiring and borrowing of chattels does the same. Such also is the effect of conditional sale. The variety of insurable interests in the same article of personal property is another illustration of the existence of qualified property in the same personalty in different individuals at the same time.

A share of stock, as personal property under our statute, cannot be denied the attributes of personal property. It is the subject, in daily experiences at the bank and on the exchanges, of bailment, hiring and borrowing. It is "goods, wares and merchandise" under the statute of frauds, and contracts relating thereto must, under conditions applicable to other personal property, be in writing. A share may be the subject of lease.

The various interests resulting from contracts and relationships do not operate to render the stock inalienable. A share of stock is not peculiar personal property, in that it may not be the subject of contract, as other species of personal property, and contracts relating thereto may be good or bad, but the mere fact that there is a contract relating thereto, under which qualified property interests therein reside, or may reside, in different ownership, does not result in a demonstration of inalienability. And the existence of the qualified interests neither increases nor diminishes the unit represented by the share.

A share of the common stock of Johnson & Higgins is no different from a share in any other corporation, and all the elements usually entering into, or incident to, a share of common stock are at all times existent in a Johnson & Higgins common share. That it is subject to the provisions of the contract made by its original issuee with Johnson & Higgins and with all the other issuees of all other common shares of Jonhson & Higgins, a contract which does not withdraw from or add to its natural elements, and affects only the enjoyment of those elements pursuant to the contract provisions, in no way denies the alienability of the share or of the property interest residing therein. Every common share of the corporation is like every other common share, and all common shares are subject to like contract.

Apart from the diversities of interest in shares of stock incidental to their use as collateral, and, in the stock market, to the lending and borrowing of shares, we are all familiar with contemporaneous ownership by different individuals of divisible property interests in a single share of stock. For example, as

between life tenant and remainderman, and as between vendor and vendee, ownership of cash and stock dividends being for a time in one person, and of the stock *ex*-dividend in somebody else. And the right to subscribe to an additional issue of stock, as a property right inherent in stock ownership, may be in the stock *ex*-dividend, while the dividend right is in other enjoyment.

Illustrative authorities are plentiful: *Lang* v. *Lang's Executors,* 57 N. J. Eq. 325; *Day* v. *Faulks,* 79 N. J. Eq. 66, aff'd 81 N. J. Eq. 173; *Ballantine* v. *Young,* 79 N. J. Eq. 7; and *McCracken* v. *Gulick,* 112 Atl. 317, deal with interests of different persons in the same shares of stock as between tenants for life and remaindermen, both as to cash and stock dividends and subscription rights to additional issues of new stock.

Re Brandreth, 169 N. Y. 437, 58 L. R. A. 149, dealt, from the standpoint of succession tax incidence, with the dividend interest in shares of stock which were the subject of a transfer by a father to his daughters, retaining in himself the dividend right until his death. In an opinion by Justice Cullen the stock itself and the dividends were treated as analogous to land and its rents or a fund and its income. It was said that the question presented was, in effect, whether a gift of a remainder after the death of the donor in real or personal property was taxable under the New York statute. The case held that in New York State a life estate and remainder could be created in a chattel or a fund the same as in real property, and, therefore, in shares of stock.

This case was followed in *In re Cornell's Estate,* 170 N. Y. 423 (Court of Appeals, 1902).

Bigbee & W. R. Packet Co. v. *Moore,* 121 Ala. 379, 25 S. R. 602, upheld a contract between a corporation and its stockholders providing that the stockholder should forfeit dividends earned over such periods as the stockholder should not furnish a boat suitable for the company's use.

In *State* v. *Probate Court,* 102 Minn. 268, 113 N. W. 888, the testator and his wife had assigned shares of stock to their four children, and the children had leased the same to their parents for life, the stock remaining in the names of the children but the leases being recorded with the corporation. The court held that the testator had a life estate with reversion in the children, and that personal property could be held in estates of this character.

In *Rivers* v. *Oak Lawn Sugar Company, Ltd., et al.,* 52 La. Ann. 762, 26 So. 118, the plaintiff sold stock of the defendant corporation to the defendant Thompson, reserving ownership of

profits made and earned and declared or to be declared for the year 1897, and the right to receive the same. Plaintiff prayed that he be decreed owner of his proportion of the 1897 profits and that the Company be ordered to pay, and there was decree accordingly.

Hyatt v. *Allen,* 56 N. Y. 553, recognized the legality of the sale of stock by plaintiff to defendant "all profits and dividends of and upon the stock", up to January 1, 1872, to be retained by plaintiff.

In *Hancock* v. *Clark,* 68 Vt. 302; 39 Atl. 317, plaintiff sold stock, to be paid for in instalments, retaining dividends on unpaid shares in lieu of interest. Defendant paid up after a dividend. Plaintiff recovered the amount of the dividend.

In *Kaufman* v. *Charlottesville Woolen Mills,* 93 Va. 673; 25 S. E. 1003, under a contract providing that dividends declared for January, 1896, should go to the transferor, the court distinguished between cash dividends which were awarded to the transferror and stock dividends which were awarded to the transferee, because the surplus belonged to the Company until the dividend was declared and a stock dividend was not income from an investment.

Zachry v. *Nolan,* 66 Fed. 467 (Circ. Ct. of App., 5th Circ. 1895), was a case on an account stated. The plaintiff delivered written option to defendant to lease certain stock and dividends for five years at a certain per cent. per annum, and also gave defendant signed proxy. The lower court directed a verdict for the plaintiff. The Circuit Court of Appeals reversed the judgment for error as to refusal to admit evidence, holding that the action was not on the lease but on an account for the use of the stock.

See generally *Cook on Corporations,* 7th Ed. Chapter XXXIII.

If the elements of property going to make up a share of stock are capable of division in separate enjoyment and proprietorship after the stock is first issued, it cannot be reasonably argued, in the absence of statutory prohibition to the contrary, that contracts in charters are invalid, which may have effect, in the future, to bring about the surrender of corporate shares in exchange for a consideration measured by ten years dividends and evidenced by a transferable dividend certificate.

There surely is nothing inherent in shares of stock, *because personal property,* forbidding such contracts.

Under the settled law of New Jersey the charter is a contract as well between the corporation and its stockholders as

between the stockholders *inter sese,* and there is nothing in the New Jersey Corporation Act which declares the impropriety of undertaking to define or create qualified interests in the corporate shares under definite conditions in the charter set forth.

Such provisions are not an interference with the alienability of the stock interests as created or in contravention of the declaration of the statute that the share of stock shall be personal property, but are merely definitive of property right in the stock in the hands of the issuee and those subsequently deriving title through him.

(3) *The provisions of the Johnson & Higgins charter, relative to its common stock, even if construed as restraining alienation, do not violate any "rule against perpetuities" applicable to personal property in this State.*

The rule against perpetuities originally applied to real estate only. Many states have statutes covering both real and personal property—notably New York. The New York statute has been copied in many other jurisdictions. New Jersey has no statute.

It seems idle to talk of the Johnson & Higgins plan as violating, in its provisions in relation to its common stock necessary for the conduct and permanence of its operation, any rule against perpetuities applicable to personal property. This objection is obviously inapplicable.

The rule against perpetuities applies only to future interests and not to vested interests. Reversions and vested remainders and those equitable interests and interests in personalty which, if they were legal interests in realty, would be reversions and vested remainders, are not within the prohibition because they are vested and not future interests. Nor are contract or option rights within the rule. (See *Gray's Rule Against Perpetuities,* 3rd Ed., Sec. 205; 5 *Halsbury,* 187 (Sec. 310); 22 *Halsbury,* 319 (Sec. 665), 322 (Sec. 671); *Machen Modern Law of Corp.,* Vol. I, 575, Sec. 710; *Borland's Trustee* v. *Steel Bros Co.,* 1 Chan. 279; *Williams* v. *Montgomery,* 148 N. Y. 519, 526; *A. G.* v. *Jameson,* 2 I. R. 644, 2 I. R. 218; , L. R. 43, Ch. Div. 265; *Kingston* v. *Home Life Insurance Co.,* 101 Atl. 898 (Del. Ch.).)

In the last case the validity of an option for the purchase of stock, unlimited as to time, was under examination. One of the objections urged against its validity was that it was in violation of the rule against perpetuities. The court said:

"According to the authorities cited by the complainants, an unlimited option to purchase land is a contract in restraint of alienation of land and against public policy, and therefore void. *Barton* v. *Thaw,* 246 Pa. 348, 92 Atl. 213, Ann. Cas. 1916D, 570; *London etc. Co.* v. *Gomm,* 20 Ch. Div. 562. In general the rule against remoteness in the time of vesting future interests applies to personalty as well as realty. Lewis on Perpetuities; Gray on Perpetuities, Sec. 202. But almost all of the cases in which the rule has been applied to personalty the instrument by which the future right was created related to land, such as leaseholds or chattels real. In three Maryland cases cited the rule was applied to bequests of future interests in slaves. *Johnson* v. *Lish,* 4 Har. & J. (Md.) 441; *Matthews* v. *Daniel,* 3 N. C. 346; *Hatton* v. *Weems,* 12 Gill. & J. (Md.) 82.

However, the real purpose of the rule was to prevent inalienability of land, *i. e.,* to prevent its being tied up for an unreasonably long period whereby it was kept out of commerce. Public policy was the reason for the rule. This was peculiarly applicable to land and interests in land.

Has it any relation to contracts as to shares of stock of a private business corporation? There is no principle of public policy involved. It can make no difference to the general public, or to any one other than stockholders of that particular company. To tie up land, which is the source of all wealth, is quite a different thing from giving an unlimited option to buy all unissued shares of a corporation doing a private business. No case has been produced or found which so extends the rule respecting real estate and interests in real estate, however sound, wholesome and well established the rule be with respect to land, and I do not feel justified in extending it to the stock option, and, therefore, cannot hold the option contract entirely invalid for either of the reasons urged."

In *Borland's Trustee* v. *Steel Brothers Co.,* 1 Chan. 79, *supra,* under charter containing provisions for a compulsory transfer of certain common shares at a fixed price applicable only in the event of bankruptcy, and further providing that none of such shares should be transferred to any person not being a "manager or assistant"—these being certain working members of the company—so long as any "manager or assistant" should be willing to purchase at "fair value", to be determined by the method set forth in the charter, Justice Farwell upheld the charter against the claims, first, that such provisions were repugnant to absolute ownership, and, second, that they tended to perpetuity.

This is not such an English case as that referred to by Vice Chancellor Backes in his opinion, relative to liens on shares for

debts due the company from stockholders, as finding support in Section 14 of the English Companies Act of 1862. The provisions in this charter are not within the express authority of the English Act, which act also contains a declaration that shares shall be personal estate transferable in manner provided by the articles of the company.

The opinion of Justice Farwell deals interestingly with the nature of a share in a corporation as not being merely an interest in the company measured by a sum of money for purposes of liability and interest, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*. The Justice then said:

> "Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion, the rule against perpetuity has no application whatever to personal contracts If authority is necessary for that proposition, *Witham* v. *Vane* is a direct authority of the House of Lords; and to my mind an even stronger case is that of *Walsh* v. *Secretary of State for India*. A stronger instance of the unlimited extent of personal liability could hardly be found; in that case the old East India Company entered into a contract, in 1770, with the first Lord Clive, to the effect—to put it shortly—that in the event of the Company ceasing to be possessors of the Bengal territories, they should repay to Lord Clive, his executors or administrators, several lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham* v. *Vane*, the question of perpetuity was tentatively raised in the House of Lords; but Lord Cairns, who was counsel in that case, refrained, with his usual discretion, from pressing it. I have said that the articles now under consideration are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under section 16 of the Companies Act, 1862; Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards; but were it so, the answer, so far as they are concerned, is this —that each of them on coming in executes a deed of transfer, which, in the terms in which it is executed, makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say that there is any repugnancy or perpetuity in the covenant he has entered into; and his trustee in bankruptcy stands in this respect in no better position than Mr. Borland himself. Counsel for the plaintiff attempted to apply the reasoning in *Gomm's*

> *Case* to the present, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But this is, in my opinion, unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be."

We are not concerned in the present case with any equities arising out of lack of notice or other considerations than those to be found in the charter, by-laws and stock certificates under examination, in a controversy between the complainant as a stockholder of the defendant corporation and that corporation. No matter how broad the rule against perpetuities may be read, the corporate contract now under examination shows that every stock or other interest created is completely vested in ownership at all times and capable of transfer by an assignment, carrying a property right, enjoyable by the assignor, as broad as that right by the act of its origin.

A contract which regulates merely the right to be disposed of in a particular manner, as in this charter, *is indicative of freedom of contract—one of the highest rights known to the law*—and not of restraint of alienation or otherwise. The complainant voluntarily made this contract. He knew what he was getting, and in law or in equity is entitled to no more. He defined his tenure by voluntary agreement, and the quality of his tenure, as defined by his voluntary agreement, has not been questioned or refused recognition. Nor is there any restriction or restraint upon his right to transfer the interest he acquired.

The restrictions of the chater necessary to the successful continuance of the corporate plan are reasonable in the highest degree.

(4) *The provisions of the Johnson & Higgins charter relative to its common stock are, even if construed as restraining alienation, reasonable and therefore valid.*

Complainant further objects that, apart from the rule against perpetuities, the corporate plan and contract are invalid because they involve restraints upon the alienation of stock interests. This we dispute as matter of fact, but, assuming it for purposes of argument, the answer is complete that the limitations, reservations and reversions of the charter, if they constitute restraints, are nevertheless reasonable.

The corporate plan of Johnson & Higgins needs no further illumination. It has not been condemned as unreasonable in itself by complainant. It has operated to the large advan-

tage of the corporation as shown by the growth of the corporate enterprise from 1899 to the present time, and to the large advantage of its active common stockholders including the complainant. It is not selective in its application to individual common stockholders, active or retiring, but is uniform and indiscrimnating. This case offers no proof of fraud or unfairness in the operation of the plan through combination or chicanery aimed at the complainant. Quite the contrary. The plan was designed to secure and has secured a harmonious, energetic and self-perpetuating organization of persons formed by common consent, skilled in their line, individually devoted to the common enterprise, satisfied with large contemporary rewards during active service and content with the retirement provisions indiscriminately applicable to each associate.

There is no rule of public policy absolutely forbidding any contract restraints or restrictions. The late John C. Gray devoted a small book to the subject of "Restraints on the Alienation of Property". This book has apparently all the law available on the subject of restraints, strictly treats only of the ability or inability, as a matter of public policy, of one to grant or give property, or an interest in property, absolutely to another and yet keep it beyond the beneficiary's creditors, or, of the invalidity of conditions of repugnancy because they operate to diminish or defeat an estate or interest theretofore fully granted or given. Although Professor Gray's views on the subject of restraints and perpetuities are quite extreme, yet, when it comes to stock restrictions, he declares:

> "Section 29*d*. (The interest of a partner in a partnership, or of a shareholder in an unincorporated or incorporated company, may also be made non-assignable. In the absence of agreement the right of a partner is generally presumed to be non-assignable and of a shareholder to be assignable; but this may in both cases be changed by the terms of the articles or the by-laws. The law does not force fellowship on any one without his consent.)"

A claim that the transfer of stock was limited by a condition void because of repugnancy is not sound. The rule of repugnancy is a rule of construction generally applied to grants and gifts where there is first clearly expressed the intention of transferring the entire estate or interest which is thereafter sought to be diminished or destroyed by a condition. Under such circumstances the condition is void because it is wholly inconsistent with the estate theretofore granted and intended to be granted, and any restraining condition cannot be said to co-exist with an

absolute estate or interest *theretofore* created. It is usually a rule to aid in resolving an absolute conflict between the habendum and granting clauses of a deed or a similar situation presented by a will. (*Havens* v. *Seashore Land Co.*, 47 N. J. Eq. 465; *Staffordville Gravel Co.* v. *Newell*, 53 N. J. L. 412; *Benz* v. *Fabian*, 54 N. J. Eq. 615; *DePuyster* v. *Michael*, 6 N. Y. 467, 492-497.)

The authorities cited by counsel for complainant-appellant at pages 64 to 66 of their brief, where void or repugnant conditions are discussed, relate: to a deed with conditions limiting the use of the premises conveyed exclusively to certain purposes (*Cornelius* v. *Ivins*, 26 N. J. L. 377); to a will making a devise upon the condition that no part of the devise shall go to a certain person or class of persons (*Trumball* v. *Gibbons*, 22 N. J. L. 177); to a will containing a clause forbidding the alienation of the estate without the consent of persons other than the devisee (*Feit* v. *Richards*, 64 N. J. Eq. 16); to a will making a gift subject to a forfeiture if a condition is broken (*Bradley* v. *Piexoto*, 3 Vesey, Jr., 324).

None of these instances presents circumstances like those in the case at bar, and obviously there is no call for the application of the rule applied in any of those cases.

The rule as to repugnancy can have no application in cases where there are clear reservations or exceptions in the grant or gift, and applies only where there is a clear grant or gift of an estate or interest later sought to be restrained or limited. That situation does not exist in this case. The charter as well as the by-laws and stock certificates could not be more exact in the statement of limitations, reservations and reversions definitive of the only right or interest created or intended to be, and possible to be granted, to the common stockholder.

(5) *The provisions of the Johnson & Higgins charter relative to its common stock, even if construed as restraining alienation, violate no public policy of the State of New Jersey.*

Complainant claims that Section 20 of the Corporation Act, declaring that the shares of stock in every corporation shall be personal property and that they shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide, is a declaration of public policy by the legislature which has the effect of preventing any limitation of any kind on the absolute assignability by the registered owner of the shares.

So far as Section 20 refers to the manner and regulation of transfers, pursuant to by-law provisions, it is undoubtedly true that provisions of this character are chiefly intended for the protection of the company only. A charter or by-law provision, that the stock is transferable only on the books of the company, does not permit the directors to destroy the assignability of the shares by establishing prohibitive regulations. That doctrine, however, is not involved in the present case, and, as we have heretofore argued, nothing in Section 20 prevents charter contracts definitive of the estate or property right, and making such property right, so to speak, less than an absolute fee. The Vice Chancellor so held. It is not less than an absolute fee. The subject matter of the fee is narrower than is usually the case. That is all.

As hereinbefore stated Section 20 of the present Corporation Act goes back to the Act of 1849. Side by side with this provision stood, both in the revision of 1875 and in the revision of 1896, the provision that the certificate might contain any limitation upon the powers of the corporation, the directors, and the stockholders, that the parties signing the same might desire (Revision of 1875, Sec. 11 (V); Revision of 1896, Sec. 8 (Par. III)).

Section 8 of the Act of 1896 was amended in 1898 (P. L. 1898, 408) to the form in which it is now found, and the provisions authorized to be set forth in certificates of incorporation relative to the acquisition of stock and limitations upon powers of the corporation, the directors, and the stockholders, are found in subparagraphs IV and VII. See also Section 18.

It will be argued later that under these provisions there is express authority for the stock provisions in the Johnson & Higgins charter, but, however that may be, these sections do unquestionably confer considerable freedom upon the incorporators in the creation of stock and of limitations upon the stockholders, and are indicative of a legislative policy in favor of rather than against restrictions.

Equities sometimes arise as against the corporation affecting the enforcement of provisions relating to the assignability of stock interests when the restraint or limitation upon the stockholder's interest is sought to be asserted by the corporation against a transferee without notice. In the present case we are not dealing with any such equities. We are directly concerned in a court of equity with the relations between the corporation and a stockholder of record whose certificates contain all the provisions found in the charter.

Neither are we concerned in the present case with limitations or restraints upon the assignability resulting from *by-law* provisions.

We are dealing with definite charter contract provisions. The question is, must all incidents which inhere in stock at any time be assignable unconditionally? The charter provisions do not restrain transferability; but limit the right of an inactive holder. He has five possible resorts:

1. He may surrender.

2. He may hold and take his distributive share on dissolution.

3. He may sell to an active shareholder.

4. He may become active again.

5. He may sell to another inactive shareholder.

In any case all he ever had he continues to possess or disposes of.

The most usual provisions found in charters relating to restrictions on transfers are those denying the right to the stockholder to transfer his stock while indebted to the corporation, such debt being by many charters made a lien on the stock, and restrictions or limitations on the right to sell or transfer without consent of the corporation, or of some definite proportion of the other stoockholders, creating what is generally referred to as an option right in other stockholders or in the corporation. That restrictive provisions of these classes are most usual is no argument against the validity of other reasonable restrictions.

Whatever may be the law in other states we think it easily demonstrable that there is no public policy declared, either by the legislature or by judicial decisions, in this State against restrictions or limitations of the character referred to. On the contrary an affirmative public policy in favor of reasonable regulations for the benefit of the corporation and its stockholders or in aid of lawful corporate purposes is manifested.

First, as to the legislature.

Special charters by legislative act were cited to the Vice Chancellor on the argument below instancing a lien on stock for debts due the corporation. (Dover Manufacturing Co., P. L. 1826, p. 53, Sec. 7; Bloomfield Manufacturing Co., P. L. 1828, p. 107, Sec. 7; Howell Works Co., P. L. 1828, p. 209, Sec. 7; Manufacturing Company of Clinton, N. J., P. L. 1833, p. 121, Sec. 8; Morris & Sussex Manufacturing Co., P. L. 1835, p. 111,

Sec. 8; Hamburg Manufacturing Co., P. L. 1836, p. 399, Sec. 7; Little Falls Power Co., P. L. 1860, p. 83, Sec. 4.)

After the constitutional amendment of 1875 there was complete legislative recognition of the legality of corporate provisions bearing on the assignability of stockholders' interests in a supplement to the Corporation Act of 1875, approved March 9, 1891 (P. L. 1891, 87).

It will be found on reading this act that it conferred authority upon any corporation organized under the Act of 1875 which "*shall have or has* by the terms of its certificate of organization limited or restricted the free sale or transfer of its stock by requiring such company at a corporate meeting to fix upon the value of such stock, and by giving, in any manner, such company or its board of directors a pre-emption upon or right to purchase such stock before the transfer thereof by the owner to a third person, or by requiring any employee who shall be a stockholder thereof to hold his stock subject to such pre-emptive right in said company, or to sell the same to said company upon his or her ceasing to be a stockholder therein", to, by a two-thirds vote of its board of directors, at a regular or special meeting called for that purpose, change, alter or repeal any or all of such restrictions or limitations and any and all provisions inserted in the certificate of incorporation for the purpose of securing the same, provided that all the stockholders of the company should have surrendered their stock issued under the original certificate and should have accepted in lieu thereof new stock to be issued in pursuance of such resolution; and there are provisions for the appraisal of the stock of any dissenting stockholder "at the full market value thereof without regard to any depreciation or appreciation in consequence of the said change", and for the payment by the company to the stockholder of the value of the stock as ascertained by the appraisal.

It will be remembered that the Act of 1875 contained the provisions of Section 20 which are now appealed to as prohibitive of corporate charters such as the Johnson & Higgins charter, and that there are provisions in the Act of 1896, as amended in 1898, seemingly broader than the Act of 1875 in legislative intention to confer upon the incorporators opportunities to form a corporate structure, for lawful purposes, to meet their own peculiar desires.

This Act of 1891 continued on the statute books until the Revision of 1896 and was not included in that act presumably because the powers of amendment consolidated in Section 27

of the Act of 1896 were made by the revisers inclusive of and applicable to all corporations organized under the general law.

In the view of the legislature it was not necessary to retain the supplement of 1891 to confer power as to original incorporation. There were even broader powers in the Act of 1896 than in the Act of 1875 relative to original incorporation. And the legislature, having already recognized the right to organize corporations with restrictions and limitations of the character set forth in the Act of 1891, left the general provisions as before and included the right of amendment in the new general act.

We have also the adoption by the legislature of this State of the Uniform Stock Transfer Act (P. L. 1916, 398, Sec. 15), forbidding restrictions creating a lien in favor of the corporation on its own shares by virtue of by-law or otherwise, *unless* "the right of the corporation to such lien or restriction is stated upon the certificate". This statute impliedly recognizes the legality of such provisions whether by by-law or *otherwise,* adding a requirement assuring notice to vendees of stock of corporations, of provisions creating a lien in favor of the corporation on its own shares, however created—by-law, charter, agreement, or otherwise—to be shown upon the certificate of stock. The statute invalidates nothing except a restriction creating a lien in favor of the corporation without notice in the certificate of stock. No other limitation or restriction is forbidden. Taken by itself this statute would seem to be a recognition by the legislature of the law as declared by the court of last resort in *Young* vs. *Vough,* hereinafter referred to, which upheld the validity of a by-law provision creating a lien in favor of the corporation. So far as the Uniform Stock Transfer Act suggests the propriety of notice of restrictions, that policy is not infringed by the Johnson & Higgins charter, as its provisions are all rewritten in the stock certificate. Moreover we are not in the present case concerned with any rights of a third party without notice, or claiming to be without notice. We are concerned with the direct relationship between the corporation and a stockholder fully apprised of every charter provision.

Second, let us see whether a public policy, such as claimed by the complainant, can be deduced from the decisions of the courts of this State.

In *Young* v. *Vough,* 23 N. J. Eq. 325, Chancellor Zabriskie held that the by-law of a bank, declaring that the debts of a stockholder should be a lien on his stock and that he should not transfer until such debt was paid, was a reasonable and legal

by-law and enforceable against a transferee who took with due notice of it.

In *Delaware, Lackawanna & Western R. R. Co.* v. *Oxford Iron Co.,* 38 N. J. Eq. 340, Chancellor Runyon, referring to the case of *Young* v. *Vough,* said that the decree in that case was affirmed by the Court of Appeals (24 N. J. Eq. 535), but that this court carefully refrained from determining whether the by-law was legal under the Act of Congress of 1864, the National Bank Act. After the decision in *Young* v. *Vough* the Supreme Court of the United States held that a national bank organized under the law of 1864 could not, even by provisions in its articles of association and by direct by-laws, acquire a lien on its own stock. But this decision of the Supreme Court was based on the differences between the National Bank Act of 1863 and the public policy initiated by the Revised National Bank Act of 1864.

And the Supreme Court of the United States in the later case of *Morgan* v. *Struthers,* 131 U. S. 246; 33 Law Ed. 246 (mistakenly cited to the contrary by the complainant), expressly recognizes the effect of charter or articles of association in restraint of the transferability of shares of stock whether in the hands of an original subscriber or of a purchaser.

The Federal decision did not, therefore, overrule *Young* v. *Vough,* insofar as it declared the common law and it is still the law of New Jersey except as to the stock of national banks.

Again in *Drexel* v. *The Long Branch Gas Light Co.,* 3 N. J. Law Journal, 250, Mr. Justice Scudder, at the Monmouth Circuit, in considering a by-law of the Gas Company, making a stockholder's unpaid gas bills a lien on his stock, makes a distinction, found in other cases, between charter and by-law provisions. He held the by-law bad, but supported a provision of the same character in a charter as follows:

> "Is this by-law enforceable against the plaintiff who has become the owner of the certificate? This depends on the question whether the Company had the right to pass such by-law, of which he had no notice. No lien exists at the common law on the shares of a stockholder for debts due from him to the corporation; Ang. and Ames on Corp., Sec. 355.
>
> It is sometimes given in express terms in the act of incorporation to banking companies and to trading corporations. Where this is done, it has been held, and I think correctly, that a by-law enforcing such lien is binding on the shares when transferred to others by the debtor of the corporation. But where the charter does not give the lien for indebtedness in express terms, I think the better

> opinion is that no right exists by by-laws or otherwise to deduct the amount of indebtedness as against a transferee for value and without notice. It is needless to review and attempt to reconcile the cases which are in apparent or actual conflict with this conclusion."

It is also to be noted that the Court of Chancery, in working out intricate rights in real and personal property, has frequently authorized the formation of corporations under the general law and the conversion of rights in real and personal property into stock of such corporations, with provisions contained in the charter absolutely prohibitive of the free assignability of the stock of the corporation.

An instance of this kind finds its root in the opinion of this Court in *Ballantine* v. *Frelinghuysen,* 38 N. J. Eq. 266, construing the will and codicil of Peter Ballantine, relative to its provisions for the continuance of the business of P. Ballantine & Sons and Ballantine & Co., and the formation of a joint stock company or companies for that purpose. In that case there was an affirmance of a decree advised by Vice-Chancellor Van Vleet, dated June 5, 1883. One of its provisions sustained the authority of the executors of Peter Ballantine to convey to a company or companies organized for that purpose all of the property of the testator authorized to be continued in the business, and required that the executors before conveyance should submit the plan of the organization of said company or companies "with the regulations prepared for their government". This the executors did, and the charter submitted, drawn by the late John R. Emery, afterwards Vice-Chancellor, was approved as submitted in the form submitted in the report filed in the office of the Clerk in Chancery June 23, 1883, by decree bearing date June 27, 1883. This charter contained, to quote its language, "limitations upon the powers of the company, its directors and stockholders", declaring that stockholders should not have the right to assign or transfer their stock, or their interest in the assets of the company to others than members of the company, unless the company, after notice to the board of directors, refused or neglected to take transfer of the same upon payment of the value of the shares, at the value fixed by a majority in interest of the stockholders, and further providing that shares so purchased by the corporation should be allotted *pro rata* to the other stockholders willing to take and pay for the same. The charter also contained a provision that the company should have a lien upon the shares of the stockholders for debts due the company.

Another very strong instance laid before the Vice-Chancellor on the argument below was found in the charter of the Wiss Realty Corporation, organized in September, 1909, under a final decree of the Court of Chancery dated September 20, 1909, in a Chancery cause wherein Fanny B. Wiss was complainant and Frederick C. J. Wiss and others were defendants. This charter, by direction of the Chancellor, contained the following provision, illustrative not only of restrictions on transferability but of restrictions on the corporation as to the directorate:

> "Seventh. None of the shares of stock of this corporation shall be transferable until after the Sixth day of December, nineteen hundred and sixteen without leave of the Court of Chancery of New Jersey, and until after the same date John R. Hardin, Trustee for Margarethe B. Wiss and Jerome B. Wiss, or for one of them or a successor trustee, shall be elected a Director of said corporation at the annual meeting of the stockholders or whenever any election shall be held, the corporators of this Company having expressly agreed, in accordance with the provisions of a decree of the Court of Chancery made on the twentieth day of September, nineteen hundred and nine, in a cause wherein Fanny B. Wiss is complainant and Frederick C. J. Wiss and others are defendants, that until the date aforesaid the said John R. Hardin, named in said decree as trustee, or a successor trustee named in accordance therewith, shall continue in the Board of Directors of this corporation as a representative of the interests therein of Margarethe B. Wiss and Jerome B. Wiss; and endorsement of the provisions of this clause of this certificate of incorporation shall be made on every certificate of stock issued by this corporation before the date aforesaid."

Is it conceivable that the Court of Chancery would insert provisions, such as in these instances, in a final decree, and compel their insertion in a corporation organized by the direction of the Court of Chancery if the court regarded the provisions of Section 20 of the Corporation Act as absolutely prohibitive of limitations or restraints on the assignability of the stock of corporations organized under the law?

In the absence of any past or present express statutory prohibition it would seem from the foregoing examination that there is in this State no such public policy as is now asserted. Charter provisions interfering with absolute assignability have had the drect approval of our court of last resort in *Young* v. *Vough* and the inferential approval of Mr. Justice Scudder in *Drexel* v. *Gas Light Company*.

Vice Chancellor Emery's opinion in *Morris* v. *Hussong Dyeing Co.*, 81 N. J. Eq. 256, is cited to the contrary. The Vice Chancellor was dealing with a by-law and not a charter provision and with a by-law, cited in the opinion, under which shares were transferable by endorsement of certificate and its surrender to secretary for cancellation "whereupon a new certificate shall be issued to the transferee, *if approved by the directors.*" This by-law was claimed to confer power upon the directors to withhold approval of the transfer of stock and in its discretion to refuse to admit a transferee as a stockholder. The case cannot be held as overruling *Young* v. *Vough* in this court, or as other than *dictum* so far as relates to restrictive provisions other than by-law provisions, but the case is, in reality, an authority expressly recognizing the imposition of reasonable restrictions, *either by charter or by-law,* on the absolute right of transfer. The particular by-law was held not to justify an arbitrary refusal of transfer for some other reason than informality, and if so construed, to be invalid *because unreasonable.* The Vice Chancellor however said: "In the absence of clear express provisions either in the articles or by-laws lawfully restricting or qualifying this absolute right of property and transfer, he (the stockholder) has the same absolute right to transfer his shares as to transfer any other personal property". This was no condemnation of all restrictions or qualifications on transfers, but, on the contrary, was a distinct recognition of the existence of *lawful* restrictions and qualifications. The restrictions on the transferability of shares of P. Ballantine & Sons (in another place in this brief referred to) requiring prior offer to the corporation at a price to be fixed by stockholders meeting, and impressing a lien on the shares for debts due the corporation, elsewhere in this brief referred to, drawn by the Vice Chancellor himself while at the bar, are not condemned by this case.

Third, as to executive practice in the Department of State, instances were also cited on the argument below of charters taken out under the general corporation act, containing restrictions limiting the right of transfer. One such, as illustrative of such restrictions in association with so-called employees' cooperative stock, will be found in White & McKinney's 5th Edition of Dill, page 527, form 310 (Marshall-Wells Hardware Company). Those charters, like the Johnson & Higgins charter, were necessarily approved by the Secretary of State, and, while it is suggested by counsel for the complainant that the Secretary of State has no authority to reject a charter, and that no inference as to

the validity of charter provisions can be drawn from the approval of the Secretary of State, it is common knowledge that that officer does frequently reject charters because not in compliance with the statute as construed by him. Whether the act of approval by the Secretary of State can be appealed to as supporting the validity of provisions in charters passed by him or not, the continued acceptance by the Secretary of State of charters containing provisions limiting the transferability of shares is at least indicative of recognition, by the executive department of the State of authority, either express or implied, for the insertion of such provisions as not inconsistent with public policy.

And, finally, it is evident, from the many instances of the insertion of such provisions in charters taken out under the general act, both before and after the Revision of 1896, that lawyers engaged in corporate practice generally hold to the view, that such provisions are legal and enforcible under the statutes and law of this State and not against public policy.

We find, therefore, the legislative, executive and judicial departments of the Government, and the legal profession generally, in agreement in practical recognition, over a long period of years, of the validity of restrictions and limitations in corporate charters affecting the absolute assignability of shares.

Under such circumstances there seems to be no room for the contention that restrictions and limitations of the character found in the Johnson & Higgins charter offend of themselves any general public policy of this State.

(6) *The validity of such provisions as those contained in the Johnson & Higgins charter, relative to its common stock, is upheld by the weight of judicial authority in other jurisdictions.*

The Vice Chancellor found authority for the English cases, sustaining restrictive provisions as to liens for debts due the company from stockholders, under the provisions of the Companies Act of 1862, expressing no opinion as to the validity of such provisions under the New Jersey act.

Insofar as he did intimate the view that, under the New Jersey statute, all provisions imposing actual restraints upon the transfer of what he termed "Unqualified, full-fledged" shares, except for convenience in corporate regulations, were in contravention of public policy and void, we are not in harmony with his conclusion, nor can we accept without qualification that the authorities are unanimous in support of that principle. There is, we may concede, a conflict of authority, but the better

view, in this country and in England, and the view better adapted to present day conditions, and the view, we submit, in the light of the legislative, executive and judicial precedents above discussed, is, that sustaining considerable latitude to incorporators, in the control by charters of the corporate family, through reasonable restrictions on freedom of alienability.

And first it is interesting to consider the English law.

Section 22 of the Companies Act, 8 Esw. 7, c. 69, provides as follows:

> "The shares or other interest of any member of a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate."

This section is derived from Section 22 of the Companies Act of 1862 which has been construed several times by the English courts, and they have uniformly held that that section places no limit upon the restrictions a company's articles may place upon the right to transfer.

This proposition has been stated inferentially in *Weston's Case,* 4 Chan. 20, and *Gilbert's Case,* 5 Chan. 565, and has been held positively in the following cases, *In re Cauley & Co.,* 142 C. D. 209, at page 231; *Stockton Malleable Iron Co.,* 2 C. D. 101.

In the foregoing cases the possible contravention of the rule against perpetuities was not directly considered, but the position that there was nothing in the act to limit the restrictions which a company, by its articles, may place upon the right to transfer, was reaffirmed as not in contravention to the rule against perpetuities in *Borland's Trustees* v. *Steel Brothers & Co.,* 1901, 1 Chan. 270, already cited *supra.*

Section 22 of the English Companies Act quoted above is the only provision of the English statutes with reference to the transfer and transmission of shares, and in terms it authorizes no restriction upon their transfer but rather is designed to make the shares capable of easy transfer. See *re Bahia & San Francisco Rail Co.,* L. R. 3 Q. B. 595, where the great object of the section is stated by Lord Blackburn.

It necessarily follows from the foregoing that the placing of restrictions upon the transfer of shares of English companies, registered under the English Companies Act, by the articles of said companies, and the upholding of such restrictions by the courts, results not from a direct authorization of said restrictions by statute but by the application of legal principles in the light of the existence of the statute.

Section 22 of the English Companies Act is no stronger and no different in practical effect than Section 20 of the New Jersey Act which reads:

> "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 may provide."

The only real difference is that under the English act the manner of transfer must be provided by the articles of the company, whereas under the New Jersey act it may be by by-law.

The English authorities are, therefore, properly cited as expressions of judicial opinion by courts of high authority on questions similar to those discussed in the present case.

The concluding part of Section 20 of the New Jersey act, "and when any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer", is found in the Act of 1849, just as now, and is without influence in the present discussion. The words have no reference to the legality or illegality of restrictions contained in charters, or even in by-laws. They relate to the recording on the books of the corporation of the *notice* given the corporation by the transfer of *unrestricted* shares for collateral security and not absolutely. They deal with the rights of third parties taking *unrestricted* shares for a special purpose arising after the shares are in *unrestricted* circulation. They show of themselves no legislative policy against charter limitations or restrictions on alienation, and they antedate the legislative, executive and judicial assumptions hereinbefore referred to in favor of the legality of charter restrictions.

We may compare Section 30 of the English Companies Act of 1862, "No notice of any trust, express, implied or constructive, shall be entered on the register or receivable by the registrar in case of companies under this act registered in England or Ireland." This English prohibition was negative in general as to notice, while the reference to the transfer of shares as collateral in our Section 20 is affirmative. The English courts have not found Section 30 of the English Act applicable to defeat restrictive charter privisions or as interfering with contracts between stockholders *inter sese* defining their rights in corporate shares.

The law of England is thus stated in *5 Halsbury* 187 (Sec. 310):

> "* * * There is apparently no limit to the restric-

> tion on transfer which may be so imposed, although restrictive provisions are strictly construed. The shares are subjected to the restrictions in their inception and as one of their incidents, that is to say, they are taken on the terms and conditions of the articles. * * * The rule against perpetuities has no application in such cases * * *."

Again, in *22 Halsbury* 322 (Sec. 671), under title "Perpetuities":

> "The articles of association of a company under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), take effect by way of contract between the members; and accordingly, provisions in such articles restricting transfers of shares and enabling the directors to call for a transfer from a shareholder, or subjecting the shares of any shareholder to a lien for debt due to the company to arise at any time while he is registered as shareholder, are valid."

The note to the text quotes *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 Ch. D. 302, C. A.; and *Broadford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29, the two cases referred to by Vice Chancellor Backes in his opinion (Record, p. 426, line 35), as being directly traceable to the permission given by paragraph 10 of schedule 1 of the Companies Act of 1862, authorizing provisions in articles of association for refusal of transfer while the stockholder is indebted to the corporation. But the note also cites *Borland's Trustees* v. *Steel Brothers & Co., Ltd.* (1901), 1 Ch. 279, which, as we have seen, is not a case of that character.

Section 22 of the English Companies Act of 1862 was carried into the Act of 1908 so that later legislation can have no effect in limiting the authority of earlier decisions while Section 22 was in effect.

We may also cite opinions of courts of high repute in this country.

Farmers M. & S. Co. v. *Laun,* 131 N. W. 366 (Wis.) (distinguishing *In re Klaus,* 29 N. W. 582 (Wis.) cited by complainant, and emphasizing the power of natural persons to make all contracts not prohibited by law).

Weiland v. *Hogan,* 143 N. W. 599 (Mich.), (sustaining a by-law "for the reason that whether valid or void, considered strictly as a by-law, it can be sustained as an agreement entered into between all the parties in interest". The case also supports

estoppel, "The stockholders are not in position to complain, for they were all willing parties to the transaction and are therefore estopped to deny its validity)".

Blue Mountain Forest Ass'n v. *Browne,* 51 Atl. 670. (N. H.) (sustaining a by-law for an assessment on fully paid stock, both as contract and by estoppel).

Gibbs v. *Long Island Bank,* 31 N. Y. Sup. 406; aff'd on opinion below, 46 N. E. 1147 (151 N. Y. 657).

Garrett v. *Phila. Lawn Mower Co.,* 39 Pa. Super. Ct. 78.

Bloomingdale v. *Bloomingdale,* 107 Misc. (N. Y.) 646.

James v. *Brown,* 50 N. E. 648 (Mass.).

(B)

The provisions of the Johnson & Higgins charter are within the express authority of the New Jersey Corporation Act.

By the Corporation Act corporations have not only the powers given by Section 1 of the Act, but also such powers as are specified in the charter, or in the act or certificate of incorporation.

Under sub-division IV of Section 8 authority is conferred upon the incorporators to declare in the certificate of incorporation the terms on which the classes of stock are created. Section 18 also gives authority

> "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 or in any certificate of amendment thereof."

And under sub-division VII of the same section it is provided as follows:

> "VII. The certificate of incorporation may also contain any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided such provision be not inconsistent with this act."

And Section 18 provides that every corporation organized under the act shall have 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 or in any certificate of amendment thereof.

No specific statute prohibitory of the provisions of the Johnson & Higgins charter has been cited by the complainant. The only statutory appeal is to Section 20, with its declaration that shares of stock are personal property.

The absence of express prohibition of such provisions as are contained in the Johnson & Higgins charter, giving them the construction claimed therefor by the complainant, is significant in view of the legislative, judicial, executive and professional recognition of restrictive provisions in charters by act of the legislature and under general laws, which has already been developed.

It will appear that not only are the provisions in the Johnson & Higgins charter with relation to common stock without positive prohibition by the New Jersey Corporation Act, but that this charter finds express warrant in the law.

The incorporators of Johnson & Higgins created its preferred and common stocks, as classes, pursuant to the express provisions of subdivision IV of Section 8 and of Section 18, and its charter contained provisions which "created, defined, limited and regulated the powers" of the classes of its stockholders preferred and common, as expressly authorized by subparagraph VII of Section 8. The charter provisions are of equal application to every share of each class, binding on all holders, original issuees or their successors.

Provisions definitive of the extent of property rights of stockholders in the stock by conditions set forth in the charter, are provisions "creating, defining, limiting and regulating the powers * * * of stockholders, or any class or classes of stockholders."

The complainant has cited to the contrary *Audenried* v. *East Coast Milling Co.,* 68 N. J. Eq. 450, a case on creditor's bill to compel directors to pay an amount claimed to have been unlawfully disbursed in reduction of capital stock contrary to the provisions of Section 30 of the General Corporation Act. Vice Chancellor Bergen in that case did undoubtedly condemn a provision of the charter of the defendant company providing that action by the directors, not in meeting assembled, by resolution signed by all the directors, should constitute action by the board to the same effect as if taken in lawful meeting. He held that Paragraph VII of Section 8 of the Corporation Act did not authorize the dispensing by charter provision of the necessity for corporate action by the directors. This holding seems to be

entirely sound, but it is very far from condemning the common stock provisions of the Johnson & Higgins charter.

By Section 12 of the Corporation Act it is provided that the business of every corporation shall be managed by its directors who shall be not less than three in number and shall be chosen annually to hold office for one year and until others are chosen and qualified in their stead, with right to provide in the certificate of incorporation for a longer term of office and for classification of terms.

Sub-paragraph VII of Section 8 confers authority upon the incorporators to insert in the certificate of incorporation provisions creating, defining, limiting and regulating the powers of the directors, *"provided such provision be not inconsistent with this act."* A provision inserted in the charter in contravention of Section 12 would be clearly bad, and the provision of the East Milling Company charter would seem to be such. But such a provision is not at all comparable with a provision concerning shares of stock defining property rights therein of the original issuees and their successors.

A provision in articles of incorporation that the number of directors shall not be changed except by unanimous consent of stockholders, was upheld as a limitation upon the "powers of the corporation, its directors or stockholders" under the New York Stock Corporation law by the Court of Appeals in *Ripin* v. *Atlantic Mercantile Co.,* 205 N. Y. 442; 98 N. E. Rep. 855.

A provision in a Massachusetts charter that "none of the shares of the capital stock shall be sold, hypothecated or transferred without the consent of three-fourths of the corporate stock of the corporation," was upheld not only as a provision binding on each stockholder because inherent in his stock, but also as "a limitation upon the corporation". *Longyear* v. *Hardman,* 106 N. E. 1012 (Mass.), cited *supra.*

Counsel for complainant argues against effect being given paragraphs IV and VII of Section 8 and Section 18, and generally against the provisions of the Johnson & Higgins charter, on the ground that assignability is an essential characteristic of stock, and non-assignability of a partnership, and that Johnson & Higgins stockholders, incorporating their partnership, could not by unanimous consent carry into the corporation any prohibition limiting assignability.

We freely concede the defendant Johnson & Higgins to be a corporation and not a partnership. We deny that it is a partnership, and we see nothing in the argument advanced in complain-

ant's brief that, because the legislature has seen fit to pass an act allowing individuals to associate themselves as partners with limited liability and assignability of interest, contrary to the common law incidents of the partnership relation, there is legislative prohibition against such provisions as found in the Johnson & Higgins charter. Legislation as to partnerships did not begin with the partnership associations act of 1880. The limited partnership act goes back to 1830. The laws relative to corporations and partnerships are not related or contradictory. They are not even *pari materia* and no rule of statutory construction recognizes their union to ascertain their respective meanings. Neither line of legislation contains any prohibition against individuals organizing under the other. While there are certain analogies in corporate law drawn from the *common law* applicable to partnerships, the statutory corporation law of New Jersey and the statutory partnership law are not about the same subject. So far as a corporation may be in equity regarded as a "statutory partnership", its creation and the rights of its membership, in the application of the partnership analogy, are governed by corporation law, statute and common, and agreements permissible thereunder are unaffected as to their validity, by statutory provisions specially relating to partnerships.

We have already dealt with the provisions of the Johnson & Higgins charter and have, we believe, successfully shown that they define the quality of the property rights in the stock and do not interfere with their alienability; that nothing in the character of stock as personal property interferes with such a contract relating thereto as is found in the Johnson & Higgins charter; that the restrictions in that charter, if they be restrictions at all, are reasonable and, therefore, not in restraint of trade, and that they contravene no public policy of the State of New Jersey.

We shall elsewhere argue, as to the effect of acquiescence and unanimous consent, citing *Breslin* v. *Fries Breslin Co.,* 70 N. J. L. 274, and *New Jersey Car Spring Co.,* v. *Fields,* 85 N. J. L. 217, both cases in the Court of Errors.

We have already quoted from the Massachusetts cases as to the right to select associates being unobjectionable in corporate organization no less than in partnership under analogy pointed out by the court. Of course, if this doctrine be sound, express authority found in the New Jersey Corporation Act must be held to include assurance by charter provision not merely of the right to select associates, necessarily residing in the incorporators, but

to the incorporators and their successors the same right of selection.

This court in the *Fries-Breslin* case, speaking by Mr. Justice Pitney (p. 282), has carried out the same thought without making the application we now make, but adopting the partnership analogy and making the conclusion effective both against stockholders and corporation:

> "In the eye of the *law* corporations are entities separate and distinct from their constituent members and not bound by the individual acts of the latter. The *law* deals with the corporation as an artificial person. *Equity* realizes that this legal entity is but a legal fiction; looking through the form it discerns the substance. It finds that a stock corporation is in essence an aggregation of individuals, a statutory partnership with assignable membership and limited liability of the members, and so the doctrine of equitable estoppel applies fully to all the internal concerns of stock companies. Saving so far as pubic policy and the interest of creditors and other third parties are concerned (none of which is involved in the present case), the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements, and what will bind *all* the stockholders, with respect to an obligation from the company to one of its members, will bind the company as such."

This view was not overruled by anything in *Jackson* v. *Hooper,* 76 N. J. Eq. 592. Mr. Justice Swayze, who voted for the affirmance resulting from the opinion in the *Fries-Breslin* case, voted in the unanimous decision of *Jackson* v. *Hooper,* and later, writing for the Court of Appeals in the *N. J. Car Spring* case, cited approvingly the *Breslin* case.

The provisions now incorporated in sub-paragraphs IV and VII of Section 8, although considerably liberalized, have been in substance, as has already been stated, in the present Corporation Act, together with the present Section 20, since 1875. Section 20 itself going back to 1849 (P. L. 1849, 300). Any claim that Section 20 was intended, by its mere definition of stock as personal property, to limit or restrain the effect of the provisions authorized to be inserted in certificates by the incorporators is, on the face of it fallacious, as there is nothing in the nature of personal property as such even suggesting the necessity for such view.

(C)

The provisions of the Johnson & Higgins charter are binding on all the stockholders as a contract to which they have given assent.

Even if not expressly authorized by statute, the provisions of the Johnson & Higgins charter as to the common stock, and of the by-laws and stock certificates, having the unanimous consent of all stockholders, including the complainant, are valid as a contract acted on by both corporation and stockholders, executed and not executory as to the considerations both as between stockholders and the corporation and stockholders *inter sese.*

The complainant was admitted to this close corporation as a common stockholder on the faith of his acceptance of those conditions. Other common stockholders came in after him, on the understanding with the corporation and the then existing common stockholders including the complainant, of the existence and validity of the conditions and with like faith on acceptance by the newcomer.

We have seen that there is no express statutory prohibition, and we have shown that there is no infraction of public policy.

The inviolability of the corporate contract comprised in the charter against disturbance without unanimous consent of stockholders, except as expressly authorized by the contract itself, or by statute law effective when it was made, in particulars which affect the property interests of the stockholders, is a definite feature of the law of this State. It is presented in the cases from many different angles but with unvarying result, where the circumstances show invasion of the stockholder's fundamental rights, through the long line of cases from *Kean* v. *Johnson,* 9 N. J. Eq. 417, down. The cases are too familiar to require citation.

The attempt of a single stockholder to ignore the rights of all the rest of the stockholders calls just as loudly for the application of the doctrine involved in these cases, as the attempt of a large majority of the stockholders to ignore the rights of a small minority.

The claim by the complainant of the right, by ignoring charter limitations on the property interest of the stockholders, to enlarge his limited interest into an absolute estate, is even more serious than the oft denied attempt of a majority of stockholders to, by amendment or agreement, override charter provisions defining the rights of preferred stockholders, presented in such cases as

Pronick v. *Spirits Distributing Co.,* 58 N. J. Eq. 97, *Einstein* v. *Raritan Woolen Mills Co.,* 74 N. J. Eq. 624, in this State, or in *Kent* v. *Quicksilver Mining Co.,* 78 N. Y. 159, 182, in New York State (a case frequently cited in our reports).

To grant complainant's claim is to permit him to accomplish the enlargement of his own interest and the diminution of the interests of his fellow stockholders by his own arbitrary decision, a result denied by the courts when attempted by overwhelming majorities and attended by strictest compliance with corporate formalities.

In *Lowenthal* v. *Rubber Reclaiming Company,* 52 N. J. Eq. 440, a corporation was organized by a group of corporations and individuals under an agreement set forth in the opinion, by which each interest coming into the corporation was to have representation in the directorate and the method adopted to assure this right was a by-law provision for cumulative voting. The repeal of the by-law for the purpose of abrogating cumulative voting was enjoined as contrary to the contract between the stockholders comprising the charter and *by-laws.*

The case was cited by this court in *Chapman* v. *Bates,* 61 N. J. Eq. 658, 666, and in *Johnson* v. *Mutual Guarantee B. & L. Ass'n.,* 66 N. J. L. 683.

Voting trust agreements, not in this state *per se* illegal as against public policy, but dependent in each case on the attendant circumstances, are illustrations of contracts in restraint of complete alienability.

We have also cited to the court the partnership analogy adopted by this court with reference to the binding effect of unanimous action not forbidden by statute or public policy. *Breslin* v. *Fries-Breslin Co., supra.*

Many of the cases already cited have dealt with this contract view and they do not need to be again discussed.

In *Fitzsimmons* v. *Lindsay,* 205 Pa. 79; 54 Atl. 488 (1903), there was an agreement between all the owners of the capital stock of James C. Lindsay Corporation, for the evident purpose of continuing the company as a close corporation, providing that in the event of the death of a stockholder, the remaining stockholders should have the right of purchase at book value, that value in case of dispute to be fixed by arbitration. The agreement was upheld on demurrer as on sufficient consideration and not illegal on its face. The court also said:

> "Nor is the objection that the agreement is in restraint of alienation sufficient. Such agreements are quite com-

> mon among partners as to their shares in the firm assets, and are enforced by courts without hesitation. No reason of overruling public policy is apparent why they should not also be sustained in relation to shares of stock in what is really only a private trading corporation."

The Pennsylvania court does not seem to have been troubled by the Pennsylvania "Partnership Associations" Act.

The case of *New England Trust Co.* v. *Abbott,* 38 N. E. 432 (Mass.), has already been cited. It dealt not with a charter provision but with a by-law assented to by all stockholders. In upholding the by-law as a binding contract, the court said:

> "The defendant contends that these by-laws are void We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders might have no power of commission over him. In *Adley* v. *Whitstable Co.,* 17 Ves. 315, 322, Lord Eldon says: 'It has been frequently determined that what may well be made the subject of a contract between the different interests of a partnership would not be good as a by-law. For instance, an agreement among the citizens of London that they would not sell except in the markets of London would be good; yet it has been declared by the legislature that a by-law to that effect is void'. See also, *David* v. *Proprietors, etc.,* 8 Metc. (Mass.) 321; *Bank of Attica* v. *Manufacturers' & Traders Bank,* 20 N. Y. 505; 6 Cook, Stocks & S. Sec. 408. In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in by-laws which may have been invalid as such does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this State that a corporation, unless prohibited, may purchase its own stock (*Dupee* v. *Water Power Co.,* 114 Mass. 37); and we see nothing opposed to public policy in such an agreement as this, with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from

which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to. In England it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint-stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. *Bargate* v. *Shortridge,* 5 H. L. Cas. 297; *Poole* v. *Middleton,* 29 Beav. 646; *Ex parte Penney,* 8 Ch. App. 446; *Moffatt* v. *Farquhar,* 7 Ch. Div. 591; *Chappell's Case,* 6 Ch. App. 902. No objection seems to have been made to these provisions. In this state, the legislature, in numerous instances, has provided, in the charters of corporations like this, that the shares shall be transferable according to such rules and regulations as the stockholders shall establish, and not otherwise. It is hardly possible that the legislature was ignorant of the construction which has been put upon the power thus conferred, and which in the case of the first corporation of the kind chartered in the commonwealth, the Massachusetts Hospital Life Insurance Company (Acts 1818, c. 180), was shown, it is said, by the adoption of by-laws from which those in this case were copied. It is true that this charter contains no provision in regard to by-laws or to the transfer of shares; but the policy of the legislature cannot be affected by such an omission, especially in view of the fact that many of the charters since granted contain this provision."

The corporation Johnson & Higgins has authority under its charter and the law of this State to acquire its own stock, but the case of *Trust Co.* v. *Abbott,* from which the foregoing citation is taken, is authority, even in the absence of that right, for the legality of such provisions as contracts.

"Neither do we think that the agreement is void for the reason that it authorizes the plaintiff to invest, as the defendant contends, in its own stock, or because it compels the defendant to submit to the appraisal of the directors. If the enumeration in its charter of certain things in which it may invest is to be construed as excluding, among others, its own stock, we think that the object of the agreement is not to secure the transfer of the shares to the plaintiff as an investment, but to enable the directors to dispose of it to such person or persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; and

> though, pending its disposition by the directors, it may, for convenience's sake, be placed with the company's securities, and dividends, if declared, collected upon it, that does not alter the essential character of the tenure upon which the company holds it. It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested; provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown. *Brown* v. *Bellows,* 4 Pick. 179, 189; *Palmer* v. *Clark,* 106 Mass. 373, 389; *Haley* v. *Bellamy,* 137 Mass. 357, 359; *Fox* v. *Hazelton,* 10 Pick. 275; *Strong* v. *Strong,* 9 Cush. 569; Benj. Sales (6th Am. Ed.), Sec. 88, note 3."

Certainly complainant could lawfully contract to sell his stock to the defendant for a price to be measured and paid by ten years' dividends. Contracts are constantly made, not only between corporations and employees but between ordinary vendors and vendees, by which the payments are made from future dividends. That is certain which may become certain. Judging by past results, ten years' dividends of the defendant would represent a reasonable consideration for a present sale of a holding of the size of complainant, of entirely unrestricted stock by an owner to any vendee.

POINT SECOND.

The complainant, in view of the reliance of defendant and its active members upon his contract, conduct and assent, and its and their resulting change of position, is equitably estopped from asserting any claim inconsistent with his agreement.

After defendant's entire corporate plan had been fully established and executed, complainant, with a general knowledge of the plan, joined it and became a party to the corporate contract. In consideration not merely of the transfer to defendant of a one-half interest in Prindiville & Co., not then owned by it, but of his acceptance of the entire charter plan and contract, he was admitted and defendant gave him the rights and interest specifically fixed in the charter and in his stock certificate, *i. e.,* his contract. In reliance upon his contract and his assumption of its validity very large benefits in compensation were conferred

upon him by the defendant and, out of their own interests, by his associates, which, except for his agreement, they would have retained. In further reliance upon his contract, complainant's associates have surrendered common stock, taken dividend certificates in return for their stock, and the corporation has distributed to complainant the reissued common stock ex ten years dividends. Complainant's benefits and the change of position by the defendant and by complainant's associates are further shown by the large amounts paid him by way of compensation, in contrast to those by way of dividends. Others have since become active common stockholders, on the faith of complainant's continued assent to the corporate plan.

We may easily illustrate the constantly changing interests in the operation of the plan by reference to the common stockholdings both before and after the admission of the complainant into the corporation.

The stock record at the beginning of 1911, the year in which he was admitted, stood as follows:

Total common shares outstanding		3,610
Divided into—dividend bearing	1,155¾	
ex-dividend	2,454¼	3,610
Dividend certificates outstanding		2,454¼
Ex-dividend shares held by corporation	531	
Ex-dividend shares held by directors	1,923¼	2,454¼

All of the 531 ex-dividend shares held by the corporation, with others subsequently surrendered, were later distributed among the actives, including Mr. Prindiville.

The first retirement and surrender after the organization of the company in 1899 came in 1900, when Mr. J. H. Gourlie, one of the original issuees holding 418¾ shares (out of 2,500), surrendered his shares and took dividend certificates on all of them. The surrendered shares were held in the treasury ex-dividend until 1902 when they were distributed *pro rata* to the common stockholders. The process thus illustrated was repeated as shares were surrendered on retirement and dividend certificates issued thereon.

Under the operation of the plan the direct dividend bearing shares had decreased in number by the beginning of 1911 as compared with dividend certificates issued on partial or total retirement, so that, taking in new common shares (issued on the introduction of new active common stockholders), increasing the total then outstanding to ~~3,717~~ 3610, there were in the hands of the

active directors and officers 1,155¾ common shares directly dividend bearing to their holders and 2,454¼ common shares ex-dividend, which had been surrendered by retiring directors and re-issued to the actives and against which there were outstanding 2,454¼ ten year dividend certificates issued to the retiring directors and held by them, or their personal representatives or assigns. Of the ex-dividend shares there were then held by the corporation 531, all of which, with others afterward surrendered, were later distributed among the then actives (see above table).

In 1918, when Mr. Prindiville severed his relationship with the corporation, there were outstanding 3,729 shares of common stock, 1,625 of which were direct dividend bearing in the hands of the active directors (including Mr. Prindiville as active to the end of 1918), and 2,104 shares were held ex-dividend by the actives against which there were outstanding 2,104 dividend certificates of varying maturities.

It thus appears that the dividend bearing common shares in the hands of actives had increased during the eight years that Mr. Prindiville had been associated with the corporation, and during which he was completely assenting to the entire corporate program, from 1,155¾ shares to 1,625 shares, and the shares held ex-dividend had decreased by the expiration of dividend certificates from 2,454¼ shares to 2,104 shares.

At the beginning of 1918 the corporation held none of the ex-dividend shares, all surrenders having been theretofore completely re-distributed. During 1918 there were surrenders on retirement of actives of 600 shares, all of which were still in the corporate treasury at the end of 1918.

The plan had then been running for about twenty years and none of the active directors held direct dividend bearing shares of original issue except to the extent that new common stock (in the case of Mr. Prindiville 125 shares, but usually 50 shares) had been issued to them respectively on their admission to the corporation. All other shares had been actually through the process of surrender and re-issue and every shareholder, except those admitted within the ten-year period, was already the holder of shares so surrendered and re-issued ex-dividend and again become dividend bearing by the expiration of the corresponding dividend certificates.

And all of the actives also held common shares ex-dividend which would become dividend bearing at various periods as the corresponding dividend certificates expired. Of these Mr. Prindiville had 115 shares.

Obviously it would be impossible to accomplish at this late day an equitable readjustment of the rights which have been surrendered, affected and originated by and under the operation of the Johnson & Higgins charter. The executed considerations, corporate and personal, are incapable of recall.

It is to be noted that, when Mr. Prindiville was admitted to defendant's organization in 1911, the shares of common stock then issued to him were the property of the corporation. They were then sold by the corporation itself to the complainant in reliance upon his agreement with the corporation when that interest might have instead been retained by the company or issued to another. Equally true is this of the stock surrendered to the corporation and as its property re-issued to complainant. And, again, complainant's liberal compensation was all because of his complete acceptance of the entire corporate plan, and was all out of sums which were the property or assets of the defendant until by appropriate corporate action awarded to complainant. Surely a change of original position on the part of defendant, induced by complainant's conduct, could not be more convincingly shown!

The fact that all of the benefits flow from the general plan of which the percentage salaries are an integral part and of which the surrender of the stock for dividend certificates is an essential condition, is obvious. Everything that complainant has had, including his original stock, the increases of stock from which he may get income in the future (and also his partnership interest and his shares in the partnership distributions), as well as his salary percentages, are benefits which he has accepted in consideration of his adherence to the plan as a whole and each one of which deprives him of the right to attack this plan from which each benefit flows. It is clear, too, that these benefits have been taken by complainant in some instances from the corporation and in others from the very individuals he now seeks to deprive of like benefits.

He has received the great benefits of his contract and now seeks to repudiate only its burdens and its obligations. Having accepted all of the pecuniary advantages of his contract, he cannot disaffirm it. There being no statutory prohibition its invalidity is urged on the theory that the charter plan and contract is without warrant in the law or in excess of power. But, even if claimed to be void on grounds of public policy, complainant, having accepted the contract with knowledge of its details and defects, having accepted and retained all its benefits

and having participated in and ratified its every phase, he is no longer permitted to deny its validity when the considerations of the contract have been so far executed. The circumstances of this case call for the strictest application of equitable estoppel.

Breslin v. *Fries-Breslin Co.,* 70 N. J. L. 274;
Wormser v. *Met. St. Ry. Co.,* 184 N. Y. 83;
Treadwell v. *United Verde Copper Co.,* 134 App. Div. 394, 398;
Bonta v. *Gridley,* 77 App. Div. 33, 39, and cases cited;
Wieland v. *Hogan,* 177 Mich. 626, 631;
Pickard v. *Sears,* 6 Ad. & El. 469;
St. Louis R. R. v. *Terra Haute R. R.,* 145 U. S. 393, 407, 408;
Veeder v. *Mudgett,* 95 N. Y. 295, 310;
Rabe v. *Dunlap,* 51 N. J. Eq. 40;
Trustees, etc. v. *Smith,* 118 N. Y. 634, 640, 641;
N. J. Car Spring & Rubber Co. v. *Fields,* 85 N. J. L. 217.

POINT THIRD.

A court of equity should not, under the circumstances of this case, give complainant aid in avoidance of his agreement with defendant, fully executed by the latter except as to the issue of the dividend certificate which it has tendered and which complainant has refused.

Complainant's claim presents an instance of gross inequity. He became with knowledge a party to the corporate plan and contract after it had been fully consummated. The common stock provisions were, before and during his membership, and by the practice of the parties construed to constitute a part of the corporate plan under which stockholders ceasing to be active in the corporate service surrendered their shares to the corporation and received in exchange therefor ten year dividend certificates, the surrendered shares being subject to re-issue ex-dividend to actives. Complainant participated in and procured all the benefits of every phase of the corporate plan. He had no objection to the salary fixing or to stock distribution, never asserted, until January, 1919, or after, that the charter plan and contract was

invalid and knew of no one objecting to the surrender of common stock in accordance with the charter plan. Complainant in December, 1918, completely abandoned Johnson & Higgins and his official and personal duties therein. He moreover had no idea of returning any of the salaries paid or stock distributed to him during his corporate relation, nor of tendering any of his common stock to secure dividend certificates.

Complainant's inequity and inconsistency preclude any recovery by him and call for the withholding by a Court of Equity of any and every relief demanded by him.

Continental Securities Co. v. *Northern Securities Co.*, 66 N. J. Eq. 274;
Harriman v. *Northern Securities Co.*, 197 U. S. 244, 286, *et seq.;*
Unckles v. *Colgate*, 148 N. Y. 529;
Leonard v. *Poole*, 114 N. Y. 371;
Knowlton v. *Congress etc. Spring Co.*, 57 N. Y. 518, reversed in 103 U. S. 49, but rule reinstated in 197 U. S. 244, 296;
Arnot v. *Pittston & E. Coal Co.*, 68 N. Y. 558;
Gould v. *Head*, 41 Fed. 240, 248;
Funck v. *Farmers El. Co.*, 121 N. W. 53 (Iowa);
Tracy v. *Talmadge*, 14 N. Y. 162;
St. Louis R. R. v. *Terra Haute R. R.*, 145 U. S. 393, 407-409;
Newman v. *Nellis*, 97 N. Y. 285.

It is true that there is a rule permitting an innocent party who has delivered goods or paid money under an illegal contract still executory to disaffirm the contract and to recover his goods or payments. There is no analogy whatever between such a case and the present.

Here the corporate contract to which complainant became a party is at most or worse, simply ineffectual, *i. e.*, incapable of affirmative enforcement, because not authorized when attached to stock ownership. Complainant's claim of invalidity can go no further.

Here the contract was fully executed. The whole system was consummated and in settled operation when complainant became a participant therein and bound by his contract thereunder. When he abandoned the corporation and his duties therein the contract had been wholly performed by the defendant on its part. All the benefits his contract entitled him to, including the salaries

and dividends, had been paid him. All the dividends he is entitled to subsequent to his withdrawal on surrender of his common shares in exchange for dividend certificates have been declared, and defendant has done everything on its part to make those dividends available to complainant. Even if anything remained to be done to fully execute the contract plan and contract, its partial execution would preclude any relief to one in complainant's position if the plan were invalid.

Complainant is not an innocent person. He adopted the plan knowing the features he claims to be invalid and ratified and confirmed, by his participation therein, the plan in all of its details. Moreover he is not a penitent seeking to withdraw from an invalid executory contract, and suing to recover his payments made, or property delivered, thereunder. He cannot and does not put himself in that attitude. If it be not permissible under the New Jersey Corporation Act to create qualified stock interests, and the plan were invalid as complainant alleges, then, when he received the share of stock, he got nothing, it being invalid, as well as the entire corporate arrangement, and he has no equity to claim anything more. Both as against the corporation and its stockholders, now, of course, represented in this suit by the defendant it would be entirely inequitable to give complainant what he did not pay for, and what it was expressly agreed by him he should not get. If on the contrary he got a stock right it was as the result of a contract which exactly defined the stock interest. This contract in all of its phases was an entirety, a creation of a stock interest and its reservations or reversions, which contract was with the corporation, with complainant and with the other stockholders. Complainant does not offer to return what he got, but on the contrary necessarily founds all of his rights in this suit upon that contract. He cannot now make the contract something different from what it was in fact. He cannot repudiate it as against public policy and at the same time claim the benefits of it. In fact he does not repudiate, for if he wished to repudiate it he must bring a different action, must tender back his stock (both the original 125 shares and the 115 reissued shares) and what he has received in money, less reasonable compensation for his labor, and ask to have reconveyed to him a half interest in Prindiville & Co., less the cost of operation and a reasonable charge for the services which replaced his. Not only has he not done this, but he has expressly affirmed his purpose to take and to keep all he has received both stock and money under his contract and under the practice in contempla-

tion of which it was made. Complainant exhausted every possible benefit under the corporate plan and contract and, failing to get more in dividends and salaries than he was entitled to under the usual operation of the plan, he wholly abandoned the corporation and his duties to it. And, now, far from disaffirming the contract, and seeking to recover wholly independently of it for the property delivered by him to the corporation under the alleged invalid plan, he plants himself squarely upon his right as a stockholder in what he declares to be an unlawful corporate plan, and seeks relief through this equitable action, solely in pursuance of contract rights inextricably intertwined with a corporate charter and plan now alleged to be unauthorized, invalid and illegal. This is impossible!

Complainant would be in no better position if the claim were that the corporate plan is an absolute illegality in violation of a specific provision of law. Even then complainant by reason of his knowledge and participation as a party equally at fault would be left by the law where he has placed himself.

Harriman v. *Northern Securities Co., supra;*
Funck v. *Farmers El. Co., supra;*
Gould v. *Head, supra;*
Leonard v. *Poole, supra;*
Arnot v. *Pittston & E. Coal Co., supra.*

POINT FOURTH.

As to complainant's second cause of action praying restraint against the payment of salaries as excessive.

The Vice Chancellor disposed of the complainant's prayer for injunction against the payment of salaries alleged to be excessive, on the ground that, until he surrendered his certificates of common stock and accepted dividend certificates, pursuant to his charter contract, he was not entitled to dividends, and therefore not entitled to complain of the diminution of the dividend fund by the payment of excessive salaries.

This seems logical, and if this court concurs in the view of the Vice Chancellor, the salary phase of the relief sought needs no further consideration.

But on the merits of the complainant's case as to salaries, and laying aside the objection that his bill in this regard, brought

in the corporate right and not his own, is not representative, we submit he should be denied relief.

(a) *The salaries complained of are not shown to be excessive in themselves.*

The complainant has offered no evidence as to what are reasonable salaries in comparable conditions.

The burden was upon him, as the salaries paid were directed and approved by all the stockholders, excepting only himself, now objecting for the first time after years of acquiescence.

> "In respect to the burden and amount of proof the status of the opposing stockholder may in some cases be different when the majority of the stockholders and not merely the board direct or approve the compensation or salaries, and instead of requiring the director to prove that the compensation is fair—our rule when the board fix the salary—the objecting stockholder may be required to establish affirmatively that the salary or compensation fixed by the stockholders is unreasonable and oppressive."
>
> V. C. Emery, *Lillard* v. *Oil Paint & Drug Co.*, 70 N. J. Eq. 197, 208.

The fixing of compensation by percentage of earnings is not in itself illegal or even unusual. In the present case the method and rate had had the approval of Mr. Prindiville for many years.

The mere fact that the amounts are large does not prove them excessive, in view of the nature and character of the business and of the plan set forth in the charter under which the corporation has operated since 1899.

The complainant cannot escape the presumptions arising out of his own assent to method and rate for many years, accompanied by acceptance and retention by himself of the resulting compensation.

The presumption is against the salaries being excessive after so long a history and after eight years assent and participation by the complainant himself.

The presumption from the corporate practice, which harmonizes with its charter and has had the assent of all its common stockholders for many years, is that the salaries are reasonable.

(1) In a corporation like Johnson & Higgins, the payment of salaries to directors is a mere method of dividing profits among all those who are entitled to them in such manner that a man who gives a large amount of personal service, and whose work is exceedingly valuable, shall not be compelled to share in proportion merely to stock interests with a man who gives service

of little or no value or no services at all (an inactive stockholder or holder of dividend certificates).

It stands to reason that in the absence of fraud there must be some corporate power to determine such a division—in other words, to fix the salaries of active managers. If by reason of the fact that all of the directors are also salaried officers, disqualification exists on the part of the directors to fix the salaries, it must be that when salaries are fixed by the board of directors and the action of the board confirmed by a majority of the stockholders, the corporate power has been adequately exercised, for there is no other way in which it can be exercised, and to say that it cannot be exercised in this way is to say that it cannot be exercised at all. It would be an innovation upon corporate law to hold that in such a condition the only power to fix salaries lies in the court.

In this case, the board of directors has acted and its action has been approved by the stockholders—not only by a majority but by all the stockholders exception Prindiville himself, and Mr. Prindiville being an inactive stockholder having for the time being no interest in the division of profits.

(2) But the action of the directors and stockholders is supported by Mr. Prindiville's own action (without reference to his acts as creating estoppel). He not only has acquiesced for eight years in the method pursued but he has actually participated in applying the plan—that is to say, in dividing fifty per cent. of the profits as salaries among the directors. Quite aside from any question of estoppel, this makes a *prima facie* case as against Mr. Prindiville of reasonableness and propriety. In other words, when this was proved, a case was made out of Mr. Prindiville's own mouth for the reasonableness of the plan and the advisability of its application from the point of view of success in the business of the corporation and the profit of all concerned.

Mr. Prindiville's obligation, action by the directors and stockholders being proved, was to prove that the salaries were so unreasonable as to amount to constructive fraud but when his own participation was proved, it *prima facie* rebutted any idea of constructive fraud and left him with the burden to prove something which amounted to fraud in fact. No proof whatever of fraud or even unreasonableness has been presented. On the contrary, good faith is admitted.

(3) Mr. Prindiville's position seems to be that if he is to cease to be a shareholder and to become merely a holder of a

dividend certificate, the consideration obtained for his stock will be diminished by the amount by which salaries are unreasonable, but the contract which entitles him to be paid the ten-years purchase value of his stock in consideration of its surrender is a part of the general corporate contract and an integral part of that contract is a provision which authorizes the directors to fix aggregate salaries at any amount not exceeding fifty per cent. of the profits. This provision amounts to saying that the action of the directors shall be conclusively deemed to be reasonable if they fix the aggregate salaries at any amount not exceeding fifty per cent. of the net profits, and Prindiville, as a certificate holder taking under this contract, would seem to be concluded by the action of the directors within the limits thus imposed.

What was the purpose of inserting this provision? It was not to bind the active stockholder, because he must have submitted, if not agreed to, the action of the majority, and the inactive stockholder would have no interest in the matter. Its purpose must have been to bind the holders of dividend certificates, to define the point up to which the directors—that is to say, the active stockholders personally interested as against the holders of dividend certificates—could lawfully act and bind the holders of dividend certificates. In other words, it was to make the holder of a dividend certificate agree that he should have no cause of complaint if the directors acted within these limits. In other words, its very purpose was to bind Mr. Prindiville in these very circumstances, and he himself so considered as to others.

(b) *Complainant is affected, in view of his knowledge, assent and participation, of, to and in the salary appropriations and distributions, by all the equitable considerations applicable to his complaints against the corporate plan in the matter of dividends.*

(c) *Complainant cannot object, as a stockholder speaking in the corporate right, because the corporation is itself estopped.*

The salaries result from the operation of a formula, authority for which is contained in the charter and by-laws, operative from the inception of the corporation in 1899, and assented to by every common stockholder. The complainant-appellant himself has accepted compensation on the same basis from 1912 to 1918 inclusive. He himself acted on the salary committee to fix percentages for the year 1917.

The case is not one for an application of the rule of *Gardner*

v. *Butler,* 3 Stew. 702, and kindred cases in the Court of Chancery and this court.

Courts are not able to ignore facts, and Courts of equity at least do not avoid the realities disclosed by the facts. How can any usual hard and fast rule, governing a contract between a director and his corporation and subjecting its making to equitable scrutiny, on the ground of supposed inability of a man, acting for himself, to deal fairly with himself acting for the corporation, be applied to the present case?

The common stockholders of this corporation elected the directors, and there were no directors who were not common stockholders and no common stockholders who were not directors.

So it was from the beginning, as such was the corporate plan. There is no statutory prohibition against such a situation. In this case it was in the charter, in the by-laws and in practical operation from the minute of the birth of the corporation. Read the minutes of its first business session.

Perforce the directors must fix their own compensation. They did so for twenty years by the same formula, by like machinery and with the like result of distributing among themselves as salaries 50% of the net profits of the corporation. In so doing they observed the charter and by-laws to which all had assented.

In the *Lillard* case Vice Chancellor Emery said (p. 206):

> "The regulation of official duties and the salaries therefor is a proper subject of by-laws within the power of stockholders under the statute, and although it may be doubtful whether the stockholders, against the consent of the board of directors, have the power under our statute to direct the employment of the agents to manage the ordinary business of the company outside of the official duties, and fix their compensation for such service, there would seem to be no question that, in the absence of statutory or charter provisions to the contrary, the stockholders, as a body, must have the general power to direct or ratify the employment of a director for that purpose and fix the compensation. Otherwise the corporation might not be able to employ any director as such agent against the objection of any stockholder."

In this case the common stockholders were also all the directors, and the action taken by the directors was (no creditors being concerned) to be accounted only to themselves as stockholders.

Each year at their annual meeting they, as stockholders, ratified all they had done as directors. The complainant joined

in this ratification from his first association with the company in 1912, until 1918.

Complainant admits *himself* concluded and estopped from objecting to the salary percentages on the ground of his participation through the year 1918. He says, however, that as to subsequent time *he* is not estopped to object.

The remaining common stockholders ratified at their annual meetings in 1919 and 1920 the directors action as to salaries, but against his protest.

He admits the applicability of the authority of *Breslin* v. *Fries Breslin Co.,* 70 N. J. L. 274, as to the past but denies it as to the future.

We have already quoted the words of Mr. Justice Pitney as to the partnership analogy recognized in corporate observation by the eye of a Court of Equity. That analogy is especially apt in the present case both because of the personal service character of the corporate enterprise and organization, and also because of the complete identity of the governing stockholders and directors.

It would almost seem that acquiescence of the stock in any action of the directors was to be assumed, and that equity should regard every directors' meeting as also a stockholders' meeting.

Beslin v. *Fries Breslin Co.* was followed by *N. J. Car Spring Co.* v. *Fields,* 85 N. J. L. 217. Justice Swayze spoke for the Court of Errors and Appeals. We quote (p. 219):

> "This action is to recover money paid the decedent, upon the theory that the contract of July 15th, 1902, was void since the decedent as director was contracting with himself. *Gardner* v. *Butler,* 3 Stew. Eq. 702, is relied on.
>
> The case, however, differs from Gardner *v.* Butler in several respects—*fiirst,* the contract was assented to by all the stockholders who were also all the directors; *second,* the payments were continued for more than six years after the elder Fields had ceased to be a director or stockholder; *third,* the plaintiff corporation, controlled as it was by those who still control it, never repudiated the transaction until after the death of the elder Fields. The case of the defendant might therefore be rested upon the right of the stockholders as distinguished from the directors to make or to ratify the contract. (*United States Steel Corporation* v. *Hodge,* 19 Dick. Ch. Rep. 807), or upon their acquiescence in what was done (*Breslin* v. *Fries Breslin Co.,* 41 Vroom 274), or upon the long delay in acting (*Lillard* v. *Oil, Paint and Drug Co.,* 4 Robb. 197, 210). But inasmuch as the payment was on the face of it and in form a mere gratuity, or at best a pension to

> the man who seems to have built up the company, it may be well to examine a little further its real character for the purpose of showing the fairness of the whole transaction to the stockholders who now seek to question it and recover the money. Mr. Fields had been receiving six per cent. on $400,000, the entire capital stock. He had already given one thousand shares to his son, and was about to give him two thousand more, and to give the grandson the remaining one thousand. He was about to strip himself of the whole capital stock without consideration. As a part of the transaction, and evidently by way of partial payment, the son and grandson, in effect, agreed to pay him three per cent. on the amount during his life, which, at best, could last but a few years. They might have put the agreement in the formal shape of a contract by them as individuals to pay the annuity. They might then as stockholders have received dividends from the company and out of the money paid their obligation to the decedent. They sought to accomplish the same object by a short cut—by having the corporation pay him directly. The practical effect was the same. Their dividends were necessarily that much less. In the absence of any claim of creditors, we see no legal objection to their accomplishing the object as they did, as long as every one acquiesced. To hold otherwise would enable them to retain the stock without paying the price agreed upon. There was no fraud, and although this method of paying a dividend to the nominee of the stockholders instead of paying it directly to the stockholders is irregular, it is not *ultra vires,* and there is no minority of the stockholders to suffer thereby. The irregularity even is much less serious than were the irregularities in *Breslin* v. *Fries Breslin Co., supra.*"

The stockholders in this case have ratified the compensations criticised.

The complainant in this case voluntarily joined with all other common stockholders in a plan, twelve years in operation when he joined and continued with it eight years thereafter. No change was introduced in the operation of the plan as to salaries from the birth of the corporation and for nearly twenty years, nobody, stockholder or other, ever complained of its operation. Nobody—not even the complainant—now says that it has been operated in relation to the complainant, except as in relation to all others in interest, and as the complainant himself assisted to operate it as a member of the 1917 salary committee.

It is submitted that such acquiescence by all common stockholders estops themselves and their corporation not only as to

the past, but also as to the future, so long as the complaint is against individual application of the plan in its customary operation. Assent was to a plan and its operation in the ~~substitution~~ distribution of 50% of the net earnings as compensation to the operating directors, and not to a single salary distribution for a given year. Assent to a plan is quite as possible as assent to a single act, and in the present case is much more in accord with the admitted facts. Complainant did not say in 1912 "I will assent to a distribution of 50% of Johnson & Higgins net earnings this year for salary and compensation of the directors including myself". He joined unreservedly and committed himself to the plan and its results, not for one year, but for good and all. He actually continued with it for eight years. He refuses continuance solely because he is dissatisfied with the percentage of salary awarded him although he admits that the award was made by customary method and in good faith without prejudice on the part of his associates against himself. A Court of Equity ought not to permit him to withdraw his assent to this plan of salary appropriation and distribution in the absence of allegation and proof of fraud and conspiracy.

The principles of estoppel are well settled and are operative against the complainant. He speaks as to this branch of his case in the corporate right and not in his own, and if the corporation is estopped he is estopped. Unanimous agreement of the stockholders estops the corporation. *Breslin* v. *Fries Breslin Co., supra.*

POINT FIFTH.

The Court of Chancery is without jurisdiction at the suit of a stockholder to entertain the bill of complaint in this case, if the effect of granting the prayers for relief would be to determine the charter of the corporation to be invalid as in contravention of the Act of the Legislature entitled, "An Act Concerning Corporations (Revision of 1896)."

The corporation of Johnson & Higgins was, as we have seen, incorporated under the General Corporation Act of 1896 and includes a complete and comprehensive plan for acquiring and

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taking over a portion of the business and co-partnership of Johnson & Higgins as insurance brokers, insurance agents, agents of underwriters and insurance companies, adjustors of averages, and other kindred business, all as conducted in New York and other places (excepting the business as conducted in Boston, Philadelphia, Baltimore, New Orleans, Chicago and San Francisco), and for assuring, by special provisions with reference to stock ownership and compensation, the active personal service with the corporation of the members of the firm of Johnson & Higgins at the time of incorporation and their successor stockholders. The charter contains within itself a plan for accommodating a corporate organization to the character, necessities and demands of a business theretofore conducted in partnership form, and under the charter the whole method of inducting a common stockholder, increasing his interest and compensation, diminishing his compensation, and inducing—or even compelling—his retirement when he ceased to be actively engaged in its affairs, is one integral arrangement which cannot be disturbed in any one of its vital parts without wrecking the whole arrangement.

The remedies sought by the complainant, both in relation to dividends and salaries, are to prevent the operation of specific provisions of the defendant's charter. The provisions so sought to be eliminated are integral parts of the plan embraced in the charter as a whole and are incapable of elimination without destroying the whole.

The charter is equivalent to a special act of the legislature. *Ellerman* v. *Chicago Junction Railways Co.*, 49 N. J. Eq. 217, 241. The principles of construction to be applied to corporate charters are therefore similar to those applicable to acts of the legislature. If all the provisions of the act are so interwoven as to be incapable of distinct operation, or are of such a character that it cannot be said that the legislature intended that the valid parts should be enforced if the other parts failed, the entire law will be held invalid. The provisions of an act which are dependent, conditional, or connected so as to warrant the belief that the legislature intended them as a whole, stand or fall together under the test of the constitutionality of any such provision.

State, Van Cleef, Pros. v. *Commissioners, etc.*, 38 N. J. L. 320, 322.

Cooley on Const. Lim. 178, and cases cited.

Complainant would reject from the charter of the defendant provisions relating to dividends operative when the holder of

common stock ceases to be an officer, employee or director actively engaged in defendant's service, and the provisions as to salaries of executive officers and directors. These excissions would destroy the entire corporate plan of the corporation as found in its charter and as continuously observed from 1899 to date. The charter without these conditions is beyond the corporator's intentions. Complainant strikes at the life of the corporation.

He cannot, of course, succeed if the charter is a valid grant under the State authority as contained in the General Corporation Act under which defendant has taken out its charter.

And if the charter includes the powers attacked by the complainant as not within the statute under which the defendant is organized, the defect is fundamental. The charter was in such case illegally obtained and undoubtedly the right of the corporation to continue may be challenged by the State.

It has been held, that an inquiry, whether a corporation exists *de jure* or not, is beyond the power of a Court of Chancery, and whenever it is sought to impugn the legality of a corporation which exists under the forms of law, the remedy is by *quo warranto,* or information in the nature thereof, instituted by the attorney general.

> *Elizabethtown Gas Light Co.* v. *Green,* 46 N. J. Eq. 118 (Van Fleet, *V. C.*).

It is well settled that the shareholders in a corporation cannot extinguish its charter or dissolve it, and that a court of equity cannot dissolve it at their instance. In the absence of a statutory provision, the franchises can be declared forfeited and extinguished only at the suit of the state in an appropriate proceeding at law.

> *Benedict* v. *Columbus Construction Co.,* 49 N. J. Eq. 26, 36 (McGill, *C.*);
>
> *Ellerman* v. *Chicago Junction Rwy. Co.,* 49 N. J. Eq. 217, 231.
>
> *National Docks R. R. Co.* v. *Central R. R. Co. of N. J.,* 32 N. J. Eq. 765.

In the latter case Mr. Justice Dixon, in reversing a decree of the Court of Chancery granting an injunction, discusses the power of the court to determine the legality of a corporation which exists under the forms of law, saying that "an inquiry and judgment of this nature are, we think, beyond the powers of the

court of chancery, *at least at the suit of private parties*". The decision of the court was unanimous.

The complainant, therefore, on his own showing, has no standing in the court of chancery to incite the court's jurisdiction to enjoin acts by the defendant corporation, organized under the forms of law, within the scope of the powers conferred upon it by its charter.

Attorney General vs. *American Tobacco Co.*, 55 N. J. Eq. 352, 374. Affirmed 56 N. J. Eq. 847.

And the Vice Chancellor correctly so held (Record, 423, beginning at line 29):

> "If", says the Vice Chancellor, "the defendant corporation has arrogated to itself powers that are not conferred, or that are obnoxious in the eyes of the law as against its policy, it is guilty of an invasion of the public right, and direct redress lies with the State through its appointed agency, the Attorney General. Strangers may resist their imposition, but the Complainant is not in a position to assail them. The charter restriction, of which he complains, forms the very keystone of the corporate scheme and structure which he helped build, and under which he holds, and he cannot be heard to obliterate it. He has supped sumptuously at the table of plenty for eight years and he cannot bring the feast to an end simply because he is indisposed."

POINT SIXTH.

The decree of the Court of Chancery of New Jersey should be affirmed.

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