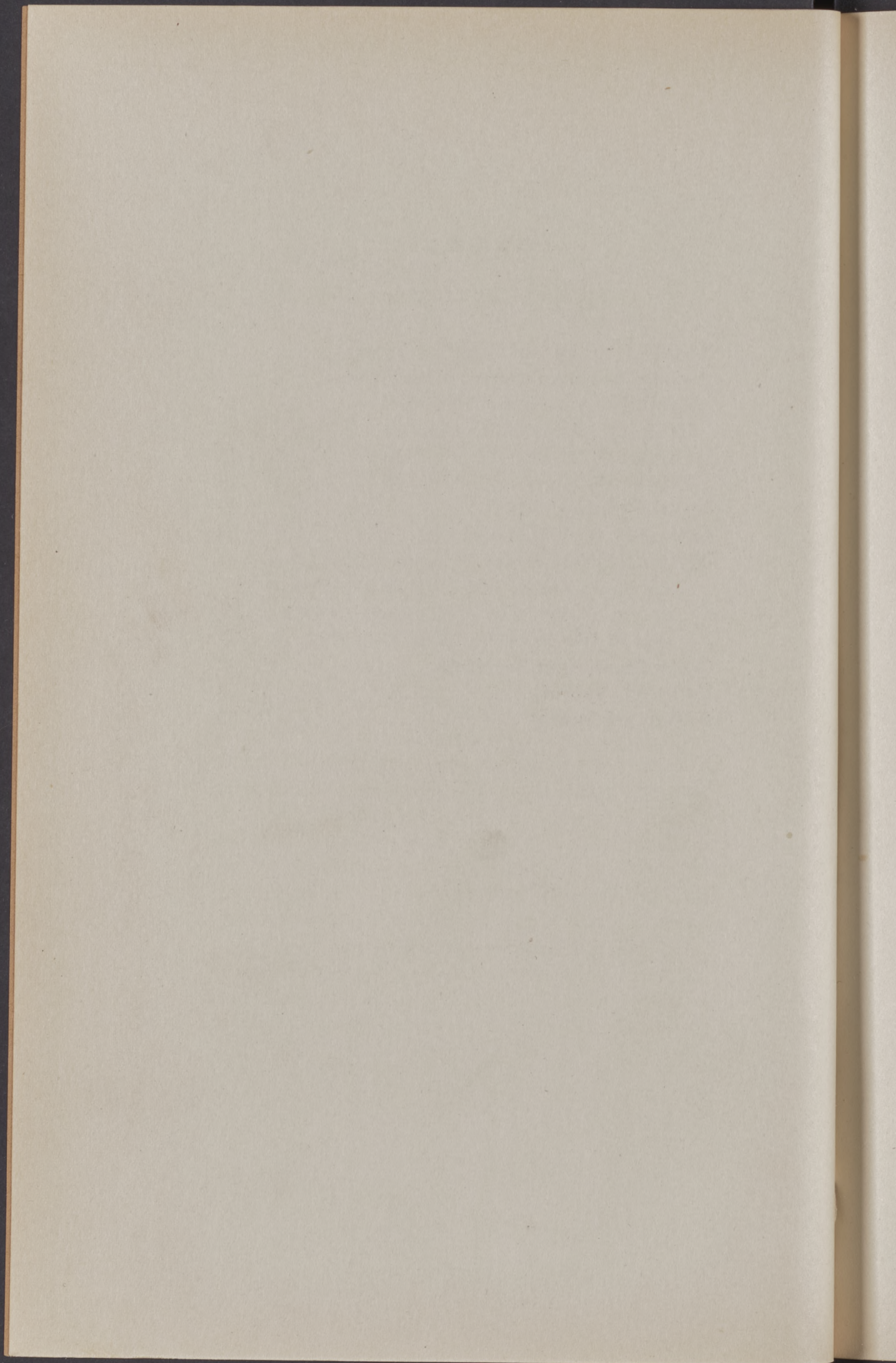


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Notice of Motion for Stay.

(Served June 15, 1923.)

COURT OF ERRORS AND APPEALS.

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In the Matter
of the
Dissolution of the NEW JERSEY
REFRIGERATING COMPANY.

To Merritt Lane, Esq., Solicitor for Petitioners, Edward H. Wright and Frank J. Bock, Receivers:

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PLEASE TAKE NOTICE that the appellants in the above entitled cause will, on Tuesday, the 19th day of June, 1923, at the hour of eleven o'clock in the forenoon (Daylight Savings Time) or as soon thereafter as the same may be heard, apply to the Court of Errors and Appeals at the State House, Trenton, New Jersey, for a stay of the order, made in the above entitled cause, on the 13th day of June, 1923, wherein the administration of the liquidation of the New Jersey Refrigerating Company was taken over by the said Court of Chancery, and the said Edward H. Wright and Frank J. Bock were appointed Receivers, during the pendency of said appeal and until the determination of the Court of Errors and Appeals, and for

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Petition for Appointment of Receivers.

such other and further relief as said Court may grant.

10 On said motion we will lay before the Court, the petition filed in said matter, on the 11th day of June, 1923; the order to show cause thereon; the affidavit of Otto A. Lembeck filed on the 13th day of June, 1923, and the order appointing Receivers, dated the said 13th day of June, 1923.

Dated June 15, 1923.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Otto A. Lembeck.

HUDSPETH & DEMAREST,
Solicitors of Appellants.

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FISK & FISK,
Solicitors for and of Counsel
with Horace Bowen.

Petition for Appointment of Receivers.

(Served June 11, 1923.)

IN CHANCERY OF NEW JERSEY.

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To his Honor, EDWIN ROBERT WALKER, Chancellor
of the State of New Jersey.

The petition of SARAH LEMBECK of Watkins,
in the State of New York, respectfully shows unto
your Honor:

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1. The New Jersey Refrigerating Company is
a corporation of the state of New Jersey incorpo-
rated under the name of the Lembeck and Betz
Eagle Brewing Company in the year 1889. It was
originally incorporated for the purpose of conduct-

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ing a brewing business, but with the advent of prohibition its business was changed into that of a refrigerating company, and its name was changed to the New Jersey Refrigerating Company in December, 1920.

2. It has issued and outstanding approximately 6400 shares of stock, of the par value of \$100. per share. Of this stock 2636 shares are and have been, since the death of Henry Lembeck, in 1904, owned by the Estate of Henry Lembeck, of which Gustav W. Lembeck and Otto A. Lembeck, two of the sons of Henry Lembeck, are trustees. 2279 shares are controlled by the Betz interests. The remaining stock, a considerable portion, is owned by the Lembeck interests individually, and there are several outside stockholders. Of this stock petitioner is the owner and holder of 235 shares.

3. Prior to May 1922 the control of the company was in Otto A. Lembeck. At the annual meeting of the company held in May of 1922 an attempt was made by Gustav W. Lembeck, and those associated with him, to divest the control of the company from Otto A. Lembeck and to lodge it with the independent interests. This attempt resulted in a contested election proceeding, which did not terminate until December 1922. In the meantime, and in order to preserve the company's business your Honor appointed four trustees to operate the business of the company and the business of the company was operated by trustees under the direction of your Honor from June 1922 until December 1922 when, the Supreme Court having decided the contested election proceeding, a new election took place. At that election the Lembeck stock was voted by the trustee appointed by

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your Honor. In December 1922 the business of the company was turned over to the directors elected at such meeting and the business of the company was conducted by said directors until the annual meeting in May 1923.

10 4. A suit was started in this court by Gustav W. Lembeck against Otto A. Lembeck seeking to remove the said Otto A. Lembeck as trustee of the Lembeck estate and in that suit a counterclaim was filed by the said Otto A. Lembeck seeking the removal of the said Gustav W. Lembeck, and in that suit several of the beneficiaries of the Lembeck estate intervened and considerable testimony was taken; charges and counter-charges were made, but the issue has never been determined
20 because of a settlement hereinafter referred to. Prior to the annual meeting to be held in May 1923 attempts were made by the various persons interested to agree upon a form of settlement, and it was claimed and insisted by Otto A. Lembeck and those associated with him, that, in fact, an agreement of settlement was made on or about the 8th day of February, 1923, a copy of which said agreement as contended for by the said Otto
30 A. Lembeck and those associated with him, is hereto annexed and marked Ex. 1. On the contrary it was claimed by the said Gustav W. Lembeck and those associated with him, that no agreement of settlement was, in fact, arrived at. In any event it appears from the terms of said settlement that it was manifestly unfair to the independent interests in the company and unfair toward the Betz interests.

40 5. The controversy between the said Gustav W. Lembeck and Otto A. Lembeck not having been

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settled the Betz interests and independent interests in the company, conceiving it to be for the best interest of those interested in the company that it should be dissolved, proposed a dissolution, with the result that finally an agreement to dissolve was made. At the time the agreement to dissolve was made it was proposed that the business of the company should be continued, and that the company should continue to be operated as a going concern until the business of the company could be properly disposed of and the assets distributed to its stockholders. In the operation of the business it was proposed that the officers should continue to function. It was also proposed that the directors to be elected at the annual meeting in May, 1923, who should become trustees upon dissolution, should be elected two by the Betz interests, two by Gustav W. Lembeck and three by Otto A. Lembeck. At a meeting of counsel involved in the proceedings an agreement was arrived at, the terms of which are as set forth in a written memorandum thereof, a copy of which is hereto annexed and marked Exhibit 2.

6. Following the making of said agreement a consent to the dissolution of the company was signed by all of the stockholders; said consent was actually signed prior to the annual meeting in May, 1923. The annual meeting of the company was held in May, 1923, and all of the stock was represented at the said meeting except 35 shares owned by Elizabeth Bechtlof. At the annual meeting, in accordance with the provisions of the agreement heretofore referred to and marked Exhibit 2, by-laws were adopted, a copy of which are hereto annexed and marked Exhibit 3. Directors were also elected in accordance with the provision of

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10 said agreement and said directors are—Otto A. Lembeck, Horace Bowen, Charles Greene, who were nominated by Otto A. Lembeck; Arthur Betz and George W. Carr, who were nominated by the Betz interests; Gustav W. Lembeck and Thomas Lembeck, who were nominated by Gustav W. Lembeck. Immediately after the said annual meeting the board of directors organized and elected as President Otto A. Lembeck; as Vice-President and Treasurer Arthur Betz; as Vice-President Gustav W. Lembeck; as Secretary George W. Carr; the board of directors also fixed the salaries of the respective officers in accordance with the provisions of said agreement. The directors and officers heretofore referred to immediately took over the management of the business of the company and have been conducting the business of the company to the present time.

20 7. The consent to a dissolution signed by all of the stockholders of the company was actually filed with the Secretary of State, and publication of said dissolution, as required by the statute in such case made and provided, was forthwith commenced, and if said publication has not yet been completed it is almost completed. The trustees on dissolution and the officers of the company continued to operate the business of the company as a going concern until on or about the 4th day of June, 1923, when Hudspeth and Demarest, representing certain of the beneficiaries under the last will and testament of Henry Lembeck, which said beneficiaries were represented at the meeting of counsel heretofore referred to, which resulted in the agreement Exhibit 2, wrote a letter to Otto A. Lembeck, president of the company, a copy of which

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said letter is hereto annexed and marked Exhibit 4. Because of said letter the said Otto A. Lembeck, as president of the company, refused to sign checks and warehouse receipts, and to take in any further new business. In order to carry on the business of the company it is necessary that the company make loans on commodities stored with it. These loans amount to large sums of money. It has been the practice of the company to borrow said moneys from the banks and at the present time the company is indebted to the banks for moneys borrowed for such purpose to the extent of \$700,000. On the day on which the said Otto A. Lembeck refused to further carry on the business of the company there was to be advanced by the company upon contracts made by it for storage of upwards of \$40,000. These moneys were not advanced. Upon the 6th day of June, 1923, a conference of counsel and parties interested was held at which there were present Otto A. Lembeck, Hudspeth and Demarest representing beneficiaries, Gustav W. Lembeck, Merritt Lane, representing him and certain beneficiaries, Thomas Lembeck, Alfred J. O'Neill Allison, Arthur Betz and George W. Carr, representing him; said meeting of counsel was called for the purpose of determining the action which should be taken by the trustees with respect to a further continuation of the business of the company. At said meeting it developed that the situation had been taken out of the hands of those interested by the suspension of the business of the company for the preceding forty-eight hours; it was represented that the fact that the company had suspended its business had become noised around among the trade, and that it was

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impossible to hold the business. It was further represented that the company was obligated upon contracts already made to loan moneys to the extent of approximately \$100,000, and it was the consensus of the opinion of counsel and those interested that, in order to save loss to the extent
10 that the company was obligated to advance moneys, moneys should be advanced even if said moneys had to be borrowed for that purpose. It now develops that the estimate of the moneys which the company was obliged to advance is understated, and it is now claimed that the company will have to advance, if it continues to accept goods for storage, approximately \$170,000. It is the consensus of opinion that, in view of the developments
20 and of the position taken by certain of the beneficiaries with respect to the responsibility of the trustees, no moneys should be advanced except those actually necessary in order to prevent loss to the company, and doubt has arisen with respect to the ability of the company and its officers, in view of the situation, to borrow moneys and unless the moneys can be borrowed there is no source of supply. It is likewise the consensus of opinion that the business of the company, which is under
30 contract, should, if possible, be diverted even if by such diversion the company will suffer a loss.

8. Petitioner says that at the time of the agreement for dissolution and at the annual meeting the parties had in mind a continuation of the business of the company so that the plant of the company could be disposed of in connection with a going business, and petitioner shows that the act of sending the letter to the said Otto A. Lembeck was a
40 breach of said agreement, and the result of the sending of that letter has been to make impossible

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the carrying out of the liquidation as contemplated by the parties.

9. A large part of the assets of the company consists of real estate, consisting of many parcels not used in the business of the company; the real estate is worth upwards of \$2,000,000 and there are upwards of 130 parcels. The trustees since they became such have disposed of certain of the real estate and are attempting to dispose of the rest. Alfred J. O'Neill Allison is in the real estate business under the name of the Hudson Real Estate Company, and is one of those who has been attempting to dispose of the company's real estate upon commission. The said Alfred J. O'Neill Allison, although not a member of the trustees, nevertheless has attended meetings of the trustees, and at a meeting of the trustees held on or about the 4th day of June, 1923, although four of the trustees, to wit, George W. Carr, Gustav W. Lembeck, Thomas Lembeck and Arthur Betz, or a majority thereof, voted that the said Alfred J. O'Neill Allison be not permitted to attend said meeting, persisted in remaining, doing so because it was stated by the three remaining trustees that they needed his advice. As a result friction has arisen between the trustees. The said Otto A. Lembeck has stated that he would not be governed by the act of the majority of the trustees and that he would not as an officer of the company sign papers directed to be signed by a majority of the trustees, unless he himself felt that the action of the trustees was one that should be taken. At a conference of counsel held upon the 8th day of June, 1923, the said Otto A. Lembeck conceded that the act of the majority of the trustees was binding, but insisted that when any act

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Petition for Appointment of Receivers.

of the trustees, such as the sale of real property, was not an act in the best interests of the company, he would dissent and insisted that the trustees designate some person other than himself to sign such documents as would be directed to be signed by said trustees. A concrete case which gave rise to this situation was the fact that after an offer for a certain piece of property for \$31,500 had been accepted by those authorized to act for the company, the said Alfred J. O'Neill Allison said that he had had a purchaser who would offer \$32,000 or \$500 more than the amount which the company had agreed to take. The said Otto A. Lembeck insisted that the said offer of \$31,500 be refused. A majority of the trustees insisted that the company sell the property for the \$31,500 which had been offered and insisted that they were bound to accept that offer in the exercise of good faith. The said Otto A. Lembeck by taking the position that he would dissent and refuse to sign papers has reserved to himself the right of questioning the acts of the trustees who may act and because of the bitterness which has permeated the affairs of the company since May, 1922, the trustees are and will be afraid to act in the best interests of the company because they will fear attacks upon their good faith when the time to account comes. The position of the trustees has also been rendered difficult by reason of the sending of the letter which is a warning to the trustees that they will be held strictly accountable under the law, and that all the trustees now can do, in view of the filing of the certificate of dissolution, is to liquidate the business of the company in as speedy a way as possible.

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10. There are many hundreds of thousands of dollars worth of goods stored in the said warehouse. In the natural course of events these goods will not be withdrawn until January or February, 1924. In the meantime it is necessary that the plant of the company be kept operating and petitioner fears that because of the threats which have been made with respect to the responsibility of the trustees the trustees will not exercise their discretion when required for the best interests of the company, but may well, because of such threats, not having any authority from this court, perform acts which will result in harm and injury to the stockholders.

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11. Petitioner further shows that with respect to the real estate and the disposal thereof, because of the inside information possessed by the said Alfred J. O'Neill Allison, controversies and bickerings with respect to sales are bound to occur, as they have occurred in the past, and because of those controversies and bickerings the trustees may well be driven to perform acts which will not be for the best interests of the stockholders of the company. The experience of the trustees since they took over the control of the company has been such as that it is fair to assume that there will be continual disagreements and the result of that has been that the business of the company for the past few weeks has largely been conducted as the result of and through conferences of counsel.

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12. Your petitioner says that this situation is not for the best interests of the stockholders. The company has a surplus of upwards of \$2,000,000. There are no debts except a bond issue amounting

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Petition for Appointment of Receivers.

10 to approximately \$300,000 and moneys borrowed which have been loaned upon warehouse receipts. The stock is worth upwards of \$450 a share upon conservative estimates, but the business is of such a nature as that, in order to preserve it and realize its best value, it is absolutely necessary that someone be in charge with full and complete power to act and without fear to act and protected by the order of a court.

20 13. For the details with respect to the company's business your petitioner respectfully refers to the files of this court in the suits of "New Jersey Refrigerating Company v. Otto A. Lembeck"; "Gustav W. Lembeck against Otto A. Lembeck" for his removal as trustee; "Aruthur Mc-Aleenan against Otto A. Lembeck."

14. Your petitioner further shows that for the best interests of the company this court should take control of the situation through a receiver or receivers, and therefore prays—

30 1. That the respondents to this petition who are the New Jersey Refrigerating Company, Otto A. Lembeck, Charles Green, Horace Bowen, Gustav W. Lembeck, Thomas Lembeck, George W. Carr and Arthur Betz, answer this petition, but without oath.

2. That this court take over the administration of the affairs of the New Jersey Refrigerating Company, and appoint a receiver or receivers in accordance with the provisions of the statute in such case made and provided.

40 3. That your petitioner may have such other and further relief as may be proper.

Petition for Appointment of Receivers.

4. That a writ of subpoena may issue, commanding the said defendants, to answer this petition and to abide by such decree as this court may make in the premises.

MERRITT LANE.

Solicitor for and of counsel with petitioner. 10

State of New Jersey, }
County of Essex, } ss.:

Thomas Lembeck, of full age, being duly sworn according to law upon his oath deposes and says:

I am one of the trustees of the New Jersey Refrigerating Company. The petitioner, Sarah Lembeck, is my mother. I know that she is the owner, in her own right, of 235 shares of said stock. I have authority to act for her. I have been intimately connected with the affairs of the New Jersey Refrigerating Company since May, 1922. I have attended all of the meetings of the trustees and the conferences of counsel referred to in the petition. I was one of the directors elected at the meeting of May, 1922, and I was likewise elected a director in December 1922. I have been a director of the company since May, 1922. I am familiar with each and every statement made in the foregoing petition and each and every statement is true. 20 30

THOS. A. LEMBECK.

Sworn and subscribed to before me }
this 11th day of June, 1923. }

Elizabeth Coons,
Notary Public of N. J.

Exhibits Annexed to Petition.

EXHIBIT I.

MEMORANDUM OF SETTLEMENT FEBRUARY 8th, 1923, OF THE LEMBECK CONTROVERSIES AGREED TO BY OTTO A. LEMBECK, IDA. L. BOWEN, KATHARINE LEMBECK, GUSTAV W. LEMBECK and THOMAS A. LEMBECK, IN PRESENCE OF THE ATTORNEYS OF THE RESPECTIVE PARTIES—MERRITT LANE, FISK & FISK, JOHN A. BERNHARD and ALBERT C. WALL—KATHARINE LEMBECK, because of the absence of MESSRS. HUDSPETH & DEMAREST, being REPRESENTED on the occasion by MR. ANDERSON, RICHARD LEMBECK and ALBERT LEMBECK, acting *pro se*, and THOMAS A. LEMBECK acting for his mother SARAH E. LEMBECK, and his brother, HARRY LEMBECK.

1: The Board of Directors of NEW JERSEY REFRIGERATING COMPANY to be elected at the annual meetings in May, 1923, and thereafter until May 1929, to be constituted as follows:

Three (3) of the directors to be named by Gustav W. Lembeck.

Three (3) of the directors to be named by Otto A. Lembeck.

The seventh director to be G. ARTHUR BETZ.

The two remaining directors to be JOHN W. HARDENBERGH and a person to be selected by him, preferably a man of unquestioned standing in the community and if possible engaged in the banking business.

In case of the resignation, death or disability of either John W. Hardenbergh or the person whom he may select, to serve with him, the office shall be

Exhibits Annexed to Petition.

filled for the period of this agreement by the survivor of the last two referred to.

2: The officers of the Company to be as follows:

	Salary:	
President:	Otto A. Lembeck	\$15,000.
Vice Presidents:	Gustav W. Lembeck ..	
	Alfred J. O'Neill-Allison	10,000.
		each.
Secretary and		
Treasurer:	G. Arthur Betz	10,000.

Thomas A. Lembeck to perform such duties as may be assigned to him by the Board of Directors of the Company at a salary of \$5,000.

The amounts of these salaries for the respective positions not to be changed prior to the stockholders' meeting in May 1924. The present directors of the Company to be urged to take immediate steps to install the officers (other than those now in office) at the salaries indicated in order that the officers named may enter at once upon their duties.

3: The real estate of the Company not held for company purposes to be turned into cash as rapidly as may be consistent with the realization of good sale prices.

4: That the policy of larger dividends as opposed to building up the surplus be inaugurated insofar as the directors of the Company will authorize the payment of reasonable dividends.

5: The various litigations now pending shall be discontinued without costs, viz:

The suit in Chancery of Gustav W. Lembeck *v.* Otto A. Lembeck for the removal of Otto as a

Exhibits Annexed to Petition.

trustee under the Will of Henry Lembeck, deceased;

The proceedings for the removal of Gustav W. Lembeck as trustee of the same trust;

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The appeal now pending in the Court of Errors and Appeals from the judgment of the Supreme Court in the matter of the purported election of May 16th, 1922.

The suit in Chancery of Reardon *v.* Otto A. Lembeck and New Jersey Refrigerating Company for an accounting.

The suit of McAleenan *v.* Otto A. Lembeck.

The suit in Chancery instituted in the name of New Jersey Refrigerating Company by Merritt Lane against Otto A. Lembeck and others.

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NOTE: The suit of the Company against McAnarney is not affected by this agreement.

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6: A voting trust agreement to be drawn in terms satisfactory to the various counsel referred to above to effectuate so far as may be lawful the matters agreed upon, such voting trust agreement to be effective until July 26th, 1920, (i. e., 25 years from the death of Henry Lembeck) or for the longest term for which said trust may be lawful, not exceeding said day, the voting trustee to beCompany.

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The shares controlled by Gustav W. Lembeck and Otto A. Lembeck as trustees under their father's will, as well as the 255 shares owned by Sarah E. Lembeck, Thomas A. Lembeck and Harry F. Lembeck; all shares owned individually by Otto A. Lembeck and Gustav W. Lembeck, and shares held in trust for Gustav W. Lembeck, and shares of Ida L. Bown and Katharine Lembeck

Exhibits Annexed to Petition.

shall be deposited under the voting trust, the voting trust agreement to provide in terms that any stockholder may avail himself of the advantages thereof and deposit his stock thereunder.

EXHIBIT II.

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MEMORANDUM OF AGREEMENT ARRIVED AT
APRIL 27, 1923, AT THE OFFICE OF HUD-
SPETH & DEMAREST, 75 MONTGOMERY
STREET, JERSEY CITY, N. J.

Present: Alfred J. O'Neill-Allison, representing Otto A. Lembeck, Albert C. Wall, Counsel for Otto A. Lembeck, George J. Carr, representing all the Betz stock; Robert S. Hudspeth and Elmer W. Demarest, representing Katherine I. Lembeck, Emma Lembeck, Richard Lembeck and the Executors of the Will of Mary E. Harms; Richard Lembeck personally, Merritt Lane, representing Gustav W. Lembeck; Gustav W. Lembeck personally; Thomas A. Lembeck; D. Eugene Blankenhorn; J. Fischer Anderson, representing Ida L. Bowen.

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The meeting having been called to discuss plans for liquidating the affairs of the New Jersey Refrigerating Company and dissolving that corporation, it was agreed:

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1. That New Jersey Refrigerating Company is to be dissolved and liquidated under the statute in such case made and provided, and after payment of its debts, its assets divided among the stockholders, and that such action shall be taken by either (a) unanimous consent of all the stockholders all persons present agreeing to sign such consents or (b) by two-thirds stockholders' vote at a special stockholders' meeting, all persons present agreeing to vote in favor thereof.

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Exhibits Annexed to Petition.

10 2. A special meeting of the Board of Directors is to be called, in writing, by Otto A. Lembeck, President, for the purpose of passing a resolution declaring it advisable in the judgment of the Board of Directors that the company be dissolved, and to pass such other resolutions as may be necessary to complete the plan hereinafter outlined.

3. The annual meeting of the stockholders taking place in May, 1923, is to be called and adjourned to the date of such special stockholders' meeting, unless unanimous consent of the stockholders is obtained to dissolution, in which event the annual meeting of the stockholders will be held at the time fixed by the by-laws.

20 4. At the adjourned annual meeting, a Board of Seven Directors is to be elected consisting of Gustav W. Lembeck and Thomas A. Lembeck, representing the Gustav W. Lembeck faction; and George J. Carr and G. Arthur Betz, representing the Betz faction, and Otto A. Lembeck and Charles Green and Dr. Horace Bowen, representing the Otto A. Lembeck faction; and that upon the death, disability, absence or refusal to serve of a member of any faction, the Directors and any office made
30 vacant, and at the salary previously paid, the person selected by the surviving director representing the faction formerly represented by the deceased director, the numerical representation of each faction not to exceed the number allotted above; such representation is to continue throughout the dissolution and liquidation of the company's affairs.

40 5. The Board of Directors elected at the ad-

Exhibits Annexed to Petition.

journed annual meeting is to elect the following officers:

Otto A. Lembeck,	President.	
G. Arthur Betz,	First Vice Pres't and Treas.	
Gustav W. Lembeck,	Second Vice President.	
George J. Carr,	Secretary.	10

6. Salaries are to be as follows:

(a) Otto A. Lembeck faction, \$19,000 per annum; \$12,000 to cover compensation to Otto as President and Director or Trustee; \$7,000 to cover compensation to Charles Green and Horace Bowen for attendance at Directors' meetings or attendance at meetings of Trustees on dissolution and to cover compensation to Alfred J. O'Neill-Allison for any service he may render to the company or to the Board of Directors or to the Trustees on dissolution, the \$12,000 to be paid out to Otto A. Lembeck and \$7,000 to his nominees in writing as he may from time to time designate, limited, however, at present to Otto A. Lembeck, Charles Green, Dr. Horace Bowen and A. J. O'Neill-Allison, such compensation to Alfred J. O'Neill-Allison is not to include any services rendered by him individually, or by the Hudson Real Estate Company, in writing insurance, collection of rents or sale of real estate. 20

(b) The Betz faction, \$16,000, viz., at present, \$9,000 per annum to G. Arthur Betz, First Vice-President and Treasurer; \$7,000 per annum to George J. Carr, Secretary. 30

(c) The Gustav W. Lembeck faction; \$10,500, viz., at present, \$7,000 per annum to Gustav W. Lembeck, Second Vice-President and Trustee, and 40

Exhibits Annexed to Petition.

\$3,500 per annum to Thomas A. Lembeck as Trustee.

10 All such salaries to be for the period of liquidation only, and as the liquidation of the company's affairs continues and as the services required decrease in amount and nature, salaries to be reduced ratably in accordance to the proportions between the above amounts, such reduction to be fixed by the Board of Directors or the Trustees on Dissolution and if any successor to any officer or director be elected then so far as compensation is concerned, he to take the place of the person succeeded.

20 7. The matter of signing the company's checks is to be fixed by resolution of the Board of Directors or Trustees on Dissolution, provided, however, that not less than two signatures shall be required, and provided further that no two representatives of any faction shall be permitted to sign checks in concert.

30 8. The company's by-laws are to be amended so as to eliminate any executive committee; to change the number of directors to seven; to fix a majority of the Board of Directors as a quorum; to have monthly directors' meetings; and to have special directors' meetings called by any two directors at any time upon two days' written notice.

40 9. Service of the Superintendent of Plant, Rogers, are to be retained if agreeable to him, by a two years' contract, salary to be fixed by the Board of Directors or Trustees on dissolution, such contract to contain a provision that if the company's refrigerating business and plant are sold and if the purchaser takes Rogers with the plant, the contract terminates. Otherwise the contract is to be carried out by the company.

Exhibits Annexed to Petition.

10. Gustav W. Lembeck and Otto A. Lembeck, Trustees of the Will of Henry Lembeck, deceased, before the special stockholders' meeting are to apply to Vice Chancellor Church upon written petition for an order directed to the beneficiaries under the Henry Lembeck will, having rights or interest in the trusteed stock of the New Jersey Refrigerating Company, to show cause why the trustees should not be directed to sign a consent to a voluntary dissolution or to vote in favor of such dissolution at such special stockholders' meeting. The following litigations are to be disposed of as follows: 10

a. The suit pending in the Court of Chancery (referred to Vice Chancellor Lewis) by Matthew J. Reardon, against Otto A. Lembeck and Alfred J. O'Neill-Allison, is to be discontinued upon the filing of the consent to dissolution. 20

b. The appeal pending in the Court of Errors and Appeals, in the contested corporation election suit, instituted in the New Jersey Supreme Court, is to be discontinued subject to the reservations made by all counsel as to the claimed counsel fees mentioned below, when consent to liquidation is filed. 30

c. The Court of Chancery is to retain jurisdiction of the administration of the estate of Henry Lembeck in the suit of Gustav W. Lembeck et al. v. Otto A. Lembeck, provided, however, that the application and attempt of the complainants in that suit to have Otto S. Lembeck removed as Trustee under the Lembeck will and the application and attempt of Otto A. Lembeck and others to have Gustav W. Lembeck removed as Trustee under the Lembeck will are to be discontinued and are not to 40

Exhibits Annexed to Petition.

be hereafter prosecuted, this stipulation being subject to the reservation of claimed counsel fees of counsel mentioned below.

10 d. The suit in chancery, New Jersey Refrigerating Company complaint, vs. Otto A. Lembeck, Alfred J. O'Neill-Allison and James Dodds, is not to be moved except that Mr. Lane may renew his application to the Vice Chancellor Church for additional compensation for Gustav W. Lembeck and Thomas A. Lembeck as trustees in that suit, with the privilege in the other Trustees to make similar application and without waiving the right of appeal for the allowance by the court of any such additional compensation.

20 11. At the meeting at which this agreement was reached, Mr. Merritt Lane and Mr. Demarest notified all persons present that they reserved his rights if any to apply for counsel fees in the following matter: (a) On the appeal pending in the Court of Errors and Appeals from the decision of the Supreme Court in the contested corporation election case. (b) In the suit of Gustav W. Lembeck, et
30 als., vs. Otto A. Lembeck in the Court of Chancery and in the combined suit of certain of the beneficiaries under the will of Henry Lembeck deceased, to have Gustav W. Lembeck removed as trustee, instituted in the Hudson County Orphans Court and taken over by the Court of Chancery and in the Reardon suit in the said Court of Chancery and in the event of such application and allowance, all other counsel involved in such suits (a) and (b) are to have the same privilege.

40 12. Mr. Wall then stated that his presence at the meeting did not mean that he agreed on behalf of

Exhibits Annexed to Petition.

Otto A. Lembeck to the terms above set out, but that Mr. Allison was there representing Otto A. Lembeck.

This agreement is to be void and of no effect unless the consents to dissolution are given and filed as herein provided.

10

Signed MERRITT LANE
 G. W. LEMBECK
 T. A. LEMBECK
 R. S. HUDSPETH
 ELMER W. DEMAREST
 J. FISHER ANDERSON
 D. EUGENE BLANKENHORN
 GEORGE J. CARR
 OTTO A. LEMBECK
 by ALFRED J. O'NEILL-ALLISON,
 Attorney,
 ALFRED J. O'NEILL-ALLISON
 RICHARD LEMBECK

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EXHIBIT III.

AMENDED BY-LAWS

OF

NEW JERSEY REFRIGERATING COMPANY.

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ARTICLE 1.—Stockholders' Meeting.

Sec 1.—The annual meeting of the New Jersey Refrigerating Company shall be held at the Company's office in Jersey City, New Jersey, on the third Tuesday in May at twelve o'clock noon.

Sec. 2.—Special meetings of the Stockholders may be called at any time by the President, or in his absence, by the First Vice President, and may be called by two or more Directors and shall be

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Exhibits Annexed to Petition.

called on the application of five or more stockholders.

10 Sec. 3.—A majority of the stock qualified to vote issued and outstanding represented by the holders thereof, in person or by proxy, shall be a quorum at all meetings of the stockholders.

Sec. 4.—Notice in writing of every meeting of the Stockholders shall be given to each Stockholder in person or by mail at least five days previous to the time for holding the meeting. Notices of special meetings shall state briefly the object for which the meeting is called, but all the stockholders may, in writing, waive notice of any meeting.

20 Sec. 5.—Stockholders may vote in person or by proxy duly constituted in writing and each stockholder shall be entitled to one vote for each share of stock standing in his name.

ARTICLE 2.—Inspectors of Election.

Sec. 1.—Before the election of Directors, two inspectors of election, who are not stockholders or candidates for Directors, shall be elected by the stockholders.

30 ARTICLE 3.—Number and Meeting of Directors and Election of Officers.

Sec. 1.—The Board shall consist of seven directors, and each Director shall hold at least one share of the Capital Stock of the Company to qualify him to be a Director. The Directors shall be chosen by ballot by the Stockholders at the annual meeting, and the person receiving the greatest
40 number of votes shall be the directors.

Sec. 2.—The Directors elected at any meeting of

Exhibits Annexed to Petition.

the Stockholders shall meet at the principal office of the corporation in New Jersey on the day of their election, directly after the meeting of the Stockholders and at that meeting of the Directors, the Directors shall elect a President, First Vice President, Second Vice President, Treasurer and Secretary, which officers shall hold their respective offices until the next annual meeting of the Stockholders or until others are chosen in their place, unless removed by death, or resignation.

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ARTICLE 4.—Meetings of the Board of Directors.

Sec. 1.—Regular meetings of the Board of Directors shall be held without notice at the principal office of the Company in Jersey City on the third Tuesday of each month at 9.30 o'clock a. m., or at such other times and places in New Jersey as the Directors may agree upon or may designate by a vote of the Board, and whenever called together by the President, First Vice President, or any two Directors, it shall be the duty of the Secretary to send notices to each Director of all called meetings. At all meetings of the Directors, a majority of the Directors shall constitute a quorum.

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ARTICLE 5.—Powers of the Board of Directors.

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Sec. 1.—The ultimate decision and entire control of all the business of the Company shall be and is vested in the Board of Directors, and it is hereby declared that all the authority exercised by the several officers and agents of the company is derived from the Board of Directors and such Board shall have power to fix the amount of working capital.

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Exhibits Annexed to Petition.

ARTICLE 6.—The President.

10 Sec. 1.—The duties of the President shall be to preside at all meetings of the Stockholders and of the Board of Directors and to take and exercise a general supervision of the business of the Company, and to examine, when he shall deem it expedient, the books, and operations of the Company.

20 Sec. 2.—The President shall also make such reports from time to time as to the affairs of the company as the Board of Directors shall reasonably require and shall especially make a correct and detailed report at each annual meeting of the stockholders, exhibiting the affairs and business of the company up to the first day of January preceding such annual meeting.

ARTICLE 7.—The First Vice President.

Sec. 1.—The First Vice President shall exercise the powers and functions of the President in case of the absence or disability of the President to act until the election of a new president and not otherwise.

30 ARTICLE 8.—The Secretary.

40 Sec. 1.—The Secretary shall make and keep a true record of all the votes, acts and proceedings at the meeting of the Stockholders of the Corporation and of the Board of Directors, and except in his absence or disability, shall give all notices required to be given Stockholders or Directors, and shall turn over to his successor in office, all books, papers and other property belonging to the company in his possession.

Exhibits Annexed to Petition.

Sec. 2.—In case of the disability or absence of the Secretary, it shall be the duty of one of the other officers of the Company, upon the request of the President or two of the Directors, to send notices of every meeting of stockholders or Directors called by the President or two Directors.

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Sec. 3.—In case the Secretary, or any of the other officers shall not send said notices upon request of the President or two Directors, the President or any two Directors may send the same.

Sec. 4.—In case of the absence or disability of the Secretary, the Treasurer shall be assistant Secretary and have the powers and perform the duties of the Secretary.

ARTICLE 9.—The Treasurer.

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Sec. 1.—The Treasurer shall act as Cashier of the Company and shall receive or cause to be received all cash, drafts, bills of exchange, notes, etc., and shall keep or cause to be kept an accurate account thereof, and shall endorse for deposit or cause to be endorsed for deposit the same in a bank or banks designated by the Board of Directors in the name of the company, and shall keep or cause to be kept a full and accurate account of all the disbursements of the company. He shall give a bond at the expense of the company in the sum of not less than Ten Thousand Dollars for the faithful performance of his duties as Treasurer, and shall turn over to his successor in office, all funds, books, papers and other property belonging to the company in his possession.

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Sec. 2.—In case of the absence or disability of the Treasurer, the Secretary shall be Assistant

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Exhibits Annexed to Petition.

Treasurer and have the powers and may perform the duties of the Treasurer.

ARTICLE 10.—Stock Certificate.

10 Sec. 1.—Each certificate of stock of this Corporation shall be signed by the President or First Vice-President and Countersigned by the Treasurer or Secretary, and shall be transferred only on the books of the Company in person or by attorney, duly authorized in writing, on the surrender of the old certificate. Such writing shall be lodged with or kept on file by the Treasurer or Secretary who shall cancel the surrendered certificate before countersigning the new certificate.

ARTICLE 11.—Seal.

20 Sec. 1.—A seal with the words, "New Jersey Refrigerating Company, Jersey City, N. J.," with the figure of an eagle thereon, is hereby established as the Common Corporate Seal of the Company, which shall be in the custody of the Secretary.

ARTICLE 12.—Amendments.

30 Sec. 1.—These by-laws may be amended at any annual or special meeting of the stockholders, at which a majority of the stockholders is represented in person or by proxy.

Exhibits Annexed to Petition.

EXHIBIT IV.

HUDSPETH & DEMAREST

Law Offices
 75 Montgomery Street
 Jersey City, N. J. 10
 Jersey City, N. J.

June 4th, 1923.

Otto A. Lembeck, Esq.,
 c/o N. J. Refrigerating Co.,
 173 Ninth Street,
 Jersey City, N. J.

Dear Mr. Lembeck:

I wrote you May 29th last regarding the filing of 20
 the consent of the stockholders to the dissolution
 of the above Company and the effect thereof.
 Since then I have been considering with Mr. Dem-
 arest very carefully, one or two propositions
 growing out of this alleged dissolution which ma-
 terially concerns the actions of the so-called of-
 ficers and of the directors of the corporation. If,
 by the filing of the consent of the stockholders the
 dissolution is effective, under the statute the cor-
 poration cannot continue its business after such 30
 dissolution. It is only kept alive for the purpose
 of prosecuting and defending suits by or against
 it, and of enabling it to settle and close its affairs
 and to dispose of and convey its property and to
 divide its capital (The medium to be employed in
 these transactions is the directors as hereinafter
 stated). The directors, not the officers and di-
 rectors, are expressly constituted trustees to set- 40
 tle the affairs of the company, sell and convey its
 property, etc. etc. which they may do in the cor-

Exhibits Annexed to Petition.

10 porate name of the Company, but such matters are not to be done by the Corporation through its officers. The directors may sue for and recover the debts and property of the Company either in its name or in their names or individual capacities, and the directors, as such trustees, are liable in their own names or individual capacities for the debts owing by such corporation and shall be responsible for the same to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees.

20 Now this means, if it means anything, that you cannot continue carrying on the business of the corporation; you cannot use the moneys coming from the liquidation of the corporation in and about the business of the company as a going concern as it belongs to the creditors and stockholders. If such moneys are deposited in the name of the corporation, they are a trust fund for the purpose of paying the creditors and for distribution amongst stockholders. I should be very fearful, as an officer, or an alleged officer, of a corporation in process of liquidation, of signing any checks in the name of the corporation as such officers to be used in and about the business of the corporation as a going concern, and should also be very fearful of contracting any debt or liability for the same purpose.

30 You may remember that the main ground urged for the dissolution of this corporation was that it appeared to be losing money in its business. Now, if this should continue to be the case and the officers of the corporation continue to carry on its business and use the moneys derived from the liquidation for the business purposes of the cor-
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Exhibits Annexed to Petition.

poration as a going concern and should there be a deficiency, the creditors and stockholders could claim that those responsible for the use of such moneys should be liable to respond for the same.

Again, for illustration, should the business be continued and the officers and directors of the Company make a long term contract with Rogers, as superintendent or manager, as I recall it was proposed to do, then there would arise the personal liability of the officers and directors entering into this contract, should it not be carried out. Then, there is the question of the rights of the bondholders. While there is a mortgage covering definite property, yet there is the liability of the corporation upon its bonds. Just what these bondholders can or could do should this business be continued, and a considerable loss entailed, I am not now going to determine, but it does seem to me that some provision should be made to secure the payment of this bonded debt, so as to avoid any question arising between the officers and directors and the bondholders.

Now, these are a few of the objections appearing to me at this time in connection with the carrying on of the business of the corporation, after the filing of this consent to dissolve. They are sufficient in my mind to cause the officers and directors to hesitate in going ahead as they are in carrying on this business. Furthermore, there is another question where the corporation is in process of liquidation and the corporation is inhibited from carrying on its business, whether the directors can fix salaries of officers and the officers draw such salaries so fixed during the period of liquidation. In other words, can the trustees expressly charged

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Order to Show Cause.

10 with the liquidation of the business, fix their own compensation? I think it would be wise for the officers and directors of the corporation to hold a conference with the various attorneys interested and try and reach some definite program where liability on the part of the so-called officers and of the directors of the Company can be reduced to the minimum.

I am,

Very truly yours,

R. S. HUDSPETH

RSH/MM

Endorsed:

20 Filed June 11/23.

A. CHURCH,
V. C.

Order to Show Cause.

(Served June 11th, 1923.)

IN CHANCERY OF NEW JERSEY.

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In the Matter
of the
DISSOLUTION OF THE NEW JERSEY
REFRIGERATING COMPANY,

On Petition, &c.
Order to show
Cause.

This matter being opened to the court by Merritt Lane, of counsel with the petitioner;

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It is, on this 11th day of June, 1923,

ORDERED, that the respondents, New Jersey

Order to Show Cause.

Refrigerating Company, Otto A. Lembeck, Charles Greene, Horace Bowen, Gustave W. Lembeck, Thomas Lembeck, George W. Carr and Arthur Betz show cause before the Chancellor, at Chancery Chambers, in the City of Newark, on Wednesday the 13th day of June, 1923, at 4:30 o'clock in the afternoon, or as soon thereafter as counsel can be heard why an order should not be made taking over the administration of the affairs of the New Jersey Refrigerating Company, and why a receiver or receivers should not be appointed in accordance with the provisions of the statute in such cases made and provided, and why the petitioner should not have such other and further relief as may be proper.

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And it is further ordered that a copy of this order, which need not be certified, be served upon the said respondents either personally or by leaving at their usual place of abode within one day of the date hereof.

20

Respectfully advised,

ALONZO CHURCH

E. R. WALKER

V. C.

C.

Endorsed:

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Filed June 11, 1923.

A. CHURCH,

V. C.

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Answer of O. A. Lembeck.

(Served June 13, 1923.)

IN CHANCERY OF NEW JERSEY.

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In the Matter
of
The Dissolution of THE NEW
JERSEY REFRIGERATING COMPANY.

On Petition, &c.

Answer of Otto A.
Lembeck to Peti-
tion for Receiver.

OTTO A. LEMBECK, one of the defendants
named in said petition, answering says:

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1. He admits the substantial accuracy of para-
graphs 1 and 2 of the petition.

2. Answering paragraph 3, this Defendant an-
nexes hereto a copy of the decision of the Supreme
Court of the State of New Jersey, which describes
the acts referred to in said paragraph.

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Defendant admits the appointment of four trus-
tees by the Chancellor and that a new election was
held after the Supreme Court proceeding and in
December, 1922, the business of the company was
turned over to the directors elected at said meeting
and conducted by them until the annual meeting
in May, 1923.

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3. Defendant admits the institution of the suit
mentioned in said paragraph, filing of the counter-
claim, the intervention of the beneficiaries and
that Defendant insisted that in fact an agreement
of settlement was made about the Eighth day of
February, 1923, substantially in the form of Ex-
hibit "1" annexed to the petition, and this Defend-

Answer of O. A. Lembeck.

ant begs leave to produce before this court the correspondence and documents which passed between his counsel Albert C. Wall, and Merritt Lane, as counsel for the interests represented by Gustav W. Lembeck and his faction. This Defendant says that the said Gustav by his counsel repudiated the agreement made on February 8th, 1923, and that it was not until George J. Carr, of counsel with the Betz interests had expressed his dissatisfaction with the settlement of February 8th in respect of the share of the Betz interests in the advantages of said agreement that the said Lane made any contention that an agreement of settlement was in fact not arrived at. After the draft of the agreement of February 8th was forwarded to the said Lane on February 16th, no answer or acknowledgment having been received from the said Lane, this Defendant's counsel on March 7th spoke to the said Lane about the matter in the Court of Errors' room at Trenton, and requested a reply. Later, on March 12th, Defendant's counsel wrote to the said Lane asking for a prompt response, whereupon on March 15th the said Lane replied changing the form of memorandum of settlement and the form of proposed voting trust agreement. The draft of the memorandum of settlement made by the said Lane contained the following heading:

"MEMORANDUM OF SETTLEMENT
FEBRUARY 8TH, 1923, OF THE LEMBECK
CONTROVERSIES AGREED TO BY OTTO
A. LEMBECK, IDA L. BOWEN, KATH-
ARINE LEMBECK, GUSTAV W. LEMBECK
and THOMAS A. LEMBECK, IN PRESENCE
OF THE ATTORNEYS OF THE RESPEC-

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Answer of O. A. Lembeck.

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TIVE PARTIES—MERRITT LANE, FISK & FISK, JOHN A. BERNHARD and ALBERT C. WALL—KATHARINE LEMBECK, because of the absence of MESSRS. HUDSPETH & DEMAREST, being represented on the occasion by MR. ANDERSON, RICHARD LEMBECK and ALBERT LEMBECK acting *pro se*, and THOMAS A. LEMBECK, acting for his mother SARAH E. LEMBECK, and his brother HARRY LEMBECK.”

On March 21st the said Lane wrote to the Defendant's counsel a letter containing the following statement:

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“You are quite mistaken that any agreement of settlement was made upon the 8th day of February, 1923, or at any other time except in matter of principle.”

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In said settlement of February 8th the petitioner SARAH E. LEMBECK, was represented by Thomas A. Lembeck, her son, and if there was any unfairness to the independent interests in the Company, or towards the Betz interests, the said Lane either did not perceive it at the time, or was silent concerning it.

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4. It is true as alleged in paragraph 5 of the petition that an agreement to dissolve the corporation was made, and that a copy of the same is annexed to the petition and marked Exhibit “2.” Petitioner was represented in said agreement by her son. The agreement covers the agreements of the parties in respect of the dissolution and does not assume to cover proposals. The proposals mentioned in paragraph 5 of the petition are, therefore,

Answer of O. A. Lembeck.

denied, except as they were adopted by the parties in the agreement annexed to the petition.

5. Defendant admits that the consent to the dissolution was signed by substantially all the stockholders, and that substantially all of the stock was represented at the annual meeting in May, 1923, and also that the by-laws were adopted as set forth in the petition, and directors elected, and the board organized and the officers elected and salaries fixed in accordance with the provisions of the agreement, and further, that the directors and officers have been conducting the business of the company to the present time. 10

6. The consent to the dissolution signed by substantially all the stockholders was filed with the Secretary of State on the 24th day of May, 1923, and publication thereof was begun on the 31st day of said May. This Defendant did not refuse to sign checks and warehouse receipts, but on the contrary signed a number of each, but this Defendant was advised, and verily believed, that the certificate of dissolution having been issued by the Secretary of State upon the filing of the consent, and this Defendant thereby becoming a Trustee in dissolution, he was not empowered to take in new business in the sense of making loans on commodities stored with the Company after the date of the issuance of the certificate of dissolution. It was not until June 4th that this Defendant was advised of this limitation upon his powers. This Defendant is quite ready as a Trustee to borrow moneys for the purposes referred to provided that the authority to borrow is conferred by this court on the Trustees. This Defendant never refused to carry on the business of the Company. 20 30 40

Answer of O. A. Lembeck.

7. This Defendant denies the allegations of paragraph 8 of the petition.

10 8. Alfred J. O'Neill-Allison has been present at meetings of the Trustees and it is true that on the 4th of June, 1923, it was voted, four to three, that all persons present be requested to leave the room, other than the officers, directors and the stenographer. Thereupon the said Allison asked the said Gustav W. Lembeck to request the said Allison to leave the room, and the said Gustav made no response, nor did any one ask the said Allison to leave the room on that occasion. His participation in matters having to do with matters pertaining to the real estate of the Company was highly beneficial, because he has had knowledge of the real estate and took care of it for over twenty (20) years. There is no friction between the Trustees on this score. The discussion at the meeting in question had to do with the McAnarney suit, and had nothing to do with the real estate matters. The statement that this Defendant has stated that he would not be governed by the act of the majority of the Trustees is inaccurate. He is advised that by law the acts of the majority of the Trustees are valid. This Defendant's position is that when he does not wish to follow the action of the majority he will dissent and if he considers his duty to the trust requires that he should not sign papers, such a decision will in no way affect the power of the majority to act, and indeed the by-laws adopted are ample to give the directors power to designate some one else to act in his stead. The statement as to the transaction concerning a proposed sale for \$31,500 is inaccurate. Several days previous to the case referred to in the said paragraph an offer had been

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Answer of O. A. Lembeck.

made to the Hudson Real Estate Company for the property in the sum of \$32,000, and it was to that offer which reference was made when the other Trustees desired to sell for \$31,500. The allegation that by this Defendant's taking the position that he would dissent from acts of his fellow trustees which he considered unlawful or wrong he has thereby filled the other Trustees with trepidation is absurd. The attacks in all these series of litigation have come from Gustav since his attempt to control the meeting of the corporation on May 16th, 1922. It is untrue that the letter of Hudspeth & Demarest has made the position of the Trustees difficult.

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9. The necessities for the operation of the plant are simply that the plant should be operated in the interest of the goods which are now in storage; that so soon as the cost of operation by reason of withdrawals becomes inordinate in comparison with the storage dues operation should entirely stop.

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10. It is untrue that any inside information possessed by Allison is the cause of any controversies, or will be the cause of controversies. His inside information consists of experience in respect of the realty of the Company, and he was agreed upon by all parties to advise the Board of Directors, as set forth in Exhibit "2." The disagreements need in no way affect the transaction of the business.

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11. The present Trustees would, if appointed as such by the Court, and so made specifically subject to the provisions of the General Corporation Act, have all the powers that were necessary for the winding up of the Company in the interest of its stockholders and creditors.

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Answer of O. A. Lembeck.

12. This Defendant denies the allegations of paragraph 14 of the petition.

10 And this Defendant further answering says that the petition of Sarah Lembeck is not filed in good faith. Sarah Lembeck is the sister of Thomas W. McAnarney, against whom for several years the Company has been carrying on a law suit for the purpose of obtaining possession of some property at Watkins, New York, which the said McAnarney bought from the Company at an inadequate price while he was a Director, and thereafter he caused the property to be insured for a large sum, and the imposition he had practiced upon the Company was called to its attention when the Company learned of the amount of insurance that the said
20 McAnarney had placed upon the property, as compared with the price which he had informed his fellow directors the property was worth. Such proceedings were had that the United States District Court for the Northern District of New York ordered, in the early part of the year 1923, that the contract between the said McAnarney and the Company be rescinded and that he account to the Company for all the money that he had collected as profits through the use of said property since it
30 had been turned over to him, and that the Company refund to him the price that the said McAnarney had paid. His desire is to settle the said case, and he has taken an appeal to the United States Circuit Court of Appeals. Thomas A. Lembeck, the son of Sarah Lembeck, testified in the proceeding in the Supreme Court to investigate the election of May 16, 1922, that in the controversy between the Company and the said McAnarney he, the said Thomas,
40 was on the side of his uncle. On page 580 of the

Answer of O. A. Lembeck.

printed book in that case are the following question, and his answer:

“Q. And you are on his side in that controversy, aren’t you? A. Naturally.”

This Defendant prays that pursuant to Section 66 of the General Corporation Act of New Jersey, Revision of 1896, this Honorable Court appoint the persons agreed upon pursuant to the terms of Exhibit “2” as the Trustees in dissolution under the provisions of said statute.

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WALL, HAIGHT, CAREY & HARTPENCE,

By ALBERT C. WALL,

Of Counsel with Defendant

Otto A. Lembeck.

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State of New Jersey, }
County of Hudson, } ss.:

Otto A. Lembeck, of full age, being duly sworn upon his oath deposes and says:

I have read the foregoing answer. The allegations therein are true, and I offer the said Answer by way of affidavit on the order to show cause made herein on the 11th day of June, 1923.

OTTO A. LEMBECK.

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Sworn and subscribed to before }
me this 13th day of June, 1923. }

Grover J. Carey,
Notary Public of N. J.

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**Opinion of New Jersey Supreme Court,
Rendered December 9th, 1922, in the In-
vestigation by the Court of the Pur-
ported Election of Directors Held May
16th, 1922.**

NEW JERSEY SUPREME COURT,

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In the Matter
of the
Purported Election of Directors
of NEW JERSEY REFRIGERATING
Co.

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Argued November Term, 1922.

Before Justices BERGEN and MINTURN.
HUDSPETH & DEMAREST,
SHIRLEY N. CARR,
WALL, HAIGHT, CAREY & HARTPENCE,
FISK & FISK,

For Petitioner.

MERRITT LANE, *Contra.*

Per Curiam.

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This is an application to have an election for Directors of New Jersey Refrigerating Company, held on May 16, 1922, set aside and a new election ordered as authorized by Section 42 of the Corporation Act of this State. The outstanding stock of the corporation is divided into 6,400 shares, of which 2,279 are held by what is called in this proceeding the "Betz interest," standing in the name

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Opinion of New Jersey Supreme Court.

of George A. Betz and Eleanor B. Howe. 2,636 shares held by Gustave W. Lembeck and Otto A. Lembeck as trustees under the will of Henry Lembeck, deceased, and the residue by divers other persons, so that the Betz and Lembeck interest together held a great majority of the stock. At the stockholders meeting, May 16, 1922, the Betz interest was not represented, and the Lembeck stock was voted by Gustave W. Lembeck in favor of his election as a director against the protest of the other trustee who refused to join with Gustave in putting through a scheme of his to give him the control of the company. It is quite apparent from the testimony that Gustave was not a fit and proper person to be entrusted with the management of the company, although the stockholders had the right to trust him if they saw fit.

We are satisfied by the testimony that Gustave W. Lembeck, designing to obtain control of the company from whose management he had been deposed for improper conduct, entered into an arrangement with some of the smaller stockholders, not exceeding the holders of 810 shares, to accomplish that purpose against the wishes of the majority interests in the stock. His first step was to secure, if possible, the support of the Betz interest; this was refused. He then told such holders that he had control of the Lembeck interest which was large enough to outvote the Betz interest, and knowing that to be the fact, the Betz interest did not attend the meeting of the stockholders. It was not true that Gustave controlled that interest, because the voting power was in the hands of two trustees, Gustave and Otto A. Lembeck, and they did not agree on the persons to be voted for as

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Opinion of New Jersey Supreme Court.

directors at the election, and this Gustave knew when he made the untrue representation.

10 At the election the inspectors reported that 3,704 shares had been voted for the persons favored by Gustave, but this included the Lembeck stock voted by Gustave against the protest of the other trustee, and was not legally voted.

20 If the Lembeck stock, 2,636 shares, be eliminated, only about one-sixth of the stock was voted, and some of that was of doubtful legality. It is argued that if the Lembeck stock unlawfully voted, be eliminated, still the other shares voted would be sufficient to elect and, therefore, the election should not be set aside. Other objections to the validity of the election are argued, but it is not necessary to pass on them as we think the election should be set aside and a new election ordered. This record plainly shows that the election was so conducted as to indicate a purpose, carried out, to override the wishes of a majority of the stockholders and the result, as proclaimed by the inspectors, was contrary to the wishes of a majority of the stockholders and beneficiaries under the Lembeck trust, and if allowed to stand will permit an insignificant minority to control the
30 great corporation with an opportunity to Gustave to repeat his former misconduct to its injury.

This application is based on Section 42 of our Act relating to corporations, C. S. 1624, which provides that upon the application of any person who may be aggrieved by "any election, or any proceeding, act or matter touching same," the Supreme Court shall proceed, and in a summary way, hear the affidavits and allegations of the
40 parties, or otherwise inquire into the matter or

Opinion of New Jersey Supreme Court.

causes of complaint, and thereupon establish the election, or order a new election, or make any such order, and give such relief in the premises as right and justice may require. This Mr. Justice Pitney, in speaking for the Court of Errors and Appeals, in *Stratford v. Mallory*, 70 N. J. L., 294, said, "Leaves the Court free to deal with the case, not necessarily in accordance with the strict legal rules, but according to the substantial rights and equities of the matter." We think that the substantial rights and equities of this matter require a new election, because in our opinion the election was the result of unfair methods to accomplish what the majority of the stockholders were opposed to, and were opposed to when the election was held. The election complained of will be set aside and a new election ordered.

A true copy.

ENOCH L. JOHNSON,
Clerk.

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Order Appointing Receivers.
IN CHANCERY OF NEW JERSEY.

10	In the Matter of the DISSOLUTION OF THE NEW JERSEY REFRIGERATING COMPANY,	} On Petition, etc. Order.
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This matter coming on to be heard in the pres-
ence of Merritt Lane, of counsel with the peti-
tioner, Sarah Lembeck, the holder of 235 shares of
the common stock of the New Jersey Refrigerat-
ing Company, George J. Carr, one of the directors
and trustees on dissolution of the New Jersey
20 Refrigerating Company and representing Arthur
Betz, another of such trustees, and the Betz in-
terests owning 2,279 shares of the common stock
of said corporation out of a total stock issued and
outstanding of 6,400, Eugene Blankenhorn, of
counsel with Albert Lembeck, one of the bene-
ficiaries of the estate of Henry Lembeck, deceased,
Albert C. Wall, of counsel with Otto Lembeck, one
of the directors and trustees on dissolution of the
New Jersey Refrigerating Company and one of
30 the trustees of the estate of Henry Lembeck, and
the holder in his own right of 166 shares of the
common stock of said corporation, Elmer W.
Demarest, of counsel with Catherine Lembeck,
one of the beneficiaries of the estate of Henry
Lembeck, deceased, and the holder in her own
right of 65 shares of the common stock of said cor-
poration, and of counsel with Richard Lembeck,
one of the beneficiaries of the estate of Henry

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Order Appointing Receivers.

Lembeck, deceased, and of counsel with Emma Lembeck, the holder in her own right of 37 shares of common stock of said corporation, and of counsel with Charles Green, one of the directors and trustees on dissolution of the New Jersey Refrigerating Company, J. Fisher Anderson, of counsel with Horace Bowen, one of the directors and trustees on dissolution of the New Jersey Refrigerating Company and the holder in his own right of 10 shares of common stock of said corporation and in the personal presence of Gustav W. Lembeck and Thomas Lembeck, two of the directors and trustees on dissolution of the New Jersey Refrigerating Company, the said Gustav W. Lembeck also being a trustee of the estate of Henry Lembeck, which owns 2,636 shares of the common stock of said Corporation and the said Gustav W. Lembeck also being the owner in his own right of 339 shares of common stock of said corporation, and the said Thomas Lembeck, being the owner in his own right of 10 shares of common stock of said corporation, all of the said directors and trustees of said company being represented by counsel or in person, and it appearing to the court that the order of this court made upon the petition of Sarah Lembeck aforesaid has been served as in said order directed and it further appearing to the court that all of the stockholders of said corporation have consented to a dissolution of said corporation and that said consent has been duly filed in the office of the Secretary of State and the certificate of the Secretary of State of the dissolution of said corporation has been duly issued and that since or on about the 23rd day of May, the directors of said corporation as trustees on

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Order Appointing Receivers.

dissolution have been attempting to liquidate the business of said corporation in accordance with the provisions of the statute in such case made and provided and the complainant and the Betz interest urging that this court take over the administration of the dissolution proceedings of said corporation and appoint receivers and the said Albert C. Wall and Hudspeth and Demarest and J. Fisher Anderson for their respective interests urging that this court by order continue the directors as trustees on dissolution and it further appearing to the court by the proceedings herein and by the statement of counsel and of the trustees personally present in open court that since the proceedings taken in dissolution and since the directors have been acting as trustees upon dissolution dissensions have arisen among the directors with respect to the manner in which the liquidation should be conducted to such an extent as that the directors are not functioning as trustees; and it further appearing to the court that by reason of the complexity of the business of said corporation and of the divers interests represented upon its board of directors and of the dissensions which have already arisen between the trustees that the directors as trustees cannot function with due regard to the interests of the stockholders of the company and a majority of the trustees either personally or through counsel expressing the opinion that the directors cannot so function and it further appearing to the court that the business of the company is of such a nature and the liquidation must necessarily be of such a nature as that the directors as trustees could not safely properly function without the aid and assistance of orders of this court which would necessitate continuous

Order Appointing Receivers.

applications to this court for relief which would tend to the injury of the interest of the stockholders; and it further appearing to the court upon the whole case that the interests of the stockholders of the company require that this court take control of the liquidation of the affairs of said corporation and that the control so taken be exercised through receivers;

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It is on this 13th day of June, 1923,

ORDERED, that this court take over the administration of the liquidation of the affairs of the New Jersey Refrigerating Company.

And it is further ORDERED that Edward H. Wright and Frank J. Bock be and they are hereby appointed receivers of the New Jersey Refrigerating Company with full and complete power to collect the debts and property due and belonging to the corporation and to prosecute and defend in the name of the corporation or otherwise all suits necessary or proper for the purposes aforesaid and to appoint an agent or agents under them and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business.

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And it is further ORDERED, but not in any wise of the limitations of the powers heretofore granted that the said receivers have power to take into their possession all the property of the said corporation, real, personal and mixed, and of whatever kind and description and wheresoever situate, including the business now conducted by it and all of the lands, buildings, premises and property owned, leased or operated by it and all furniture,

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Order Appointing Receivers.

10 fixtures, materials and supplies, books of account, cash in bank, on deposit and in hand, moneys, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises and all assets of every kind; that the said receivers be and they are hereby authorized immediately to take possession of the same and run, manage and operate the business heretofore conducted by the New Jersey Refrigerating Company, and the premises and property in such manner as will in their judgment produce most satisfactory results; to exercise the authority and franchises of the said New

20 Jersey Refrigerating Company, to preserve and protect its property and business and to protect the title and possession and secure and continue the business of the same; And in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, agents or employees, and to make such payments and disbursements as may be needful and proper, in so doing, the said receivers be and they are hereby authorized to collect rents, profits on any real property,

30 to make proper payments therefrom on account of accruing interest on mortgages, taxes and other necessary charges and also so far as may be needful to pay all current necessities for labor and supplies; the said receivers be and they are hereby authorized and empowered to purchase such additional materials as they in their judgment may deem proper for the said business of the New Jersey Refrigerating Company and to pay there-

40 for; to pay the debts of said corporation, to borrow money on the faith and credit of said corporation,

Order Appointing Receivers.

to execute and deliver bills, notes, warehouse receipts and other negotiable instruments in the name of said corporation, to sell and convey the property of such corporation, to execute and deliver proper deeds of conveyance, bills of sale and other instruments in the name of the corporation; to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property, business and trust hereby reposed in them and likewise to defend all actions instituted against them as receivers or against said corporation and also to appear and have the prosecution and defense of any actions or suits now pending in any court wherein the New Jersey Refrigerating Company is a party.

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And it is further ORDERED that the receivers have power to delegate to such officers or agents as they may select the power hereby conferred upon them of signing bills, notes, warehouse receipts and other negotiable instruments and conveyances of land and bills of sale and other instruments of transfer.

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AND IT IS FURTHER ORDERED that the Receivers employ as counsel J. Henry Harrison, Esquire, with leave to apply to the court for further legal assistance if necessary.

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And it is further ORDERED that the receivers give a joint bond in the sum of Fifty Thousand Dollars, conditioned that they well and truly perform the duties of their office and duly account for all moneys or properties which may come into their hands and abide and perform all things which they shall be directed to do, with sufficient sureties to be approved by Casimiro Scoppettone

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Order Appointing Receivers.

Special Master of this court and to be filed in the office of the clerk of this court, and certified copies of this order endorsed by the solicitors of the complainant shall be evidence of the correctness of this order.

10 And it is further ORDERED that the receivers have leave to apply to this court at any time for such order or instruction as they may desire.

E. R. WALKER,
C.

Respectfully advised,

Alonzo Church,
V. C.

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Notice of Appeal.

(Filed June 16, 1923.)

(Served June 15, 1923.)

IN CHANCERY OF NEW JERSEY.

In the Matter	} On Petition, &c. Notice of Appeal.	10
of the		
DISSOLUTION OF THE NEW JERSEY REFRIGERATING COMPANY, cor- poration.		

TO MERRITT LANE, ESQ., SOLICITOR FOR THE
PETITIONER:

PLEASE TAKE NOTICE that the respondents
Otto A. Lembeck, Charles E. Green and Horace
Bowen, Directors and Trustees of said New Jersey
Refrigerating Company, a corporation, Emma
Lembeck, Ida L. Bowen, Katherine I. Lembeck,
Mary A. Green and Edith M. Ditto, individually,
and as Executrices and Trustees, under the Last
Will and Testament of Mary E. Harms, deceased,
Elizabeth Ocumpaugh and Grace H. Steele, and
Richard Lembeck, beneficiaries under the Trust,
created by the Last Will and Testament of Henry
Lembeck, deceased, do hereby appeal from an
order made herein on the 13th day of June, 1923,
wherein it was ORDERED, that the Court of
Chancery take over the administration of the
liquidation of the affairs of the New Jersey Re-
frigerating Company, a corporation, and appoint-
ing Edward H. Wright and Frank J. Bock, Re-

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Notice of Appeal.

ceivers of the said corporation, with power to act in the place and stead of the directors and trustees of said corporation, and of and from the whole and every part thereof to the Court of Errors and Appeals, in the last resort in all causes.

10 Dated June 15, 1923.

HUDSPETH & DEMAREST,
Solicitors and Counsel
with Appellants.

WALL, HAIGHT, CAREY & HARTPENCE,
per Wall,
Solicitors for and of Counsel with
Otto A. Lembeck, Appellant.

20 FISK & FISK,
Solicitors for and of Counsel
with Horace Bowen.

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

ALBERT C. WALL,
Of Counsel with Appellant
Otto A. Lembeck.

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Petition of Appeal.

(Filed June 16, 1923.)

(Served June 15, 1923.)

COURT OF ERRORS AND APPEALS.

In the Matter	} Petition of Appeal.	10
of the		
DISSOLUTION OF THE NEW JERSEY REFRIGERATING COMPANY, a cor- poration.		

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:	20
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The petition of Otto A. Lembeck, Charles E. Green, and Horace Bowen, Directors and Trus- tees of the New Jersey Refrigerating Company, a corporation, Emma Lembeck, Ida. L. Bowen, Katharine I. Lembeck, Mary A. Green and Edith M. Ditto, individually, and as Executrices and Trustees, under the Last Will and Testament of Mary E. Harms, deceased, Elizabeth Ocumpaugh and Grace H. Steele, beneficiaries under the trust created by the Last Will and Testament of Henry Lembeck, deceased, and <i>cestui que</i> trustent un- der the said Last Will and Testament, respect- fully show, that they find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the 14th day	30
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Petition of Appeal.

of June, in the year 1923, wherein Sarah Lembeck was petitioner, and the New Jersey Refrigerating Company, Otto A. Lembeck were petitioners, and others are respondents, wherein said order appealed from finds that the said Corporation is not functioning through its directors and trustees; that said directors and trustees cannot function with due regard to the interest of the stockholders; that a majority of said directors cannot function; that the business of the Company requires a liquidation which cannot be carried out by the directors and trustees of said Company, and that the interest of the stockholders requires the Court to take control of the liquidation of its affairs as well as those portions thereof as ordered that the Court take over the administration of the liquidation of said Company, appoint Edward H. Wright and Frank J. Bock, Receivers thereof with power to liquidate said Corporation, take charge of its assets, sell the same and execute good and sufficient deeds, conveying title to the lands owned by said Corporation to delegate their powers to agents and such other authority as is given by said order to which order the appellants refer as to form.

And your petitioners humbly appeal from those parts of said order of the Chancellor which find that said Corporation is not functioning through its directors and trustees; that it is necessary that the administration of its liquidation be taken over by said Court of Chancery, and that Receivers be appointed upon the ground that the said Court had no jurisdiction to take said order, that no necessity exists for the making of said order, and

Petition of Appeal.

that the same is erroneous and improvidently made.

Your petitioners, therefore, pray that the said order of the said Chancellor may be in the particulars aforesaid reversed, set aside and from nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

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HUDSPETH & DEMAREST,
Solicitors and of Counsel
with Appellants.

WALL, HAIGHT, CAREY & HARTPENCE,
per Wall,
Solicitors and of Counsel with
Otto A. Lembeck, Appellant.

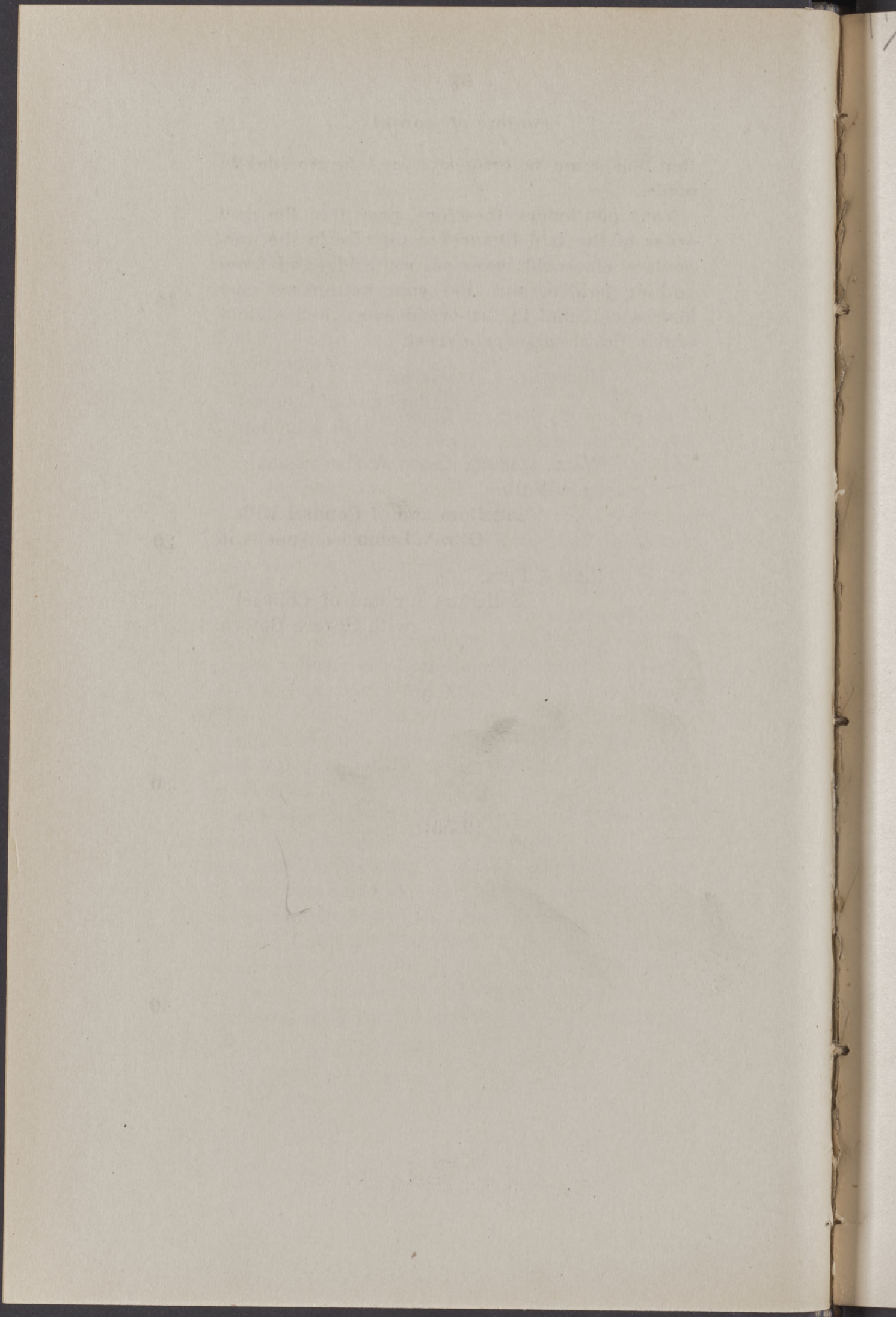
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FISK & FISK,
Solicitors for and of Counsel
with Horace Bowen.

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NEW JERSEY

Court of Errors and Appeals

IN THE MATTER

OF THE

Dissolution of the NEW
JERSEY REFRIGERAT-
ING COMPANY.

On appeal from order of the
Chancellor advised by Vice-
Chancellor Church appoint-
ing receivers of New Jersey
Refrigerating Company.

BRIEF FOR RESPONDENTS.

The appeal is from an order made on June 13, 1923, in the Court of Chancery, directing that the administration of the liquidation of the affairs of the New Jersey Refrigerating Company, a dissolving concern, be taken over by the Court of Chancery and appointing receivers, and granting certain powers to the receivers.

The order is supported by four of the seven directors of the corporation, who became trustees on dissolution, by 3,278 shares of stock out of a total issue of 6,400 shares and by twenty-five individual stockholders out of a total number of forty-two. This is excluding the stock of the estate of Henry Lembeck, which holds 2,636 shares. This stock is held in trust, the trustees being Gustav W. Lembeck and Otto A. Lembeck. Because of disputes between the two trustees it was necessary for the Court of Chancery to take over the administration of that estate

New Jersey State Library

in the case of Gustav W. Lembeck against Otto A. Lembeck, referred to in paragraph 13 of the petition for the appointment of receivers (p. 12). Of the beneficiaries of that trust, at least one-third favored the order. The difficulties between the two trustees of the estate of Henry Lembeck were such as that, at a meeting of the stockholders of the corporation in December, 1922, called after the Supreme Court set aside the election of May, 1922, it was necessary for the Court of Chancery to appoint a master to vote the stock.

The order is opposed by three trustees—Otto A. Lembeck, Horace Bowen, who holds but ten shares of stock of the company, and Charles E. Greene, who holds merely sufficient of the stock of the company to qualify him. It is likewise opposed by approximately two-thirds in interest of the beneficiaries of the Henry Lembeck estate. The number of shares of stock, in opposition to the order, excluding the Henry Lembeck estate stock, is 351. One independent stockholder, holding 100 shares, has not signified her position.

The result is that the order is favored by a majority of the directors or trustees on dissolution, by a vast majority of the capital stock, by every independent stockholder of the company, except one, who has not expressed an opinion. It is favored by the Betz interest, which represents a block of stock of 2,279 shares. The representatives of this stock have no interest in the controversy between the Lembecks and the only desire of that stock is to see to it that the affairs of the company are so conducted as that the most can be made out of it, and the representatives of that stock, two of whom were on the board of directors, reached the conclusion, prior to the making of the application for a receiver and expressed that conclusion to the Vice-

Chancellor at the time that the order was applied for, that, because of the attitude taken by Otto A. Lembeck, one of the trustees and the president of the company, and because of the continuous dissensions between the brothers and the directors, it was impossible to liquidate the affairs of the company through the directors as trustees and that the interests of the creditors and stockholders absolutely required the appointment of receivers, and in that conclusion the representatives of the Betz stock were joined by Gustav W. Lembeck and Thomas A. Lembeck, two of the board of directors, and by the independent interests in the company.

When the Vice-Chancellor made the order, which is appealed from, in effect, he therefore had before him an application made on behalf of the company itself, because, in open court, as indicated by the order, a majority of the trustees favored the application, and in favoring it indicated to the court that the directors could not function and were not, at the time of the application, functioning.

An added significance is given to the intervention of the Betz interest in this, that when the dispute originally started between Gustav and Otto in May, 1922, the Betz interests took the side of Otto, and the Betz interests did this because they did not trust Gustav; as a result, however, of the meeting in May, 1922, and the proceedings which took place thereafter, the Betz interests were placed in such a position as that their representatives got an insight into the business of the company, which they had never had before; two of their representatives from October to November, 1922, were appointees of the court as trustees operating the business of the company under the direction of the court pending the result of the contested election proceedings; at the new election held in December, 1922, two of their representatives were elected upon the board of di-

rectors; the insight which the Betz interests got into the business of the company and the manner in which it was conducted convinced the Betz interests that at least sufficient of the charges made by Gustav were true as to make it necessary, in the interests of the stockholders of the company, that the company be dissolved and their experience upon the board of directors when the members of the board were acting as trustees, after the annual meeting in May, 1923, was such as to lead one of their representatives to announce to the court, upon the application for the order appointing receivers, that he did not desire to be associated as a trustee with Otto A. Lembeck, in view of the conduct of Otto A. Lembeck after the board of directors began to function as a board of trustees upon dissolution.

Much has been made of the fact that the Betz interests switched after they knew that Gustav W. Lembeck and Otto A. Lembeck and those associated with them proposed to enter into an agreement of settlement of the various controversies (Exhibit 1 of the Petition, p. 14). It is true that the Betz interests were dissatisfied with this proposed agreement, and it is likewise true that they were entitled to be so dissatisfied. The agreement is manifestly unfair to the Betz interests and is manifestly unfair to all the independent interests in the company. It is suggested that the idea that this agreement is unfair comes with poor grace from Gustav W. Lembeck because he was a party to it. But the suggestion likewise comes from the Betz interests, who were not parties to it. And with respect to the suggestion coming from Gustav W. Lembeck, the situation which existed at the time it was proposed that this agreement should be made must be kept in mind. At that time the Betz interests were aligned with Otto A. Lembeck and Gustav W. Lembeck, and those associated with him, which included

all of the other independent interests of the company, were in a hopeless minority. Gustav W. Lembeck, therefore, was in the position of being obliged to accept what was dictated to him, unfair as it might be, both to him and to the independent interests of the company.

It is claimed by Otto A. Lembeck that this agreement (Exhibit 1, p. 14) was, in fact, made, though not signed. This is denied by Gustav W. Lembeck. It is wholly immaterial so far as the propriety of the order appealed from is concerned.

Prior to agreeing on the terms of this agreement the Betz interests had concluded that it was for the best interests of the stockholders that the company should be dissolved. This was an entirely new suggestion and it was conceived By Gustav W. Lembeck and those associated with him that the agreement of settlement, which was in treaty, not having been concluded, they were at perfect liberty to entertain the new proposition calling for dissolution.

Otto A. Lembeck took the other view and even went to the extent of threatening that a bill of specific performance of this proposed agreement would be filed. No bill was filed, and no attempt was made to enforce it, but, on the contrary, Otto A. Lembeck finally agreed, with all of the other stockholders of the company, to dissolution.

Prior to the annual meeting of this company in May, 1922, at which the dispute arose which caused the contested election proceeding, the corporation had been operated solely in the interests of the Lembecks as such, and from 1917 to 1922 the business of the company had been controlled by Otto A. Lembeck. The independent stockholders had been excluded from any participation in the affairs of the company. Notwithstanding the provisions of the Lembeck will, which provided for life tenancies, the policy of building up an enormous surplus had been

pursued as against the policy of declaring dividends, to the detriment of the life beneficiaries of the Henry Lembeck trust, of which Otto A. Lembeck was one of the trustees. The officers' salaries had not even been fixed by the board of directors, but were fixed by an executive committee, the appointees of Otto A. Lembeck; neither the stockholders nor the board of directors knew the amount of the salaries of the respective officers. In mandamus proceedings instituted by one of the independent stockholders to compel an inspection of the company's books, Otto A. Lembeck, under examination, declined to disclose what the officers' salaries were, stating that it was against the policy of the company so to do. It was not until the affairs of the company were opened up, by the controversies which arose after the election in May, 1922, that the independent interests of the company, including the Betzs, got an insight into the business of the company, and when they got that insight their eyes were opened, and they became convinced that Gustav W. Lembeck was not, in truth and fact, attempting to subserve his own interests, but was, in truth and fact, attempting to get justice for the independent interests in the company, and it is because of that insight into the business of the company, which the independent interests never before had, that we now find Gustav W. Lembeck and those associated with him and the Betz interests and the other independent interests of the company solidly aligned for the dissolution and against Otto A. Lembeck.

In the contested election proceedings in the Supreme Court and in other proceedings pending in the Court of Chancery in 1922, much was made of the fact that the change of this company from a brewery to a refrigerating company was due to Otto A. Lembeck; that Otto A. Lembeck was the

engineer who made the change; that the business of the company as a refrigerating company had been built up by him; that he was responsible for the condition of the company's business. As a commentary on that, the language of the letter of Hudspeth & Demarest, who, by the way, have at times represented Otto A. Lembeck and who represent Otto A. Lembeck in the suit brought by him against the company, the summons and complaint in which was served on the very day the application to appoint receivers was made, is significant. That firm says (p. 30) :

“You may remember that the main ground urged for the dissolution of this corporation was that it appeared to be losing money in its business. Now, if this should continue to be the case and the officers of the corporation continue to carry on its business and use the moneys derived from the liquidation for the business purposes of the corporation as a going concern and should there be a deficiency, the creditors and stockholders could claim that those responsible for the use of such moneys should be liable to respond for the same.”

There is no suggestion that the loss in the operation of the company's business has been due to the litigation, but it was not until the independent interests of the company received access to the books of the company through the litigation which was commenced in May, 1922, that they were truly acquainted with the financial condition of the company.

The consent of every stockholder of this company to its dissolution has been filed with the Secretary of State and he has issued his certificate of dissolution; the company is in process of dissolution; no one has questioned or can question but that the property of the company must be administered with a view to disposition and distribution among its creditors and stockholders.

The only practical question presented is whether the control of the court over the proceedings in dissolution shall be through independent receivers appointed by the court or through trustees acting under the direction of the court, the majority of whom have certified to the court that the trustees cannot function, and a majority of whom do not desire that the dissolution be so conducted.

No brief has been filed by the appellants, we assume, because of the shortness of time, and we can only anticipate what may be said by the scope of the petition of appeal.

From the petition and the files of the court, referred to in paragraph 13 of the petition, and the statements of counsel for the opposing parties in open court, the following facts appeared before the court when the application for the appointment was made:

FIRST: Since May, 1922, the affairs of the New Jersey Refrigerating Company have been before the Court of Chancery. At the annual meeting held in May, 1922, because of dissensions which had arisen between the two trustees of the estate, the stock of the Henry Lembeck estate was not voted. The result was a contested election proceeding. Gustav W. Lembeck was the leader of one faction

and Otto A. Lembeck the leader of another. Gustav W. Lembeck claimed to have elected his board of directors and Otto A. Lembeck claimed that no board of directors was elected because of the absence of a quorum. Each side attempted to act. In order to protect the business of the company *ad interim*, the parties finally agreed upon the management of the company by four trustees, Gustav W. Lembeck, Thomas A. Lembeck, Otto A. Lembeck and Alfred J. O'Neill Allison. No proceedings having been taken in the Supreme Court in the matter of a contested election, a bill was brought in the Court of Chancery to enjoin the old officers from interfering, and in the meantime to protect the company's business by *ad interim* relief. Upon that bill the Court of Chancery continued the four persons above named as trustees and the business of the company was operated by those four trustees until November, 1922. The Court of Chancery was then obliged to remove Otto A. Lembeck and Alfred J. O'Neill Allison as trustees because of their acts as such, the Court finding that each of them was guilty of contempt of court in concealing from his fellow trustees assets of the company. Subsequently the Supreme Court set aside the claimed election in May, 1922, and ordered a new election. Under the direction of the Court of Chancery a new election was held. In order that the Henry Lembeck estate stock could be voted, the Court of Chancery was obliged to appoint Edward W. Jackson as trustee to vote that stock. At this meeting a board of directors was elected, partly composed of those associated with Otto A. Lembeck, those associated with the Betz interests and those associated with Gustav W. Lembeck. The Betz interests were not represented at the meeting in May, 1922. The business of the company was conducted by this new board of directors until the annual meeting in

May, 1923. During the time between May, 1922, and December, 1922, there were continuous applications to the court for instructions, etc., and the record of the case is voluminous.

SECOND: A bill was filed in the Court of Chancery by Gustav W. Lembeck against Otto A. Lembeck for the removal of Otto A. Lembeck as a trustee of the Henry Lembeck estate. After that bill was filed Katherine I. Lembeck and others, represented by Hudspeth & Demarest, filed a petition in the Orphans' Court asking for the removal of Gustav W. Lembeck. The Court of Chancery was obliged to make an order staying the prosecution of that proceeding and bringing it over into the Court of Chancery, and because of the situation of the Henry Lembeck estate was obliged to make an order taking over the entire administration of the estate into the Court of Chancery, and from the time of the making of that order, which was on the day of , 1923, the Court of Chancery has been in control of the administration of the affairs of the estate. In this suit testimony was taken before the court for days. The side of the petitioner, Gustav W. Lembeck, was fully put in. Whereupon a suggestion of settlement was made.

THIRD: Otto A. Lembeck and Gustav W. Lembeck and those associated with them respectively, negotiated for a settlement, and it was claimed and insisted by Otto A. Lembeck that such an agreement was entered into. It is denied by Gustav W. Lembeck that any such agreement had been consummated. A copy of the agreement is annexed to the proceedings in this cause, and it appears that the agreement is manifestly unfair to the interests of the independent stockholders, including the Betz

interests, which up to that time had been aligned with Otto A. Lembeck, and the agreement appears to have been made in the sole interests of the Lembecks as such. It is apparent that negotiations were then taken up with a view to the dissolution of the company, which resulted in an agreement that the company be dissolved and a consent to dissolution was signed by all of the stockholders of the company. In pursuance of that agreement a meeting of the stockholders was held on May 23, 1923, and directors were elected as follows: G. Arthur Betz, George J. Carr, Otto A. Lembeck, Charles A. Green, Horace Bowen, Gustav W. Lembeck and Thomas A. Lembeck. Three of these directors, to wit, Charles A. Green, Horace Bowen and Otto A. Lembeck, were nominated by Otto A. Lembeck; two of these directors, to wit, G. Arthur Betz and George J. Carr, were nominated by the Betz interests, and two of these directors were nominated by Gustav W. Lembeck, to wit, Gustav W. Lembeck and Thomas A. Lembeck. New by-laws were adopted and under the terms of the agreement directors met and elected Otto A. Lembeck as president; G. Arthur Betz as vice-president and treasurer; George J. Carr as secretary and Gustav W. Lembeck as second vice-president; the salaries were fixed as indicated in said agreement. By the agreement Otto A. Lembeck received for himself and those associated with him \$19,000 a year; Gustav W. Lembeck \$7,000 a year; Thomas A. Lembeck \$3,500 a year; G. Arthur Betz \$9,000 a year; George J. Carr \$7,000 a year. The consent to dissolution was promptly filed upon the 24th day of May, 1923, and publication of the certificate of dissolution issued by the Secretary of State was forthwith commenced. The directors proceeded to administer the affairs of the company as trustees upon dissolution.

FOURTH: The agreement of dissolution and the by-laws adopted by the company indicated that it was the intent of the parties that the business of the company be continued in such a way, to the extent necessary, to realize the most that could be realized for the company's property.

On the 4th day of June, 1923, Hudspeth & Demarest, representing parties to the agreement, wrote a letter to Otto A. Lembeck in which they warned Mr. Lembeck against a continuation of the business of the company, and among other things that letter stated:

"Now, this means, if it means anything, that you cannot continue carrying on the business of the corporation; you cannot use the moneys coming from the liquidation of the corporation in and about the business of the company as a going concern as it belongs to the creditors and stockholders. * * * I should be very fearful, as an officer, or an alleged officer, of the corporation in process of liquidation, of signing any checks in the name of the corporation as such officer, to be used in and about the business of the corporation as a going concern, and should also be very fearful of contracting any debt or liability for the same purpose."

"You may remember that the main ground urged for the dissolution of this corporation was that it appeared to be losing money in its business. Now, if this should continue to be the case and the officers of the corporation continue to carry on its business and use the moneys derived from the liquidation for the business purposes of the corporation as a going concern and should there be a

deficiency, the creditors and stockholders could claim that those responsible for the use of such moneys should be liable to respond for the same."

"Again, for illustration, should the business be continued and the officers and directors of the Company make a long term contract with Rogers, as superintendent or manager, as I recall it was proposed to do, then there would arise the personal liability of the officers and directors entering into this contract, should it not be carried out. * * *"

"Now, these are a few of the objections appearing to me at this time in connection with the carrying on of the business of the corporation, after the filing of this consent to dissolve. They are sufficient in my mind to cause the officers and directors to hesitate in going ahead as they are in carrying on this business."

As a result of this letter Otto A. Lembeck refused to sign warehouse receipts, checks and negotiable instruments. He did this without consultation with his associates and the trustees. There was no opportunity to get a conference of attorneys until forty-eight hours had elapsed. It then appeared, and does now appear, that by reason of the acts of Otto A. Lembeck in refusing to sign checks, warehouse receipts, negotiable instruments, etc., the business of the company as a going concern has been injured with resultant loss to the stockholders. It further appeared that Otto A. Lembeck had insisted that a member of the firm of his personal attorneys represent the company in a proceeding brought against Otto A. Lembeck and Alfred J. O'Neill Allison by one McAnerny, which

suit would be in the interest of the company solely if it were successful. It also appeared that the majority of the trustees were unable to carry out their directions, the said Otto A. Lembeck refusing to recognize their authority. In one instance, Alfred J. O'Neill Allison persisted in remaining at a meeting of the trustees when it was deemed by the majority that he should not, and a vote was carried by four to three to exclude everybody from the room except the trustees and the stenographer. Nevertheless, the said Allison remained and the trustees could not make their orders effective. It also appeared that Otto A. Lembeck had made statements that he would not be bound by the acts of a majority of the trustees unless it appeared, in his judgment, that they were for the best interests of the stockholders. It also appeared that there were disputes with respect to the disposal of real estate. In one instance, a price of \$31,500 was about to be accepted by a majority of the trustees, and Otto A. Lembeck, because a statement had been made by Alfred J. O'Neill Allison that he had had an offer of \$32,000, stated that he would not carry out the directions of the trustees and would not sign instruments to make the transfer.

FIFTH: Because of the controversies arising since the 24th day of May, 1923, when the directors took over the administration of the affairs of the company as trustees upon dissolution it appeared that the trustees were not functioning in the interests of the stockholders and could not function to effect, and were, in fact, inactive, and it also appeared that it was impossible for the trustees to continue to function.

The business of the company is that of a refrigerating plant. It has stored in its warehouses many hundreds of thousands of dollars' worth of goods

of customers. It is necessary that the orders of these customers be obeyed at once. Great loss and injury would be occasioned in a very short space of time by any interruption. It likewise has many parcels of real estate, which must be disposed of in order to effect the dissolution. The market for the company's business and for the real estate is now at the peak. If there are to be continual disputes between the trustees, as it is evident there will be, the property cannot be disposed of at the best advantage and the market may well be lost.

It also appeared that there are contracts had for the conveyance of real estate which must be carried out at the time stated or the opportunity to dispose of the real estate may be lost.

SIXTH: Four of the trustees were personally represented or in open court, Mr. George J. Carr and Mr. A. Arthur Betz, the two trustees representing the Betz interests, and Mr. Gustav W. Lembeck and Mr. Thomas A. Lembeck, two trustees nominated by Gustav W. Lembeck. These four trustees, or a majority of the whole, agreed that the trustees were not, in effect, functioning, and that they could not function, and agreed that the best interests of the company and of its stockholders required that the court should appoint receivers rather than continue the directors as trustees upon dissolution as was the prayer of those objecting to the appointment of receivers.

SEVENTH: Before the return of the order to show cause Otto A. Lembeck, by his attorneys, Hudspeth & Demarest, brought suit against the company to recover what he said was the difference between his salary as president of the company for a period from May, 1922 (the day of the annual meeting on which the contested election was had), and Decem-

ber, 1922 (the day on which the new election was held in accordance with the opinion of the Supreme Court), and the amount that was ordered by Vice-Chancellor Church to be paid to him for his services as one of the four trustees of the company appointed by Vice-Chancellor Church to conduct the affairs of the company pending a decision in the matter of the contested election. The amount claimed by Otto A. Lembeck was upwards of \$4,500.

Alfred J. O'Neill Allison brought a similar suit for the sum claimed by him to be due to him as a vice-president of the company during the same period, the amount being upwards of \$1,200. The Vice-Chancellor directed George J. Carr, secretary of the company, to file a petition praying that the suits be stayed. Such a petition was filed and the suits stayed. These suits followed an attempt by Otto Lembeck to get the old directors to vote him and Allison the moneys, which attempt was defeated by a vote of six to three.

With this statement we will take up the matters urged in the petition of appeal.

I.

The court had jurisdiction.

Proceedings in voluntary dissolution are provided for by Section 31 of the Corporation Act, Revision of 1896. There are two distinct methods of dissolution provided for—one where *two-thirds* in interest of the stockholders consent, and the other where there is a *unanimous* consent.

Where there is a two-thirds consent there must be a resolution of the board of directors subsequently adopted or approved at a meeting of the stockholders called for the purpose; after that has

been done two-thirds must signify their consent in writing, and then "such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, *shall issue a certificate that such consent has been filed.*" And it is then provided that *that* certificate, to wit, the certificate *that such consent has been filed*, should be published four weeks successively, etc., and then "upon the filing in the office of the secretary of state of an affidavit that said certificate has been so published the corporation shall be dissolved and the board shall proceed to settle up and adjust its business and affairs; * * *."

But where all of the stockholders consent, then "no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary *he shall forthwith issue a certificate of dissolution, which shall be published as above provided.*"

It will be at once observed that the certificate which is to be made by the secretary of state, when there is a two-thirds consent, is a certificate "that such consent has been filed," and it is this certificate which is to be published and upon the publication of this certificate and the filing of an affidavit that it has been published the corporation shall be dissolved.

But where the consent to dissolution is by a unanimous consent, the certificate which is to be issued by the secretary of state is "*a certificate of dissolution.*"

While it is likewise provided that this certificate of dissolution shall be published once a week for four weeks, the provision that an affidavit of such publication should be filed and that thereupon the

corporation should be dissolved has no application and is not mentioned or required because the first certificate issued by the Secretary of State is a *certificate of dissolution*. This clearly connotes a dissolution at the time of the issuance of the certificate.

This seemed to be the view of Hudspeth & Demarest, who now apparently take the opposite view, when they wrote their letter to Otto A. Lembeck protesting against the further carrying on of the business of the company (Exhibit 4, p. 29).

It seemed to be the view of Mr. Wall in the argument before this court upon the application for a stay, and it was certainly his view before the Vice-Chancellor, because in the answer of Otto A. Lembeck, filed to the petition and signed by Mr. Wall, the following appears (p. 41) :

"This defendant prays that pursuant to sec. 66 of the General Corporation Act of New Jersey, Revision of 1896, this honorable court appoint the persons agreed upon pursuant to the terms of Ex. 2 as the trustees in dissolution under the provisions of said statute."

This was the only answer or other pleading filed by the appellants herein.

While counsel in his answer (p. 41) refers to Section 66, that is not the section that he really had reference to. That is the section providing for the appointment of receivers or trustees in case the corporation shall become insolvent or shall suspend its business, etc. The section which counsel had reference to undoubtedly is Section 56, which provides :

“When any corporation shall be dissolved in any manner whatever, the court of chancery, on application of any creditor or stockholder at any time, may *either* continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof, etc.”

In *Hegeman v. Atlantic Rubber Shoe Co.*, 73 N. J. E. 295, referred to by counsel, the proceedings to dissolve was by two-thirds consent of the stockholders, and it is that situation which is dealt with by the Vice-Chancellor. He refers to the certificate which is to be issued by the Secretary of State under those circumstances, to wit, the certificate that such consent has been filed, and to the provision that following the publication of that consent an affidavit be filed and that upon the filing of the affidavit the company shall be dissolved. And the reason for the distinction is clearly indicated by the Vice-Chancellor. He says:

“Manifestly this must be true, because not only are the rights of the assenting stockholders to be considered, but also the rights of the minority and dissenting stockholders and the rights of the creditors.”

It is clear that the legislative purpose in requiring publication of the certificate of the Secretary of State that the consent of two-thirds has been filed, where the proceedings to dissolve is by a two-thirds vote, is to provide notice to dissenting stockholders or stockholders who were not present. And the reason why the legislature has provided that, not until an affidavit of such publication has been filed, shall the company be dissolved is that dissenting stockholders who may allege fraud or what not

may have an opportunity to intervene by legal proceedings or otherwise. But where the dissolution is by unanimous consent there is no purpose in notifying stockholders because all of the stockholders have consented. The only purpose to be subserved by the publication, then, is notice to creditors. This notice to creditors is necessary in order that they may know that the corporation has been dissolved so that they may assert their claims and so that they may know with whom they are dealing. The purpose is precisely the same as is subserved by the publication of a notice of dissolution of a partnership. There is no reason why the actual dissolution should be suspended until the filing of an affidavit of publication, because all of those persons who have a right to object to dissolution have consented. Creditors have no right to object to dissolution. Their rights are fully protected by other sections of the act. The company is continued for their purposes. It is for this reason unquestionably that the legislature has made the distinction between cases in which the dissolution is by a two-thirds consent and cases where the dissolution is by unanimous consent and has provided, in the first case, upon filing of the consent, all that the Secretary of State shall issue is a certificate that consent has been filed, and in the latter case that he should issue a certificate of dissolution.

Even in the cited case the Vice-Chancellor finally denied the application for the appointment of receivers *ad interim* and held the matter over to final hearing upon the ground that "the statutory remedy which he has invoked is extremely doubtful."

In that case it appeared that the directors were functioning and the application for a receiver was opposed by the company.

Moreover, even if a technical dissolution had not yet been affected and the company were an operat-

ing concern, not dissolved, the court would have jurisdiction because of the dissensions in the board of directors and because the board of directors was not functioning. Under its inherent jurisdiction the court would have power under those circumstances to appoint receivers to protect the property of the company as trust property.

Morse v. Metropolitan Steamship Co., 88 N. J. E. 325.

Even without the statutory grant of power the court would have jurisdiction because of its inherent power over trusts.

Vice-Chancellor Leaming said in *Trustees, &c.*, v. *First National Bank of Ocean City*, 87 N. J. E. 84:

"In the absence of legislation conferring upon any court other than this court jurisdiction over this statutory trust, it is obvious that this court possesses such jurisdiction in all matters necessary to its proper enforcement and protection by reason of the inherent jurisdiction of this court over trusts; but the several sections of the statute referred to also clearly disclose a legislative intent that this court should exercise that jurisdiction in all necessary matters relating to the execution of the specific trust."

While it is now stated that, orally before the Vice-Chancellor, Hudspeth & Demarest raised the question of the right of the court to appoint receivers in the then present aspect of the case, it is significant that the only pleading filed on behalf of the respondents in the court below was the answer of Otto A. Lembeck, and that in that answer he distinctly prayed that the court take jurisdiction

by appointing the persons agreed upon pursuant to the terms of Exhibit 2 (who were the directors elected on May 23, 1923) as the trustees in dissolution under the provisions of the statute, and it is significant, as I have indicated above, that the present position of Hudspeth & Demarest is quite inconsistent with the position which they took in their letter of June 4, 1923 (Exhibit 4, p. 29), the writing of which letter created the situation which led to the appointment of the receivers.

The court, therefore, had jurisdiction to appoint receivers—

FIRST: Under the statute.

SECOND: Under its jurisdiction to appoint receivers of corporations where it is apparent, because of dissensions among its directors it is impossible for its business to be properly conducted.

In this case it went further than that because the statement of four of the directors or trustees was that the directors were not functioning.

THIRD: Because of its inherent jurisdiction over trusts, it appearing to the court that here was a trust with property and business worth upwards of \$3,000,000, and with no trustees in possession functioning.

It is fundamnetal that the Court of Chancery has jurisdiction, wherever there is a trust, and no trustee actually functioning or capable of functioning, to appoint receivers.

II.

The order was providently made.

(a) THERE WAS NO BREACH OF ANY AGREEMENT.

It is suggested that the application for the appointment of receivers was made in violation of the provisions of the agreement entered into on April 27, 1923 (p. 17), which preceded the consent of the stockholders to dissolution. That agreement was annexed to the petition for receivers. It was an agreement entered into by certain stockholders, but not by all. It was an agreement that was contemplated to be signed by all those who were present, but was never signed by Mr. Wall. It was contemplated to be signed by Emma Lembeck, who did not sign. Emma Lembeck is aligned with Otto A. Lembeck. She is his mother. She is a holder of thirty-seven shares of stock. The petitioner Sarah Lembeck was not a party to it. The memorandum of agreement was not drawn by counsel for Gustav W. Lembeck, or anyone associated with Gustav W. Lembeck. The written agreement was prepared by counsel for the other side, and they, having prepared it, are certainly bound by its recitals. But however that may be, it is the insistence of the respondents that any party to that agreement, under the circumstances which developed subsequent to its being made, was entitled to apply for receivers. The agreement by its terms said (p. 17) that the company was to be dissolved and liquidated *under the statute in such case made and provided*. Among one of the provisions of the statute is that the liquidation should be under the control of the Court of Chancery and that the court might appoint receivers or continue the trustees. While it is true that an application by a party to the agreement to have receivers appointed, unless something

transpired after the making of the agreement which made it necessary or which altered the situation, would be contrary to the spirit of the agreement, it cannot be contended that the parties to the agreement intended to relinquish their rights, given them by the statute, to apply for the appointment of receivers if, subsequent to the making of the agreement and the institution of dissolution proceedings, matters occurred which made it necessary, in the judgment of the parties, to apply for the appointment of receivers.

The agreement contemplated a continuation of the business of the company. It fixed salaries of the various officers upon that theory. It provided (par. 9) for the making of a contract with Rogers, the superintendent of the plant. At the meeting of stockholders held in May, 1923, following the making of the agreement at which the directors agreed upon in the agreement were elected, by-laws were adopted (p. 23), which by-laws clearly contemplated the continuation of the business of the company. Among the powers given to the board of directors (Article 5, p. 25) was the power to fix the amount of *working capital*. The by-laws speak from their beginning to their end of a continuation of the business. And these by-laws were not hastily drafted, but were the matter of considerable study, and many provisions were inserted by amendment.

The four trustees, whom we speak for, and the other parties to the agreement whom we represented at that time, proceeded to carry out the dissolution in good faith in strict accord with the provisions of the agreement, and were it not for the events subsequent to the 23rd day of May, 1923, the parties to the agreement, whom we represent, would never think of either departing from its terms or applying for or agreeing to the appointment of receivers.

The trustees had hardly set about performance of their duties when, on June 4, 1923, Hudspeth & Demarest wrote the letter to Otto A. Lembeck, printed at page 20, in which they bring the attention of Mr. Lembeck to the fact that the business of the corporation *cannot be continued*; that the company is only kept alive for the purpose of prosecuting suits by or against it, and of enabling it to settle and close its affairs and to dispose of and convey its property and to divide its capital. And they say (p. 30) :

“Now, this means, if it means anything, that you cannot continue carrying on the business of the corporation, you cannot use the moneys coming from the liquidation of the corporation in and about the business of the company as a going concern as it belongs to the creditors and stockholders. * * * I should be very fearful, as an officer, or an alleged officer, of the corporation in process of liquidation, of signing any checks in the name of the corporation as such officer, to be used in and about the business of the corporation as a going concern, and should also be very fearful of contracting any debt or liability for the same purpose.”

“You may remember that the main ground urged for the dissolution of this corporation was that it appeared to be losing money in its business. Now, if this should continue to be the case and the officers of the corporation continue to carry on its business and use the moneys derived from the liquidation for the business purposes of the corporation as a going concern and should there be a deficiency, the creditors and stockholders could claim that those responsible for the use of

such moneys should be liable to respond for the same. * * *."

"Now, these are a few of the objections appearing to me at this time in connection with the carrying on of the business of the corporation, after the filing of this consent to dissolve. They are sufficient in my mind to cause the officers and directors to hesitate in going ahead as they are in carrying on this business."

By these statements in that letter, and by that wording, Hudspeth & Demarest, speaking for their clients, repudiated the entire spirit of the agreement and of the by-laws of the company, and they did it in other particulars. On page 29, in the letter, they say:

"The directors, not the officers and directors, are expressly constituted trustees to settle the affairs of the company, sell and convey its property, etc., etc., which they may do in the corporate name of the company, but such matters are not to be done by the corporation through its officers. The directors may sue for and recover the debts and property of the company either in its name or in their names or individual capacities, and the directors, as such trustees, are liable in their own names or individual capacities for the debts owing by such corporation and shall be responsible for the same to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees."

By this they expressly repudiated the intent of the agreement and of the by-laws, which was that

the directors as trustees should act through the officers who were expressly provided for by the agreement, and they went further. On page 31 they say:

“Again, for illustration, should the business be continued and the officers and directors of the Company make a long term contract with Rogers, as superintendent or manager, as I recall it was proposed to do, then there would arise the personal liability of the officers and directors entering into this contract, should it not be carried out.”

The agreement specifically provided (Sec. 9, p. 20) for the making of the contract referred to with Rogers, and they went further; they said (p. 31):

“Furthermore, there is another question where the corporation is in process of liquidation and the corporation is inhibited from carrying on its business, whether the directors can fix salaries of officers and the officers draw such salaries so fixed during the period of liquidation. In other words, can the trustees expressly charged with the liquidation of the business, fix their own compensation.”

The agreement specifically provided that they could.

By this letter, Hudspeth & Demarest, who represented parties to the agreement referred to, in effect announced that, because of the provisions of the law, the agreement was unworkable, and, in fact, announced to Mr. Otto A. Lembeck that, notwithstanding the terms of the agreement, he would be held strictly accountable for his acts as trustee

under the statute notwithstanding the terms of the agreement.

This letter is highly significant when it appears now that in various phases of this litigation, including the latest suit brought by Otto A. Lembeck against the company, the summons and complaint in which were served on the company on the day the application was made for receivers, Hudspeth & Demarest, who wrote the letter, represent Otto A. Lembeck.

Acting upon this letter, Otto A. Lembeck refused to sign checks, issue negotiable warehouse receipts or perform any other duties of an executive officer which had to do with the continuation of the business. He did this without consulting his fellow trustees, and without calling a meeting of his trustees and directors, and laying the letter before them, and notwithstanding the fact that the direction of the trustees and directors given through the by-laws and at the meetings required the continuation of the business of the company.

It was not until nearly forty-eight hours had elapsed that it was possible to have a conference of counsel referred to in the letter, and when that conference was held it was ascertained that it was useless to talk about a continuation of the business of the company except in a small way, to wit, talking in short term consignments, because the business of the company had been irreparably ruined by the suspension of business during the length of time that Otto A. Lembeck had refused to function.

The good will of the business, by the act of Otto A. Lembeck, taken without consultation with his fellow directors or trustees, had been reduced in value by a percentage which cannot be accurately ascertained.

Other difficulties had arisen among the trustees. Alfred J. O'Neill Allison, who was *not* one of the

trustees, persisted in attending the meeting of trustees and at one meeting four of the trustees voted that everyone should be excluded except the trustees and the stenographer, but nevertheless Alfred J. O'Neill Allison remained, and the four trustees could not make their orders effective.

Induced, unquestionably by the statements made in the letter of Hudspeth & Demarest, Otto A. Lembeck took the position that the acts of a majority of the trustees were not binding and that the trustees had to act unanimously, but later abandoned that position when the provisions of the statute were brought to his attention by counsel. He then took the position, and still maintains it, that, as an executive officer of the company, he would not carry out an order of the majority of the trustees unless he felt that their orders were in the best interests of the stockholders, and he says that a majority of the trustees may designate other officers to execute the necessary papers and that he will dissent. The purpose of that dissent, of course, is to hold the other trustees personally responsible for every act which they may perform. He is laying up material for future litigation.

All of this is quite contrary to the spirit of the agreement referred to, which contemplated that the trustees upon dissolution should administer the affairs of the company precisely the same as if they were directors, acting by a majority through their executive officers and responsible only as directors.

Difficulty arose between the trustees with respect to the acceptance of prices upon real estate, and in one instance Otto A. Lembeck stated that he would not carry out the directions of the trustees because, although a price of \$31,500 was about to be accepted by the majority of the trustees, Allison stated that he had had an offer of \$32,000.

The effect of what was done subsequent to May 23, 1923, was to destroy the agreement referred to. Hudspeth & Demarest, counsel for parties to that agreement, clearly took the position that the agreement was unworkable in view of the provisions of the statute and that the conduct of the business would have to be in strict accord with the statute, notwithstanding the terms of the agreement, and in that position Otto A. Lembeck acquiesced and upon that suggestion he acted, without regard to the wishes of his fellow trustees and to the detriment of the company's business.

Having taken the position that the agreement is unworkable because its terms are contrary to the provisions of the statute, counsel cannot complain if the other parties to the agreement take the position that they are entitled to all the rights and remedies provided by the statute; among others, the right to apply for the appointment of receivers. If the agreement cannot be performed in all its parts it falls.

There are other acts upon the part of Otto A. Lembeck which gave the right to those who were parties to the agreement to apply for receivers.

In a suit instituted by one McAnarney against Otto A. Lembeck and Alfred J. O'Neill Allison to recover moneys for the benefit of the corporation, Otto A. Lembeck insisted that the company be represented by a member of Mr. Wall's firm, that firm being his personal attorneys.

Notwithstanding the fact that he performed no duties as president of the company from May, 1922, until December, 1922, and notwithstanding the fact that during all that period of time he was acting as trustee under the appointment of the Court of Chancery, with compensation fixed by the Court of Chancery, and notwithstanding that he accepted that compensation, on the very day that the appli-

cation for the appointment of receivers was made he brought suit against the corporation to recover from the corporation the difference between the salary which he had been enjoying as president of the company for his term which had expired in May, 1922, and the amount which he received as compensation under the order of the court, and Allison brought a similar suit, and Hudspeth and Demarest are their attorneys.

Is it any wonder that one of the trustees in the hearing before the Vice-Chancellor stated that he did not desire to remain associated with trustees who did those things?

The petitioner had the absolute right to make the application to the Court of Chancery for the appointment of receivers.

As I read the answer of Otto A. Lembeck, which is the only pleading filed upon the part of the appellants, her right to do so is not questioned.

Otto A. Lembeck prays that, pursuant to the statute, the court appoint the persons agreed upon according to the terms of Exhibit 2 as trustees in dissolution. But the court was not bound, and could not be bound, by the agreement, and the circumstances were such as that the court could not consistently appoint the persons referred to in the agreement as trustees in dissolution even if the parties were bound. But, as heretofore argued, the parties were not bound because it had developed that the agreement as made was unworkable, and inasmuch as resource had to be made to the court, the court was free to exercise its discretion.

(b) THE APPLICATION WAS MADE IN GOOD FAITH.

It is suggested in the answer of Otto A. Lembeck (par. 12) that Sarah Lembeck is the sister of

Thomas W. McAnarney, and that the company has a suit pending against Thomas McAnarney, and that because the company has a suit against Thomas McAnarney his sister is guilty of bad faith in filing a petition for the appointment of a receiver of the company, although she is the owner of 235 shares of that company and is entitled to have her rights protected. The statement of the proposition is almost its own refutation. But if it needs any further refutation it is supplied by the events which occurred among the trustees since May, 1923, and by the acts of Otto A. Lembeck.

The same motive cannot be imputed to the Betz interests, which joined in the application representing shares of stock of this company. There is no question but that that interest is acting in good faith. No unfair motive can be attributed to every independent stockholder of this company who have approved this course of procedure and that means every independent stockholder of the company except one who has not expressed an opinion.

Moreover, the bad faith of petitioner is no defense.

Carver v. Southern Iron & Steel Co., 78
N. J. E. 82.

III.

The court properly exercised its discretion and appointed receivers rather than continue the trustees upon dissolution.

The discretion conferred by Section 56 upon the Court of Chancery is broad.

The statute provides that the court "may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation."

While this discretion may not be unlimited, nevertheless it is submitted that this court will not interfere with the exercise of that discretion unless there is a gross abuse. Whether the court should take control or not is one thing, but assuming that the court is to take control, and in this case the pleading indicates that all parties pleading asked the court to take control, the method by which the control is to be exercised would seem to be a matter of discretion and the statute so indicates.

Upon the intervention of the court, the receivers, or the trustees, as the case may be, become the representatives of the court. Is it conceivable that the court could reasonably continue these trustees as representatives of the court when it appeared to the court that it was impossible for them to work together; that the minority were refusing to obey the judgment of the majority, when the executive officers were refusing to comply with the will of the majority, when the majority stated to the court that they did not desire the trust administered in that way, when the majority stated to the

court that they were not functioning and could not function?

Could the court, upon any hypothesis, have continued these trustees as its representatives?

Far from the exercise by the court of its discretion by appointing receivers being a gross abuse of discretion, it is submitted that, under the circumstances which confronted the court, there was nothing for the court to do but what it did do.

So far as the written pleadings are concerned, the court had before it the application for the appointment of receivers on the one side, and on the other side an application for the continuation of the directors as trustees upon dissolution, both sides joining in the application to make some order with respect to the trust.

What could the court have done under the circumstances of this case but appoint receivers?

The case of *Newfoundland R. Construction Co. v. Schack*, 40 N. J. E. 222, which has been referred to, has no application. That was an application for the appointment of a receiver upon the ground of insolvency. The company resisted and the court held that the insolvency was not proven. Under those circumstances, of course, there was no jurisdiction in the court to make the appointment on that ground.

A further ground urged for the appointment of a receiver was that the directors had taken steps for the dissolution of the corporation, and a charge of fraud was made with respect to this dissolution, but the court held that the charge of fraud was not sustained, and that the directors were proceeding in strict accordance with the statute to dissolve the company as trustees upon dissolution. And all that this court said was—

"The authority of the chancellor to interpose and take from the directors the power to close up the business of the corporation, and place its affairs in charge of a receiver, is a discretionary power, to be exercised only on good cause shown—upon circumstances disclosed by the proof which show the need of the interference of the court for the protection of creditors or stockholders from breaches of trust by the directors in the performance of their duties."

Of course the court was there referring to a situation where the directors were united; were acting as trustees in strict accordance with the provisions of the statute; desired to continue with the dissolution; there was no dissension among them and, in the absence of fraud or of some conduct on their part, which made it necessary that receivers be appointed in their place and stead, they should be left in charge of the liquidation. The mere statement of the facts present in the *Newfoundland* case shows how radically different it is from the case at bar.

IV.

The order appointing receivers is not too broad and the court properly authorized them to continue the business to the extent that the order permits.

The petition filed makes no point of the fact that the order permits the continuation of the business of the company to the extent therein authorized, but, on the oral argument of the application for the

stay, it was suggested that the court had no power to permit the receivers to carry on the business of the company in view of Sections 53, 54, 56 of the Corporation Act.

Under Section 53 all dissolved corporations "shall be continued bodies corporate for the purpose of prosecuting suits and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, *but not for the purpose of continuing the business for which they were established.*"

Section 54 is the section which provides that the directors should be trustees after dissolution. That section provides "that the directors should have full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them."

Referring to directors as trustees, etc., the statute (Sec. 54), with respect to their powers, provides, "to do and perform all such other acts as shall be necessary to carry out the provisions of this act relative to the winding up of the affairs of such corporation and to the distribution of its assets."

Section 56, with respect to the powers of receivers or directors continued as trustees by the order of the Court of Chancery, provides, "to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such cor-

poration, if in being, that may be necessary for final settlement of its unfinished business; and the powers of such trustees or receivers may be continued so long as the court shall think necessary for such purposes."

Section 57, "The court of chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, *and may make such orders and decrees therein as justice and equity shall require.*"

This company is in the refrigerating business. In the refrigerating business goods are taken on storage for considerable lengths of time. The warehousemen usually finance the depositor by loaning money upon warehouse receipts, and the warehousemen usually get the money to loan by pledging warehouse receipts with banks as collateral. There are upwards of \$2,000,000 of goods of customers now in the refrigerating plant. Some of these goods cannot be withdrawn until January or February, 1924. During all of that space of time the refrigerating plant must be kept in operation. If it is not kept in operation for a single day great damage will be done to the goods on storage, and the entire assets of the company will be wiped out, causing loss of the customers. It costs the same amount to keep this refrigerating plant in operation if it is half full as it does if it is wholly full. The revenue is, of course, different. It is utterly absurd to refuse to continue the business during this period of time when the refrigerating plant must be kept in operation, from a business standpoint, to refuse to accept goods on storage which may be tendered for spaces of time within the period that the refrigerating plant must be kept in operation. There is no intent upon the part of anybody to continue to take goods on storage upon

which large loans must be made. All that is contemplated by the order is that the receivers be permitted to continue the business to the extent that it is necessary to continue it in order to preserve the good will and in order to reduce the amount of overhead which must be borne.

The company is also in a cereal beverage business. That business is a valuable asset. Its value, however, consists of its being sold as a going concern. To turn the key in the lock and shut down that business at the present moment would mean to destroy the good will.

The company still has the good will of its refrigerating business. It is not wholly destroyed. It has a good will in its cereal beverage business. It is at the present moment an operating concern. The purpose of the receivers is to attempt to dispose of this property as a going concern. If the position taken by the appellants be correct that the receivers must turn the key in the lock and shut down the business, the value of the refrigerating plant and of the cereal beverage business will be reduced to scrap.

It is common practice to authorize receivers of corporations to continue the business so that the good will of the company may not be destroyed, and so that the plant may be sold as a going concern, and it is common practice to permit receivers to issue receivers' certificates with a preference.

Jeffers v. N. J. & P. R., 86 N. J. E. 402.

Lockport Felt Co. v. United Box Board and Paper Co., 74 N. J. E. 686.

It is true that under Section 53 the corporate existence of the company is continued "for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and

close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

But the legislature had in mind in this section the continuation of the company's business by the corporation, and with a view to a company existence, it could not have in mind the continuance of the business by receivers or trustees which is incidental to a disposal of the company's property at the most advantageous price which can be obtained. The powers given to the trustees on dissolution (Sec. 65) are authority to sue for and recover debts and property in the name of the corporation, and Section 54, power "to prescribe the terms and conditions of the sale of such property," to sell the property, to take mortgages and bonds for part of the purchase price, "full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts." The power given to the trustees "to settle the affairs" includes within it the power to continue such of the company's business as it may be necessary to continue, and for the time necessary so that the company's property may be disposed of advantageously. Power is given by Section 56 to the receivers to take charge of the estate and effects, and to collect the debts and to prosecute and defend "and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business, * * *." And it is further provided that the powers of such trustees or receivers may be continued as long as the court shall think necessary for such purposes.

This power to do all things necessary for the final settlement of its unfinished business includes the power to take in such new business as may be necessary to maintain the company's business so that the business may be disposed of as a going concern.

By Section 57 it is provided, "The court of chancery shall have jurisdiction of said application (application for the appointment of receivers and continue the receivers) and of all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity shall require."

The purpose of the trustees and receivers must be to dispose of the property of the company as speedily as may be consistent with good business judgment. One of the elements of value, of course, in a going business is the good will. It was not the intent of the legislature to destroy its good will.

The broad grant of jurisdiction given to the Court of Chancery by Section 57 "to make such orders or decrees therein as justice and equity shall require" includes within it the power to permit the receivers to continue the business of the company to the extent that good business judgment requires that it should be continued in order that property rights may not be sacrificed. It, of course, does not contemplate that the business of the company should be conducted with a view to a continuation, and it is submitted that neither does it contemplate that immediately upon the appointment of receivers the business of the company should be stopped and its property reduced in value to scrap.

The order, which is appealed from, in its grant of powers to the receivers does not contemplate a continuation of the business of the company except

such continuation as may be incidental and necessary in process of dissolution so as to protect and preserve property value.

As we have before stated, the business of the company is that of a refrigerating warehouse, and there are goods in storage of large value which cannot be removed until the early part of 1924. It is necessary, therefore, that the business of the company to the extent necessary to preserve these goods must be continued or loss and injury will be occasioned to customers of the company and there will be suits against the company which will wipe out the company's property. It costs as much to keep the refrigerating plant in operation for the preservation of the goods which are now in it as it would cost if the refrigerating plant were full.

In the meantime, of course, it is the duty of the receivers to attempt to dispose of this plant as a going concern. It is of most value as such. The order merely contemplates that during this period of time the receivers may be permitted to take in other goods upon short terms so that the overhead may be reduced to the minimum possible and so that the business may be kept intact so that it may be disposed of as a going concern.

Any order which will require the immediate suspension of the business of the company in the sense above referred to will cause great loss and injury to every person concerned in this company, including the appellants.

The general rule is that the receivers may be authorized to continue the business.

23 *Ruling Case Law*, title "Receivers," Section 78, page 73, states the rule:

"While a receiver has no authority, as such, to continue and carry on the business

of which he is appointed receiver, nevertheless, since the object of appointing a receiver is to preserve the property for the benefit of all parties interested, there is a discretion on the part of the court to permit this to be done temporarily when the interests of the parties seem to require it."

It is respectfully submitted that the order appealed from should be affirmed in all its parts.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Respondents.

New Jersey Court of Errors and Appeals

IN THE MATTER

of the

DISSOLUTION OF THE
NEW JERSEY
REFRIGERATING COMPANY.

On appeal from order of
the Chancellor advised by
Vice-Chancellor Church ap-
pointing Receivers of New
Jersey Refrigerating Com-
pany.

Brief in Support of Order Appointing Receiver

The application for the appointment of receivers was made by Sarah Lembeck, a stockholder in the New Jersey Refrigerating Company owning 235 shares; but after the petition was filed other stockholders signed a paper wherein they stated that they joined in the application. This paper is signed by persons owning 3,218 shares, that being a majority of the stock outstanding. Among the signers are the representatives of the Betz interest, being 2,279 shares, and also persons who besides the stock standing in their own names, are beneficiaries under the will of Henry Lembeck, and therefore interested in the stock held by Otto Lembeck and Gustav Lembeck, as testamentary trustees; and one of these trustees, Gustav Lembeck has himself signed the

paper joining in the application for a receiver. Furthermore the consent for a receiver is signed by four of the seven trustees of the corporation, namely Gustav W. Lembeck, Thomas A. Lembeck, G. Arthur Betz and George J. Carr. As one of the testamentary trustees of Henry Lembeck joined in the application, and the other opposed the same, the 2,636 shares standing in their names may be laid out of the case, in the same manner that those shares would be disregarded if the trustees were voting upon opposite sides of a question at a stockholders' meeting.

Now, the whole number of shares outstanding is 6,400, and when the 2,636 shares held by the testamentary trustees are disregarded, the application for the appointment of the receivers is supported by shareholders owning 3,278 shares out of a total of 3,774 shares. Moreover, the application had the support of four of the trustees of the corporation, namely, George Arthur Betz, Gustav W. Lembeck, Thomas A. Lembeck and George J. Carr; and the only opposition comes from the three trustees who, to use the language of the contract hereinafter mentioned, are "representing the Otto A. Lembeck faction." But this "faction," as it is very properly called in the contract, represents a very small stock interest; for Otto Lembeck cannot be said to represent the stock belonging to the Estate of Henry Lembeck any more than can his co-trustee who has joined in the application.

The reason why a majority of the directors, and stockholders owning very nearly all of the stock outside of the shares held by the testamentary trustees of Henry Lembeck, desire to have the business of the corporation wound up by receivers is patent. The board as at present constituted cannot function. And why this is so will appear from a brief

recital of the facts. The record plainly discloses that the dissolution of the corporation was brought about by internicine quarrels, and that the differences and animosities which disastrously affected the corporation while it was a going concern exist in the present board of directors. At the stockholders' meeting held on May 16th, 1922, the Betz interest which owns 2,279 shares, was not represented, and the Lembeck stock was voted by Gustav in favor of his candidates, including himself as directors against the protest of his co-trustee, who refused to join with Gustav in putting through a scheme by which Gustav was to obtain control of the company. Application was then made to the Supreme Court by some of the stockholders to have the election of May 16th, 1922, set aside, and a new election ordered; and this application was granted, and an election held under the direction of the court on December 19th, 1922. (Papers on Motion for Stay pp. 42-45). Thereafter, on April 27th, 1923, the stockholders either personally or through their counsel and representatives, entered into an agreement to the effect that the corporation should be dissolved and its affairs liquidated; that meetings of the stockholders were to be called, and that a board of directors should be elected "consisting of Gustav W. Lembeck and Thomas A. Lembeck, representing the Gustav W. Lembeck faction; and George J. Carr and G. Arthur Betz, representing the Betz faction, and Otto A. Lembeck and Charles Green and Dr. Horace Bowen, representing the Otto A. Lembeck faction"; and that the directors so to be elected should choose certain persons named in the agreement as officers of the corporation, and the salaries of such officers should be the amounts mentioned in the agreement. (Paper on Motion for Stay pp. 17, 18).

The persons so named were elected directors at the meeting held on May 23, 1923.

Now, it would seem plain that a board so chosen would have great difficulty in transacting the business incidental to the winding up of the corporation. The personal enmity existing between Gustav Lembeck and Otto Lembeck is very likely to cause one to oppose whatever the other may favor, and to bring about delay and difficulty where the interests of the corporation and its stockholders require a prompt decision. Nor would these differences affect only Gustav and Otto, and leave the other directors free to act; for as Thomas A. Lembeck was chosen with Gustav to represent the "Gustav W. Lembeck faction" and Charles Green and Dr. Horace Bowen were chosen with Otto to represent "the Otto A. Lembeck faction," the dissensions between Gustav and Otto would often prevent, or at least impede, action by a majority of the board where immediate action would be necessary.

It furthermore appears that Otto Lembeck (who is practically the only person who opposed the application since Messrs. Green and Bowen are, as stated in the contract, "representing the Otto A. Lembeck faction") has a suit pending against the corporation for alleged arrears of salary, and this claim will necessarily be defended by the directors representing the other factions—a circumstance which will unavoidably cause further dissensions in the board.

Again, the interest of the stockholders requires that something more be done than to sell the property of the corporation and divide the proceeds among the stockholders. The corporation has outstanding contracts for the cold storage of goods of customers which must be performed, and to enable it to perform these contracts it must continue to

operate its plant. There are many hundreds of thousands of dollars worth of goods of customers stored in the company's warehouse, and under existing contracts the company must continue this storage until January or February 1924, and for this purpose the company must continue to operate its plant. But in view of the provisions of section 53 of the General Corporation Act, and in view of the limited powers conferred upon the trustees by section 54 of that Act, the trustees, even if they were harmonious, might hesitate to take the necessary action for fear of the personal liability they might incur; and when there are dissensions in the board actions in matters of this character would be practically impossible.

The power of the court to appoint receivers seems to be plain. The dissolution was by the written consent of all of the stockholders, and the dissolution became effective when the consent was filed in the office of the Secretary of State, and his certificate issued. (Section 31 General Corporation Act). And by Section 56 of the Act it is provided that "When any corporation shall be dissolved in any manner whatever, the court of chancery, on application of any creditor or stockholder at any time, may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof."

Now, it will be noticed that the statute places no limitation upon the discretion of the court in this matter; but the court may adopt the one course or the other as shall seem to it most expedient. True, in a case where the directors are harmonious and the board is free from factional differences the court would very properly continue the director trustees, but where, as here, there are dissensions

in the board and the trustees will not be likely to function, the proper and business-like course is to have the winding up conducted by impartial and disinterested persons who act as the hand of the court.

GEORGE J. CARR (of New York Bar),
Trustee and Respondent, Pro Se and of Counsel
with G. Arthur Betz, Trustee and Respondent.

New Jersey Court of Errors and Appeals

In the Matter
of
The dissolution of NEW JERSEY
REFRIGERATING COMPANY.

Appeal from order of the Chancellor advised by
Church, V.C., appointing receivers for New Jersey
Refrigerating Company.

BRIEF FOR APPELLANTS.

HUDSPETH & DEMAREST, Solicitors for
Charles E. Green, *et al.*;
FISK & FISK, Solicitors for and of Counsel
with Horace Bowen;
WALL, HAIGHT, CAREY & HARTPENCE, So-
licitors for Otto A. Lembeck, Appellant.

Facts.

New Jersey Refrigerating Company, a New Jer-
sey corporation, is in process of dissolution by
unanimous consent of all the stockholders. Such
consent has been filed with the Secretary of State
and publication of the certificate of the Secretary
of State is now being or has been made.

The agreement to dissolve the Company was arrived at on April 27, 1923, and the terms of the agreement are found in Exhibit 2, pages 17-23.

Following the execution of this agreement and in accordance with its terms a Board of Directors and Officers were elected at the annual meeting in May, 1923, and at the first Director's meeting directly following the annual meeting all of the Company's stock was represented at the annual meeting at which the dissolution agreement was put into effect except thirty-five (35) shares of stock owned by one Bechtloff.

The Board of Directors thus elected have been handling the Company's affairs from the time of the annual meeting up to the filing of the unanimous consent of dissolution and the issue by the Secretary of State of the certificate of dissolution, and after May 24, 1923, as trustees until the order appointing receivers.

Vice-Chancellor Church, on June 13, 1923, advised an order appointing receivers (Case, pp. 46-52).

Notice of appeal and petition of appeal were served June 15th and filed forthwith.

On Tuesday, June 19th, the opening day of this term of Court, a motion was made to stay the appointment and powers of the receivers pending argument of this appeal and decision thereon.

After hearing counsel, this Court ordered as follows:

"That insofar as the order above referred to appoints receivers and directs the property and effects of the corporation to be turned over to them the motion for a stay is denied. It is further ordered that insofar as the exercise of the powers granted by the order above referred to is concerned that exercise by the

receivers shall be stayed except so far as is necessary to protect the property and preserve the business of the corporation."

There are no allegations of insolvency or creditors' rights in the petition and it is admitted that the corporation is solvent.

I.

The Court of Chancery had no jurisdiction.

Section 31 of the General Corporation Act provides, "and upon the filing in the office of the Secretary of State of an affidavit that said certificate has been so published, the corporation shall be dissolved and the Board shall proceed to settle up and adjust its business and affairs."

There is no allegation in the bill of complaint that there has been filed with the Secretary of State an affidavit that the certificate of the Secretary of State that the stockholders' consent has been filed, has been published, as required by Section 31 of the General Corporation Act.

The Court of Chancery was, therefore, without jurisdiction to appoint receivers.

Hegeman v. Atlantic Rubber Shoe Company, 73 N. J. Eq., p. 295.

There are no questions of insolvency or creditors' rights involved in this proceeding.

Assuming, however, that the Court had jurisdiction to appoint receivers, the petition does not set up a case sufficient to warrant the exercise of the Court's discretion.

In this connection we desire to call the attention of the Court to the papers in opposition sub-

mitted by Mr. Lane and associate counsel, *viz.*: resolution of directors adopted June 18, 1923, appearing on pages 9-15, which was not before the Court of Chancery, having been adopted at a meeting of the trustees held on June 18, 1923, five days after the order of the Court of Chancery appointing receivers, and to the affidavits of George J. Carr, G. Arthur Betz, G. W. Lembeck and Thomas A. Lembeck, and to the consent of stockholders to appointment of receivers, appearing on pages 16-24, none of which was before the Court of Chancery when it made the order appointing receivers.

II.

Facts not sufficient to warrant appointment of receivers.

The petition alleges various controversies among the stockholders of the New Jersey Refrigerating Company and various litigations between them and between Otto A. Lembeck and Gustav W. Lembeck, trustees of the Lembeck estate, and an attempt to settle these controversies in February, 1923 (pp. 3-5).

This Court is not concerned with these disputes or litigations or with any controversies prior to April 27, 1923, the date of the agreement to dissolve (p. 17, Ex. 2).

The settlement agreement having been executed and the agreement having been carried out by the election of Directors thereunder and the stockholders all having consented to dissolve and having set into motion the machinery for dissolution, their past disputes are immaterial.

(a)

As to the alleged refusal of Otto A. Lembeck to conduct the company's business.

It is alleged (Petition, Case, p. 5, lines 9-18, and p. 8, lines 36-38) that at the time the dissolution agreement was signed and at the annual meeting held in May, 1923, it was proposed that the business of the company should be continued as a going concern until the business could be properly disposed of and the assets distributed, and that the officers should continue to function.

The petition itself (p. 5, lines 25-6) admits that the terms of the dissolution agreement are "as set forth in a written memorandum thereof" (Exhibit 2, pp. 17-23).

The dissolution agreement contemplates only such continuance of the business as might be permitted by the General Corporation Act, the agreement providing "that New Jersey Refrigerating Company is to be dissolved and liquidated under the statute in such case made and provided and after payment of its debts its assets divided among the stockholders" (p. 17, lines 33-37).

Section 53 of the General Corporation Act prohibits the continuance of the business.

"All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established" (2 Comp. St., pp. 1634-5).

The terms of the agreement for dissolution being in writing, the question of the agreement is to be governed by the writing and not by what the petition says was proposed or what the parties are alleged to have had in mind.

The continuance of the business of the company to the extent of taking new goods into storage and loaning additional moneys thereon is expressly prohibited by the statute.

O. A. Lembeck, president, is accused of having refused to further carry on the business of the company.

It appears from the petition that there are two aspects of the company's business: (1) the operating of its refrigerating plant for the safe-keeping of the goods already in storage (p. 11, par. 10), and (2) the taking in of additional goods and the loaning of additional moneys thereon (pp. 7-8).

There is no charge in the petition that anyone refused to operate the company's refrigerating plant to safeguard the goods in storage.

As to new business, Otto A. Lembeck, the President, is charged with having refused to sign checks and warehouse receipts and to take in any further new business. Such action is alleged to have been taken by him after his receipt of a letter written by Hudspeth & Demarest (Exhibit 4, p. 29), relative to the power of the trustees to continue the company's business.

The refusal of Otto A. Lembeck to take in new goods and lend moneys thereon alleged as a breach of the dissolution agreement and as a reason for appointing the receivers was warranted by the terms of the agreement itself and by the statute (Sec. 53, Corporation Act).

The prohibition of the operation of the company as to new business and continuing its business was

one voluntarily assumed by the stockholders when they consented to dissolve.

There is no allegation that the trustees or any of them refused to sell any of the company's real estate in order to reduce the same to cash.

(b)

As to friction between the trustees re Allison.

The next allegation of the petition is that friction has arisen between the trustees regarding the attendance at a trustees' meeting on June 4, 1923, of Alfred J. O'Neill-Allison, who remained at the meeting because O. A. Lembeck, Bowen and Green, three of seven trustees, stated that they needed his advice (p. 9, lines 18-31).

There is no allegation that these three trustees requested him to remain or insisted that he remain.

Allison had been the company's real estate advisor for many years and the settlement agreement provides (p. 19, lines 26-30) for compensation to Allison for services to be rendered to the trustees.

The answer shows (p. 38) that Allison was the company's real estate advisor (lines 19-20) and that there is no friction between the trustees on this point (p. 38, lines 20-21).

In view of the agreement regarding compensation to Allison and in view of the statement of the three trustees that they needed his advice, the refusal of Allison to leave the meeting was not sufficient to warrant a finding that to cure this situation receivers are necessary.

Under the by-laws under which the trustees are working (Art. 5, Sec. 1, p. 25) the entire control of the company's business is in the Board of Trustees and the four trustees by majority vote

could enforce any action they saw fit to take both by the by-laws and Section 73 of the Corporation Act.

(c)

As to the dissent of O. A. Lembeck.

O. A. Lembeck, one of the trustees, is charged with taking the position that the act of the majority of the trustees is binding (p. 9, lines 31-41) but that he would dissent from any act of the trustees of which he disapproved and would request the trustees to designate some other person and himself to sign necessary documents in cases where he dissented, reserving the right to question the act of the trustees which results in putting the trustees in a position of liquidating as speedily as possible (p. 10).

Under Section 54 of the Corporation Act the powers are vested in the Board of Trustees; they are given power to act under the by-laws of the company, and there being no provision in the by-laws governing the number of votes necessary to pass an act by the Board of Directors, a majority of a quorum would be sufficient to take any act the trustees might think proper. (See also Section 73, Corporation Act.)

The fact that the trustees did not act at all times unanimously is not sufficient reason for appointing receivers, nor is the reservation by one trustee of his right to dissent from any act taken by the trustees sufficient reason.

(d)

As to future controversies between the trustees.

The petition (p. 11) next alleges that because of the inside information possessed by Allison controversies and bickerings with respect to sales are

bound to occur as they have in the past and the trustees may be driven to perform acts which would not be for the best interest of the stockholders of the Company, and that it is fair to assume that there will be continual disagreements, and that the business of the company has been largely conducted through conferences of counsel.

It is not alleged of what the inside information consists. His experience with the company's real estate and the use of his information were contemplated by the settlement agreement providing for his compensation (Ex. 2, p. 19, lines 26-31).

As to future controversies regarding sales of real estate the Court could not assume in advance that there would be any such controversies.

The petition alleges no facts showing the conduct of the company's business by counsel except two conferences of some of the counsel (p. 7, line 22; p. 9, lines 38).

The only past controversies alleged in the petition with respect to the sale of real estate is on page 10, where the trustees ordered a sale for \$31,500 in face of an offer of more than that amount.

The answer, which is not replied to (p. 38, line 38; p. 39, lines 1-5), shows the inaccuracy of the petition on this point.

A four to three vote by the seven trustees, with the consequent lack of unanimity, is no warrant for the appointment of receivers.

The petition upon which the receivers were appointed, when analyzed, alleges four reasons for the appointment of receivers: (1) The refusal of one trustee to sign checks, warehouse receipts and lend money to customers on new goods to be taken in storage, and the refusal to take in such new goods, all of which actions were prohibited by the

Corporation Act and the agreement of the parties; (2) friction between the trustees in a Board of Trustees composed of seven members, a majority of whom could at any time enforce their acts, and is really only the failure of the Board to act unanimously; (3) the exercise by one trustee of his right to dissent from the actions taken by the other trustees and (4) possible future controversies between the trustees; and upon which petition the Court of Chancery took away from the stockholders and away from directors elected at an annual meeting at which all but thirty-five shares of stock were represented, the management of the liquidation of the company's business.

It seems apparent that facts were not presented to the Court of Chancery sufficient to warrant the appointment of receivers.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
With Otto A. Lembeck.

FISK & FISK,
Solicitors for and of Counsel
With Horace Bowen.

[9895]

New Jersey Court of Errors and Appeals

IN THE MATTER

of

The Dissolution of the NEW
JERSEY REFRIGERATING COM-
PANY.

Appeal from Or-
der of the Chan-
cellor appointing
Receivers of the
New Jersey Re-
frigerating Com-
pany.

BRIEF ON APPEAL OF CHARLES E. GREEN ET ALS.

This appeal brings before the court a situation involving a number of litigations, covering a period of more than a year, with respect to the affairs of the New Jersey Refrigerating Company, a corporation, whose assets amount to upwards of \$3,000,000. The subject matter of the litigation is of great value; the questions involved are of great import.

The corporation was originally the Lembeck & Betz Eagle Brewing Company, which before the passage of the Eighteenth Constitutional Amendment was engaged in the brewing business. Since the purpose of its organization has become illegal the plant of the corporation has been transformed into a cold storage warehouse.

The corporation during the life of Henry Lembeck, its founder, who died in 1904, was practically owned by him and his partner, John Betz. In the course of the expansion of its business the corporation acquired a large amount of real estate for the purpose of establishing saloons in

New York City and Hudson County. Both Henry Lembeck and John Betz are dead, and about eighty percent of the stock of the present corporation is owned by their families. Both men died leaving wills by which trusts were established to insure the continuance of the business, and until May 16, 1922, the business was managed and officered principally by the representatives of the Lembeck estate. For several years prior to May, 1922, Otto A. Lembeck, one of the trustees under the will of his father, Henry Lembeck, was the President of the corporation. Just previous to the annual stockholders' meeting held May 16, 1922, Gustav W. Lembeck, a co-executor and trustee, against the wishes of a majority of the *cestuis que trust* under the Lembeck will, attempted to have himself and others of his nomination elected directors of the corporation; and to oust his brother, Otto A. Lembeck, and his nominees, as the officers and directors of the corporation.

Gustav W. Lembeck, claiming that he and his nominees had been duly elected directors at the meeting of stockholders May 16, 1922, first filed a bill in the Court of Chancery to restrain his brother, Otto, and the hold-over officers and directors from interfering with the complainants in the management of the corporation. The rights of the parties to that litigation depending upon the regularity of the election of directors, the Court of Chancery held that it had no jurisdiction to inquire into the election and directed the counsel presenting this brief to institute in the Supreme Court proper proceedings under Section 42 of the Corporation Act to determine the regularity of the proceedings of the stockholders' meeting. The result of this was that the Supreme Court ordered a new election, as evidenced

by the opinion set out in the case on this appeal. Upon the election being set aside by the Supreme Court, the Court of Chancery appointed (in the corporation suit, and as we contend without jurisdiction) a representative of the Court to vote the stock held by the Trustees of the Lembeck Estate with the result that a Board of Directors of which the Otto A. Lembeck faction was in the majority, but upon which certain representatives of the Gustav W. Lembeck faction and the Betz estate were members, was elected.

A writ of error was taken from the judgment of the Supreme Court in the matter of the election proceedings to this court, but has been abandoned. In view of various litigations arising out of suits instituted by the several parties interested in the business and the Lembeck trust at a meeting of counsel representing the various parties (Exhibit 2, P. 17) it was agreed by counsel that the corporation be liquidated, that meetings of the directors and stockholders for that purpose be called, that a board of seven directors be elected—three of whom should represent the Otto A. Lembeck faction, two the Gustav W. Lembeck faction and two the Betz faction—at certain salaries thereafter agreed upon; and, as a part of said plan, it was agreed that the pending suits be discontinued except as to the extent required for administration purposes.

This agreement was signed by all counsel and in pursuance thereof a meeting of the stockholders was held at which by-laws to carry out said plan were adopted and the unanimous consent of the stockholders to liquidation of the company was executed.

The assets of the corporation as above noted consist not only of the refrigerating plant, but also of a large number of tracts of real estate

in New York and Hudson County. The real estate probably has a value of over \$2,500,000 and the plant of \$500,000 or more. There appears to have been a misunderstanding of the counsel in regard to the recording of the certificate of dissolution of the company. Some counsel believed, that for the purpose of more advantageously disposing of the refrigerating plant to a competitor in business, who would not be aware of the intended dissolution of the corporation, and therefore at a better price, the dissolution agreement was not to be recorded until a large part of the assets, especially the storage plant, had been disposed of. Other counsel appear to have understood that the dissolution certificate was to be filed immediately. At any rate it was filed immediately.

In the conduct of the refrigerating business it is generally necessary to lend to the owner of merchandise stored about 60 percent of the value of the goods. In many instances these goods are stored for an average period of six months.

When certain of the stockholders and *cestuis que trust* under the Lembeck will, to whom a large amount of dividends were due, learned that the liquidation certificate had been filed and that news thereof had been given to the public through the press, they, by letter of counsel (P. 29) addressed to the President of the company, called the officer's attention to the fact that upon dissolution the corporation was forbidden by statute to continue the business for which it was formed, and that it was unwise for them to continue the refrigerating business to such extent as would require the company to borrow large sums of money to make loans to customers upon stored merchandise while the company was liquidating. At a meeting of counsel representing

the various interests, held about June 8, 1923, it was unanimously agreed that, in order to pay a part of the overhead charges of the business during the period of existing contracts for storage, the company should take from customers on storage, and only for a short term, such merchandise as would not require it to borrow money to make loans to customers. It was further agreed that such contracts as had been entered into between the company and its customers prior to the execution by the stockholders of the dissolution agreement, and upon which the company might be held liable, should be performed, but that no business requiring the raising and lending of large sums of money by the corporation should be taken. At the time of this meeting loans to the extent of approximately \$250,000 from banks upon the company's notes signed by Otto A. Lembeck, President, had been made to make customers loans, in addition to the use of such liquid assets of the corporation as were available. While the company was being liquidated pursuant to Sections 54 to 60 of the Corporation Act under the agreement (Exhibit 2) of April 27, 1923, as modified by the agreement of counsel held about June 8th, the present bill for liquidation of the corporation by the Court of Chancery and the appointment of Receivers for that purpose was filed by the four directors-trustees representing the Gustav W. Lembeck and Betz interests; and upon motion of the petitioners in said proceeding the order appealed from was made June 14, 1923.

The above rather lengthy rehearsal of the facts and statements of the situation is made to place this court in a position of determining the necessity for and the regularity of the order appealed from. Without this statement it occurs to

counsel the court would not be in a position to appreciate the various matters mentioned in the memorandum agreement (P. 2) and the supplemental oral agreement of counsel of June 8th.

POINT I.

The Court had no jurisdiction to appoint receivers.

Upon the return of the notice and argument of the motion for the appointment of Receivers on June 13th (the order was dated the day following) the question of jurisdiction was extensively argued by counsel submitting this brief. The Vice Chancellor's attention was called to the case of Hageman vs. Atlantic Rubber Shoe Company (3 Buch. 295) with which the court stated he was familiar. The court's further attention was called to City Property Company vs. Yates (7 N. J. L. J. 42), Sternberg vs. Wolff (11 Dick. 555), Fougerey vs. Cord (5 Dick. 756), when counsel was informed that the court required the citation of no further authorities. Counsel argued that there being seven directors of the corporation, who were trustees for the purpose of liquidation, there could be no deadlock, and that the four director-trustees representing the Gustav W. Lembeck-Betz interests, who it was stated in open court were in accord and acting together and therefore controlled the policies of the corporation. Counsel further argued that the mere fact that Otto A. Lembeck, President of the Corporation, had signed the company's notes for approximately \$250,000 worth of loans proved that the corporation was functioning, and urged that a receiver should not be appointed unless the interests of the creditors or stockholders

were in jeopardy. It is conceded by all parties that the assets of the corporation are abundantly able to pay all creditors. The value of the stock has increased from \$150 per share in 1904 to \$450 at the present time. Counsel further urged, as a matter of jurisdiction, that if receivers were appointed, such appointment should extend only to the purposes of conservation of the property and that the management of the affairs of the corporation should be left entirely in the hands of the directors, without large administration expenses to be paid to the receivers, their counsel and other agencies of the court. The fact is that a majority of the *cestuis que trust* under the Lembeck will insisted upon the election of Charles E. Green as a director-trustee to represent their interests, and would not have consented to the liquidation of the company upon the lines set out in Exhibit 2 had not this representation been given to them.

Over these objections and arguments the court made the sweeping order of June 14th, taking over not only the custody of the assets but giving to the receivers full power to do every act which the directors-trustees are authorized to do under the statute.

This court in *Sternberg vs. Wolff* (11 Dick. 389) has construed the sections of the Corporation Act relating to voluntary dissolutions, and held that where a deadlock in the management exists, a receiver *pendente lite* may be appointed.

The English authorities cited in the opinion in that case relate to divisions in the Board of Directors, which make it *impossible* for the company to function. This is not true in the present case. Section 54 of the Corporation Act provides in effect that the will of a majority shall control the trustees. In the present case four

of the trustees—a majority of the whole—join the petitioner, say that they are impotent, and complain that one of the minority of three is not acting in conformity with their instructions, notwithstanding the admitted fact that he has signed obligations of the corporation to the extent of \$250,000 since it has become a certainty that the corporation will be liquidated, and notwithstanding that the trustees must act strictly within the powers conferred by the statute or will be personally liable for their acts.

It has been further argued that the four petitioners are impotent because they refuse to take any risks of personal liability, which the other three refuse to assume. This is an admission of their own weakness, for obviously they either admit the conservatism of the other three directors or are creating a situation of impotency themselves to accomplish their own purpose. *Sternberg vs. Wolff* (11 Dick. at P. 569).

In the case of *Einstein vs. Rosenfeld* (11 Stew. 309) the appointment of a receiver was denied on the ground that the corporation was able to function. In *Archer vs. American Water Works* (5 Dict. 33) the language of the Chancellor was "My interference, however, by injunction and receiver will be limited to the imperative requirements of the present emergency." Other cases upon the subject hold that the right of the court to appoint a receiver "must always be exercised with *great caution* and *only for such time* and to such extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders" (*Edison vs. Edison United Phonograph Company*, 7 Dick. 620). In *Fougeray vs. Cord* (5 Dick. 756) this court held that "The disturbance of corporate functions incident to receivership are extreme

powers," and in that case the appointment of a receiver was set aside as an improperly exercised power. It should be noted that the Vice Chancellor in *Sternberg vs. Wolff* (*supra*), after the powers of the Court of Chancery to appoint a receiver had been defined by this court, failed to make the appointment. Impotency to act in these cases is the sole basis of jurisdiction. Without the court being satisfied that the corporation cannot act through a majority of its agents duly authorized to dissolve the corporation, there is no power to appoint a receiver.

POINT II.

The Court had no jurisdiction to appoint receivers because the corporation had not become dissolved.

Vice Chancellor Howell has construed the Corporation Act to mean that dissolution by the directors is not complete until every step required by the statute has been performed, and that until the time required for the advertisement of the certificate of the dissolution by the Secretary of State (four weeks) has elapsed the liquidation is not complete. In the present case there had been but two insertions of the liquidation notice at the time the bill was filed. In the case of *Dolgeville Electric Light & Power Company* (160 N. Y. 500) Chief Justice Parker held that the statute must be strictly complied with, and that a failure to observe every required step in the proceedings to liquidate would invalidate them. We therefore submit that jurisdiction in the Court of Chancery did not exist to appoint liquidating receivers under the statute until the

liquidation proceedings were complete, and the corporation was no longer subject to the control of the board of directors as directors.

POINT III.

There was no jurisdiction for giving to the receivers, even if their appointment to conserve the assets were proper, the authority given by the order.

In *Sternberg vs. Wolff* (*supra*) Vice Chancellor Pitney says regarding the power to appoint receivers "It must always be exercised with great caution and only for such time and to such extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted governing body comes into existence, whether it is brought into existence by an adjustment of the dissension or by the election of the new body, and such body is ready to take possession of the property of the corporation and proceed in the proper discharge of its duties, *the court must lift its hand and retire.*"

Again the court observes: "We must also consider the effect upon the general credit of the corporation of the appointment of a receiver."

Practically the same language is used in all the decisions to be found in this country and in England.

In the present case, as above noted, the value of the refrigerating plant is probably one-sixth of the entire assets of the corporation. While the corporation may not at the time of the filing of the present bill have passed from the stage

of conducting its authorized business to a concern solely in the process of liquidation, the agreement of the parties, the stockholders' certificate, and the resolution of the Board of Directors were all looking toward, not a continuance of the business but the liquidation of the corporation. Business prudence required its affairs to be conducted accordingly.

The rights of creditors are not jeopardized; neither are those of the stockholders. The trustees may be looked upon as partners dealing with their own assets, and by a majority vote of their organization to act prudently or unwisely in converting into cash the assets of the corporation which belong to them. They must suffer for their own mistakes. The court should not interfere with the appointment of receivers at the expense of the owners of the property to be liquidated. Obviously they, with their experience, are better qualified for these duties than are the receivers who are unacquainted with real estate conditions in Hudson County and New York. The expenses of this litigation have already been sufficiently large, allowances having been made by the same court to counsel and the receiver in the contested election suit and the original Chancery suit of nearly \$60,000, in addition to \$19,500 made to counsel in the two suits to remove the trustees of the trust under the Lembeck will.

The trustees representing the Betz faction join in the petition for the appointment of receivers. Their contribution to these allowances has been confined to matters pertaining to the corporation. They have not been called upon to contribute to the expenses of the litigation had with regard to the Lembeck trust.

The experiences of the owners of the company in this respect should be considered by the court,

and they should if possible be saved the attendant additional expense of the liquidation of the corporation by instruments of the courts, whose allowances may be assumed to be proportionate to those already made.

POINT IV.

The powers given to the receivers under the order of appointment are not authorized by law.

The powers of receivers in insolvency and liquidation proceedings are entirely different. In the former case the court is acting in behalf of creditors and in the latter (where the corporation is solvent) for the stockholders. The receivers, who may be appointed by the court to assist in the proceedings to liquidate a corporation, are appointed for liquidating purposes only, not to carry on the general purposes of the business. In the order under review the receivers are given general powers to continue the business for which the corporation was organized. The court has no power to nullify the stockholders' action taken for the purpose of liquidating the corporation. Inasmuch as the receivers to be appointed are liquidating receivers only; the receivers are as much bound by the prohibition of the statute forbidding the continuance of the business for which the corporation was formed as are the directors-trustees. We submit that in this respect the order is without legal authority.

We submit that the order complained of should be vacated.

HUDSPETH & DEMAREST,
Solicitors for Appellants
Charles E. Green *et als.*

