

New Jersey Court of Errors and Appeals

Between

WM. B. RIKER & SON COMPANY,
et al.,

Complainants-Appellants,
and

UNITED DRUG COMPANY,
Defendant-Respondent.

On Bill, etc.
On Appeal
from Order
Denying
Injunction.

Brief for Appellants in Reply to Brief for Respondent.

At the argument in this case, Respondent's counsel had no brief, and procured from the court permission, of which he has availed himself, to file and serve a brief; and the appellants, without making a formal reply, desire likewise to avail themselves of the court's permission, which was expressly accorded, by making the following comments upon the respondent's brief.

The Respondent suggests, on p. 6: "The validity of "the by-law does not therefore seem to be necessarily "involved in the present case." We do not differ with this view. We have always felt, however, that the important contract right which the by-law gives the appellants, could not be violated or interfered with by any act of the United Drug Company, and that the appellants obtained important contract rights thereunder which the Drug Co. was incompetent to impair. (*Loewenthal v. The Rubber Reclaiming Co.*, 52 N. J. Eq., 440, *Pitney V. C.*, cited with approval by this court in *Johnson v. Mutual Guaranty B. & L. Ass'n.*

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37 Vr., 683.) Our only reason, however, for referring to the by-law and our rights thereunder, is to indicate to the court that it is a substantial equity, and not a mere technical right, which we are seeking to preserve by this suit.

On page 9 of the Respondent's brief counsel twice refers to the "monopoly" of the complainants in the sale of the defendant's goods in New York, Brooklyn and Boston. The first reference is in line 2 and is followed by various references to the record. None of the references support the suggestion of a monopoly in even the remotest degree, but on the other hand the record affirmatively shows that no monopoly is claimed by the complainants. In the letter from the President of the complainant, Wm. B. Riker & Son Company, dated Feb. 6th, 1911, it is stated that

"we had and now have no motive other than to
 "obtain recognition of the agency rights involved,
 "meaning, not exclusive selling rights, but selling
 "rights, for all the products of your Company and
 "its subsidiaries in New York, Bklyn and Boston"
 (page 38, lines 19-24).

Again, the President of the complainant Wm. B R & Son Company wrote the attorney for the defendant under date of March tenth, 1911, as follows:

"As has been already written you, we have no
 "desire to secure exclusive selling rights in New
 "York, Brooklyn and Boston and have no objec-
 "tion to the goods being sold in other drug
 "stores, including stores owned by your Com-
 "pany" (page 46, lines 28-32).

On page 19, *et seq.* of Respondent's brief it is suggested that our contention is that the dissolution statutes of this State only apply to insolvent corporations. We have never made any such claim, and are prepared to concede that the directors and requisite

number of stockholders can dissolve a solvent corporation, provided the dissolution be complete, and the plan adopted be that specified in the statute, with the ultimate effect of a complete winding up and liquidation of the business carried on by the Company. For this reason the reference in Respondent's brief to *Fitzgerald v. The State Mutual Building & Loan Ass'n.*, 69 Atl. Rep. 564, which held that the dissolution statute passed in 1904, as a supplement to the act creating Building & Loan Associations, is unimportant. So long, however, as that statute and case have been referred to, we desire to direct the court's attention to the important distinction between the dissolution statute in question, and Chapter 24 of the Laws of 1904, referred to in that case. In the latter, the directors are compelled to conclude that it is "for the interest of the shareholders of such Association that the same shall be dissolved"; whereas, in Sec. 31 of the Corporation Act, the provision is: "Whenever in the judgment of the Board of Directors, it shall be deemed advisable, and most for the benefit of such corporation." The distinction is obvious, and renders valueless the suggestion of Respondent's counsel on page 26 of his brief, that the *Fitzgerald* case is authority for the proposition that shareholders are permitted to conserve "their own interests."

In passing, it is also worthy of note that the Legislature, in Chapter 24 of the Laws of 1904, instead of using the words "winding up" in connection with the dissolution proceedings, adopts the phrase "liquidate" and "wind up its affairs" indiscriminately, indicating that not only did the authorized dissolution under Chapter 24 of the Laws of 1904, include a cessation of business, as we have throughout contended was involved in Sec. 31, but that the Legislature, in using the expressions "winding up" and "liquidating" regarded them as equivalent to each other.

While it is true, as pointed out on page 21 of Respondent's brief, that the Legislature, in 1875, added to the general powers of corporations created under the act, that of winding up and dissolving itself, or being wound up and dissolved, it nevertheless was careful to add the words "in manner hereafter mentioned"; and of course one of our complaints here is that the dissolution proceedings complained of are not taken in the manner directed by the statute. While it is true that *Kean v. Johnson*, and some of the early familiar cases were decided before this enactment, nevertheless the books are full of cases, of which *Mills v. The Central Railroad Co. of N. J.*, 41 N. J. Eq. 1, is but one example, adopting and reiterating the doctrine of the earlier cases, and the rule announced in those early cases has now become too firmly established in this State to be shaken or ignored. As we argued in our principal brief, the appellants, as stockholders, have a right to insist that the corporation be continued, so long as its business is being profitably conducted, unless it be dissolved "in the manner" provided by the statute. The Respondent argues on page 24, that so long as we are to be paid the equivalent in value of our stock in cash, we have no ground of complaint because the other stockholders are willing to receive stock. Such a contention has no support in the cases. *Mason v. Bewabic Mining Co.*, 133 U. S. 51, referred to on page 50 of respondent's brief, expressly holds the contrary. MR. JUSTICE MILLER, in that case likens the interest of a stockholder in a corporation and his rights upon dissolution, to that of a partner in a partnership, and concludes that each individual stockholder, upon dissolution, has a right to insist *that all of the assets of the Company shall be sold for cash, and upon the distribution of the latter pro rata among the stockholders.* This rule has been slightly modified by our dis-

solution statute in Section 54 of our statute. What we insist upon is that the stockholder has the inherent and impregnable right to have the dissolution effected in the manner authorized by the statute, or not at all. In this connection, see also *Tobias v. Morris* (Sup. Ct. of Ala.), 28 Southern Rep. 517, and more particularly *Ferry v. Latrobe Steel Co.*, 155 Fed Rep. 161, where Judge MCPHERSON, in a well considered opinion, discusses what is involved by liquidation or winding up in dissolution, and denies that the trustees have any right in such proceedings to deal with stock or anything else than cash, which is to be distributed to the stockholders.

On page 23 of Respondent's brief attention is directed to the fact that section 31 of the Corporation Act, prescribing the method of dissolution, and in the Revision of 1896 included under the subdivision of the act entitled "Winding Up," was under the Act of 1875 included under the heading "Remedies Against the Corporation." This difference is worth pointing out, for it indicates that after the lapse of twenty-one years the legislature thought it advisable to plainly indicate that the method of dissolution provided was for the purpose of "winding up."

On the same page counsel, after commenting on section 54, showing the limitation of the power of trustees in dissolution upon disposition of the corporate property, points out that it is curious that section 56 contains no such limitation. Examination of the two sections removes any such impression. Section 56 does not contain any provision at all on the subject of sale, such provision being given in section 54, and the legislature obviously considering it unnecessary to repeat them. It is submitted that a sale by a receiver appointed under section 56 would be governed by the rules and limitations laid down in

section 54, and even counsel for the respondent does not suggest otherwise.

On pages 24 and 25, counsel devotes considerable attention to what a minority stockholder may and may not properly demand from the trustees of a corporation in process of dissolution. Counsel thus ingeniously attempts to lead the mind of the Court away from the more important question as to the extent of the powers of trustees in dissolution. This question is far more important than any question of what these complainants may demand for themselves, and the complainants are not urging upon the Court upon this appeal any consideration based upon their selfish interests only. It is here insisted that section 54 absolutely limits the powers of trustees in dissolution upon disposition of the corporate assets, and that those powers cannot be enlarged in any manner other than by the unanimous consent of all concerned. The legislature very properly provided that the trustees upon a sale could take bonds with mortgages, because that would represent security to the stockholders for whom the trustees were acting, and would mean ultimate payment of the consideration. The relation of debtor and creditor, thus created, is different fundamentally from that of investor, arising by the taking of stock in another corporation. The omission in section 54 of permission to take stock upon the sale of the corporate assets is equivalent to an affirmative prohibition. The provisions of section 54 as they stand entirely harmonize with all the other provisions of the Act on the subject of dissolution, while the construction contended for by the Respondent's counsel is wholly inconsistent with all the other provisions of the Act on the subject.

The statement is made on page 27 of the Respondent's brief, that the Court in the *Theis* case found "that the dissolution proceeding was not in good faith

"and that under the record in the case there was no *"bona fide* attempt to dissolve the corporation." It is only necessary to add that the Court found that the proceeding was not in good faith, for exactly the reason here presented to this Court, viz.: that there was no attempt within the meaning of the statute to really dissolve the corporation. The Court said:

"A dissolution of a corporation within the contemplation of the law, is the death of the corporation. It means a disintegration, a separation, a going out of business. But in this case all of the elements of dissolution are wanting. The corporation, with a slightly different name, proceeded in the same town, with the same property, the same powers, and substantially the same owners."

These words could have been written with entire accuracy with reference to the facts in the case at bar. The opinion in the *Theis* case also said, after quoting the provisions of the Washington dissolution statute, above referred to:

"Under the provisions of this statute, it is the contention of the respondents that an absolute right is given a two-thirds majority to dissolve the corporation whenever they see fit; and the broad ground is taken that inasmuch as the corporation is acting within its legal capacity, the Court has no right to inquire into the motives which actuated the moving stockholders; that its only concern is to see that the formal legal requirements have been complied with; and such was evidently the theory adopted by the trial Court." Further, the Court said: "But a court of equity will never aid in the perpetration of a fraud simply because application is made in empty form of law."

On page 28 of the Respondent's brief, counsel says that "an examination of the *Theis* case will show the statute quite different from ours." The Washington

statute in question is quoted at length in the opinion of Judge Dunbar in the *Theis* case (printed on pages 19 and 20 of appellants' brief) and an examination of the statute shows that it is very nearly identical with the New Jersey statute. In Washington a corporation may dissolve where it is shown that the stockholders by a vote of two-thirds so voted. It is true that the papers must be presented to the Superior Judge of the county, who must be satisfied that the statutory steps have been complied with, but the statute expressly states that the Judge, "if satisfied "that the corporation has taken the necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, * * * shall enter an order declaring it dissolved." Under this provision the Judge has no discretion to refuse dissolution if the statutory steps have been complied with, and the practical working effect of the statute is precisely similar to the New Jersey statute, excepting, as pointed out by the Vice Chancellor on the argument below, that in Washington all claims against the corporation must be discharged before dissolution.

On page 33 of the Respondent's brief counsel quotes at length from 4 Thompson on Corporations, sec. 4443. We direct the particular attention of the Court to this quotation, because it is in entire harmony with our construction of the portions of the New Jersey Corporation Act dealing with the subject of dissolution. The first sentence, reading, "It is believed that no case "can be found in which a court of equity has granted "an injunction, at the suit of a minority stockholder "against the majority, to prevent them from discontinuing the business of the corporation and winding "up its affairs", is the proposition on which Judge Kirkpatrick decided the case of *Windmuller vs. Standard Distilling Company*, 114 Fed. Rep. 491. It shows

that the learned Judge had in mind in making that decision, a proper compliance with the dissolution sections of the Act, and had not in mind any such perversion of the purpose and meaning of the Act as is here claimed by the respondent. The conclusion of the quotation from Thompson emphasizes this point, referring to those entirely proper cases in which the majority determines it to be "more expedient to discontinue the business." Here there is not even a pretence of discontinuing the business, but, on the contrary, a brazen attempt to continue the business with the complainants shaken out, by the imposition of conditions known to the management of the defendant to be impossible of acceptance by the complainants.

It was unfortunate for the Respondent that in order to avail himself of the expressions of some anonymous annotator to a case, that he should have been compelled to cite as he does (page 34 of his brief) *Shilholwe Woolen Mills v. State of Tenn.* 89 S. W. Rep. p. 741. Examination of that case shows that the dissolution there undertaken was proposed "where no business had been done by the corporation, no debts or obligations had been incurred, and no liabilities had accrued;" and after all, the only question decided by the case is what we have always conceded, that the necessary majority of stock may, in a proper case, against the objection of the minority, dissolve a company.

On page 35 of the Respondent's brief it is stated that

"where statutory methods are prescribed, the power of a majority pursuing such statutory methods in good faith and without fraud, is nowhere disputed."

Here it is claimed that on the defendant's part good faith is lacking and fraud is present. An open departure from the requirements of law is often quite as

bad as, and frequently is equivalent to fraud. In the *Theis* case the Supreme Court of Washington found substantially similar facts to constitute fraud on the rights of a minority stockholder, and the Court declared that it was not within the contemplation of the contract that a "two-thirds majority or any majority had a right to juggle with the corporation and "the law."

On page 37 of the brief the following sentence occurs:

"That the new enterprise is not born of a conspiracy designed to get rid of the complainants "with their hundred and twenty shares is also "conclusively shown by this same unanimity of "action, as it is inconceivable that four thousand "share holders, comprising practically all of the "stock except that held by the complainants, could "be rounded up for any plan with such an object."

In reply we claim that it is easily conceivable that four thousand shareholders of the defendant could be rounded up for the reorganization plan now before the Court with the prime object of getting rid of the interest of the complainants in the defendant. The record in the suit in which the supplemental bill is filed is before the Court, and an examination thereof will quickly convince the Court that the reasons given in the reorganization plan, Schedule A, for the abandonment of the New Jersey Corporation, and the transfer of its business to a Massachusetts corporation, are made to order, specious and flimsy in the extreme. None of the reasons set forth in the plan will stand examination. It is not necessary, in order to obtain additional capital or to confer enlarged stock privileges on the present preferred stockholders, or to take back the parts of the business heretofore given the subsidiary corporations, to abandon the defendant corporation and the State of New Jersey. The real

reason for this plan of reorganization is that, the defendant having failed in its effort to deprive the complainants of their right to buy and sell the defendant's products, under the by-law referred to, and being enjoined against selling its products in New York, Brooklyn and Boston unless sold also to the complainants; and its management being thoroughly alive to the futility of repealing the by-law as against the complainants, who protested and voted against the repeal, is now, by indirection and under such a skilfully devised and innocent appearing mask as to deceive the learned Vice Chancellor from whose decision the present appeal is taken, seeking to kill the defendant corporation and thereby end its power of living up to its by-law-contract with the complainants. It is easily conceivable that practically all of the stockholders of the defendant could be "rounded up" for such a plan under the skilful leadership of the President of the defendant, who, as appears by the record, organized the defendant largely with the assistance of the management of the complainant Wm. B. Riker & Son Company; nurtured the defendant to sturdy maturity with the constant and invaluable assistance and co-operation of the complainants; and now, feeling that the defendant is quite able to get along without the guardianship of the complainants, decides, in very modern spirit and manner, to kick over the ladder on which he has climbed. It is quite conceivable, on the record before the Court, that these four thousand stockholders could be led to believe any alarming thing, however absurd, about the complainants, that the President of the defendant wished them to believe.

On page 41 of the Respondent's brief, counsel states that the charter of the defendant is "subject to the "power of the two-thirds majority of the stock, *acting "in the statutory way*, to abandon the enterprise as

"so incorporated at any time." (The italics are ours.) No issue with this proposition is taken by the complainants on the present appeal; but the attention of the Court is directed to the fact that the defendant is not seeking to "abandon the enterprise", but, on the contrary, to perpetuate the enterprise, after sand-bagging the complainants.

On page 42 of his brief, counsel states that

"The Court of Chancery has affirmatively found
"that the course pursued is free from fraud and
"was recommended and pursued in good faith."

No such statement is contained in the opinion of the learned Vice Chancellor or in the order advised by him. The Vice Chancellor goes no further than charitably to suggest that the reasons given in the plan of reorganization are "not merely colorable" (Record page 109, line 30).

On the same page, counsel, after admitting that the rights of the complainants under the by-law in suit would be swept away by the proposed dissolution of the defendant, very plausibly suggests that the remedy of the complainants is against the estate of the dissolved corporation, and on page 43, he asserts that the rights of the complainants are "absolutely protected" because they may recover damages accruing by the defendant's breach of the by-law-contract; and, to make the remedy more absolute and perfect, he concludes by pointing out that even the directors themselves would be responsible as for a breach of trust. These considerations were just as pertinent before Vice Chancellor Howell upon the argument of the order to show cause on the original bill as here; but the complainants cannot be forced to abandon their equitable rights and compelled to attempt to compute and collect, in dollars, damages which are not susceptible of computation, and could not be ascertained by any method provided by the law courts.

This is particularly true when the Directors, against whom we are supposed to have claims for damages, scattered throughout the country, may or may not be solvent, and the Company, which by the Respondent's argument assumes responsibility for our claim, is organized under another State and is in no way amenable to process in New Jersey.

The reference by the Respondent to the National Banking Act on page 44 of its brief, is a most unfortunate one. While it is true that Section 5220 authorized the dissolution of National Banks, Section 5223 expressly permits dissolution "for the purpose of consolidating with another association." As was suggested by the court at the argument, a merger or consolidation with a Massachusetts corporation is exactly what is proposed by the plan here under review, and the fact that National Banks dissolve for that purpose, by virtue of express legislative authority, can have of course no weight in this State, where no such authority exists.

Referring to the request of the CHIEF JUSTICE on the argument of this case, that counsel consider the question why the proceedings under review are not tantamount to a merger, it is sufficient to point out that while the condition aimed at is undoubtedly analogous to that obtained by a merger, no authority whatever exists for the merger of New Jersey and Massachusetts corporations. Indeed, it would be difficult to adequately or properly characterize the proposition, except to call it a consolidation of the New Jersey Company with the Massachusetts corporation of the same name. The business is to be the same, the name is the same, the trade-marks and good-will will continue, the location of its office and manufacturing plant will remain the same, the same officers will conduct its business, and one cannot, upon reflection, escape the conviction that the author

of the scheme had in mind a virtual merger or consolidation of the business of the New Jersey Company with that of the Massachusetts concern, formed for the purpose of accomplishing that result, and finding no statutory authority for the project, adopted the dissolution statute as a means of securing the desired end. This, of course, cannot be done.

On page 51 of his brief, counsel suggests that "the plainest interests of the corporation and of its stockholders justify, even require, the removal of the business to another State, and its reorganization under other conditions," and that "the motive of the dissenter is merely a malicious or spiteful veto of the demonstrated interest of the majority." Here, and again at the end of his brief, on page 55, counsel confuses the interests of the corporation and of its stockholders, precisely as on the argument of the appeal, when in answer to a question from the Court as to how the dissolution of the defendant could be "for the benefit" of the defendant, counsel replied that it was for the benefit of the investors and of their investment. Not the slightest justification exists for counsel's suggestion that the motive of complainants is malicious or spiteful. Without undue repetition of the record before the Court, we would direct attention to the following language from the letter of the President of the complainant Wm. B. Riker & Son Company to the attorney for the defendant, on pages 51 and 52 of the record:

"Regardless of whatever legal obligation is assumed by this Company under such an agreement, it would be our aim to make the sale of your Company's goods as large as possible, and if we found with our increased selling facilities that we could double or treble the figures suggested, it would be our pleasure to do so" (page 51, lines 20-26).

And also:

"I do not think it too much to say, that through-
 "out our correspondence we have emphasized the
 "idea which we understand to be fundamental in
 "your Company and fundamental in the relations
 "between your Company and its selling agents—
 "that of co-operation" (page 51, lines 27-31);

And also:

"The arrangement proposed is for but ten
 "years, but if the arrangement be made we be-
 "lieve that within that time the fact that the
 "agency is limited as to time would disappear
 "from consideration and that the agency would
 "continue indefinitely, with advantage and profit
 "to your Company" (page 51, line 38 to page 52,
 line 3).

On page 52 of the Respondent's brief counsel states that "the compulsory retirement of stock in advance
 "of the expiration of the charters contract is closely
 "parallel to dissolution." It is respectfully insisted
 that the compulsory retirement of stock, at any time
 and in any manner, is not "closely parallel to dissolu-
 "tion," and that no other step or proceeding in cor-
 porate life is, in any way, "parallel to dissolution."
 The attempt before the Court for review is the wanton
 murder of the defendant corporation, and no mere
 robbery, battery or other injury can be properly com-
 pared with that final and complete crime.

On page 54 of the brief counsel suggests that it is
 error "to hold that the majority, who are favoring
 "dissolution of a New Jersey company, are *prima*
 "*facie* guilty of a fraud on the rights of a minority,
 "because they contemplate engaging in similar busi-
 "ness under a charter issued by another state" and
 that it is also error "to thus write into the law what
 "the legislature did not put in it." It is insisted that
 the legislature did write into the dissolution sections
 of the Corporation Act precisely the limitations on

the use of those sections here contended for by the appellants, and that the attempt to use voluntary dissolution in the manner here admitted,—that is, the attempt by indirection to accomplish what cannot be done directly, is both an abuse of the statute and a fraud on the complainants. The court in the *Theis* case emphatically branded substantially similar facts as constituting fraud on the minority complainant.

On page 55 of the Respondent's brief, counsel states that "the whole plan is frankly exposed." Just here consists the radical difference between the case before the court and most dissolution proceedings. Where the directors adopt resolutions in accordance with Sec. 31 of the Corporation Act, and the bald proposition of dissolution in accordance with the directors' vote is presented, it is usually a matter of great difficulty to show the impropriety of dissolution, or that controlling reasons why the dissolution should not be carried through, exist. In this case the management of the defendant has made open announcement that the dissolution of the defendant will be attempted in a manner not authorized by the Corporation Act, for purposes not recognized by the Corporation Act, and directly in the teeth of the system of equity based on *Kean v. Johnson*, and now firmly rooted in this and other States. The announcement of the purpose to perform an illegal act is the distinguishing feature of the case before the court for review, and it is confidently submitted that this court will not lend its sanction to any such attempt.

It is respectfully submitted that an injunction should have issued as prayed for.

ROBERT H. McCARTER,
ALBERT E. SEIBERT,
Of Counsel with Complainants.

June Term, 1911.

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Brief for Respondent.

The order from which this appeal was taken is printed on page 113 of the record.

It was made after argument under an order to show cause, dated April 21, 1911 (Record, page 99), requiring the defendant company to show cause why an injunction should not issue as prayed for in a supplemental bill of complaint filed in the above entitled cause on April 20, 1911, and printed pages 1 to 10 of the Record.

The prayer referred to in the order to show cause (Record, page 9) is that "the said defendant herein, its directors, officers, tellers and inspectors may be restrained and enjoined from submitting to the stockholders of the defendant at the adjourned meeting of the stockholders of the defendant to be held on the twenty-first day of April, nineteen hundred and eleven, or any other adjournment of said meeting, or at any other meeting, the proposition to take action upon the resolution of the board of directors of

said company, that in the judgment of said board it is advisable and most for the benefit of the United Drug Company, that the same shall be forthwith dissolved, and may be restrained and enjoined from passing any resolution, or receiving or counting any votes in favor of any resolution designed to carry into effect or accomplish any proposition to dissolve said defendant company."

The injunction prayed for is in form against the defendant corporation, its directors, officers, tellers and inspectors, but in reality is to enjoin stockholders' action at a corporate meeting, either on the specific day named in the prayer, or any adjourned day, or any other day, not only on a specific proposition set forth in the prayer, viz., the resolution of the board of directors of the company already passed that in the judgment of said board it was advisable and most for the benefit of the United Drug Company that it should be forthwith dissolved, but also on "any resolution designed to carry into effect or accomplish any proposition to dissolve said defendant company."

An injunction in accordance with this prayer would forever prevent action by the stockholders of the defendant corporation on any proposition of dissolution, and would go far beyond the facts relied on by the bill and the arguments advanced either in the court below or in this court. The petition of appeal (Record, page 116) seeks the same broad result and is based upon the ground that the decree below is erroneous "for that an injunction should have issued as prayed for in your petitioners' supplemental bill."

It is true that the charter of the defendant corporation provides that its existence shall be unlimited, but the proposition that the stockholders should be perpetually enjoined from exercising a privilege of dissolution conferred by the act under which the corporation exists is distinctly novel.

The real question in this case is within rather narrow limits.

On January 17, 1911, all the directors of the United Drug Company united in a circular letter to the stockholders, set forth as Schedule A of the supplemental bill of complaint, and printed in the record, beginning on page 14.

This circular should be read in its entirety as it discloses not only the purposes of the directors in the propositions made to the stockholders, but also the advantages and the methods suggested for the accomplishment of the purposes. Without attempting to analyze the details of this circular, its purposes were—to procure additional capital for the immediate requirements of the company and to put the business on such a basis that it could obtain from time to time in the future additional capital as needed; to give to the preferred stockholders under the present organization with limited right in the dividends, the option of sharing its future prosperity by the acquisition of common stock through the exchanges made possible under the new plan; to eliminate four subsidiary companies conducting a substantial part of the business and which are now controlled by stockholdership by placing the actual ownership of the assets of these companies in a single corporation, simplifying the accounts and to some extent reducing unnecessary duplication of expense; to settle pending litigation in the Massachusetts courts instituted by Mr. John B. Cobb, a stockholder of the company, to set aside the transfer to Mr. Liggett of the stocks of certain retail companies by the transfer to the new company proposed to be organized under the laws of Massachusetts, stocks of those companies with trade mark privileges. The plan secures through cash subscriptions required to be made by the stockholders acceding to it an immediate additional capital of \$275,000 and left available for future sale \$2,225,000 par value of preferred stock and \$250,000 of common stock.

The circular without concealment or evasion of any kind, but with the utmost frankness, laid out a comprehensive plan for the present and future advantage of the stockholders of the United Drug Company (New Jersey corporation), in which the cooperation of all the stockholders was declared to be desirable. The proposal was in effect to abandon the present New Jersey organization and under a new charter from Massachusetts undertake a new future with sufficient present and future capitalization free from legal entanglements in which the company was engaged in the courts of Massachusetts and under which all of the assets of the business now scattered in different corporate ownerships and controlled by stockholdings should be brought under one ownership and control.

At the same time a notice was sent which appears as Schedule B to the bill of complaint, printed on pages 20 and 21 of the record, and which is hereinafter more particularly referred to.

With the notice were sent proxies and transfers, and in response to the notice assent was indicated by proxies and transfers by 5,104 shares of preferred stock out of a total outstanding issue of 5,527 shares and 7,380 shares of common stock out of a total outstanding issue of 7,500 shares. Not one share of the preferred stock actively objected to the plan, and every share of the common stock except the 120 owned by the complainants in this case actually assented. Of the assenting preferred stock 5,104 shares have been actually transferred to the United Drug Company (Massachusetts corporation), and of the assenting common stock 7,273 shares have been likewise actually transferred to same company (Record, page 80, lines 9 to 31).

The book value of the common shares of the defendant corporation, with all assets at full worth as of a going concern, is \$200.00, or twice their par. (Record, page 80, line 32 to page 82, line 20).

The par value of complainants' stock is \$12,000, out of a total preferred and common issue of \$1,302,700 of which \$1,260,400 has actually approved the plan, and only complainants' \$12,000 actually opposes.

The consenting stockholders, whose holdings have been transferred to the Massachusetts corporation, were over 4,000 in number. The largest stockholder and a director of the complainant, Riker Company, one John B. Cobb, as a large stockholder of defendant, has assented and turned in and transferred his stock. (Record, page 83, beginning at line 12).

The litigation instituted by the original bill of complaint, in which the present supplemental bill was filed, was instituted by the complainants to enforce certain rights claimed under the by-law referred to in the supplemental bill (Record, page 2). The restraining order made *pendente lite* (Record, page 67), does not adjudicate anything about the rights of the parties under this by-law, and the cause has never been tried. It has not been thought necessary to print the original bill and answer and the voluminous affidavits and exhibits attached to each, although under the stipulation they were before the court below in this case. From the statements in the supplemental bill (Record page 2), it appears that in the original bill the by-law was asserted as the basis of the relief prayed for, and the denial of the validity of the by-law is asserted by the answer to the "second original bill" on page 71 of the record, and both by this answer and by the supplemental bill itself (Record, page 3) (both being duly verified) it is shown that the by-law was repealed on October 4, 1910, at a stockholders' meeting, the complainants voting against such repeal and protesting the right to repeal.

If the by-law is valid and irrepealable, by retaining one share of the stock, complainant, Riker Company, can control the exclusive sale of goods manufactured

and sold by the defendant company in the City of New York as long as the company exists. It is admitted that if the company be lawfully dissolved, the by-law cannot survive the dissolution. The validity of the by-law does not therefore seem to be necessarily involved in the present case.

The notice sent out to the stockholders, hereinbefore referred to as Schedule B attached to the supplemental bill (Record, page 20), after reciting the resolution of the directors passed on the 17th day of January, 1911, that it was advisable and most for the benefit of the United Drug Company, that the same should be forthwith dissolved, apprised the stockholders that in accordance with the vote of the directors to that effect, a special meeting of the stockholders would be held at the office of the company in Jersey City, on Tuesday, March 7, 1911, at 12 noon.

"First. To take such action as the stockholders may deem desirable upon the aforesaid resolution of the Board of Directors, relative to the dissolution of the company."

"Second. To take such action as the stockholders may deem advisable with reference to authorizing the sale of all the property and assets of the company, and in case such sale is authorized, to fix the terms and conditions thereof."

All stockholders, preferred and common, including the complainants, received this notice, and were invited to sign and return proxies also enclosed, which proxies they were informed, unless other instructions were given, would be voted in favor of the dissolution of the company, and in favor of a sale of its assets to carry out the plan described in the circular letter of the directors hereinabove referred to as Schedule A (Record, pages 14 to 20).

The proxy referred to, in addition to the usual power of attorney to vote at the meeting, contained au-

thority to sign a written consent to dissolution as follows:

"KNOW ALL MEN BY THESE PRESENTS,
that I,being the owner of
..... shares of the capital stock of the
UNITED DRUG COMPANY, hereby constitute
and appoint..... .my attorney
with power of substitution in my name and on
my behalf to vote at the special meeting of the
stockholders of the United Drug Company called
to be held at Jersey City, New Jersey, on the sev-
enth day of March, 1911, with all the power and
authority I should have if personally pres-
ent, and in particular I hereby consent to the dis-
solution of the United Drug Company in accord-
ance with the resolutions of the board of direc-
tors passed on the seventeenth day of January,
1911, and I hereby authorize and empower.....
.....in my name and on my behalf to sign a
written consent to such dissolution to be filed in
the office of the Secretary of State in New Jersey.

.....

Signature.

Dated"

Besides the proxy there was sent to each stockholder a transfer to accomplish the immediate exchange of the stock of the defendant company for stock in the Massachusetts company, as recommended by the directors in their circular letter (Record, page 19, lines 17 to 30).

As already shown more than 4,000 stockholders, preferred and common, responded with proxies and transfers, and the complainants are the sole representatives, with 120 shares of common stock, of opposition to the changes recommended by the directors.

It would be idle to deny in the face of the literature so publicly distributed among the stockholders, that the changes recommended by the directors to the stockholders included, *inter alia*, the dissolution of the New Jersey company. It would be equally idle to make such denial if the letter of the directors, the notice of the secretary about the dissolution meeting, the notice of the secretary inviting a vote of the stockholders on the transfer of the property, the proxies and the transfers and the invitations for new subscriptions had been sent out in separate mails and with appreciable intervals of time, instead of under one cover, as the relation of the different documents to each other and to the contemplated accomplishment would have been equally clear. There was no concealment of design or indirection of action. A frank recommendation of changes for the benefit of the stockholders of the United Drug Company, and an open offering of means to carry out the recommendation if the stockholders so desired.

That the business propositions contained in the recommendations seemed good to the stockholders the responses conclusively proved. Four thousand stockholders never showed greater unanimity of desire than was exhibited in this case. The correspondence between the defendant company's officers and the complainants is set forth in full in the affidavit of Mr. Cosden, printed in the record, beginning at page 31. This court will search this affidavit and the letters therein contained in vain for any suggestion on the part of the objecting complainants of difference of view with the rest of their fellow stockholders as to the business advantages of the plan to the United Drug Company.

The dissent of the complainants is based on the effect on the monopoly enjoyed by them in the sale of the Rexall goods in New York, Brooklyn and Boston (page 35, lines 8 to 16; letter of Feb. 6, 1911, pages 37 and 38; page 53, lines 15 to 30). To the letter of Feb. 6, 1911, the president of the defendant replied under date of Feb. 21, 1911 (Record, pages 39 to 41), that the rights of the complainant should be preserved notwithstanding the changes contemplated by an agreement on the part of the Massachusetts company to assume the burden of the pending litigation and abide the result of the decree of the New Jersey Court of Chancery. In this same letter the president of the defendant used this language, "I think we are agreed that the proposed plan is a desirable one from the standpoint of United Drug Company and its stockholders, and I do not think that any of the parties to the suit of *Wm. B. Riker & Son Co., et als, vs. United Drug Company*, ought to seek any advantage in such suit by reason of anything connected with or contemplated by this plan of reorganization." To this Mr. Cosden made no dissent, but the proposition was declined (Record, top of page 42). Mr. Cobb, so frequently referred to in this correspondence, is the same Mr. Cobb referred to in the directors' circular letter, as in part the author of the plan, and notice of whose endorsement went to the stockholders with the recommendation of the directors (Record, page 17, lines 10 to 35; page 83, lines 10 to 22). Mr. Cosden's affidavit shows the real attitude of the complainants toward this plan, and an examination of the affidavit will show no denunciation of what counsel eloquently denominate in their brief "a wicked scheme," but an entire willingness to aid in its consummation if the monopoly of the complainants is recognized and protected. It will further appear that the apparent reason for a failure to reach an amicable agreement was due to differences about advertising the Rexall products in New York,

Brooklyn and Boston, which advertising the complainants insisted should be for their sole benefit. A reading of this correspondence absolutely negatives the assertion that the attitude of the defendants directors was arbitrary or oppressive, and affirmatively shows that every effort was made to conciliate the complainants, even to the extent of a thirty days' adjournment of the stockholders' meeting to permit further discussion.

It is not of course questioned that the complainants had a perfect right to assume this attitude of selfish opposition, and to vote as their interests might inspire on the proposal of the directors to dissolve the corporation. It is in fact contended that stockholders represent themselves while so voting, that the privilege of asserting individual interest extends to the majority as well as the minority and that the motive of the majority, if it comprises the statutory number, in asserting its will, is of no importance in determining the validity of its action, except in cases of actual fraud.

It is not of course contended that a court of equity might not enjoin the use by stockholders of the power of dissolution, conferred upon them by the statutes under which the corporation was organized to fraudulently deprive the minority interest, however small, of their interest in the corporate property; but it is earnestly insisted that no such fraudulent purpose is to be inferred from the determination on the part of the majority, for good and prudent business reasons believed by the majority to be for the best interest of the capital invested by them in the enterprise, to terminate the relations existing under the New Jersey charter and dissolve the corporation pursuant to the forms presented by the legislature.

It is conceded that the dissolution must be in *good faith* and in accordance with the statutory requirements. If the proceedings are so conducted in good

faith and in compliance with the prescribed method, the right of dissolution conferred by the New Jersey law on a two-thirds' majority of the stock ought not to be denied because the stockholders comprising the majority propose to employ the same capital either alone, or with additions, in a similar business in another state and under other conditions. The statutory method, if pursued, is absolutely protective of the rights of the minority who may dissent, and compels an accounting to the last cent for the benefit of the dissenting stockholder. To make the right of dissolution conferred by the New Jersey statute upon a two-thirds' majority of the stock acting in good faith dependent on the assent of stockholders who declare themselves as content with present conditions and unwilling for personal reasons to agree to a change, is to repeal the statutory provisions bearing on dissolution and to restore the law to the state in which it was before such provisions were enacted.

It is familiar learning, that one of the best ways to get at the real intent and meaning of new statutory provisions is to examine the old law. Even at the expense of again laying myself open to the charge that the old law is only matter of "archeological interest," I deem it necessary to direct attention to the earlier legislation of this state on the determination of the life of corporations.

The manufacturing corporation act of 1849 contained a comprehensive plan for the winding up of corporations on the expiration of their charters by their own limitation or by annulment by the legislature or otherwise.

Section 38 continued the corporate life for the term of five years after the actual date of dissolution "for the purpose of prosecuting or defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock, but not for

the purpose of continuing business for which such corporation may be established."

Section 39 conferred the authority upon the chancellor, on application of any creditor or stockholder, at any time within said period of five years, to appoint a receiver or receivers to take charge of the estate and effects of the corporation and make final settlement of its affairs.

This section is now, in very similar language, Section 56 of the Corporation Act, as revised in 1896.

The provisions for winding up corporations that had become insolvent were also then in force substantially as now, having originated in the act of 1829, known as the act to prevent frauds by incorporated companies.

There was not at that time, or for many years after, any provision in the corporation act or out of it (except in some special charters) for the dissolution of a corporation by the action of its stockholders.

Undoubtedly a corporation might surrender its charter by unanimous action of its stockholders, but dissolution by the affirmative action of a majority of the stock was impossible.

While the statutory law stood thus the leading cases of *Kean vs. Johnson*, *Zabriskie vs. Hackensack etc. Co.*, and *Black vs. Delaware & Raritan Canal Company*, were decided.

None of the charters considered in these cases contained any provisions for dissolution by the action of the stockholders, and the life of each company concerned was either unlimited by its charter or the charter limit had not expired at the time of the happenings out of which the cases arose.

These cases discussed dissolution of corporations at common law and without reference to or consideration of the power conferred by general statute on stockholders to accomplish dissolution by majority vote. No method of terminating the corporate life in

advance of the termination of the charter period by its own limitation, annulment or repeal by act of the legislature or forfeiture was present in the minds of the judges deciding these cases, and they are none of them therefore authoritative on the question of dissolution by stockholders now under examination.

In *Kean vs. Johnson*, 1 Stock., 401, the matter under consideration was the sale of the railroad of the Elizabethtown and Somerville Railroad Company to the Somerville and Easton Company. The sale was supposed to be authorized by an act of the legislature but it is significant that under the act the consent of all stockholders of the Elizabethtown and Somerville Company was required. Mr. Cortlandt Parker, who heard the case because the chancellor had been of counsel, opened his opinion with this language (page 406):

“Notwithstanding the extremely able and ingenious arguments of the counsel for the demurrants, it seems to the master that the plain language of the statute in question requires the consent of all the stockholders of the Elizabethtown and Somerville Railroad Company, before the road in which they, as stockholders, have a joint ownership, under the purchase by them, and the acts of the legislature in reference thereto, can be sold and conveyed away from them.”

It is exceedingly remarkable that a case under a statute, the language of which plainly compelled the determination reached by the court, should have become a leading case for so much law not absolutely necessary to its decision. Notwithstanding the controlling character of the statute relied upon to justify the sale, the opinion goes deeply into the discussion of the rights of stockholders under the charter contract, but the whole argument is based on the absence of statutory provisions authorizing a majority of the

stockholders to dissolve the corporation without the intervention of either the state or the courts. The case did not involve directly the dissolution of a corporation but directly holds that a majority of the stockholders may not abandon the corporate enterprise against the dissent of even one stockholder during the life of the company as fixed by its charter. The doctrine is stated thus on page 414:

"That the majority should have the power claimed for them, does not seem to me to be the contract between the stockholders, for there is a contract, as already shown in the case of every corporation, between them. That contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. Sometimes the duration of such employment is limited in the charter, and then, until that time, it must continue so employed, unless, perhaps, in the case of clear loss. Sometimes no time is fixed by the charter at which the proposed use of the capital shall cease, and then the contract between the parties is that, so long as the affairs of the company are prosperous, it shall go on, unless all consent to the contrary. The charter of the Elizabethtown company defines no period for its expiration; it is, however, such a corporation as naturally must, at its origin, have been expected to continue permanently, and by one section of its charter, it is provided that at the end of fifty years from its completion, the state has the right to take the road at an appraisal, a provision which may have been one reason for the privileges conferred. The charter bears date February 9th, 1831, and there was, of course, at the date of the act of 1849, a long period to elapse before the half century expires. True, the present stockholders are not the origi-

nators of the road, nor do they claim by transfer of stock from the original holders; but, nevertheless, by the act legalizing the mortgage of the franchise and property, the purchasers at the mortgage sale were substituted to all the chartered rights of the first owners of the stock and the charter is still the only evidence of the character of their contract. It must be inferred, then, that they, like the first stockholders, expected and embarked their means in the enterprise, on the faith that it was to continue, if prosperous, at least till the fifty years elapsed.

It can hardly, therefore, I think, be argued with justice that a majority of the stockholders had a right, upon principle to sell out all the property of the company from which its profits were to be realized and abandon the business, and that the minority's rights are satisfied by a division to them of the value of their stock."

It is evident that the learned master had no thought in mind of statutory provisions written into the fundamental charter conferring the right upon the majority of the stockholders to dissolve the corporation at any time without reference to the limit of life prescribed by the charter contract.

In *Zabriskie vs. Hackensack & New York Railroad Company*, 3 C. E. Gr., 179, the same doctrine was repeated in these words (page 183):

"It is also settled, upon the principles of the common law in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and busi-

ness of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter."

In *Black vs. Delaware & Raritan Canal Company*, the same chancellor indicated a disposition to modify the doctrine of *Kean vs. Johnson* and *Zabriskie vs. Hackensack and New York Railroad Company*, referring to the general propositions above quoted in both cases as *dicta*, and denied the injunction asked for. The chancellor was reversed by this court in *Black vs. Delaware and Raritan Canal Company*, 9 C. E. Gr., 456, and the rule laid down in *Kean vs. Johnson*, *supra*, approved so far as it applied to the stockholders of a railroad company. A specific part of the opinion of Master Parker is quoted by Mr. Justice Van Syckel at page 463. This court also approved the language of Chancellor Zabriskie hereinabove quoted, in *Zabriskie vs. Hackensack and New York Railroad Company*. This case was not a dissolution case, involved charters which contained no right on the part of the majority to voluntarily dissolve, and is not an authority against the right of a majority of stock working under the authority of a statute in effect at the time the corporation was formed, to voluntarily abandon the chartered enterprise. It is authority for the proposition that upon dissolution the stockholders cannot be compelled to participate in another enterprise of similar or dissimilar character without their consent.

While this case was decided after the passage of the act of 1870, hereinafter referred to, that act had

no possible bearing on the rights of the stockholders under discussion and was not referred to either by the court or by counsel.

In 1870 the legislature passed a supplement to the manufacturing corporation act of 1849, as follows (P. L., 1870, page 8):

"That whenever in the judgment of the board of directors of any company organized under the provisions of the act to which this is a supplement, and the various supplements thereof, it shall be deemed advisable and most for the benefit of such company, that the same should be dissolved before the expiration of the time limited in its certificate of incorporation, it shall and may be lawful for such board of directors within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, and of which meeting every director shall have received at least three days' notice, to cause written or printed notice of the adoption of such resolution to be mailed to each and every stockholder of such company residing in the United States, and also within said ten days cause a like notice to be published in one or more newspapers published and circulating in the county wherein such corporation shall have their principal office, and be conducting their business, at least four weeks successively, once a week next preceding the time appointed for the same, of a meeting of such stockholders to be held at the office of such company in such county, to take action upon such resolution so adopted by the board of directors, and which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may on the day so appointed, by consent of a majority in interest of the stockholders pres-

ent, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in such paper shall be given ; and if at any such meeting two-thirds in interest of all the stockholders shall consent that such dissolution shall take place, and signify such their consent in writing, then, and in such case, such company shall, upon filing such consent, duly attested by their secretary, in the office of the secretary of state and receiving from him a certificate that such consent has been so filed, be dissolved ; and the board of directors of such company shall cause such certificate to be published four weeks successively, at least once in each week, in one or more of the papers published and circulating in the county in which such company has been located and conducting its business ; and at the expiration of such time the said board shall proceed to settle up and adjust the business and affairs of such company in the same manner as though the same had been dissolved by the expiration of the time mentioned in their certificate of incorporation ; provided, that the secretary of state shall not issue the certificate of dissolution hereinbefore mentioned until satisfied by due proof that the requirements of this act have been fully complied with by such corporation."

This supplement introduced for the first time the dissolution by majority action of the stockholders and the plan is very little changed as now found in Section 31 of the Revised Corporation Act of 1896.

An important difference, however, was that the directors were to settle up and adjust the business and affairs of the company, no provision being made for intervention by the chancellor.

This act was a radical change and introduced a method of dissolution in advance of the charter limit,

at variance with the common law rules laid down in the cases above quoted.

It will be noticed that this right of dissolution was not limited to failing or insolvent companies, or made conditional on either present or future intention of the stockholders. It doubtless required good faith on their part, but assuredly did not make the stockholders favoring dissolution trustees for the minority, or exact of them any duty to vote other than in their own interest.

At the time this law was passed the period limited for the life of a corporation under the general law was fifty years, which continued in the revision of 1875 and until 1896, since which time there has been no limit. Business corporations were regarded as much less permanent in character than railroad companies (*Kean v. Johnson*, 1 Stock., 401, 415), and under both private charters and general statutes were usually limited to a comparatively short life. The provision for voluntary dissolution by majority vote lessened the necessity for such limitation, and it is hardly conceivable that without such provision the legislature would have given business corporations organized under general law an unlimited existence.

Thus the law stood until the revision of 1875 (revision, page 175). The supplement to the Manufacturers' Act of 1870 was carried into this revision by Section 34 without substantial modification except that it was made applicable not only to corporations organized under the general act but to corporations "incorporated under any law of this state."

The later sections of this revision, Sections 59, 60, 61 and 62, extended the authority of the chancellor found in Section 39 of the act of 1849 to corporations dissolved in any manner whatsoever, so that on the application of any creditor or stockholder the chancellor might appoint receiver or receivers to take charge of the assets of the corporation dissolved by voluntary action of its stockholders.

Section 57 of this revision in the event of dissolution, made the directors trustees with full power to settle its affairs, collect outstanding debts, divide the moneys and other property among stockholders after paying the debts due and owing by the corporation at the time of its dissolution.

Section 59 continued the corporate existence for the purpose of prosecuting and defending suits and of enabling the corporation gradually to settle and close its concerns and dispose of and convey its property and divide capital stock, but not for the purpose of continuing the business for which the corporation might be established.

Section 64 vested the assets of the corporation on final dissolution of any corporation created under the general law in the individuals who might be stockholders at the time of the dissolution in their respective proportions as tenants in common.

The voluntary dissolution section was amended in 1877 (P. L. 1877, page 20), by requiring the board of directors to file with the secretary of state a list of the names and residences of the directors and officers, duly verified by the secretary or president, and provided that the secretary of state should not issue the certificate of dissolution until such list had been filed.

The effect of these changes was to introduce into the general act a proceeding for the voluntary dissolution of corporations by two-thirds of the stock and to bring the administration of the assets in the event of such dissolution on the application of any creditor or stockholder under the direction of the chancellor, otherwise leaving the administration of affairs after dissolution for final adjustment with the directors as trustees.

Whether the extension of this power of voluntary dissolution to corporations organized before its inclusion in the general law or under charters with no such

provisions was free from constitutional objection does not require consideration in the present case, as there has been no change in the applicable provisions of the corporation act since the United Drug Company was organized in 1902.

The revision of 1875 not only incorporated the provisions hereinbefore referred to into the general law but did something else which is possibly of even greater significance. It added to the general powers of corporations as defined in the first section of the revision a new paragraph as follows:

“VII. To wind up and dissolve itself or be wound up and dissolved in manner hereinafter mentioned.”

The earlier acts of 1846 and 1849 had included the general powers found in the first six sub-divisions of Section 1 of the Act of 1875. The enumeration of the general powers of corporations found in the text-books does not contain a power to wind up.

1 Blackst. Com., 475.

1 Cook on Corporations, 6th Ed., Sec. 3.

2 Kent. Com., 278.

10 Cyc., 148.

7 A. & E. Ency. Law., 684.

Under the recognized principle that a corporation has no power except such as is conferred upon it by law, the power to wind up and dissolve itself, not being expressly found in either the common or statute law, was excluded from consideration and it was affirmatively held, that even one stockholder in a corporation could compel the keeping of the compact for the charter period, subject only to the intervention of the state or the superior right of creditors in the event of insolvency.

This sub-division VII, adding to the inherent powers of corporations power to wind up and dissolve or

to be wound up and dissolved in the manner provided by the statute, has been continued in the framework of the Corporation Act since 1875 without change.

The revisers of 1896 simplified the language of the subsequent sections of the act bearing on the effect of dissolution and the proceedings by the directors or by receivers, but the scheme has not been thereby substantially changed.

The provision above referred to, found in the revision of 1875, vesting the property of the dissolved corporation in its stockholders upon dissolution, has been omitted and the corporate life continued for the purpose of settling up, but the title to the assets remains in the corporation under the control of the trustees in dissolution or of the receiver appointed by the Court of Chancery. The title to the corporate property is not vested by statute in such a receiver, as it is in a receiver appointed in insolvency.

Some stress is put by the appellants upon the names adopted by the revisers of the Act of 1896 for the sub-divisions into which they separated the different sections of the law. It is not perceived that the names of these sub-divisions are of any aid in interpreting the act, but if they are to be given significance the inclusion of dissolution under the sub-division II furnishes no reason for limiting the apparent power conferred upon the stockholders by Section 31 because under later sections entitled "Winding up" certain general language is used with reference to proceedings that follow dissolution. The power to settle up and adjust the business and affairs of the dissolved corporation is found in Section 31 and has been there ever since the section was originally adopted as a supplement to the Manufacturers' Act in 1870. The general authority is, "The Board shall proceed to settle up and adjust its business and affairs." The later sections do not restrict this power under well known rules of statutory con-

struction governing the effect to be given to language used in a revision. There is, however, in them nothing limiting the general authority conferred upon the directors except that they may be superseded by a receiver in the discretion of the Chancellor.

An examination of the revision of 1875 does not show the same sub-division of the law as was adopted by the revisers of 1896. The revisers of 1875 divided the act as follows:

I. Powers.

II. Formation, constitution, alteration, dissolution.

III. Election of officers.

IV. Management and liability of directors, etc.

V. Remedies:

(1) Against the corporation.

(2) Against directors and stockholders.

VI. Miscellaneous.

Section 34, bearing on voluntary dissolution, is found in the Act of 1875 under the second sub-division, as is Section 31 of the present act. The provisions found in the Act of 1896 under the head of "winding up" are found in the act of 1875 under the head "remedies (1) against the corporation." These sub-divisions seem therefore to be without significance so far as legislative intent is concerned.

Section 54 of the present act, quoted in full on page 13 of the appellants' brief, is relied upon to show the limitation on the power of trustees in dissolution in the matter of the disposition of the corporate property. It is curious that Section 56, quoted in full on page 14 of the appellants' brief, contains no such limitation and provides that the receiver appointed by the Chancellor to take charge of the estate and effects of the dissolved corporation shall have 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 and to do all other acts which might be done by the corporation, if in being, *necessary for the final settlement of its unfinished business*, the powers to continue as long as the court shall think necessary.

There is, in my view, no great significance in the difference of language used in Sections 54 and 56 with reference to the powers of trustees and receivers. It is my view that in final analysis under either section the stockholder who demands it is entitled to receive, by way of distribution, whether through the trustees or the receiver, cash, and that the power conferred upon the trustees by Section 54 to sell partly on credit or take mortgages and bonds for part of the purchase price, leaves upon the trustees selling on such terms the duty of collection of the credit given or the security taken. And if the trustees in dissolution can advantageously dispose of the corporate property for something else than cash with the assent of the stockholders, Section 54 certainly does not prohibit that course. It is just as much the disposition and distribution of the corporate property to hand to the stockholders the stock of a vendee corporation as part of the distributable result of the sale of the property, if the stockholder is willing to take it, as to give him actual cash. It seems to be argued that Section 54 would permit trustees in dissolution to dispose of the assets of the corporation for notes or mortgages or bonds of a purchasing corporation and that the stockholders of the company in course of liquidation would be obliged to take from the trustees their proportionate parts of the promissory notes, mortgages and bonds so taken. That clearly is not the meaning of the section. If it be the meaning, then Section 54 plainly indicates that it was the legislative intention that the assets of the corpora-

tion might be disposed of to some other corporation for notes or securities, and that no stockholder would have a right to insist on receiving his share of the results of the liquidation in cash, but would be obliged to accept such fractional part of notes or bonds secured or unsecured as the trustees in dissolution might assign to him.

Reference has heretofore been made to the fact that the power conferred by sub-section VII of the first section of the Corporation Act to wind up and dissolve itself or be wound up and dissolved in manner hereinafter mentioned, is not limited in any way to corporations insolvent or in failing circumstances, and that the 31st Section does not provide that "whenever a corporation is in failing circumstances or actually insolvent, if in the judgment of the board of directors it should be deemed advisable, etc." The matter of insolvency is taken care of specifically by other provisions of the act and has always been recognized as one of the methods of winding up a corporation in advance of the time fixed for the expiration of its charter, and it might be suggested in passing that notwithstanding that the revisers of 1896 saw fit to treat of insolvency under an independent sub-head VII of that name, the proceeding in insolvency is just as much a winding up proceeding as anything referred to in the sections grouped under the title "winding up." To deny the application of the power to wind up by voluntary dissolution to a prosperous corporation is to repeal the law and make a new act contradictory of the theory on which these provisions were brought into the law, for it will be remembered that in the celebrated case of *Kean vs. Johnson*, the learned Master apparently recognized an exception, supported by the text books and authorities in England and in this country, to the absolute continuity of the charter contract to the end of the charter period, that a majority of the stockholders might at

common law terminate the duration of the enterprise before the period limited in the charter in case the venture was losing. (*Kean vs. Johnson, supra*, 414.) If this exception is recognized there was no occasion to put into our law the power to wind up by voluntary dissolution, unless the legislative purpose was to include prospering corporations.

In *Fitzgerald vs. State Mutual Building and Loan Association*, 69 Atl. Rep., 564, this court held that the insolvent provisions of the General Corporation Act applied to insolvent building and loan associations and that the provisions of Chapter 24, Laws 1904, relating to building and loan associations (P. L. 1904, 44) providing for the dissolution of such associations substantially by the method found in the General Corporation Act, did not limit or override with reference to such corporations the insolvency features of the general law. Judge Dill said:

"This act" (P. L. 1904, 44) "does not apply to insolvent corporations, but its purpose is only to afford a means of winding up solvent building and loan associations when the interests of the creditors are not involved, and where the shareholders can see that their own interests will be best conserved by the dissolution of the association."

This is an authoritative definition by this court of the legislative purpose in providing for dissolution by act of the shareholders expressly holding that they are made for solvent corporations, and to permit shareholders to conserve their own interests.

So in *Nelson vs. Kalkhoff* (62 N. W. 332) the Supreme Court of Minnesota, analyzing the provisions of the Minnesota statute for the dissolution of corporations, said that the proceeding is not for insolvent concerns, and that "the manifest purpose of the law is to enable stockholders to surrender the

corporate franchise and as effectually end the corporation as if it had never existed."

In considering whether the proposal to dissolve is in good faith or not, some attention might well be given to the financial condition of the enterprise, and in a close case such an element might have controlling weight. The language quoted in the brief of the appellants from the case of *White vs. Kinkead*, 63 S. E., 109 (Supreme Court of North Carolina) bears on the question of good faith and reference is properly made to the condition of the enterprise.

In *Theis vs. Spokane Falls Gaslight Company*, 74 Pacific, 1004 (Supreme Court of Washington), from which extensive quotations are made in the brief and which is largely decided on the authority of *Kean vs. Johnson*, a case arising, as we have seen, under other conditions of statutory law, the court expressly finds that the dissolution proceeding was not in good faith and that under the record in the case there was no *bona fide* attempt to dissolve the corporation. It is true that there is language in the opinion which seems to limit the right of dissolution to a corporation in failing circumstances but an examination of the case will show the finding of absence of good faith that the purpose of the dissolution was to "freeze out" small stockholders. The course of the litigation illustrates that but for such finding a different result might have been anticipated.

Counsel for appellants have seen fit, without any precedent so far as I know, to add to their brief a letter from the attorneys of Theis in the case last referred to, setting forth their version of the issues but refusing to forward the record. The following language about the middle of page 34 of the brief is interesting:

"We then commenced a suit to enjoin the sale of the property upon the ground that it was a

prosperous, going concern, and the attempted dissolution was not made in good faith, but for the purpose of freezing out the minority stockholders, etc. We applied for an injunction *pendente lite*, which was refused. The property was sold at public auction and bid in by an agent of the majority stockholders; a new corporation was formed and the property turned over to the new company. We brought in these new people by supplemental complaint and obtained the decree set forth in the decision, requiring the undoing of everything that had been done. These are the vital facts in the case. We managed to show by cross examination of their witnesses the real purpose of the transaction, and that there was no legitimate excuse for it, because the old company could issue all the bonds that were required for the legitimate corporate business."

This seems to indicate that there was a demonstration in the case of bad faith on final hearing which was apparently absent from it when the preliminary injunction was denied.

An examination of the Theis case will show the statute quite different from ours, and under the Washington laws, there is no inherent power in a corporation to wind up and dissolve itself by the voluntary act of a majority of its stockholders.

I have examined the corporate laws of the several states as set forth in the Corporation Manual for 1910, and in only seven states is the power to "wind up and dissolve itself or be wound up and dissolved" included in the general powers of corporations as such. These states are, besides New Jersey, Alabama, Connecticut, Delaware, Nevada, North Carolina and Virginia. In all these states the language is exactly similar to the words of the New Jersey statute, and it is commonly understood that New Jersey furnished the copy which the others followed. In Minnesota among the gen-

eral powers of corporations as such is set forth a power "to wind up and liquidate its business in the manner provided by law," and in Massachusetts a power "to be dissolved or to have its affairs wound up in the manner hereinafter provided." In both these states the proceeding is by petition, after affirmative vote by a majority of the stockholders—of each class if more than one class—to a court, setting forth the grounds of the application, and the *decree* of dissolution is discretionary with the court after notice and hearing. The Minnesota statute permits forty per cent. of the stock of a corporation with a paid up capital of more than \$40,000, which has been in business for more than three years and in its business has impaired its capital at least 25 per cent., to apply to the court for decree of dissolution.

Practically every state in the Union has some method of voluntary dissolution, generally through the aid of the courts, upon which jurisdiction is conferred to decree dissolution, the decree being made after notice and subject to review on appeal as in case of other decrees. In West Virginia a majority of the stock may resolve to discontinue the corporate business and thereupon its affairs are to be settled up by the directors, or, on the application of a creditor, by receivers appointed by the court. One-third in interest may apply by bill in chancery to the Circuit Court to wind up, and on such bill the court is authorized to proceed "according to the principles and usages of equity" to hear the matter, and if sufficient cause be shown to decree dissolution.

See *Hurst vs. Coe* (W. Va., 1887), 3 S. E., 564.

In the seven states above specifically named, in which the power "to wind up and dissolve itself or be wound up and dissolved" is included in the general powers there seems to have been no reported decision by the courts attempting to define the exact purpose of the legislature in incorporating this provision into

the law except in New Jersey in the Fitzgerald case. In Minnesota, where the provision is "to wind up and liquidate its business in the manner provided by law," it has been held that the purpose of the law is to permit the stockholders to effectually surrender the franchise (*Kalkhoff vs. Nelson*, 60 Minn., 284). We find little outside aid therefore in the reported cases.

The statutory provisions do not of themselves suggest that the motive of the stockholder in voting on the question of dissolution is of any importance, or that he is to be precluded from voting as his interest may suggest. He is not required by the statutes to present any petition to any court or to explain his reasons. The effective thing to accomplish the dissolution is a two-thirds majority of the stockholders.

That this question now reaches this court for the first time is persuasive evidence, that, in the opinion of the bar, stockholders have been free to exercise their power of dissolution without supervision by the courts. Chancery has frequently been called upon to take charge of liquidation for the protection of creditors or stockholders, but even that power has been sparingly exercised, and this court has itself indicated that the chancellor's intervention should be then only for good cause shown (*Newfoundland Railroad Construction Co. vs. Schack*, 13 Stew., 222). In all the corporate activities of the last twenty years, with all sorts of evolutions in the life of corporations, big and small, and all kinds of litigations over almost every kind of corporate change and reorganization, many of which involved plans for the disappearance of one corporation by dissolution and the appearance of another to take its place, attacks of every variety that the ingenuity of lawyers could suggest have been made, but the right to dissolve, which it is common knowledge has been frequently exercised in aid of or as part of these corporate changes, has not been the subject of direct attack in the courts of the state.

This attitude of the bar has been justified by the expressions of all the judges who have said anything on the subject.

Judge Kirkpatrick, in the United States Circuit for the District of New Jersey, has expressly held that a Court of Equity has no power to review the action of the board of directors declaring dissolution advisable; that stockholders are not trustees for one another and that a stockholder is not precluded from voting for dissolution, and dissolution will not be enjoined because the interests of some stockholders are adverse to those of others. *Windmuller vs. Standard Distilling and Distributing Company*, 114 Fed. Rep., 491.

Judge Lacombe, United States Circuit Judge, has approved this view. *Windmuller vs. Standard Distilling Co.*, 115 Fed. Rep., 748, re-phrasing the language "that a majority stockholder may vote to dissolve, even if he be influenced to that course by a wish to destroy a contract beneficial to the corporation but onerous to himself."

In *Robotham vs. Prudential Insurance Co.*, 64 N. J. Equity, 673, 689, Vice-Chancellor Stevenson referred approvingly to the doctrine laid down by Judge Kirkpatrick as containing the correct principle.

Vice-Chancellor Emery, in *Bijur vs. Standard Distilling Co.*, 4 Buch., 546, referred approvingly to Judge Kirkpatrick's holding, and the decree advised by him has lately been affirmed on the opinion below.

Vice-Chancellor Pitney, in *Beling vs. American Tobacco Co.*, 2 Buch., 32, 41, discussed the statutory provisions at some length:

"The act then in force was that of April 7th, 1875, (Rev. p. 175), which in the seventh subdivisions of the first section gives express power to any corporation to wind up and dissolve itself or be wound up and dissolved in

the manner thereafter mentioned. The provisions for dissolution are found in the thirty-fourth section of that act on pages 182 and 183. This section was slightly amended by the act of February 21st, 1877 (P. L., p. 20) and this section was substantially re-enacted by the act of 1896, section 31. Dill Mun. Corp., 51.

"Now, the existence of this act shows clearly the fallacy of the complainant's argument that, by the contract, he is entitled to have the old company carried on until the time limited in its original certificate of organization, and it meets and disposes of many of the dicta cited in his argument and relied upon to support his position. That right to have the business carried on until the natural death of the corporation is subject to the will of the majority of two-thirds provided for in the statute.

"Now, while the merger proceedings here attacked do not amount, strictly speaking, to a legal winding up, their effect was, in substance, precisely the same, and the only difference to the complainant is that he did not receive the share of the proceeds of the winding up which he would have got under formal proceedings under the statute.

"But the large vote for the merger shows conclusively that, if the winding-up proceedings had been necessary, they would have been taken and pursued to the end, and it further indicates, with sufficient certainty for present purposes, that if the decree asked for by the complainant were granted, its practical effect to the complainant would be immediately met by formal winding-up proceedings."

While none of these judicial expressions are controlling here the eminence of the judges and the acquiescence of the bar justify their citation.

Textbook writers are not in conflict and analogies in other laws and decisions may be found.

Cook (6th Ed.), Section 629, discusses the subject of dissolution of a corporation by its stockholders, referring both to the common law rule and statutory changes. Bearing on dissolution by court procedure the author states that such a statutory dissolution is hardly a voluntary dissolution, yet it approaches that kind of dissolution more nearly than any other. Where statutes authorize dissolution on a certain vote of stockholders, as in New Jersey, he states that a dissolution so voted is legal irrespective of the motives of the stockholders in voting it. A note in support of the text quotes, *Beling vs. American Tobacco Co.*, *supra*, and *Windmuller vs. Standard Distilling Company*, *supra*.

Mr. Thompson (4 Thompson Corporations, Section 4443) discusses the language of Master Parker in *Kean vs. Johnson* that "the contract between the parties is that, so long as the affairs of the company are prosperous, it shall go on, unless all consent to the contrary," as a dictum of an eminent lawyer, and continues:

"It is believed that no case can be found in which a court of equity has granted an injunction, at the suit of a minority stockholder against the majority, to prevent them from discontinuing the business of the corporation and winding up its affairs. The exercise of such a power would be most extraordinary. It would be tantamount to compelling the specific performance of an agreement to form and carry on a corporation, extending over an indefinite period of time, and when, in the judgment of the majority, on a question of mere economy and propriety, on which their judgment ought to be conclusive, it has been found more expedient to discontinue the business."

Again (Section 4530) he says:

"If, as already seen, a court of equity will not enjoin the voluntary winding up of a private corporation, at the suit of a minority stockholder, it will not enjoin a dissolution and winding up which is agreed upon by the majority for the purpose of entering upon a scheme of reorganization, provided such scheme gives to the dissenting minority the option of withdrawing their several interests in the old corporation, or of taking a proportionate number of shares in the new one."

This language is, it is true, based on the Massachusetts doctrine contrary to that prevailing in this state that a majority of the stockholders may discontinue the corporate business notwithstanding that the charter period has not expired, but where one of the inherent powers of the corporation is to wind up and dissolve itself by the affirmative action of two-thirds of its stockholders, the force of the expression is applicable.

Authority is not needed for the proposition that in the absence of statutes enlarging its powers, a court possessed of chancery powers merely has no jurisdiction to dissolve a corporation and decree its winding up; or, for the converse proposition, that a court of equity will not, in the absence of fraud, enjoin the dissolution of a corporation where the proceedings to dissolve are being conducted in accordance with the statutory provisions. The interference of the courts in cases such as the present must arise out of inherent power to prevent fraud rather than any power to supervise corporations.

In the note to *Shilhowee Woolen Mills vs. State of Tennessee*, 89 S. W., 741; 2 L. R. A. N. S., 493, a case sustaining the right of a majority, proceeding under a statute, to dissolve against the will of a minority, the annotator refers to what is plainly evident from

an examination of the cases, that the question of the right of the majority of the stockholders to dissolve a private business corporation and surrender its franchise against the protest of the minority, is nearly analogous to that of the right of such majority to dispose of the entire assets and go out of active business, thus effecting a dissolution *de facto*. Points of difference are indicated that in the case of a legal dissolution the corporate entity is extinguished while the mere disposal of the assets and going out of business have no effect on the existence of the corporation as such. The uncertainty which attends the question of the right of the majority of the stockholders to dissolve a private business, is said to be largely due to the confusion of these two questions, most of the judicial discussion thereof being in the form of *dicta* in cases involving the right of the majority to dispose of the entire property of the corporation.

Courts of high authority are much divided in the absence of statute, as to the absolute right of the majority to force the dissolution of a prosperous corporation, but where statutory methods are prescribed the power of the majority pursuing such statutory methods in good faith and without fraud, is nowhere disputed.

In *White vs. Kincaid* (149 North Carolina, 415; 23 L. R. A. N. S., 1177), a case referred to in the brief of the appellants and also hereinabove mentioned, the court said, referring to the statute regulating dissolution:

"This regulation enters into every charter, subject to the provisions of the statute; and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution by resolution of the directors, concurred in by two-thirds in interest of the stockholders. This being the law gov-

erning the interest of these parties, when the board of directors of a corporation have determined, in the exercise of their best judgment, that the corporation be dissolved, and are pursuing the methods specified by the statute, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. It is a principle well established that, when a person, corporation, or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque injuria*" (quoting authorities). "In such cases the motive prompting the act, however reprehensible or malicious, is not as a rule relevant to the inquiry; nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem." * * * "In these" (dissolution) "cases, also, if it clearly appears that the action of the management is in bad faith; that the resolution for dissolution, for instance, has been superinduced by fraud or undue influence, or if it could be clearly established that this resolution was not taken for the benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders, or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, such action could well become the subject of judicial scrutiny and control."

The claim set up in the present case to show that the proceeding for the dissolution of the United Drug Company is not in good faith and is fraudulent as

against the complainants with their hundred and twenty shares of dissenting stock, is born of the fact that the dissolution proceeding is set on foot in association with an incorporation of a company with larger capital of like name in the state of Massachusetts, designed to conduct a similar business, and as a step in what is termed in the literature sent to the stockholders, a reorganization of the company's affairs. That the shareholders of the United Drug Company have seen, to quote the language of Judge Dill in the *Fitzgerald* case, "that their own interests will be best conserved by the dissolution" of the present corporation, organized and existing under New Jersey law, is conclusively proved by the fact that stockholders four thousand in number and widely scattered, have, with almost complete unanimity, approved the abandonment of the present corporate relationship and substitution of another under the laws of Massachusetts in which the rights of the preferred and common stock are different and the basis of capitalization substantially changed. That the new enterprise is not born of a conspiracy designed to get rid of the complainants with their hundred and twenty shares, is also conclusively shown by this same unanimity of action, as it is inconceivable that four thousand shareholders, comprising practically all of the stock except that held by the complainants, could be rounded up for any plan with such an object. The reasons which prompted the unanimity of action in favor of the change are business reasons which have been frankly offered and accepted. That these business reasons serve the selfish interests of all of the stockholders of this corporation except the complainants, affords no reason, either in law or common sense, for their rejection by a court of equity. The circulars do not mention the by-law referred to in the complainants' bill, but the vice-chancellor in his opinion below has properly held that, conceding the validity

of the by-law and that it reflected originally a business policy of the corporation, such business policy might be in good faith abandoned by the stockholders. Much has been said of the alleged mutuality underlying the organization of the United Drug Company, but it is not and never has been a mutual corporation. A mutual corporation could not have been organized under the General Corporation Act of this state and, as was held by this court in *Jackson vs. Hooper*, 6 Buch., 592, individuals who organize corporations must thereafter conduct themselves in accordance with the laws under which the corporations are organized and not pursuant to private agreements preceding the incorporation.

Questions arising out of dissolution proceedings have heretofore reached this court, and while the direct issues presented now were not then brought to the attention of the court, some regard must be had to the fact that, though present, such issues were not adverted to either by court or by distinguished counsel.

In *Newfoundland Railroad Construction Company vs. Shack* (13 Stew., 222), as long ago as 1885 there was brought before this court a complaint filed the day before a meeting of the stockholders called to pass upon a resolution of the directors of the corporation for the dissolution of the company. It was disclosed that a large majority of the capital stock of the defendant construction company had requested the officers and board of directors of the company to receive for all the assets of the company shares of stock of the Newfoundland Railway Company and to take the legal steps necessary to wind up and secure a legal dissolution of the construction company at the earliest practicable date. The complainant had received his allotted share without objection, but for some reason changed his mind about the dissolution. Mr. Justice Depue, speaking for this court, did not

dispose of the case on the ground of estoppel but dwelt at length upon the dissolution proceedings and the power of the two-thirds majority of the capital stock to dissolve the corporation. That dissolution involved a sale for stock without cash.

In *Odlin vs. Bingham Copper and Gold Mining Company*, 19 Dick. 363, Vice-Chancellor Stevens had refused an injunction restraining the defendant company from selling any of its assets except such portion thereof as were disposed of in the usual course of business, and from engaging in any new or different undertaking than such as was contemplated in its certificate of incorporation. On appeal to this court the Vice-Chancellor's action was sustained. It appears in the opinion that the Bingham Copper and Gold Mining Company was created under the laws of the State of New Jersey with a capital stock of two millions and had large assets consisting of lands, real estate and a smelter at and near Bingham Canon, Utah, and it was engaged in the business of mining and smelting ore. Complainant purchased 250 shares of the capital stock of the company and alleged that certain directors of the company had procured a corporation to be created under the laws of the State of Maine, called the Bingham Consolidated Mining and Smelting Company and had issued a prospectus directed to the stockholders of the Bingham Copper and Gold Mining Company signed by them and printed in one of the Boston newspapers, setting forth that five millions of the stock of the Consolidated Company should be issued to be exchanged for the capital stock of the old company and containing this expression—"to take over all the property of your company," and further stated that 75 per cent. of the stock of the original company had already endorsed the plan. The answer of the Company included a resolution passed by the board of directors set forth in full in the opinion, to the effect

that neither the company nor its board of directors had or ever had any intention of selling or transferring its entire property or assets, etc. "unless and until the said stockholders shall by appropriate and legal action otherwise order and direct," and further asserting that the only object of the prospectus was to suggest to the stockholders of the old company an opportunity to exchange their holdings for stock of the Consolidated Company, if they so desired. This court held that the circular disclosed no fraud or illegal attempt upon the part of the officers of the company and contained nothing to justify the intervention of the court by injunction. It is true that this case does not refer to the dissolution of the Jersey Company, but it is not perceived that a different result could have been arrived at if the circular had suggested, in association with the transfer of the assets, the dissolution of the New Jersey Company.

The circular in the present case, signed by all the directors, outlines a plan and recommends its acceptance by the stockholders. It does not contemplate the transfer of the assets except in the event of dissolution and expressly recognizes that may be delayed or fail of accomplishment. The answer of the company to what is called the second original bill which was part of the record on the hearing below, explicitly declares that no transfer of all the assets of the New Jersey Company to the Massachusetts Company is contemplated or considered possible except upon the dissolution of the New Jersey corporation and, if at all, only through the medium of the sale of the assets in liquidation.

The plan proposed by the directors, if deemed by the stockholders to be in their interest, involved dissolution of the company, but dissolution as a part of the plan could, under the New Jersey law, be accomplished only with absolute consideration of the

minutest right of every stockholder, and could not possibly result in any effect on a stockholder which was not possible at the time of the incorporation of the company and subject to which he became a stockholder. Under the law at the time of incorporation, no stockholder, either original or coming in later by purchase of stock, had any contract with his fellow stockholders that they would continue the corporate enterprise for any definite period of time. The charter was unlimited in duration but it was taken out with an absolute fundamental power in the corporation as such to wind up and dissolve itself or be wound up and dissolved in the manner provided in the corporation act, and subject to the power of the two-thirds majority of the stock, acting in the statutory way, to abandon the enterprise as so incorporated at any time.

The discretion of the directors to pass the dissolution resolution was not reviewable by a court of equity except on the ground of fraud, and no fraud is inferable in the action taken in the present case which fully and freely submitted to every stockholder the fullest particulars of the plan proposed and deemed by the directors to be advantageous. If the directors believed that it was to the advantage of the stockholders that the New Jersey corporation should be dissolved and a new corporation organized in another state to accomplish purposes advantageous to the stockholders, it was not only their privilege, but, as proper servants of the stockholders, their duty, to lay before them the advantages indicated and initiate such action as might be necessary to procure such advantages to be enjoyed by the stockholders. Whether their reasons were good in the eyes of the stockholders and whether the action recommended would be adopted by the stockholders, were to be determined by the stockholders themselves, voting, not as trustees for each other, but each for himself as his interest

might dictate. The approval of the stockholders in this case in the form of proxies and transfers enables it to be known in advance of the actual stockholders' meeting called by the directors to consider the dissolution in accordance with the statutory requirement, that not only the requisite statutory majority would favor the dissolution, but that practically the entire stock, preferred and common, is of one mind.

The Court of Chancery has affirmatively found that the course pursued is free from fraud and was recommended and pursued in good faith. It is confidently asserted that the finding is justified by the record. Indeed, it is not even disputed by the complainants that the proposition as a business proposition is a sound one and the objection is based on an alleged desire on the part of the complainants to preserve certain rights involved in litigation pending in the Court of Chancery. As to this litigation, it appears from the correspondence printed in the record in the affidavit of Mr. Cosden, president of the complainant Riker Company, that it was proposed to the complainants that a contract should be executed by the new Massachusetts Company, agreeing to have that company bound by the result of the litigation. This proposition was refused, but if it had not been and the complainants had succeeded in this litigation in establishing the rights asserted in that litigation, the new company would have been bound thereby without any question as to the effect of dissolution on the rights of the complainants. That dissolution will affect those rights, whatever they may be, cannot be denied, but, if they sound in contract, the dissolution will not deprive the complainants of remedy against the estate of the dissolved corporation, and no distribution of the assets of the corporation can be made until those rights have been adjudicated and, if sustained, satisfied.

While, if the dissolution be lawfully accomplished the by-law cannot survive dissolution and it has been therefore deemed that the validity of the by-law was not necessarily involved in this discussion, it is to be noted that if the effect of the by-law was to prevent, so long as the complainants chose to retain ownership of their stock, the dissolution of the corporation, it would not be a good by-law, because in contravention of the act under which the company was incorporated. If the by-law provision had been put in the charter as one of the special matters permitted by the last paragraph of Section 8 of the Corporation Act as it now stands, a different question would have been presented, but even in that case if the effect of the provision was to make it inconsistent with the Corporation Act it would have been without efficacy. Even conceding all that may be claimed by the complainants for the by-law as a contract between the stockholders, it does not seem to involve any such vested property right as to make it irrevocable. But whether so or not, conceding that it is a contract and irrevocable during the life of the corporation, any damages accruing by its breach would be a charge against the corporate assets in the event of dissolution and all rights, whatever they might be, would be absolutely protected. And, assuming that the Court of Chancery might not interfere by the appointment of a receiver with the disposal of the property of the corporation in liquidation after dissolution, if the directors as trustees in dissolution should settle up the affairs of the corporation in disregard of such contract rights, the directors themselves would be responsible as for a breach of trust.

The National Banking Act has always contained (U. S. Rev. Stat. Sec. 5154) a provision permitting the conversion of state into national banks by action of the directors after authority to them of two-thirds vote of the capital stock.

It was held in *Casey vs. Galli* (94 U. S. 673) that no authority from the state was necessary to enable the state bank so to change its organization. Many states have passed enabling statutes in harmony with the National Bank Law.

In *Metropolitan National Bank vs. Claggett*, (141 U. S. 520), it was held that reorganization under the National Bank Act did not discharge the national bank from liability for bills issued by the bank under its state charter, and various state courts have held, generally, that the obligations of the old bank were not discharged as to the new organization. There was, of course, a substantial difference in stockholdings under the National Bank Law and under the state law based on the provisions of the Federal law imposing double liability on stockholders of national banks. Notwithstanding this difference and notwithstanding that the national act conferred on two-thirds majority of the stockholders of the state bank the power to abandon the state organization and accept the national organization, the constitutionality of the act, from the standpoint of stockholders, has never been successfully, if ever, challenged. This is the more remarkable in that the compulsory provisions of the federal act were made operative against charters that did not contain provisions for dissolution by two-thirds majority of the stock.

The National Bank Act also contains a provision for voluntary liquidation by vote of the shareholders commanding two-thirds of the stock. (U. S. Rev. Stat. 5220.) This provision is customarily used in aid of the sale of the business of a bank or of its reorganization in association with another bank or banks. *Pratt's Digest of National Banking Laws* is the standard working digest in use by national banks, containing approved forms, etc. On page 152 of the edition of 1905 it is stated by way of note to Section 5220, that the best plan for consolidation of two

banks is to increase the capital of No. 1 to the extent necessary to equal the stock of both; put No. 2 in liquidation in the regular way and sell out its assets to No. 1, paying for them in increased stock to be distributed among the stockholders of No. 2. On page 251 it is stated that shareholders are entitled to the full value of their stock in cash if dissatisfied with the offer made, and that they may insist on public sale to secure full value. It is, however, stated that where the price is a fair one and the shareholders are allowed to participate in the reorganization, it is not likely that a court would order a public sale unless there was a reasonable prospect of benefit from such public sale.

These provisions of the National Bank Act have received the attention of two state courts, in both of which they have been recognized as conferring a right of dissolution even if contrary to the wishes and against the owners of the minority of the stock. *Watkins vs. National Bank of Lawrence* (Kansas, 1893), 32 Pacific Reporter 914; *Green vs. Bennett*, (Court of Civil Appeals of Texas, 1908), 110 S. W. Rep. 108. In the latter case a rehearing was denied, and while a writ of error was granted by the Supreme Court according to a foot note, no report appears of any reversal of the Court of Civil Appeals. It appears in the opinion that the purpose of the dissolution was in aid of a sale of the bank's assets to a new bank organization to which the assets of the dissolving bank were to be transferred and in which its stockholders were invited to participate by an exchange of stock. Conspiracy and bad faith were charged. The court declined to interfere, saying that it could see no reason why the liquidating committee should not dispose of the assets of the dissolving bank by sale and transfer to the other bank provided that this was done fairly and for full value; that the proceeding should not be avoided but should be sub-

jected to closest scrutiny on the part of the court to the end that full value, in fact the best price obtainable, be realized for the property sold.

Under the case of *Black vs. Delaware and Raritan Canal Company, supra*, the right of a stockholder in the event of dissolution to have the cash equivalent of his stock interest is inferentially recognized, and the weight of textbook and case authority is to this effect, although there are respectable courts holding that stockholders may be compelled to accept stock interest in a purchasing corporation. The stockholders may make a contract as to the mode of distribution or, indeed, by unanimous consent may distribute the assets without dissolution provided all creditors are paid. Good-will is an asset and may not be appropriated by directors to their own use without breach of trust. (See, generally, Cook, Sec. 641, and notes.)

It has been suggested by way of criticism of the plan under consideration that it provides no offer of cash for the dissenting stockholders who may not wish to take stock in the Massachusetts company in exchange for stock in the New Jersey company and increase their investment in accordance with the plan. This feature is in reality one of the fairest features of the plan. It does not put up to the stockholder an alternative of stock or an arbitrary amount of cash. The record shows a book value as of a going concern of about two for one as to the common stock, but no stockholder is coerced into accepting that or any other amount. He may stand aside and compel in the liquidation in dissolution the payment to him in cash of the utmost dollar the assets can be made to realize.

On the argument in this case it was suggested by the court that the plan submitted by the directors to the stockholders involved by indirection the merger of the defendant company with certain Massachusetts corporations whose stock was owned by the New

Jersey company; that such a merger was not authorized by New Jersey law and consequently could not be accomplished by indirection. If this so-called reorganization plan, set forth in the directors' circular, can properly be held to be a merger of a New Jersey corporation and Massachusetts corporations, it is clearly bad. But it is respectfully insisted that the scheme is in no sense a merger scheme. In a merger the life of the merging corporations is not extinguished but is mingled in the new body of the company created by the merger, whether known by an old name or by a new name. While the case was not disposed of on that ground but on the lack of similarity in the charters, it was properly said by this court in *Colgate vs. United States Leather Company*, 5 Buch., 229, 240:

"If we were to look beyond the objects expressed in the respective certificates of incorporation, and deal with the purposes of the United States Leather Company and of the Central Leather Company, respectively, as manifested by their actual course of business, it does not seem to us that the case would be bettered for the proposed consolidation. For, it appears, the purpose of those interested in the Central company was simply to secure control of the United States company and reorganize it in such fashion as to get rid of the limitations contained in its certificate of organization respecting the rights of preferred stockholders and the prohibition of mortgage indebtedness."

The record in that case disclosed that the birth of the Central company was out of a plan of reorganization into which the stockholders of the United States company were invited, the purposes and advantages of which were disclosed to the stockholders in circulars, and that, having failed to secure the willing

assent of a minority fraction of the stockholders, the merger plan was proposed to force that minority to accept through the merger that which had been declined on invitation under the reorganization plan. The lack of good faith of such a merger is apparent. The case involved no question of dissolution and the bad faith of the reorganizers came into the matter by reason of the misuse of the merger proposition after the plan had failed to appeal to the dissenting stockholders of the United States company. The minority in that case failed to accept the plan of reorganization because it offered to them less than the value of their preferred stock, and one of their complaints against the merger plan was that they were not only being forced into an enterprise different from the one in which they had originally embarked as stockholders under other conditions, but that, being so forced, they were not being given a fair equivalent of the money value of their shares.

In a fair proposition of merger made in good faith by the requisite majorities of two corporations organized after the passage of a merger statute, the purpose of the majorities favoring the merger is beneficial although it may be selfish and not acceptable to holders of stock who may disagree with the business views of the majority. The minute that it appears that the merger is favored for reasons not sounding in honest business welfare, the want of good faith is evident and the inference of fraudulent invasion of the stockholder's right is complete.

So much for a merger of corporations organized under our own laws and authorized by such laws to under proper conditions merge.

As to the merger of a corporation of this state and a corporation of another state, the good faith in the transaction cannot be called in aid of the merger because there is an absolute want of corporate authority. The whole matter is *ultra vires* of both corporations.

The fact, however, that there is no way in law by which a corporation of New Jersey may lawfully merge with a corporation of Massachusetts, however desirable such a merger might be to the stockholders of the two corporations, does not militate against the entire fairness and good faith of a union of the interests of the two corporations by the voluntary abandonment of a New Jersey charter, pursuant to power inherent in the New Jersey corporation, under proceedings prescribed by the very law under which the corporation lives, and the reinvestment of the capital represented by the stock of the New Jersey corporation, to such extent as the stockholders of the New Jersey corporation may care to so reinvest it, either in a particular Massachusetts corporation or in a Massachusetts corporation which shall be organized for the purpose of conducting a business which shall include the businesses theretofore conducted by the New Jersey corporation and the Massachusetts corporation. The dissenting stockholder of the New Jersey corporation may be invited to continue his interest after the dissolution in association with his fellow stockholders in the new Massachusetts organization, but no majority of fellow stockholders can compel the acceptance of that invitation. He can demand the absolute cash equivalent of his interest in the stock of the New Jersey corporation, inclusive of any good will value that may be capable of realization, on a sale of the assets of the New Jersey company. And, what is more, the New Jersey law furnishes him absolute assurance that he may not only demand the value of his interest but that he may compel compliance with the demand. While the law in the first instance leaves to the directors of the New Jersey corporation in dissolution the winding up of its affairs and does not require, even if the winding up be left to the directors of the dissenting stockholder, the acceptance of anything less than the cash equivalent of his in-

terest, the legislature has so completely safeguarded the dissenter's rights that, on his lone prayer, the chancellor may, if the interests of the petitioner require it, take the property and its management from the directors as trustees in dissolution and administer it under the direction of the court.

There is nothing to prevent any majority of the stockholders of a corporation at the expiration of its charter or after its dissolution, from organizing themselves into a syndicate, either in partnership or corporate form, to purchase the assets of the corporation and to submit themselves, as such purchasers, to such terms of distribution as may justify them in releasing the trustees in dissolution or the receiver from further liability to them. And if in such organized form they are able to offer a large price for the assets as a whole, including recognition of the good will, which must be lost if the assets be sold piecemeal, their offer to purchase before it can be considered must necessarily provide a method of cash payment to all who may prefer cash in lieu of continued interest in the purchased assets. *Mason vs. Pewabic Mining Co.*, 133 U. S., 50.)

If there be nothing wrong in such an organization after the passage of dissolution resolutions, how can there be anything wrong in such an organization prior to the passage of dissolution resolutions if the purpose of the organizers be free from bad faith and improper motives? How can such an organization be taken, if arranged before dissolution, as absolute indication of a fraudulent use of a statutory power in the absence of actual bad faith or illegal purpose? Has not the law conferred on the majority the right to abandon the corporate enterprise before the time limited for its expiration by the charter, and, was not the purpose of such authorization to change the status of stockholders, which, at the common law as interpreted in New Jersey, compelled the continuation of the corporate enterprise until the expiration

of the charter period unless by unanimous consent of every stockholder it should be sooner terminated? How can legislation conferring power of dissolution on the majority be given effect, if, the minute the majority is given opportunity to express its will, a minority man may say, "You cannot continue your investment in any enterprise similar to the one in which this company is now engaged, either under the laws of this state or any other state, either by yourselves alone or by yourselves in association with others, during the period for which this company was incorporated, without my consent. You can, if you like, withdraw your capital and seek other fields of investment, but if you stay in business you must stay with me."

And this may be just as well said, if it can be said at all, when the plainest interests of the corporation and of its stockholders justify, even require, the removal of the business to another state and its reorganization under other conditions, and when the motive of the dissenter is merely a malicious or spiteful veto of the demonstrated interest of the majority.

The statute itself contains no limitation on the right of the majority. Public interest of the state is not involved in private business corporations as it is in railroads and similar corporations conducting business involving the public interest. This court has said the purpose of this legislation was to permit stockholders of solvent corporations to wind up when the interests of creditors are not involved and whenever the shareholders can see that their own interests will be best conserved by the dissolution of the association. This court has expressly said that these provisions were not meant for insolvent corporations and it has never said that they applied only when the dissolution is for the purpose of the absolute discontinuance of the business. The judges of the United States Circuit Courts and three of the vice-chancellors have

refused to write into the statute any such limitation and the expression of this court in the Fitzgerald case that the purpose of the dissolution provision is to afford a means of winding up a solvent corporation whenever the shareholders can see that their own interests will be best conserved by the dissolution of the association, is almost a repudiation of the limitation contended for in this case.

While it is unquestionably true that the courts should be keen to protect the interest of a minority stockholder against every wrong and oppression to which he may be exposed at the hand of the majority, it is equally true that the majority is entitled to the protection of the courts in the enjoyment of the majority's rights.

Vice-Chancellor Pitney said in *Meredith vs. Zinc Company*, 14 Dick., 257, 276, considering the power of a two-thirds majority to amend charters under the law and discussing *Kean vs. Johnson* and the other authorities appealed to in the present case, that the statute was entitled to a liberal interpretation and that it was fairly inferable that that section was intended to prevent a few dissentient stockholders from setting up their wills against the will of a large majority and that the statute should be so construed as to further that object. The *Meredith* case was affirmed by this court (15 Dick., 445) in a *per curiam* announcement for the reasons stated in the opinion of Vice-Chancellor Pitney below.

And this court in *Berger vs. U. S. Steel Corporation*, 18 Dick., 809, 814, referring to these provisions said they should be given a liberal construction in that case, "in order to give effect to the intent of the legislature manifested in this broad and comprehensive grant of authority to retire shares of stock."

The compulsory retirement of stock in advance of the expiration of the charters contract is closely parallel to dissolution, and the statutory provisions

as to the latter are more "broad and comprehensive" than as to the former.

Counsel for appellants in their brief would limit the phrase, "to wind up and dissolve itself or be wound up and dissolved," not only to corporations insolvent or in failing circumstances, but also to cases where the sole and only purpose, immediate and remote, is to not only kill the corporation but to absolutely abandon the pursuit of similar business by stockholders favoring dissolution, in any other state, either in association with each other or with strangers. The death of the corporation on its dissolution after the statutory forms have been complied with, is as complete as though the period limited by the charter had expired. The right of the court to intervene in the settlement of the affairs of the corporation is the same. The protection to every stockholder, however small his interest, is as complete. What reason is there, assuming good faith as the basis of the action of the majority, for the claim that the statutory procedure for dissolution may be interrupted by the whim of a minority stockholder, when the effect of the dissolution is merely to anticipate the expiration of the period limited in the charter and to secure to every stockholder every right in the assets of the corporation that he would then have. The corporation after dissolution is as if it had never existed—just exactly as is the case at the expiration of an express period limited by its charter. Under the old law a single stockholder could compel the continuance of the corporate enterprise, if solvent, until the expiration of the charter period. Under the present law the stockholders may, in organizing, make their charter period limited or perpetual, but they may, by appropriate statutory action taken in good faith, abandon the corporate association whenever two-thirds of them shall so desire, even though their motives may be selfish and their action actually harmful to the interest

of some one of their associates who may disagree with their wish to discontinue the association.

The statutory power voluntarily to abandon the association exists. Concededly, a court of equity may inquire whether the proceeding is being conducted in good faith. To hold that the majority, who are favoring dissolution of a New Jersey company, are *prima facie* guilty of a fraud on the rights of a minority, because they contemplate engaging in similar business under a charter issued by another state and under other conditions as to capital and stock, is to leave to the minority stockholder the same compulsory right to insist on continuation of the corporate life that was his before the dissolution features were made a part of the corporate law. To thus write into the law what the legislature did not put in it, would practically accomplish the repeal of provisions which must be presumed to have been salutary in purpose and to have been intended to confer on majorities positive rights.

Unless the mere setting in motion of a plan such as is proposed in the present case, involving a dissolution in association with a removal of the business from this state and an investment of the capital involved here in a similar enterprise under other conditions, is *prima facie* fraudulent and without statutory warrant, the validity of the proceedings so far as a court of equity is justified in inquiring into them, is to be determined on principles of general equity jurisdiction and not from the standpoint of a court having visitorial powers over a corporation.

Assuming that the proceedings in the present case are not *prima facie* fraudulent because entirely without warrant of law, their good faith and fairness, affirmatively approved by the vice-chancellor in the opinion below, are confidently submitted to the examination of the members of this court. The usual badges of fraud and bad faith, namely—secrecy and

indirection, are absolutely wanting. The whole plan is frankly exposed; the invitation is extended to every stockholder; none may be compelled to accept the invitation and, not accepting, the right of none can be imperiled. The circular signed by all the directors is one of recommendation, but is nothing else and invades no right of any stockholder who may not agree with the views therein expressed. That, if the plan comes to its ultimate fulfillment, the assets of the New Jersey corporation will ultimately become by legitimate purchase the property of the Massachusetts corporation, is entirely likely. If all the stock had assented in accordance with the recommendation of the directors it would certainly have happened. Failing such unanimity it can only happen after sale and dissolution proceedings, under conditions which will assure the highest price and the ultimate dollar to every stockholder not willing to accept his distributive share in the form of stock in the Massachusetts corporation. Business reasons for the change are sound and have appealed to four thousand scattered stockholders and have been rejected by only 120 shares out of 120,000. There can be no injury possible to even this small minority except such as was incident to stockholdership in a corporation subject so far as the continuance of the corporate association was concerned to voluntary abandonment, whenever two-thirds in interest of the shareholders considered that their interests would be best conserved by the dissolution of the association.

The order appealed from should be affirmed.

JOHN R. HARDIN,

Of Counsel for Defendant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

IN SENATE, JANUARY 10, 1887.
REPORT OF THE
JUDGES OF THE COURT OF ERRORS AND APPEALS,
FOR THE YEAR 1886.
ALBANY, N. Y.: J. B. LIPPINCOTT & CO.,
1887.

Brief for Appellants

The appellants, the State of New Jersey, by their counsel, the undersigned, respectfully submit to the Court the following facts and arguments in support of their appeal from the judgment of the Circuit Court of the County of Hudson, rendered in the case of the State of New Jersey, vs. the City of Hudson, on the 10th day of December, 1885.

The facts of the case are as follows: The City of Hudson, in the year 1878, erected a bridge over the Hudson River, for the purpose of connecting the City of Hudson with the City of West Hudson. The bridge was erected at a cost of \$100,000, and was dedicated to the public use. The City of Hudson, in the year 1880, levied a tax on the property of the State of New Jersey, for the purpose of paying the interest on the bonds issued by the City of Hudson, for the purpose of erecting the bridge. The State of New Jersey, in the year 1880, paid the interest on the bonds, and the City of Hudson, in the year 1880, paid the principal of the bonds.

The appellants, the State of New Jersey, by their counsel, the undersigned, respectfully submit to the Court the following arguments in support of their appeal from the judgment of the Circuit Court of the County of Hudson, rendered in the case of the State of New Jersey, vs. the City of Hudson, on the 10th day of December, 1885.

The first argument is that the City of Hudson, in the year 1880, levied a tax on the property of the State of New Jersey, for the purpose of paying the interest on the bonds issued by the City of Hudson, for the purpose of erecting the bridge. The State of New Jersey, in the year 1880, paid the interest on the bonds, and the City of Hudson, in the year 1880, paid the principal of the bonds.

The second argument is that the City of Hudson, in the year 1880, levied a tax on the property of the State of New Jersey, for the purpose of paying the interest on the bonds issued by the City of Hudson, for the purpose of erecting the bridge. The State of New Jersey, in the year 1880, paid the interest on the bonds, and the City of Hudson, in the year 1880, paid the principal of the bonds.

The third argument is that the City of Hudson, in the year 1880, levied a tax on the property of the State of New Jersey, for the purpose of paying the interest on the bonds issued by the City of Hudson, for the purpose of erecting the bridge. The State of New Jersey, in the year 1880, paid the interest on the bonds, and the City of Hudson, in the year 1880, paid the principal of the bonds.

New Jersey Court of Errors and Appeals

Between,

WM. B. RIKER & SON COMPANY,

et al,

Complainants-Appellants,

and

UNITED DRUG COMPANY,

Defendant-Respondent.

On Bill, etc.

On Appeal

from

Order

Denying

Injunction.

Brief for Appellants.

The complainants filed their supplemental bill in this cause on the 20th of April, 1911, alleging that in the month of December, 1909, they had filed their original bill averring among other things that they were, and for several years had been corporations respectively under the laws of the States of New York and Massachusetts, and that the United Drug Company, a New Jersey Company, was operated as a co-operative manufacturing concern, the distinguishing and constant feature of whose policy had been that the articles which it manufactured should be sold exclusively to its own stockholders and at uniform prices and on uniform terms; that its stockholders were nearly all retail druggists located in most of the cities and towns of considerable size in this country; that a large business had been built up by the defendant, consisting generally of the manufacture and sale of medicines of almost every known variety, which it

sold under several trade names, and that the complainants from the time of the organization of the defendant, had been stockholders in the defendant company, with stores in New York, Brooklyn and Boston, and had enjoyed the rights and privileges of such stockholders, including the right to purchase and sell the goods and merchandise of the defendant; that the defendant had a by-law, which at the time of the filing of the bill read as follows:

"As long as any individual, firm or corporation remains the owner of at least one share of the common capital stock, and fully keeps and performs all its or his agreements with the company, such individual, firm or corporation shall retain, as far as this company can control the matter, the exclusive sale, within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this company."

Said original bill further averred that such by-law, or one of similar import, had been in vogue ever since the organization of the defendant company, and that the complainants had paid for their stock in express reliance thereon, and that they had also yearly purchased large quantities of goods from the defendant company, and in the year immediately preceding the filing of said original bill, they had purchased a larger quantity than in any previous year; that a notice had been sent to the complainants from the defendant company to the effect that unless the complainants would obligate themselves to purchase during the year 1910 goods to the amount of \$250,000 the defendant company would, on January 1st, 1910, discontinue thereafter the sale of its goods to the complainants; and that the value named, \$250,000, was more than three times the quantity the complainants had ever purchased in any previous year. The bill fur-

ther alleged that such proposition on the part of the United Drug Company was violative of the complainants' rights, and prayed that an injunction issue prohibiting it from selling any of its goods to any other persons or corporations in the cities of Boston, New York and Brooklyn, unless the United Drug Company continued to sell to the complainants all of such goods on prices, terms and conditions uniform with the prices, terms and conditions made to the other stockholders of the defendant; that upon the filing of the said original bill of complaint, which was duly verified, an order to show cause why an injunction should not issue, with a restraining *ad interim* stay, was duly made, and that upon the hearing of said order to show cause a conclusion was reached that pending the final hearing of said cause such restraint would be continued, from which time the complainants have continued to enjoy the right to acquire and dispose of the goods made and sold by the defendant, as they had theretofore enjoyed the same; and that said cause, although it had been referred to one of the vice-chancellors, had not been heard, and was still pending.

Said supplemental bill further averred that since the filing of said original bill, and on the fourth of October, 1910, at the annual meeting of the stockholders of the defendant, a resolution was passed against the protest of the complainants by which the United Drug Company undertook to repeal said by-law; that the complainants not only protested against the passage of said resolution, but voted against the same, and the bill alleged that the resolution purporting to repeal said by-law, which, notwithstanding the complainants' protest was passed, was, as against the complainants, illegal and void; that in the latter part of January, 1911, two documents had been received by the complainants, copied in Schedules A and B, annexed to the bill of complaint (Case, pp. 14 and 20). By Schedule A a so-called scheme of reorganization of

the United Drug Company was projected, which plan included the organization of a corporation under the laws of the State of Massachusetts (which organization had already been perfected) to be known also as the United Drug Company, which company had offered to purchase all the property and assets of the defendant and make payment therefor in the capital stock of said Massachusetts corporation. Said plan of reorganization refers to the remarkable increase in the business of the defendant company, and the necessity of the acquisition of additional capital, the fact that there existed in connection with the defendant company several other companies named in said circular, and the importance of combining them with the business now carried on by the defendant company and eliminating unnecessary expense attendant upon the continued corporate existence of these several subsidiary corporations; the fact that all of the common stock of the defendant company had not yet been issued, and a scheme with regard to the further issuance thereof, including a proposition to exchange \$200 of stock in the Massachusetts corporation for \$100 of stock in the defendant company. Said bill alleged that said plan was designed to continue the business now being successfully prosecuted by the defendant company under the same name, but by a charter from another State, thereby preserving all of the goodwill, property, assets, business formulae, trade names and other assets which the defendant now enjoys, and that it is the intention of the defendant, instead of winding up or terminating said business, to transfer the same bodily to the Massachusetts corporation, and that as a step in said scheme of reorganization it is proposed to dissolve the defendant under and pursuant to the provisions of the New Jersey statute.

Accompanying said circular was Schedule B, which is a notice to the stockholders of the defendant company of a special meeting of the stockholders to take

action relative to the proposed dissolution of the defendant, reciting that the directors of the defendant had already passed a resolution to the effect that in their judgment it is advisable and most for the benefit of the company that the same should be forthwith dissolved, and also notifying the stockholders of a proposition to have them take action at the same meeting in reference to the proposed sale of all the property of the New Jersey company (defendant herein) to the Massachusetts company, and in case of such a sale to fix the terms and conditions. The bill further alleged that at the ensuing meeting of the stockholders it was proposed, unless prevented, that they should vote in favor of the adoption and ratification of the resolution of the directors for the dissolution of the defendant, and that unless restrained, the scheme of reorganization set forth in Schedule A would be carried into effect; that such proposed dissolution was only a step in the line of such reorganization, and that the purpose thereof is not the *bona fide* discontinuance of the business of the defendant company, but the continuance thereof by another corporation, and that neither the spirit, reason or letter of the statute of New Jersey authorizing the dissolution of corporations applies to the situation here presented, and that the purpose and object the defendant has in proposing the said reorganization, in which said dissolution is but a step, is to thereby avoid the rights which the complainants have by virtue of the said by-law and their ownership of stock in the defendant company to enjoy the privileges of buying and selling the defendant's goods; that said Massachusetts corporation has no such by-law, and that said plan of reorganization was also regardless of the rights of the complainant to have the defendant continue as a corporation until legally dissolved for liquidation and winding up; that the exercise by the directors, through the passage of the resolution for dissolution,

is not a *bona fide* exercise of their discretion, because it is conceded that the occasion for such exercise does not exist; that the provisions of the statute of the State of New Jersey permitting directors to vote upon such question only apply to a situation where it is desired or necessary to discontinue the business and wind up and liquidate the affairs of a corporation, and that the scheme of reorganization proposed by the defendant company manifests that no such situation here exists, but that on the contrary said company is in a most prosperous and active condition, its business is constantly increasing, and it is proposed to continue the same, and not to liquidate it.

The prayer (Case, p. 9) was that the defendant, its officers, directors, tellers and inspectors, may be enjoined and restrained from submitting to the stockholders of the defendant the resolution of the board of directors of said company, that in the judgment of said board it is advisable and most for the benefit of the United Drug Company that the same should be forthwith dissolved, and from passing any resolution or receiving or counting any votes in favor of any resolution designed to carry into effect any such proposition.

Upon the filing of that bill an order to show cause issued and the defendant upon the return day appeared, and by stipulation it was agreed that the pleadings and proofs (printed in the case on pages 24-98) in another suit between Wm. B. Riker & Son Company, one of the complainants herein, and the United Drug Company, in which an injunction against the proposed sale of all the assets of the New Jersey company to the Massachusetts company had issued, should be made a part of the record in this suit.

After hearing the matter, Vice-Chancellor Emery filed a memorandum (Case, p. 103) declining to grant the complainants their desired relief, whereupon an order (p. 113) was entered, denying the injunction.

If the record in the so-called second original bill above referred to (which must not be confused with the original bill, to which the bill herein is a supplement), be examined, it will appear that the gravamen of the charge therein was the fact that the defendant corporation proposed, in carrying the scheme set out with great particularity in Schedules A and B found in that record on pages 61 and 66a (being the same documents attached to the supplemental bill herein as Schedules A and B, pages 14 and 20), to denude itself of all its property by transferring the same bodily to a Massachusetts corporation of the same name, whereafter the dissolution of the New Jersey corporation would follow as a sequence, and the complainants as before stated, were successful in preventing such proposed action, in obedience to familiar equitable principles. The prayer in that bill, however, did not seek to prevent the dissolution, and it was to that particular feature of the plan that this supplemental bill addresses itself.

Before proceeding to discuss the legal questions involved herein, it is important that the full import of the scheme set out in Schedules A and B be realized. Schedule A commences by referring to the remarkable increase in the business of the Company and the necessity for providing additional capital to meet its immediate requirements, and to put it in a position whereby it can in the future acquire additional capital. This is a most remarkable statement in view of the proposition to immediately dissolve the New Jersey company and put it out of business. Attention is then directed to the "following plan for the reorganization of the affairs of the United Drug Company." This plan includes the organization of the Massachusetts company with a large capital and particular rights in its preferred and common stockholders. The fact that the Massachusetts company has offered to purchase all of the property and assets

of the New Jersey company, and the plan for the exchange of stock then follows. The circular further points out that the plan includes the transfer by the president of the defendant company to the Massachusetts company of the entire common stock, amounting to one hundred thousand dollars, of the L. K. Liggett Company, and of another company, upon his, Liggett's, being reimbursed for all his expenditures and also receiving one hundred thousand dollars, par value, of the common stock of the new Massachusetts company. The companies thus proposed to be transferred by Mr. Liggett for one hundred thousand dollars of the capital stock of the Massachusetts company, over and above all his expenditures, are subject of attack by a stockholder of the defendant company, as being illegally organized as against that company's stockholders, and the circular further shows that the plan includes the payment by the Massachusetts company of all the legal expenses of the complaining stockholder in that suit. The circular also contains the following:

"Your directors unanimously recommend the acceptance of the proposed plan of reorganization, and pending action by the New Jersey company recommend an immediate exchange of the stock of the New Jersey company for stock of the Massachusetts company, in accordance with the terms of the offer."

It appears from the answer (p. 76, paragraph 11), that the proposed exchange of stock has been so far carried out that of 5,527 shares of preferred stock, all but 423 have been exchanged, and that of 7,500 shares of common stock, all but 120 have been exchanged.

Schedule B is the regular notice to the stockholders of the proposition to submit to the stockholders a resolution to carry into effect the conclusion of the

directors that it is advisable and most for the benefit of the defendant company that the same should be forthwith dissolved. It also appears (and here it departs from the regular and orderly course of procedure) (p. 20, l. 38), that at the said meeting the stockholders should "take such action as the stockholders may deem advisable with reference to authorizing the sale of all the property and assets of the company, and in case such sale is authorized to fix the terms and conditions thereof."

The two circulars being sent together and the notice of the proposed action at the stockholders' meeting covering not only the naked dissolution but also the authorization of the transfer of all the assets of the New Jersey company to the Massachusetts corporation as proposed in Schedule A, it is apparent that the two together form one scheme or plan and that the dissolution is but a step in the plan of reorganization by which the business and good will of the defendant company would be transmitted to the Massachusetts company, which has no by-law entitling its stockholders to the rights which the defendant company's stockholders now enjoy, and that the same business would be conducted under another charter of another State and the New Jersey company abandoned while in a most prosperous condition. Indeed the charge to that precise effect contained in paragraph VI of the supplemented bill (pages 6 and 7) is not denied by anything in the record.

The question that is presented, therefore, is whether, in view of the well settled legal principle that a stockholder has a right to expect the company in which he has invested his money, to continue its business, and only to terminate the same in a manner authorized by the statute at the time he made his investment, there is any provision in the New Jersey statutes justifying, under the circumstances here existing, a dissolution of the defendant corporation.

I.

DISSOLUTION UNDER THE CORPORATION
ACT, UNLESS BY UNANIMOUS CONSENT, CAN-
NOT BE HAD EXCEPTING FOR THE PURPOSE
OF WINDING UP.

Section 31 of the Corporation Act reads as follows:

"Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall cause notice of the adoption of such resolution to be mailed to each stockholder residing in the United States, and also beginning within said ten days cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place and signify their consent in writing,

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 the board of directors shall cause such certificate to be published four weeks successively, at least once a week, in a newspaper published in said county; 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*; whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided."

While the section begins with the uncompromising words: "Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board," etc., these words must be read with the rest of the section and also with the rest of the Corporation Act. After providing in detail the machinery for taking the votes of directors and stockholders, and for the publishing of the Secretary of State's certificate, Section 31 proceeds:

"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.*"

The Corporation Act is divided into several general divisions or parts. In Part I, entitled "Powers," it is provided, in Section 1, as follows:

"Every corporation shall have power:

* * * * *

"VII. To wind up and dissolve itself, or be wound up and dissolved in manner hereafter mentioned."

It is to be noted that the legislature at the outset of the Corporation Act thus grants the power of dissolution as a part of, or as an adjunct to, the power of winding up, and not as an independent power.

Part II of the Corporation Act is entitled "Formation, Constitution, Alteration, Dissolution," and provides the machinery for incorporation and organization, amendment of the charter, and dissolution, covering in main outline the birth, life and death of a corporation. Section 31 is included within this part of the act.

Part III, entitled "Elections; Stockholders' Meetings," and Part IV, entitled "Dividends; Payment of Capital Stock," regulate details not covered by Part II.

Part V is entitled "Winding Up," and consists of Sections 53 to 60, both inclusive.

Section 53 reads as follows:

"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.*"

It thus clearly appears, by the inclusion of this section under the caption "Winding Up," that the legislature regards dissolution, whether by expiration of term of existence or by direct annulment by the legislature or otherwise, as a means to "winding up," and the section itself plainly states that the continuance of corporate existence after the taking of the steps elsewhere in the act provided to accomplish dissolution, is *for the purpose of* "enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital," and is "*not for the purpose of continuing the business for which they were established.*"

The next section, 54, reads as follows:

"Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with 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; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property."

This section also is avowedly a part of the machinery for "winding up," and the purpose of dissolution also plainly appears from the section itself. "Upon the dissolution in any manner of any corporation," it says, "the directors shall be trustees thereof, with 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," etc.

Section 55 states the powers and liabilities of the trustees in dissolution.

Section 56 reads as follows:

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

Here, too, “when any corporation shall be dissolved in any manner whatever,” the Court of Chancery may take action “for the purposes aforesaid, * * * and to do all other acts * * * that may be necessary for the final settlement of its unfinished business.”

Section 57 establishes the jurisdiction of the Court of Chancery in dissolution.

Section 58 reads as follows:

“The said trustees or receivers shall pay ratably, as far as its moneys and property shall enable them, all the creditors of the corporation who prove their debts in the manner directed by the court; and if *any balance* remain after the

payment of such debts and necessary expenses, the same *shall be distributed among the stockholders.*"

Here the duty of trustees or receivers in dissolution is stated so broadly and comprehensively as to exclude any other course of conduct. That duty is to pay the creditors, and their own necessary expenses, and then the balance "shall be distributed among the stockholders."

Sections 59 and 60, concluding Part V of the act, cover matters of abatement and filing of decrees of dissolution.

It is plain that all the provisions of the Corporation Act above quoted must be read together as constituting a carefully devised system for disposing of failing and other corporations whose stockholders in requisite number desire to discontinue business.

Section 31, in Part II, must, therefore, be read in the light of Section 1 in Part I, containing the opening words of the legislature on the whole subject in dissolution, and to these opening words it is fair to look as indexing and explaining later portions of the Act on the same subject. "Every corporation shall have power," the legislature begins, "to wind up and dissolve itself, or be wound up and dissolved, in manner hereafter mentioned" (Sec. 1).

In reading Section 31, likewise, Sections 53, 54, 56 and 58 must also be read, for they, as well as Section 31, set forth essential parts of the "manner hereafter mentioned," referred to in Section 1, and those sections, in addition to their own positive and unequivocal terms, derive meaning and application from the heading or label which the legislature for clearness of division saw fit to prefix thereto, reading "V. Winding Up."

The foregoing analysis of the statute authorizing dissolution plainly indicates the purposes

for which and the occasion when a dissolution may be availed of, and the conceded facts of this case indicate that the management of the defendant company propose to employ the machinery provided by the Corporation Act, which was provided for the purpose of winding up corporations, for a totally different purpose, namely, that of a vehicle for transferring a prosperous and going business to another corporation.

The case of *Windmuller vs. Standard Distilling, &c. Co.*, 114 Fed. Rep., 491, relied on by the defendant as an authority justifying dissolution without regard to effect or object thereof, even if authority here (which we shall show it is not), is not opposed to our contention, for it nowhere appears from that case that genuine liquidation was not the object of the dissolution, and it affirmatively does appear from the following citation from Thompson on Corporations, on which Judge Kirkpatrick rested his conclusion, and which he cites, that the Court had that object in mind in deciding the case:

"It is believed that no case can be found in which a court of equity has granted an injunction at the suit of a minority stockholder against the majority to prevent them from *discontinuing the business of the corporation and winding up its affairs.*"

Obviously, therefore, the Court in that case decided nothing of the slightest pertinence to the issue here presented.

In *Barrett vs. Bloomfield Savings Institution*, 64 N. J. Eq., 425, affirmed for reasons below, 66 N. J. Eq., 431, it was held that despite the language of a statute authorizing the dissolution of savings banks, which were being studiously followed in the proceeding under review, the court would inquire into the object of the proposed dissolution and it appearing

that the officers and managers of the savings bank had organized a trust company and proposed to transfer to the trust company all the business of the savings bank, and as an incident to dissolve the bank, pursuant to the statute (P. L., 1902, Chap., 224), an injunction would be granted.

The discretion to be exercised in the dissolution of savings banks was by the statute just as broad as in Section 31 of the Corporation Act, the only difference being that in the one case the discretion is confined to the managers and in the other it belongs to the stockholders. In other words, the court in the Barrett case was quick to arrest dissolution proceedings when they found that the provisions of the statute were being availed of for an improper purpose, although the requirements of the statute were being strictly complied with.

In *White vs. Kincaid*, 63 S. E., 109, the Supreme Court of North Carolina rendered an important decision. There a statute of dissolution with language identical with our own, giving absolute discretion to the directors and requiring a confirmatory vote of stockholders, was sought to be availed of, and proceedings were taken to enjoin the dissolution, which were successful in the court below. The appellate court in determining not to enjoin the dissolution, said, after referring to several cases:

"Such cases almost invariably arise when the management of a solvent concern, going and prosperous, ceases operations and determines to dissolve and sell out, with a view of continuing the same or similar business under different control, and when there is indication given that the sole purpose was to oppress some of the stockholders and confiscate their holdings, or when it is done in furtherance of some scheme to promote the pecuniary interest of the actors, and to the det-

riment of the corporation, giving indication of a breach of trust on the part of the authorities in charge and control of the corporate affairs. But no such facts are presented here. There is no testimony offered of any scheme or conspiracy on the part of defendants to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon. While the company is now solvent, it has not been running for several months, because the returns were not satisfactory, and the prospect of a change in this respect only rests in surmise. There is some dispute as to the amount of indebtedness, nor does there seem to be any capital ready and available with which to resume operations in case such a course should be determined upon; and, from the allegations made by the parties, their attitude towards each other does not give promise of mutual co-operation or eventual success. On the evidence, therefore, and in a case of this kind we are permitted to act on the evidence, the court is of opinion that the restraining order was properly dissolved, and that, on the facts as they now appear, the contemplated dissolution should be allowed to proceed."

Practically all of the facts which in the North Carolina case are expressly found not to exist, did in fact exist in the case at bar. There was a concern that was in such straightened circumstances that for some time it had ceased doing business, and had not sufficient capital with which to renew it. Here is a concern that has not only not ceased to do business, but is actually engaged in a very prosperous business and invites the stockholders to take more stock to share in its future success. Here again it plainly appears that the destruction of the complainants' rights under the by-law is one of the prime objects sought to be effected by the plan. No denial is made of the fact

that the rights now enjoyed by the complainants will not obtain in the Massachusetts corporation.

Attention is called to the recent and important case of *Theis vs. Spokane Falls Gas Light Co.*, decided in the Supreme Court of Washington, and reported in 74 Pac., 1004, where, under facts strikingly similar to those in the case at bar, the court declined to permit a corporation to be dissolved under a statute similar to our own, for practically identical reasons we here urge. The whole opinion of the Court, written by Judge Dunbar and concurred in by all the judges, should be read with care. We make the following quotations from it:

"On the question of the object of the dissolution, the syndicate representative, Mr. Anderson, in his testimony, was very candid; evidently construing the statute, which will hereafter be noticed, as granting an absolute right to a two-thirds majority of the stockholders to disincorporate for any reason which seems to them necessary. So that the real question to be determined here is whether or not the statute confers power upon a two-thirds majority of a prosperous corporation to disincorporate, and dispossess minority stockholders of their stock by paying them the market price for the same.

* * *

"It is conceded that at common law a corporation had no power to dissolve, excepting by universal consent of stockholders, and that an injunction would be granted upon the application of a single stockholder to prevent such dissolution; but respondent contends that authorities cited to that effect are not in point, for the reason that the statute abrogates the common law rule. Section 4275, 1 Ballinger's Ann. Codes & St., is as follows: 'Any corporation formed un-

der this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation. Notice of the application shall then be given by the clerk, which notice shall set forth the nature of the application, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for eight weeks, or if no newspaper is published in the county, by publication in the newspaper nearest thereto in the state. At the time and place appointed, or at any other time to which it may be postponed by the judge, he shall proceed to consider the application, and if satisfied that the corporation has taken necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved.' *Under the provisions of this statute, it is the contention of the respondents that an absolute right is given a two-thirds majority to dissolve the corporation whenever they see fit; and the broad ground is taken that, inasmuch as the corporation is acting within its legal capacity, the court has no right to inquire into the motives which actuated the moving stockholders; that its only concern is to see that the formal legal requirements have been complied with; and such was evidently the theory adopted by the trial court. This, in a sense, is true, and would apply to this case if the actual attempt was to dissolve the corporation, within the meaning of the law.*

But a court of equity will never aid in the perpetration of a fraud simply because application is made in empty form of law. Its powers are not so superficial or so restricted. Equity is, we are told, the correction of that wherein the law, by reason of its universality, is deficient. He who asks its aid must present himself with clean hands. Its special mission is to relieve from fraud, and to enforce the observation of broad and just principles. If it appeared from the testimony in this case that this was an attempt to dissolve the corporation, and legal requirements had been complied with, the duty of the court to adjudicate such dissolution would be plain, for it is, no doubt, true that, when the stockholders entered into the contract by which they obtained their stock, they must be held to have contracted with reference to the law which gave a two-thirds majority of the stockholders power to dissolve the corporation. But as we read the record in the case, there was no attempt to dissolve the corporation, and it cannot be said to have been within the contemplation of the contract that a two-thirds majority or any majority had a right to juggle with the corporation and the law. The object of the law is a beneficial one, and is to prevent a small minority from unduly influencing the corporation and preventing its dissolution under circumstances unfavorable to its existence. But the record here shows conclusively that no real cause for dissolution existed; that the corporation was making money and prospering in every way; and, while this would probably not be a sufficient reason why a court should not grant the dissolution, it bears upon the question of whether or not there was an actual intent to disincorporate.

* * *

*A dissolution of a corporation, within the contemplation of the law, is the death of the corporation. It means a disintegration, a separation, a going out of business. But in this case all of the elements of dissolution are wanting. The corporation, with a slightly different name, proceeded in the same town, with the same property, the same powers, and substantially the same owners. All the difference is about what was testified by the president of the corporation—that after the new company was formed the minority stockholders' interest would be represented by a deposit in the bank, instead of stock in the corporation. It might with as much reason be concluded that a man could escape responsibilities by changing his name, and that by such change his moral or financial relations with those with whom he was engaged in business under the old name would be affected. It is not enough to say that appellant received all his stock was worth. He embarked in this business, and had a right to stay in the business during the expressed life of the corporation, or until it was dissolved by a fair compliance with the law. The rule is thus announced by Cook on Corporations, Section 670: 'Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition. Ever since the case of *Abbott vs. American Hard Rubber Company*, the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. Indeed, it is very doubtful whether a dis-*

solution can ever be had by a majority of the stockholders where the corporation is a going, properous concern,

"It is said by learned counsel for respondents that Mr. Cook is a New York lawyer and speaks with reference to the point of view of the statute in that state; there being no provision in the statute similar to our statute upon which the respondents rely. But the next announcement made by the author cannot be construed in any other light than an intention to announce the law to be *opposed* to the toleration and encouragement of *deceitful devices whereby the letter of the law is complied with, and the spirit of the law violated*, for he says: 'And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well considered case of *Kean vs. Johnson*, 9 N. J. Eq., 401. Such a dissolution is practically a fraud on dissenting stockholders. *It seeks to do indirectly what cannot legally be done directly.*' And the cases cited by the author, while not decided under statutes similar to ours, all breathe the same determination to compel straightforward dealing on the part of corporations to whose care and management are intrusted the interests of their stockholders. And in this age, when the great volume of the business of the country is done, and must necessarily be done, by corporations, courts of equity must not relax their vigilance in protecting individual interests which in the aggregate constitute the interests of the corporation, and, in accordance with the time-honored rule, will strictly construe statutes which are in deroga-

tion of the common law. *The result of a successful practice such as is attempted here will be that minority stockholders will always be at the mercy of the majority. If the enterprise fails, they bear their proportion of the losses. If, on the other hand, it succeeds, as soon as it passes the experimental stage, and the opportunity is presented to finally reap the reward of a judicious investment, they are coolly ejected from the corporation by a majority of the stockholders, who appropriate to themselves the accruing profits. In other words, they might be termed experimental dupes, who are subjected to the necessity of contributing to the losses, but denied the privilege of sharing the profits.* The following pertinent language is used by the New Jersey Court of Chancery in *Kean vs. Johnson* 9 N. J. Eq., 401. In answer to the contention that under a certain provision of the law a majority of the stockholders had the power to sell all the property of the concern and quit the business, and that the minority stockholders must be content with their proportionate share of the proceeds of the sale, the Court said: 'On principle, this position seems to me unsound. If it be true, a minority is entirely in the power of a majority, and the moment a rich man or a few rich men see what they deem a better investment for their money than the corporation in which they are already stockholders, they may compel the poorer members of the company to abandon profits satisfactory to them, and either risk the little they have, according to views from which they differ, or take back their money, to lie profitless on their hands until they find another investment. Or, more nearly to approach the case in hand, as asserted by the complainants, if a rich man or a number of rich men possess a controlling interest in two roads whose termini meet—one already

successful, the other not built, or needing nursing care—they may compel the poorer stockholders either to abandon or postpone the profitable use of their share of the capital or take back their money and give up an investment which perhaps their own enterprise suggested, and their own perseverance recommended to the attention of others, and hazard the finding of a new investment, and a repetition of the same destruction of it. If such were the law, corporations would soon be few, for seldom would capitalists, whatever their comparative wealth, invest in enterprises so readily rendered profitless at the caprice or in obedience to the interest of any man or set of men rich enough to control the majority of stock. *Vastly more unjust would it be to permit the small stockholder to be deprived of his profitable holdings by the practice upon him by a majority of a sort of legal legerdemain, which, while it ostensibly dissolves the corporation, actually leaves it intact, with his interests eliminated.*"

The reasoning of the opinion in this case is unanswerable, and comment upon it is unnecessary. The Vice-chancellor mistakenly dealt with it in his opinion (p. 111). He says "There was no vote for dissolution; there was no proceeding for dissolution, and the court in its opinion said that if there had been a proceeding for dissolution the court would have been required to act on it under the statute." This is an entire mistake, for not only does the opinion show that there was a dissolution, but we have taken the pains to communicate with the attorneys in the case, and have appended at the end of this brief a copy of a letter received from them, which shows that it was in fact a case of dissolution. (See p. 33, *post.*)

In the argument below counsel for the defendant spent a great deal of time in analyzing the historic

development of our dissolution statutes, which, while interesting from an archaeological standpoint, seems to us to have no practical bearing upon the issue, and as the same course will likely be pursued in this Court, we suggest that the complainants are justified in relying upon these statutes as they had developed and existed at the time their rights accrued, and that while frequently an examination into the history of legislation will aid in the interpretation of statutes, such a course in this case is barren of any results whatever and will render no assistance whatever to the Court in deciding this interesting and important question.

We have searched in vain for a single authority justifying a contrary view to that expressed in the opinion just referred to and for which we are here contending. As already indicated, Judge Kirkpatrick's opinion in the Windmuller case is not inconsistent with it, and concerning that case it may be noted that this Court has never yet, so far as we are aware, had occasion to approve of or pass on the propriety of that decision, and when occasion does arise, we venture the prediction that this Court will hesitate to lend the great weight of its authority to what seemed to us to be the unethical, if not immoral, standards therein justified.

Attention is also directed to Section 670 of Cook on Corporations, where it will be found that the principle we are here contending for, is adopted by the writer.

We suppose no one will question that, as held in the cases of *Kean v. Johnson*, 9 N. J. Eq. 401 and *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23, a stockholder at common law in the absence of any statute has the right to expect a corporation to continue its business during the period for which it was chartered and that notwithstanding this right if the directors fail to wind up and dissolve the com-

pany upon its being demonstrated a failure, he could call upon the court in bringing about that result. In such a case the business was liquidated and the assets distributed among the stockholders. While we deem the historic development of the dissolution acts of no importance, it is interesting to note that the legislature (P. L. 1870, page 8), in permitting voluntary dissolution, provided that "whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of the corporation that it shall be dissolved before the time limited in the charter," at the same time provided that the board upon such authorized voluntary dissolution should "proceed to settle up the business and affairs of such company in such manner as though the same had been dissolved by the expiration of the time mentioned in its certificate of incorporation," which plainly implied that the business should be wound up as well as the corporation technically dissolved; and in this connection the language of Judge Dunbar in the Theis case is most significant:

"A dissolution of a corporation within the contemplation of the law is the death of the corporation. It means a disintegration, a separation, a going out of business."

Later when the present act was passed we have the significant provisions with regard to "winding up," so that the legislative intent has been manifest throughout.

As appears from the foregoing analysts of the act and more particularly from a comparison of Sections 54 and 58, the plain intention of the legislature was to not only dissolve the company and terminate its business, but divide up the property among the stockholders.

On the argument below counsel for the defendant referred to the case of *Newfoundland R. R. Construc-*

tion Company v. Schack (40 N. J. Eq., 222), in which an order restraining dissolution of a corporation was reversed on appeal. An examination of that case, however, shows that the complainant there had assented to a dissolution of the corporation and had even as part of the plan taken stock in another company, and then had endeavored to arrest dissolution and have the corporation wound up under the insolvency sections of the Corporation Act. The Court found that there was no reason to appoint a receiver in insolvency, and, because the complainant had assented to the dissolution and made his exchange of securities, that he could not be heard to stop the dissolution.

The case is, of course, not an authority on the question now before the Court. It is interesting to note, however, that Judge Depue in the opinion of the Court shows very plainly that the proceeding which the Court was asked to arrest was "closing up the business of the corporation," and he says: "Everything done was regular in form, and, for aught that appears, was done in good faith." Here the closing up of the corporation's business is remote from the intention of the defendant, which plans to go on with its business, prospering and expanding, and, as appears from the supplemental bill, without denial by the defendant, "the purpose of such proposed dissolution is not the *bona fide* discontinuance of the business of said defendant company, but is the continuance of that business by another new corporation." Case, p. 6, ll. 31-35), and in the case of *Theis v. Spokane Falls, etc.* (*supra*), precisely similar facts were held by the Supreme Court of Washington to constitute fraud.

The case of *Odlin v. Bingham Copper and Gold Mining Company* (19 Dick., 363), was also referred to below by counsel for the defendant. No question of dissolution was involved in that case, however, and the decision has no bearing on the issue here presented.

Counsel for the defendant also read some remarks of Vice-Chancellor Pitney in the case of *Beling v. American Tobacco Company* (72 N. J. Eq., 32) intimating that the large majority vote in that case would have been sufficient for "winding-up proceedings." The remarks of the Vice-Chancellor are of no interest here, partly because his references are always to "winding-up proceedings" (and no intention to wind up is claimed by the defendant here), and partly because the proceeding before the Court in the *Beling* case was a merger and not a dissolution, and the remarks of the Vice-Chancellor were in no way involved in his decision and were the merest dicta.

II.

IT ALSO PLAINLY APPEARS THAT THE PROPOSED DISSOLUTION IS ONLY A STEP IN THE PLAN DESCRIBED IN SCHEDULE A, AND THAT IT IS PROPOSED TO BE CARRIED OUT IN THE MANNER THEREIN SET FORTH.

At the time of the filing of the second original bill herein, the complainants' counsel were not fully advised of this close relationship between the dissolution and the sale of the assets to the Massachusetts corporation. It was only after the hearing in that case and the frank admissions of counsel that the full import of the postscript to Schedule B, as well as the language of the proxy which was made a part of the defendant's proofs in that case, appeared.

In said postscript it is stated that unless other instructions are given, the stock will be voted in favor of a dissolution of the company and of a sale of its assets to carry out the plan of reorganization; and we confidently assert that no pretence exists that the proposed dissolution would be permitted to

be effected if the plan of reorganization could not be substantially carried out. The only limitation upon that broad statement that will or can be claimed by the defendant is that perhaps the complainants would be entitled to have cash as the representative of their interest in the assets of the dissolved corporation, the other stockholders to receive stock in pursuance of the plan.

Now, we cannot too strongly urge upon the Court the fact that Section 54 of the Corporation Act expressly provides that the trustees in dissolution "may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property." Where is there any authority for the trustees taking stock in another corporation for all or any part of the property? The significant omission in Section 54 of the right to accept stock as payment for the assets accentuates the strength of our preceding argument that it was not the legislative intent in dissolution that the business should be continued under the guise of another corporation whose stock should be received in payment of the assets. The dissolution being a purely statutory proceeding, must be strictly carried out in the manner authorized by the statute, and a stockholder has a right to insist that the corporation in which he has embarked his capital shall continue to exist until it is dissolved in the manner authorized by the statute, and in no other manner. If the directors and majority stockholders propose to take advantage of a statute in order to deprive him of his common law right, they must follow strictly the provisions of that statute. They cannot depart from it. Hence, inasmuch as in the case at bar they do propose to take stock and not securities, as the statute permits, in payment for the property, the whole plan is wrong, and should be enjoined. It is ~~not necessary~~ to this argument to say that the defendant will pay the complainants in the manner required by Sec-

no answer

tion 54. The complainants have a complete right to insist that dissolution shall not take place except in the manner authorized by the legislature, and no court can deprive the complainants of that right. No power less than the legislature can soften or modify the requirements. Voluntary dissolution is entirely a matter of statute, and if to be carried out, must be executed in the manner the statute directs. Any dissenting stockholder ascertaining *in limine* that the contemplated dissolution is proposed to be carried out in a manner different from that directed by the statute, has a right to prevent the consummation of the illegal scheme, and that equity exists in the complainants here. The case is directly within the doctrine of *Coler v. The Tacoma &c. Co.*, 65 N. J. Eq. 347, where Justice Dixon, reversing the Court of Chancery, analyzed the plan there sought to be enjoined and condemned it upon the express ground that it was tantamount to a dissolution without strictly following the dissolution provisions of our statute. It is respectfully insisted that the doctrine of that case is applicable to the one at bar.

So also in *Hunt v. American Grocery Co.*, 81 Fed. 532, Judge Kirkpatrick in construing our dissolution statute held that the New Jersey statute alone provides the means by which a private corporation may be dissolved and that the directors may be enjoined from adopting any other method than that therein provided.

Nor is there any weight to be attached to the argument that we are premature in our application. The complainants received their first notice of the scheme in the circulars. They show that the directors had already adopted and had called a meeting at which an opportunity was to be offered to the stockholders to ratify a plan that by the hypothesis is illegal, and which involves two distinct elements that are irrevocably united in plan and purpose. To say that they must

permit this company to go on with and complete the illegality and involve itself in inextricable difficulties and meshes and then apply for an injunction is to violate every rule requiring promptness on the part of a dissentient and the fundamentals of equity jurisprudence. The complainants have a right to prevent the directors from taking any further steps to carry into effect this illegal plan.

While the above point is valid under elementary equitable principles, the complainants have a right based upon their investment in the stock of the defendant, amounting to twelve thousand dollars, to object to the defendant being permitted to embark on illegal ventures and to occupy positions which will plainly jeopardize and diminish the value of the complainants' interests as stockholders. No provision of statute exists by which a vote by stockholders to dissolve can be undone, and if this Court permits the defendant to walk into the trap which its management has planned, injury will be done to the complainants for which we are not aware of any remedy whatever.

The complainants stand here as applicants, not for the protection of a naked right, but to prevent the consummation of a wicked scheme by which, after unsuccessful litigation, and a realization by the defendant of the futility of its effort to amend its by-laws so as to deprive the complainants of their contractual rights existing thereunder, this ingenious but unlawful plan is devised to enable the defendant to carry out its original plan of refusing to abide by its duty to sell the complainants its goods as the law now compels it to do. The complainants are asking the protection of the Court for a most valuable right, the existence of which induced them to invest their twelve thousand dollars in the defendant corporation. As Judge Dunbar in the *Theis* case significantly said, it would be vastly unjust "to

permit the small stockholder to be deprived of his profitable holdings by the practice upon him by a majority of a sort of legal legerdemain," and "a court of equity will never aid in the perpetration of a fraud simply because application is made in empty form of law."

It is respectfully insisted that the order denying an injunction should be reversed and that an injunction should issue as prayed for.

ROBERT H. McCARTER,
ALBERT E. SEIBERT,

Of Counsel with Complainants.

See p. 25, *ante*.

F. T. Post,
A. G. Avery,

T. B. Higgins,
A. E. Russell.

POST, AVERY & HIGGINS,
Attorneys & Counsellors at Law,
Exchange National Bank Building.
Spokane, Washington.

May 26, 1911.

MESSRS. SEIBERT, PADDOCK & COCHRAN,
49 Wall Street,
New York City.

GENTLEMEN:—

We have yours of the 22nd inst., in *re Theis vs. Spokane Falls Gas Light Company*. The record in this case was not printed, because such is not our practice. We are unwilling to allow the only copy we have of it to leave the office on account of some other litigation, but we might inform you briefly what the facts were in this case, giving you all the facts we think that could possibly be of interest to you in your litigation.

The Gas Company was at the time a going and prosperous company. Certain promoters bought more

than two-thirds of the stock and sought to buy all of the stock, with a view of re-organizing the company, and have the new company make an issue of bonds, which they could sell and realize as much cash as they had paid for the stock in the old company, leaving them with the stock in the new company free of cost, having got their money back out of the sale of the bonds. Our client, Mr. Theis, refused to sell his stock. That blocked their scheme for watering the bonds. They then undertook to take advantage of the statute of disincorporation, which provided that upon a vote of two-thirds of the stock, a company might disincorporate. They gave notice of a meeting of the stockholders to pass upon the question of disincorporation and sale of all the property of the corporation. The stockholders voted in favor of it—that is more than two-thirds so voted. Our stock was voted contra. We then commenced a suit to enjoin the sale of the property upon the ground that it was a prosperous, going concern, and the attempted dissolution was not made in good faith, but for the purpose of freezing out the minority stockholders and re-incorporating the majority stockholders, etc. We applied for an injunction *pendente lite*, which was refused. The property was sold at public auction and bid in by an agent of the majority stockholders; a new corporation was formed and the property turned over to the new company. We brought in these new people by supplemental complaint and obtained the decree set forth in the decision, requiring the undoing of everything that had been done. These are the vital facts in the case. We managed to show by cross examination of their witnesses the real purpose of the transaction, and that there was no legitimate excuse for it, because the old company could issue all the bonds that were required for the legitimate corporate business.

Yours very truly,

(Signed) POST, AVERY & HIGGINS.

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Supplemental Bill.

Filed April 20th, 1911.

In Chancery of New Jersey.

*To the Honorable Mahlon Pitney, Chancellor of the
State of New Jersey:* 10

Complaining show unto your honor, your orators, Wm. B. Riker & Son Company, a corporation of the state of New York, and Jaynes Drug Company, a corporation of the commonwealth of Massachusetts:

I. That on or about the thirtieth of December, nineteen hundred and nine, your orators filed their original bill of complaint in this court, averring among other things that they were, and for several 20 years had been corporations existing respectively under the laws of the state of New York and Massachusetts; that the United Drug Company, defendant herein, is a corporation of the state of New Jersey, and has been operated as a co-operative manufacturing concern, the distinguishing and constant feature of its policy having been that the articles manufactured and sold by it have been sold exclusively to its own stockholders at uniform prices, and on uniform terms; that its stockholders are nearly all retail 30 druggists located in all or nearly all of the cities or towns of any considerable size in the United States; that the United Drug Company has built up and developed an enormous business, consisting generally of the manufacture and sale of medicines and specifics of almost every known variety, and is the possessor and user of several trade names under which its business is and has been prosecuted; that from and at about the time of its organization your orators were stockholders in said United Drug Company and in 40

Supplemental Bill.

the cities of Brooklyn, New York and Boston had enjoyed the privileges as such, including the right to purchase and sell the goods and merchandise of the United Drug Company; that among the by-laws duly adopted by the stockholders of the United Drug Company on or about the fifteenth day of November, nineteen hundred and six, and at the time of the filing of said bill, in operation, was the following:

10 "As long as any individual, firm or corporation remains the owner of at least one share of the common capital stock and fully keeps and performs all his or its agreements with the company, such individual, firm or corporation shall retain, as far as this company can control the matter, the exclusive sale within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this company."

20 That such by-law, or one of practically similar import or effect, has been in vogue ever since the organization of the said United Drug Company, and that your orators had acquired their stock in said company in express reliance upon the same; that your orators had purchased from time to time large quantities of goods from the said United Drug Company, and during the year nineteen hundred and nine, that being the year preceding the filing of said bill,

30 they had purchased a larger quantity of such goods than in any previous year; that a notice had been sent to your orators from the United Drug Company to the effect that unless they would obligate themselves to purchase, during the year nineteen hundred and ten, goods to the amount of two hundred and fifty thousand dollars, or more than three times the quantity they had ever purchased in any one year, the United Drug Company would, on January first, nineteen hundred and ten, discontinue thereafter the sale

40 of their goods to your orators; that such proposition

Supplemental Bill.

on the part of the United Drug Company was violative of your orators' right, would tend to their irreparable injury, and praying that an injunction issue prohibiting the said company from selling any of their goods to other persons or corporations, in the cities of Boston, New York and Brooklyn, unless they likewise continued to sell to your orators all of such goods, on prices, terms and conditions uniform with the prices, terms and conditions made to the other stockholders of the defendant. Said bill of complaint was duly verified, and upon its filing, an order to show cause why an injunction should not issue with a restraining *ad interim* order, was duly issued by this honorable court, and that upon the hearing of said order to show cause, a conclusion was reached that pending the final hearing of said cause, such restraint should be continued, ever since which time your orators have continued to enjoy the right to acquire and dispose of the goods made and sold by the defendant company, as they had theretofore enjoyed the same; that said cause has been in due course referred to the honorable Frederick W. Stevens, vice-chancellor, but the final hearing has not yet been had, and said suit is still pending in this honorable court, to the record of which your orators beg leave to refer.

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II. And by way of supplement, your orators further show that on or about the fourth day of October, nineteen hundred and ten, at the annual meeting of the stockholders of the defendant, a resolution was passed against the protest of your orators, a true copy of which protest is hereto annexed and marked Schedule C, undertaking to repeal the by-law hereinabove quoted. Your orators, by their proxy present at said meeting, not only protested against the passage of said resolution, but voted against the same, and your orators allege that the effort to repeal said by-law was as against your orators, illegal and void, and that as your orators had acquired their

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Supplemental Bill.

stock in said defendant company upon the strength thereof, the same became a fundamental contract between the stockholders, which said company was powerless to modify or repeal without the consent of your orators.

10 III. And your orators, by way of supplement, further show unto your honor that in the latter part of January, nineteen hundred and eleven, your orators received from the United Drug Company certain documents, true copies whereof are hereto annexed and marked respectively Schedules A and B, and made a part of this bill of complaint. Schedule A sets forth a plan for the "re-organization" so-called of the affairs of the United Drug Company. As appears from said plan, a corporation organized under the laws of the commonwealth of Massachusetts and known as the United Drug Company (not the de-
20 fendant) has offered to purchase all the property and assets of the defendant, and to make payment therefor in the capital stock of said Massachusetts corporation, and the signers of said letter, being, as your orators charge, all the directors of the defendant, in said letter recommend the acceptance by the stockholders of said re-organization plan. Said plan refers to the remarkable increase in the business of the defendant company and the necessity of the acquisition of additional capital, the fact that there exist in
30 connection with the United Drug Company, several other companies named in said circular, and the importance of combining them with the business now carried on by the defendant company, and the elimination thereby of unnecessary expenses attendant upon the continued corporate existence of these several subsidiary or allied corporations, the fact that all of the common stock of the defendant company has not yet been issued, and a suggestion with regard to the further issuance and the proposition to ex-
40 change two hundred dollars of stock of the Massa-

Supplemental Bill.

chusetts corporation for one hundred dollars of stock in the defendant company. Said circular or plan contains other important matters, to which your orators beg leave to refer, and they charge that the purpose and intent of said "plan of re-organization" is based upon the prosperity and success of the United Drug Company, and is designed to continue the business now being successfully prosecuted by the defendant company under the same name, but by a charter from another state, thereby preserving all of the good will, assets, property, business, formulae, trade-names, and other assets which the New Jersey company now enjoys, and that it is the intention of the defendant, instead of winding up or terminating said business, to transfer the same bodily to the said Massachusetts corporation; and that as a step in said scheme of re-organization, it is proposed to dissolve the defendant New Jersey corporation under and pursuant to the provisions of the New Jersey statute.

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Schedule B is a notice to the stockholders of the defendant that a special meeting of the stockholders would be held on the seventh day of March, nineteen hundred and eleven, at twelve o'clock noon, to take action relative to the dissolution of the defendant, reciting that the board of directors have already passed a resolution, copied at length in the notice, to the effect that in their judgment it is advisable and most for the benefit of the company that the same should be forthwith dissolved, and also notifies the stockholders of a proposition at the same meeting to have the stockholders take action in reference to the authorizing the sale of all the property and assets of the defendant corporation, and in case of sale to fix the terms and conditions thereof.

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IV. On said seventh day of March, nineteen hundred and eleven, the stockholders of the defendant met, pursuant to the notice, but adjourned to the

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Supplemental Bill.

eleventh day of April, nineteen hundred and eleven, at which time a further adjournment was had until Friday, the twenty-first day of April, nineteen hundred and eleven, at twelve o'clock noon, at the office of the defendant in the City of Jersey City, no action having yet been taken on either of said propositions contained in Schedule B.

10. V. The certificate of incorporation of the defendant has been amended at various times by certificates filed in the office of the Secretary of State of New Jersey, and said certificate of incorporation as amended, provides that the period of existence of the defendant is unlimited, but neither said Certificate of Incorporation, nor any amendment thereof, contains any provision giving the defendant power to sell or dispose of all its property and assets.
20. VI. That at the adjourned meeting of the stockholders of said Company to be held on the twenty-first of April, it is proposed, unless prevented, that the stockholders shall vote in favor of the adoption and ratification of the resolution of the directors, for the dissolution of the defendant, the New Jersey Company, in accordance with the notice, Schedule B, hereinabove referred to, and that the scheme of reorganization set forth in Schedule A, will be carried into effect, and the proposed dissolution of the defendant, The New Jersey Company, is admittedly only
30. a step in the line thereof, and that the purpose of such proposed dissolution is not the *bona fide* discontinuance of the business of said defendant company, but is the continuance of that business by another new corporation, and that neither the spirit, reason, or letter of the statutes of the State of New Jersey, authorizing the dissolution of corporations, applies to the situation here presented, and that the purpose and object the defendant has in proposing the said re-
40. organization in which the dissolution is a step, is to

Supplemental Bill.

thereby avoid the rights which your orators have by virtue of said by-law, and their being holders of stock in the New Jersey Company, to enjoy the privilege of buying and selling the goods manufactured and sold by the defendant company; that said Massachusetts corporation has no such by-law and the said plan of reorganization is also in disregard of the right of your orators to have the defendant continued as a corporation until legally dissolved for liquidation and winding up; that the exercise by the directors, through the passage of the resolution referred to in Schedule B., in their discretion, in favor of dissolution, is not a *bona fide* exercise thereof, because of the fact that concededly the occasion for such exercise does not exist; that the provisions of the statutes of the State of New Jersey permitting directors to vote upon such question, only apply to a situation where it is desired or necessary to discontinue the business and wind up and liquidate the affairs of a corporation, and that the scheme of reorganization outlined in Schedule A, in which the proposed dissolution is but a step, manifests that no such situation here exists with regard to the defendant company, and on the contrary the said company is in a most prosperous and active condition, and its business is constantly increasing, and the plan involves its continuance and not its liquidation. Your orators therefore charge and allege that said plan of reorganization, including the plan to dissolve said Company, is devised by the management of the defendant company to deprive your orators of the right, protected and preserved by order of this court, to buy and sell the products of the defendant as aforesaid, and to avoid, by indirection, the obligations of the defendant under its said by-law, to your orators, by depriving itself of all of its property and assets, and the ability to obey and respond to the decrees and directions of this honorable court; that the management of the defendant has in its pos-

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Supplemental Bill.

session proxies enabling it to vote in favor of the ratification and adoption of said vote of the directors for the dissolution of the company, and the same will be so voted and the said dissolution perfected as far as possible at the meeting to be held on the twenty-first of April, unless enjoined by this honorable court. Furthermore, the purpose and object of said plan of reorganization, as outlined in Schedule A, is practically to deprive your orators of their interests as stockholders in the prosecution of said business, as the management of said Company well knows that your orators would not and could not consent to surrender their stock in the New Jersey Company, attached to which are the rights growing out of said by-law, for stock in a Massachusetts Company having no such by-law.

Your orators further show that not only is said proposed dissolution a mere step in the comprehensive plan of a reorganization outlined in Schedule A, which involves a sale of the assets of the defendant for stock of the Massachusetts Company, but that such exchange is an essential ingredient in the plan, and the directors who have already voted in favor of the proposition to dissolve, necessarily reached that conclusion on the supposition that the dissolution would be followed by an exchange of assets of the New Jersey corporation for the stock of the Massachusetts corporation, which scheme or plan is directly violative of the provisions of the New Jersey statutes with regard to dissolution, and inasmuch as the management of the defendant company openly announce that the proposed dissolution is only one step in the plan of reorganization, your orators charge that the same should not be permitted to proceed further, inasmuch as the plan involves a departure from, and proceeding in violation of the method for disposing of the assets permitted by said statutes; that so large a number of the stockholders of the defendant company have already

Supplemental Bill.

assented to the plan of reorganization and exchanged their stock in the defendant company for stock of the Massachusetts Company, that the latter is now the owner of seven thousand, two hundred and seventy-three shares of the common stock of the defendant company, out of a total of seventy-five hundred, and of five thousand, one hundred and four shares of the preferred stock, out of a total of five thousand, five hundred and twenty-seven shares, so that the result will be that if the vote of the stockholders at the proposed meeting shall be permitted to take place, the resolution for the proposed dissolution will be carried by means of the vote of the Massachusetts corporation, which is the same person that proposes to buy the assets of the defendant company, and to which the directors of the defendant company have already recommended the sale of such assets. 10

To the end, therefore, that the said defendant, The United Drug Company, may, without oath, an answer under oath being hereby waved, full, true, and perfect answer make to all and singular the premises, and that by the order and decree of this honorable court, the said defendant, its directors, officers, tellers and inspectors, may be restrained and enjoined from submitting to the stockholders of the defendant at the adjourned meeting of the stockholders of the defendant to be held on the twenty-first day of April, nineteen hundred and eleven, or at any other adjournment of said meeting, or at any other meeting, the proposition to take action upon the resolution of the Board of Directors of said Company, that in the judgment of said board it is advisable and most for the benefit of the United Drug Company, that the same shall be forthwith dissolved, and may be restrained and enjoined from passing any resolution, or receiving or counting any votes in favor of any resolution designed to carry into effect or accomplish any proposition to dissolve said defendant company, and that 20 30 40

Supplemental Bill.

your orators may have such other and further relief as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

- May it please your honor, the premises considered, to grant unto your orators not only the state's writ of injunction, issuing out of and under the seal of this honorable court, directed to the United Drug Company, the defendant herein, its directors, officers, tellers, and inspectors, commanding and restraining them as hereinabove prayed, but also the state's writ of subpoena, likewise issuing out of this court, and directed to the said defendant, commanding it, at a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree herein as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

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

McCARTER & ENGLISH,

Solicitors for and of Counsel with Complainant.

ROBERT H. McCARTER,

ALBERT E. SEIBERT,

Of Counsel.

Affidavit of Albert E. Seibert.

Affidavit.

IN CHANCERY OF NEW JERSEY.

Between

WM. B. RIKER & SON COMPANY,
et al,

Complainants,

and

UNITED DRUG COMPANY,

Defendant.

*On Bill
and Sup-
plemental
Bill.*

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

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Albert E. Seibert, being duly sworn upon his oath says, I am a member of the bar of the State of New York and for a number of years have been the counsel of the above named complainants, which are corporations organized and existing under the laws of the states of New York and Massachusetts respectively, and carry on in such states a retail drug business. Each of them is a stockholder in the United Drug Company, a New Jersey corporation, owning together one hundred and twenty shares of its common stock. The Certificate of Incorporation of the defendant has been amended several times consisting of over fifty pages in typewriting. It is so bulky I have not appended it hereto. I know, however, that it contains no provision authorizing the sale of all of its assets and that its period of existence is unlimited. The by-laws of the Company until the fourth of October, nineteen hundred and ten contained the provision set out in the bill of complaint or one substantially the same varying slightly only phraseology and it has

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Affidavit of Albert E. Seibert.

been my contention as counsel for the complainants, that they having purchased their stock in reliance upon the by-law, had a right to its continued existence and the right thereunder to acquire and sell the goods made and sold by the defendant. The foregoing supplemental bill correctly abstracts the averments of the original bill filed in this court by the complainants in the month of December, nineteen hundred and nine.

10 Upon the hearing of the order to show cause therein, Vice-Chancellor Howell, after consideration, determined to continue the injunction until the case was finally disposed of. The case has not yet been heard and the restraint is still in effect. On the fourth of October, nineteen hundred and ten, I attended the annual meeting of the stockholders of the defendant company, carrying a proxy from both of the complainants. At that meeting a motion was made to repeal the by-law set out in the bill of complaint in

20 the following form:

“Resolved, that the second paragraph of section one (1) of Article Nine (9) of the By-laws be and the same is hereby repealed.”

Before this resolution was put to motion, I, on behalf of the complainants, read a protest, a true copy whereof is attached to the bill marked Schedule C, and by virtue of my proxy voted for the complainants against the motion which was passed. I have always

30 advised my clients that the attempted repeal of this by-law was ineffectual as against them who became stockholders of the defendant company upon the faith of the by-law. In the latter part of January, nineteen hundred and eleven, the complainants each received from the defendant, circulars, true copies whereof are attached to the supplemental bill herein and marked Schedules A and B. The meeting therein called for the seventh of March, nineteen hundred and

40 enth of April. I was then present, as I was also pres-

Affidavit of Albert E. Seibert.

ent on the eleventh day of April, and a further adjournment was had until the twenty-first of April. Because of proceedings taken in the Court of Chancery by one of the complainants to prevent the carrying out of the proposition to authorize the sale of all of the assets of the defendant company, action thereon has been restrained by an order of this honorable court, but unless relief of the character prayed for in the foregoing supplemental bill be accorded, action will be taken on the twenty-first of April instant, to which the meeting was further adjourned, upon the proposition to dissolve the Company. I was not aware until the argument upon the application for the injunction in the proceedings just referred to, that the proposal to dissolve the defendant company referred to in Schedule B was part and parcel of the plan or scheme set forth in Schedules A and B, to transfer all of the property and assets of the defendant to another corporation organized under the laws of another state, but learned of said fact from the counsel for the defendant in the course of the argument. I am familiar with the facts and circumstances set out in the foregoing supplemental bill of complaint and the same are therein correctly stated.

The said defendant, the United Drug Company, is constantly increasing its business, is very prosperous, is acquiring additional facilities and constructing factories at widely separated points in the United States and is regularly paying dividends on all of its capital stock.

The facts in the supplemental bill with regard to the present holdings of stock in the defendant company by the Massachusetts corporation are taken from an answer verified by the president of the defendant company filed in this court by the defendant com-

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Schedule A.

pany on the eighteenth day of April, 1911, in the chancery proceedings above referred to.

ALBERT E. SEIBERT.

Sworn and subscribed to before me,
this twentieth day of April, nine-
teen hundred and eleven.

NELLIE B. CRAWFORD,

10 (SEAL) *Notary Public of New Jersey.*

SCHEDULE A.

The following is an explanatory letter written and signed by every director of the United Drug Company of New Jersey:

20 *To the Stockholders of the United Drug Company:*

Your directors have had under consideration, for some time, the desirability of a reorganization of the affairs of the United Drug Company. They have had in mind, among other things, the accomplishment of the following results:

30 First. Owing to the remarkable increase in the business of the company, it is necessary to provide not only for additional capital to meet its immediate requirements, but also to put the company on such a basis so that it can obtain, from time to time, in the future, such additional capital as may be needed.

40 Second. The present preferred stock of the company is nearly all held by retail druggists to whose co-operation the success of the company is largely due. The preferred stockholders are limited to a fixed rate of dividend, and they should be allowed to exchange their preferred stock for common stock so as to participate in the future success of the company.

Schedule A.

Third. A substantial part of the business of the company is now conducted by the United Laboratories Company, the United Perfume Company, the United Candy Company and the United Stationery Company, all subsidiary corporations of the parent company. It is proposed to eliminate these subsidiary companies, to place the ownership of all these in one corporation, and obtain greater simplicity in accounting, and to some extent eliminate an unnecessary duplication of expense. 10

With the approval of your directors, therefore, the following plan for the reorganization of the affairs of the United Drug Company has been proposed:

Your directors have authorized the organization of a corporation under the laws of Massachusetts by the name of United Drug Company.

The authorized capital of this corporation is \$5,000,000 par value, of which \$2,500,000 consists of preferred stock, the shares being of the par value of \$50 each, and \$2,500,000 common stock, the shares being of the par value of \$100 each. The preferred stock is entitled to cumulative dividends at the rate of seven per cent. (7%) per annum, and no more, and is preferred as to principal in case of liquidation. It will be subject to redemption in whole or in part at any time after January 1, 1914, at the option of the Company, at \$60 per share and accrued and unpaid dividends. The common stock will be entitled to all earnings after the payment of a fixed dividend on the preferred stock, and will be entitled in case of liquidation to all assets after payment of the liabilities of the company and the par value of the preferred stock. The common stock will contain restrictions on its transfer, which will prevent its sale without first being offered to the corporation. This is done so as to prevent the control of the corporation passing from the retail druggists. The common stockholders will alone have the right to participate in any increase of the common stock. 20 30 40

Schedule A.

10 The right to vote at all meetings of the company has been reserved to the common stock alone, except on default in the payment of four quarterly dividends on the preferred stock, in which case the holders of preferred stock shall enjoy all the voting privileges which attach to the common stock, until all dividends in arrears are paid and four consecutive quarterly dividends thereafter are paid; any increase of the preferred stock of the corporation must be authorized by the affirmative vote of at least two-thirds of the preferred stock then outstanding and may be sold in the discretion of the directors without first being offered to the stockholders.

The United Drug Company (of Massachusetts) has offered to purchase all the property and assets of the United Drug Company (of New Jersey) subject to all its indebtedness, and to pay therefor as follows:

20 (a) It will issue and deliver to each holder of preferred stock in the New Jersey company one (1) share of its common stock for one (1) share of the preferred stock in the New Jersey company, provided the holder of preferred stock in the New Jersey company will subscribe for in cash at par an amount of the preferred stock in the Massachusetts company equal to one-half of the par value of his holdings in the New Jersey company; or it will exchange two (2) shares of its preferred stock of the par value of \$50 each for one share of preferred stock of the par value of \$100 each in the New Jersey company.

30 (b) The Massachusetts Company will issue and deliver to the holders of common stock in the New Jersey company two (2) shares of the common stock of the Massachusetts company of the par value of \$100 each, in exchange for one (1) share of the common stock of the New Jersey company of the par value of \$100 each.

Schedule A.

The Massachusetts Company agrees that prior to the acceptance of this offer the unissued common stock of the New Jersey Company may be offered to its common stockholders for subscription in cash at par, and pending corporate action by the New Jersey company it will, upon presentation, exchange its own stock for stock of the New Jersey company on the foregoing basis.

In order to carry the plan into effect, the co-operation of all the stockholders is desirable, and the plan has, therefore, been discussed with several representative stockholders, including Mr. John B. Cobb, who, as you are aware, commenced a suit in the Massachusetts courts some time ago to set aside the transfer to Mr. Liggett of the stocks of certain retail companies. Mr. Cobb was of opinion that if the reorganization was to be effected it should include all matters in controversy, and suggested that in connection with the reorganization Mr. Liggett ought to transfer to the Massachusetts company the entire common stock of the L. K. Liggett Company, amounting to \$1,000,000, and the stock in the Williamson & Watts Company, upon being reimbursed for all his expenditures and receiving \$100,000 par value of the common stock of the new Massachusetts company in payment therefor. In order to bring about the proposed reorganization Mr. Liggett has assented to this suggestion.

In view of the recent changes in the character of the retail drug business and the probable ability of the new Massachusetts company to finance the retail business if necessary, your directors are of opinion that it is wise to adopt Mr. Cobb's suggestion.

It is therefore proposed that Mr. Liggett shall transfer to the new Massachusetts company the entire common stock of the L. K. Liggett Company, amounting at par to \$1,000,000, and six hundred and sixty-five shares of the par value of \$66,500 of the capital

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Schedule A.

stock of the Williamson & Watts Company, and that he shall also formally authorize the new Massachusetts company to use the name "Liggett" in connection with its business; that the new Massachusetts company shall reimburse Mr. Liggett for all advances made by him to the L. K. Liggett Company, and for the actual cost of the stock of the Williamson & Watts Company and of the stock of the retail companies which have been transferred to the L. K. Liggett Company over and above the amount received by him from the sale of the notes of the L. K. Liggett Company; that the new Massachusetts company shall hold Mr. Liggett harmless for all liability in respect of the outstanding notes of the L. K. Liggett Company, and shall issue to him \$100,000 par value of the fully paid common stock of the Massachusetts company.

20 It is proposed that as part of the same transaction the new Massachusetts company shall assume and pay the expenses of the litigation instituted by Mr. Cobb, and that all questions raised by Mr. Cobb as to the validity of the issue and exchange of stock of the New Jersey company shall be waived.

30 It is further proposed that \$100,000 of the common stock of the new Massachusetts company shall be set aside to be sold in the direction of the directors from time to time for cash, at par, to such of the employees of the new company as they may select, in order that they may have a financial interest in the prosperity of the company.

If the above plan is carried out, the original issue of the capital of the Massachusetts company, provided the preferred stockholders of the present New Jersey company elect to exchange their preferred stock for common stock, will be substantially as follows:

40 Preferred stock: authorized..... \$2,500,000

Schedule A.

Issued in exchange for cash subscriptions by the preferred stockholders of the New Jersey company.....	275,000	
Common stock: authorized.....	2,500,000	
To be issued in exchange for the common and preferred stock of the New Jersey company	2,050,000	
To be issued for the acquisition of the stock of the L. K. Liggett Company, etc.	100,000	10
To be set aside for sale to employees....	100,000	

This will leave \$250,000 of common stock unissued, and will leave \$2,225,000 par value of preferred stock, which may be used, from time to time, for the requirements of the company.

Your directors unanimously recommend the acceptance of the proposed plan of reorganization, and pending action by the New Jersey company recommend an immediate exchange of the stock of the New Jersey company for stock of the Massachusetts company, in accordance with the terms of the offer. 20

If, for any reason, it should become either necessary or desirable to delay the dissolution of the New Jersey corporation and the transfer of its assets, or even to continue its corporate existence, the practical accomplishment of the plan would not be affected, as the Massachusetts corporation would, by the exchange, become the controlling stockholder of the New Jersey corporation. 30

This seventeenth day of January, nineteen hundred and eleven.

(Signed) W. C. BOLTON,
" J. C. BRADY,
" FRED. S. ROGERS,
" WALTER A. MAY,
" THOS. VOEGELI,
" T. P. TAYLOR,
" E. R. PETTY,

Schedule B.

(Signed) BYRON M. HYDE,
 " LOUIS K. LIGGETT,
 " JAMES C. MCCORMICK,
 " LOUIS I. SCHREINER,
 " E. L. SCHOLTZ,
 " W. M. FEDERMANN,
 " T. H. BRANNEN,
 " G. W. BENCE,

10

All of Your Directors.

SCHEDULE B.

To the Stockholders of United Drug Company:

20 You are hereby notified, that at a meeting of the Board of Directors of the company, called for that purpose, and held on the 17th day of January, A. D., 1911, said board by a majority of the whole board did adopt the following resolution, to wit:

Resolved, that in the judgment of this board, it is advisable and most for the benefit of the United Drug Company, that the same should be forthwith dissolved.

30 In accordance with the vote of the directors to that effect, and by order of the president, you are hereby notified that a special meeting of the stockholders of the company will be held on Tuesday, the seventh day of March, A. D., 1911, at twelve o'clock, noon, at the office of the company in the City of Jersey City and State of New Jersey, for the following purposes:

First. To take such action as the stockholders may deem desirable upon the aforesaid resolution of the Board of Directors relative to the dissolution of the company.

40 Second. To take such action as the stockholders may deem advisable with reference to authorizing the sale of all the property and assets of the company, and

Schedule C.

in case such sale is authorized to fix the terms and conditions thereof.

CHARLES E. MURNAN,
Secretary.

It is desired that the preferred stockholders as well as the common stockholders, shall vote upon the question of the dissolution of the company, and the preferred stockholders as well as the common stockholders, who are unable to be present at the meeting are requested to sign and return their proxies, which will, unless other instructions are given, be voted in favor of the dissolution of the company and of a sale of its property and assets, to carry out the plan of reorganization described in the circular letter of the directors inclosed herewith. 10

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SCHEDULE "C."

Protest is hereby made by Wm. B. Riker & Son Company and The Jaynes Drug Company, against the taking of any action looking to the repeal of the second paragraph of Section 1 of Article IX of the By-Laws of this Company, reading as follows:

"As long as any individual, firm or corporation remains the owner of at least one share of the common capital stock and fully keeps and performs all his or its agreements with the Company, such individual, firm or corporation shall retain, as far as this Company can control the matter, the exclusive sale within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this Company." 30

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Schedule C.

This protest is made on the following grounds, that is to say:

10 First. The United Drug Company was projected as a co-operative concern, was organized as a co-operative concern, and has been conducted with conspicuous success as a co-operative concern. Co-operation was its corner stone, and always has been its most valuable asset. In reviewing the Company's career, this feature is easily distinguished as accounting principally for the unique position attained by it in the manufacturing world. This by-law embodies this co-operative feature, and for the Company now voluntarily to repudiate and throw aside that characteristic, which has stood to the public as representative of the United Drug Company, and which has been associated in the mind of the public with the Company's reputation as prominently and as constantly as the trade mark "Rexall" has been associated with its name, is reactionary, and in the highest degree unwise.

20 Second. Wm. B. Riker & Son Company and The Jaynes Drug Company have certain rights, based on subscription to and payment for stock of this company, and on loyal support of the policy and interests of this Company, which rights have been submitted to the Court of Chancery of this State for protection, and pending a final decision thereon, it is submitted that no action on the proposal to repeal the portion of the by-laws in question should be taken, and that no action that will bind or affect the rights of Wm. B. Riker & Son Company or of the Jaynes Drug Company legally can be taken.

Third. The by-law sought to be repealed was a part of the original organization of the Company, and Wm. B. Riker & Son Company and the predecessors in interest of the Jaynes Drug Company, both acquired their stock upon the strength thereof, and such

Schedule C.

by-law thereby became a fundamental contract between the stockholders, including Wm. B. Riker & Son Company and the Jaynes Drug Company's predecessor in interest, and the United Drug Company, which cannot be repealed or modified without the consent of Wm. B. Riker & Son Company and the Jaynes Drug Company, and any action designed to repeal such by-law without the consent of the Wm. B. Riker & Son Company, and the Jaynes Drug Company is illegal and void as to them.

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2nd Original Bill.

Filed April 8th, 1911.

IN CHANCERY OF NEW JERSEY.

10 *To the Honorable Mahlon Pitney, Chancellor of the
State of New Jersey:*

Complaining show unto your honor, your orator,
Wm. B. Riker & Son Company, a corporation of the
State of New York:

20 I. Your orator is and for several years last past
has been a corporation existing and organized under
the laws of the State of New York. It has been and is
engaged in the retail drug business in the City and
State of New York and elsewhere and is likewise duly
authorized to transact business in the State of New
Jersey.

30 II. The defendant United Drug Company is a
corporation organized and existing under the laws
of the State of New Jersey, pursuant to the provisions
of "An Act Concerning Corporations (Revision of
"eighteen hundred and ninety-six)" and its several
supplements and amendments, having been so organ-
ized in or about the month of November, 1902.

III. Your orator is and ever since about the time
of the organization of the defendant has been the
owner and holder of forty shares of the common capi-
tal stock of the defendant and as such is entitled to
vote at all meetings of the stockholders of the de-
fendant.

40 IV. Your orator in the month of January, 1911,
received from the defendant a paper of which a copy
is hereto annexed, marked Schedule A and made part

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of this bill of complaint, the same being a letter from the directors of the defendant to the stockholders of the defendant setting forth a plan for the "reorganization," so called, of the affairs of the defendant. As appears from said reorganization plan, a corporation organized under the laws of the Commonwealth of Massachusetts and known as the United Drug Company (not the defendant) has offered to purchase all the property and assets of the defendant and to make payment therefor in the capital stock of said Massachusetts corporation, and the signers of said letter, being, as your orator believes, all the directors of the defendant, in said letter recommended the acceptance of said reorganization plan.

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V. With said reorganization plan your orator received a paper of which a copy is hereto annexed, marked Schedule B and made a part of this bill of complaint, the same being a notice to the stockholders of the defendant that a special meeting of the stockholders of the defendant would be held on the seventh day of March, 1911, at twelve o'clock noon at the office of the defendant in the City of Jersey City, to take action relative to the dissolution of the defendant and to take action with reference to authorizing the sale of all the property and assets of the defendant and in case of sale to fix the terms and conditions thereof.

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VI. On said seventh day of March, 1911, the stockholders of the defendant met pursuant to said notice, but adjourned to the eleventh day of April, 1911, at the same hour and place, without taking any action.

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VII. The certificates of incorporation of the defendant has been amended at various times by certificates filed in the office of the Secretary of State of the State of New Jersey, and said certificate of incorporation as amended provides that the period of existence of the defendant is unlimited, but neither said certifi-

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cate of incorporation nor any amendment thereof contains any provision giving the defendant power to sell or dispose of all its property and assets.

VIII. On the thirtieth day of December, 1909, there was in force and effect a by-law of the defendant reading as follows: "As long as any individual, firm
 10 "or corporation remains the owner of at least one
 "share of the common capital stock and fully keeps
 "and performs all his or its agreements with the com-
 "pany, such individual, firm or corporation shall re-
 "tain, as far as this company can control the matter,
 "the exclusive sale within the territorial limits of his
 "or its city or town, if he or it so desires, of all the
 "articles manufactured and sold by this company."

On said date your orator and the Jaynes Drug Com-
 pany, a Massachusetts corporation of which prac-
 20 tically all the capital stock was owned by your orator,
 were the owners of one hundred and twenty shares
 of the common capital stock of the defendant, for
 which the par value of twelve thousand (12,000) dol-
 lars had been paid in cash, and said stock had been
 subscribed and paid for in reliance upon said by-law.
 The defendant is a co-operative manufacturing con-
 cern, selling its goods only to its own stockholders,
 of whom there is but one engaged in the retail drug
 business in any city or town.

Your orator materially assisted in the organiza-
 30 tion of the defendant, assisted the defendant finan-
 cially and otherwise, gave the products of the defend-
 ant effective support through advertising, window
 and counter displays, distribution of booklets and
 samples and payment of commissions to salesmen,
 wholly without expense to the defendant, and in gen-
 eral supported the defendant in its policies and helped
 in the exploitation of its products. The sales of pro-
 ducts of the defendant by your orator and said Jaynes
 Drug Company in the year 1909 were larger than ever
 40 before.

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On this state of facts, the defendant, not claiming that either your orator or said Jaynes Drug Company had failed to keep any agreement with the defendant, threatened to terminate the right given your orator and said Jaynes Drug Company by said by-law unless they should bind themselves to purchase during the year 1910 two hundred and fifty thousand (250,000) dollars of the products of the defendant, the larger purchases of said products by your orator and said Jaynes Drug Company in any year to that time having been but seventy-five thousand (75,000) dollars. The withdrawal from your orator and said Jaynes Drug Company of the right to handle the products of the defendant would cause serious injury to your orator and said Jaynes Drug Company, both because of loss of direct profit on the sale of the products of the defendant and because of loss of sales of other articles sold by your orator and said Jaynes Drug Company at large profits, experience having shown that the sale of such other articles depended to a large extent upon the sale of the products of the defendant.

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Thereupon your orator and said Jaynes Drug Company applied to this honorable court for relief, and this court at the instance of your orator and said Jaynes Drug Company as complainants on said thirtieth day of December, 1909, made an order (a copy whereof, marked Schedule C, is hereto annexed and made a part of this bill of complaint) restraining and enjoining the defendant from selling any of its goods in the Borough of Manhattan or the Borough of Brooklyn in the City and State of New York or in the City of Boston in the Commonwealth of Massachusetts so long as and while the defendant should fail to sell its goods to your orator and said Jaynes Drug Company for prices and on terms and conditions uniform with the prices, terms and conditions made to the other stockholders of the defendant.

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After the granting by this court of said restraining order the defendant filed voluminous answering affi-

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davits, and then, after extended argument by counsel, this court continued said restraining order, and the same is now in full force and effect.

- IX. The defendant has capital stock issued and outstanding in excess of one million, two hundred thousand (1,200,000) dollars par value, is conducting a large and constantly increasing business, is
- 10 abundantly solvent and prosperous and is paying dividends on all its capital stock, and your orator charges that the action proposed by the directors of the defendant, namely, the sale of all the property and assets of said corporation to said Massachusetts corporation, is in disregard of the right of your orator as a stockholder of the defendant to have the business of the defendant continued by the defendant and also in
- 20 disregard of the right of your orator under said by-law of the defendant to continue to buy and sell the products of the defendant in said Boroughs of Manhattan and Brooklyn and said City of Boston and constitutes an attempt by the defendant to deprive your orator of the right, protected and preserved by said order of this court, to buy and sell the products of the defendant as aforesaid, and to avoid by indirection the obligations of the defendant under its said by-law to your orator by depriving itself of all its property and assets and the ability to obey and respond to the decrees and directions of this honorable court. Your
- 30 orator protested in writing to the management of the defendant against such proposed sale, and if the matters in said notice of meeting, Schedule B, referred to had been brought to a vote at said meeting of stockholders, held on the seventh day of March, 1911, your orator, being represented at said meeting by proxy duly authorized, would have voted against the proposed dissolution of the defendant and against the proposed sale to said Massachusetts corporation of all the property and assets of the defendant as pro-
- 40 posed, and at the adjourned meeting of stockholders

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to be held on the eleventh day of April, 1911, your orator intends voting against both of said propositions.

For as much as your orator is without relief except in this honorable court, where matters of this nature are peculiarly cognizable:

To the end therefore that said defendant, United Drug Company, may, without oath, an answer under oath being hereby waived, full, true and perfect answer make to all and singular the premises, and that by the order and decree of this honorable court the said defendant, its directors, officers, tellers and inspectors, may be restrained and enjoined from submitting to the stockholders of the defendant at the adjourned meeting of the stockholders of the defendant to be held on the eleventh day of April, 1911, or at any other adjournment of said meeting, or at any other meeting, the proposition to sell or dispose of all the property and assets of the defendant referred to in the reorganization plan and notice of meeting sent to the stockholders of the defendant, copies whereof are hereto attached as Schedules A and B, and may be restrained and enjoined from passing any resolution or receiving or counting any votes in favor of any resolution designed to carry into effect or to accomplish any proposition to sell or transfer all of the property and assets of the defendant to the United Drug Company, a Massachusetts corporation, or otherwise, and that your orator may have such other and further relief as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orator not only the state's writ of injunction, issuing out of and under the seal of this honorable court, directed to the United Drug Company, the defendant herein, its directors, officers, tellers and inspectors, commanding and restraining them as hereinabove prayed, but also the state's writ of

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subpoena, likewise issuing out of this court, and directed to the said defendant, commanding it, at a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such order and decree herein as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

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

McCARTER & ENGLISH,

Solicitors for and of Counsel with Complainants.

ROBERT H. McCARTER,

ALBERT E. SEIBERT,

Of Counsel.

Affidavit of Alfred H. Cosden.

Affidavit.

IN CHANCERY OF NEW JERSEY.

Between

WM B. RIKER & SON COMPANY

Complainant,

and

UNITED DRUG COMPANY,

Defendant.

On Bill, &c.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

Alfred H. Cosden, being duly sworn, deposes and
says:

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I reside in the City and State of New York, and am the President of Wm. B. Riker & Son Company, a corporation organized under the laws of the State of New York, the complainant in the above entitled cause, and have been President of said corporation, since the month of January, 1908. I have been connected with said corporation ever since 1894, and for five years prior to 1908, I was secretary of said corporation and since 1903 I have been general manager of said corporation.

30

In the month of January, 1911, the complainant received from the defendant a so-called plan of reorganization of the defendant and a notice of a special meeting of the stockholders of the defendant to be held on the seventh day of March, 1911, copies of said plan and notice, marked respectively Schedule A and Schedule B, being hereto annexed. As appears by reference to said Schedule A, said plan of reorganiza-

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tion is contained in a letter signed, as I believe, by all of the directors of the defendant and addressed to the stockholders of the defendant. Said letter or plan states that a corporation organized under the laws of the Commonwealth of Massachusetts under the name United Drug Company has offered to purchase all the property and assets of the defendant and to make payment therefor in its own capital stock, and the directors signing said letter or plan recommend the acceptance of the reorganization plan in said letter set forth.

As appears by reference to Schedule B, the same is a notice from the secretary of the defendant to the stockholders of the defendant of a special meeting of the stockholders of the defendant to be held on the seventh day of March, 1911, at twelve o'clock noon, at the office of the defendant in the City of Jersey City, to take action relative to the dissolution of the defendant and to take action with reference to authorizing the sale of all the property and assets of the defendant, and in case of sale to fix the terms and conditions thereof.

On the thirtieth day of December, 1909, there was in force and effect a by-law of the defendant reading as follows: "As long as any individual, firm or corporation remains the owner of at least one share of the common capital stock and fully keeps and performs all his or its agreements with the Company, such individual, firm or corporation shall retain, as far as this Company can control the matter, the exclusive sale within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this Company."

On said date the present complainant and the Jaynes Drug Company, a Massachusetts corporation of which practically all the capital stock was and is owned by the present complainant and of which I then was and now am the president, were the owners

Affidavit of Alfred H. Cosden.

of one hundred and twenty shares of the common capital stock of the defendant, for which the par value of twelve thousand (12,000) dollars had been paid in cash, and said stock had been subscribed and paid for in reliance upon said by-law. The defendant is a co-operative manufacturing concern, selling its goods only to its own stockholders, of whom there is but one engaged in the retail drug business in any city or town.

10

The management of the present complainant took a prominent and material part in the organization of the defendant. When the defendant was preparing to manufacture the complainant gave to it many valuable formulae for recognized remedies having a large sale. When the defendant was ready to sell goods the complainant ordered freely and laid in and kept up a large stock of the defendant's goods and in some instances paid for the goods in advance of delivery in order to assist the defendant financially. The treasurer of this complainant was the first president of the defendant and many houses in the drug trade applied to the complainant for information as to the credit and financial responsibility of the defendant and specifically stated that they would sell goods to the defendant on credit only because of the interest of the complainant in the defendant and of the connection of the treasurer of the complainant with the defendant. This complainant always has given the products of the defendant effective support through advertising, window and counter displays, distribution of booklets and samples and payment of commissions to salesmen, wholly without expense to the defendant, and in general has supported the defendant in its policies and helped in the exploitation of its products.

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The sales of products of the defendant by this complainant and said Jaynes Drug Company in the year 1909 were larger than ever before.

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Affidavit of Alfred H. Cosden.

The defendant, not claiming that either this complainant or said Jaynes Drug Company had failed to keep any agreement with the defendant, threatened to terminate the right given this complainant and said Jaynes Drug Company by said by-law unless they should bind themselves to purchase during the year 1910 two hundred and fifty thousand (250,000) dollars of the products of the defendant, the largest purchases of said products by this complainant and said Jaynes Drug Company in any year to that time having been but seventy-five thousand (75,000) dollars. The withdrawal from this complainant and said Jaynes Drug Company of the right to handle the products of the defendant would cause serious injury to this complainant and said Jaynes Drug Company, both because of loss of direct profit on the sale of the products of the defendant and because of loss of sales of other articles sold by this complainant and said Jaynes Drug Company at large profits, experience having shown that the sale of such other articles depended to a large extent upon the sale of the products of the defendant.

This complainant and said Jaynes Drug Company thereupon applied to this honorable court for relief, and this court at the instance of this complainant and said Jaynes Drug Company as complainants on said thirtieth day of December, 1909, made an order (a copy whereof, marked Schedule C, is hereto annexed and made a part of the bill of complaint) restraining and enjoining the defendant from selling any of its goods in the borough of Manhattan or the borough of Brooklyn in the city and state of New York or in the city of Boston in the Commonwealth of Massachusetts so long as and while the defendant should fail to sell its goods to this complainant and said Jaynes Drug Company for prices and on terms and conditions uniform with the prices, terms and conditions made to the other stockholders of the defendant.

After the granting by this court of said restraining order the defendant filed voluminous answering affidavits, and then, after extended argument by counsel, this court continued said restraining order, and the same is now in full force and effect.

The sale by the defendant of all its property and assets, if carried out as threatened, would work great hardship and inflict irreparable injury on this complainant, and would in fact accomplish by indirection what this court has forbidden by its said order, namely, the destruction of the right now enjoyed by the complainant to buy and sell the products of the defendant in the boroughs of Manhattan and Brooklyn and the city of Boston. 10

I have in my possession a certified copy of the certificate of incorporation of the defendant, filed in the office of the Secretary of State of the State of New Jersey on the third day of November, 1902, and certified copies of all the various certificates amending the said certificate of incorporation, respectively filed in the office of said Secretary of State on the thirteenth day of June, 1904, the thirty-first day of May, 1906, the twenty-seventh day of November, 1906, and the sixteenth day of October, 1907. Said certificate of incorporation as amended contains the following provisions, that is to say: 20

Fourth. The total authorized capital stock of this corporation is one million, five hundred thousand (1,500,000) dollars, divided into fifteen thousand (15,000) shares each of the par value of one hundred (100) dollars. 30

Of this capital stock seven hundred and fifty thousand (750,000) dollars, being seven thousand, five hundred (7,500) shares each of the par value of one hundred (100) dollars, shall be known as general or common stock and shall have all the powers and privileges incident to such stock, including voting powers. 40

Affidavit of Alfred H. Cosden.

Seven hundred and fifty thousand (750,000) dollars of said stock, being seven thousand, five hundred (7,500) shares each of the par value of one hundred (100) dollars shall be known as preferred stock. The holders of such preferred stock shall be entitled to receive from the surplus or net profits arising from the business of said corporation a fixed yearly cumulative dividend of seven per centum and no more, payable semi-annually on such dates as may be determined by the board of directors. The board of directors shall have power to determine from time to time the amount to be reserved as working capital.

10 Said preferred stock shall be subject to redemption at par and accumulated dividends thereon at any time after three years from the issue thereof, at such times and in such manner as the board of directors shall determine.

20 The holders of preferred stock shall have no voting power whatsoever, nor shall they be entitled to receive notice of any meeting of stockholders of the company.

The amount with which such corporation will commence business is one thousand (1,000) dollars, which is to be divided into ten (10) shares of the common stock of the par value of one hundred (100) dollars each.

Sixth. The period of the existence of this corporation is unlimited.

30 The reason I do not annex to this affidavit a copy of said certificate of incorporation and of said certificate amending the same is because said papers are very voluminous.

Neither said certificate of incorporation nor any of said amendments thereof contains any provision giving the defendant power to sell or dispose of all its property and assets.

On receiving said plan of reorganization and notice of special meeting of stockholders, Schedules A and B,
40 I conferred with other directors of the complainant

Affidavit of Alfred H. Cosden.

and then sent the defendant a letter of which the following is a copy :

6 February, 1911.

United Drug Company,

43 Leon St.,

Boston, Mass.

Dear Sirs :

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Referring to the plan for the reorganization of your company recently received, we would say that we have given the same careful consideration. In considering the plan we have necessarily considered also the pending litigation between our companies over the agency rights for which this company and its subsidiaries paid money on the organization of your company. It is evident that the adoption of the plan of reorganization would involve the destruction of your company, leaving nothing subject to the decree of the New Jersey Court of Chancery in the event of this company finally succeeding in the pending suit. It is plain, therefore, that a vote on behalf of this company in favor of the adoption of the plan would be inconsistent with the position of this company in the pending suit, and we are advised by our counsel that such a vote would be taken by the Court of Chancery as an abandonment by this company of the rights to enforce which the suit was commenced.

20

Evidently, therefore, this company cannot approve or vote in favor of the plan. Moreover, we are advised that, in order to avoid compromising our position in the pending suit, we must affirmatively oppose the adoption and effectuation of the plan, both by our vote at the stockholders' meeting and by the taking of such legal steps as may be appropriate. We are advised further, not only that there rests on this company an obligation to oppose the plan of reorganization by all proper means, owing to the pendency of the injunction suit, but also that legal objections to the

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Affidavit of Alfred H. Cosden.

plan exist sufficient to enable this company to prevent the carrying of the plan into effect, either by your company as a going concern or by the trustees of your company as a concern in process of dissolution.

10 The meeting of your stockholders to act on the plan is called for the seventh proximo, but we write you thus promptly in order that you may be clearly informed as to the position which we are constrained by force of circumstances to assume.

As to the pending suit, it was brought, as you are aware, to protect rights in the sale of your goods for which this company and its subsidiaries paid \$12,000, in cash and also contributed substantial value in the shape of advertising and general support. No course other than that pursued in commencing the suit was open to us, in view of your demand that we purchase \$250,000 of your goods in a year. The course in ques-
 20 tion was taken, however, with regret, and we had and now have no motive other than to obtain recognition of the agency rights involved, meaning, not exclusive selling rights, but selling rights, for all the products of your company and its subsidiaries in New York, Brooklyn and Boston. If your company should after consideration now see its way to secure to this com-
 30 pany by appropriate means the rights to purchase your company's goods for a reasonable period, the continuation of the pending suit would be rendered unnecessary, and thereby the necessity for the present attitude of this company toward the reorganization plan, as far as based on the continuation of the pending suit, would disappear, and this company in that event would be willing to waive its other objections to the plan.

We should be pleased to learn your attitude with reference to this suggestion as promptly as possible.

Yours very truly,

A. H. COSDEN,
President.

40 AHC/AR

Affidavit of Alfred H. Cosden.

Thereafter an interview was held at the office of the complainant between counsel for the defendant and three directors of the complainant, including myself, and counsel for the complainant, with the object on our part of finding some way for the adjustment of all matters in controversy between the complainant and the defendant.

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Thereafter and on the twenty-second day of February, 1911, I received from the defendant a letter of which the following is a copy:

February 21st, 1911.

Wm. B. Riker & Son Co.,

109 West Twenty-Seventh Street,

New York City.

20

Gentlemen:

I am in receipt of your letter of February 6, 1911, in connection with the matter of the reorganization of United Drug Company and your attitude with respect to it.

I think we are agreed that the proposed plan is a desirable one from the standpoint of United Drug Company and its stockholders, and I do not think that any of the parties to the suit of Wm. B. Riker & Son Co., et als, *vs.* United Drug Company ought to seek any advantage in such suit by reason of anything connected with, or contemplated by, this plan of reorganization.

30

With a view, therefore, of preserving all of the rights of your company now being asserted in that suit, and, at the same time, affording you the opportunity of exchanging the stock of the United Drug Company of New Jersey, now held by you, for the stock of United Drug Company of Massachusetts, I make the following offer:

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Affidavit of Alfred H. Cosden.

United Drug Company of Massachusetts will agree that it will, with the sanction of the Court of Chancery of New Jersey, be substituted as party defendant in the suit above referred to, so that that litigation may continue, and so that any decree rendered in it will be binding upon the Massachusetts corporation; or, if, for any reason, it cannot by such agreement be made the defendant in that suit, it will make
 10 and execute an agreement by which it will abide and be bound by any decree which may be rendered against United Drug Company of New Jersey therein. In this way, your company can still try out the matter of its alleged rights in that suit, and the fact that you have surrendered your stock in the New Jersey company cannot then be pleaded as a bar, and you cannot, in any way, be prejudiced by it.

20 In your letter of February 6th, you say that you want selling rights for all of the products of this company and its subsidiaries, in New York, Brooklyn and Boston, meaning not exclusive rights, and that if this company should, after consideration, see its way clear to secure to your company, by proper means, the right to purchase this company's goods, for a reasonable period, the continuation of the pending suit would be rendered unnecessary, and thereby the
 30 necessity of the present attitude of your company toward the reorganization plan would disappear, and your company would, in that event, be willing to waive any other objections which it may have to the plan; but that unless we did make such arrangement that you would affirmatively oppose the adoption and effectuation of the plan by your vote at the stockholders' meeting, and otherwise.

In your conversation with Mr. Fuller in New York on Friday, supplemented by the letter of Mr. Seibert, dated February 17th, you stated that you want this
 40 company to make a contract by which it will sell

Affidavit of Alfred H. Cosden.

its goods to your company in New York, Brooklyn and Boston for a period of ten years, and that this company may have the right to sell goods manufactured by it in its own stores in those cities, or in stores of others, but that whatever advertising is done by United Drug Company should refer to your company as the Rexall agent. We cannot assent to this arrangement, and you ought not to ask, at this time, such an advantage. Your right to sell our goods is the basis of the suit now pending in the Court of Chancery of New Jersey. We are not asking you to settle that suit, or give us any advantage in it, and nothing in the plan of reorganization, together with the offer now made in this letter, can in any way give this company any advantage. All of your rights in that suit will be preserved, and that is all that you are entitled to ask. 10

I hope, therefore, you will accept my offer herein made, and make the exchanges contemplated by the plan, as early as possible. 20

Yours very truly,

LOUIS K. LIGGETT,

President,

UNITED DRUG COMPANY.

On the twenty-fourth of February, 1911, I replied to said letter in a letter of which the following is a copy: 30

24 February, 1911.

United Drug Co.,

Leon & Greenleaf Streets,

Boston, Mass.

Gentlemen:—

Your letter of the 21st inst. was duly received and contents carefully noted. 40

Affidavit of Alfred H. Cosden.

In reply to your suggestion that some arrangement be made with reference to the pending suit in New Jersey, whereby this company would approve the plan for the reorganization of your company, we would say that we are unable to perceive any method by which your suggestion could be carried out with due regard to the rights and interests of this company in the premises. We must therefore respectfully decline your suggestion.

Referring to the interview between Mr. Fuller and representatives of this company on Friday last, we desire to direct your attention again to the matters there considered. At that interview, the object of all present seemed to be to find some method satisfactory and just to both your company and this company by which the agency of this company could be continued, and the litigation between our companies terminated. Certain suggestions made and questions asked by Mr. Fuller, seemed to indicate an attitude on the part of the management of your company, favorable to such an arrangement. As far as the attitude of this company is concerned, we would say that we regard the agency of your company highly, and desire to continue it, and desire moreover to make it profitable and advantageous alike to both companies. No suggestion contained in our letter of the 6th inst. or made to Mr. Fuller at our interview, was made with the idea of obtaining any advantage over your company, and our desire is, if a fair adjustment can be reached, to do full justice to your products in every way.

Referring also to a comparatively recent interview between your Mr. Fuller, Mr. Junius Parker, and our Mr. Cobb, at which the same subject was considered at some length, we would say that we are entirely willing to make such an arrangement as was then discussed, namely: one by which the agency of this company in New York, Brooklyn and Boston should

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be continued as it existed down to a period, say two years ago, with an undertaking on the part of this company, to purchase a specified reasonable minimum quantity of your products the first year, and to purchase a gradually increasing amount, say at the rate of at least five per cent. a year, and this company to receive the same treatment at the hands of your company as is accorded to other valuable agents of your company, including the expenditure for advertising of at least the percentage of our purchases, as is expended by your company in support of its other valuable agents.

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This suggestion, which is largely repetition of what was said at the interview between Mr. Fuller, Mr. Parker, and Mr. Cobb, is here repeated and re-made, because this company sincerely desires to resume friendly relations with your company, and to co-operate thoroughly and to the full, in promoting the sale of your products and the general interests of your company, and is prepared in any reasonable way, to satisfy the management of your company on these points. Moreover we respectfully record our opinion and belief as a stockholder of your company to the extent of one hundred twenty shares, that the making of an arrangement with this company substantially as above outlined, would be to the best interests of your company.

20

In view of the shortness of the time remaining before the proposed special meeting of stockholders of your company, we would request for our guidance in the premises, that a reply to this letter be in our hands by, say Tuesday next, the 28th inst.

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Very truly yours,

A. H. COSDEN,
President.

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Affidavit of Alfred H. Cosden.

On the twenty-eighth day of February, 1911, I received a letter of which the following is a copy:

February 27, 1911.

A. H. Cosden, Esq., President,
Wm. B. Riker & Son Company,
109 West 27th Street,
New York City.

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Dear Mr. Cosden:

Your letter of February 24th, addressed to United Drug Company, in reply to its letter of February 21st, was received, and has been referred to me for answer. In it you say that you must have the company's reply by to-morrow, the 28th inst.

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This company regrets that your company is unwilling to accept its offer contained in its letter of the 21st, and, in the absence of such acceptance, there is really nothing definite pending, and the time between this date and the 7th of March, the date set for the special meeting of the stockholders of United Drug Company, is too short to accomplish anything. In order, therefore, that there may be more time for the proper consideration of these matters, the management of United Drug Company will ask for an adjournment of the stockholders' meeting for thirty days from March 7th.

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Your letter of the 24th suggests no definite proposition, and I hope that, pending the adjournment, and as soon as you can do so, you will submit to us some definite offer of what you want.

Yours very truly,

JONES FULLER.

Affidavit of Alfred H. Cosden.

On the tenth day of March, 1911, I replied to said letter by a letter of which the following is a copy:

10 March, 1911.

Jones Fuller, Esq.,

United Drug Company,

Greenleaf and Leon Streets,

Boston.

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Dear Mr. Fuller:

Your letter of the twenty-seventh ultimo was duly received, and I note your statement therein that my letter to your company of the twenty-fourth ultimo contained no definite proposal.

My letter of the twenty-fourth was intended to be sufficiently definite to enable your company to determine whether or not it cared to undertake the restoration of the former relations existing between our companies. Our desire is to resume relations with your company as its agent in New York, Brooklyn and Boston on the same basis as formerly, excepting as to an obligation to take a specific minimum quantity of your goods each year. We are willing to agree to take some reasonable minimum quantity of goods each year, and our willingness to do this is designed to meet any doubt that may exist on the part of your management as to our intention to support your products.

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On the occasion of your recent interview at our office nothing was said by you about this company assuming an obligation of this character, but instead you suggested that your company be conceded the right to advertise your goods in other stores in New York, Brooklyn and Boston, including stores owned by your company. For the reasons set forth in Mr. Seibert's letter of the seventeenth ultimo, your suggestion as to advertising was not acceptable. In fact, we believe that any attempt along the line suggested by you would prove impracticable and that such a plan could

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not possibly succeed, involving as it would the temptation on the part of your company to treat your representation through this company with indifference as compared with your representation through other stores. Granting it to be the intention of your company to be impartial as between our stores in New York, Brooklyn and Boston, and other stores, including your own, in those places, still we do not
10 believe it possible as a practical matter that such an intention could be carried out. The fact is, of course, if the intention is to restore the agency relations formerly existing, that there should be no division of the support given your goods in New York, Brooklyn and Boston, and that all of such support should be given this company as your agent. In this we are not suggesting that any greater kind or degree of support be given us than you are now giving, as a matter of general policy, to your other agents in general.

20 The fundamental point to be determined by your company, therefore, is whether or not you desire to have the Riker Company continue as a Rexall agent. If you do, it should be possible for us to reach an agreement on the minimum to be purchased, and if, on the other hand, your company does not really desire this company to longer represent it, any attempt to agree on a minimum figure must necessarily be effort wasted. As has been already written you, we have
30 no desire to secure exclusive selling rights in New York, Brooklyn and Boston and have no objection to the goods being sold in other drug stores, including stores owned by your company, but we do think that all advertising of United Drug Company products for sale in stores in New York, Brooklyn and Boston should be in our name. In other words, we propose to properly support your goods, and in return expect your company to properly support this company as your agent.

40 The amount of minimum purchases is, of course, the important point about such an arrangement. In

Affidavit of Alfred H. Cosden.

this connection it must be borne in mind that owing to the existing condition of affairs (which was not of our seeking, but was forced on us) the sale of your products here and in Boston has largely lost headway. Some time and effort necessarily must be expended in order to regain the lost momentum, and allowance for such a period should be made in arriving at a figure. We suggest, then, that for the remainder of the present year we take goods from you at the rate of \$30,000 for the year, that in 1912 we take \$40,000 of your goods, in 1913 \$50,000, and that thereafter in each year we take an increase of five per cent. We believe these figures to be fair, and in proposing them for your consideration would add that, regardless of whatever legal obligation is assumed by this company under such an arrangement, it would be our aim to make the sales of your company's goods as large as possible, and if we found with our increased selling facilities that we could double or treble the figures suggested, it would be our pleasure to do so.

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The arrangement proposed is for but ten years, but if the arrangement be made we believe that within that time the fact that the agency is limited as to time would disappear from consideration and that the agency would continue indefinitely, with advantage and profit to your Company.

Very truly yours,

A. H. COSDEN,

President.

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Affidavit of Alfred H. Cosden.

On the eighteenth day of March, 1911, I received a letter of which the following is a copy:

March 17, 1911.

Alfred H. Cosden, Esq., President,
William B. Riker & Son Company,
111 West 27th Street,
New York City.

My dear Mr. Cosden:

Mr. Liggett has returned to his office, and I have taken up with him the matters referred to in your letter of March 10th.

As I understand your proposition, it is that your company shall have the right to sell, in New York, Brooklyn and Boston, the products manufactured and sold by United Drug Company, for a period of ten years, provided your company shall purchase goods at the rate of \$30,000 for the present year, \$40,000 in the year 1912, \$50,000 in the year 1913, and that thereafter in each year you shall increase such purchases 5 per cent. I do not understand whether your proposition contemplates that you shall have the exclusive right to sell these products in the places named, or not; but I do understand from it that whatever advertising is done in those places by this company shall be done in your name; that is, even if this company should, by the terms of any contract which we might enter into, have the right to sell its goods in its own stores in those cities, it could not advertise that fact.

This company is unwilling, for the amount of the purchases named in your letter, to make the arrangement you suggest.

Yours very truly,

JONES FULLER.

Affidavit of Alfred H. Cosden.

On the twenty-second day of March, 1911, I replied to said letter by a letter of which the following is a copy:

22 March, 1911.

Jones Fuller, Esq.,
United Drug Company,
Greenleaf and Leon streets,
Boston.

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Dear Mr. Fuller:

Your letter of the seventeenth instant was duly received. In it you decline the proposition made in my letter of the tenth. As you make no other suggestion, I must assume that the correspondence is closed. So assuming, I desire to direct your attention to one or two points.

First. In your letter of the seventeenth you say: "I do not understand whether your proposition con-
"templates that you shall have the exclusive right to
"sell these products in the places named, or not."
This surely must have been written under a misapprehension, for I do not think that you intentionally ignored the following words in my letter of the tenth, to which yours was a reply: "As has been already
"written you, we have no desire to secure exclusive
"selling rights in New York, Brooklyn and Boston
"and have no objection to the goods being sold in
"other drug stores, including stores owned by your
"company."

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Second. In my letter to your company of the twenty-fourth ultimo, referring to the proposition discussed by Mr. Parker, Mr. Cobb and yourself (being substantially the proposition embodied in my letter of the tenth instant), I wrote as follows: "This suggestion, which is largely repetition of what was said
"between Mr. Fuller, Mr. Parker and Mr. Cobb, is
"here repeated and re-made because this company sincerely desires to resume friendly relations with your

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Affidavit of Alfred H. Cosden.

10 "company and to co-operate thoroughly and to the
 "full in promoting the sale of your products and the
 "general interests of your company, and is prepared
 "in any reasonable way to satisfy the management of
 "your company on these points." No question has
 been raised by your company as to this statement
 representing the actual attitude of this company, and
 no action has been taken in response to our offer to
 satisfy the management of your company on the sub-
 ject.

20 In my letter of the tenth instant, I wrote as follows:
 "We are willing to agree to take some reasonable mini-
 "mum quantity of goods each year, and our willing-
 "ness to do this is designed to meet any doubt that
 "may exist on the part of your management as to our
 "intention to support your products. * * * The fun-
 "damental point to be determined by your company,
 "therefore, is whether or not you desire to have the
 "Riker Company continue as a Rexall agent. If you
 "do, it should be possible for us to reach an agree-
 "ment on the minimum to be purchased, and if, on
 "the other hand, your company does not really desire
 "this company to longer represent it, any attempt to
 "agree on a minimum figure must necessarily be ef-
 "fort wasted." No comment on these words is made
 in any letter received by us from your company, and
 our specific proposition to take a definite minimum
 30 quantity of your goods each year is declined without
 comment.

40 In my letter of the tenth instant I also wrote: "As
 "has been already written you, we have no desire to
 "secure exclusive selling rights in New York, Brook-
 "lyn and Boston and have no objection to the goods
 "being sold in other drug stores, including stores
 "owned by your company, but we do think, that all
 "advertising of United Drug Company products for
 "sale in stores in New York, Brooklyn and Boston,
 "should be in our name. In other words, we propose

Affidavit of Alfred H. Cosden.

"to properly support your goods, and in return expect your company to properly support this company as your agent."

In the same letter I also wrote: "The fact is, of course, if the intention is to restore the agency relations formerly existing, that there should be no division of the support given your goods in New York, Brooklyn and Boston, and that all of such support should be given this company as your agent. In this we are not suggesting that any greater kind or degree of support be given us than you are now giving, as a matter of general policy, to your other agents in general."

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In the same letter, in making the definite proposition for the purchase of a minimum quantity of your goods each year, which you have just declined, I wrote: "We believe these figures to be fair, and in proposing them for your consideration would add that, regardless of whatever legal obligation is assumed by this company under such an agreement, it would be our aim to make the sale of your company's goods as large as possible, and if we found with our increased selling facilities that we could double or treble the figures suggested, it would be our pleasure to do so."

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I do not think it too much to say, that throughout our correspondence we have emphasized the idea which we understand to be fundamental in your company and fundamental in the relations between your company and its selling agents—that of co-operation. In my letter of the twenty-fourth ult., referring to our agency I wrote that we "desire to continue it and desire to make it profitable and advantageous alike to both companies." In my letter of the tenth instant, I registered my belief in the essential fairness of the proposition made in that letter in the following words: "The arrangement proposed is for but ten years, but if the arrangement be made we believe that within that time the fact that the agency is limited as to

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Affidavit of Alfred H. Cosden.

“time would disappear from consideration and that
 “the agency would continue indefinitely, with advan-
 “tage and profit to your company.” The same idea
 was elaborated and emphasized by Mr. Cobb at his
 interview with Mr. Liggett on the day of the date of
 your last letter, the seventeenth instant. At the same
 interview Mr. Cobb suggested that a conference be
 10 held between representatives of our respective com-
 panies, as the most likely means to lead to an ad-
 justment and agreement.

I have taken the trouble to write you at this length,
 mostly by way of repetition, in order that there may
 remain no possibility of the management of your com-
 pany misunderstanding the attitude of this company,
 and if, as I assume, our correspondence is closed, it is
 with sincere regret on our part.

Very truly yours,

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A. H. COSDEN,
President.

To-day I received a letter of which the following is
 a copy :

April 6, 1911.

Wm. B. Riker & Son Co.,
 No. 111 West 27th Street,
 New York City.

30 Gentlemen :

On February 21st, I wrote your company a letter
 replying to your letter of February 6th, in which I
 made an offer in behalf of United Drug Company, of
 Massachusetts, that it should become the party de-
 fendant to the suit in equity now pending in the Court
 of Chancery of New Jersey, between your company
 and others and United Drug Company, or if this could
 not be done that the Massachusetts Company would
 enter into an agreement to abide and be bound by any
 40 decree which might be rendered against United Drug

Affidavit of Alfred H. Cosden.

Company of New Jersey, the defendant in that suit. This offer was made in order that your company might exchange the stock now held by it for stock of the new Massachusetts Company, as provided in the plan known as the plan of reorganization, without prejudice to any rights asserted by you in the suit above referred to. You declined to accept this offer. I write now to expressly withdraw the offer because of your non-acceptance of it.

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Yours very truly,

LOUIS K. LIGGETT,

President.

Recently it was announced in the newspapers in the City of New York that the defendant had taken a long lease of certain store premises at the southeast corner of Broadway and Thirty-fourth street in the Borough of Manhattan in said City of New York and intended to establish on said premises a retail drug store. At the interview above referred to the counsel for the defendant intimated that the defendant contemplated the establishment in the City of New York of a number of retail drug stores, and I believe that such is the intention of the defendant and that the defendant seeks to avoid its obligations under its said by-law to the complainant in order to prevent the complainant having the products of the defendant on sale and in order to prevent and forestall competition on the part of the complainant with the stores of the defendant having the defendant's products on sale.

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ALFRED H. COSDEN.

Subscribed and sworn to before me,
a Notary Public in and for the
County and State of New York,
this 7th day of April, 1911.

FREDERICK TRUBE,
(SEAL) *Notary Public,*
N. Y. County, N. Y.

Term expires, March, 1912.

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Affidavit of Edward D. Cahoon.

Affidavit.

IN CHANCERY OF NEW JERSEY.

10 *Between*

WM. B. RIKER & SON COMPANY,
Complainant,

and

UNITED DRUG COMPANY,
Defendant.

On Bill, &c.

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STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.

EDWARD D. CAHOON, being duly sworn, deposes
and says:

30 I reside at Southold, County of Suffolk and State
of New York, and am the treasurer of Wm. B. Riker
& Son Company, a corporation organized under the
laws of the State of New York, the complainant in
the above-entitled cause, and have been treasurer of
said corporation ever since or about the month of
January, 1899. I was the general manager of said
corporation from 1892 to 1903. Said corporation
was organized in the year 1892 and ever since has
been engaged in the retail drug business in the old
City of New York and in the Borough of Manhattan
in the present City of New York, and the predecessors
of the said corporation in said business were engaged
therein in the said City of New York from the year
40 1846 down to the organization of the complainant in

Affidavit of Edward D. Cahoon.

1892. The complainant is, by certificate issued by the Secretary of State of the State of New Jersey, duly authorized to transact business in said State of New Jersey.

The United Drug Company, the defendant in the above-entitled cause, was organized as a corporation under the laws of the State of New Jersey in the month of November, 1902. I was one of the incorporators of the corporation and was thoroughly familiar with all the details pertaining thereto. At the first meeting of said incorporators I was elected a director of said corporation and continued as a director thereof continuously down to the month of October, 1907. At the first meeting of the board of directors of said corporation I was elected president of said corporation and continued as president thereof down to the month of October, 1904. Said corporation was projected as a co-operative manufacturing concern, with the object of enabling the retail druggists who should become members of the concern by purchase of its stock to make greater and additional profits on the drugs handled and sold by them. To this end it was fundamentally designed on the organization of said co-operative concern that none of the products of the said concern should be sold to other than its own stockholders and that not more than one stockholder of said concern should be located in any one city or town. A further and fundamental feature of said co-operative concern was that all the stockholders should be furnished the products of said concern at uniform prices and on uniform terms.

The complainant always supported the defendant in its policies and assisted in the exploitation of its products, and in the beginning of the career of the defendant rendered valuable services to it. Prior to the organization of the defendant I attended a great many meetings of those interested in the proposed corporation, probably fifteen or twenty in number,

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Affidavit of Edward D. Cahoon.

one of said meetings being held in Chicago and the remainder in the said City of New York, and the complainant incurred considerable expense for traveling and entertainment in connection with said meetings. When the defendant was preparing to manufacture, the complainant gave to it many formulae for recognized remedies having a large sale. When
 10 the defendant was ready to sell goods, the complainant ordered freely and laid in and kept up a large stock of its goods and in a number of instances paid for the goods in advance of their delivery in order to assist the defendant financially. When the defendant commenced manufacturing, it was in a building in the City of Boston leased by the defendant from a corporation having its headquarters in the City of New York, and at the time negotiations for such
 20 lease were in progress said corporation applied to the complainant for information as to the standing and credit of the defendant, and finally made the lease largely in reliance upon the fact that the complainant was interested in the defendant and that I was the president of the defendant. Thereafter the officers of the complainant many times were applied to for information as to the credit and financial responsibility of the defendant, and many houses in the drug trade specifically stated that they would sell goods to the defendant on credit only because of the
 30 interest of the complainant in the defendant and of my connection with the defendant as director and president.

At or about the time of the organization of the defendant the complainant subscribed for forty shares of the common capital stock of the defendant and paid for the same in cash, and ever since the organization of the defendant the complainant has been the agent in the Borough of Manhattan in the said City of New York for the sale of the articles manufactured
 40 and sold by the defendant.

Affidavit of Edward D. Cahoon.

To my personal knowledge the defendant is conducting a large and constantly increasing business, is abundantly solvent and prosperous, and is paying dividends on all its capital stock.

EDWARD D. CAHOON.

Subscribed and sworn to before me,
a Notary Public in and for the
County and State of New York,
this 7th day of April, 1911.

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FREDERICK TRUBE,
(SEAL) *Notary Public,*
N. Y. County, N. Y.

Term expires, March, 1912.

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Affidavit of Albert E. Seibert.

Affidavit.

IN CHANCERY OF NEW JERSEY.

Between

10 Wm. B. RIKER & SON COMPANY,
Complainant,

and

UNITED DRUG COMPANY,
Defendant.

On Bill, &c.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

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ALBERT E. SEIBERT, being duly sworn, deposes and says:

I reside in the city and State of New York and am an attorney and counsellor-at-law, and on the seventeenth day of February, 1911, as counsel for Wm. B. Riker & Son Company, the complainant in the above entitled cause, attended a conference at the office of said complainant between Mr. Jones Fuller, counsel for the United Drug Company, the defend-
30 ant in the above entitled cause, and Messrs. Alfred H. Cosden, Edward B. Cahoon and John B. Cobb, directors of the complainant. Thereafter on the same day I sent to Mr. Fuller a letter of which the following is a copy:

17 February, 1911.

Dear Mr. Fuller:

Referring to our conference at Mr. Cosden's office this morning, I wish to refer to a point which received
40 some attention but was left in a rather indefinite

Affidavit of Albert E. Seibert.

condition—the suggestion that in the event of the United Drug Company opening retail drug stores in New York it should be at liberty to do Rexall advertising for the benefit of such stores.

It was agreed this morning that the one thing essential to make any agreement such as that proposed effectual and successful is an honest desire on both sides to make the arrangement a workable one. As explained by Mr. Cosden, the Riker Company regards as essential the continuing of its Rexall agency on the same basis as the other agencies of the United Drug Company, excepting as to the exclusive selling feature. I suggested to you that by the establishment of retail stores here the United Drug Company would be placing difficulties in its own way in carrying out the spirit of such an agreement as that discussed by us. Upon reflection, this appears to both Mr. Cosden and myself to be true, and it also seems to us that the United Drug Company could not spend money here for advertising Rexall goods, devoting part of such advertising to stores other than the Riker stores, and still maintain the position of the Riker Company as a Rexall agent on an equality with other agents. The Riker Company has no objection whatever to the establishment by the United Drug Company of retail stores here nor to the sale of Rexall goods by its own and other retail stores, but it does think that whatever advertising is done here by the United Drug Company should refer to the Riker Company as the Rexall agent. The present greatly enlarged distributing facilities of the Riker Company can only be of maximum value to the United Drug Company if supported in the manner in which other Rexall agents are supported, and if other stores were to be advertised by the United Drug Company as carrying Rexall goods the kind of loyalty and support due a Rexall agent by the manufacturer of the Rexall goods would be rendered, from a practical standpoint, impossible.

Affidavit of Albert E. Seibert.

Upon reflection, I believe that the force of these considerations will be clear to you. The Riker Company regards them as of controlling importance in considering the arrangement discussed to-day.

Sincerely yours,

ALBERT E. SEIBERT.

10 Jones Fuller, Esq.,
Leon and Greenleaf Streets,
Boston.

20 On the seventh day of March, 1911, as proxy of the complainant I attended a special meeting of the stockholders of the defendant held at No. 15 Exchange place, Jersey City, New Jersey. Mr. Louis K. Liggett, the president of the defendant, was elected chairman of the meeting and he stated in my presence that twelve thousand, nine hundred and seven (12,907) shares of the defendant's capital stock were at that time issued and outstanding. No vote was taken at said meeting excepting on a motion to adjourn, and said meeting was adjourned to the eleventh day of April, 1911, at twelve o'clock, at the same place.

30 On the fifth day of April, 1911, and prior thereto I caused inquiry to be made of the Secretary of State of the State of New Jersey and was informed that the only certificates amending the certificate of incorporation of the United Drug Company filed in the office of said Secretary of State were filed in said office on the following dates, that is to say:

June thirteenth, 1904,
May thirty-first, 1906,
November twenty-seventh, 1906, and
October sixteenth, 1907.

ALBERT E. SEIBERT.

Schedule A.

Subscribed and sworn to before me,
a Notary Public in and for the
County and State of New York,
this 7th day of April, 1911.

FREDERICK TRUBE,

(SEAL)

Notary Public,

N. Y. County, N. Y.

Term expires, March, 1912.

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SCHEDULE A.

The following is an explanatory letter written and signed by every director of the United Drug Company of New Jersey:

To the Stockholders of the United Drug Company:

Your directors have had under consideration, for some time, the desirability of a reorganization of the affairs of the United Drug Company. They have had in mind, among other things, the accomplishment of the following results:

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First. Owing to the remarkable increase in the business of the company, it is necessary to provide not only for additional capital to meet its immediate requirements, but also to put the company on such a basis so that it can obtain, from time to time, in the future, such additional capital as may be needed.

Second. The present preferred stock of the company is nearly all held by retail druggists to whose co-operation the success of the company is largely due. The preferred stockholders are limited to a fixed rate of dividend, and they should be allowed to exchange their preferred stock for common stock so as to participate in the future success of the company.

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Third. A substantial part of the business of the company is now conducted by the United Laboratories Company, the United Perfume Company, the

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Schedule A.

United Candy Company and the United Stationery Company, all subsidiary corporations of the parent company. It is proposed to eliminate these subsidiary companies, to place the ownership of all these in one corporation, and obtain greater simplicity in accounting, and to some extent eliminate an unnecessary duplication of expense.

- 10 With the approval of your directors, therefore, the following plan for the reorganization of the affairs of the United Drug Company has been proposed:

Your directors have authorized the organization of a corporation under the laws of Massachusetts by the name of United Drug Company.

- 20 The authorized capital of this corporation is \$5,000,000 par value, of which \$2,500,000 consists of preferred stock, the shares being of the par value of \$50 each, and \$2,500,000 common stock, the shares being of the par value of \$100 each. The preferred
- 30 stock is entitled to cumulative dividends at the rate of seven per cent. (7%) per annum, and no more, and is preferred as to principal in case of liquidation. It will be subject to redemption in whole or in part at any time after January 1, 1914, at the option of the company, at \$60 per share and accrued and unpaid dividends. The common stock will be entitled to all earnings after the payment of a fixed dividend on the preferred stock, and will be entitled in case of liquidation to all assets after payment of the liabilities of the company and the par value of the
- 40 preferred stock. The common stock will contain restrictions on its transfer, which will prevent its sale without first being offered to the corporation. This is done so as to prevent the control of the corporation passing from the retail druggists. The common stockholders will alone have the right to participate in any increase of the common stock.

- 40 The right to vote at all meetings of the company has been reserved to the common stock alone, except on default in the payment of four quarterly dividends

Schedule A.

on the preferred stock, in which case the holders of preferred stock, shall enjoy all the voting privileges which attach to the common stock, until all dividends in arrears are paid and four consecutive quarterly dividends thereafter are paid; any increase of the preferred stock of the corporation must be authorized by the affirmative vote of at least two-thirds of the preferred stock then outstanding and may be sold in the discretion of the directors without first being offered to the stockholders. 10

The United Drug Company (of Massachussets) has offered to purchase all the property and assets of the United Drug Company (of New Jersey) subject to all its indebtedness, and to pay therefor as follows:

(a) It will issue and deliver to each holder of preferred stock in the New Jersey Company one (1) share of its common stock for one (1) share of the preferred stock in the New Jersey Company, provided the holder of preferred stock in the New Jersey Company will subscribe for in cash at par an amount of the preferred stock in the Massachusetts Company equal to one-half of the par value of his holdings in the New Jersey Company; or it will exchange two (2) shares of its preferred stock of the par value of \$50 each for one share of preferred stock of the par value of \$100 each in the New Jersey Company. 20

(b) The Massachusetts Company will issue and deliver to the holders of common stock in the New Jersey Company two (2) shares of the common stock of the Massachusetts Company of the par value of \$100 each, in exchange for one (1) share of the common stock of the New Jersey Company of the par value of \$100 each. 30

The Massachusetts Company agrees that prior to the acceptance of this offer the unissued common stock of the New Jersey Company may be offered to 40

Schedule A.

its common stockholders for subscription in cash at par, and pending corporate action by the New Jersey Company it will upon presentation exchange its own stock for stock of the New Jersey Company on the foregoing basis.

In order to carry the plan into effect, the co-operation of all the stockholders is desirable, and the plan has, therefore, been discussed with several representative stockholders, including Mr. John B. Cobb, who, as you are aware, commenced a suit in the Massachusetts courts some time ago to set aside the transfer to Mr. Liggett of the stocks of certain retail companies. Mr. Cobb was of opinion that if the reorganization was to be effected it should include all matters in controversy, and suggested that in connection with the reorganization Mr. Liggett ought to transfer to the Massachusetts company the entire common stock of the L. K. Liggett Company, amounting to \$1,000,000, and the stock in the Williamson & Watts Company, upon being reimbursed for all his expenditures and receiving \$100,000 par value of the common stock of the new Massachusetts company, in payment therefor. In order to bring about the proposed reorganization Mr. Liggett has assented to this suggestion.

In view of the recent changes in the character of the retail drug business and the probable ability of the new Massachusetts company to finance the retail business if necessary, your directors are of opinion that it is wise to adopt Mr. Cobb's suggestion.

It is therefore proposed that Mr. Liggett shall transfer to the new Massachusetts company the entire common stock of the L. K. Liggett Company amounting at par to \$1,000,000, and six hundred and sixty-five shares of the par value of \$66,500 of the capital stock of the Williamson & Watts Company, and that he shall also formally authorize the new Massachusetts company to use the name "Liggett" in connection with its business; that the new Massachusetts company shall reimburse Mr. Liggett for all advances made by him to the L. K. Liggett Company,

Schedule A.

and for the actual cost of the stock of the Williamson & Watts Company and of the stock of the retail companies which have been transferred to the L. K. Liggett Company over and above the amount received by him from the sale of the notes of the L. K. Liggett Company; that the new Massachusetts company shall hold Mr. Liggett harmless from all liability in respect of the outstanding notes of the L. K. Liggett Company, and shall issue to him \$100,000 par value of the fully paid common stock of the Massachusetts company.

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It is proposed that as part of the same transaction the new Massachusetts company shall assume and pay the expenses of the litigation instituted by Mr. Cobb, and that all questions raised by Mr. Cobb as to the validity of the issue and exchange of stock of the New Jersey company shall be waived.

It is further proposed that \$100,000 of the common stock of the new Massachusetts company shall be set aside to be sold in the direction of the directors from time to time for cash, at par to such of the employees of the new company as they may select, in order that they may have a financial interest in the prosperity of the company.

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If the above plan is carried out, the original issue of the capital of the Massachusetts company, provided the preferred stockholders of the present New Jersey company elect to exchange their preferred stock for common stock, will be substantially as follows:

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Preferred stock—authorized	\$2,500,000	
Issued in exchange for cash subscriptions by the preferred stockholders of the New Jersey company.....	275,000	
Common stock—authorized	\$2,500,000	
To be issued in exchange for the common and preferred stock of the New Jersey company	2,050,000	40

Schedule A.

To be issued for the acquisition of the
stock of the L. K. Liggett Company, etc. 100,000

To be set aside for sale to employees. 100,000

This will leave \$250,000 of common stock unissued,
and will leave \$2,225,000 par value of the preferred
stock, which may be used, from time to time, for the
requirements of the company.

- 10 Your directors unanimously recommend the ac-
ceptance of the proposed plan of reorganization, and
pending action by the New Jersey company recom-
mend an immediate exchange of the stock of the New
Jersey company for stock of the Massachusetts com-
pany, in accordance with the terms of the offer.

- 20 If for any reason it should become either necessary
or desirable to delay the dissolution of the New Jer-
sey corporation and the transfer of its assets, or even
to continue its corporate existence, the practical ac-
complishment of the plan would not be affected, as
the Massachusetts corporation would by the exchange
become the controlling stockholder of the New Jersey
corporation.

This seventeenth day of January, nineteen hundred
and eleven.

(Signed) W. C. BOLTON,

" J. C. BRADY,

" FRED S. ROGERS,

" WALTER A. MAY,

" THOMAS VOEGELI,

30 " T. P. TAYLOR,

" E. R. PETTY,

" BYRON M. HYDE,

" LOUIS K. LIGGETT,

" JAMES C. McCORMICK,

" LOUIS I. SCHREINER,

" E. L. SCHOLTZ,

" W. M. FEDERMANN,

" T. H. BRANNEN,

" G. W. BENGE,

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All of your Directors.

Schedule B.

SCHEDULE B.

To the Stockholders of United Drug Company:

You are hereby notified that at a meeting of the Board of Directors of the company called for that purpose and held on the 17th day of January, A. D., 1911, said Board by a majority of the whole Board did adopt the following resolution, to wit: 10

Resolved, that in the judgment of this Board, it is advisable and most for the benefit of the United Drug Company that the same should be forthwith dissolved.

In accordance with the vote of the Directors to that effect, and by order of the President, you are hereby notified that a special meeting of the Stockholders of the Company will be held on Tuesday, the seventh day of March, A. D., 1911, at twelve o'clock, noon, at the office of the Company in the City of Jersey City and State of New Jersey, for the following purposes: 20

First. To take such action as the Stockholders may deem desirable upon the aforesaid resolution of the Board of Directors relative to the dissolution of the Company.

Second. To take such action as the Stockholders may deem advisable with reference to authorizing the sale of all the property and assets of the Company, and in case such sale is authorized to fix the terms and conditions thereof. 30

CHARLES E. MURNAN,
Secretary.

It is desired that the Preferred Stockholders as well as the Common Stockholders shall vote upon the question of the dissolution of the Company, and the Preferred Stockholders as well as the Common Stockholders who are unable to be present at the meeting 40

Schedule B.

are requested to sign and return their proxies, which will, unless other instructions are given, be voted in favor of the dissolution of the Company and of a sale of its property and assets, to carry out the plan of reorganization described in the circular letter of the Directors enclosed herewith.

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SCHEDULE C.

IN CHANCERY OF NEW JERSEY.

*Between*WM. B. RIKER & SON COMPANY,
*et al,**Complainant,**and*

UNITED DRUG COMPANY,

*Defendant.**On Bill, &c.*

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ORDER TO SHOW CAUSE.

This matter being opened to the court by Albert E. Seibert, of New York, and Robert H. McCarter, of counsel for the complainants, and the court having filed the bill of complaint and affidavits thereto attached; 20

It is thereupon, on this thirtieth day of December, nineteen hundred and nine, ordered, that the defendant, United Drug Company, show cause before the court, at the Chancery Chambers, in the City of Newark, on Tuesday, the eleventh day of January, nineteen hundred and ten, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue against it, as prayed for in the bill of complaint. 30

And it is further, ordered, that meantime, and until otherwise directed, said United Drug Company, its officers, employes, attorneys and agents, do refrain and desist from selling, giving or furnishing, at wholesale, retail or otherwise, any article manufactured and sold by it, to any individual, firm or corporation, or joint stock association or company, in the Borough of Manhattan in the City and State of New York, in the 40

Schedule C.

Borough of Brooklyn in the City and State of New York, or in the City of Boston in the Commonwealth of Massachusetts, so long as and while the defendant shall fail to sell such goods to the complainants herein, for their sale and disposition in the said Boroughs of Brooklyn and Manhattan, and said City of Boston, for prices and on terms and conditions uniform with the prices, terms and conditions made to the other stockholders of the defendant.

And it is further, ordered, that a true copy (which need not be certified), of said bill and affidavits, and of this order, be served within two days from the date hereof, upon the defendant by leaving the same with its registered agent in the State of New Jersey.

MAHLON PITNEY,

C.

Respectfully advised,

JAMES E. HOWELL,

V. C.

Answer.

Answer to 2nd Suit.

Filed Apr. 18th, 1911.

IN CHANCERY OF NEW JERSEY.

Between

THE WILLIAM B. RIKER & SON
COMPANY,

Complainant,

and

THE UNITED DRUG COMPANY,

Defendant.

On Bill, &c.

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ANSWER.

The answer of the United Drug Company, defendant to the bill of complaint filed by the complainant, The William B. Riker & Son Company, in the above-entitled cause.

1. This defendant admits that the complainant is a corporation organized and existing under the laws of the State of New York and engaged in the retail drug business in the said State of New York and elsewhere, as alleged in paragraph 1 of the said bill of complaint.

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2. This defendant admits that this defendant is a corporation organized and existing under the laws of the State of New Jersey, as alleged in paragraph 2 of the said bill of complaint.

3. This defendant admits that the said complainant has been the owner and holder of forty shares (40)

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Answer.

of the common capital stock of this defendant, as alleged in paragraph 3 of said bill of complaint.

10 4. This defendant believes it to be true that in the month of January, nineteen hundred and eleven, said complainant received a paper, of which a copy is annexed to the bill of complaint, marked Schedule A, being a letter from the directors of this defendant to the stockholders of this defendant, as alleged in paragraph 4 of the said bill of complaint, and for the contents of said Schedule A, makes reference thereto; this defendant admits that the said letter was signed by all of the directors of this defendant.

20 5. This defendant believes said complainant also received a notice, a copy of which is annexed to said bill of complaint, marked Schedule B, the same being notice to the stockholders of this defendant of the special meeting of said stockholders, to be held on the seventh day of March, nineteen hundred and eleven, at twelve o'clock, at the office of this defendant, in the City of Jersey City, and for the contents of said notice, this defendant makes reference to said copy.

30 6. That defendant admits that on said seventh day of March, nineteen hundred and eleven, the stockholders of this defendant met pursuant to said notice and adjourned to the eleventh day of April, nineteen hundred and eleven, at the same hour and place, without taking any action; and this defendant shows that since the filing of the bill of complaint herein, said stockholders met pursuant to said adjournment, and further adjourned the said meeting of stockholders to the twenty-first day of April, nineteen hundred and eleven, at the same hour and place, without taking any other action.

40 7. This defendant admits that its certificate of incorporation has been several times amended and that the period of existence of this defendant is by

Answer.

its certificate of incorporation unlimited, and that said certificate of incorporation as amended contains no express provision giving this defendant power to sell or dispose of all its property and assets and for the contents of said certificate refers to copy annexed to this answer.

8. This defendant admits that on the thirtieth day of December, nineteen hundred and nine, there was a by-law of this defendant as set forth in paragraph 8 of said bill of complaint, but this defendant says that it has been advised that said by-law was illegal and of no binding force or effect on either this defendant or the stockholders of this defendant; and this defendant shows that said by-law was repealed on the fourth day of October, 1910, and is no longer in effect, as appears from copy of by-laws annexed to this answer. 10

This defendant denies that the said complainant and the Jaynes Drug Company, a Massachusetts corporation, were on said thirtieth day of December, nineteen hundred and nine, the owners of one hundred and twenty (120) shares of the common capital stock of this defendant and denies that said stock had been subscribed and paid for in reliance upon said by-law; this defendant denies that it is a co-operative manufacturing concern, selling its goods only to its own stockholders, of whom there is but one engaged in the retail drug business in a city or town; this defendant states that its stockholders are largely retail druggists located in cities and towns of considerable size in the United States, and that usually there is but one of said stockholders engaged in the retail business in any city or town. 20 30

This defendant admits that for a time after the incorporation of this defendant, said complainant supported this defendant in its policies and helped in the common exploitation and sale of its products. 40

Answer.

This defendant admits that differences arose between said complainant and the defendant and that litigation resulted, as generally described in the latter part of the eighth paragraph of the bill of complaint, but this defendant does not admit that said differences and litigation are therein correctly described, and prays that reference may be had to the record of the cause in this court therein referred to.

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This defendant admits that said cause is still undetermined and that a restraining order is in effect therein, a copy of which is marked Schedule C and attached to said bill of complaint.

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9. This defendant admits that it has capital stock outstanding in excess of one million two hundred thousand dollars (\$1,200,000) par value, as alleged in paragraph 9 of said bill of complaint, and shows that the exact number of shares now outstanding comprise five thousand five hundred and twenty-seven (5,527) shares of preferred stock of the par value of one hundred dollars (\$100) each, and seventy-five hundred (7500) shares of common stock of the par value of one hundred dollars (\$100) each, or a total par value of one million three hundred and two thousand seven hundred dollars (\$1,302,700).

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Defendant admits that its business has been large and increasing, that this defendant is abundantly solvent and has been paying dividends on its capital stock; this defendant denies that the action proposed by the directors of this defendant is in disregard of the rights of the complainant as a stockholder of the defendant, and denies that the said complainant has any right to have the business of the defendant continued if the statutory majority of the stockholders of the defendant wish to discontinue the same.

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This defendant denies that the action proposed by the directors of this defendant was designed to deprive the complainant of any lawful right or to

Answer.

avoid by indirection the obligations of this defendant to the said complainant under said by-law or otherwise.

This defendant admits and believes it to be true that if the dissolution of this defendant had been brought before the stockholders' meeting, the complainant would have voted against such dissolution.

10. This defendant further answering says that the manufacturing business of this defendant has been conducted through subsidiary companies, of which this defendant company owns all or controlling interest of the capital stock; that the only business directly transacted by this defendant has been the selling of products manufactured by such subsidiary companies; that this defendant owns certain real estate in the City of Boston which has been leased to some of said subsidiary companies, and except as to the ownership of said real estate and the conduct of the selling business aforesaid, this defendant is a holding company. 10 20

This defendant shows that the proposed reorganization referred to in schedule A attached to said bill of complaint was not, as alleged in the said bill of complaint, designed for the purpose of evading any obligation of the defendant to the said complainant, but was made necessary by conditions existing with reference to this defendant and its business entirely divorced of all reference to the said complainant or the controversy pending between said complainant and this defendant in the suit in chancery in said bill of complaint referred to; that it was imperatively necessary to take care of the increasing business to provide for additional capital to meet the manufacturing requirements of the subsidiary companies, and also to put the credit of the business on such a basis as to enable it to meet temporary financial demands from time to time arising in the course of its business; that as appears from the circular referred to in said 30 40

Answer.

bill of complaint and attached thereto as Exhibit A, that a substantial part of the business of the defendant was conducted by the United Laboratories Company, the United Perfume Company, the United Candy Company, and the United Stationery Company, subsidiary corporations of the parent company, each engaged in the manufacturing business and having outstanding obligations of their own, but largely dependent on this defendant for financial support. That the present plan is to eliminate all of said subsidiary companies and consolidate them into one company to the evident advantage of the financial and business interests of all concerned; said plan is also intended to increase the working capital, to facilitate the financing and equalize the rights of the preferred and common stockholders of this defendant; that the plan also included a settlement of litigation in the Massachusetts courts referred to in said circular in Schedule A attached to said bill of complaint, which was seriously affecting the business and credit of this defendant and making difficult the proper financing of the growth of the business of this defendant and its subsidiary companies. That the possible effect of such reorganization on the litigation between the complainant and this defendant in the Court of Chancery of New Jersey in the bill of complaint referred to is merely incidental, and the said plan was in no sense devised with any thought to get rid thereof; that as appears by the affidavit of Alfred H. Cosden, president of the complaint, annexed to the bill of complaint, and the correspondence between said complainant and this defendant therein referred to, this defendant was quite willing when the opposition of the complainant was made known to this defendant, to arrange that any rights that the said complainant might establish in said litigation should be preserved and continued as against the United Drug Company organized under the laws of Massachusetts, which,

Answer.

under the said plan, would ultimately acquire the assets of this defendant; that the refusal of the said complainant to accede to that suggestion, is indicative, as this defendant charges, of the design on the part of the complainant not to consider said plan in the light of the prosperity of this defendant and its subsidiary companies, but from the standpoint of a selfish desire to prevent the extension and expansion of said businesses; that as also appears by the affidavit of said Cosden annexed to said bill of complaint, the said complainant in the correspondence and negotiations therein referred to, has declared itself not content with the preservation of the condition secured by the restraining order made by this court in the chancery cause in the bill of complaint referred to, that this defendant should refrain and desist from selling or furnishing at wholesale, retail or otherwise, any article manufactured and sold by it to any individual, firm or corporation or joint stock association or company, in the borough of Manhattan, in the city and state of New York, in the borough of Brooklyn, in the city and state of New York, or in the city of Boston, in the Commonwealth of Massachusetts, so long or while the defendant should fail to sell such goods to the complainant, for sale and disposition in said boroughs of Brooklyn and Manhattan and said city of Boston, for prices and on terms and conditions uniform with the prices, terms and conditions made to other stockholders of this defendant, and while it pretended to be willing that this defendant, or the said Massachusetts corporation of the same name, might open stores in the places named for the retail drug business, without objection on the complainant's part, all advertising done by this defendant or by the said Massachusetts corporation of the same name, must be done exclusively for the benefit of the said complainant; that the said complainant never has claimed for itself, under said by-law

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Answer.

or otherwise in the bill of complaint heretofore filed by it in the litigation in this court referred to in its bill in the present case, as it has latterly asserted; that any contract right that the said complainant has against this defendant, whether under said by-law or otherwise, will remain as the basis of a claim against this defendant's estate in the event of this defendant's dissolution, which the trustees in liquidation of this defendant will be bound to answer, if capable of establishment against such estate; that the estate of this defendant in the event of its dissolution would be ample to answer any claim that might be established either at law or in this court; that in no case can any right of the said complaint prevent the stockholders of this defendant from accomplishing the dissolution of this defendant in accordance with the laws of the state of New Jersey in such case made and provided.

11. That this defendant at the present time has five thousand five hundred and twenty-seven (5,527) shares of preferred stock, of which all but four hundred and twenty-three (423) shares have assented to the said plan and turned in their stock in accordance therewith, with proxy copy of which is annexed to this answer and transfer; that this defendant has outstanding seven thousand five hundred (7,500) shares of common stock, of which every share, except the one hundred and twenty (120) shares referred to in the complainant's bill of complaint as controlled by it, has assented to said plan; with proxy as aforesaid and transfer that the only shares of common stock withholding assent from said plan are the one hundred and twenty (120) shares owned or controlled by the said complainant and that no preferred share has actually appeared in opposition, although four hundred and twenty-three (423) shares have not been heard from; that the number of stockholders of this defendant was more than four thousand, and

Answer.

the United Drug Company (Massachusetts corporation) is now the record owner on the books of the defendant of 5,104 shares of the preferred stock and 7,273 shares of the common stock.

12. This defendant further answering shows that what is termed the consolidated trial balance sheet of this defendant as of the first of April, nineteen hundred and eleven, shows if the capital stock of the subsidiary companies be taken at the book value of those assets instead of par value, net assets after the payment of all liabilities except capital stock of about two million and fifty-eight thousand dollars (\$2,058,000), deducting the five hundred and fifty-two thousand seven hundred dollars (\$552,700) representing the par of the preferred stock, there remains about one million, five hundred and six thousand, five hundred dollars (\$1,506,500), or almost exactly two hundred dollars (\$200) for each of the seventy-five hundred (7500) shares of common stock; that from this it appears that the shares of common stock held or controlled by the complainant of the par value of twelve thousand dollars (\$12,000) are worth in reality, giving all assets full book value, about twenty-four thousand dollars (\$24,000); that if this defendant should be liquidated and all its assets brought full worth, the money value of the stock of the complainant in this defendant would be twenty-four thousand dollars (\$24,000).

That this defendant has made no transfer of all its said assets to the said Massachusetts company of the same name, and if the resolutions for the dissolution of this defendant should be passed by the stockholders' meeting called for that purpose, no such transfer or sale could be made without proper provision for the payment in cash of the complainant for its proportion of the assets of this defendant; that the dissolution of this corporation, if the resolution should be passed by the stockholders by the requisite statu-

Answer.

10 tory majority could not be accomplished until after the proper publication of a certificate of dissolution and the filing of proof of such publication in the office of the Secretary of State; that when such dissolution was finally accomplished by the statutory method, the assets would, by force of the law, be liquidated by the directors as trustees in dissolution subject to the right of any creditor or stockholder of this defendant to apply to this court to take charge of such liquidation.

20 That the said complainant has no lawful right, either by reason of the by-law referred to in the bill of complaint, or by any contract or other relation to this defendant as stockholder or otherwise, to prevent the stockholders of this defendant from passing upon the question of the dissolution of this defendant in the way provided by law in effect at the time this defendant was organized, and still in effect; that the said complainant has no lawful right to object to the expression of an opinion by other stockholders of this defendant as to the proper method of liquidating the assets of this defendant in the event of its dissolution, and in so far as such expression by other stockholders may interfere with the just rights of the complainant, such expression of opinion is of no weight as against the said complainant; that until the trustees in liquidation or a receiver appointed by this court, if the discretion of this court invoked at the instance of
30 any creditor or stockholder of this defendant should result in the appointment of a receiver, undertakes to dispose of the assets of this defendant, if dissolved in bulk, without proper provision for the securing to the said complainant, if unwilling to accept the terms agreeable to the other stockholders, of the cash equivalent for its stock, the rights of the said complainant have not been and are not invaded.

40 This defendant further answering says, that it has been advised and fully understands that it cannot

Affidavit of Louis K. Liggett.

transfer its assets in gross to the said Massachusetts corporation without the assent of the said complainant, but it has also been advised and alleges that its stockholders have the lawful right to vote upon the question of its dissolution and that if the statutory majority of the capital stock of this defendant votes for such dissolution and gives its assent thereto, this defendant will, by force of the statute in such case made and provided, be presently dissolved, and its assets liquidated, either by its directors as trustee in dissolution, or by a receiver appointed by this court, and that in such case the right of every stockholder to absolute protection in the distribution of the assets of this defendant will be and must be amply protected and secured.

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This defendant prays that it may be hence dismissed with its lawful costs and charges in this behalf most wrongfully sustained.

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PITNEY, HARDIN & SKINNER,
Solicitors and of Counsel for Defendant.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

LOUIS K. LIGGETT, being duly sworn on his oath deposes and says, that he is the president of The United Drug Company, the defendant in the foregoing answer named; that he has read the foregoing answer and is familiar with the contents thereof. The matters and things therein contained, so far as they relate to the acts of this deponent or of the said defendant, are true, and so far as the allegations therein relate to the acts of others, this deponent believes them to be true.

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Deponent further says that the meeting of the stockholders of said defendant, adjourned as in the said bill of complaint mentioned, until the eleventh day of

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Affidavit of Louis K. Liggett.

April, nineteen hundred and eleven, at the office of the said defendant, in the City of Jersey City, was by unanimous action of the stockholders present at said meeting adjourned until the twenty-first day of April, nineteen hundred and eleven, at the same time and place.

10 Deponent further says that there are outstanding at the present time five thousand five hundred and twenty-seven (5,527) shares of preferred stock of said defendant corporation, and seventy-five hundred shares of common stock (7,500), both issues of the par value of one hundred dollars (\$100) each; that of said preferred stock all but four hundred and twenty-three (423) shares have approved of the plan described in the circular Schedule B annexed to the said bill of complaint, and the shares (5,104 in number) have been transferred to the United Drug Company (Massachu-
20 setts) as owners and of those four hundred and twenty-three (423) shares, not one has actively objected to the plan; that of the seventy-five hundred (7,500) shares of common stock, every share except the one hundred and twenty (120) shares owned or controlled by the complainant, has actually approved of and assented to said plan and turned in their stock, and the same had been on April 10, 1911, to the extent of seven thousand two hundred and seventy-three (7,273) shares already transferred unto the name of
30 The United Drug Company of Massachusetts as owner.

Deponent further says that by the trial balance sheets of the said defendant company as of April first, nineteen hundred and eleven, the net worth of all of the assets of The United Drug Company, figuring the stock held by it in the subsidiary companies at the book value of those subsidiary companies, is about two million and fifty-nine thousand dollars (\$2,059,000); allowing par value of five hundred and fifty-two thousand seven hundred dollars (\$552,700) of preferred
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stock, there remains almost exactly two hundred dollars (\$200) a share as the book value of the common stock.

That the defendant company owns certain real estate in Boston of a book value of three hundred and twenty-four thousand three hundred and eighty-six dollars and eighty-nine cents (\$324,386.89), which real estate is rented to and occupied by United Laboratories Company, United Candy Company, United Perfume Company, all corporations organized under the laws of Massachusetts, of which the entire capital stock is owned by said defendant; that the said United Laboratories Company has resources including accounts, merchandise, inventory, machinery and so forth, of three hundred and twenty-six thousand four hundred and fifteen dollars and sixty-two cents (\$326,415.62), and liabilities, exclusive of capital stock, of twenty thousand nine hundred and eighty-nine dollars and twenty-five cents (\$20,989.25), with capital stock of seventy-five thousand dollars (\$75,000), and a surplus of two hundred and thirty thousand four hundred and twenty-six dollars and thirty-seven cents (\$230,426.37); that the United Candy Company has like assets of two hundred and sixty-one thousand six hundred and fifty-three dollars and fifty-four cents (\$261,653.54), with liabilities of one hundred and twelve thousand and six dollars and forty-two cents (\$112,006.42), and capital stock of twenty-five thousand dollars (\$25,000), and surplus of one hundred and twenty-four thousand six hundred and forty-seven dollars and twelve cents (\$124,647.12); that United Perfume Company has like assets of three hundred and forty-five thousand two hundred and ninety-six dollars and twenty-six cents (\$345,296.26), with liabilities of two hundred and fifty-four thousand nine hundred and thirty-one dollars and three cents (\$254,931.03), with capital stock of twenty-five thousand dollars (\$25,000) and surplus of sixty-five thousand

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Affidavit of Louis K. Liggett.

three hundred and sixty-five dollars and twenty-three cents (\$65,365.23).

That the defendant corporation does no manufacturing, its business being confined to the sale of the manufactured products produced by its subsidiary corporations and other corporations with which it is allied, or has some lesser interest than control.

10 That the book value of the capital stock of the subsidiary companies is approximately five hundred and thirty-one thousand dollars (\$531,000), although it is carried on the books of the defendant corporation at only one hundred and eleven thousand dollars (\$111,000); that in estimating the book value of the defendant corporation and of the subsidiary companies, all assets are taken at full worth and such figures represent of course the values of going concerns and substantially more than could be realized on
20 liquidation.

Deponent further says that the general purposes of the plans for the so-called reorganization of the defendant corporation referred to in the bill of complaint are correctly set forth in the circular Schedule B annexed to the bill of complaint; that the plan was not intended for the purpose of defeating any right of the defendant, or to accomplish by indirection the end of the litigation between the defendant and the complainant in the Court of Chancery of New Jersey referred to in the bill of complaint. That the chief
30 reason for the plan was the need to make possible the proper financing of the increasing business of the defendant and the subsidiary companies both by way of working capital and in establishing credit for temporary loans needed at times in the conduct of the business. That difficulty had been found particularly in securing such loans because of the ownership of a large part of the substantial assets of the enterprise by the subsidiary companies and this defendant was
40 advised and thoroughly realized that it was exceed-

ingly desirable that all of the assets involved in the enterprise should be so far as possible consolidated in ownership in one corporation; that another urgent reason for the plan was the settlement of litigation involving the affairs of the defendant and its subsidiary corporations, between this deponent and John B. Cobb, which was pending in the Massachusetts courts; that the plan practically grew out of discussions looking to the adjustment of that litigation between this deponent and Mr. Cobb and their respective attorneys. That Mr. Cobb was a large stockholder of the defendant and has actually turned in his shares and given his assent to the plan. That the said Cobb is also one of the largest stockholders, if not the largest, of the said complainant, and one of its directors, and the said complainant has been advised by the said Cobb as well as by the directors of the defendant, of the advantages of the plan, but said plan, so far as the adjustment of the Massachusetts litigation goes, has actually been carried out and consummated both by the said Cobb and by this deponent; that the Massachusetts corporation by the name United Drug Company has been duly organized with capital stock, common and preferred, of the character described in said circular Schedule A, and except in so far as the plan contemplates the ultimate acquisition by the said Massachusetts corporation of the assets of the defendant, the same has been practically consummated, and the said Massachusetts corporation is now the actual owner of practically all of the common stock of the defendant and the controlling stockholder with the full approval, assent and active co-operation of every common stockholder of the defendant except the said complainant, and of all but a very small percentage of the preferred stock, none of which has announced any active opposition; that the consenting stockholders were over four thousand in number, and in expressing their assent, not only transferred their stock,

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Affidavit of Louis K. Liggett.

but executed in most cases, a proxy, copy of which is attached to the answer.

Deponent further says that he has read the affidavit of Alfred H. Cosden, president of the complainant, attached to the bill of complaint, and asks attention to the correspondence between the complainant interests and the defendant interests therein set forth, from which it abundantly appears that in the course of the negotiation with the complainant and in the effort made by the defendant to satisfy its objections, the said complainant demanded far more than was asserted as a right in the litigation in the Court of Chancery of New Jersey referred to in the bill of complaint, and insisted that while it was willing that the defendant or the Massachusetts corporation of the same name might establish retail stores in New York, Brooklyn and Boston, no advertising could be done except for the benefit of the stores controlled by the complainant; that such attitude on the part of the complainant indicates that its attitude is not one of interest in the common concern of all the stockholders of the complainant or one influenced by desire to promote the common good, but rather is intended to serve its selfish interest as the proprietor of a large number of retail stores, not only in the cities named, but in other cities, where in defiance of the by-law quoted in the bill of complaint, it has established its stores in active competition with the stores of the stockholders of the defendant; that such stores have been so established in competition in the cities of Lawrence, Lynn, Lowell, Salem and Brockton, in the State of Massachusetts, and in the City of Newark, in the State of New Jersey, and in Mount Vernon, in the State of New York and this deponent believes it is the intention of the said complainant to establish other stores in similar competition in other places. That in these competitive stores the said Riker management, contrary to the right it asserts for itself

Affidavit of Louis K. Liggett.

under said by-law, sold goods of the defendant corporation, which are generally known by the trade name of "Rexall," and has continued so to do against the urgent protest made by the stockholders of this defendant owning stores in said places established long prior to the appearance therein of the Riker Company.

Deponent further says that he has appended to and hereby makes a part of this affidavit, a copy of the charter of the defendant company, in which appear the provisions relating to the preferred and common stock issues as they now exist. Deponent further says that the provisions of said certificate as to the offer of stock of said defendant corporation to the corporation before transfer, have been waived by the said defendant by resolution passed by its board of directors prior to the transfer of said shares of stock to the said United Drug Company, Massachusetts corporation.

Deponent further says that the litigation between the said complainant and the defendant in the Court of Chancery referred to in the bill of complaint arose out of differences between the two companies, in which it was claimed by the defendant company that the Riker Company was not keeping its contract obligations to the defendant or continuing in good faith to support the purposes and policies of the defendant as the said Riker Company had in earlier days loyally done; that said differences are fully set forth in the pleadings and affidavits filed in the said chancery cause, to which if need be deponent prays reference may be made.

Deponent further says that said deponent has been advised that the said by-law set forth in the bill of complaint is illegal and not binding on the defendant corporation or on the stockholders thereof; that the said defendant, as appears from the affidavit of the said Cosden attached to the bill of complaint, and the correspondence incorporated thereon, tendered to

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Affidavit of James Browne.

the said complainant an agreement that the rights of the Riker Company in said suit in chancery might be protected by making transfer of stock to said Massachusetts corporation without prejudice to the result of that suit, and that said Riker Company was unwilling to accept any such suggestion.

10 Deponent further says that the copy of the charter and of the by-laws are correct copies of said charter and by-laws as now existing; that the by-law referred to in the bill of complaint (Par. 2 of Art. IX) was repealed at a meeting of the stockholders of the defendant held at the Company's office in Jersey City, N. J. on October 4, 1910, the complainant company voting at said meeting against such repeal.

LOUIS K. LIGGETT.

Subscribed and sworn to before me
this 17th day of April, 1911.

20 WALDRON M. WARD,
Attorney at Law of New Jersey.

STATE OF NEW JERSEY. }
COUNTY OF ESSEX, } ss.

30 JAMES BROWNE, being duly sworn on his oath says that he is twenty-nine years old, resides in the City of Newark, and is employed by E. R. Petty, druggist, Prudential Building, Newark, New Jersey; that on this day, the seventeenth of April, 1911, this deponent called at the Riker drug store, at the corner of Broad street and Clinton street in the City of Newark, County of Essex and State of New Jersey, and asked a clerk behind one of the counters there for a bottle of Rexall Cough Syrup and for a bottle of Rexall Hair Tonic; that the said clerk, without any hesitation or asking any questions of this deponent, got from the shelf behind the counter a bottle of the Rexall Cough Syrup, which is marked by this deponent Exhibit "A," J. Browne, April 17, 1911; that

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By-Laws of United Drug Company.

said clerk asked this deponent to wait while he sent upstairs to get the hair tonic, and that after waiting until the same was brought from upstairs the said clerk handed this deponent the bottle of Rexall Hair Tonic, marked by this deponent Exhibit "B," J. Browne, April 17, 1911; that deponent paid said clerk for the said bottle of Rexall Cough Syrup seventy-five cents and for the bottle of Rexall Hair Tonic fifty cents.

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JAMES BROWNE.

Subscribed and sworn to before me
this 17th day of April, 1911.

(SEAL.) EDGAR A. BROSS,
Notary Public in the State of N. J.

BY-LAWS

20

OF

UNITED DRUG COMPANY

[as amended to 4 October, 1910.]

ARTICLE I.

Section 1. The term of office of directors and officers shall be one year.

Section 2. The number of directors is fixed at fifteen.

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Section 3. Vacancies among directors and officers shall be filled by the board of directors at any regular or special meeting.

Section 4. The directors shall meet for organization immediately after the annual meeting of the stockholders, and regular meetings of the board of directors shall be held without notice at twelve o'clock noon on the first Tuesday of each month, excepting when that day is a holiday, in which case the regular

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By-Laws of United Drug Company.

meeting shall be held at the same hour on the following day.

10 Section 5. Special meetings of the board of directors may be called at any time by the president or three of the directors upon four days' notice of the time and place thereof served personally upon each of the directors or sent by telegraph to each of the directors at his last known address, or upon six days' notice sent by mail to each of the directors at his last known address.

Section 6. The board of directors may hold its meetings and have an office and keep the books of the company (except the stock and transfer books) outside the State of New Jersey, and at such place or places as from time to time may be determined by the board.

20 Section 7. The board of directors shall have power before the payment of any dividends on the common stock to set aside out of the net profits of the company from time to time, in addition to working capital, such sums as a reserve fund as it may deem proper and conducive to the interests of the company.

30 Section 8. The board of directors may by resolution adopted by a majority of the whole board appoint from its members an executive committee, which for the time being shall have and exercise all the powers of the board of directors in the management of the business and affairs of the company and have power to authorize the seal of the company to be affixed to all papers which may require it. Such committee shall consist of five members appointed by the board, but in the event of the absence of any member so appointed such committee shall consist of such members or member as may be present, and of such other member or members of the board by them or him designated as member or members of the executive committee *pro tem* as may be necessary to make up the number of five.

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By-Laws of United Drug Company.

Each member of the executive committee except the president shall receive such compensation as the board of directors or the executive committee may from time to time determine.

ARTICLE II.

Section 1. The annual meeting of the stockholders shall be held at the office of the company in Jersey City at twelve o'clock noon on the first Tuesday in October in each year, excepting when that day is a holiday, in which case the annual meeting shall be held at the same hour on the following day. 10

Notice of the annual meeting of the stockholders of this company shall be mailed to each stockholder at his address as the same appears upon the records of the company at least ten (10) days prior to such meeting.

Section 2. Special meetings of the stockholders may be called at any time by the president or three of the directors upon six days' notice of the time and place thereof, served personally upon each of the common stockholders, or sent by mail or by telegraph to each common stockholder at his address as the same appears upon the records of the company. 20

Section 3. In order to constitute a quorum at any annual or special meeting of stockholders, there shall attend in person or by proxy stockholders representing a majority of the issued and outstanding common capital stock of the company, but the holders of less than a majority of such stock may adjourn from time to time until a quorum appears. 30

ARTICLE III.

The board of directors immediately after organization shall elect a president, three vice-presidents, a treasurer and a secretary, and a majority of the whole board of directors shall be necessary for a choice. 40

By-Laws of United Drug Company.

ARTICLE IV.

It shall be the duty of the president to preside at all meetings of the board or directors, to execute on behalf of the company all contracts and other documents, and in general to do and perform all acts incident to his office. The president shall be *ex officio* a member of all committees appointed by the board of directors.

The president shall give the company a bond for the faithful performance of his duty in such amount as the board of directors may determine, and the expense thereof shall be paid by the company.

ARTICLE V.

In the event of the absence or disability of the president, the senior vice-president present shall be vested with all the powers and required to perform all the duties of the office of president. The vice-president severally shall perform such duties as from time to time may be assigned to them by the board of directors.

ARTICLE VI.

It shall be the duty of the treasurer to have the custody of and be responsible for all the moneys, papers books and accounts of the company, subject always to the control of the board of directors. He shall deposit in the name of the company all funds of the company which may come into his hands in such bank or banks or other depository as the board of directors may designate. He shall pay out money as the business of the company may require, taking proper vouchers therefor. At each annual meeting of stockholders he shall present a full statement of the affairs of the company. He shall in addition do and perform all acts incident to his office.

By-Laws of United Drug Company.

The treasurer shall give the company a bond for the faithful performance of his duty in such amount as the board of directors may determine, and the expense thereof shall be paid by the company.

ARTICLE VII.

It shall be the duty of the secretary to attend to the giving and serving of all notices of meetings of the board of directors and stockholders and of such other notices as the company from time to time may be required to give, to keep the record in proper books provided for that purpose of all regular and special meetings of the board or directors and of all annual and special meetings of the stockholders, to record all votes of the company, and to keep such other records, attend to such correspondence and perform such other duties as the board of directors shall direct. He shall be sworn to the faithful discharge of his duty.

ARTICLE VIII.

All checks, drafts and promissory notes must be signed by two of the following-named officers: the president, the vice-presidents, the treasurer and the auditor, but indorsements for deposit may be signed by any one of said officers.

ARTICLE IX.

Certificates of stock shall be numbered and registered in the order in which they are issued, and shall be signed by the president and the treasurer. The certificates shall be in the usual form of corporate stock certificates, excepting as hereinafter stated, and shall be issued in order from certificate books. Certificates shall be transferred only upon the books of the company by the holder or owner, either personally or by duly authorized attorney on surrender of the certificate properly indorsed. The board of directors shall

By-Laws of United Drug Company.

appoint a transfer agent within the State of New Jersey for the transfer of the company's stock.

10 As long as any individual, firm or corporation remains the owner of at least one share of the common stock and fully keeps and performs all his or its agreements with the company, such individual, firm or corporation shall retain, as far as this company can control the matter, the exclusive sale within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this company.

Every share of common stock issued by this company shall be issued upon the following express terms and conditions, namely:

20 In case of the death of the holder of any common stock of this company his legal representatives, or in case of an assignment for the benefit of creditors by any holder of such common stock, his assignee, or in case of the voluntary or involuntary adjudication in bankruptcy of the holder of any such common stock, his trustee in bankruptcy, shall as soon as practicable notify this company of such death, assignment or adjudication.

30 Upon receipt of notice of such death, assignment or adjudication the board of directors or the executive committee shall determine what, according to the assets of the company and its earning capacity, is the fair value of the stock owned by such decedent or by such assignor or bankrupt, and such legal representatives, assignee or trustee, as the case may be, shall, upon request of the company, sell and transfer to the company such stock at any price not lower than the value of the same, determined as aforesaid, provided that such legal representatives, assignee or trustee shall not be obliged to sell or transfer such stock to the company at any price less than the par value thereof.

By-Laws of United Drug Company.

In case of the violation by the holder of any common stock of the company of the terms of any agreement entered into between such stockholder and the company, such stockholder shall, upon notice of a vote of the board of directors so requiring, sell and assign to the company all his or its stock in the company at a valuation determined by the board of directors or the executive committee as aforesaid.

In the event of the holder of any common stock of the company desiring to sell any part of the same, he or it shall notify the company of his or its desire and, if he or it so elect, also of any offer he or it may have received therefore. Within thirty days after the receipt of notice from such stockholder of his or its desire to sell such stock and of an offer received by him or it therefor, the company may elect to purchase such stock at any price not lower than the price named in such offer, and upon payment or tender of such price by the company within ten days after such election, the holder of such stock shall sell and transfer the same to the company forthwith; but in the event of the company within such time not making such payment or tender, such stockholder shall be free to sell and dispose of such stock at any time within thirty days next ensuing the termination of the period last named to any person, firm or corporation at any price not lower than that named in such offer, provided, however, that no such person, firm or corporation purchasing such stock shall by virtue of such purchase succeed to or acquire any right in the selling agency for this company held by the seller. If such stockholder shall not sell and dispose of such stock within such period of thirty days, he or it shall not be entitled to sell stock thereafter, excepting to the company, without first notifying the company of his or its desire to sell as aforesaid. Upon receipt by the company of notice from the holder of any such stock of his or its desire to sell any part of the same, but not including notice of any offer therefor received by such

By-Laws of United Drug Company.

stockholder, the value of such stock shall be determined by the board of directors or the executive committee as in this article hereinabove provided, and if thereupon the board of directors shall vote to purchase such stock at any price not lower than such value, such holder, within fifteen days after receipt of notice of such vote, may sell and transfer such stock to the company, and the company upon receipt of such stock within such time shall pay therefor such price so voted.

Should any sale of stock of the company be made in violation of any of the foregoing provisions of this article of the by-laws, the company shall not be bound to recognize such sale nor bound to transfer such stock on the books of the company, nor bound to recognize any transfer of such stock.

Every certificate of common stock shall have written or printed across its face in red ink, or in some other distinctive manner, the following words:

"This certificate is issued upon the express condition and agreement that the holder thereof shall be bound by and conform to any and all existing by-laws of this corporation and any and all by-laws which shall hereafter be made by this corporation relating in any way to the issue, sale, transfer, assignment, surrender or validity of stock."

ARTICLE X.

The seal of the company shall be of such character and form as may be determined by the board of directors, and may be altered at its pleasure.

ARTICLE XI.

These by-laws may be amended or added to at any annual meeting or special meeting by a vote of a majority of the issued and outstanding common capital stock, if notice of any proposed amendment or addition be contained in the notice of meeting.

Affidavit of Albert E. Seibert.

IN CHANCERY OF NEW JERSEY.

Between

WM. B. RIKER & SON COMPANY,
Complainant,

and

UNITED DRUG COMPANY,
Defendant.

On Bill, etc.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.

ALBERT E. SEIBERT, being duly sworn upon his oath, says: I am a member of the bar of the State of New York, and one of the counsel of the above named complainant. A copy of the answer and affidavits herein, comprising twenty-one typewritten pages, was handed to my associate Mr. McCarter and me, for the first time this morning, at the chancery chambers, while waiting for the order to show cause heretofore granted by Vice-Chancellor Howell, to be reached.

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With regard to the allegation therein contained, as to the repeal of the by-law, I beg to say that I have been counsel for the Wm. B. Riker & Son Company for some time, and was made aware of the proposition to repeal such by-law by the receipt of a notice thereof and I therefore attended the annual meeting of the stockholders of the company held at Jersey City on the fourth of October, nineteen hundred and ten, carrying a proxy from my clients. When the proposition to repeal the by-law was brought before the meeting, on behalf of my clients I read the following protest:

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"Protest is hereby made by Wm. B. Riker & Son Company and The Jaynes Drug Company, against the taking of any action looking to the repeal of the second paragraph of section 1 of

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article IX of the by-laws of this company, reading as follows :

10 'As long as any individual, firm or corporation remains the owner of at least one share of the common capital stock and fully keeps and performs all his or its agreements with the company, such individual, firm or corporation shall retain, as far as this company can control the matter, the exclusive sale within the territorial limits of his or its city or town, if he or it so desires, of all the articles manufactured and sold by this company.'

This protest is made on the following grounds, that is to say :

20 First. The United Drug Company was projected as a co-operative concern, was organized as a co-operative concern and has been conducted with conspicuous success as a co-operative concern. Co-operation was its cornerstone, and always has been its most valuable asset. In reviewing the company's career, this feature is easily distinguished as accounting principally for the unique position attained by it in the manufacturing world. This by-law embodies this co-operative feature, and for the company now voluntarily to repudiate and throw aside that characteristic, which has stood to the public as representative of the United Drug Company, and which has been associated in the mind of the public with the company's reputation as prominently and as constantly as the trade-mark 'Rexal' has been associated with its name, is reactionary, and in the highest degree unwise.

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40 Second. Wm. B. Riker & Son Company and The Jaynes Drug Company have certain rights, based on subscription to and payment for stock of this company, and on loyal support of the policy

Affidavit of Albert E. Seibert.

and interests of this company, which rights have been submitted to the Court of Chancery of this state for protection, and pending a final decision thereon, it is submitted that no action on the proposal to repeal the portion of the by-laws in question should be taken, and that no action that will bind or affect the rights of Wm. B. Riker & Son Company or of The Jaynes Drug Company legally can be taken.

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Third. The by-law sought to be repealed was a part of the original organization of the company, and Wm. B. Riker & Son Company and the predecessor in interest of the Jaynes Drug Company, both acquired their stock upon the strength thereof, and such by-law thereby became a fundamental contract between the stockholders, including Wm. B. Riker & Son Company and The Jaynes Drug Company's predecessor in interest, and The United Drug Company, which cannot be repealed or modified without the consent of Wm. B. Riker & Son Company and The Jaynes Drug Company, and any action designed to repeal such by-law without the consent of the Wm. B. Riker & Son Company, and The Jaynes Drug Company is illegal and void as to them."

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The meeting was also attended by Jones Fuller, Esquire, the general counsel of the company, and he, in bringing the proposition up, stated that of course no stockholder of the company would be bound by the repeal of the by-law unless he voted for the repeal. The vote was subsequently taken and the motion to repeal was carried, I voting on behalf of my clients and under my proxy, eighty shares in opposition thereto.

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ALBERT E. SEIBERT,

Sworn to and subscribed before me,

this 18th day of April, 1911.

WM. E. HOLMWOOD,

Attorney at Law of New Jersey.

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Affidavit of Jones Fuller.

Affidavit.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> WM. B. RIKER & SON COMPANY, <i>Complainant,</i> <i>and</i> UNITED DRUG COMPANY, <i>Defendant.</i>	} <i>On Bill, etc.</i>
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STATE OF NEW JERSEY, } ss.
 COUNTY OF ESSEX.

20 Jones Fuller, being duly sworn, upon his oath says:
 I am a member of the bar of the Commonwealth of
 Massachusetts; that I have read the affidavit of Al-
 bert E. Seibert, Esquire, filed in this cause; that
 the matters set out in said affidavit are true with the
 exception of that part of said affidavit which purports
 to be a statement made by me at the meeting of the
 stockholders of United Drug Co. referred to in said
 affidavit; that what I said at that time was as fol-
 30 lows: That if any stockholder of the corporation had
 any vested rights under or by virtue of the by-law
 in question, such stockholder could not be deprived of
 such rights by the repeal of said by-law unless the
 stockholder claiming such rights voted in favor of
 such repeal.

JONES FULLER.

Sworn to and subscribed before
 me this 18th day of April, 1911.

WALDRON M. WARD,
Attorney at Law of New Jersey.

Order to Show Cause.

Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

WM. B. RIKER & SON COMPANY,
et al.,

Complainants,

and

UNITED DRUG COMPANY,

Defendant.

*On Supple-
mental Bill.*

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This matter being opened to the court by Albert E. Seibert, and Robert H. McCarter, of counsel with the complainants, and the supplemental bill of complaint, exhibits and affidavit having been considered and filed,

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It is now, on this twentieth day of April, nineteen hundred and eleven, on motion of McCarter & English, solicitors of complainants, ordered that the defendant United Drug Company, show cause before the Court at the Chancery Chambers, in the City of Newark, on Friday, the twenty-first day of April, nineteen hundred and eleven, at ten o'clock in the forenoon, why an injunction should not issue as prayed for in the supplemental bill of complaint.

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And it is further ordered that true copies, which need not be certified, of said bill of complaint, exhibits and affidavit, and of this order, be served upon said defendant forthwith, by leaving the same with the solicitor of the defendant in the above-stated cause.

Respectfully advised,

JOHN R. EMERY,
Vice-Chancellor.

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*Restraining Order.***Order.**

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> WM. B. RIKER & SON COMPANY, <i>et al,</i> <i>and</i> UNITED DRUG COMPANY, 	}	<i>On Sup- plemental Bill.</i>
	<i>Complainants,</i> <i>Defendant.</i>		

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Upon the filing of the supplemental bill in the above entitled cause, and order to show cause returnable on the twenty-first day of April, nineteen hundred and eleven, at ten o'clock in the forenoon having been issued, at which time the parties appearing, and it being evident to the court that it will be unable to dispose of the questions involved herein before twelve o'clock noon, the time to which the meeting of the stockholders of said defendant company in the bill referred to has been adjourned.

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It is now, on this twenty-first day of April, one thousand nine hundred and eleven, pending the further consideration of the matter, upon motion of McCarter & English, solicitors of the complainants, ordered that until otherwise directed, United Drug Company, its directors, officers, tellers and inspectors, be and they are hereby restrained from submitting to the stockholders of United Drug Company, at their adjourned meeting to be held on the said twenty-first day of April, nineteen hundred and eleven, or at any

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Restraining Order.

other adjournment of said meeting, or at any other meeting, the proposition to take action upon the resolution of the Board of Directors of said Company, that in the judgment of said board it is advisable and most for the benefit of the United Drug Company, that said Company shall be forthwith dissolved, or from passing any resolution or receiving or counting any votes in favor of any resolution designed to carry into effect or accomplish any proposition to dissolve said Company. 10

Respectfully advised,

JOHN R. EMERY,

Vice-Chancellor.

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Order.

Order.

IN CHANCERY OF NEW JERSEY.

*Between*WM. B. RIKER & SON COMPANY,
*Complainant,**and*

UNITED DRUG COMPANY,

*Defendant.**On Order
to Show
Cause.*

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An order to show cause having been heretofore made herein returnable this day, and the defendant having filed its answer and affidavits, and the complainant having filed an additional affidavit, and the court having read and considered the pleadings and affidavits, and having heard Robert H. McCarter for the complainant, and John R. Hardin for the defendant.

It is, on this eighteenth day of April, nineteen hundred and eleven, on motion of McCarter & English, solicitors of the complainant, ordered, that nothing in the restraining order heretofore made on the eighth day of April, nineteen hundred and eleven, be construed as preventing action by the stockholders at the meeting in the bill of complaint referred to, or any adjournment thereof, on the proposed dissolution of the defendant corporation, or as preventing any proceedings for such dissolution; and that said meeting of stockholders may be further adjourned from time to time until the further order of the court herein for consideration of the matter of action under the second and final paragraph in the notice attached to the bill of complaint as Schedule B, and that the restraining order as herein construed in the meantime and until further order to the contrary, be continued in force.

Respectfully advised,

JOHN R. EMERY,
Vice-Chancellor.

(40)

IN CHANCERY OF NEW JERSEY.

*Between*WM. B. RIKER & SON COMPANY,
AND JAYNES COMPANY,*Complainants,**and*

UNITED DRUG COMPANY,

*Defendant.**On Bill and
Supplemental
Bill.*

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*Between*WM. B. RIKER & SON COMPANY,
*Complainant,**and*

UNITED DRUG COMPANY,

*Defendant.**On Bill.*

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On application for preliminary injunctions.

Mr. R. H. McCarter and Mr. Seibert (of the New York bar) for complainants.

Mr. John R. Hardin and Mr. Fuller (of the Massachusetts bar) for defendant.

MEMORANDUM.

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(May 2nd, 1911.)

Emery, V. C. (Orally). There are two cases before me: one, of the William B. Riker & Son Company and Jaynes Company, complainants, and United Drug Company, defendant, on original bill and supplemental bill, and the second, between William B. Riker & Son Company, complainant, and United Drug Company, defendant on bill. There is an application for preliminary injunction in each case.

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Conclusions of Vice-Chancellor Emery.

10 The directors of the defendant company on January 17, 1911, adopted a resolution declaring "that in the judgment of the board it is advisable and most for the benefit of the United Drug Company that the same should be forthwith dissolved." This was in regular form under the provisions of section 31 of the corporation act relating to voluntary dissolution, and a meeting of the stockholders was duly called under that section, for the seventh day of March, 1911, to take action upon this resolution. In connection with the notice of the directors' adoption of the resolution and of the stockholders' meeting to take action upon the resolution, the directors prepared and sent out to the stockholders a circular letter signed by every director of the company, giving in detail a plan which has been approved by the directors, and the reasons in detail are set out in the circular. This plan is referred to in the circular as a plan for the reorganization of the affairs of the company, and as one designed by the directors to accomplish certain results: First, to provide additional capital for the immediate requirements of the company, and also future additional capital, both made necessary by the remarkable increase in the business of the company; second, to give to the preferred stockholders of the company the option of sharing in the future success of the company's business by the option of exchanging preferred stock, which is now limited in its right to dividends, for common stock; third, the elimination of four subsidiary companies which conduct a substantial part of the business of the company, by placing the ownership of these companies in a single corporation, simplifying the accounts and reducing some expenses that are now duplicated.

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This plan contemplates (among other things) the transfer or sale of all the property and assets of the company (subject to its indebtedness) to a company of the same name organized under the laws of Massachusetts. This company has been in fact organized

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Conclusions of Vice-Chancellor Emery.

and by exchange of its stock (on the basis set out in the circular) for stock of the New Jersey company has now become the owner of nearly all the common stock of the New Jersey company—7,243 shares out of 7,500, and of 5,104 shares out of 5,527 of the preferred stock. Complainants together own 120 shares of the common stock.

The statutory notice of the meeting sets out a copy of the resolution for dissolution and notifies stockholders that the special meeting will be held for the following purposes: 10

First. To take such action as the stockholders may deem desirable upon the aforesaid resolution of the board of directors relative to the dissolution of the company.

Second. To take such action as the stockholders may deem advisable with reference to authorizing the sale of all the property and assets of the company, and in case such sale is authorized, to fix the terms and conditions thereof. 20

The meeting has been adjourned from time to time and pending the adjournments, applications for preliminary injunctions have been made in the above causes.

In the first case, in which both the Riker Company and the Jaynes Company are complainants, an injunction is sought against action on the first resolution for dissolution, while in the second case, in which the Riker Company is the sole complainant, an injunction is sought against the proposed transfer of the property and assets to the Massachusetts company. 30

While the applications were not argued together, they both involve to a large extent a consideration of the same affidavits, and by agreement of counsel the affidavits filed by defendant in the second case, which was first argued, were used on the application in the first case. 40

Conclusions of Vice-Chancellor Emery.

My conclusions on both applications will be stated together and briefly, leaving a fuller statement and opinion to be filed hereafter if desired.

The meeting for the purpose of acting upon the first resolution—relative to dissolution, has been duly called, and the power and right is expressly given by the statute to the stockholders to take action on such resolution and consent to the dissolution by a two-thirds vote, and consent in writing. The stockholders at this meeting, act, not as trustees for each other, but individually, and have the right to vote as their views of their individual interests may dictate, subject to the qualification hereafter stated.

The New Jersey cases settling the nature of the rights of stockholders at stockholders' meeting, are referred to in some cases that have been before me, especially the Colgate case, 67 Atl. Rep., 657, which was a case of consolidation and merger, and the Bijur case, 70 Atl. Rep., 934, a case of dissolution. The latter case is now pending before the Court of Errors and Appeals, and it is possible some qualifications of the rights as previously declared may be made. This right to take action on the resolution for dissolution is conferred by statute in express terms, without any express terms of qualification. It is contended on the part of the complainants that there are provisions in the statutes relating to corporations which have the effect of qualifying this right. These provisions are those defining the effect of dissolution and directing the proceedings that are to be taken for winding up on dissolution. It is contended that these have the effect of qualifying this power, and that on a proposed dissolution the court may examine whether in reference to the steps intended to be taken, they are such as are directed or intended by the statute, and if not, may enjoin the entire proceedings for dissolution, including a vote on the resolution. I think that is a wrong view of the effect of those provisions.

Those provisions are effective, but they are not effect-

ive by way of qualifying the right to dissolution. They are effective by way of preventing any plan being carried out subsequent to the dissolution which is not in compliance with the terms of the statute, but the court should not undertake in advance to say that the right to vote on the question of dissolution must be taken away, for the reason that in voting on this question they do so with the motive, or for the object, of carrying out certain plans which would be in violation of the statute relating to proceedings after dissolution. For if the plans are violations of the statute, they cannot be carried out after dissolution, and the stockholders in voting to dissolve, take that risk of their being carried out.

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I conclude therefore that these other provisions of the corporation act relating to the effect of dissolution and the proceedings on dissolution have not the effect of qualifying the right or power of a stockholder to vote on the resolution for dissolution. It is undoubtedly true that the dissolution could not be used by the majority for the purpose of committing a fraud on the minority stockholders, but in the absence of fraud, or acts beyond their lawful powers as stockholders, the minority have, as I think, no standing to enjoin the exercise of this right conferred by statute on the majority stockholders.

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The complainants in both cases stand on their general rights as stockholders, and in the first case, stand also on a special right given, or claimed to be given, to stockholders, as to the purchase of the products of the company under a by-law of the company. A dispute having arisen between the complainants in the first suit and the defendant, as to the right of the company to fix certain conditions before complainants could have the benefit of this by-law, a preliminary injunction was granted on the original bill in this case, enjoining the company from refusing to furnish goods to the complainants on the same conditions that they furnished other stockholders. But I think the in-

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junction given by that suit does not at all affect the right which the company may have pending the suit to proceed to dissolve. So long as the company continues to exist they must furnish to the complainants goods on the same terms that they do to other stockholders, but I do not think that the injunction obtained in that case gives any additional standing in this case to the complainants on their supplemental bill for the protection against the passage of a vote for dissolution, beyond what they would have as an ordinary stockholder. The circumstance that one motive or reason for the dissolution of the company may be a termination of rights given by a by-law of the company to the stockholders, does not of itself make the proceedings for dissolution a fraud on the minority stockholders. It is often found in the organization of companies, that provisions are adopted either by way of express contracts in the stock itself or in the by-laws, that operate in a way far different from what the promoters or original organizers of the company expected, and in many cases it is a matter of pure business reason and judgment, not at all involving any question of fraud, whether the company should consider the advisability in a business point of view, of taking into account, in the dissolution of the company, the termination of contracts, leaving the assets of the company subject to any liability therefor. In the *Bijur* case, as I recall it, one of the reasons mostly relied on for a dissolution of one of the companies, was that in its original charter or contracts made under it, there had been provisions for contracts of such an onerous character, that if carried out it eventually must injure the business of the company materially. So far, therefore, as it is a business reason, the stockholders have a right to consider the effect of the by-law and its continuance. The circular does not state expressly that the termination of this by-law is one of the objects of the plan of reorganization, but I think in view of the fact that the Massachusetts company

Conclusions of Vice-Chancellor Emery.

is organized on a plan by which the by-law is omitted, the complainants as well as the defendant in this case are entitled to consider the elimination of this by-law as one change in the status of the company in the reorganization of its affairs proposed. My view in reference to the right to terminate rights conferred by a by-law is, that the by-law, considered merely as such, is made subject to determination by dissolution of the company, under the laws that were in force at its adoption. 10

The fact that the dissolution is recommended by the directors, or may be intended by the majority stockholders in giving consent to it, as one step in a proceeding to reorganize the financial and business affairs of the company, does not of itself make the proceedings either fraudulent or colorable under the statute.

On the affidavits in this case as presented to me, it cannot be said that they disclose merely a colorable dissolution or plan of reorganization. The principal results to be accomplished are substantially set out in that circular: the provision for additional capital, temporary and permanent, contemplates the payment into the treasury of the Massachusetts Company of \$275,000 in cash, and it also contemplates the creation of a fund of securities of \$2,225,000 of preferred stock as a basis for procuring capital in the future, when it is considered advisable to do so. They are substantial changes in the financial organization of the company, and not merely colorable. 20 30

I have read over the correspondence between the complainants and the defendant which took place soon after the resolution for dissolution had been passed by the directors and the circular sent out, and in that correspondence, there is no complaint that the scope of this plan is merely colorable and that there are no advantages to be gained to the company for reorganization of its affairs on that basis. The dispute between the parties arose on what should be the adjustment between them in reference to the 10

Conclusions of Vice-Chancellor Emery.

continuanee of complainants' business with the Massachusetts Company, but I do not find any suggestion anywhere that these are not really substantial matters, fairly to be considered by the stockholders as a matter of business judgment, in voting for a dissolution of the company as one step in the proceedings. In doing so, the risk of its legality is taken. In other words, if a plan of this kind should be carried
 10 through, as it now strikes me, it cannot be said to involve so little change from the present condition of the company as to its financial affairs, that the court can say the whole proceeding for dissolution is merely colorable, and should be enjoined at the outset, by preventing its submission to the stockholders.

Whether, after dissolution, the further steps of this proposed plan can be carried out, or whether if dissolution takes place, the plan proposed, either in its entirety or substantially, and with the omission of
 20 some of its terms, can be carried out, under the statute, except by the consent of all who are stockholders at the time of the dissolution, is a matter which it is premature to consider. What is now decided is, that these statutory directions as to the effect of dissolution and the proceedings subsequent thereto, are not limitations of the power to dissolve, and that so far nothing has been shown which will disentitle the stockholders to exercise the right conferred on them
 30 by the statute, of consenting to the dissolution of the company. This is the limit of the right at this special statutory meeting, and in exercising their right to consent at this meeting, no further or other powers of stockholders in reference to the dissolution should be exercised.

Second. The status of the company on such dissolution as to the settlement of its affairs and its winding up, are all matters of express statutory provisions. Corp. Act., Sec. 5, winding up, Sec. 53-60. Under these provisions, the directors at the time of dissolution
 40 became statutory trustees, with special powers

and subject to special duties, as to which the vote, consent or advice of those who were stockholders at the time the dissolution goes into effect, or afterwards become stockholders or succeed to the interests of stockholders, may be entitled to consideration in deciding upon their duty as trustees. But the direction in advance is beyond the scope of the stockholders' meeting, especially when, as in this case, the plan is substantially that of approving the terms on which it is proposed that the entire assets upon dissolution shall be conveyed to the majority stockholder itself. Such action before dissolution is admittedly beyond the powers of the company, and it must be held, I think, that it is beyond the powers of the company, either to call a meeting of stockholders for this purpose, or to vote on such proposition, against the consent of any stockholder of the company.

The second resolution expressly contemplates an authorization of the sale of all the property and assets of the company, and if authorized, the fixing of the terms and conditions thereof. It is not in terms confined to a sale after dissolution, and if it were, decision upon or discussion of the plan proposed or its details should not be anticipated or embarrassed by present action of the stockholders. Neither should the minority stockholder nor the court be required to decide in advance on the competency of this plan or the right to make objections to any special feature, if this should be the plan finally adopted.

The case of *Theis vs. Spokane Falls Gas Light Co.*, 74 Pac., 1004 (Washington Sup. Ct., 1904), which has been so much referred to, was a case of precisely that character. There was no vote for dissolution; there was no proceeding for dissolution, and the court in its opinion said that if there had been a proceeding for dissolution the court would have been required to act on it under the statute. In that case a meeting of the stockholders authorized a sale of the entire assets, the intention of the majority stockholders be-

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ing to purchase it themselves. That was a proceeding exactly like this second resolution, authorizing a sale of all the property of the company. The court below declined to enjoin the sale; the sale was carried out pending the appeal. The court on the appeal said that the sale should have been enjoined, and the circumstances that developed on the sale and afterwards, showed that the sale contemplated was a sale to the majority stockholders which voted for the sale, and therefore it could not be called a dissolution, under the statute, and the proceeding under it was enjoined.

I conclude, therefore, that although the stockholders have the right to proceed to vote on the first resolution relating to dissolution, exercising that right in view of what they deem to be their individual interests, they have no right now in advance of the dissolution, either by way of advice or consent or estoppel, or any course to embarrass, hinder or affect the statutory power and duty of the trustees on dissolution to perform their duties under the statute, and an injunction will be granted against proceedings on the second resolution. As questions are here involved which the defendant as well as the complainants may desire to have reviewed on appeal in order that the whole status of the powers of stockholders on these dissolution proceedings may be settled, I will, if either party desires, on the signing of the orders and the filing of appeals, consider an application for a stay pending appeal.

Order Denying Injunction.

Filed May 5, 1911.

IN CHANCERY OF NEW JERSEY.

*Between*WM. B. RIKER & SON COMPANY,
*et al.,**Complainants,**and*

UNITED DRUG COMPANY,

*Defendant.**On Bill, &c.*

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An order to show cause having heretofore been made in the above entitled cause, bearing date the twentieth day of April, 1911, requiring the defendant to show cause before this Court at the Chancery Chambers in the City of Newark, on the twenty-first day of April, 1911, why an injunction should not issue according to the prayer of the supplemental bill filed herein, and the defendant having appeared on the return of said order, and it having been stipulated and agreed between counsel for the respective parties complainant and defendant that there should be read and considered on the hearing under said rule to show cause the bill of complaint, answer thereto and supplemental bill and the affidavits heretofore filed by complainants and defendant in this cause, and also the bill of complainant and affidavits thereto annexed and affidavits of the defendant in another cause in this court wherein the said William B. Riker & Son Company is complainant and the said United

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Order Denying Injunction.

Drug Company is defendant, which said last mentioned bill was filed on the eighth day of April, 1911; and the court having heard the said pleadings and affidavits read and having heard the argument of Albert E. Seibert, of New York, and Robert H. McCarter, of counsel for the complainants, and John R. Hardin, of counsel for the defendant, and having considered the matter:

- 10 It is now, on this fifth day of May, nineteen hundred and eleven, on motion of Pitney, Hardin & Skinner, solicitors of the defendant, ordered that the application for injunction prayed for by said supplemental bill be and the same hereby is denied, and all further proceedings under the said order to show cause made herein on the twentieth day of April, 1911, be discharged.

MAHLON PITNEY.

- 20 Respectfully advised,
JOHN R. EMERY,
Vice-Chancellor.
A true copy.
SAM'L K. ROBBINS,
Clerk.

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Notice of Appeal.

Notice of Appeal.

Filed May 5, 1911.

IN CHANCERY OF NEW JERSEY.

Between

WM. B. RIKER & SON COMPANY,
et al,

Complainants,

and

UNITED DRUG COMPANY,

Defendant.

On Bill, etc.

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The complainants, Wm. B. Riker & Son Company, and Jaynes Drug Company, hereby appeal from the order made in the above entitled cause on the fifth day of May, nineteen hundred and eleven, denying to the complainants, a preliminary injunction against the said defendant, and from the whole and every part of said order, to the Court of Errors and Appeals in the last resort in all causes.

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McCARTER & ENGLISH,

Solicitors for Complainants.

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Dated May 10th, 1911.

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

ROBERT H. McCARTER,

Of Counsel for Complainants.

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*Petition of Appeal.***Petition of Appeal.**

Filed May 20, 1911.

New Jersey Court of Errors and Appeals

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*Between*WM. B. RIKER & SON COMPANY,
*et. al.,**Complainants—Appellants,*
*and*UNITED DRUG COMPANY,
*Defendant—Appellee.**On Bill etc.*

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*To the Honorable, the Court of Errors and Appeals,
in the last resort in all causes:*

The petition of Wm. B. Riker & Son Company and Jaynes Drug Company, the appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Mahlon Pitney, Chancellor of New Jersey, bearing date the fifth day of May, in the year of our Lord nineteen hundred and eleven, in a cause wherein the said Wm. B. Riker & Son Company and Jaynes Drug Company, were complainants, and United Drug Company was defendant, in this respect, to wit: that the said order directs "that the application for injunction prayed for by said supplemental bill be and the same is hereby denied, and all further proceedings under the said order to show cause made herein on the twentieth day of April, 1911, be discharged."

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Petition of Appeal.

And your petitioners humbly appeal from each and every part of the order aforesaid, upon the ground that the same is erroneous for that an injunction should have issued as prayed for in your petitioners' supplemental bill, with costs to your petitioners.

Your petitioners therefore pray that the said order of the chancellor be, in all respects, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet. 10

McCARTER & ENGLISH,

*Solicitors for and of Counsel with
Appellants.*

Formal answer to Petition of Appeal filed.

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